Criminal Law and Procedure

"Domestic Unlawful Combatants"
A Proposal to Adjudicate Constitutional Detentions

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As was perhaps inevitable, the sense of facing an urgent and deadly danger that gripped the country after the events of September 11, 2001 has faded somewhat with the passage of time. With that lessening of an imminent threat to our security, a cycle of recriminations for alleged overreaching in reaction to September 11 has already begun—even though the terror threat remains quite real. This can be seen as an opportunity for sober reflection on some of the more challenging issues presented by the post 9/11 world. Not least among these is the question of how to address the situation of known enemy combatants being present in the United States and, specifically, how to incapacitate them from carrying out domestic terrorist attacks.

A hypothetical, but realistic, scenario can serve to illustrate the problem: Imagine that U.S. intelligence and law enforcement authorities are in receipt of credible information that a medical doctor living and practicing in the United States, along with several of his associates, intend to kidnap, torture and kill a high-ranking federal government official. The doctor is the central member and the guiding hand of a sleeper cell whose members are otherwise unidentified. This information has been obtained by U.S. intelligence agencies from multiple third-country sources. It has been verified in material respects by a former terrorist organization functionary who was privy to a meeting where these plans were initially discussed and approved, and where the doctor's name and geographic location were inadvertently disclosed.

Extensive electronic and physical surveillance of the doctor over a period of months has failed to adduce any evidence verifying the essential aspects of this intelligence information. The investigation has, however, verified that the doctor attends a mosque with many radical members and is in regular contact with other persons known to be members of or associated with this terrorist organization, but about whom little else is known or provable. Even more recent information from a reliable third-country source verifies that the plot is alive and well and, most importantly, that organization approval to proceed with it will not be given if the doctor is not in a position to supervise and direct the mission. Under what authority can this threat be neutralized, and how and under what legal mechanism may this physician be detained in order to render him and his cell incapable of carrying out this mission?

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I. The Existing Legal Framework: Federal Authority to Detain Enemy Combatants

The Framers recognized that the constitutional authority of the federal government with respect to national security must extend to any measures necessary to defend the security of the nation. As Alexander Hamilton wrote in *Federalist* No. 23, the powers of the federal government to provide for the common defense are complete:

> These powers ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of our national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defense. . . . The means ought to be proportioned to the end; the persons, from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained.[1]

The Supreme Court affirmed this interpretation of our constitutional structure early in the nation's history. In *Brown v. United States* (1814),[2] the Court recognized that the Constitution vests in the federal government an "independent substantive power" with respect to national security.

Further, "[t]he Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations."[3] For this reason, the President is vested with all the executive power and with the position of Commander in Chief of the armed forces.[4]

Whether this constitutional structure gives executive authority to designate and detain enemy combatants[5] captured within the United States has, historically, not been made as clear as it could be by the Supreme Court. Nevertheless, a review of the relevant case law reveals that such authority does exist.

In *Ex Parte Quirin*,[6] the Supreme Court provided authority for the seizure and detention of unlawful belligerents or combatants, even United States citizens, within the United States. In that case, the Supreme Court

considered habeas petitions by seven German soldiers who had come to the United States to perform acts of military sabotage. The Court denied the petitioners' requests for relief, concluding that they were properly tried before a military tribunal pursuant to an executive order.

Several aspects of the Court's holding in *Quirin* are notable. First, the Court explicitly rejected the argument that a distinction should be drawn between citizens and non-citizens for purposes of determining eligibility to be tried by such a commission: "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the laws of war."[7]

Second, the Court held that, incidental to his power as Commander-in-Chief, the President has the power to enforce all laws relating to the conduct of war, and "to carry into effect . . . all laws defining and punishing offenses against the law of nations including those which pertain to the conduct of war."[8] This power, the Court held, includes the authority "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."[9] An enemy thus seized, even a citizen, does not enjoy the constitutional rights enjoyed by an accused defendant in the criminal justice system.[10]

The Supreme Court and the lower federal courts have within the last year announced a number of significant decisions relating to the government's authority to detain enemy combatants upon executive designation. Among the most significant of these was the Supreme Court's decision in *Hamdi v. Rumsfeld*,[11] which involved a habeas petition by an American citizen captured in Afghanistan. Hamdi was classified by the Government as an enemy combatant and detained in military custody. The Government contended that Hamdi was captured while fighting with the Taliban against U.S. forces.

Hamdi was initially detained overseas. When the military learned that Hamdi was an American citizen, however, he was transferred from an overseas detention facility to one within the United States. Hamdi's father filed a habeas petition as next friend, alleging, among other things, that the government was detaining his son in violation of the Fifth and Fourteenth Amendments. The habeas petition conceded that Hamdi had been in Afghanistan, but denied that he had engaged in military training or taken up arms against U.S. forces. The district court concluded that the Government's proffered factual basis for Hamdi's detention, which consisted of a declaration by a Defense Department official, could not support the detention and ordered a number of materials to be released for *in camera* review.

