

ABRAHAM LINCOLN AND CIVIL LIBERTIES—THEN AND NOW: OLD WINE IN NEW BOTTLES†

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INTRODUCTION	535
I. SUSPENSION OF HABEAS CORPUS IN WARTIME.....	536
A. <i>Affording Citizens a Right of Habeas Corpus</i>	536
B. <i>Lincoln’s Suspension of Habeas Corpus</i>	537
1. The Case of John Merryman	540
2. The Case of Clement L. Vallandigham	543
3. The Case of Lambdin P. Milligan.....	546
C. <i>World War II Prompts Trials by Military Commission Without Habeas Corpus Protections</i>	547
II. SUSPENDING HABEAS CORPUS IN A MODERN ERA AND THE ROLE OF EXECUTIVE POWERS.....	550
A. <i>The Wars on Terror: Executive, Legislative, and Judicial Responses</i>	550
III. THE NEED FOR A MILITARY COURT SYSTEM IN THE WARS ON TERROR	558
A. <i>Trial by Military Commission Rather than by the American Criminal Justice System is Vital to Preserving National Security</i>	558
B. <i>Bush Legacy</i>	567
IV. THE FUTURE OF HABEAS CORPUS AND THE ROLE OF	

† Although this article stands on its own as a contemporary contribution to national security, civil liberties, and national executive powers scholarship, sections I and III have been derived from one of my earlier publications. Frank J. Williams et al., *Still a Frightening Unknown: Achieving a Constitutional Balance Between Civil Liberties and National Security During the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675 (2007).

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EXECUTIVE POWERS569
CONCLUSION572

INTRODUCTION

*“[R]esponsibility weighs with its heaviest force on a single head.”*¹

In 1861, in the midst of the Civil War, Abraham Lincoln was faced with an insoluble dilemma. There was a war within the country’s borders and southern rebellion imperiled the fate of the Union. Understanding that he held an awesome power as Commander in Chief of the nation, Lincoln acted in the way he saw best fit for the survival of the nation as a *United States*. Although grounded in the Constitution, Lincoln’s acts were, in the eyes of many, extraordinary and unprecedented expansions of his executive authority; and in the eyes of some, extra-constitutional. Indeed, Karl Marx wrote:

Lincoln called for 75,000 men to defend the Union. [It was] [t]he [Confederate] bombardment of Fort Sumter [that] cut off the only possible constitutional way out, namely the convocation of a general convention of the American people, as Lincoln had proposed in his inaugural address. For Lincoln, there now remained only the choice of fleeing from Washington, evacuating Maryland and Delaware and surrendering Kentucky, Missouri and Virginia, or of answering war with war.²

Today the security of the United States’ borders are once again in jeopardy. As with President George W. Bush, when terrorists attacked the nation and its citizens on September 11, 2001, he was faced with a choice—to restrict certain civil liberties in the name of national security or risk losing the very country that the Constitution was written to protect. Mindful of Lincoln’s caution, “are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?”³ President Bush, with congressional support, chose the former. In so doing, he followed in the footsteps of past wartime presidents like Lincoln and Franklin Delano Roosevelt, who demonstrated the constitutional principle that although executive authority ebbs and flows, it is at its pinnacle during wartime. With the Wars on Terror still raging and a Supreme Court reluctant to afford the

¹ Letter to Samuel Kercheval (July 12, 1816), *in* 12 THE WORKS OF THOMAS JEFFERSON 3, 8 (Paul Leicester Ford ed., 1905).

² Karl Marx, *The North American Civil War*, DIE PRESSE, Oct. 20, 1861, *reprinted in* 19 KARL MARX & FREDERICK ENGELS COLLECTED WORKS 32, 34 (Eric Hobsbawm et al. eds., 1984).

³ Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler et. al eds., 1953) [hereinafter COLLECTED WORKS].

executive branch the tools with which to defend the country, it remains to be seen what will come of the fate of liberty under the guardianship of the new administration of President Barack Obama. However, it is apparent that President Obama seems to be recognizing the utility of trial by military commissions in the current wartime climate.

I. SUSPENSION OF HABEAS CORPUS IN WARTIME

“Civil liberties depend on national security in a broader sense. Because they are the point of balance between security and liberty, a decline in security causes the balance to shift against liberty. . . . [W]ithout physical security there is likely to be very little liberty.”⁴

A. Affording Citizens a Right of Habeas Corpus

Often known as the “Great Writ of Liberty,”⁵ habeas corpus⁶ is the constitutionally authorized means by which a court may immediately assume jurisdiction and inquire into the legality of an individual’s detention.⁷ If a court, upon making this inquiry, concludes that an individual has been unlawfully detained, it is empowered to immediately release him or her.⁸

As the Framers of the Constitution took pains to make clear, the privilege is by no means absolute. In August of 1787, a great debate took place on the floor of the Constitutional Convention⁹ over what evolved into the suspension clause in Article I, Section 9.¹⁰ Federalists like James McHenry, reported back to their constituencies about the compromises made at the convention. In a speech to the Maryland legislature, McHenry explained that “[p]ublic safety may require a suspension of the [Habeas] Corpus in cases of necessity: when those cases do not exist, the virtuous Citizen will ever be protected in his opposition to power, ‘till

⁴ RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 46–47 (2006).

⁵ ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 1 (2001).

⁶ U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

⁷ FREEDMAN, *supra* note 5, at 1.

⁸ *Id.*

⁹ See Erwin Chemerinsky, *The Individual Liberties Within the Body of the Constitution: A Symposium: Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 752 (1987).

¹⁰ See FREEDMAN, *supra* note 5, at 1.

corruption shall have obliterated any sense of Honor & Virtue from a Brave and free People.”¹¹

As is evident from the resulting Constitution, the Federalists prevailed; they succeeded in balancing this important civil liberty with the recognized need for public safety.¹² That balance was achieved by authorizing, in explicit constitutional language, the suspension of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.”¹³ As history would later confirm, the Framers of our Constitution wisely included such a provision, foreseeing that there would be times of national emergency that would require relinquishing some civil liberties to some degree to concentrate on concerns about public safety and national security. Less than a century later, the Framers’ concerns became a reality.

B. Lincoln’s Suspension of Habeas Corpus

In April 1861, on the heels of the bombardment of Fort Sumter in Charleston Harbor by Confederate forces, Lincoln called for reinforcements to protect Washington, D.C.¹⁴ Responding to Lincoln’s call for state militias, the Sixth Massachusetts Regiment arrived in Baltimore, where riots congested the streets and rioters attempted to prevent troops from reaching Washington.¹⁵ The regiment from Massachusetts forged its way from one railroad station to another, sustaining twelve deaths with several more soldiers being wounded.¹⁶ By then, the Civil

¹¹ *Id.* at 17.

¹² *Id.*

¹³ U.S. CONST. art. I, § 9, cl. 2.

¹⁴ Proclamation Calling Militia and Convening Congress (Apr. 15, 1861), in 4 COLLECTED WORKS, *supra* note 3, at 331, 332; see Presidential Proclamation (Apr. 15, 1861), in ABRAHAM LINCOLN: A DOCUMENTARY PORTRAIT THROUGH HIS SPEECHES AND WRITINGS 160, 160–62 (Don E. Fehrenbacher ed., 1964) (responding to the fact that Confederate troops had opened fire on Fort Sumter, Lincoln called out the militia of the several states of the Union and convened a special session of Congress).

¹⁵ DANIEL FARBER, LINCOLN’S CONSTITUTION 16 (2003); *Startling from Baltimore.; The Northern Troops Mobbed and Fired Upon—The Troops Return Fire—Four Massachusetts Volunteers Killed and Several Wounded—Several of the Rioters Killed.*, N.Y. TIMES, Apr. 19, 1861, reprinted in LINCOLN IN THE TIMES: THE LIFE OF ABRAHAM LINCOLN AS ORIGINALLY REPORTED IN THE NEW YORK TIMES 110, 110–11 (David Herbert Donald & Harold Holzer eds., 2005) [hereinafter LINCOLN IN THE TIMES].

