

**THE MILITARY-JUDICIAL NEXUS IN RESPONSE TO TERRORISM:  
THE KKK AND ALQAEDA**

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Imagine, if you will, this scenario in a third-world dictatorship. The President has announced that an alleged offender can be turned over to military authorities and prosecuted before a military commission rather than civilian court.<sup>2</sup> One citizen is arrested in his own country by his own government and held incommunicado for 30 days, then turned over to military authorities, and imprisoned indefinitely with no hearing and no public disclosure of the evidence against him, not even to a court sitting in habeas corpus.<sup>3</sup> The military then decides not to conduct a trial at all for those that it determines to be “enemy combatants” and simply holds these persons in custody with no contact with the outside world and no prospects of judicial proceedings.<sup>4</sup>

Meanwhile, hundreds of persons of diverse nationalities are captured in armed conflict with another nation, and transported to an island military base not on the national soil of the capturing nation, where they are held as combatants of the capturing nation but not as prisoners of war.<sup>5</sup> The nation in which they were captured is an enemy in an undeclared war because the nation was accused of harboring criminals who acted against the capturing nation.<sup>6</sup> International human rights organizations criticize the capturing nation for holding prisoners in violation of international conventions.<sup>7</sup>

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Military Order of November, 2001: Detention, Treatment, and Trial of Certain Non Citizens in the War Against Terrorism, 66 FED. REG. 57, 833 (2001).

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Padilla v. Bush, 2002 U.S. Dist. LEXIS 23086 (SDNY 2002) (Order requiring Padilla be allowed to meet with self-appointed habeas corpus attorney); *see* Government’s Response and Motion to Dismiss Petition for Habeas Corpus, <http://news.findlaw.com/hdocs/docs/terrorism/padillabush82702grsp.pdf> (SDNY 2002): “In view of the substantial deference owed the President’s determination, there is no basis to second guess the President’s conclusion that Padilla is an enemy combatant.”

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Hamdi v. Rumsfeld, 2002 U.S. App. Lexis 198 (4th Cir. 2003) (judicial review limited to determining that “enemy combatant” was armed and in the company of enemy troops).

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US WHITE HOUSE, “Fact Sheet: Status of Detainees at Guantanamo,” <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (2/7/02).

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Pub. L. 107-40 [S.J. Res. 23] (2001)

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The United Nations High Commissioner for Human Rights resigned “under fire” for criticism of major nations’ records, including statements regarding the US detentions at Guantanamo. ASSOCIATED PRESS, “U.N. Human Rights Leader Exits After Criticizing U.S., Others” (Sept. 8, 2002).

The International Committee of the Red Cross has been critical of the US policy position, but has accomplished its principal objectives of being allowed to visit detainees and carry messages from them to relatives. “There has been much public debate about whether the internees in Guantanamo Bay are prisoners of war or not. The ICRC

This is not the plot of a cheap movie about third-world dictatorships. Each of these actions is part of the United States' "War on Terrorism." Wending their way to the Supreme Court are three cases presenting the range of possibilities for detention without trial: one US citizen arrested on US soil for allegedly plotting violent action against civilian targets on US soil, one US citizen captured in a country in which US forces were engaged in armed conflict, and one non-citizen arrested on US soil for alleged participation in violence against civilians on US soil.

The scholars, as well as the political pundits, are split on the issue of the validity of using military commissions in this context. Professor Paust, a former faculty member of the Army JAG School, takes the position that the President's Commander in Chief power to set up military commissions applies only during actual war within a war zone or relevant occupied territory and apparently ends when peace is finalized.<sup>8</sup> Professors Bradley and Goldsmith, however, argue that President Bush had statutory authority to issue the Order, and probably also had independent constitutional authority to do so as Commander in Chief.<sup>9</sup>

With utmost humility, there are at least three more conclusions that suggest themselves.

First, the thought of indefinite military detention of a US citizen arrested on US soil for a domestic crime is far beyond the pale of basic constitutional underpinnings. There is no justification in Anglo-American history for indefinite detention without trial. With respect to noncitizens and citizens captured overseas, the President's power is arguable but far from solid. In that event, why not take the route that does the least disruption to our system? If the bad guys can make us change and appear to panic, then aren't they already accomplishing some of their goals? Isn't it more in keeping with our societal attitudes toward terrorism to refuse them the honor of being considered an entity worthy of belligerent status as opposed to just ordinary criminals?

Second, because the law abhors incoherence, we should be able to make coherent distinctions among alleged terrorists for the purpose of deciding who is tried in civilian courts, who is tried in military tribunals, and who if anyone is detained indefinitely with no trial at all. US military commissions are available only to prosecute violations of the "law of war,"<sup>10</sup> so it becomes important to distinguish those

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thinks that the legal status of each internee needs to be clarified on an individual basis and has repeatedly urged the US to do this. In any case, the US has the right to legally prosecute any internee at Guantanamo Bay suspected of having committed war crimes or any other criminal offence punishable under US law prior to or during the hostilities." <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/D218FD3E4617732A41256C760044F5F6>

Amnesty International has openly complained that the US is violating international law in its detention and treatment of detainees at Guantanamo. *See* <http://web.amnesty.org/ai.nsf/Index/AMR510542002?OpenDocument&of=COUNTRIES\USA>

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Jordan Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L LAW 1, 9 (2001). The word finalized is an important qualifier on this statement because the power can extend throughout occupation of conquered territory or even beyond occupation with the consent of a new government.

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Curtis A. Bradley and Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249 (2002). "Although the 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. We also argue that the September 11 terrorist attacks, to which the Order was a response, violate the laws of war and therefore fall within the jurisdiction of military commissions."

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10 U.S.C. §821: "The provisions of this chapter [10 USCS §§ 801 et seq.] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction

violations from the actions of ordinary criminals. This is important to American law, not to denigrate military tribunals but to validate the basic assumptions of American civil justice and to lend coherence to an otherwise incoherent set of choices. The history of federalism and terrorism in the United States under the post-Civil War statutes can be helpful in defining offenses that have multi-sovereign implications.

Third, indefinite detention of “combatants” in an offshore prison camp is highly doubtful, although apparently beyond the reach of US courts, and subject to diplomatic negotiations. Under the Geneva Conventions, even persons who “have fallen into the hands of the enemy” as to whom there is any “doubt” about their POW status are entitled to be treated as prisoners of war “until such time as their status has been determined by a competent tribunal.”<sup>11</sup> Thus, some form of review of the status of these persons should be a feature of US diplomatic relations with other nations.

### I. Setting the Stage

There are at least four “fronts” on which the US government has made aggressive moves against individuals thought to represent a threat to American public safety, and this article deals with only one of those. Three topics to be excluded are: (1) issues of the propriety of invading countries such as Afghanistan and Iraq, (2) the expansion of investigatory powers of federal law enforcement, through the USA Patriot Act, with many tools that will inevitably trigger Fourth Amendment challenges,<sup>12</sup> and (3) immigration reforms that include powers to track and detain alleged violators.<sup>13</sup>

Although it links into the others to some degree, I want to focus here on at least some aspects of a partial change from criminal processes to military action in dealing with some alleged terrorists.

Thus, let me be specific about what is within the scope of this article and what is not. No civilian has yet been charged before a military tribunal. Yaser Hamdi is a US citizen held in military custody after capture on foreign soil as an “enemy combatant,” a term that arose from use of military commissions, so we will need to deal with the power of the military to detain. Anyone captured within the “theater of operations” of a legitimate military action is subject to military law, including detention and trial for

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with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”

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Geneva Convention Relating to Prisoners of War (1949), Article V.

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Pub. L. 107-56. The title of the Act sounds almost tongue in cheek from this distance: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism. The Act contains hundreds of amendments to various federal statutes involved with law enforcement, such as the Foreign Intelligence Surveillance Act, immigration, criminal procedure codes, and the investigatory powers of the FBI and CIA. There is no secret that the Act was pieced together from several proposals that had already been drafted and were sitting “on the shelf” in the Justice Department waiting for appropriate opportunities for introduction in Congress. For summaries and analysis of the Patriot Act, see CONGRESSIONAL RESEARCH SERVICE, *The USA PATRIOT Act: A Legal Analysis*, CRS Report RL31377; LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, . . . ; AMERICAN LIBRARY ASSOCIATION, *Libraries and the Patriot Legislation*, <http://www.ala.org/washoff/patriot.html>; NATL.LEGAL AID & DEFENDERS ASS’N, *Significant Provisions of the Patriot Act*, <http://www.nlada.org/DMS/Documents/1006186143.01/USA%20Patriot%20Act%20Summary.pdf>.

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Detention of aliens arrested (or “detained”) in this country is governed by immigration rules that have been given additional teeth legislatively, are being challenged in judicial fora, and are well beyond the scope of this article. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

crimes against the “law of nations,” but that is a far cry from indefinite detention without trial and it assumes a definition of treason as being part of the “law of nations.”

Second, Jose Padilla is being held in military custody following arrest on US soil for conspiracy to commit an act of violence against civilian targets within the US. Military detention of a citizen captured within US borders would depend upon either a valid declaration of martial law pursuant to emergency or a judicial finding of “enemy combatant” status by linkage with a foreign power.

Third, there are a number of alleged terrorist cells whose noncitizen members are awaiting trial in US civilian courts. With regard to trial processes for alleged terrorists operating within this country, the first question is why are they being treated differently from Padilla? The use of military commissions, for either citizen or noncitizen, turns on whether the allegations involve violations of the “law of war,” which should turn on whether the perpetrator has acted “under color of state authority.” The terrorist operating without sanction of any nation-state is merely a criminal, not a violator of the law of war because the laws of war operate among nations.<sup>14</sup>

Finally, with regard to noncitizen detainees captured abroad (the Guantanamo detainees), there is surprisingly little to say: the principal focal points are international law, the President’s emergency powers, and the simple question of what to do with some people who placed themselves in an undesirable situation.<sup>15</sup> We need to consider their situation, however, to round out the picture of the legal regime that applies to the multi-front task of confronting terrorism.

## II. Military Commissions and the Classification of “Enemy Combatant”

The US administration argues that military commissions can be convened pursuant to the President’s C-in-C powers as augmented by statutory authorization for the use of military commissions when warranted by the law of war.<sup>16</sup> The argument is that members of a well-organized international terrorist group engaged in violent attack on the US qualify as enemy combatants under international law. The counter-argument is that the customs and usages of international law permit military commissions to operate only in the actual “theater of operations” of the military or in occupied territory. We will get to the details of these arguments later after developing much of the background and implications of using military commissions.

With regard to those who carry out illegal activities within this country on behalf of a foreign state, the Supreme Court was willing to allow the military to deal with them outside the setting of the normal criminal processes during World War II.<sup>17</sup> That incident, however, is “bookended” by the Civil War cases

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For example, the crime of “providing material support to a terrorist organization” is very similar to the old crime of “criminal syndicalism” which formed the basis of prosecutions against communist party members and sympathizers prior to the Supreme Court’s decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

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Professors Bryant and Tobias assert that the President at least must show a basis for detention, that there is not a sufficient emergency foundation for the assertion that courts have no role in inquiring into the facts of each individual who is being held. A. Christopher Bryant and Carl Tobias, *Youngstown Revisited*, (2003). But the question then becomes, what basis would justify an indefinite detention? *See generally* Joanne Mariner, *Guantanamo: The Continuing Debate Over The Legal Status Of Guantanamo Detainees*, <http://writ.news.findlaw.com/mariner/20020311.html>.

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10 U.S.C. § 821

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*Ex parte Quirin*, 317 U.S. 1 (1942).

insisting that military courts cannot operate in areas where the civilian courts are open and operating<sup>18</sup> and by the invalidity of using military tribunals in Hawaii during World War II.<sup>19</sup>

A great deal of speculation has been devoted to the issue of whether military commissions can be assembled for AlQaeda members. Interestingly, however, not a single commission has yet been empaneled for prosecution of a terrorist offense. I am choosing to add to the speculation here because the subject casts considerable light on the remainder of our issues.

A. The Civil War and WWII Precedents

The leading case is *Ex parte Quirin*,<sup>20</sup> in which eight persons were arrested early in World War II by the FBI and handed over to military authorities for trial as spies or saboteurs. They had landed in two groups of four by German submarine, one group on Long Island with targets in New York City and the other group near Jacksonville, Florida with a variety of targets. Each had undergone training in Germany, was paid by German officials, was issued a German military uniform to wear until ashore in the US, was arrested in civilian clothing, and brought a quantity of explosives ashore. With a bit of procedural maneuvering regarding whether captured spies could even have recourse to the civilian courts for a writ of habeas corpus, which the Supreme Court did not hesitate to answer affirmatively, the Court held that they were not entitled to the processes of civil courts but could be dealt with under military law for violations of the “law of war.”

The Constitution has three statements regarding the place and type of trial for offenses against the United States, with one key exception for cases “arising in the land and naval forces, or in the Militia, in actual service in time of War or public danger.”<sup>21</sup> For substantive rules of criminal behavior, Article I, 8 grants Congress the power, in addition to the familiar power to make rules and regulations for governance of the military, “To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”

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*Ex parte Milligan*, 71 U.S. 2 (4 Wall.) (1866); *Beckwith v. Bean*, 98 U.S. 283 (1878).

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*Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (decided on statutory grounds but with constitutional overtones).

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317 U.S. 1 (1942).

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Article III, 2:

The trial of all Crimes except in cases of Impeachment shall be by Jury and such Trial shall be held in the State where the said Crimes shall have been committed but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .

The Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and notice of charges, confrontation of witnesses, subpoena power, and right to counsel.

Taking all these provisions together, it is easy to construct an argument that it is up to Congress to define and criminalize offenses such as sabotage and war crimes, that the place of trial shall be where the offense was committed or such other place as directed by law, that the accused is entitled to trial by jury and the other rights of the sixth amendment, and that none of this contemplates anything other than the normal processes of the civilian courts except in cases “arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”<sup>22</sup> The exception is so clearly targeted to offenses committed by US personnel that it is difficult to imagine its application to foreign nationals either one way or the other.

These provisions are all so consistent with each other and with the argument for civilian courts that it is difficult to construct the counter argument. The Supreme Court in *Quirin* relied upon a minimal amount of textual analysis to point out that the Article III and fifth amendment provisions must be read in light of their historical understanding, which was that not all offenses give rise to a right of trial by jury. The two examples used for this purpose – petty offenses and criminal contempt charges – did not give rise to a jury trial but did remain in the civilian court systems.<sup>23</sup> The *Quirin* opinion also relied on a structural anomaly if our own troops are subject to military tribunals, why should the alleged bad guys get better treatment by being sent to the civilian system?