On appeal, the Fourth Circuit reversed, holding that because Hamdi was captured in an active combat zone and designated an enemy combatant, the scope of federal judicial review was severely restricted, and that the district court had erred in ordering the release of additional documentation relating to Hamdi's classification. The Fourth Circuit further held that even if congressional authorization for detention of citizen enemy combatants were required (a doubtful proposition, the court suggested), such authorization existed in the Authorization for Use of Military Force[12] passed shortly after September 11, 2001 ("the AUMF"). The Fourth Circuit noted that "capturing and detaining enemy combatants is an inherent part of warfare," and thus "the 'necessary and appropriate force' referenced in the [AUMF] necessarily includes the capture and detention of any and all hostile forces arrayed against our troops."[13]

The Supreme Court vacated and remanded. In an opinion for herself and the Chief Justice, as well as Justices Kennedy and Breyer, Justice O'Connor concluded that Hamdi was appropriately detained as an "enemy combatant." Justice O'Connor's opinion did not reach the question whether the President has "plenary authority to detain" persons in Hamdi's position pursuant to Article II of the Constitution, because she concluded "that Congress ha[d] in fact authorized [such] detention" in the AUMF.[14] "[I]ndividuals who fought against the United States in Afghanistan as part of the Taliban," Justice O'Connor concluded, were clearly covered by the AUMF, which authorized the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11 attacks.[15]

Addressing Hamdi's contention that his detention could end up being indefinite and thus not authorized by the AUMF—if premised on the ongoing nature of the "war on terror," Justice O'Connor did not reach the question of the President's authority for such detentions. Because "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan," she concluded, indefinite detention "is not the situation we face as of this date."[16]

Having concluded that detention of an enemy combatant such as Hamdi is legally authorized, Justice O'Connor considered what process is constitutionally due to a citizen who disputes his enemy-combatant status. As an initial matter, the writ of habeas corpus will remain available in some form to individuals detained within the United States or under the control of United States authorities in places subject to the authorities' dominion and control.[17] As Justice O'Connor noted, the "ordinary mechanism that we use for balancing . . . serious competing interests, and for determining that procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law' is the test . . . articulated in *Mathews v. Eldredge*, 424 U.S. 319 (1976)."[18] Under the *Mathews* test, the process due in a given circumstance is determined by weighing the private interest that will be affected by official action against the government's interest, including the governmental function involved and the burden that providing greater process would place on the government. These concerns are to be balanced by analyzing the risk of erroneous deprivation of the private interest if the procedures were reduced or eliminated, and the probable value of imposing additional or substitute safeguards.[19]

The only substantive characteristics of a procedure that would comport with due process offered by the Court were that (1) "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification," and (2) such a

detainee must receive "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[20] These are, of course, the most fundamental characteristics of due process.[21]

The Supreme Court in *Hamdi* did not reach the question of the President's plenary authority to detain unlawful combatants absent congressional authorization of some sort. At least where Congress has spoken, however—as in the AUMF—the Court accepted that executive authority for such detention exists. Reading the case in conjunction with *Quirin*, the Court's recognition of executive authority to detain such combatants in some circumstances is clear. In other, limited circumstances, the scope of such authority is less clear. For example, when may a citizen captured in the United States be detained as an enemy combatant? These are the circumstances in the case of Jose Padilla, a U.S. citizen captured at O'Hare airport and subsequently designated an enemy combatant on the basis of his alleged participation in a plot to detonate a "dirty bomb" in the United States. The Supreme Court last year addressed a habeas petition filed by Padilla, but ruled only that he had filed it in the wrong district.[22]

While the Supreme Court's decision in *Padilla* is thus not particularly illuminating, the opinion by District Judge Mukasey addressing Padilla's habeas petition is well worth examination, both for its analysis of the instant question and because it notes and effectively rejects several potential objections to the detention of enemy combatants as discussed herein. In a thorough and well crafted opinion, Judge Mukasey concluded, *inter alia*, that "the President is authorized under the Constitution and by law to direct the military to detain enemy combatants" who are citizens and are seized within the United States.[23]

Addressing Padilla's objections to his detention, Judge Mukasey first considered the contention that the President could not exercise the authority to detain Padilla because the United States was not engaged in a war. Judge Mukasey noted that "a formal declaration of war is not necessary in order for the executive to exercise its constitutional authority to prosecute an armed conflict—particularly when, as on September 11, the United States is attacked."[24] Judge Mukasey further rejected the contention that a war against an organization such as al Qaeda cannot trigger the authority to exercise such executive power because the organization lacks clear corporeal definition and the conflict can have no clear end. "So long as American troops remain on the ground in Afghanistan and Pakistan in combat with and pursuit of al Qaeda fighters, there is no basis for contradicting the President's repeated assertions that the conflict has not ended."[25] If at some point in the future "operations against al Qaeda fighters end, or the operational capacity of al Qaeda is effectively destroyed," there might be "occasion to debate the legality of continuing to hold prisoners based on their connection to al Qaeda." Absent such circumstances, however, no "indefinite detention" issue exists.[26]

Importantly for purposes of this paper, Judge Mukasey also rejected Padilla's suggestion that he could not be held because he had not been convicted of a crime. As Judge Mukasey noted, the Supreme Court has in a number of cases the non-retributive commitment of persons likely to commit violence against others. As the Court stated in *United States v. Salerno,*[27] "We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh a person's liberty interest. For example, in times of war and insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous."