¹⁶ FARBER, *supra* note 15, at 16; *Startling from Baltimore.; The Northern Troops Mobbed and Fired Upon—The Troops Return Fire—Four Massachusetts Volunteers Killed and Several Wounded—Several of the Rioters Killed.*, *supra* note 15, at 111.

War was underway. The nation's capital was in jeopardy, given that it was bordered by Virginia, a secessionist state, and Maryland, whose threats to secede were widely known.¹⁷ Newspaper headlines loudly proclaimed the horror endured by the soldiers passing through Baltimore. Giving America a glimpse of that horror, the *New York Times* reported: "It is said there have been 12 lives lost. Several are mortally wounded. Parties of men half frantic are roaming the streets armed with guns, pistols and muskets. . . . A general state of dread prevails."¹⁸ In the days and weeks that followed, the city of Washington was virtually severed from the states of the North.¹⁹ Troops stopped arriving,²⁰ telegraph lines were slashed,²¹ and postal mail from the North reached the city only infrequently.²²

Lincoln immediately perceived the grave danger that the War would be lost if the Confederates seized the capital or caused it to be completely isolated, but he was reluctant to suspend the Great Writ.²³ Finally, prompted by the urging of his Secretary of State, William H. Seward, Lincoln, an attorney, concluded that the suspension of habeas corpus could not wait.²⁴ Although Congress was in recess, Lincoln, relying on the constitutional authorization that the Framers had perceptively included years before, issued a proclamation suspending the writ, believing that his duty to protect the Capitol and the Union required such an action.²⁵

¹⁷ See Frank J. Williams, *Abraham Lincoln and Civil Liberties: Then & Now—The Southern Rebellion & September 11*, 60 N.Y.U. ANN. SURVEY OF AM. L. 463, 466 (2004); see also MICHAEL LIND, *WHAT LINCOLN BELIEVED: THE VALUES AND CONVICTIONS OF AMERICA'S GREATEST PRESIDENT 174* (2004).

¹⁸ *Startling from Baltimore.; The Northern Troops Mobbed and Fired Upon—The Troops Return Fire—Four Massachusetts Volunteers Killed and Several Wounded—Several of the Rioters Killed.*, *supra* note 15, at 111.

¹⁹ Williams, *supra* note 17, at 466.

²⁰ See *id.*

²¹ See *Startling from Baltimore.; The Northern Troops Mobbed and Fired Upon—The Troops Return Fire—Four Massachusetts Volunteers Killed and Several Wounded—Several of the Rioters Killed.*, *supra* note 15, at 111.

²² WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 22 (1998); see Annual Message to Congress (Dec. 1, 1862), in 5 *COLLECTED WORKS*, *supra* note 3, at 518, 524.

²³ At one point, Lincoln ruminated that bombarding cities in Maryland would be a preferable alternative to suspending the writ of habeas corpus. See Letter to Winfield Scott (Apr. 25, 1861), in 4 *COLLECTED WORKS*, *supra* note 3, at 344, 344.

²⁴ See REHNQUIST, *supra* note 22, at 23.

²⁵ On April 27, 1861 Abraham Lincoln reluctantly ordered General Winfield Scott to suspend habeas corpus where necessary to avoid the overthrow of the government and to protect the nation's capital:

To The Commanding General of the Army of the United States:

Lincoln's unilateral suspension of habeas corpus between Washington and Philadelphia was instrumental in securing communication lines to the nation's capital.²⁶ The effect was to enable military commanders to arrest and "detain individuals indefinitely in areas where martial law ha[d] been imposed."²⁷ Many of those detained were individuals who attempted to halt military convoys.²⁸ Lincoln saw that immediate action and a declaration of martial law was necessary to divest civil liberties from those who were disloyal and whose overt acts against the United States threatened its survival without the rights explicit in our usual judicial process.²⁹

Nevertheless, Lincoln's actions did not go unchallenged; criticism was not lacking. Despite the urgent situation that warranted Lincoln's suspension of habeas during the Civil War, his critics bemoaned his decision as an act of civil disobedience,³⁰ and they deemed his actions illegal.³¹ Lincoln himself responded to such criticism in a message to a special session of Congress on July 4, 1861. In Lincoln's words:

The provision of the Constitution that "The privilege of the writ of habeas corpus, shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it," is equivalent to a provision—is a provision—that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety *does* require it. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is

You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of . . . [any] military line, which is now [or which shall be] used between the city of Philadelphia and the city of Washington . . . you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you, personally or through the officer in command at the point where . . . resistance occurs, are authorized to suspend that writ.
Letter to Winfield Scott, *supra* note 23, at 347.

²⁶ See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 146 (1980).

²⁷ LIND, *supra* note 17, at 174.

²⁸ See LINCOLN IN THE TIMES, *supra* note 15, at 117.

²⁹ See POSNER, *supra* note 4, at 45.

³⁰ *Id.* at 85 (describing civil disobedience as an act of a private individual who feels a "moral [obligation and] duty to disobey [a particular] positive law").

³¹ B.F. McClarren Charleston, Op-Ed., *Lincoln's Actions May Apply to Current War*, TIMES-COURIER (Charleston, Ill.), Nov. 19, 2001, available at <http://www.jg-tc.com> (click on "Archives"; click on "JG/T-C Print Archives"; enter article title in search; then follow second result).

vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.³²

Lincoln explained that his actions were not only justified, but were required of him pursuant to his oath to preserve, protect, and defend the Constitution of the United States.³³ In August 1861, Congress ratified the President's actions in all respects.³⁴

To Lincoln, there was no tolerable middle road. He was acutely aware that some citizens would sharply criticize him for suspending the Great Writ. The alternative, however, was far worse in his estimation. In Lincoln's judgment nothing would be worse than allowing the nation to succumb to Confederate forces. Even some of those who deemed Lincoln's actions unconstitutional have noted the real-world emergency with which he was faced. One commentator has noted: "Lincoln's unconstitutional acts during the Civil War show that even legality must sometimes be sacrificed for other values. We are a nation under law, but first we are a nation."³⁵

1. The Case of John Merryman

Only a month after Lincoln's proclamation, Captain Samuel Yohe, empowered by Lincoln's suspension of habeas, entered the Baltimore home of John Merryman, a discontented American who

³² Message to Congress in Special Session, *supra* note 3, at 430–31.

³³ See *id.* at 430. Lincoln's actual words were: "Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?" *Id.*; see JAMES M. MCPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR 211 (2007) (noting that Lincoln's oath imposed a larger duty that "overrode his obligation to heed a lesser specific provision in the Constitution"). The oath that every President must take before entering on the execution of that high office is explicitly set forth in Article II, Section 1 of the Constitution. It should also be recalled that the Preamble to the Constitution specifically states that "provid[ing] for the common defence" and "secur[ing] the Blessings of Liberty" are among the goals of the Constitution. U.S. CONST. pmbl.

³⁴ Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326. Although this language did not expressly ratify the President's suspension of habeas corpus, it was widely understood as having done so. See BRIAN MCGINTY, LINCOLN AND THE COURT 84 (2008).

³⁵ Richard A. Posner, The Truth About Our Liberties, *in* RIGHTS VS. PUBLIC SAFETY AFTER 9/11: AMERICA IN THE AGE OF TERRORISM 25, 27 (Amitai Etzioni & Jason H. Marsh eds., 2003).

had spoken out vigorously against President Lincoln and had actively recruited a company of Confederate soldiers.³⁶ There, he arrested Merryman for various acts of treason, including his leadership of the secessionist group that conspired to destroy and ultimately did destroy railroad bridges after the Baltimore riots.³⁷ The government believed that Merryman's decision to form an armed group to overthrow the government was an act far beyond a simple expression of dissatisfaction, which would be protected under the Constitution.

Merryman's attorney sought a writ of habeas corpus,³⁸ directing his petition to Supreme Court Chief Justice Roger Brooke Taney.³⁹ Lawyers for Merryman suspected that Chief Justice Taney would entertain the petition in Washington,⁴⁰ but because he was then assigned to the Circuit Court sitting in Maryland,⁴¹ he took up the matter in Baltimore and granted the writ.⁴² Despite Chief Justice Taney's demand to have Merryman brought before the court, the commander of the fort where Merryman was detained, George Cadwalader, respectfully refused, relying on President Lincoln's suspension of habeas

³⁶ 4 JOHN G. NICOLAY & JOHN HAY, ABRAHAM LINCOLN: A HISTORY 174 (1909); 1 JOHN T. MORSE, JR., AMERICAN STATESMAN: ABRAHAM LINCOLN 287 (1899).