Most of the opinion was historical, citing examples from the Revolutionary War and Civil War of alleged spies who were subjected to the death penalty either by commanding officer fiat or after the current version of a military proceeding. Of interest to the current situation, the Court stated in no uncertain terms that the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens<sup>24</sup> but because they had violated the law of war by committing offenses traditionally triable by military tribunal.<sup>25</sup>

This approach makes the jurisdiction of military tribunals depend on the nature of the charged offense – violation of the law of war. In the case of members of terrorist groups, what law of war has been violated? *Quirin* was decided in the unquestioned context of war, a more or less easily understood term

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*See* Paust

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After *Quirin* there have been further restrictions placed on both these exceptions to jury trial, defining petty offenses as those punishable by no more than six months incarceration, *Baldwin v. New York*, 399 U.S. 66 (1970), and requiring a separate trial for contempt that does not threaten the continuation of the proceedings. *Frank v. United States*, 395 U.S. 147 (1969); *Harris v. United States*, 382 U.S. 162 (1965). Under RULE CRIM. PROC. 42(b), if the alleged contempt involves disrespect of the judge, then that judge is disqualified from hearing the contempt trial.

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“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 law of war.” 317 U.S. at 37.

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The Court blended U.S. and international law regarding the rules applicable to unlawful combatants:

Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who, though combatants, do not wear “fixed and distinctive emblems.” And by [the predecessor of 10 U.S.C. §815], Congress has made provision for their trial and punishment by military commission, according to the “law of war.”

317 U.S. at 35.

referring to conditions of hostilities between nation states. Since WWII, the international community has been defining crimes of international law that do not depend on conditions of hostility between nations. But are those offenses triable under US law in military courts or in the civilian courts? In fact, the international community has been quite adamant in not defining the acts of terrorists to be acts of war, lawful or unlawful.

The argument for using civilian courts rather than military courts under US domestic law hinges on *Ex parte Milligan*.<sup>26</sup> Milligan was arrested in Indiana during the Civil War, charged with conspiracy before a military commission, convicted and sentenced to death by hanging. His habeas corpus petition was granted by the Supreme Court unanimously, although the nine Justices disagreed over whether the defects in the proceedings were constitutional or statutory. Justice Davis, for the five-vote majority, held that Congress could not authorize the use of military commissions even for violations of the “laws and usages of war” in areas outside the “theater of operations” and in which the civilian courts were open and operating.<sup>27</sup> Chief Justice Chase, for the four-vote minority, believed that Congress could have authorized the use of military commissions under these circumstances but had not done so.<sup>28</sup>

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71 U.S. 2 (4 Wall.) (1866)

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It can serve no useful purpose to inquire what those laws and usages [of war] are, whence they originated, where found, and on whom they operate; they 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. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

71 U.S. at 121-22.

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The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

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It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them.

71 U.S. at 141-42.

Chief Justice Chase went further to deliver a lecture about the role of President Lincoln and the military officers in these matters:

With that prohibition [by Congress] we are satisfied, and should have remained silent if the answers to the questions certified had been put on that ground, without denial of the existence of a power which we believe to be constitutional and important to the public safety, – a denial which, as we have already suggested, seems to draw in question the power of Congress to protect from prosecution the members of military commissions who acted in obedience to their superior officers, and whose action, whether warranted by law or not, was approved by that up-right and patriotic President under whose administration

*Milligan* is often read as stating emphatically that it would be unconstitutional to prosecute citizens in military commissions for crimes committed in areas in which the civilian courts are open and operating. There is even stronger language in *Beckwith v. Bean*<sup>29</sup> a civil case for false imprisonment under similar facts as *Milligan* but decided long after the Civil War was over. In *Beckwith*, Justice Field delivered a vigorous lecture about the inability of Congress to suspend the operation of civilian law even in war time.<sup>30</sup>

The Supreme Court in *Quirin* answered the *Milligan* argument rather curtly by pointing out that “*Milligan*, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as – in circumstances found not there to be present, and not involved here – martial law might be constitutionally established.”<sup>31</sup> In this statement, the *Quirin* Court observed that Congress had not established “martial law” in the US, but the opinion relies extensively on explaining that these saboteurs had penetrated behind military lines to reach targets that were potentially civilian support systems for the military’s war effort.

The implication of these observations is that the “theater of operations,” in which military commissions could act, was expanded to reach those areas behind friendly lines in which saboteurs would find it profitable to operate. From this, one could conclude that the “theater of operations” in time of armed conflict extends to any target that a saboteur desires to strike, and from this the act of a terrorist becomes the act of an “enemy combatant.”

But can the President, even with the consent of Congress, authorize military detention or trial of a US citizen when the civilian courts are open and operating? *Quirin* points in the direction of yes, at least when the US is in the middle of a declared war and the alleged perpetrators are captured in the middle of attacking US targets. *Milligan* says emphatically no, unless the context of national emergency is so great that there is military necessity for supplanting the civilian processes.

There is further guidance to be gained from *Duncan v. Kahanamoku*,<sup>32</sup> which struck down the use of military tribunals during a time of “martial law” in Hawaii following the attack on Pearl Harbor. Duncan was a “civilian shipfitter employed in the Navy Yard at Honolulu” who “engaged in a brawl with two armed Marine sentries at the yard.” The military authorities (presumably foregoing a charge of criminal stupidity) charged him with violation of a standing military order, “assault on military or naval personnel with intent to resist or hinder them in the discharge of their duty.” At the time, Hawaii was under martial law, although the civilian courts were open and operating for some purposes. Duncan was convicted and

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the Republic was rescued from threatened destruction.

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98 U.S. 266 (1878).

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No mere order or proclamation of the President for the arrest and imprisonment of a person not in the military service, in a State removed from the scene of actual hostilities, where the courts are open and in the unobstructed exercise of their jurisdiction, can constitute the due process of law, nor can it be made such by any act of Congress.

98 U.S. at 293.

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317 U.S. at 45.

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327 U.S. 304 (1946).

sentenced by a military tribunal, and the Supreme Court invalidated his conviction. While recognizing that Congress had authorized the declaration of martial law in the Hawaii Organic Act, the Court reviewed the history of military tribunals as it existed at the time of the Organic Act and concluded that it “was not intended to authorize the supplanting of courts by military tribunals.”<sup>33</sup>

By relying on congressional intent, the Court in *Duncan* avoided constitutional grounds for its decision, but it was clear that the situation skirted on constitutional issues. Citing *Milligan*, the Court stated,

We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embedded in the Constitution itself. Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government.

Military tribunals have no such standing.<sup>34</sup>

Indeed, in something approaching a fit of pique, Justice Black’s opinion referred to the Civil War experience by pointing out that “in order to prevent this Court from passing on the constitutionality of [Reconstruction] legislation Congress found it necessary to curtail our appellate jurisdiction.”

The *Duncan* Court was well aware of *Quirin*, decided just four years earlier, as well as *In re Yamashita*, decided [same day? week?] as *Duncan*. What the Court said to distinguish these cases, as well as others involving legitimate use of military tribunals was this:

Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war. We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function. . . . Nor need we here consider the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war.

In short, the Court limited the legitimate realm of military tribunals to governance of the armed forces themselves, the “theater of operations” (including occupied territory, as Winthrop argued) and “others charged with violating the laws of war.” So once again we come to the question of whether a person acting without “color of state action” can violate the law of war.

#### B. Non-State Actors and the “Law of War”

The Government claims statutory authority in support of the Commander-in-Chief powers from 10 U.S.C. §821 (Article 15 of the UCMJ), which states that creation of military courts-martial by statute does not “deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that . . . by the law of war may be tried by military commissions.” The argument from *Quirin* goes on to assert that in wartime conditions, military necessity as determined by the Commander-in-Chief can justify using military tribunals for punishment of offenses against the law of war. Because a terrorist act (wearing civilian clothing, targeting a civilian facility, and blending back into a civilian population) is against the law of war, even in the absence of an international definition of “terrorism,” then the power of the military is complete.<sup>35</sup>

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*Id.* at 324.

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*Id.* at 322.

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Bradley & Goldsmith, *supra* note \*.

The *Quirin* opinion distinguished *Milligan* on the ground that “Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent.” Professors Bradley and Goldsmith argue that AlQaeda is a sufficiently organized and hostile organization to be subject to the law of war. “If the September 11 attacks were committed by traditional state actors during this armed conflict, they would clearly violate international law prohibitions on attacking civilian populations and destroying their property.”<sup>36</sup> They argue that “there is precedent for applying the laws of war to groups not directly acting on behalf of nation-states, such as guerilla groups and insurgents.”

Guerrillas and insurgents, however, do not violate the law of war by the inherent nature of their mission or composition. They may violate provisions against systematically attacking populations and engaging in armed conflict without appropriate insignia. For specific violations of this type, the guerilla may be criminally responsible, but it is also possible to conduct guerilla operations in compliance with the law of war. For example, the lack of insignia may be justified by defense of home so long as they limit targets to military ones. Thus, this argument in favor of allowing military commissions to try offenses committed by terrorists boils down to equating the terrorist operation to an ongoing state of armed conflict with a “belligerent” who violates the law of war, or as often designated in government policy statements, an “illegal enemy combatant.” But a belligerent is not illegal just by being a belligerent.

Professor Paust argues not just from *Milligan* but also from general international law as represented by noted scholars<sup>37</sup> that the authority of military commissions is limited to the “theatre of operations” or occupied territory. Moreover, he points out that granting the status of “insurgent” or “belligerent” to AlQaeda would have the unintended, and potentially disastrous, effect of giving them the option of practicing their terrorist acts in legitimate ways.<sup>38</sup> All they would have to do is don an appropriate insignia, limit their attacks to militarily defined targets, and they do not commit any crime against the law of war. Of course, anyone wearing such an insignia could be hunted down and killed without warning, but they could not be prosecuted for war crimes.

There are two interesting aspects of this argument. One is that there is another way of looking at *Quirin* and *Milligan*, which focuses more on the role of Congress and “martial law” in keeping with the concurrence of Chief Justice Chase in *Milligan*. The other interesting issue has to do with the terminology. We will consider them in reverse order.

There has been a great deal of sloppiness in the popular press, and even in some legal writing, around the terms “insurgent,” “belligerent,” and “combatant.” A quick explanation of these terms will help explain why the language of war just does not fit the actions of or reactions to an organized terrorist group. Most of these terms have been designed for use in determining when it is appropriate for an outside nation to come to the aid of a group fighting with its own recognized government. Until now, it has not been necessary to have special terminology for the member of an enemy military.

The terms “rebel” and “rebellion” refer to persons or groups who are violently opposed to the existing regime within their own country. It is not legitimate for another nation to come to the aid of a rebellious force. For this purpose, rebellion “covers minor instances of internal war of a wide variety: violent protest involving a single issue . . . or an uprising that is so rapidly suppressed as to warrant no acknowledgment

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Bradley and Goldsmith point out, however, that “isolated or sporadic” attacks would not violate the law of war because they would not constitute a “state of armed conflict.”

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In the European tradition, international law is often contained in scholarly commentaries more than in legislative documents or court opinions.

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Paust, at 8 n.6.

of its existence on an international level.”<sup>39</sup> The second stage of internal conflict is “insurgency,” which is somewhere between rebellion and belligerency. The declaration of an activity as insurgency basically protects other nations and their nationals from being accused of aiding a criminal faction if they have any contact with the insurgents, such as by doing business in nonmilitary goods. Only when a group achieves the status of “belligerent” can other nations come to their aid. A belligerent is characterized by the ability to control a segment of territory and thus require other nations either to choose sides in the conflict or to declare neutrality between them.

Because the terms “insurgent” and “belligerent” were developed for use in sorting out the rights and obligations of other nations with respect to an internal dispute in one nation, they are not suited for use in instances of open armed conflict between nations. For that purpose, international law has turned to the concepts of “combatant” and “noncombatant,” along with occasional use of terms such as “camp follower” and “retainer.” Combatants are expected to be in uniform or otherwise recognizably identified. Noncombatants need not carry any special insignia but certain facilities such as hospitals and schools are entitled to even greater protection when they are clearly identified, as are the medical and religious personnel who wear special symbols so long as they refrain from any military act.

The US governmental positions of the past year have attempted to brand everyone connected with AlQaeda an “unlawful enemy combatant.” The potency of this term, if successful, would be enormous. It is the same as branding someone a spy or war criminal. This term places the accused squarely within the operation of military law.<sup>40</sup> It further triggers application of the law of war and all its defined criminal behavior, such as targeting civilian populations.

With the terminology more firmly in mind, let us return to the question of using military commissions in civilian territory during wartime. The concurring opinion in *Milligan* is sometimes dubbed a dissent because Chase disagreed vigorously with the constitutional analysis of the majority. The majority had said that Congress could not authorize military commissions and the suspension of habeas corpus in areas that were out of the theater of operations and in which the civilian courts were open and operating. Chase, on the other hand, argued that Congress could have done so but had affirmatively chosen not to allow those actions during the Civil War. The Government now argues that *Quirin* chose the Chase formulation and that Congress has provided the necessary authorization.

Chase’s opinion, however, deals with declaration of “martial law” not just with the use of military commissions when martial law has not been declared. In the absence of application of military law generally to a region, then there is no place for the use of military commissions absent military action of the type portrayed in *Quirin*. Colonel Morgan makes this point vigorously and even Colonel-Professor Winthrop may be read as having the concept of martial law in mind as a precursor to exercise of the power claimed for Congress. Certainly, even Winthrop would agree that Congress would have to declare a national emergency or be unable to act.

As a matter of pure logic, Professor Paust must have the better of the argument. that the use of military commissions is limited to the theater of operations. The government’s argument that the President can apply military law and procedures to anyone who engages in “armed attack” upon the United States would have no limits. Anyone who attacks a US governmental, military, or even civilian

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Richard Falk, *Janus Tormented: The International Law of Internal War*, in INTERNATIONAL ASPECT OF CIVIL STRIFE 185, 198-99 (J. Rosenau ed., 1964).

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As a matter of internal direction to the Executive Branch, the Military Order takes away the option of referring a case to the civilian courts by saying that a person subject to the order “shall be tried only” by military commissions. But the order is triggered only by a presidential finding that it is applicable to a particular person, so the option of not certifying a person for that treatment remains available.

target could be branded an enemy combatant under this view of plenary military authority.

### C. Application of US Law to Alleged Terrorists

Having cast at least some doubt on the “jurisdiction” of military tribunals, we should explore the question of what law applies. Because picking the tribunal depends in part on what law applies, we need to know the sources of law that can be applied to terrorists.

Some of the Guantanamo detainees may have been members of AlQaeda or related terrorist organizations. Some may have been more or less directly implicated in specific terrorist actions. Because the language of war was used from the beginning with respect to these detainees, a widespread perception has been created that the alleged terrorist is to be dealt with in military fashion. There may even be a perception in existence that there is no criminal law to deal with the alleged wrongs of some of these people. In fact, there is a substantial body of law that applies to both citizen and noncitizen alike, to offenses committed on US soil and to those committed abroad. So before we turn to the military commission, it would be profitable first to outline the law that could be applied to an alleged terrorist in the civilian courts.