As to the specific question of the President's power to detain enemy combatants in Padilla's circumstances, Judge Mukasey found *Quirin* particularly persuasive. He noted that in *Quirin* the Court addressed what it rightly considered a more serious consequence than mere detention —trial by military commission. Given that the Court authorized even that more serious consequence in the analogous circumstances of *Quirin*, the case plainly stands also for the proposition that mere detention is lawful in such circumstances.[29] Like the *Hamdi* Court, Judge Mukasey did not consider whether the President's authority would be more limited absent an authorization from Congress such as the AUMF; where such authorization is present, however, such authority exists.

The case law regarding plenary executive authority for detention of enemy combatants is thus not entirely settled. In particular, the Supreme Court has not addressed specifically the authority underlying the proposal herein—that is, to designate and detain enemy combatants captured within the United States, who may or may not be U.S. citizens. The lack of perfect clarity as to the extent of the authority to designate and detain unlawful combatants who are citizens and found on U.S. soil does not argue for the conclusion that such authority does not exist. Rather, these circumstances call for more explicit definition of that authority and more precise identification of when and how it will be exercised. Establishment of a system to exercise such authority should increase national security by providing a clear structure for detaining such individuals, bring clarity to the question of when such authority will be exercised, and, in turn, aid the courts in determining the validity of such exercise. Identification and definition of such executive authority is also consistent with the position the federal government has adopted in briefing and argument to courts considering the detention of individuals designated as enemy combatants, where it has argued that the President has plenary authority to detain combatants in defense of the nation, wherever they are seized, and whether or not they are citizens.

In sum, recognizing that the President is charged with defending the nation, and that that he has the powers necessary to do so, we must conclude that he has the authority to detain citizen enemy combatants within the United States. As Justice Jackson remarked in *Shaughnessy v. United States ex rel. Mezei*,[30] "the underlying consideration is the power of our system of government to defend itself, and changing strategy of attack by infiltration may be met with changed tactics of defense."[31]

II. The Need for a New Adjudicatory Framework

A review of our constitutional framework and the relevant case law thus reveals that the President would have inherent authority to detain the doctor identified in the initial hypothetical. In certain circumstances where the detention of but a few individuals is necessary, this authority, utilizing an *ad hoc* process, may be sufficient to protect U.S. security and citizens, while at the same time respecting the constitutional protections and rights of the individuals.

The military, with the President as its Commander-in-Chief, retains responsibility and authority to defend the homeland from threats and attacks, particularly those from abroad. In the scenario outlined above, the doctor is the weapon of a foreign authority and power. He infiltrated the homeland for purposes of attacking the United States. Whether he intends to kidnap and torture a government official or to become a suicide bomber, a case can clearly be made that the military, with the President as its Commander-in-Chief, has the responsibility and the authority to defend the homeland from such attacks. As the Supreme Court has indicated, the President and the armed forces are tasked with protecting national security and specifically with resisting attacks by force on American soil:

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority . . . Whether the President in fulfilling his duties as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance . . . is a question to be decided *by him*.[32]

Thus, detention by military authorities and adjudication by a military tribunal would be an appropriate way to adjudicate the justification for this physician's detention. For many reasons beyond the scope of this analysis, however, that paradigm of adjudication is not ideal, and may even be undesirable. Politically, at least, it is hard to imagine that without a great escalation in the scope and intensity of the threat to the homeland, there would be broad political support for a stronger military role in domestic security, particularly involving the detention of U.S. citizens or permanent resident aliens.

The criminal justice system is not the appropriate forum for confronting the particular threat at issue here. Criminal prosecution may, through detention, neutralize the capacity of a convicted defendant to cause further harm, but that is not its primary purpose, and criminal adjudication is not a system conducive to meeting the exigencies of incapacitating unlawful combatants. The purpose of criminal prosecution has traditionally been to punish wrongdoers for acts already undertaken, to deter, and to temporarily incapacitate. The criminal justice system reaches the most troublesome limits of governmental authority to enforce the criminal law when it seeks to punish secret agreements to carry out illegal acts. Indeed, so troubled are the legislatures and courts by conspiracy prosecutions that, under most aspects of federal law, some overt act in furtherance of the conspiracy is required for the prosecution to lie.[33]