³⁷ DUKER, *supra* note 26, at 147.

³⁸ *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9,487).

³⁹ Interestingly, Merryman's attorney filed the writ with Chief Justice Taney, not as a circuit judge but in his capacity as Chief Justice of the Supreme Court. Some historians believe this decision was made because Merryman's counsel sought to circumvent the circuit court, whose writs of habeas corpus had been ignored by "military commanders in another case." Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 90 n.27 (1993) (citing CARL B. SWISHER, THE TANEY PERIOD 1836-64, in 5 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 845-47 (1974)).

⁴⁰ See Arthur T. Downey, *The Conflict Between the Chief Justice and the Chief Executive: Ex parte Merryman*, 31 J. OF SUPREME CT. HIST. 262, 263 (2006).

⁴¹ Apart from their duties on the Supreme Court, it was customary at that time for Supreme Court justices to work also as circuit court justices. Each Supreme Court justice was assigned to one of the seven circuits. District court judges in the area were paired with the Supreme Court justice assigned to that circuit and would hold circuit court together. If a Supreme Court justice was unable to attend, in some instances, a district court judge would hold circuit court alone. SWISHER, *supra* note 39, at 248. Circuit justices were responsible for disposing of "applications arising in cases from state and federal courts within [that] circuit." Cynthia J. Rapp, *In Chambers Opinions by Justices of the Supreme Court*, 5 GREEN BAG 181, 182 (2002). These applications included "requests for bail, certificates of appealability, extensions of time, injunctions, . . . stays," writs of habeas corpus, and "writ[s] of error or appeal." *Id.* at 183.

⁴² *Merryman*, 17 F. Cas. at 147.

corpus.⁴³ Outraged, Chief Justice Taney authored *Ex parte Merryman*, opining that Congress alone had the power to suspend the writ of habeas corpus.⁴⁴

Although the case is published in the Federal Cases reporter and labeled as a case from the April 1861 term of the Circuit Court for the District of Maryland, the original opinion, in Chief Justice Taney's longhand, is captioned "Before the Chief Justice of the Supreme Court of the United States at Chambers."⁴⁵

Unfortunately for Chief Justice Taney, his words carried no precedential value as an in-chambers opinion.⁴⁶ Chief Justice Taney recognized this but forwarded his in-chambers opinion to President Lincoln.⁴⁷ Ironically, it was Taney who, only a month before, had administered the President's oath,⁴⁸ which the President now relied upon to justify his actions.

If one thing is certain, it is that Chief Justice Taney's opinion did not deter Lincoln. Rather, Lincoln turned to Attorney General Edward Bates for confirmation that his decision to suspend habeas corpus was within his authority.⁴⁹ Bates responded as follows:

I am clearly of opinion that, in a time like the present, when the very existence of the nation is assailed, by a great and dangerous insurrection, the President has the lawful discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity.⁵⁰

⁴³ See Downey, *supra* note 40, at 264–65.

⁴⁴ *Merryman*, 17 F. Cas. at 148. The Chief Justice pointed to the suspension clause found in Article I of the Constitution, which outlines congressional duties. U.S. CONST. art. I, § 9, cl. 2.

⁴⁵ SWISHER, *supra* note 39, at 848.

⁴⁶ Typically, a circuit justice would either grant or deny the application before him or her. "On occasion, however, a Circuit Justice [would] issue an [in-chambers] opinion explaining the reasons for his or her action." Rapp, *supra* note 41, at 182. These opinions were typically brief and were not circulated to the full court before release. *See id.*

⁴⁷ See FARBER, *supra* note 15, at 17; see also JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 12 (2006) ("Taney went out of his way to mock the president, circulating his opinion as widely as possible to embarrass the administration.").

⁴⁸ See MCGINTY, *supra* note 34, at 14.

⁴⁹ Letter to Edward Bates (May 30, 1861), in 4 COLLECTED WORKS, *supra* note 3, at 390, 390.

⁵⁰ 10 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES, ADVISING THE PRESIDENT AND HEADS OF DEPARTMENTS IN RELATION TO THEIR OFFICIAL DUTIES, AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN GOVERNMENTS AND WITH INDIAN TRIBES, AND THE PUBLIC LAWS OF THE COUNTRY 81 (J. Hubley Ashton ed., 1868).

Disregarding the in-chambers opinion of Chief Justice Taney, Lincoln boldly broadened the scope of the suspension of the writ.⁵¹ In the draft of Lincoln's report to Congress (the only extant copy of his speech of July 4, 1861⁵²), he passionately defended his position:

The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution . . . [A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?⁵³

Lincoln ardently explained that the outbreak of the Civil War made it necessary "to call out the war power of the Government; and so to resist force, employed for the destruction, by force, for its preservation."⁵⁴ Lincoln further professed that his actions, "whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them."⁵⁵

Although the Constitution is silent with respect to which branch of government is authorized to exercise the power to suspend habeas corpus, Lincoln's words reflected his own belief that he had exercised a power that required at least some cooperation and approval from Congress.⁵⁶ Whatever confusion remained regarding the legality of Lincoln's unilateral suspension of habeas corpus was quelled two years later when Congress, in addition to its previous ratification of August 6, 1861,⁵⁷ enacted legislation empowering the President to suspend the writ nationwide while rebellion continued.⁵⁸

2. The Case of Clement L. Vallandigham

On September 24, 1862, Lincoln issued a proclamation

⁵¹ Letter to Henry W. Halleck (Dec. 2, 1861), in 5 COLLECTED WORKS, *supra* note 3, at 35, 35; Proclamation Suspending Writ of Habeas Corpus (Sept. 15, 1863), in 6 COLLECTED WORKS, *supra* note 3, at 451, 451–52; Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), in 5 COLLECTED WORKS, *supra* note 3, at 436, 436–37; see FARBER, *supra* note 15, at 159.

⁵² No official copy of Lincoln's speech of July 4, 1861 has been found. The cited text is Lincoln's second proof, which contains his final revisions. Message to Congress in Special Session, *supra* note 3, at 421 n.1.

⁵³ *Id.* at 430.

⁵⁴ *Id.* at 426.

⁵⁵ *Id.* at 429.

⁵⁶ *Id.* at 431.

⁵⁷ See *supra* note 34 and accompanying text.

⁵⁸ See Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755.

declaring martial law and authorizing the use of military tribunals to try civilians within the United States who were believed to be “guilty of disloyal practice” or who “afford[ed] aid and comfort to Rebels.”⁵⁹ This was just the beginning. The following March, Lincoln appointed Major General Ambrose Burnside “as commanding general of the Department of the Ohio.”⁶⁰ After only one month in that position, Burnside issued General Order No. 38, authorizing the imposition of the death penalty for those who aided the Confederacy and who “declar[ed] sympathies for the enemy.”⁶¹

With this order as justification, military officials arrested antiwar Congressman Clement L. Vallandigham of Ohio for a public speech he delivered in Mount Vernon, lambasting President Lincoln, referring to him as a political tyrant, and calling for his overthrow.⁶² Specifically, Vallandigham was charged with having proclaimed, among other things, “that the present war was a wicked, cruel, and unnecessary war, one not waged for the preservation of the Union, but for the purpose of crushing out liberty and to erect a despotism; a war for the freedom of the blacks and the enslavement of the whites.”⁶³ Although he was a United States citizen who would ordinarily be tried for criminal offenses in the civilian court system, Vallandigham was tried before a military tribunal a day after his arrest.⁶⁴ Vallandigham, an attorney, objected that trial by a military tribunal was unconstitutional, but his protestations to the Lincoln administration fell on deaf ears.⁶⁵ The military tribunal found the Ohio Copperhead⁶⁶ in violation of General

⁵⁹ Proclamation Suspending the Writ of Habeas Corpus, *supra* note 51, at 437. Over 2,000 cases were tried by military tribunals during the Civil War and the Reconstruction Period. See LEONARD CUTLER, *THE RULE OF LAW AND THE LAW OF WAR: MILITARY COMMISSIONS AND ENEMY COMBATANTS POST 9/11*, at 4 (2005).