#### 1. Citizen-Noncitizen Distinctions

For some reason, the Bush administration chose to draw a distinction between citizens and noncitizens in the Military Order authorizing the trial of AlQaeda members by military commissions.<sup>41</sup> The same distinction also has been drawn as a practical matter in dealing with the detainees because the only two known US citizens originally confined in Cuba were transferred to Virginia, one to be tried in the civilian courts<sup>42</sup> and one to be detained in military isolation.<sup>43</sup>

Citizenship does matter in this context in one important regard. The citizen has a constitutionally protected right to enter the United States at any time,<sup>44</sup> whereas the noncitizen has rights of entry only so far as granted by Congress.<sup>45</sup> It may have been a violation of citizenship rights to have continued confinement of citizens in Cuba, whereas the noncitizens have no more right to be brought to the United States than to be taken anywhere else. Their confinement is purely a matter of international law except to the extent that there is a question of Presidential emergency power to hold people in confinement to begin with. When we look at that question below, there may well be a distinction to be drawn between citizens and noncitizens on that issue as well.

Oddly, the citizen-noncitizen distinction has worked the reverse with regard to persons arrested on US soil. Padilla, a citizen, was sent to military custody<sup>46</sup> while a number of noncitizens arrested on charges of

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Professor Cole sees this distinction as part of a broad attempt to isolate noncitizens for unusually harsh treatment reminiscent of Japanese internment. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002).

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See Plea Agreement, *United States v. John Walker Lindh* (ED Va. July 25, 2002), <http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf> (last visited 1/26/03).

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See *Hamdi v. Rumsfeld*, 2003 U.S. App. LEXIS 198 (4th Cir. 1/8/03)

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See *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

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*Chinese Exclusion Case*, 130 U.S. 581 (1889).

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See *Padilla v. Bush*, 2002 U.S. Dist. LEXIS 23086 (SDNY 2002)

supporting terrorist activity are pending trial in civilian courts.<sup>47</sup> Again, the citizen-noncitizen distinction has no function in the context of which court system will take jurisdiction over the offender, and we are met with another example of incoherence in government responses to the terrorism phenomenon.

## *2. Acts Committed Outside US Territory*

It might be thought that there would be a difference between criminal acts committed on US soil and those committed abroad. This distinction is material only in a very limited class of cases. The US, like most nations, claims extra-territorial jurisdiction to apply its law and procedures in roughly five classes of cases:<sup>48</sup>

1. external incidents with effects in US territory
2. a victim that is a US national
3. a perpetrator that is a US national
4. impacts on interests of the US
5. “universal” jurisdiction

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Two alleged AlQaeda cells, one in Oregon and one in New York, resulted in arrests and indictments in the fall of 2002. Those prosecutions are still pending. See FINDLAW, TERRORISM, CRIMINAL CASES, <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html> (last visited 1/26/03).

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United States v. Layton, 509 F. Supp. 212 (ND Cal. 1981); *see* United States v. Yunis, 924 F.2d 1086 (DC Cir. 1991); United States v. Yousef, 927 F. Supp. 673 (SDNY 1996).

Unfortunately, the categories are spelled out this cleanly neither in US statutes nor even in the Restatement of Foreign Relations.<sup>49</sup> The statute defining “special maritime and territorial jurisdiction” of the US,<sup>50</sup> contains a long list of provisions that have accumulated over the years and includes several examples of the first four categories by referring to crimes committed by or against US nationals under certain circumstances, by detailing offenses committed on the high seas on or against certain vehicles, and by referring to categories of US possessions. In some instances, the statute limits application of US law in extraterritorial settings “to the extent permitted by international law.” This is a reference to an inherent limitation that no application of one nation’s law is to interfere with the sovereignty of another nation.<sup>51</sup>

The federal statute detailing “acts of terrorism transcending national boundaries”<sup>52</sup> likewise relies on several aspects of US interests, such as “ interstate or foreign commerce,” US officials, US property, along with anything with the “special maritime and territorial jurisdiction.” For most crimes of terrorism there will be some offense under US law that can be charged whenever the terrorism touches our shores or our overseas interests.

The fifth category, “universal jurisdiction,” refers to the power of any nation to punish offenses that transgress against the universal law of nations. The Restatement describes this as the authority to “define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes and *perhaps certain acts of terrorism.*”<sup>53</sup>

Universal jurisdiction has been used as the basis for creation of international tribunals to deal with war crimes in situations when the persons or state most affected were not viewed by the international community as being up to the task, such as tribunals created for Rwanda and Yugoslavia. Virtually the only nation that has avowedly used “universal jurisdiction” as a heading for its own criminal prosecutions is Israel’s use of the concept to try Nazi leaders for offenses that occurred on other territory before the State of Israel existed. Historically, universal jurisdiction could also have been part of the justification for “police actions” against pirates and slave traders. The Restatement contemplates this prospect by allowing a nation to “punish noncompliance . . . by police or other nonjudicial action.”<sup>54</sup>

It may be noteworthy that the US has not made a general claim of universal jurisdiction regarding any

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RESTATEMENT (THIRD) FOREIGN RELATIONS §§402 - 404

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18 USC §7

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The Restatement expresses this principle by insisting that every application of national law be tested against the question of whether “exercise of such jurisdiction is unreasonable” with a list of factors to be considered. This formulation may work well in application of civil law but it is rather loose and vague for application of criminal penalties. Due process may well require more specificity, subject to prosecutorial discretion if a particular prosecution would offend the interests of another nation.

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18 USC §2332b

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RESTATEMENT (THIRD) FOREIGN RELATIONS §404 (emphasis added).

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RESTATEMENT (THIRD) FOREIGN RELATIONS §401.

offenses. Given the expansive reading that can be given to US interests in such matters as “foreign commerce,” however, particularly in the globalized economy, the issue of universal jurisdiction may be of little consequence other than as it affects the use of military commissions for prosecution of a crime “against the law of nations.”

Another important question is whether US intrusion into another nation’s territory to apprehend or “punish” an offender is justified under international law, which could be incorporated into domestic law. Extradition from another country is subject to whatever treaty arrangements exist between the two countries. In most instances, good politics more than law will dictate the wisdom of having either the consent of that nation or an international sanction, such as UN resolution, in place before any such enforcement action occurs.<sup>55</sup> The propriety of using military force to capture or kill a suspected terrorist in another country is beyond the scope of this article.

The Department of Justice Task Force on Terrorism has an informal list of 148 federal statutes that can be considered when deciding what criminal offenses to charge in a terrorism case. In addition, federal law defines a “federal crime of terrorism” as violation of any of 39 statutes when the “offense is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”<sup>56</sup> There are also federal statutes defining offenses of providing financing for terrorism, providing material support for terrorists,<sup>57</sup> and providing material support for terrorist organizations.<sup>58</sup> The implications of these statutes are also beyond the scope of this article.

### 3. Sabotage and Spying

The *Quirin* opinion relied on historical antecedents stemming from the exigencies of war-time conditions (essentially battlefield trials of alleged spies) and from a *quid -pro-quo* comparison of alleged saboteurs to US soldiers. We should attempt to determine whether these or similar considerations apply to alleged members of terrorist organizations and also whether international law has criminalized terrorist behavior in such fashion as to indicate what sort of tribunal should conduct the trials.

The historic examples that the Supreme Court used in *Quirin* had the distinguishing characteristic of having occurred mostly under battlefield conditions. The Court cited 11 cases of persons convicted as spies by courts-martial and executed during the Revolutionary War. These proceedings were conducted under the authority of a Resolution of the Continental Congress, which was later converted to statutory form. The original resolution and statute applied to “alien spies.” The Court also mentions seven cases in which there may not have even been a court martial but just summary execution by authority of the field commander.

Three persons were tried by courts-martial for spying during the War of 1812, one was hanged, one acquitted, and the third was convicted but then “released by President Madison on the ground that he was an American citizen.”

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The Supreme Court has upheld the “kidnapping” of criminal defendants from other countries for trial in the US, at least so long as existing treaties do not prohibit that action. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *see United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

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18 U.S.C. § 1332b(g).

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18 U.S.C. §1332A. This statute depends on knowledge that funds, shelter, or goods may be used “in preparation for, or in carrying out, a violation of” specified federal crimes of terrorism.

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18 U.S.C. §1332B. This statute depends on designation of a particular organization by the Secretary of State.

The statute was amended in 1862 to apply not just to aliens but to any person on the ground that almost all combatants in the Civil War (and those civilians likely to aid them) were actually US citizens, and it would not make sense to subject an Englishman to military justice but not the South Carolinian who was doing the same thing to the forces of the Union.<sup>59</sup> In other words, the enemies were citizens and the circumstances were indisputably war.

A potentially significant issue arose a year later when the 1863 Conscription Act expanded the areas to which this provision would extend. From 1775 to 1863, the scope of military jurisdiction extended to those “lurking as spies in or about the fortifications or encampments of the armies of the United States.” The 1863 Act extended to “in or about any of the fortifications, posts, quarters, or encampments of any of the Armies of the United States, or elsewhere.” A motion to strike the phrase “or elsewhere” failed and the language has remained since.<sup>60</sup>

One other change from the original versions of the spy provision was made during codification in 1912 when the phrase “shall be triable” was converted without explanation to “shall be tried.” Colonel-Professor Morgan notes that the change was not even disclosed to Congress when voting on the codification and that it could remove discretion from the executive branch to take either the military course or the civilian course of trial for treason.<sup>61</sup>

*a. Citizen Spies and Alien Spies*

Colonel-Professor Morgan argues forcefully that it is within Congress’ power to subject a citizen spy to the same military authority as the alien spy. Congress has the power to raise an army, to define offenses against the law of nations, and to make rules and regulations for the governance of the military. So far as jury trial is concerned, there is pre-Constitution precedent for treating the offense of spying as “arising within the land and naval forces” so as to be exempted by the Sixth Amendment.

Morgan believed that the more important issue was the breadth of the power to subject a citizen to court-martial, the issue raised in the addition of the phrase “or elsewhere” in 1863. He was writing in 1920 with reference to the conditions of WWI and noted that much of the nation was mobilized for the war effort by making and supplying everything from munitions to food and clothing, while also keeping open channels of communication and transportation on which the military would rely along with the rest of the country. “Under such circumstances, the zone of operations in truth and in fact comprehends the entire country.”

The “zone of operations” was an attempt to distinguish the act of spying from that of tourism. What is it that makes gathering information punishable by death? In the 18th and 19th Centuries, military encampments and posts were easily identifiable and there was little motivation to gather information about those encampments other than for nefarious reasons. Conversely, there was little motivation for anyone to attack anything else and so no proscription on gathering information about civilian establishments. In the context of WWI, when Morgan was writing, and even more so during WWII, when the entire industrial complex was mobilized for support of the war effort, the zone of operations could have been significantly blurred.

Colonel Morgan, however, remained unconvinced. He asserted that the citizen spy is engaged in treason, which must be tried in the civilian courts with a jury, unless “in the theatre of operations or any

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Edmund Morgan, *Court-Martial Jurisdiction over Non-Military Persons Under the Articles of War*, 4 MINN. L. REV. 79, 109 (1920).

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*Id.* at 111.

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*Id.* at n.112.

other area subject to the actual control and dominion of the military.” Only in this way can the act be deemed to “arise in the land or naval forces.” He conceded that modern conditions of armaments and supply were moving toward a day when the “zone of operations [could] include the entire area of a belligerent country.” Referring to *Milligan*, however, he believed that the term should be limited to the “theatre of actual hostilities, the lines of communication, and the reserves and service of supply under actual military control, and that it cannot properly be enlarged to cover the farms, factories and workshops under exclusively civilian control.”<sup>62</sup>

The counter position to Colonel-Professor Morgan was the opinion of Colonel-Professor Wambaugh, who wrote as Judge Advocate General that the civilian spy was punishable by death as a threat to military operations.<sup>63</sup> In fact, Colonel-Professor Wambaugh asserted that a spy is not a criminal unless a citizen. The alien spy, he claimed, might actually be engaged in a brave and honorable act but is still shot because of the threat to the military, just as a soldier in uniform would be shot without the luxury even of court martial trial. To Wambaugh, the concept of a treasonous crime which could also be the subject of a court martial noncrime was not disturbing. To Morgan, however, the crime of treason was so heavily protected by constitutional prescriptions of trial by jury and evidence, that only an act within the immediate vicinity of military control could justify abandoning those prescriptions.

The debate between Colonel-Professors Morgan and Wambaugh is instructive for the proposition that almost a century ago experts were already beginning to realize that time of war could involve most of a belligerent country. But even then, at least some voices were heard to argue for recourse to the civilian courts. The reasons advanced had to do with constitutional guarantees. The heart of the matter seems to have been that there are such significant constitutional guarantees surrounding the crime of “treason” that it would be foolhardy to bypass those guarantees by remitting the accused to military power.

In addition to constitutional guarantees, I would add the thought that it is critically important to the national psyche today to see our civilian processes as up to the task of defending our freedoms – both physical freedom and legal civil liberties. If the terrorist can change our ways of life, then we have lost. Moreover, the offense of spying exists under military law only in time of war. Information gathering for the purpose of destroying a building or taking life during peacetime may be an act in furtherance of a conspiracy to commit murder or other crimes, but it is not spying. Here is a clear example of the importance of deciding what it means to be at war or whether there is some other status between war and peace.

*b. Citizen Saboteurs and Suppliers of the Enemy*

The prior section dealt with the phenomenon of spying, which essentially consists of gathering information. Curiously enough, it was the basis for the Court’s decision in *Quirin* with regard to planned sabotage. The person who already has information on where to plant a bomb and is captured with explosives in hand may not be a spy. He may be bent on murder or destruction of property, but the principal reason that the language of spying has been borrowed is that he is moving clandestinely and out of uniform toward his target. That may make him an unlawful combatant under the international law of war, but there is a provision in the UCMJ that also should be considered.

Article 106 declares that “any person who aids . . . the enemy with arms, ammunition, supplies, money, or other things . . . shall suffer death or such other punishment as a court martial or military commission may direct.”<sup>64</sup> If we carried the Wambaugh theory to this provision, then supplying of money

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*Id.* at 116.

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The Wambaugh discussion is from a governmental memorandum as quoted by Morgan, *id.* at 113.

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to “charities” that aid a terrorist organization could subject an individual to trial by military commission.

We are not entirely without precedent for construction of this provision. In several cases in the post-Civil War era involving persons who were trading with Indian tribes, it became apparent that the principal difficulty would be in determining when a “state of war” existed with a particular tribe or band. The Attorney General declared that this section could be triggered when there were armed conflicts occurring between those tribes and US military forces.<sup>65</sup> It might be tempting to assert that a state of hostility between the US and a group of people such as Al-Qaeda is similar to the conditions of hostility with some Indian tribes in the late 19th Century. The analogy fails, however, on a couple of fronts. First, a particular Indian tribe would be defined by a common ethnic and cultural heritage that is vastly more homogeneous than what is likely to exist with most terrorist groups.<sup>66</sup> Secondly, although Indian tribes did not attempt to stake out very precise borders of their territory, they clearly had claims of right to areas that constituted their homelands. Thirdly, a point that is of much greater significance than might be imagined, the Indian tribes can be considered similar to nation-states for the simple reason that the European settlers regarded them as at least resembling nations for purposes of international dealings, for example in treaty negotiations and cession of territory.<sup>67</sup>

#### *4. Treason and its Derivatives*

The law of treason has not been widely studied in a very long time, but it may offer us some interesting insights. The Framers were so concerned about the potential misuses of treason charges that this is the only “crime” which is given special treatment in the Constitution.<sup>68</sup> The Treason Clause builds extremely high barricades against prosecution for this “heinous” crime, so the question becomes whether those barricades can be circumvented by creating other crimes, or by calling the traitor something else such as an “enemy combatant.” To be grossly flippant, could we avoid restrictions on prosecution for treason by calling it jaywalking? and the answer turns out to be yes, we can! But there is nothing to indicate that we can avoid conducting public trials for jaywalking.