The use of criminal prosecutions to incapacitate terrorists is proving to be clumsy, inadequate and, civil libertarians should note, taking law enforcement powers where they have never gone before. Experience in the *Moussaoui* case, and others, already has shown the shortcomings of the use of the criminal justice system in this area. Among other problems, a criminal defendant may seek and receive access to classified information that cannot safely be shared with him. Additionally, the prosecution may need to withhold evidence in order to protect intelligence sources and methods, and it may need the testimony of witnesses who are themselves detained as enemy combatants. Such difficulties may force prosecutors to stop short of pursuing their legal claims to their full extent, as was apparently the case in the prosecution of John Walker Lindh, the American captured while fighting with the Taliban in Afghanistan.[34] More fundamentally, the underlying behavior in the criminal prosecution of an enemy combatant, while it may well be a crime, is more accurately described as the planning or execution of a paramilitary attack on the United States. The criminal code is not designed to be a counter-measure to war. Attempting to so use it produces awkward results and is inadequate to the task. We need a better solution.

The hypothetical scenario with which this paper began is neither farfetched nor difficult to execute. Indeed, it is a much more low-tech operation than many other threats that have received a great deal of attention. It is a core responsibility of government, perhaps the *raison d'etre* for a federal government, to protect the citizens and the smooth functioning of society from foreign attack, whether that attack comes in the form of a guided missile in the sky, or a guided agent woven into the society.[35]

The premise of the next section of this paper is that an effective way to neutralize a ticking time bomb such as the doctor imagined in the hypothetical above is to detain and thereby incapacitate him until we are satisfied that the threat he represents has abated sufficiently to take some lesser action.[36]

III. A New Adjudicatory System

Although a better approach to the problem of terrorist conspirators within our borders is clearly called for, we need not write on a blank slate or create a new adjudicatory regime out of whole cloth to arrive at the appropriate structure and procedures. Rather, two well-developed legal processes can provide us with the foundation for a new paradigm under which the adjudication of the detention of unlawful domestic combatants can be established. One is the existing legal authority to detain those determined through legal process to be mentally ill and dangerous. The other is the statutory process now used to effectuate inherent presidential authority to authorize searches or other surveillance for foreign intelligence purposes.

A. Characteristics of the Proposed Adjudicatory Process

As detailed above, the Supreme Court has strongly indicated that persons who fit the definition of unlawful or irregular combatants and are found in the United States may lawfully be detained under existing presidential authority. The Court has also held that such detainees are entitled to some level of legal review. Yet the Court has offered few specifics to guide the establishment of a regularized adjudicatory process. The following subsections are intended to identify and outline some of the principal characteristics that such a process might have.

i. Evidentiary Provisions

The most significant shortcoming of the civil justice system when it comes to the detention of unlawful combatants are the standard rules of evidence. Our rules of evidence have been defined and refined to achieve exquisite levels of fairness and balance in a legal system that crowns as royalty the combat of the adversary process. Parties compete under the allocated burden of proof and burdens of persuasion. The rules of evidence are designed to level the playing field on which this combat takes place. Yet the Constitution requires no such balance of power between advocates when it comes to governmental actions necessary to protect national security. Thus, the first and foremost characteristic that would differentiate a new method for adjudicating the detention of unlawful combatant would be avoiding the rules of evidence strictures which are customarily employed in the civil courts.

The primary standard for evidence admittance in the new system should be one of fundamental reliability, without confining that concept to the dozens of rules, and reams of cases, which establish the arcane minutia of degrees of reliability and trustworthiness under the law of evidence employed to find justice in the civil courts. Questions about the degree of reliability would instead be used to accord weight to the evidence in the deliberations of the trier of fact, but not to control what the trier may know. In other words, almost nothing would be excluded from being received, but the precise evidentiary weight and value to be given to the evidence would be left up to the sound discretion of the adjudicating officer. Justice O'Connor has recognized the necessity for such tailoring of the rules of evidence in tribunals adjudicating the status of enemy combatants, noting in *Hamdi* that, "[h]earsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding."[37]

Similarly, the burden of proof could be shifted in such proceedings. The "beyond a reasonable doubt" standard imposed on the government in criminal proceedings should be replaced with a burden-shifting regime or a presumption in favor of evidence presented by the government. As Justice O'Connor explained in *Hamdi*, "the Constitution would not be offended by a presumption in favor of the government's evidence, so long as that presumption remained a rebuttable one and a fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." [38]

ii. Adjudicator

Justice O'Connor also noted in *Hamdi* that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive . . . a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker."[39] Such a detainee, however, does not have the right to a decision by jury.[40] Article III judges could be designated to sit in this role in addition to their duties as lifetime appointees to the federal bench. Alternatively, adjudicatory officers could be appointed, under much the same authority as administrative law judges are appointed in various government agencies. These would be persons with background, understanding, and expertise in the underworld of terrorism who might be more capable than the uninitiated to make reasoned and sensible judgments about intelligence information presented as evidence in support of a petition for detention. These adjudicators would provide oversight and review of the executive authority which reposes in the President and is delegated to an inferior official, a common practice in the executive branch.