⁶⁰ See Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 119 (1998).

⁶¹ General Orders, No. 38, *reprinted in* BEN: PERLEY POORE, *THE LIFE AND PUBLIC SERVICES OF AMBROSE E. BURNSIDE, SOLDIER—CITIZEN—STATESMAN* 206, 207 (1882).

⁶² POORE, *supra* note 61, at 208; see REHNQUIST, *supra* note 22, at 65–66.

⁶³ *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 244 (1863).

⁶⁴ *Id.*; see Curtis, *supra* note 60, at 121.

⁶⁵ *Vallandigham*, 68 U.S. (1 Wall.) at 246.

⁶⁶ Copperheads were northern Democrats who sided with the South and opposed the Civil War. Republicans dubbed such War opponents Copperheads because of the copper liberty-head coins they wore as badges. *ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY* 498–99 (David S. Heidler & Jeanne T. Heidler eds., 2000). The term Copperhead was borrowed from the poisonous snake of the same name that lies in hiding

Order No. 38 and ordered him imprisoned until the War's end.⁶⁷ Subsequent to this sentence, Vallandigham petitioned the United States Circuit Court sitting in Cincinnati for a writ of habeas corpus, which, perhaps much to Chief Justice Taney's dismay, was denied.⁶⁸ In a final attempt, Vallandigham petitioned the United States Supreme Court for a writ of certiorari, but his petition to the Court was unsuccessful, the court ruling that it was without jurisdiction to review the military tribunal's proceedings.⁶⁹

Not surprisingly, the trial of Vallandigham by a military tribunal subjected Lincoln to yet more criticism. His critics bemoaned his decision, deeming it "a palpable violation of the . . . Constitution."⁷⁰ Lincoln insisted, however, that civilians captured away from the battlefield could lawfully be tried by a military tribunal because the whole country, in his opinion, was a war zone.⁷¹ Lincoln further defended his suspension of habeas corpus:

If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them The constitution itself makes the distinction; and I can no more be persuaded that the government can constitutionally take no strong measure in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown to not be good food for a well one.⁷²

President Lincoln, concerned about the harshness of Vallandigham's punishment and the potential criticism over Vallandigham's arrest, detention, and trial by military tribunal,

and strikes without warning. However, "Copperheads" regarded themselves as lovers of liberty, and some of them wore a lapel pin with the head of the Goddess of Liberty cut out of the large copper penny minted by the Federal treasury.

Frank J. Williams, *Abraham Lincoln and Civil Liberties in Wartime*, HERITAGE LECTURES, May 5, 2004, at 5 n.18, available at <http://www.heritage.org/research/nationalsecurity/hl834.cfm>.

⁶⁷ THE TRIAL OF HON. CLEMENT L. VALLANDIGHAM BY A MILITARY COMMISSION AND THE PROCEEDINGS UNDER HIS APPLICATION FOR A WRIT OF HABEAS CORPUS IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO 33 (1863).

⁶⁸ *Id.* at 37–39, 272.

⁶⁹ *Vallandigham*, 68 U.S. (1 Wall.) at 251.

⁷⁰ See Letter to Matthew Birchar and Others (June 29, 1863), in 6 COLLECTED WORKS, *supra* note 3, at 300, 300.

⁷¹ MCPHERSON, *supra* note 33, at 217.

⁷² Letter to Erastus Corning and Others (June 12, 1863), in 6 COLLECTED WORKS, *supra* note 3, at 260, 267.

commuted his sentence to banishment to the Confederacy.⁷³

3. The Case of Lambdin P. Milligan

In 1866, the War having ended, the Supreme Court was called upon to consider the legality of Lincoln's suspension of habeas corpus and his use of military tribunals.⁷⁴ The Supreme Court, upon which Taney no longer sat, as he had died in 1864, proceeded to conclude, as Taney had in *Ex parte Merryman*, that the President could not unilaterally suspend the writ of habeas corpus.⁷⁵

On October 5, 1864, Lambdin P. Milligan, a lawyer and Indiana citizen, had been arrested by the military commander for that military district on the basis of his belief that Milligan was plotting to overthrow the government.⁷⁶ Although Milligan was not captured on the battlefield, he was tried by a military commission and sentenced to death even though the civilian courts were functioning in Indiana.⁷⁷ Before the sentence was carried out, Milligan petitioned the Circuit Court of the United States for the District of Indiana for a writ of habeas corpus.⁷⁸ The Circuit Court certified the question to the Supreme Court, which assumed jurisdiction and issued the writ.⁷⁹

In so concluding, the Supreme Court reasoned that the suspension of habeas corpus was permissible, but that such a suspension did not apply to Milligan's case because he had not joined the Confederate forces and was captured away from the battlefield in an area where civilian courts were still operating.⁸⁰ According to the Court, Milligan was simply a person who was ideologically aligned with the Confederates and not an enemy combatant who should be tried by a military tribunal.⁸¹ Therefore, Milligan could only be properly tried in a civilian court and not by a military tribunal.⁸² This post-War, post-Taney Court also impliedly validated Chief Justice Taney's opinion in *Ex parte*

⁷³ See Curtis, *supra* note 60, at 131. The Confederacy was not happy to see Vallandigham, who made his way to Winson, Ontario, opposite Ohio, where he ran unsuccessfully for Governor of Ohio. *Id.* at 135.

⁷⁴ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6 (1866).

⁷⁵ *Id.* at 137.

⁷⁶ THE MILLIGAN CASE 36, 64 (Samuel Klaus ed., 1970).

⁷⁷ *Milligan*, 71 U.S. (4 Wall.) at 107.

⁷⁸ *Id.* at 108.

⁷⁹ *Id.* at 107–10, 132.

⁸⁰ *Id.* at 127, 131.

⁸¹ *Id.* at 131.

⁸² *Id.*

Merryman as it agreed that only Congress may authorize the suspension of habeas corpus.⁸³

Milligan did make clear, however, that the right of American citizens to seek a writ of habeas corpus may be suspended during wartime so long as those citizens have joined enemy forces or have been captured on the battlefield. Indeed, without such a ruling, “the Union could not have fought the Civil War, because the courts would have ordered President Lincoln to release thousands of Confederate POWs and spies.”⁸⁴

C. World War II Prompts Trials by Military Commission Without Habeas Corpus Protections

In accordance with the venerable maxim that “what’s past is prologue,”⁸⁵ almost a century after its decision in the *Milligan* case, the Supreme Court revisited the legality of trials by military tribunal without habeas corpus protection in the context of a different war.

This time it was President Franklin D. Roosevelt who was faced with the momentous decision of to how to try detainees at the height of World War II.⁸⁶ His order, denying enemy captives access to the United States courts and authorizing trials by military tribunals, resulted in the placement of *Ex parte Quirin*⁸⁷ on the Supreme Court’s docket; the *Quirin* case closely mirrored the issues addressed in *Milligan*.

In June 1942, several months after Congress had declared that a state of war existed between Germany and the United States, eight German saboteurs, acting for the German Reich, a belligerent enemy nation, boarded two submarines in occupied France and traveled to Long Island, New York, and Ponte Vedra Beach, Florida, respectively.⁸⁸ The German-born saboteurs were engaged in a plot to destroy war facilities in the United States.⁸⁹

⁸³ *Id.* at 137.

⁸⁴ JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 146 (2006).

⁸⁵ WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1. Shakespeare’s words are inscribed on the National Archives Building on Pennsylvania Avenue in Washington, D.C. *RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE* 245 (Suzy Platt ed., 1989).

⁸⁶ *See* LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* 43–44 (2003).

⁸⁷ 317 U.S. 1 (1942).

⁸⁸ *Id.* at 21.