Article III’s “peculiar phraseology observable in the definition of” treason, and “the equally stringent feature” requiring two eyewitness’ testimony of the same overt act, have been said to flow from the Framers’ discomfort with “abuses . . . under the tyrannical reigns of the Tudors and the Stuarts.”<sup>69</sup> In

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10 U.S.C. §906.

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Winthrop’s *Military Law and Precedents* 86, 101, 103 (reprint 1920).

<sup>66</sup>

Although many terrorist groups share common ethnic, religious, and cultural bonds, any particular group may also recruit from outside these bonds. AlQaeda appears to have been extremely successful in recruiting from a number of cultures. *See* John Cooley, *Unholy Wars* 66-85 (3d ed. 2002).

<sup>67</sup>

*See* *United States v. Sioux Nation*, 448 U.S. 371 (1980); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

<sup>68</sup>

US CONST. art. 3, § 3:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

<sup>69</sup>

Charge to Grand Jury – Treason, 30 Fed. Cas. No. 18,271, p. 1035 (SDNY 1861).

particular, the Framers were reacting to the concept of “constructive treason” by which anyone who spoke in support of, or was friendly with those who expressed, resistance to policies of the Crown could be accused of treason. Indeed, it is not likely that even the Tudors and Stuarts would have had an easy time of tossing a citizen into jail indefinitely on the mere say-so of a military officer. That they did so on occasion led directly to our constitutional language preventing the possibility.

Is it possible to square this history with the “enemy combatant” concept employed by the Supreme Court in *Quirin* and leading to the Bush Military Order? The answer is “not very easily,” and the lessons to be learned are not very clear. The Treason Clause creates two categories of treason: levying war against the United States, and providing aid and comfort to the enemy. In the first there must be an armed assemblage and the second requires an enemy.

Chief Justice Marshall gave us our first instruction in the operation of the Treason Clause in *Ex parte Bollman*,<sup>70</sup> dealing with some of the alleged conspirators in the Burr escapade. Some of his discussion is so pertinent that it is set out at length below.<sup>71</sup> Marshall distinguished strongly between treason and

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8 U.S. (4 Cranch) 75 (1807).

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Id. at 126 - 127:

To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that, in a case reported by Ventris, and mentioned in some modern treatises on criminal law, it has been determined that the actual enlistment of men to serve against the government does not amount to levying war. It is true that in that case the soldiers enlisted were to serve without the realm, but they were enlisted within it, and if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied.

It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war.

Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is therefore more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide.

To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to

conspiracy: “However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason.” It must be remembered, however, that the Burr escapade did not involve a foreign enemy, so there was no occasion for him to deal with the offense of providing aid and comfort to the enemy.

Marshall went on to deal with our very question. Although “to complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design,” he expressed the view that the legislature could define other offenses to which the strictures of the Treason Clause would not apply. The Framers were concerned about the passions that the thought of treason would engender, but they could have been comfortable with the thought that “crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide.”

In a number of cases stemming from the Civil War, the judges expanded Marshall’s view of conspiracy to state that there could be no such concept as an accessory to treason because an act was either treason or not.<sup>72</sup> They consistently recognized the differences between the two kinds of treason, the first depending on whether the defendant has taken up arms,<sup>73</sup> the second consisting of providing material support to a recognized enemy. It is familiar ground that President Lincoln attempted to use the military courts for prosecution of Southern sympathizers, leading eventually to the opinion in *Milligan*. For the remainder of the story, we become embroiled in the tripartite struggle for power among the President (Andrew Johnson), the Court (Taney, then Chase), and Congress (Radical Republican by 1865). In *Thorington v. Smith*,<sup>74</sup> the Court dealt with the question of whether debts payable in Confederate currency were still valid as between two individuals (and, thus, payable in US currency after the war ended). Chief Justice Chase distinguished among different levels of *de facto* governments. At one extreme would be a solidly established actual government such that “adherents to it in war against the government *de jure* do not incur the penalties of treason.” The government of the Confederacy, he said, was sufficiently established that it obtained “actual supremacy, however unlawfully gained, in all matters of government within its military lines.”

That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority, in civil and local matters, not only a necessity but a duty. Without such obedience, civil order was impossible.<sup>75</sup>

By this language, Chase was implying that there could be no prosecution for providing aid and comfort to the enemy by a person residing within the military control of the Confederacy. As we know,

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overturn the government of the United States in New-Orleans by force, would have been unquestionably a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war.

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United States v. Greathouse, 26 Fed. Cas. No. 15,254 (CC Cal. 1863).

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Id.; see Charges to Grand Juries collected at 30 Fed. Cas. No. 18,270 - 273 (1863).

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75 U.S. (8 Wall.) 1 (1869).

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Id. at 11.

there were no such prosecutions. Moreover, when Congress attempted to punish former active rebels by forfeiture of their property, the President decreed that a Presidential pardon worked to prevent forfeiture and the Court sided with the President.<sup>76</sup> There is little more that we can make of the Civil War experience with regard to the ability of Congress to decree punishment for the sympathizers and supporters of foreign enemies, so we now fast-forward to World War I.

The seminal case in First Amendment law is *Schenck v. United States*.<sup>77</sup> Schenck and his cohorts were convicted of conspiracy to violate the Espionage Act of 1917, which made it unlawful to “cause insubordination . . . in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States.” Justice Holmes’ famous opinion for the Court, after using the analogy of “falsely shouting fire in a crowded theater,” stated:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in § 4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.

Before *Schenck* was decided, Congress had already responded to the emerging level of dissension regarding U.S. entry into the war in Europe by passing the 1918 amendments to the Espionage Act. Under the amendments, it was unlawful to “urge, incite, or advocate” actions that could disrupt the war effort.<sup>78</sup> The majority of the Court found that an intent to disrupt the war effort was sufficient to uphold conviction under the statute. Justice Holmes, joined by Brandeis, dissented with the famous “marketplace of ideas” analysis. The combination of opinions sounds as if the majority were treating the statute as if it were a finding by Congress of “clear and present danger.” The interesting point for our purposes is that nobody questioned whether Congress could define crimes that came very close to “providing aid and comfort to the enemy” without requiring two witnesses to the same overt act. It seems that in this stage, Congress and the Court had accepted Chief Justice Marshall’s invitation to Congress to define non-treason offenses.

The only World War II case in the Supreme Court on the subject of Treason was *Cramer v. United*

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United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

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249 U.S. 47 (1919).

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Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish: In the first count, "disloyal, scurrilous and abusive language about the form of Government of the United States;" in the second count, language "intended to bring the form of Government of the United States into contempt, scorn, contumely and disrepute;" and in the third count, language "intended to incite, provoke and encourage resistance to the United States in said war." The charge in the fourth count was that the defendants conspired "when the United States was at war with the Imperial German Government, . . . unlawfully and wilfully, by utterance, writing, printing and publication, to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war." The offenses were charged in the language of the act of Congress.

*States*,<sup>79</sup> a follow-up to *Quirin*. One of the eight German saboteurs, Thiel, had a friend in the US named Cramer, who was German by birth and a naturalized US citizen. Thiel contacted Cramer in New York, met with him twice in public places, and gave Cramer some money to hold for him. Cramer testified that he suspected Thiel was here as a propagandist for the German government, but there was no evidence that Cramer suspected anything of the violent intentions of the saboteurs. Cramer was convicted of treason.<sup>80</sup> The basic question presented to the Supreme Court was whether an overt act in furtherance of treason needed to be done with intent by the defendant of furthering enemy action against the government, or whether an innocent overt act could be treasonous because of its role in the enemy's plan.

Justice Jackson's majority opinion in *Cramer* has received surprisingly little attention.<sup>81</sup> He canvassed the history of treason prosecutions from English law through the colonial era, pointing out that much of the turbulence of those periods could lead to a citizen's being caught between competing loyalties and this subject to treason from two different sides. The Framers built protections against treason prosecutions to guard against two dangers: "(1) perversion by established authority to repress peaceful political opposition; and (2) conviction of the innocent as a result of perjury, passion or inadequate evidence."<sup>82</sup> The critical passage for definition of criminal behavior is this:

Thus the crime of treason consists of two elements: adherence to the enemy; and rendering him aid and comfort. A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy – making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength – but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.<sup>83</sup>

Applying these thoughts to the evidence, Jackson pointed out that the prosecution had "withdrawn" the safekeeping of money as an overt act to be submitted to the jury.<sup>84</sup> That left only the two meetings

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325 U.S. 1 (1945).

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Former 18 U.S.C. §1 is now codified as 18 U.S.C. §2381:

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$ 10,000; and shall be incapable of holding any office under the United States.

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Shepard's lists only 20 judicial "analyses" of the opinion and only 115 "citing decisions" in the 58 years since it was issued.

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325 U.S. at 27.

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Id. at 29.

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We can speculate that there were neither two eyewitnesses to this act nor a "confession in open court." Cramer's testimony described the money transaction while denying that he knew the purpose of the money or the purpose of

with Thiel that were corroborated by eyewitness testimony. These could not be said to have shown either furtherance of a scheme sufficient to prove either aid or adherence to the enemy. By contrast, the money transaction, if proved by the requisite testimony, would have made “a quite different case.”<sup>85</sup> Finally, Justice Jackson addressed the Government’s arguments for relaxing the standards related to treason:

The Government has urged that our initial interpretation of the treason clause should be less exacting, lest treason be too hard to prove and the Government disabled from adequately combating the techniques of modern warfare. But the treason offense is not the only nor can it well serve as the principal legal weapon to vindicate our national cohesion and security. In debating this provision, Rufus King observed to the Convention that the “controversy relating to Treason might be of less magnitude than was supposed; as the legislature might punish capitally under other names than Treason.” His statement holds good today. Of course we do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense another name. But the power of Congress is in no way limited to enact prohibitions of specified acts thought detrimental to our wartime safety.<sup>86</sup>

Congress, with the assistance of many subsequent administrations, has accepted this invitation by enacting many statutes that relate to providing aid and comfort to those who threaten the public safety of the United States. Perhaps the most directly relevant are those that criminalize “Providing Material Support to Terrorists”<sup>87</sup> and “Providing Material Support or Resources to Designated Terrorist Organizations.”<sup>88</sup> There are also crimes, such as what John Walker Lindh pleaded guilty to, defined as violations of Presidential directives blocking trading with, or providing services to, regimes designated in time of national emergency.<sup>89</sup> Given the history of the Treason Clause, and particularly Justices Marshall’s and Jackson’s invitations to Congress, there can be little doubt about the validity of these statutes, except insofar as they might in some situations be subject to first amendment restrictions.

But does the ability of Congress to define crimes other than treason extend to the ability of the military to imprison either with or without trial? There is no hint in any of this that the normal processes of the civilian justice system should not apply to crimes undermining the public safety just because there are foreign connections to the crime.

#### D. Global Federalism – KKK and AlQaeda

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Thiel’s presence in the US. *Id.* at 5.

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*Id.* at 39.

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*Id.* at 45.

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18 U.S.C. §2339A (“knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [specified federal crimes], or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation”).

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18 U.S.C. §2339B (“knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so”).

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50 U.S.C. §1705(b) makes it a crime to violate a presidential directive of this nature. The designation of the Taliban regime as off-limits to American citizens was effective January 1, 2001 under 31 C.F.R. §545.204.

Under current federal law, the use of military commissions for trial of alleged terrorists depends on finding that an alleged offense constitutes a violation of the “law of war.”<sup>90</sup> More generally, the question of whether to apply military law to terrorism implicates other questions that are important for those who wish to believe that the international arena has developed coherent norms for the conduct of warfare, questions such as with whom are we at war? what are the rules of engagement for a war that is against an ideological group rather than a national group?

It is no accident that the history of the United States is roughly contemporaneous with the development of modern international law, a development that was fueled by the Europeans’ Age of Colonialism and its demise.<sup>91</sup> For most of that history, international law has been seen as rules or norms that pertain to relations among nations.<sup>92</sup> Until recently, the world has held to a dichotomous distinction between the processes of warfare and those of the civilian criminal system. War was something that took place between nations, involved an effort to kill or capture enemy combatants, and thus provided no occasion for making considered judgments about the culpability of someone on the other side.<sup>93</sup> By contrast, those who are suspected of committing crimes against the law of a nation were treated as individuals whose culpability must be judged in an individualized proceeding.

The lines between warfare and criminal processes have blurred because of changes in approach both by the enforcers of peace and the perpetrators of violence. The peacemakers have attempted to use processes patterned from criminal law to punish violations of respected rules of warfare,<sup>94</sup> while the

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The Bush Military Order cites for its statutory authority 10 USC § 821 (2002), which states that the UCMJ provisions “conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that *by statute or by the law of war* may be tried by military commissions, provost courts, or other military tribunals.” [emphasis added]

91

The rules pertaining to war can be traced almost to prehistory through Leviticus in the Middle East and Sun Tzu in the Far East. St. Augustine amplified on the Hebraic traditions with his concepts of just war, outlining rules both for entry into war and conduct of war. But the modern version, which depends on the concept of nation state, begins with Grotius and the Treaty of Westphalia in 1648. As the European nation states fanned out around the globe in search of adventure and resources, they would bump into each other in primitive locations and needed rules to govern their behavior so as not to alienate other nation states who could cause them difficulties in other locations. Thus the Age of Colonialism fueled the effort to codify the “understandings and practices of civilized nations.” A concise summary of this history is contained in LEON FRIEDMAN, *THE LAW OF WAR* 3-15 (1972).

92

The exclusive focus on nation-state participation in international law has been modified by the emergence of additional organizations as world players, such as Regional Organizations (*e.g.*, NATO, EU, OAS) and NonGovernmental Organizations (*e.g.*, Amnesty International, International Red Cross). Although these additional actors are participants in the development of international law, there are only a few instances of treaties that specifically recognize their role as legal actors.

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The rules of engagement of a particular military action eliminate the soldier’s need to inquire into the culpability of someone in uniform carrying arms. But those rules cannot authorize violence against noncombatants. WILLIAM WINTHROP, *MILITARY LAW AND PROCEDURE* 778 (2d ed. 1920): “The State is represented in active war by its contending army, and the laws of war justify killing or disabling of members of the one army by those of the other in battle or hostile operations.”

94

The trials at Nuremberg were intended to import the processes of law onto the international scene for dealing with

perpetrators of violence have acted on their own outside the confines of government and those same rules of warfare. The world's search for a new paradigm to deal with these phenomena has produced international commissions for prosecution of war crimes<sup>95</sup> and is now engaged in defining responses to terrorism.<sup>96</sup>

The United States and Israel disagreed over whether the Egyptian expatriate who shot three people at the El Al counter in LAX was a terrorist.<sup>97</sup> The nations of the world have been at odds for decades over the definition of terrorist and whether it constitutes a crime under international law.