iii. Right to Counsel

As a society, we have grown accustomed to the notion that anytime persons are faced with a legal difficulty they are entitled to the assistance of counsel, provided free of cost if they cannot afford it themselves. This popular notion, however, is not the law. The Supreme Court has held that the right to counsel attaches only in certain situations, such as at the initiation of a criminal prosecution, not in all legal proceedings.[41] Nonetheless, a system that is designed to meet both the test and the spirit of the due process clause of the Constitution ought to provide for the assistance of counsel to unlawful combatants who are being detained. It may be quite preferable, however, to have a bar of available counsel with the appropriate security clearances and other indicia of trustworthiness that would render the attorneys capable of meaningfully participating in these adjudications.

iv. Secrecy of Proceedings

Proceedings to determine a detained enemy combatant's status should be secret, but on the record. As with other aspects of the procedures discussed in the paper, they should not be sealed forever. Indeed, there should be, for the benefit of public knowledge and assurance that the Government is acting lawfully, a presumption in favor of disclosing such proceedings, so long as, or perhaps as soon as, disclosure can be accomplished without comprising important intelligence objectives.

v. Applicable Substantive Standards

The Government's asserted authority to detain individuals involved in terrorist activity or plots against the United States has turned on its designation of those individuals as "enemy combatants." As noted above, there is some confusion about the precise scope of the term. A

more precise, codified definition could serve to clarify the executive authority to detain such individuals and to establish a substantive standard in the proceedings discussed herein.

The President designated the petitioner in *Padilla* an "enemy combatant" on that grounds that he "(1) is closely associated with al Qaeda, an international terrorist organization with which the United States is at war; (2) that he engaged in . . . hostile and war-like acts, including . . . preparation for acts of international terrorism against the United States; (3) that he possesses intelligence about al Qaeda that would aid U.S. efforts to prevent attacks by al Qaeda on the United States; and finally, (4) that he represents a continuing, present and grave danger to the national security of the United States such that his military detention is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States."[42] The second and fourth of these elements, and perhaps the others in some form as well, could be codified into a standard to be applied in the adjudications envisioned herein.

In short, detention should be permissible where a subject is found to have taken part in preparation for or actual conduct of attacks directed at targets in the U.S. or at U.S. instrumentalities or facilities, abroad or on the high seas. It should also be possible to detain those individuals who provide material support for such undertakings.

An essential aspect of a fair adjudicatory system of this nature would be required showing of a capability to carry out the attack or mission in question. Thus, it should be a required finding that the subject in question had the capability to inflict harm on the United States or, alternatively, that the subject was a member of an organization that had both the intention and capability to inflict harm on the United States. In *Padilla*, for example, a demonstration of the petitioner's ties to al Qaeda would certainly meet this requirement.

vi. Length of Detention

How long should a detention be permitted as a result of this process? The initial determination of status as an enemy combatant should be made by an official to whom the President's authority to make that determination has been delegated. This may require the creation of a new "Assistant Attorney General for Domestic Security" or some similar position. Once that designation is made, the detainee should receive an initial hearing on his status within a reasonable time of being detained, likely to be more than days but less than months. He should receive notice in advance of the hearing, and he should have the right to counsel at this initial hearing. After the initial decision to detain is made, the detainee should have the right to at least an annual review of his status, at which the key question would be whether the threat and the capability to carry it out remain or, that the threat and capability would be rekindled or fostered if the individual were released.

vii. Presidential Review Authority

Finally, in this summary of the procedures, the President has and should retain the ultimate authority to overrule any adjudication that results from such a process. I do not propose that the President should sit as an appellate court, but since it is the President's authority that is being exercised, the President would retain the right in any case brought to his attention by any means to make a different decision than that which resulted from the adjudication. The ultimate check on the exercise of this power is political, not legal, save for a judicial determination in the context of a habeas action.

In that vein, the question arises of how this adjudication would affect habeas review by Article III courts. The Supreme Court has already indicated that habeas in some form must be provided to enemy combatants detained in the United States.[43] Congress could easily make it a part of this process that the adjudication of the legality of the detention of an enemy combatant shall constitute clear and convincing evidence in court that his designation as an enemy combatant is correct and shall create a presumption that his detention is lawful. Thus, in a nutshell, habeas review would be extremely limited. This is not unlike strict limitations that have been placed on habeas review in other contexts. For example, in the Antiterrorism and Effective Death Penalty Act Congress limited the right of prisoners to file successive habeas corpus petitions in the federal courts. This procedural limitation, however, comports with due process.[44]

viii. Additional Features

Finally, a few additional features that this system might entail bear mention. A limited right of action to seek reparations could be authorized for any person subsequently found to have been unlawfully detained in the initial three month period. This would act as a check on the unbridled abuse of this limited detention. It is also logical that the prosecuting officers who present the evidence to the adjudication panel or officer should be Department of Justice attorneys, thus preserving the essential civilian nature of the process, but separating it from the law enforcement functions typically handled by federal prosecutors.