⁸⁹ *Id.*

Upon the eventual capture of the enemy agents, President Roosevelt convened a secret military tribunal to try the eight men, resulting in a guilty verdict and a death sentence for each.⁹⁰ The prisoners petitioned the United States District Court for the District of Columbia for a writ of habeas corpus, which was denied.⁹¹ The prisoners then petitioned the United States Supreme Court for certiorari review of the district court's decision and additionally petitioned the Supreme Court for leave to file their petitions for habeas corpus in that Court as well.⁹² The court of appeals had not yet issued a decision when the prisoners also petitioned the United States Court of Appeals for the District of Columbia.⁹³ Before a decision was issued by the court of appeals, the prisoners again petitioned the Supreme Court for certiorari, which the Court granted.⁹⁴

The Supreme Court considered whether the detention of the petitioners by the United States was consistent with the laws and Constitution of the United States.⁹⁵ The Court explained that "military tribunals . . . are not courts in the sense of the Judiciary Article" of the Constitution.⁹⁶ Instead, the Court held that such Article I tribunals are administrative bodies within the military that are utilized to determine the guilt or innocence of declared enemies, and to subsequently pass judgment.⁹⁷

Upholding the jurisdiction of the military tribunals to hear the cases of the German saboteurs, the Court emphatically stated:

the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.⁹⁸

In so ruling, the Court went to great lengths to distinguish its holding from that rendered years before in *Milligan*.⁹⁹ The Supreme Court emphasized that the holding in *Milligan* should

⁹⁰ *Id.* at 22; see FISHER, *supra* note 86, at 43–44.

⁹¹ *Quirin*, 317 U.S. at 18.

⁹² *Id.*

⁹³ *Id.* at 19–20.

⁹⁴ *Id.*

⁹⁵ *Id.* at 18–19.

⁹⁶ *Id.* at 39.

⁹⁷ See *id.* at 44–45.

⁹⁸ *Id.* at 30–31.

⁹⁹ *Id.* at 45.

be limited to the facts of that case. As the *Quirin* Court noted, Milligan was a citizen of Indiana and had never been a resident of any state involved in the rebellion nor had he been an enemy combatant who would qualify as a prisoner of war.¹⁰⁰ *Quirin*, however, involved “enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in, our territory without uniform—an offense against the law of war.”¹⁰¹ Those critical distinctions allowed the Court to rule in the government’s favor.¹⁰²

Having resolved, in *Quirin*, the appropriateness of trying in the United States unlawful enemy combatants by military tribunal, the Court, in 1950, next considered the related question of whether alien prisoners seized overseas during wartime had the right to petition the courts of the United States for a writ of habeas corpus.¹⁰³

The case of *Johnson v. Eisentrager* involved one Ludwig Eisentrager, who had operated a German intelligence office in Shanghai and, with his cohorts, had contracted to aid the Japanese during World War II in return for money and food.¹⁰⁴ The spies additionally agreed, *inter alia*, to intercept American naval communications and transmit them to the Japanese forces.¹⁰⁵

In 1946, the United States military captured “Eisentrager and twenty-six other German intelligence officers . . . in China.”¹⁰⁶ The officers were tried and convicted by a United States military commission and were then imprisoned in a German prison then controlled by the United States Army.¹⁰⁷

Seeking to challenge their detention, Eisentrager and twenty other German nationals petitioned the United States District Court for the District of Columbia for a writ of habeas corpus.¹⁰⁸ The district court dismissed the petition for lack of jurisdiction, but the Court of Appeals subsequently reversed, reinstating the petition for habeas corpus and remanding the case for further proceedings.¹⁰⁹

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 46.

¹⁰² *See id.* at 48.

¹⁰³ *Johnson v. Eisentrager*, 339 U.S. 763, 765 (1950).

¹⁰⁴ CUTLER, *supra* note 59, at 37.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Eisentrager*, 339 U.S. at 765.

¹⁰⁹ *Eisentrager v. Forrestal*, 174 F.2d 961, 968 (D.C. Cir. 1949), *rev’d sub nom*

When the case finally reached the Supreme Court of the United States on the government's petition for certiorari, the high court agreed with the district court and held that the petitioners had no right to petition for a writ of habeas corpus.¹¹⁰ Finding the location of the prisoners' capture, conviction, and detention dispositive, the Supreme Court noted: "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."¹¹¹

It would be another half century before the past would become prologue yet again. In 2001, issues over the habeas corpus rights of enemy combatants, markedly similar to those that arose during the administrations of Abraham Lincoln and Franklin Roosevelt, appeared once again on the Supreme Court's docket.

II. SUSPENDING HABEAS CORPUS IN A MODERN ERA AND THE ROLE OF EXECUTIVE POWERS

A. *The Wars on Terror: Executive, Legislative, and Judicial Responses*

On September 11, 2001, a series of coordinated terrorist attacks were launched against the United States, inescapably leading to what has become an almost decade-long struggle to secure the borders of our country. In response to these attacks, President George W. Bush launched the Wars on Terror to protect United States citizens both at home and abroad.¹¹² Despite criticism from his opponents, who insisted that the country was not engaged in a "war" in the traditional meaning of the word,¹¹³ the Bush Administration proclaimed that the United States was indeed a nation at war.¹¹⁴

On September 14, 2001, President Bush officially declared a national emergency;¹¹⁵ four days later, on September 18, 2001,

Eisentrager, 339 U.S. 763.

¹¹⁰ *Eisentrager*, 339 U.S. at 791.

¹¹¹ *Id.* at 778.

¹¹² See 147 CONG. REC. S9554 (daily ed. Sept. 20, 2001) (statement of President Bush).

¹¹³ See Samantha Power, *Our War on Terror*, N.Y. TIMES, July 29, 2007, § 7, at 1, available at 2007 WLNR 26225767 (describing the Wars on Terror as metaphorical).

¹¹⁴ See YOO, *supra* note 84, at 11.

¹¹⁵ Exec. Order No. 7,463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

Congress followed suit by enacting the Authorization for Use of Military Force (AUMF), an endorsement allowing the President to act in order to prevent any future terrorist attacks against the United States.¹¹⁶ The AUMF “authorize[d] the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.”¹¹⁷ Specifically, it empowered the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹¹⁸

As Commander in Chief, the President has the responsibility of leading the nation’s military forces; the AUMF sanctioned the President’s acts and buttressed those executive powers.¹¹⁹

The next order of significance issued by President Bush was one permitting the establishment of military commissions, which would detain and try those accused of terrorist activities.¹²⁰ Rather than be tried in the traditional court system set forth in Article III of the United States Constitution, suspected terrorists would be tried in a military tribunal, a military court designed to try enemy combatants during wartime.¹²¹

Critics complained that in light of the President’s order establishing military commissions, the detainees held at Guantanamo Bay, Cuba were being denied their fundamental right to petition the federal courts for habeas corpus relief—the constitutional right to challenge their detention.¹²² At the heart of the issue was how to strike an appropriate balance between civil liberties and national security; and in the throes of the Wars on Terror, the Bush Administration took the position that securing the country’s border was of greater consequence.

During the 2003–2004 term, the Supreme Court of the United States agreed to consider three cases in which jurisdiction and authority over enemy combatants were at issue.

¹¹⁶ Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹¹⁷ *Id.*

¹¹⁸ § 2(a).

¹¹⁹ *See* § 2. The AUMF was more of a declaration of war than most administrations received and was broad enough to answer any critic. Indeed, there have been only five formal declarations of war in United States history.

¹²⁰ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

¹²¹ *Id.*

¹²² *Id.*

The Supreme Court first heard the case of *Rasul v. Bush*¹²³ brought by foreign detainees captured abroad during the hostilities between the United States and the Taliban and detained at Guantanamo Bay, Cuba. The question before the Supreme Court was “whether the habeas corpus statute [28 U.S.C. § 2241] confers a right to judicial review of the legality of executive detention of aliens.”¹²⁴ The issue turned on whether there was federal court jurisdiction over the Guantanamo Bay facility because habeas corpus relief can be invoked either: (1) by citizens of the United States (which the detainees were not); or (2) when the court has jurisdiction over the facility.¹²⁵ The Supreme Court decided that because the petitioners were being held at an American naval base, over which the United States exercises “complete jurisdiction and control,” . . . [a]liens held at the base . . . are entitled to invoke the federal courts’ authority” by filing writs of habeas corpus.¹²⁶

The Supreme Court also was presented with another case, *Rumsfeld v. Padilla*,¹²⁷ on the very same day as *Rasul v. Bush*. The petitioner was a United States citizen also detained as an enemy combatant who posed a grave threat to national security.¹²⁸ The Supreme Court determined that Jose Padilla had improperly named the Secretary of Defense as the defendant, and not his jailer (the Navy facility’s commander), and had filed his petition in the wrong jurisdiction.¹²⁹ Accordingly, the Court declined to reach the issue of whether the President had the authority to detain him.¹³⁰

In the last of this trilogy of cases, the Supreme Court of the United States heard and decided the case of *Hamdi v. Rumsfeld*.¹³¹ Unlike the petitioners in *Rasul*, Yassar Hamdi was an American citizen.¹³² He was fighting with the Taliban in Afghanistan in 2001 when his unit surrendered to the Northern Alliance, with which American forces were aligned.¹³³ He was

¹²³ 542 U.S. 466 (2004).