The familiar theme of "one person's terrorist is another's freedom fighter" has muddled the issue enormously.<sup>98</sup> As numerous authors have pointed out, this is an almost silly argument because universal law criminalizes attacks on civilian populations without regard to the political motivations of the actor.<sup>99</sup> The difficulty is not whether there could be justification for an attack on civilians because legally there cannot be. The difficulty is in determining by what process to respond to such an attack depending on the degree of affiliation by the actor with a nation-state.

What distinguishes the "terrorist" from the ordinary street criminal with ties to an international criminal organization? Take, for instance, a murder committed on the streets of an American city by a drug dealer who knows in some vague way that his livelihood is linked to a well-organized and well-funded cartel in Colombia or Afghanistan. Is this an act of terrorism? Is it an act of war? Is the US justified in invading Colombia because there are organized criminals there who carry out violence on US civilians? This has been the theme of at least two recent movies,<sup>100</sup> both carrying the message that US

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war crimes. Prior to that time, "victor's justice" had been meted out at the national level. Gerry J. Simpson, *War Crimes: A Critical Introduction*, in MCCORMACK & SIMPSON, *THE LAW OF WAR CRIMES* 5 (1997).

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For a specific discussion of the significance of the Ad Hoc Tribunals for Rwanda & Yugoslavia, see Christopher Blakesley, *Atrocity and its Prosecution*, in MCCORMACK & SIMPSON, *THE LAW OF WAR CRIMES* 189 (1997).

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UN Convention of Financing of Terrorism, UN Convention on Hostage Taking, UN Convention on Air Piracy.

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"American and Israeli officials initially appeared to disagree on Thursday about whether Mr. Hadayet's rampage should be called a terrorist attack. But it became clear today that the difference was really over what constitutes terrorism. Yuval Rotem, Israel's consul general in Los Angeles, said that even a lone individual attacking an Israeli target like the El Al ticket counter should be considered a terrorist. But F.B.I. officials said that only if Mr. Hadayet was linked to a terrorist organization would American investigators call it that, rather than a hate crime." NY Times (July 6, 2002), <http://query.nytimes.com/search/article-printpage.html?res=9800E2DE1E31F935A35754C0A9649C8B63>

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The argument alludes to the difficulties of small dissident groups in fighting against repressive regimes and attempts to lend legitimacy to the use of violence by persons who operate clandestinely. The key distinction between freedom fighters and terrorists, however, for most people is the targeting of civilian populations.

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Harmon at 188 - 196. As Harmon also points out, the habit of inflicting violence on civilians is not easy for a group to break and terrorist organizations gaining control of political power often continue their patterns of abuse.

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"Clear and Present Danger" and "Collateral Damage."

involvement in Colombia would be permissible only with the permission of the Colombian government, certainly the correct answer under international law. Meanwhile, international law is creating cooperative efforts to deal with the transborder aspects of large criminal organizations without promoting intrusion into the internal affairs of any one nation.<sup>101</sup>

On the global stage, what distinguishes Jose Padilla from Terry McVeigh? Assuming the facts as disclosed in press releases about Padilla, both were motivated by extreme hatred for the US government, both were planning mass civilian casualties at governmental centers. Padilla was in league with foreign citizens, but what does this signify? How do we distinguish him from alleged Mafiosi, or drug dealers in league with Colombian cartels?

The difficulty in remitting Padilla, or even Hamdi, to the military is not just that the Supreme Court has expressed distrust of military tribunals, which it certainly has, but also that the law abhors incoherence. If there is no rational distinguishing principle among these examples, and if the choice of military or civilian trial is pure executive whim, then we are left with unbridled executive discretion that is more than just uncomfortable – it at least verges on a level of incoherence that due process itself would prevent.

The post Civil War federalism experience of the US offers some very sensible guidance at this point. Indeed, for this author, the current situation on a global scale makes the concerns of that era much more readily understandable than they had been to this point. For 150 years, the federal courts have struggled with criminal, civil rights and conspiracy statutes that make federal jurisdiction over an incident turn on whether the actor acted “under color of state law.” In some instances, the KKK or related miscreants were sufficiently aligned with local governmental officials to make this finding, while in others the “private citizen” could escape federal jurisdiction for lack of any connection to a governmental official or agency. Given the power of racial discrimination, particularly in the South through at least the 1960’s, it was very difficult for many to understand why the governmental connection needed to be made. Now I for one can see the point.

The Reconstruction statutes created two classes of federal crimes for interference with “any right or privilege secured to him by the Constitution or laws of the United States:” those committed “under color of law”<sup>102</sup> and those committed by combination of two or more persons.<sup>103</sup>

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The United Nations’ Office of Drug Control and Crime Prevention is charged with coordinating efforts with respect to organized crime as well as terrorism. Its principal mandate is the Convention Against Transnational Organized Crime. “In the new global age, borders have opened up, trade barriers have fallen and information speeds around the world at the touch of a button. Business is booming – and so is transnational organized crime. Fortunes are being made from drug trafficking, prostitution, illegal firearms and a host of other cross-border crimes. Every year, organized crime groups launder huge amounts of money in illegal proceeds. These large criminal groups often mimic legitimate business by forming multinational alliances to extend their reach and push up profits.” [http://www.odccp.org/odccp/organized\\_crime.html?id=11704](http://www.odccp.org/odccp/organized_crime.html?id=11704) (last visited 1/26/03)

102

18 U.S.C. § 242:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens . . . .

103

18 U.S.C. § 241:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State,

The “color of law” provision came safely within the “state action” requirement of the Fourteenth Amendment, which was in turn an expression that the federal government operated on the states and not directly on the citizenry at large.<sup>104</sup> The conspiracy statute, however, presented a bit of a conundrum. If the Fourteenth Amendment operated only against the states, how could Congress criminalize private behavior? The few cases actually using this criminal provision thus far have found either that the perpetrators were acting “in concert” with state officials or acted in direct contravention of defined federal interests, such as federal instrumentalities of commerce.<sup>105</sup>

Many commentators, and some Justices of the Supreme Court, have thought that these limitations were unduly restrictive of federal power. In particular, because the statutes arose out of widespread concern over the lack of state enforcement against the Ku Klux Klan, it could be argued that the federal government should be able to criminalize any behavior that has an impact on racial minorities.<sup>106</sup>

With the international experience with terrorism in mind, perhaps it makes more sense to realize that the difficulty with federalizing crime is essentially one of line-drawing. Without some “color of state law” or a federally-defined right at stake, how does one distinguish the KKK “terrorist” from the ordinary street criminal who also carries racial animosity for his victims?

The primary federal interest in the post-Civil War Era was the unwillingness of state governments to take steps to enforce the law against the KKK or similar groups. The resulting violence against US citizens (newly defined as such by the Fourteenth Amendment) gave rise to a collective interest among other states to enforce legal controls against state-sanctioned violence. The primary federal interest in the KKK or similar groups today lies in the greater psychological (as well as physical) impact of a large, concerted, organized group with common means of carrying out their hostility.

Identical statements can be made with regard to terrorism. The international interest in terrorism lies in the greater psychological (as well as physical) impact of a large, concerted, organized group with common means of carrying out their hostility. The international community is based in a respect for the individual sovereignty of nations that is even greater than that of the federal respect for state sovereignty in the US. Given that respect, the international law does not need to intrude into the internal affairs of a nation to deal with ordinary street criminals. It is when a large, organized and well-funded group appears on the scene with the means to wreak widespread psychological and physical harm that the international interest is triggered. This leads to the international corollary of federalist-defined offenses: either when the actor is clothed with some semblance of “state authority” or the conspiracy is sufficiently large to be a concern of the international community.

Under this view, an act may be a personal act of “terrorism” (as in the Israeli view of the LAX

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Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured

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*Civil Rights Cases*, 109 U.S. 3 (1883).

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*United States v. Guest*, 383 U.S. 745 (1966) (concerted action through defendants’ “causing arrests” plus private interference with federal right to travel); *United States v. Price*, 383 U.S. 787 (1966) (state officials were defendants); *Screws v. United States*, 325 U.S. 91 (1945) (state officials).

106

See *United States v. Guest*, 383 U.S. 745, \* (1966) (Brennan, J., concurring and dissenting).

shooter) without triggering the international concern of “terrorism” for lack of state involvement or lack of a well-organized group identity. This is the position taken by the FBI in the case of the LAX shooter and it makes a great deal of sense from the international perspective.

To carry out the analogy, consider the case of John Paul Franklin, who acted alone in shooting two white men who were in the company of two African-American women and who also engaged in other racially-motivated behavior.<sup>107</sup> Should he have been charged with a federal crime or left to the state criminal justice system? This is a very close case in US law. For the federal government to intervene might imply an unhealthy lack of respect for state justice, but for the federal government to ignore the situation could be seen as expressing a lack of concern for the racial issues of the country. In the end, it may have been the flamboyance of Franklin’s racial attitudes that tipped the scales to federal prosecution because of the potential contagion of his racism, but the federal nexus of authority was the “use of public facilities” by the victims.<sup>108</sup>

Crimes of violence often carry racial overtones. It is often impossible to say that any one motivation is the sole force in driving a person to violence. Any ordinary street crime may have an element of racial hostility buried within it. For the federal government to pick and choose those that it will prosecute, without any guiding principle for its decisions, would be contrary to the rationality that we demand of our criminal justice system. Thus, distinctions in American civil rights law that depend on “state action” (state sponsorship would be the analogy in terrorism) or “conspiracy” (a large terrorist organization) make sense from the point of view of importing rationality into what might otherwise become decisions based on whim, or the identity of the victim, or even the color of the defendant’s skin.

This line of analogy leads in the field of terrorism to considering a terrorist act to be a violation of the “law of war” only if carried out with state sanction. It might also be a violation of international law (the “law of nations”) but that only serves to provide universal jurisdiction for the courts of any nation; it does not indicate which court system within the US structure should take jurisdiction. For that, we need a rational distinction such as state sponsorship.

Now the use of the “color of state law” requirement in the post-Civil War legislation begins to make more sense. The limitation of federal power to actors who were in league with governmental agents was a very rational way of confining the operation of law. Similarly, limiting application of military authority to actors who are in league with foreign governmental agents is a rational limiting principle, one that courts can apply with confidence.

There is another limiting principle available, but we must wonder whether the courts can apply it with the requisite level of confidence. The most likely limit is that of “member of a terrorist organization,” which imports criteria of political motivation, organized group behavior, and funding capabilities to reach international targets. If Congress plainly authorized military tribunals for actors who meet these criteria, and if the government were willing to show to a court in habeas corpus that an individual meets these criteria, it is likely that the court will accede to the government’s demand for military authority. To claim that the courts have no review power over these criteria is utterly disingenuous. Even in *Quirin* the courts received evidence of the behavior of the German saboteurs showing that they were acting under direction and in the service of a foreign enemy.

Thus, by foregoing the claim of immunity from habeas corpus review, the government can construct an argument that an individual falls within the modern definition of pirate – i.e., a terrorist. We should not, however, confuse the subject by using the language of war. These people are not combatants in

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United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983).

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18 U.S.C. §245.

armed conflict between nations. They are in a category of criminal that arguably places them within the domain of the military, but they are also criminals who could be referred to the ordinary processes of the civilian justice system.

The difficulty is that the only statutory basis for military tribunals at this point is “violation of the law of war.” And just as the KKK did not violate federal law if not acting “under color of state law,” on the world stage a terrorist does not violate the law of war unless acting “under color of state authority.” How else can we distinguish the terrorist from the mafiosi?

It is at this stage that Professor Paust is most persuasive. The whole message of the western world to the rest of the world is that democratic civilian processes are better than a mere show of force. A critical factor in being “better” is the rationality by which different handling of different cases can be explained by public policies. Another factor is the transparent fairness of civilian systems of justice with attendant due process. Although the current state of law might justify acceptance of the argument that the terrorist should be subject to military justice, it would be a mistake to do so and give up the moral high ground that serves as the underpinnings of our claim to international accord.

#### E. Military Commissions and Unlawful Combatants

Next, we need to consider what the international law of warfare has to say about persons who attempt to inflict destruction on a particular nation and its inhabitants. One reason for delving into this topic is that much of the discussion of spies and comforters of the enemy draws on the law of war as justification for treating these as military matters rather than crimes of treason or other civilly defined offenses.

Colonel Winthrop begins from the proposition that the law of war is limited to the “theatre of operations” and sets out a frame of reference for the citizens of belligerent states.<sup>109</sup> “[U]pon the declaration or initiation of war,” he says, “not only the opposed military forces but all the inhabitants of the belligerent nations . . . become . . . the enemies both of the adverse governments and of each other.”

Civilian enemies, however, are not necessarily combatants. The civilian is disempowered from trading with civilian enemies and is at risk of having his property destroyed or seized if it is useful to the enemy, but a noncombatant is not to be subjected to personal violence. Among the few reasonably consistent edicts of warfare throughout recorded history are the rules protecting noncombatants. In modern times, those rules have extended to those engaged in medical or spiritual support of combatants. It is a clear violation of the law of war to target noncombatants, although obviously civilian casualties have been heavy in some instances of bombing. The justification advanced by the US for civilian casualties of bombing is that it is the other side’s choice of where to place military industrial targets and that if we target those structures, then the “collateral damage” to civilian populations is not our fault.

The principal gray area for noncombatants is in the category of “camp followers” or “retainers.” Civilian employees of the military are subject to capture just as if they were prisoners of war and are to be treated as such, but they are not to be subjected to violence so long as they do not threaten violence themselves. Winthrop states that “[c]amp followers, although they may be made prisoners, are to be treated as noncombatants.”

Winthrop deals rather cursorily with the question of “THE FORCES BY WHICH WAR IS TO BE WAGED” and states “the general rule that the operations of war on land can legally be carried on only through the recognized armies or soldiery of the State as duly enlisted or employed in its service.” He has a special place for “irregulars” or “guerillas.” “Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war but may upon capture be summarily punished even with death.”<sup>110</sup> This is a surprisingly harsh statement in a text

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Winthrop’s *Military Law and Precedents* 776 (reprint 1920).

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generally attempting to place more civilized and humane boundaries on the conduct of warfare, and the explanation can be found in the image that he portrays of marauding bands inside the enemy's borders "killing, disabling and robbing of peaceable citizens or soldiers . . . from motives mostly of personal profit or revenge."<sup>111</sup> The picture of undisciplined, nonuniformed persons wreaking havoc upon civilians and blending back into civilian populations is Winthrop's contribution to the earliest depiction of what today we might call a terrorist.

This depiction is significantly different from the image one has of a citizen defending his homeland against an invading force. Would we really expect summary execution of a person captured while shooting back at invaders from inside his home? The 1949 Geneva Convention dealt explicitly with this phenomenon by including within the definition of prisoners of war, and thus protected from summary punishment, both organized militias which "conduct their operations in accordance with the laws and customs of war" and those "inhabitants of a non occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading force" [emergency defense of home].<sup>112</sup> What evolved between the 19th Century and the end of WWII, it appears, is a sense that the treatment of a person depends more on how that person behaved during warfare than on the official status of the person.