B. Legal Frameworks Providing Precedent for the Proposed Procedures

The model proposed above is not written on a blank slate or created out of whole cloth. Two well-developed legal processes may provide precedent and guidance in the establishment of such a system.

First, state law commonly provides a legal mechanism by which persons adjudged to be mentally ill and a danger to themselves or others may be involuntarily committed to detention in an institution, even for life. Federal statutes likewise permit commitment of criminal defendants unfit to stand trial because of a mental disease or defect. These systems, which constitutionally permit the detention of individuals against their wills who are adjudged to be a danger to society provide a valuable model for the paradigm outlined above.

While civil commitment procedures vary somewhat from state to state, the Supreme Court has announced several baseline principles that such procedures must respect. First, "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[45]

Civil commitment proceedings, however, are generally regulatory, not criminal, in nature, and thus the panoply of rights and safeguards that must be provided in a criminal trial need not be provided in such a proceeding.[46] Thus, a state need only demonstrate danger with clear and convincing evidence to justify commitment,[47] and the Sixth Amendment right to jury trial is inapplicable in regulatory commitment proceedings.[48]

In light of the similar governmental ends sought to be achieved in civil commitment proceedings and by the proposed preventive detention regime—ensuring fair procedures, accurate fact-finding, and the safety and security of society—the structure of civil detention regimes is worth consideration in constructing a fair and effective preventive detention regime.

The civil commitment procedures outlined in federal law for criminal defendants deemed mentally incompetent to stand trial are particularly useful in considering the appropriate procedures for adjudicating the status of enemy combatant detainees. The treatment of mentally incompetent defendants under federal law is governed by 18 U.S.C. §§ 4241-4247. Under § 4241(a), when a court has reasonable cause to believe that a defendant is suffering from a mental disease or defect rendering him unable to understand the nature and consequences of the proceedings against him, or to assist in his defense, the court may conduct a hearing to determine the defendant's competency to stand trial. If the court finds by a preponderance of the evidence that the defendant is incompetent, the defendant is to be committed to the custody of the Attorney General for an initial period of hospitalization.[49] The defendant may then be hospitalized, generally up to four months, to determine whether a substantial probability exists that his condition will improve in the foreseeable future to a point that will allow trial to proceed.[50] If at the end of the defendant's hospitalization the court determines that the defendant's condition has not improved sufficiently, the defendant may then be committed for an indeterminate period pursuant to the provisions of § 4246.[51]

Under § 4246(a), the director of the facility in which the defendant is hospitalized may certify that the defendant is "suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another" and that "suitable arrangements for State custody and care of the [defendant] are not available."[52] Once the director of the facility files such a certificate, the court holds a second hearing to assess the accuracy of the director's certification. At the hearing, the court is to determine whether there is clear and convincing evidence that the defendant's condition meets the criteria identified in § 4246(a). Upon such a finding, the defendant is again committed to the custody of the Attorney General until such time as he is determined fit to stand trial. The director of the hospital facility at which the defendant is confined is thereafter to prepare annual reports, to be submitted to the court, concerning the condition of the committed person and containing recommendations concerning the need for his continued hospitalization.[53]

Several aspects of this federal statutory scheme are instructive here. First, the varying burdens of proof provide a good model for a preventive detention regime. The imposition of a low standard, such as reasonable cause, to justify initial detention would permit the Executive to act quickly when a threat becomes apparent. The higher "clear and convincing" standard applicable at the subsequent hearing would provide a heightened safeguard to ensure the accuracy and reliability of the determinations reached earlier. The provision for annual certification of the need for continued detention, and annual review of that certification, would likewise guard against the unnecessary detention of individuals who do not pose a risk.

The purpose of the federal statutory scheme—which has played a large role in the courts' having upheld its restrictions on the right to a jury trial and to other trial rights—is also significant. As Judge Kozinski stated in *Sahhar*, the scheme "protects society by placing in the government's custody certain dangerous individuals. . . . [It] is not intended to address past wrongs, but rather to reduce the risk of future harm to persons and property."[54] These purposes would also be served by a regime of preventive detention of domestic enemy combatants. Indeed, given that the risk posed by an individual detained to prevent his engaging in an act of terrorism will ordinarily be substantially greater, in terms of lives and other potential losses, than that posed by a defendant unfit to stand trial, the justification for detention is all the more compelling.

The second legal basis of support for the new paradigm outlined above is that which is currently employed to exercise the President's constitutional authority to conduct electronic surveillance and to authorize breaking-and-entering for the purpose of achieving the national security objectives of the United States. The Foreign Intelligence Surveillance Act ("FISA") was enacted in 1978 to regulate the government's use of electronic surveillance within the United States to acquire foreign intelligence information, which includes information relating to the ability of the United States to defend itself against international terrorism.