¹²⁴ *Id.* at 475.

¹²⁵ *See id.* at 470.

¹²⁶ *Id.* at 480–81.

¹²⁷ 542 U.S. 426 (2004).

¹²⁸ *Id.* at 430.

¹²⁹ *Id.* at 432, 451. The petitioner had been held by the Navy in Charleston, South Carolina and as such, the habeas petition should have been filed in the United States District Court for the District of South Carolina.

¹³⁰ *Id.* at 430.

¹³¹ 542 U.S. 507 (2004).

¹³² *Id.* at 510.

¹³³ *Id.*

held at a military brig in Charleston, South Carolina for two years without being formally charged.¹³⁴ In his appeal to the Supreme Court, Hamdi challenged the government's treatment of him as an "enemy combatant."¹³⁵ In a ruling that tipped the balance in favor of civil liberties, the Supreme Court held that due process requires citizens detained in the United States to be given a meaningful opportunity to contest their detention before a "neutral decisionmaker," which could be either the federal judiciary or a military tribunal, provided the latter allows him to challenge the factual basis for his detention.¹³⁶

Although the decision officially repudiated the government's suspension of certain individual rights of Hamdi, five members of the Court agreed that United States citizens could be held as enemy combatants and four Justices believed that the President had the authority to designate certain persons as enemy combatants.¹³⁷

On November 10, 2005, the Senate voted to prevent captured "enemy combatants" at Guantanamo the right to seek writs of habeas corpus.¹³⁸ In an amendment sponsored by Senator Lindsey Graham, that was passed 49–42, Guantanamo detainees, not citizens, would have one appeal to the D.C. Circuit Court of Appeals at the conclusion of the military proceeding including review thereof if the sentence were ten or more years of imprisonment or death.¹³⁹ But they would no longer have a right to the writ of habeas corpus.¹⁴⁰ On December 30, 2005, President Bush signed the Detainee Treatment Act (DTA) incorporating these provisions.¹⁴¹

Despite this seeming expansion of presidential powers, criticism of the DTA ultimately led to a challenge before the United States Supreme Court. Captured and originally detained in Afghanistan, petitioner Salim Ahmed Hamdan was transferred to the detention facility at Guantanamo Bay.¹⁴² He challenged the government's plans to try him in front of a military tribunal

¹³⁴ *Id.*

¹³⁵ *Id.* at 510, 516.

¹³⁶ *Id.* at 533, 538.

¹³⁷ *Id.* at 538, 579, 589.

¹³⁸ 151 CONG. REC. S12666–67 (daily ed. Nov. 10, 2005); see Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, tit X, 119 Stat. 2739 (codified at 42 U.S.C. § 2000dd (2006)).

¹³⁹ DTA, Pub. L. No. 109-148, tit X, sec. 1005, § 2241(e)(2)(B), 119 Stat. 2739, 2742.

¹⁴⁰ *Id.*

¹⁴¹ *See id.*

¹⁴² *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006).

instead of before a civilian court. In the 2006 case, *Hamdan v. Rumsfeld*, the United States Supreme Court ruled (5–3) that President Bush’s first attempt at establishing military commissions violated both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1946.¹⁴³ The Court held that military commissions needed to be expressly authorized by Congress and that the procedures set forth in the DTA did not serve as an adequate substitute for habeas relief.¹⁴⁴

Nevertheless, four members of the Court explicitly advised the President to reconsider his strategy and to seek authorization from Congress. “Nothing prevents the President from returning to Congress to seek the authority he believes necessary,” Justice Breyer noted in his concurring opinion, which was joined by Associate Justices Kennedy, Souter, and Ginsberg.¹⁴⁵ Beyond their suggestion to the President, these four justices also made clear that Congress had authority to revisit the issue and to ultimately grant the President the power to convene such tribunals.¹⁴⁶

Following the Supreme Court’s advice, President Bush returned to Congress to seek the necessary authorization. In light of Congress’s tendency to be sympathetic to the expansion of executive powers during the Wars on Terror, President Bush, with Congress’s authorization, signed into law the Military Commissions Act of 2006 (MCA).¹⁴⁷ The primary effect of this new legislation was to establish the jurisdiction of military tribunals.¹⁴⁸ The Act also abrogated federal court jurisdiction with respect to petitions for writs of habeas corpus filed by or on behalf of alien unlawful enemy combatants detained anywhere by the United States until after all military appeals were taken; the petition would then reach the Court of Appeals for the District of Columbia.¹⁴⁹

Unlike Congress, however, the Supreme Court of the United States was not agreeable to an expansion of executive authority. In its 2008 decision, *Boumediene v. Bush*, detainees classified as unlawful enemy combatants challenged the legality of their

¹⁴³ *Id.* at 634–35; see *No Blank Check for Bush*, BOSTON GLOBE, June 30, 2006, at A16.

¹⁴⁴ *Hamdan*, 548 U.S. at 634–35.

¹⁴⁵ *Id.* at 636 (Breyer J., concurring).

¹⁴⁶ *Id.* at 637.

¹⁴⁷ Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w (2006)).

¹⁴⁸ *Id.* sec. 3, §§ 948b(a), 948c, 948d(a), 120 Stat. at 2602, 2603.

¹⁴⁹ *Id.* sec. 3, § 950g, 120 Stat. at 2622.

detention without the right to immediately petition the federal courts for habeas relief.¹⁵⁰ Although the courts of this country had never before held that an unlawful enemy combatant captured overseas has the right to habeas corpus under the United States Constitution, in a 5–4 decision, the Supreme Court concluded that these unlawful enemy combatants had the constitutional right to habeas corpus and that despite their status as enemy combatants, could petition the Court for habeas relief.¹⁵¹

The words of the Constitution make clear that one's right to habeas corpus "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."¹⁵² According to the majority in *Boumediene*, we are not currently under "Rebellion or Invasion" and thus the great Writ cannot be disregarded.¹⁵³

In light of the high Court's ruling, Guantanamo Bay detainees are challenging their detention in front of a federal judge before being tried by a military commission, thus allowing for an examination (and second-guessing) of the grounds on which prisoners have been held. Labeled by some as "a stinging rebuke of the administration's antiterrorism policies,"¹⁵⁴ the decision made clear that the Supreme Court was putting a stop to the President's far-reaching attempts to set aside civil liberties in the name of national security.

Contradicting the President's authority, the majority opinion disagreed with the administration's view that those detained at Guantanamo were similar to prisoners of war held during World War II.¹⁵⁵ Justice Kennedy, writing for the majority, explained that unlike World War II detainees, those imprisoned at Guantanamo were not captured on a battlefield in Afghanistan, Iraq, or any other foreign country.¹⁵⁶

The *Boumediene* decision rendered the state of the MCA unknown; however, President Bush declared that the government would follow the decision of the country's highest court, yet continue to try those detained at Guantanamo by military

¹⁵⁰ 128 S. Ct. 2229, 2240 (2008).

¹⁵¹ *Id.* at 2277 ("Our decision today holds that the petitioners before us are entitled to seek the writ . . .").

¹⁵² U.S. CONST. art. I, § 9, cl. 2.

¹⁵³ *Boumediene*, 128 S. Ct. at 2275.

¹⁵⁴ John Yoo, *The Supreme Court Goes to War*, WALL ST. J., June 17, 2008, at A23.

¹⁵⁵ *Boumediene*, 128 S. Ct. at 2260–61.