The 1949 Geneva Convention recognizes that rules are one thing and application another by providing that if there is any doubt about whether a person belongs to the protected categories, then "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."<sup>113</sup> The companion Convention Relative to the Protection of Civilian Persons provides that there shall be no reprisals and that no "protected person may be punished for an offence he or she has not personally committed."<sup>114</sup>

The upshot of all this is that individuals who are captured in the course of military action in another country must be treated as prisoners of war or civilians unless they were engaged in clandestine use of arms without the excuse of emergency defense of home. According to Winthrop, who probably had a good feel for the "customs and usages" of war, a person clandestinely using arms without the emergency home defense excuse could have been summarily executed upon capture. There can be little doubt that the customs and usages have changed in the past century to the point that no summary executions are allowed under any circumstances. Indeed, the most recent statements on war crimes would make it a crime to "pass sentence or execute anyone who is *hors de combat* without previous judgement by a regularly constituted court."<sup>115</sup>

## II. Detention Without Trial

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*Id.* at 783.

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*Id.* at 784.

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GPW art. 4.

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GPW art. 5.

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Convention Relative to the Protection of Civilian Persons art. 33

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Rome Statute of the International Criminal Court, §8(2)(c)(4).

If the detainees are alien combatants in a war against the US, then there is no crime in taking up arms against the US. In a sense, this is the flip side of the reasons why these people are not prisoners of war. The question for this group is simply at what point must they be repatriated?

On the other hand, citizens who are alleged to have taken up arms against the US essentially are accused of treason, which may also be a subject of military law if the appropriate jurisdictional elements are met. There are also practical arguments for allowing the military to detain indefinitely, such as preventive detention, detention to assist interrogation, or avoiding disclosure of classified information. Although some of these approach justification of military detention of “enemy combatants,” none is sufficiently persuasive to undermine the fundamental bedrock of Anglo-American concepts of due process entitling an accused to a hearing on specified charges before a competent tribunal.

#### A. Indeterminate Duration of Hostilities

One argument for detention without trial could track closely the analogy of war. Because the suspected terrorist is part of a group that has promised continuing hostile action, the members of the group can hardly be turned loose to help carry out that promise. Prisoners of war are detained for the duration of hostilities because it would be foolish to send them back to have another chance to kill people on our side. This is a compelling argument if we can be sure that the person to whom it applies is in fact committed to taking violent action.

Criminology has put substantial effort into the predictability of the violent offender, or at least of identifying the factors that tend toward anti-social behavior. Young males are far more likely to commit violent crimes than any other group.<sup>116</sup> Perhaps violence would be reduced dramatically if we could just warehouse all males between the ages of 16 and 30. In a more serious vein, the “idea of *incapacitation* is simply that offenders separated from society will not be able to inflict harms on innocent people during the period of their incarceration.”<sup>117</sup> There are many students who argue against repeat offender laws on the basis that they tend to apply only to those offenders who are already nearing the end of their criminal careers.<sup>118</sup>

There are two problems with the incapacitation model in criminal law. One is that the predictive factors are still just too uncertain to allow anyone to make more than just an educated guess about whether a particular person is likely to commit a violent crime. Even the principles of rehabilitation and parole have fallen on hard times in recent decades. The second problem is that the very idea of predictive incapacitation conflicts with our deeply held values of free will. We want desperately to believe that even the most likely offender can have a change of heart before harming innocent persons.

Indeed, it is this emphasis on free will that lies at the heart of conspiracy law. We don’t punish for joining groups or even for planning a criminal act. We insist on an overt act in furtherance of the plan for the very reason that we do not want to punish evil intent or proclivities without providing the opportunity for the potential miscreant to “wise up.”

Suppose we decided to lock up a person just for being a member of a terrorist organization. The task is daunting and the problems multiply rapidly. First of all, there are too many to be all-inclusive so the effort will be highly select and arbitrary. Secondly, for each one that we treat in this fashion, we persuade two or more fellow travelers to convert to the cause. Next, we cut off some of the most promising sources

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R.J. Herrnstein, *Criminogenic Traits* 40-43, in JAMES WILSON & JOAN PETERSILIA, *CRIME* (1995).

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Brian Forst, *Prosecution and Sentencing* 376, in WILSON & PETERSILIA

118

The Supreme Court is considering this Term the validity of habitual offender statutes on the ground of “cruel and unusual punishment.”

of information about the plans of terrorist organizations. Lastly, although we could probably go on and on, this action would undercut the whole notion of free will and persuasion to peaceful dispute resolution.

All of this just relates to the question of whether we want to pursue the prospect of indefinite detention without trial. The very idea is anathema to western notions of law and justice, but it has to be mentioned. With regard to a person who has been proven guilty of active participation in a conspiracy, whether in military or civilian trial, a very lengthy sentence may be appropriate. After all, the conspiracy of terrorism is conspiracy to commit murder (and probably on a broad scale and probably of unknown persons), so the prospect of near life imprisonment is not out of bounds. The emphasis here is on the need to have a trial for an act – the question of sentence is another matter entirely.

#### B. Detention as Incentive To Talk

In one explanation of the Government's position with respect to Hamdi, AG Ashcroft said that he would be detained as an incentive to get him talking about his knowledge of the AlQaeda organization and its future plans. Deal brokering with organized crime members is certainly not unknown, but it usually takes place in the context of criminal trials. It can also lead to abuses in which government officials end up protecting ongoing criminal activity to obtain information on other criminal activity.<sup>119</sup>

The major problem with indefinite detention to obtain information is that it flies in the face of basic notions of due process, at least in the American system if not internationally. At the domestic level, it has been said repeatedly that government cannot incarcerate someone without due process, meaning at least a decision by a competent tribunal.

Although we can use incarceration as a method of coercing information from an individual in American law, it is accomplished only by court order and then almost never carried out. In civil litigation, for example, refusal to provide information in discovery can become the basis of a court order under Rule 37. Refusal to comply with the order can then be punished by contempt. Although in theory a court can order a contumacious witness to be incarcerated until he or she complies,<sup>120</sup> in practice this power is rarely, if ever, exercised because the courts have other less intrusive remedies available and because incarceration is surrounded by heavy procedural safeguards.<sup>121</sup> If an individual can be shown to have information to which a government agency has a right, then a court will order the individual to divulge that information,<sup>122</sup> and refusal to obey that court order could result in imprisonment for contempt of court.<sup>123</sup> Contempt may also be used to coerce a witness to testify before a grand jury.<sup>124</sup> But “the

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Some particularly heinous abuses of the criminal justice system have been alleged recently in the context of protected Mafia informants in the Boston area. The allegations include the proposition that government informants were allowed to perjure themselves to obtain convictions of their enemies for crimes actually committed by the informants themselves

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*See Fremont Energy Corp. v. Seattle Post-Intelligencer*, 688 F.2d 1285 (9th Cir. 1982).

121

*See Mertsching v. United States*, 704 F.2d 505 (10th Cir. 1983) (dismissal of lawsuit for failure to answer questions).

122

The appropriate procedure is for the agency to file a lawsuit for enforcement of an administrative subpoena. *See Smith v. United States*, 289 F.3d 843 (6th Cir. 2001); *NLRB v. G. Rabine & Sons*, 2001 US Dist. Lexis 14090 (ND Ill. 2001).

123

Courts will go to extreme lengths to avoid using incarceration as a method of coercing disclosure of information. “In

justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order" and "a court must exercise 'the least possible power adequate to the end proposed.'"<sup>125</sup> In all of these examples, the requirement of a court order at least ensures a judicial check against governmental abuse in the quest for information, and in addition the courts are adamant that incarceration be circumspectly applied if at all.

At the international level, there are a number of provisions that need to be considered. One is the provision from the Geneva Convention that prisoners of war cannot be punished for wrongdoing without a determination of wrongdoing by a competent tribunal. Another is the proscription on hostage taking that has been built into several international treaties and conventions. Is the detainee essentially being held hostage for information? The common sense idea of hostage taking is that the detained person is being held until someone else is given up. But it could be argued that holding someone until he gives up information in his own possession is no different.

The Supreme Court of Israel dealt with two levels of this argument in *Anonymous v. Minister of Defence*.<sup>126</sup> The unnamed petitioners were being held under the Israeli Emergency Powers (Administrative Detention) Law of 1979, which has been in effect for over 30 years as an "emergency" measure. It authorizes detention of persons as to whom "the Minister of Defence has reasonable cause to believe that reasons of State security or public security require that a particular person be detained." The order of detention can be renewed every six months so long as the same findings are made. In the *Anonymous* case, the government conceded that the individuals in custody no longer represented a threat themselves (how this could be known is a mystery) but that they could be held as bargaining chips to obtain information from terrorist groups about a missing Israeli soldier.

In its initial decision in this case, the Israeli Court held that there was nothing in Israeli law to counter the grant of power to the Minister of Defence. With regard to basic human rights principles, the Court merely said that it is the legislature's job to create a "balance between freedom and dignity on one hand and security on the other." After severe criticism from a number of quarters, the Court granted a rehearing and reversed itself. Noting that international law prohibits hostage-taking, the Court said that using a detainee as a bargaining chip "comprises a serious infringement of human dignity." The Court pointed out that the detainees could not provide the desired information themselves and thus "detention of the appellants is nothing other than a situation in which the key to a person's prison is not held by him but by others."

But what if the information in fact were in the person's own head? Would detention to persuade him to talk still constitute an illegal hostage situation? This may be an interesting question in international

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the case of administrative subpoenas, parties may immediately appeal district court orders enforcing these subpoenas, as the Supreme Court has deemed them to be 'self-contained, so far as the judiciary is concerned[.]' *Cobbledick v. United States*, 309 U.S. 323, 330 (1940)." *Doe v. United States*, 253 F.3d 256 (6th Cir. 2001).

124

*Shilitani v. United States*, 384 U.S. 364, 371 (1966) ("Where contempt consists of a refusal to obey a court order to testify at any stage in judicial proceedings, the witness may be confined until compliance."), *citing McCrone v. United States*, 307 U.S. 61 (1939).

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*Id.*, *citing Maggio v. Zeitz*, 333 U.S. 56 (1948) and *Anderson v. Dunn*, (6 Wheat.) 204 (1821).

126

54(1) P.D. 721 (Sup. Ct. Israel 1997). I do not pretend to read Hebrew, so this discussion relies on the description of the Court's opinions in Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel*, 18 *Ariz. J. Int'l & Comp. Law* 721 (2001).

law, but it is virtually irrelevant to American law because the concept of administrative detention itself has been unknown until now.

### C. Detention To Prevent Violent Acts

Another argument for detention could be that the individual can be held because he represents a danger to public safety, that if released he would be likely to commit an act of violence. Other than civil commitment, the only detentions without conviction that American law has acknowledged have been those for purposes of pre-trial proceedings or based on some judicial mechanism for preventing administrative abuse. There are no cases on “administrative detention” in the United States for the simple reason that no legislative or executive has even attempted it. During the 1960’s and 70’s, there was some thought given to the notion of “preventive detention,” in which persons who were a threat to society could be incarcerated, but this idea mostly died out under political pressure. The portion that remained is the presence in a few states of civil commitment proceedings for violent sexual offenders. These persons are thought to be in a special category because evidence shows that they tend not to “age out” of their aggressive behavior.<sup>127</sup> These statutes are very little different from those that authorize civil commitment for a person who is “a danger to himself or others.”

When the Kansas sexual offender statute was challenged, the Supreme Court stated, “We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards.”<sup>128</sup>

Although freedom from physical restraint has “always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,” that liberty interest is not absolute. The Court has recognized that an individual’s constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context.<sup>129</sup>

Now that Britain and Israel have adopted emergency detention provisions, is the United States likely to follow suit? Perhaps more incidents such as 9/11 could persuade the populace to go along with such a severe imposition on basic liberties, but the courts are not likely to play along.

### D. Problems With the Civilian Criminal System

Finally, what is wrong with use of the civilian court system for trial of those Guantanamo detainees who are accused of being AlQaeda confederates? or of additional persons arrested and accused of being part of a terrorist cell, such as the Lackawanna Six or the Portland Five? or Jose Padilla?

One problem with use of the criminal process for alleged terrorists is in defining a crime. Clandestine use of arms may well constitute a crime under international law. There are ample crimes that can be charged in the civilian system under the heading of universal jurisdiction. Crimes against air piracy, hostage taking, destruction of life or property, are all criminalized by US statute as well as by international conventions. The only thing lacking in international law is a proscription against terrorism generally.

The US has attempted to fill the terrorism definitional void by defining the crime of providing material support to a terrorist or a designated terrorist organization.<sup>130</sup> These statutes are being employed

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Indeed, evidence exists to show that a sexual offender will still engage in physical abuse even after chemical castration eliminates the sexual urge.

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Kansas v. Hendricks, 521 U.S. 346, 357 (1997).

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521 U.S. at 356, *quoting from* Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780 (1992).

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against those who may be supportive of others who have committed or planned to commit violent acts. In a sense, the statute defines a conspiracy without calling it a conspiracy. Even under the relaxed standards of conspiracy law, the criminal defendant is not usually accountable absent knowledge of the general nature of a crime that is to be committed. Generalized knowledge that a group is likely to carry out violent action when the occasion arises is not enough for conviction of conspiracy to commit the crime.

Under the most relaxed view of due process, reflected in the anti-labor and anti-communist legislation of the early 20th Century, the Supreme Court did uphold legislation that made it a crime merely to belong to an organization with unlawful objectives.<sup>131</sup> When the red baiting of the 1950's subsided, the Court then stated that these holdings had been thoroughly discredited and that constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions.<sup>132</sup>

If an individual were subjected to prosecution for belonging to a terrorist organization, US constitutional guarantees would require proof that the individual knew of the imminence of violence. This is the type of evidence that may be extremely difficult to marshal with regard to someone whose role in a foreign organization took place clandestinely in various foreign arenas.

Perhaps the most salient argument against the civilian justice system is the military courts' ability to "provide for . . . the handling of, admission into evidence of, and access to materials and information in a manner consistent with the protection of information classified or classifiable." The civilian courts

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There are two statutes, one for providing material support or resources knowing or intending that they be used in violent acts, and the other for providing material support or resources to a designated organization.

#### **USC 2339A. Providing material support to terrorists**

**(a) Offense.** Whoever, within the United States, provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [specified federal crimes], or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation, shall be fined under this title, imprisoned not more than years, or both.

**Definition.** In this section, the term "material support or resources" means currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

#### **USC 2339B. Providing material support or resources to designated foreign terrorist organizations**

**(a) Prohibited Activities.- Unlawful conduct.** Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to, shall be fined under this title or imprisoned not more than years, or both.

**Extraterritorial Jurisdiction.** There is extraterritorial Federal jurisdiction over an offense under this section.

131

Whitney v. California, 274 U.S. 357 (1927). Interestingly, Justices Brandeis and Holmes in concurrence described "advocacy of criminal syndicalism" as a crime "very unlike the old felony of conspiracy because it creates guilt although the society may not contemplate immediate promulgation of the doctrine." See also Herndon v. Lowry, 301 U.S. 242 (1937) (prosecution for speech must show a "reasonable apprehension of danger.").