Under FISA, a court of eleven specially assigned federal district court judges is authorized to hear government applications for foreign surveillance and search orders. A three-judge appeals court is designated to hear reviews of application denials. These judges are selected by the Chief Justice of the United States Supreme Court. Yet the FISA court is not a typical Article III court; rather, it serves to regulate and regularize the exercise of inherent executive authority. In its only decision to date, the FISA Review Court noted that the authority for the searches authorized by FISA stems ultimately from the President's inherent authority over foreign affairs and national security.[55] This point is further exemplified by FISA's explicit provision for the use of electronic surveillance without a warrant against any individual or organization for up to seventy-two hours, or the physical search of a location, if the Attorney General determines that an emergency situation exists. In such a

circumstance, the Attorney General exercises the authority delegated by the President directly, without the layer of review imposed by the FISA court.

In light of the inherent executive authority for searches that the FISA court reviews, this process has been challenged on separation of powers grounds. These challenges have been unsuccessful, however. The courts have ruled that the FISA court is not called upon to exercise executive authority by making foreign policy or decisions about national security, but rather to apply statutory language and make findings of fact of the kind frequently made by courts.[56] This characterization of function could apply equally to that outlined for the trier of fact in the instant proposal.

The FISA court thus represents a legal and constitutional system that provides a methodology for inferior officers to exercise the President's authority to conduct national security surveillance activities. The system has the hallmarks and characteristics of a legal process which meets constitutional muster under due process standards, yet at the same time preserves the secrecy necessary to avoid the catastrophic consequences of revealing intelligence sources, methods and the information produced from them.

CONCLUSION

It is apparent that by reposing in the courts the authority to detain and incapacitate mental defectives, we as a society have recognized and lent our support to the credibility of the legal system and the integrity of judges who determine that a fellow citizen should have his or her liberty extinguished, perhaps for life. Similarly, by cloaking the process of determining the justification for intrusive electronic surveillance under the umbrella of national security objectives with the aura and process of court-like proceedings, we have struck a balance between meeting national security needs and entrusting such decision-making merely to a secret process under the control of an individual or to a clandestine bureaucracy. Taking these established legal regimes as models, a scheme to adjudicate constitutionally the need to detain enemy combatants could be fashioned. An incremental surrender of executive authority to a prescribed process that embodies the hallmarks of due process and employs fundamental judicial determinations is preferable to risking curtailment of that authority were it to be abused by its use in an *ad hoc* manner in times of great peril and uncertainty.

Footnotes

[1] Federalist No. 23 (Alexander Hamilton).

[2] 12 U.S. [8 Cranch] 110 (1814).

[3] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2675 (2004) (Thomas, J., dissenting).

[4] U.S. Const. art. II, §§ 1, 2.

[5] The term "enemy combatant," though it has taken on distinct significance in the legal landscape regarding executive authority in this area, does not have a single, precise definition. In this background discussion of case law, it will be used as used by the case under discussion. Later in this paper, a definition will be proposed that could serve as a substantive standard applicable in the adjudicatory hearings proposed herein.

[6] 317 U.S. 1 (1942).

[7] *Id.* at 37.

[8] *Id.* at 26.

[9] *Id.* at 28-29.

[10] *Id.* at 30-31, 37. It is also notable that the Court recognized in *Quirin* that an enemy combatant need not be a regular member of an enemy force. The petitioners in *Quirin* were not members of the German Army, but rather disguised saboteurs who infiltrated the United States. Indeed, it was this aspect of their activities that rendered them *unlawful* combatants under the laws of war and subjected them to trial by military tribunal. *Quirin*, 317 U.S. at 31. Without engaging in an extended review of the laws of war, it may be said with confidence that members of al Qaeda or similar terrorist organizations would not meet the requirements to be considered regular, lawful members of an enemy force, including wearing fixed emblems recognizable at a distance, carrying arms openly, and operating in accordance with the laws and customs of war. *See* David B. Rivkin Jr. & Lee Casey, *Enemy Combatant Determinations and Judicial Review* (Federalist Society White Paper, Washington, D.C.), Feb. 2003, at 3-4.

[11] 124 S. Ct. 2633 (2004).

[12] 115 Stat. 224.

[13] Rumsfeld v. Hamdi, 316 F.3d 450, 467 (4th Cir. 2003); *Id*.

[14] *Hamdi*, 124 S. Ct. at 2639.

[15] *Id.* at 2641-42. Justice O'Connor further noted that Hamdi was captured "in a *foreign* combat zone." *Id.* at 2643.

[16] *Id.*

[17] *See id.*; *see also* Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

[18] *Hamdi*, 524 U.S. at 21-22.

[19] *Hamdi*, 124 S. Ct. at 2648 (citing *Mathews*, 424 U.S. at 335); *Id*.

[20] *Id.* at 2648-49.