¹⁵⁶ *Id.* at 2261–62.

tribunal.¹⁵⁷ The detainee first would receive an administrative procedural hearing to determine whether sufficient evidence exists to proceed to trial.¹⁵⁸ If, after the habeas hearing, the court found the evidence to be insufficient or unpersuasive, the detainee could be held for no more than an additional six months, before they would be deported to their countries of origin.¹⁵⁹ On the other hand, if the habeas hearing resulted in a finding of sufficient evidence, a trial would proceed either before a military commission or in a civilian court under the traditional criminal justice system.¹⁶⁰

A majority of the habeas hearings held in civilian courts for those detained at Guantanamo have resulted in a determination there was insufficient evidence to support their classification as unlawful enemy combatants of the United States.¹⁶¹ It was not until December 30, 2008, that a federal judge ruled, for the first time, that two Guantanamo detainees were being properly held as enemy combatants.¹⁶²

Because it has been rare for a case to pass even the habeas hearing, the ease or difficulty with which terrorism cases can be handled in the civilian court system has yet to be fully established. Yet it is the success of these trials that stands at the heart of the debate over what to do with those detained at Guantanamo. Based on the nature of the terrorism trials, trouble seems inevitable. The “facts may be unclear, some methods used by Bush administration officials to gather evidence were shadowy and perhaps tainted, and the evidence itself might be mired in the kinds of secrets that officials say could affect national security.”¹⁶³ At the heart of the controversy is how to prevent the release of highly dangerous suspects, yet at the same time manage their prosecution without revealing highly classified evidence.

In the first instance to reach trial, wherein sufficient evidence for prosecution was found during the habeas hearing, Ali Saleh Kahlah al-Marri, a sleeper *al Qaeda* agent, struck a deal with

¹⁵⁷ Yoo, *supra* note 154.

¹⁵⁸ See *The Enemy Detainee Mess*, WALL ST. J., July 3, 2008, at A10.

¹⁵⁹ *Id.*

¹⁶⁰ See John Schwartz, *Path to Justice, but Bumpy, for Terrorists*, N.Y. TIMES, May 2, 2009, at A9.

¹⁶¹ See, e.g., William Glaberson, *For 20 at Guantanamo, Court Victories Fall Short*, N.Y. TIMES, Feb. 26, 2009, at A23.

¹⁶² See William Glaberson, *Judge Agrees with Bush in Ruling on 2 Detainees' Status*, N.Y. TIMES, Dec. 31, 2008, at A15.

¹⁶³ Schwartz, *supra* note 160.

prosecutors giving him a fifteen-year sentence (half of the maximum) in lieu of standing trial in an Illinois federal court.¹⁶⁴ Although al-Marri technically received his day in court, the government's willingness to plea bargain appears, perhaps, as a suggestion that prosecution in a civilian federal court may not be the best route.

Although *Boumediene* has been praised as a triumph for civil liberties, the wisdom behind Justice Kennedy's majority opinion remains to be seen. One member of that Court, Justice Scalia, labeled the majority's opinion a "game of bait-and-switch" that will "make the war harder on us" and "almost certainly cause more Americans to be killed."¹⁶⁵ He further stated that the opinion made it clear that the handling of "enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails."¹⁶⁶ By refusing to defer to Congress and the President, the Supreme Court exerted its own power in the name of civil liberties and likely at the expense of our national security.

Lincoln noted:

In any future great national trial, compared with the men of this, we shall have as weak, and as strong; as silly and as wise; as bad and good. Let us, therefore, study the incidents of this, as philosophy to learn wisdom from, and none of them as wrongs to be revenged.¹⁶⁷

Lincoln understood the importance of history and the need for each generation to look back on the successes and failures of past generations for guidance and wisdom. Indeed, the issues with trying a person before a military tribunal are more exacerbated today than they were during Lincoln's time because of the ever-shrinking global village¹⁶⁸ in which we all live. During the Civil War, Lincoln was not concerned about the effect of his judgment about civil liberties on Britain and France, for example. But today, people are even more acutely aware of how the United

¹⁶⁴ *Id.*

¹⁶⁵ *Boumediene v. Bush*, 128 S. Ct. 2229, 2294 (2008) (Scalia, J. dissenting).

¹⁶⁶ *Id.* at 2296.

¹⁶⁷ Response to a Serenade (Nov. 10, 1864), in 8 COLLECTED WORKS, *supra* note 3, at 100, 101.

¹⁶⁸ Global village is a term first introduced by Wyndham Lewis in his book *America and Cosmic Man*; the term was later coined and popularized by Marshall McLuhan's *The Gutenberg Galaxy: The Making of Typographic Man*, where it is used to describe a historical period. See WYNDHAM LEWIS, AMERICA AND COSMIC MAN 21 (1949) (referring to the earth as "one big village"); see also MARSHALL MCLUHAN, THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN 31, 43 (1962).

States is perceived by our allies and others, especially on matters of human rights and freedom.

III. THE NEED FOR A MILITARY COURT SYSTEM IN THE WARS ON TERROR

A. Trial by Military Commission Rather than by the American Criminal Justice System is Vital to Preserving National Security

At the heart of the debate over holding detainees captive during the Wars on Terror is the need for a military court system at all. Many protest that the United States should try all suspected terrorists in the American criminal justice system and not in military courts that enforce the laws of war.¹⁶⁹ To do so, however, would in effect be an attempt to squeeze a round peg into a square hole.¹⁷⁰ The criminal justice system is not only ill-suited for such wartime trials, but its rules and procedures would likely foster rather than thwart further terrorist attacks.¹⁷¹

The policy of detaining unlawful enemy combatants at Guantanamo and trying them before a military commission is vital to the effort to prevent further terrorist attacks. Contrary to the belief of some, “detention is not a penal sanction; it is the fortune of war.”¹⁷² Indeed, detaining suspected unlawful enemy combatants serves a twofold purpose. First, in light of the Office of Homeland Security’s belief that *al Qaeda* operatives will plan other attacks, detaining those individuals who are capable of spearheading such an operation brings us one step closer to

¹⁶⁹ See, e.g., Adam Liptak, *Tribunal System, Newly Righted, Stumbles Again*, N.Y. TIMES, June 5, 2007, at A21 (quoting Steven R. Shapiro, legal director of the ACLU, who contended that “[t]he time is long overdue for all these cases to be transferred to military courts-martial or civilian courts”).

¹⁷⁰ See Thom Shanker & David Johnston, *Legislation Could be Path to Closing Guantanamo*, N.Y. TIMES, July 3, 2007, at A10. Even some opponents of the administration’s detention policies recognize that the civilian criminal justice system is ill-suited for the trial of unlawful enemy combatants. For example, Professor Neal K. Katyal of Georgetown University Law Center has acknowledged that, “it’s not realistic to think that all people can be tried in an ordinary criminal court.” *Id.* (quoting Neal Katyal).

¹⁷¹ See James Taranto, Op-Ed., *The Truth About Guantanamo*, WALL ST. J., June 26, 2007, at A15 (noting that granting constitutional protections to detainees would: (1) “endanger the lives of American civilians”; (2) “afford preferential treatment to enemy fighters who defy the rules of war”; and (3) “make a mockery of international humanitarian law”).