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Brandenburg v. Ohio, 395 U.S. 444 (1970).

similarly can hear claims of privilege that would prevent disclosure of classified information, but because criminal proceedings must be open to the public, the civilian courts could not receive that evidence without making it known to the public.

The administration does not want a public trial with disclosure of evidence because it does not want public disclosure of the sources of its information.<sup>133</sup> Moreover, in many instances that information might be sufficient to justify a reasonable person's acting on it but fall short of proof beyond a reasonable doubt.<sup>134</sup> Again, it is worth pointing out what the criminal defendant would be entitled to receive: a speedy and fair public trial, a terminable sentence commensurate with the evidence, proof beyond a reasonable doubt that this individual participated in conduct amounting to a crime under US law or universal law.

The heart of the problem with open trials for alleged terrorists is that thwarting well-organized, well-disciplined, fanatical groups will require intelligence work premised on infiltration. This means placing informants into, or buying the cooperation of informants within, the heart of the organizations. We will be doing business with some very nasty people, and we will need to protect those people by not revealing the nature of the information we have about those we capture. Revealing that information necessarily would demonstrate the source of the information, thus jeopardizing the informants who provided it.<sup>135</sup>

These problems have been addressed by Congress at least twice in the past two decades, once in the Classified Information Procedures Act of 1980<sup>136</sup> and again in the 1996 statute criminalizing material support for terrorist organizations.<sup>137</sup> In essence, these statutes permit the trial judge in a criminal prosecution to review government claims for secrecy of evidence *in camera*, to order use of redacted disclosures or summaries, and to exclude classified information from introduction at trial.

The extent to which the classified information procedures can be applied consistently with the defendant's rights to confrontation and due process remains to be seen. Certainly, judges could be presented with some excruciatingly difficult choices, in the extreme being faced with the prospect of releasing a very nasty terrorist to prevent disclosure of information in a public trial. One consolation is that the terrorist is not likely to have committed only one crime; there may be other offenses that can be charged without the need for disclosure of classified information. Perhaps another consolation would be

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In some instances, the source of the information may be a person who is still entrenched in the organization and providing further information. Disclosing the identity of an in-place informant is obviously detrimental to the health of that person. In other instances, the source may be highly sophisticated technology and disclosure of its operation would give the organization clues about how to avoid detection.

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The Military Order authorizing commissions for trial of alleged AlQaeda members uses a reasonableness standard rather than beyond a reasonable doubt.

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In some instances, the source of the information may be a person who is still entrenched in the organization and providing further information. Disclosing the identity of an in place informant is obviously x detrimental to the health of that person. In other instances, the source may be highly sophisticated technology and disclosure of its operation would give the organization clues about how to avoid detection.

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18 U.S.C. App.

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18 U.S.C. §2339B.

that the government is not about to let that person wander loose in public without constant surveillance. This will be expensive, yes, but perhaps not that much more expensive than life-time confinement would be anyway.

#### E. Judicial Review of Military Detentions

In two pending cases, Yaser Esam Hamdi and Jose Padilla are being held in the Navy brig at Norfolk, Virginia. Hamdi is a US citizen who was captured in the military engagement (i.e. during wartime) in Afghanistan. The Government has not chosen to disclose the circumstances of his capture, whether he was actively engaged in carrying arms against US troops or what he was doing. Padilla, by contrast, was arrested by civilian authorities when deplaning in Chicago after a trip to Pakistan, during which he allegedly made plans to detonate a “dirty bomb” in the District of Columbia. In both cases, the Justice Department is taking the position that the Government is not required to disclose to a court the basis for the detention beyond the conclusion that each is an “enemy combatant.” The Government takes the position that Hamdi can be held without benefit of counsel as part of its interrogation strategy. The justification for this position is that the United States may capture and detain enemy combatants without review by the courts.

Especially in a time of active conflict, a court considering a properly filed habeas action generally should accept the military’s determination that a detainee is an enemy combatant.<sup>138</sup>

Even granting the wiggle room of the word “generally,” this is at best an astonishing statement. If made by the government of any number of third-world countries over the last half century, it would bring instant rebuke from both left and right political allegiances. The United States Government, apparently recognizing the enormity of the statement, immediately asserts that its position “does not nullify the writ.” The Government suggests two checks on the military. First, the court can insist on a statement of the detainee’s status, and second the courts are assured of the efficacy of political checks on the executive branch.

The first question presented by Hamdi is whether there is review authority to determine whether indeed the detainee is an “enemy combatant.” The *Hamdi* brief attempts reassurance by stating that although a court should accept the military’s determination that an individual is an enemy combatant, a court may evaluate the legal consequences of that determination. For example, a court might evaluate whether the military’s determination that an individual is an enemy combatant is sufficient as a matter of law to justify his detention even if the combatant has a claim to American citizenship. In doing so, however, a court may not second guess the military’s determination that the detainee is an enemy combatant, and therefore no evidentiary proceedings concerning such determination are necessary.

But the Government also takes the position that the EC determination is “sufficient as a matter of law to justify his detention.” If a court were to decide as the Government wished, then the EC determination effectively isolates the detainee from any judicial oversight whatsoever. The Supreme Court never hesitated in either *Quirin* or *Eisentrager* to assert its authority to make the basic determination of the prisoner’s status. Anything less would undercut the entire structure which this nation’s jurisprudence is built. If there were any need for specific authority for this proposition, we need look no further than the essentials of due process in the fifth amendment, seizure and arrest requirements in the fourth amendment, and place of trial requirements in the sixth amendment.

If, on the other hand, the court decided that a military determination were not sufficient as a matter of law, then the Government would have to decide what its next step should be. We can speculate that it would then turn either to proof of combatant status or to another course such as trial for specific criminal conduct. Pursuing the first course requires asking what sort of evidence would be required for the United States to justify its holding a citizen without trial. What might this be? Actually, with Hamdi all the Government needs to show is that he was bearing arms against the US. For a person captured bearing

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arms in the “theater of operations,” a military commission should have ample jurisdiction.<sup>139</sup>

The second reassurance offered by the Government in *Hamdi* is the usual fallback for executive discretion. Coupling two different statements from the Federalist Papers together, the Government asserts that the courts have no role in “reviewing military decisions or operations.” The first statement from the Federalist is said to be that, with regard to military affairs, “if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger [by the minority], and [the community] will have an opportunity of taking measures to guard against it.”<sup>140</sup> Looking at this language in context leads almost to the conclusion that the Government is playing cynical games. The passage is by Hamilton and concerns assurances that Congress will have control of the military by virtue of its inability “to vest permanent funds for the support of an army” and by action of the “party in opposition.” When the entire objective of the executive is to hide information from the other branches and the public, as in *Hamdi*, it is difficult to place much reliance on the power of the Loyal Opposition. The second quote, regarding the judiciary’s lack of influence over either sword or purse, related to assurances that the judiciary would not be able to rule by fiat.<sup>141</sup>

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*See \* infra.*

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FEDERALIST PAPERS NO. 26. The language chosen by the Government is italicized:

The legislature of the United States will be OBLIGED, by this provision, once at least in every two , years, to deliberate upon the propriety of keeping a military force on foot to come to a new resolution on the point and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not AT LIBERTY to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence. As the spirit of party, in different degrees, must be expected to infect all political bodies, there will be, no doubt, persons in the national legislature willing enough to arraign the measures and criminate the views of the majority. The provision for the support of a military force will always be a favorable topic for declamation. As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition and *if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it.* Independent of parties in the national legislature itself, as often as the period of discussion arrived, the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.

Schemes to subvert the liberties of a great community REQUIRE TIME to mature them for execution. An army, so large as seriously to menace those liberties, could only be formed by progressive augmentations which would suppose, not merely a temporary combination between the legislature and executive, but a l continued conspiracy for a series of time. Is it probable that such a combination would exist at all Is it 4 probable that it would be persevered in, and transmitted along through all the successive variations in a L representative body, which biennial elections would naturally produce in both houses Is it presumable, that every man, the instant he took his seat in the national Senate or House of Representatives, would commence a traitor to his constituents and to his country Can it be supposed that there would not be found one man, discerning enough to detect so atrocious a conspiracy, or bold or honest enough to apprise his constituents of their danger If such presumptions can fairly be made, there ought at once to be an end of all delegated authority. The people should resolve to recall all the powers they have heretofore parted with out of their own hands, and to divide themselves into as many States as there are counties, in order that they may be able to t manage their own concerns in person.

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FEDERALIST PAPERS NO. 78

Using these quotes to support plenary military authority is far from fair to the authors of the Federalist Papers, who could hardly have been arguing in favor of rule by military fiat. They had just fought a war against a runaway monarch, had drafted a Constitution full of checks on executive power, and were consistently reminding the public of the need to be vigilant against the abuses of a standing army.

The Fourth Circuit's response to these arguments<sup>142</sup> was to straddle both sides of the fence, an uncomfortable if not downright painful position. After reciting the reasons for judicial deference to executive military decisions and praising American reliance on the Bill of Rights and habeas corpus, the court held that Hamdi could be detained because in fact he had been captured bearing arms against the US in an active combat zone. "We shall, in fact, go no further in this case than the specific context before us – that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces."

The Fourth Circuit seemed to hold that a court must accept the factual determinations of the military without judicial review<sup>143</sup> but it backed off the most extreme implications of this position by gratefully accepting the Government's "voluntary" submission of some factual information.<sup>144</sup> A fair reading of the Fourth Circuit's opinion is that the judiciary must defer to the military and that the military must defer to the judiciary, which shows the extraordinarily difficult position in which the court found itself.

Given that difficulty, isn't this precisely the time to fall back on tradition and on tried-and-true processes? Given the closeness of the question, the best answer should be to choose the route that is least disruptive to the American system of law and to insist that Hamdi be remitted to the civilian justice system unless the military is willing to place him on trial for crimes committed in a military theater of operations. In neither military law nor civilian law is there any justification for indefinite detention of an American citizen once he is removed from the theater of operations.<sup>145</sup>

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Hamdi v. Rumsfeld, 2003 U.S. App. LEXIS 198 (4th Cir. 2003)

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Id. at \*: "The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi's detention may have been slain or injured in battle. Others might have to be diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance."

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Id. at \*: "This deferential posture, however, only comes into play after we ascertain that the challenged decision is one legitimately made pursuant to the war powers. It does not preclude us from determining in the first instance whether the factual assertions set forth by the government would, if accurate, provide a legally valid basis for Hamdi's detention under that power. Otherwise, we would be deferring to a decision made without any inquiry into whether such deference is due. For these reasons, it is appropriate, upon a citizen's presentation of a habeas petition alleging that he is being unlawfully detained by his own government, to ask that the government provide the legal authority upon which it relies for that detention and the basic facts relied upon to support a legitimate exercise of that authority. Indeed, in this case, the government has voluntarily submitted -- and urged us to review -- an affidavit from Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, describing what the government contends were the circumstances leading to Hamdi's designation as an enemy combatant under Article II's war power."

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The Fourth Circuit saw the problems of conducting a trial as being insurmountable in light of an ongoing war effort. "The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency

The case of Jose Padilla is even more doubtful. Padilla is a US citizen, arrested on US soil, carrying no weapons (he just stepped off a secure airplane), but allegedly hoping to carry out an attack on US soil at an undisclosed date in the future. The Government first held him as a “material witness” before a grand jury in New York but then transferred him to military custody as an “enemy combatant.” A habeas corpus petition in the Southern District of New York has been met with claims by the US that isolation of Padilla is necessary “to bring psychological pressure to bear on him for interrogation” and that the court should accept the factual conclusions of the Defense Intelligence Agency that Padilla was engaged on a mission for a terrorist network. Whatever the facts that may be disclosed to the court *in camera*, it is difficult to see how actions in a terrorist capacity make a US citizen subject to military power.

There is one glaring distinction between Padilla and the *Quirin* defendants. The *Quirin* group was acting under the orders of an enemy nation-state during a declared war. By contrast, AlQaeda is not a nation-state and there is no “law of war” for a military court to apply. There are basically three ways of dealing with Padilla. First, he could be tried in civilian court for conspiracy to commit any number of crimes by exploding a bomb. Second, he could be tried in military court for violation of the law of war. Is there really any difference between trial in a civilian court and a military court? The US Court of Military Appeals has applied the same standards of public trial requirements in dealing with classified materials as would a civilian court. The problem is that without a nation-state sponsor or principal, there is no provision of the law of war that Padilla has violated, and the military courts are not statutorily authorized to try offenses that do not have a military connection.

Third, the Government argues that Padilla could be held in indefinite military detention without any trial process at all. The minimum thrust of due process, from Magna Carta forward, has been to prevent unreviewed executive incarceration. Even with the precedent of *Quirin*, it is not easy to construct a justification for allowing the military to hold a US citizen arrested on US soil without trial. The defendants in *Quirin* at least received a prompt (very prompt) military trial.

The District Court in *Padilla* has issued two opinions, the first very scholarly and deferential and the second approaching testiness with the Government. Let’s look at what the Government argued and the court’s responses. As in *Hamdi*, the Government argued that the President was entitled to classify Padilla as an enemy combatant under the precedent of *Quirin* and that the determination was entitled to deference from the courts. When pressed by the court as to why this should be the case, the Government proffered basically two justifications for detention without trial, to “prevent him from rejoining the enemy,” and to allow investigators to maintain “psychological pressure” to obtain information from him. Despite the court’s impatience with the Government’s behavior in the case, it accepted both arguments as valid and required only that “some evidence” be offered to show that he was “engaged in a mission against the United States on behalf of an enemy with whom the United States is at war.”

With all due respect, neither of the proffered justifications is persuasive. And even under the court’s standard, there is no possibility that AlQaeda can be considered “an enemy with whom the United States is at war.”

The argument of preventing Padilla from rejoining the enemy calls for nothing more than a trial, conviction, and sentence. He should no more be allowed to rejoin his AlQaeda buddies than should a drug lord be allowed to rejoin his cohorts. What distinguishes Padilla from the common street criminal with ties to a Colombian drug cartel? The wantonness of his desire to kill and maim? Is he more like a serial killer or mass murderer? Granted this consideration (assuming it exists) should affect the length of his

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and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi's detention may have been slain or injured in battle. Others might have to be diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance.” *Id.* at \*. But this argument is simply unpersuasive in light of modern communications and transportation, especially a year after the military operation has reached 90% of its objectives and now consists of something closer to occupation than active engagement.

sentence, but the concept of preventive detention has been considered and rejected in any number of settings. Incarceration follows proof, not mere suspicion or even unreviewed hearsay. The court commented that prisoners of war could be detained “for the duration of the hostilities,” but there is not likely to be a duration of hostilities with AlQaeda for the simple reason that there is no political structure with which to negotiate terms and conditions of peace. The object of war is peace, AlQaeda has no peaceful objectives, and the conflict with AlQaeda cannot plausibly be considered a war.