[21] Shortly after the Supreme Court's decisions in *Hamdi*, *Padilla*, and *Rasul*, the Government created a tribunal called the Combatant Status Review Tribunal ("CSRT") to review the status of each detainee held at Guantanamo Bay, Cuba, as an enemy combatant. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 443, 450 (D.D.C. 2005); *see also* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (link to Order issued by Deputy Defense Secretary Paul Wolfowitz creating CSRT). The CSRT procedures, however, have already been held by at least one district court to fall short of that called for in the Hamdi plurality. *See id.* at 468-78. The district court noted that, among other problems, CSRT detainees were not given access to classified evidence used to demonstrate their enemy combatant status, nor were they permitted to have an advocate review to challenge it on their behalf, or access to counsel. *Id.* at 468-72.

[22] *Padilla*, 124 S. Ct. at 2715.

[23] *See* Padilla v. Bush, 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002).

[24] *Id.* at 589-90 (citing, *inter alia*, *The Prize Cases*, 67 U.S. (2 Black) 635 (1862)).

[25] *Id.* at 590.

[26] *Id.*

[27] 481 U.S. 739, 748 (1987).

[28] *Id.* at 748.

[29] *Padilla*, 233 F. Supp. 2d at 595. Judge Mukasey noted that the Quirin Court gave a "narrow reading" to the prior decision in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), in which the Supreme Court set aside the conviction of a citizen tried before a military commission for a plot involving plans to seize weapons, free Confederate prisoners, and kidnap the governor of Indiana.

[30] 345 U.S. 206 (1953).

[31] *Id.* at 210 (Jackson, J., dissenting).

[32] *The Prize Cases*, 2 Black 635, 668, 670 (1863).

[33] The general federal conspiracy statute, for instance, 18 U.S.C. § 371, requires the commission of an overt act by a conspirator for a prosecution to lie.

[34] *See, e.g.*, Phillip Shenon, *Government Lawyers Fear 9/11 Ruling Threatens Qaeda Cases*, N.Y. TIMES, Oct. 4, 2003 (quoting defense attorney for Lindh as stating that potential disclosure of classified information was an important factor in convincing government to agree to plea bargain with him).

[35] *See, e.g.*, FEDERALIST No. 23, ("The principle purposes to answered by Union are these—the common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks.").

[36] It is worth noting that we have some experience with another approach that might be taken under our system. During the Cold War, a State Department official named Felix Bloch was identified as a spy by the FBI, but they were unable to bring charges against him. To prevent Bloch from conveying information to the Soviet Union, the FBI simply trailed him (often with media in tow) wherever he went. The spectacle of the FBI openly and notoriously trailing Bloch for days and months on end should not be forgotten. If we are dealing with scores of Felix Blochs, even this endgame alternative becomes a practical impossibility. *See, e.g.*, Brian Duffy, *Tinker, Tailor, Soldier, Deputy Chief of Mission: The Felix Bloch Case Raised Questions About U.S. Counterintelligence and Fears of a New Spy Disaster*, U.S. NEWS & WORLD REPORT, Aug. 7, 1989 (describing Bloch's being tailed by FBI, in turn tailed by media).

[37] *Hamdi*, 124 S. Ct. at 2649.

[38] *See id.*

[39] *Id.* at 26.

[40] *See infra* note 48.

[41] The Sixth Amendment right to counsel "does not attach until a prosecution is commenced." McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). That is, it attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.*

[42] *Padilla*, 124 S. Ct. at 2715 n.2 (internal quotation marks omitted).

[43] *See Hamdi*, 124 S. Ct. at 2644; CONST. Art. I § 9 cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in cases of Rebellion or Invasion the public Safety may require it.").

[44] *See, e.g.,* Graham v. Johnson, 168 F.3d 762 (5th Cir. 1999) (noting that a procedural limitation on habeas relief "is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") (quoting Medina v. California, 505 U.S. 437, 445 (1992)).

[45] Addington v. Texas, 441 U.S. 418, 425 (1979).

[46] *See* Allen v. Illinois, 478 U.S. 364 (1986); United States v. Salerno, 481 U.S. 739 (1987).

[47] *See Addington*, 441 U.S. at 431-33.

[48] *See* United States v. Sahhar, 917 F.2d 1197, 1205-06 (9th Cir. 1990).

[49] 18 U.S.C. § 4241(d).

[50] *Id.* § 4241(d)(1)

[51] *Id.*

[52] *Id.* § 4246(a).

[53] *Id.* § 4247(e)(1)(B).

[54] *Sahhar*, 917 F.2d at 1205.

[55] *See In re Sealed Case*, 310 F.3d 717, 719, 746 (Foreign Int. Surv. Ct. Rev. 2002) (noting that searches in question under FISA are authorized pursuant to "the President's inherent constitutional authority to conduct warrantless foreign intelligence surveillance").

[56] *See* United States v. Duggan, 743 F.2d 59, 74 (2d Cir. 1984); United States v. Cavanagh, 807 F.2d 787, 791-92 (9th Cir. 1987); United States v. Nicholson, 955 F. Supp. 588, 592-93 (E.D. Va. 1997); United States v. Megahey, 553 F. Supp. 1180, 1200 (E.D.N.Y. 1982).