The psychological pressure argument flies in the face of due process and all its related themes. It is difficult even to imagine cases dealing with this kind of argument. Do we look at cases granting immunity as the Government argued? Nothing in those cases even hint at isolated confinement without judicial process. Court orders for immunity or to compel testimony before a grand jury are court orders in which the witness knows exactly what is demanded and knows the consequences of refusing to divulge. Shall we look at the purposes behind Miranda? The strictures on custodial interrogation are irrelevant because the custody can continue only until arraignment, and the testimony is sought for prosecution purposes. Shall we look at the walls and barriers built to prevent prosecutorial use of surveillance information under FISA? Again, there is no custody, no pressure, no psychological dependence. Frankly, the surprising part of the Padilla district court opinion is that the judge did not declare this argument to be an outrageous attack on the Constitution.

Finally, for the same reasons that there is not an enemy with whom to negotiate a cessation of hostilities, there is no entity as to which to apply the court’s “some evidence” standard. Who is the “enemy with whom the United States is at war?” Is AlQaeda different from ETA? from any number of other para-military organizations that use violence against civilians either to make political points or to carry out their own frustrations?

Accepting the Government’s position in *Hamdi*, that civilian courts may not inquire into the bases of classifying a person as an enemy combatant, would constitute a radical change in the American way of doing government business. That position in the context of Padilla, who was not captured within any theater of operations, is quite simply unsupportable. “War is too important to be left to the Generals” is a statement intended to express something about limits on the use of force. In this regard, however, it expresses something about the very nature of our national psyche. In this situation, perhaps we should also be cognizant that “this war is too important to be left to the politicians.” The judiciary is independent from the executive for a very good reason. It is the people’s check on abuses of executive power.

#### **IV. Status of the Guantanamo Detainees**

As of November 2002, approximately 598 persons were being held at Guantanamo Bay, Cuba after being captured in Afghanistan, and facilities were being constructed to hold as many as 2,000 prisoners. The first releases from Guantanamo Bay occurred in October 2002 when three Afghans were repatriated to that country pursuant to a finding that they were connected to neither the Taliban regime nor AlQaeda.<sup>146</sup> A fourth person was released to an undisclosed country. Saudi Arabia and Britain have made official requests for custody of their nationals.

Our last step in this exercise of exploring the intersection of the judiciary and the military in responding to terrorism is to question the status of the Taliban detainees at Guantanamo Bay. The Taliban detainees include nationals from a number of countries, such as Britain and Sweden, which have begun demanding that their citizens either be repatriated or accused of a crime. It is possible that some of the Guantanamo detainees could be charged with terrorist acts in league with organizations such as AlQaeda, but Government press releases and court filings indicate only that they are being held for their involvement as functionaries of the Taliban regime.<sup>147</sup> As yet, the US courts have denied any role for

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<http://www.cnn.com/2002/WORLD/asiapcf/central/10/28/afghans.returned/index.html>

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Professor Paust dealt with the POW issue in the context of whether the detainees have the international version of

judicial review over their status<sup>148</sup> and the Government has shown no inclination to bring any of them before either military or judicial tribunals.

The United States administration will not likely prosecute many of the Taliban in the US criminal justice system, neither civilian nor military, for the simple reason that most of them cannot be accused of crimes cognizable under US law. There are some, undoubtedly, who could be brought to task for “crimes against humanity” on the basis of the human rights violations that occurred in Afghanistan while the Taliban regime was in place. Torture, dismemberment, and execution may be crimes cognizable in universal jurisdiction, but only if they were either part of an “armed conflict”<sup>149</sup> or “committed as part of a widespread or systematic attack against any civilian population”<sup>150</sup> and only if the individual had a culpable level of knowledge or intent.<sup>151</sup> Universal jurisdiction over acts of brutality generally does not apply to the internal actions of a state against its own citizens until those acts rise to the level of systematic torture.<sup>152</sup> Although it might be worthwhile to prosecute some of the Taliban leadership for their most egregious violations of human rights, there is no indication that the persons held by the US military fall into the leadership category. Moreover, in its position opposing the International Criminal Court, the United States has expressed grave concern about the concept of universal jurisdiction by which persons could be tried outside their home countries for offenses committed against their own population.

#### A. POW Status and International Law

The United States issued an explicit policy statement that the persons detained at Guantanamo Bay are not to be considered prisoners of war.<sup>153</sup> The statement distinguished between Taliban detainees and alQaeda detainees. With respect to the former, because the Taliban government was never recognized as the legitimate government of Afghanistan, its troops would not be POW’s of a nation. With respect to the AlQaeda members, the statement declares that they are members of a foreign terrorist group and not entitled to POW status. The statement declared that although the detainees are not entitled to POW

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due process rights under the GPW. Jordan Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L LAW 1, 5-8 n. 15 & 16 (2001).

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Khaled al Odah v. United States, 2003 U.S. App. LEXIS 4250 (DC Cir. 2003); Coalition of Clergy, Lawyers & Law Professors v. Bush, 310 F.2d 1153 (9th Cir. 2002) (none of petitioners were appropriate “next friend” of any detainees).

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Rome Statute of the International Criminal Court [hereafter Rome Statute] art. 8(2); see *Prosecutor v. Furundzija*, No. IT-95-17 (Dec. 10, 1998), Int’l Criminal Tribunal for the Former Yugoslavia.

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Rome Statute art. 7

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Rome Statute art. 25

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The extradition of Augusto Pinochet from England to Spain was sought on the basis of “state torture” committed “by or with the acquiescence of a public official or other person acting in an official capacity.” *Regina v. Bow Street Magistrate*, 1 APP. CAS. 147, 2 ALL ENG. REP. 97 (HL 2000).

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*Supra* note 3.

privileges, they will be provided many POW privileges as a matter of policy. The statement delineated some aspects of humane treatment that would be available to the detainees and some that would not. In general, they would be given food, clothing, and shelter, but would not be provided access to money or purchasable goods.

The official policy statement is silent about many aspects of POW treatment detailed under the Geneva Convention on Prisoners of War (GPW). First, however, we should be clear that if one is neither arrested in the civilian system nor classified as a prisoner of war, that person still cannot be treated with impunity and subjected to brutal treatment. The universal rules of law, as well as various treaties and conventions, prevent murder, torture, starvation, or holding of hostages.<sup>154</sup>

With regard to conditions of confinement, under the GPW, POW's are entitled to minimum standards of food, clothing, shelter, and medical treatment. Although the descriptions of these items in the GPW at first glance might appear to describe a standard of living above the norm in many third world countries, and above the poverty line in developed nations, the standards do not require caring for prisoners at a level higher than is afforded to the soldiers or citizens of the detaining nation.<sup>155</sup> It is at least arguable that for a developed nation to provide grossly substandard conditions to POW's would be a violation of the proscriptions against starvation or inhumane treatment regardless of the language of the GPW. Nevertheless, POW status under the GPW does guarantee these conditions as more than a mere policy.

POW status would also trigger the right of international NGO's to inspect the premises and observe the treatment of prisoners. The US policy on the detainees accords the International Committee of the Red Cross this visitation and consultation privilege. POW's are entitled to means and places of worship, recreation, and education. They are allowed to correspond with friends and relatives. The US policy contemplates allowing most of these opportunities with limitations because "many detainees at Guantanamo pose a severe security risk to those responsible for guarding them and to each other."

The policy statement is silent about the crucial issues of long term destiny of the detainees. POW's can be tried for offenses only as defined by the detaining power for its own soldiers, and under conditions equivalent to those provided for the armed forces of the detaining power.<sup>156</sup> In any such proceeding, they are entitled at least to counsel, notice of charges, and the opportunity to present evidence.

For present purposes, probably the most significant distinctive feature of POW status is the right to repatriation, either at the end of hostilities or when an individual is sufficiently sick or feeble as no longer to be a threat to the detaining nation. This right alone reflects the difficulties in according POW status to a suspected terrorist. Stated most simply, it is difficult to imagine a point of cessation of hostilities with terrorism.

Generally speaking, a person serving in the armed forces of his country has a personal animosity toward the armed forces of a hostile nation principally because it is in his interests to do so. If it is necessary to think and react in "kill or be killed" terms, then the soldier needs the shield of personal animosity. But when the hostilities cease, the personal animosity can cease because it had nothing to fuel it other than the hostilities themselves. In other words, the soldier takes on the mission of his government. Even when serving his family and people, he is responding to a more or less official call to arms. When

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*See* Rome Statute of the International Criminal Court art. 8(2)(a).

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GPW art 26.

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GPW art. 82-88. Breaches of disciplinary rules, even including escape attempts, can be punished only by withdrawal of privileges, minimal labor, or confinement. GPW art. 89.

the call is terminated, the likelihood of violence should diminish if not cease.<sup>157</sup>

By contrast, the terrorist is responding to deep-seated animosity independent of any official call to arms. The call is from irregulars to begin with, and it is not made with a specific set of solutions in mind. It may have quasi-political objectives but only the total collapse of the targeted regime will satisfy those objectives, and often even that may not turn off the animosity.<sup>158</sup> The personal animosity is the reason for the hostilities, not the other way around. Therefore, an official cessation of hostilities does nothing to assuage the personal animosity and the terrorist continues to be a threat into the foreseeable future.

It does not make sense to speak of prisoners of war in the absence of a war. And the war on terrorism is not a “state of armed conflict” between nations. With neither an official sponsoring state nor an official means of declaring a cessation of hostilities, the alleged terrorist is on his own and subject to normal criminal processes..

But the Taliban detainees should be separated from the alQaeda members for this purpose. The Taliban were combatants of an enemy government, whether considered a legitimate government or not. The Taliban could be repatriated into the tender mercies of the new regime in Afghanistan without, for the most part, presenting any greater likelihood of immediately joining a terrorist organization than would be true for much of the Arab world’s population, many of whom carry intense hostility toward the Euro-NorAm culture.<sup>159</sup> In other words, absent some showing of individual circumstances, the Taliban detainees are no more likely to be terrorists than any of millions of their cohort, and the problem of continuing terrorist hostility is not particularly realistic.

All of this points in the direction that the Taliban might have claims to protection under various treaty provisions, most notably the GPW. The problem with that approach is that treaty obligations generally exist among nations and do not grant rights to individuals.

#### B. Enemy Aliens and Habeas Corpus

Several habeas corpus and related petitions were presented to federal courts in the District of Columbia and consolidated under the heading of *Khaled al Odah v. United States*.<sup>160</sup> All these petitions

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Obviously, acts of postwar violence can and will occur, but usually they will be sporadic, isolated events rather than an ongoing campaign of systematic violence. When the latter does occur, the occupying force will take steps to deal with it. In US history, one of the most clear examples of this phenomenon was the rise of the KKK and the reactions of the federal government following the Civil War.

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Although terrorism is politically motivated, it does not have an objective that calls for the terrorist strategies to cease at the culmination of a specified objective. *See* CHRISTOPHER HARMON, *TERRORISM TODAY* 187 (2000). “Terrorists on the left and right deliver their biggest impacts against the status quo, with its stability, moderation, and rule of law, qualities clearly varying in their proportions according to the country in question. That . . . is key to explaining why, when organizations dominated by terror rise to power, they remain antithetical to popular self government.”

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We are dealing here with a recognizable group, the Taliban, although even that group fractures into many individuals of varying ethnicity and even nationality. Moreover, the statement in the text merely recognizes that there is a high level of anger and bitterness in the Arab world toward the “West” without implying that only Islamic fundamentalists constitute a threat of terrorist activities. Terrorists exist on every continent with virtually every political or religious affiliation. *See* CHRISTOPHER HARMON, *TERRORISM TODAY* 1 - 43 (2000).

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2003 US App. LEXIS 4250 (DC Cir. 2003).

were brought on behalf of nationals of nations other than Afghanistan,<sup>161</sup> and all essentially challenged the authority of the United States to hold the detainees without due process. The DC Circuit held that habeas corpus is not available to aliens held outside the “sovereign territory” of the United States for the simple reason that those persons have no constitutional rights under US law.

There is very little reason to question this holding. It would hardly make sense to hold the United States to the obligation to obey interpretations of the US Constitution in dealing with nationals of other nations in various places around the globe. Holding the US to its obligations under international law, and perhaps to the municipal law of whatever country it is involved in, is difficult enough without adding the complication of requiring our operations to obey potentially conflicting obligations of domestic law. The problem, again, is that the requirements of international law, treaties, and municipal law of other nations must be enforced through diplomatic methods or perhaps through the courts of the other nation.

The important point in all this is that the Government’s insistence on an unreviewable discretion to classify persons as “enemy aliens” was firmly rejected by the DC Circuit. These detainees were not nationals of a country with which the United States is in enemy status. If an Australian chooses to commit crimes against the US, that does not make Australia an enemy. In an offhand bit of dictum, however, the court said that “[a]n ‘alien friend’ may become an ‘alien enemy’ by taking up arms against the United States, but the cases before us were decided on the pleadings, each of which denied that the detainees had engaged in hostilities against America.” This is an unfortunate and unnecessary statement that runs counter to the court’s own argument that the US “response” to 9/11 is “against a network of terrorists operating in secret throughout the world and often hiding among civilian populations.” This response has nothing to do with “enemy” status, which is the language of war and applies to relationships among nations. The person who engages in hostilities against a nation without any affiliation with another nation should be considered a criminal, not an “enemy” within the language and laws of war.

### **Conclusion**

We have looked at just a few of the many governmental actions in the “war” on terrorism. The few that we have considered coalesce in the arena of defining terrorism offenses under the “law of nations” or the “law of war.”

With regard to the Guantanamo detainees, a distinction can be drawn between those foreign nationals who were serving in the “regular” forces of the Taliban regime who can be repatriated as soon as it is determined that they have not individually committed a crime under either US or international law. With regard to the alleged AlQaeda confederates, they could be transferred to the civilian criminal system with attendant difficulties of the disclosure of classified intelligence information. Perhaps they could be extradited to another country for trial, but that presents issues of whether the requesting country provides adequate safeguards for rights of the defendant.

With regard to persons accused of committing terrorist acts against the US or its interests, whether they are foreign nationals or US citizens should be irrelevant. Until the international community defines terrorist crimes as being violations of the “law of war,” the US system should commit that these persons be tried in civilian courts rather than by military commissions. The principal reason for this conclusion is not that the civilian courts are necessarily “better” than military commissions but because there is no coherent distinction between the alleged terrorist and the ordinary street criminal.

The law abhors incoherence. The lack of coherence in this setting results from making the defining characteristic for recourse to a military commission to be violation of the “law of war,” and the international community has not defined terrorist acts as violations of the law of war. One approach worth exploring is that definition of international terrorism for this purpose should be limited to those who act

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The named individuals on whose behalf relief was sought were 12 Kuwaitis, two Australians, and two Britons, all of whom were alleged to be in Afghanistan for various personal or humanitarian reasons, to have been kidnapped by locals, and to have ended up in the hands of US military forces without having taken up arms against the US.

“under color of state authorization” in a fashion similar to the US definition of civil rights violations committed “under color of state law.”

If there is any general thought that comes to mind about terrorism and the processes of American law, it is this. Terrorism is not subject to a war to be won with brute force, it is a battle for the hearts and minds of a very large disaffected portion of the world population. To win that battle, we must be better than we want to be. One beginning point is building coherence into our legal responses, and the history of our own country should be useful.