¹⁷² David B. Rivkin, Jr. & Lee A. Casey, Op-Ed., *The Law and War; Protecting the Innocents*, WASH. TIMES, Jan. 29, 2004, at A23.

thwarting such an imminent attack.¹⁷³ Secondly, yet equally as important, detaining suspected terrorists enables American military personnel to obtain critical information from those with knowledge of future attacks on the United States.¹⁷⁴

To achieve these ends, the laws of war, which are unlike our civilian criminal justice system in this regard, enable American military forces to attack enemies without notice and hold them captive until the end of hostilities.¹⁷⁵ While the American civilian criminal justice system would require the government to first indict suspects, arrest them without the use of excessive force, and fully Mirandize them, “[t]he right to detain enemy combatants during wartime is one of the most fundamental aspects of the customary laws of war.”¹⁷⁶ Military officials need not establish probable cause nor do they need to secure an arrest warrant from a neutral and detached magistrate in order to capture perceived enemy fighters.¹⁷⁷ Significantly, the laws of war do not require the giving of Miranda warnings when capturing an enemy, nor do they require adherence to the legal niceties of the Federal Rules of Criminal Procedure.¹⁷⁸ As Professor Ruth Wedgwood quipped: “U.S. Marines may have to burrow down an Afghan cave to smoke out the leadership of al Qaeda. It would be ludicrous to ask that they pause in the dark to pull an Afghan-language Miranda card from their kit bag. This is war, not a criminal case.”¹⁷⁹

While the laws of war are specially designed for all periods of armed conflict, they are particularly suited for the new-age warfare evidenced by the Wars on Terror. *Al Qaeda’s* suicide

¹⁷³ Brief of American Center for Law & Justice as Amicus Curiae in Support of Petitioners, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 553649; see William Glaberson, *Pentagon Study Sees Threat In Guantanamo Detainees*, N.Y. TIMES, July 26, 2007, at A16 (noting that a recent report by a terrorism study center at West Point revealed that many detainees held captive at Guantanamo during 2004 and 2005 were a proven threat to United States forces).

¹⁷⁴ Glaberson, *supra* note 173; Rivkin & Casey, *supra* note 172.

¹⁷⁵ David B. Rivkin, Jr. & Lee A. Casey, Op-Ed., *The Law and War; Are We at War?*, WASH. TIMES, Jan. 26, 2004, at A19.

¹⁷⁶ Lee A. Casey & David B. Rivkin, Jr., Op-Ed., *The Law and War; U.S. Right to Detain Combatants*, WASH. TIMES, Jan. 27, 2004, at A19.

¹⁷⁷ Military Commissions Act (MCA), 10 U.S.C. § 949a (2)(B) (2006).

¹⁷⁸ John Dean, *The Critics Are Wrong: Why President Bush’s Decision to Bring Foreign Terrorists to Justice Before Military Tribunals Should Not Offend Civil Libertarians*, FINDLAW, Nov. 23, 2001, <http://writ.news.findlaw.com/dean/20011123.html>.

¹⁷⁹ Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18.

attacks have demonstrated that many of its members have an utter disregard for their own lives, thereby lessening the deterrent value of bloodshed inflicted by opponents. In their quest to destroy our nation, information is the only precious gem that *al Qaeda* members seek desperately to shield from American view.¹⁸⁰ It is that intelligence, relating to anticipated *al Qaeda* attacks, that the United States desperately needs.¹⁸¹ Without the ability to capture enemy combatants and immediately interrogate them to obtain such intelligence, the likelihood of victory in the Wars on Terror would become substantially more remote.

Moreover, the procedural rules that are characteristic of our criminal justice system would further complicate the trial of suspected terrorists and could jeopardize our nation's security. Most notable are the rules of discovery, which mandate that the government disclose to a criminal defendant any information in its possession that can be deemed material to the accused, in addition to any potentially exculpatory evidence.¹⁸² To provide a suspected terrorist with such extensive information could be deadly. Andrew C. McCarthy, the former federal prosecutor who tried twelve suspected terrorists following the 1993 attacks on the World Trade Center, reflected upon the repercussions of trying such individuals in federal court.¹⁸³ According to McCarthy, the broader an indictment is drawn, the more information that must be disclosed.¹⁸⁴ "This is a staggering quantum of information," he wrote, "certain to illuminate not only what the government knows about terrorist organizations, but the methods and sources used by intelligence agencies in obtaining that information as well."¹⁸⁵

If anyone would know the consequences of adhering to the federal rules of discovery, it would be McCarthy, who served as a prosecutor at Omar Abdel Rahman's trial for participation in the

¹⁸⁰ See Jay Winik, *Security Comes Before Liberty*, WALL ST. J., Oct. 23, 2001, at A26 ("It is commonly agreed that our greatest breakthroughs in this war will most likely come not from military strikes or careful diplomacy -- needed and important as they both are -- but from crucial pieces of information: a lead about a terrorist cell; a confession from a captured bin Laden associate; reliable intercepts warning that a new attack is going to take place.").

¹⁸¹ Ruth Wedgwood, *Lawyers at War*, WALL ST. J., Feb. 18, 2003, at A22; see JOHN KEEGAN, *INTELLIGENCE IN WAR: KNOWLEDGE OF THE ENEMY FROM NAPOLEON TO AL-QAEDA* 316 (2003).

¹⁸² See *United States v. Bagley*, 473 U.S. 667, 676 (1985); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹⁸³ See Andrew C. McCarthy, *The Legal Challenge to the War on Terror*, 9 J. INT'L SEC. AFFAIRS 43 (2005).

¹⁸⁴ *Id.* at 48.

¹⁸⁵ *Id.*

1993 World Trade Center bombings.¹⁸⁶ McCarthy complied with the discovery rules that govern criminal trials in the federal courts and produced to the defense counsel a list of 200 possible unindicted co-conspirators.¹⁸⁷ Within days of its production in court, the list—“a sketch of American intelligence on al Qaeda”—was delivered to Osama bin Laden in Sudan.¹⁸⁸ It is believed that bin Laden, by inspecting the list and determining who was not discovered, was able to deduce how American intelligence had obtained this information.¹⁸⁹ This disclosure—a mistake, which had the potential of impeding American intelligence operations—should not occur again. At the same time, the mistake should teach us how “applying criminal justice rules to a national security problem not only provides terror organizations with precious intelligence they could never obtain on their own . . . [but] also threatens public safety by retarding inputs to our intelligence community.”¹⁹⁰

In this same vein, inherent in a military commission trial is a level of confidentiality that is absent from the criminal justice system. Our American criminal justice system recognizes the inherent value of open trials in ferreting out truth and preserving faith and trust in the judicial system.¹⁹¹ Although certainly valuable in the normal criminal trial, affording public access to the military trials of suspected terrorists could jeopardize the nation’s security.¹⁹² If classified information or the fruits of American intelligence efforts were disclosed in open court, those terrorists still at large would have the benefit of insight into our military and intelligence operations, enabling those who continue to plot against the United States to better disguise their plans and carry them to fruition.¹⁹³ For example, according to an anecdote referred to by President Bush in the 1990s, a newspaper learned that American intelligence had communicated with Osama bin Laden through his cell phone.¹⁹⁴ The President

¹⁸⁶ *Id.* at 43.

¹⁸⁷ Andrew C. McCarthy, *The Intelligence Mess: How It Happened, What to Do About It*, 117 COMMENT. 11, 16 (2004).

¹⁸⁸ YOO, *supra* note 84, at 212.

¹⁸⁹ *Id.*

¹⁹⁰ McCarthy, *supra* note 183, at 49.

¹⁹¹ See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12–13 (1986); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

¹⁹² YOO, *supra* note 84, at 212 (“In an ongoing war, the costs of openly disclosing information can be very high.”).

¹⁹³ *Id.*

¹⁹⁴ Press Release, President George W. Bush, President Bush’s News Conference (Dec. 19, 2005), <http://www.nytimes.com/2005/12/19/politics/19text->

claimed that the newspaper's publication of the fact prompted bin Laden to stop using his phone, thereby preventing United States intelligence from monitoring his activity.¹⁹⁵ Although the truth of the anecdote has since been disputed,¹⁹⁶ most notably, the story demonstrates the possible ramifications of the media's disclosing confidential intelligence data. The potential effect of such publicity on American intelligence operations is reason alone to be wary of trying detainees in the public federal court arena. While generally there is unquestionably tremendous value in public disclosure and media oversight of judicial processes, this value must be subordinated at a time when national security could be jeopardized.

Conducting the trial of detainees in open court would also pose risks to those American citizens who would be called upon for jury service. In early 2001, a jury trial commenced to prosecute *al Qaeda* terrorists for conspiring in the bombings of two American embassies in East Africa.¹⁹⁷ Despite the grave security concerns with respect to the jurors' well-being and the court's guarantee to jurors of anonymity, two years later the *New York Times* published a lengthy article replete with personal identifiers of the jurors.¹⁹⁸ Although refraining from actually naming the jurors whom the *Times* interviewed on the condition of anonymity, the article detailed nine of the jurors' professions, race, and beliefs.¹⁹⁹ Surely if *al Qaeda* operatives can surreptitiously wreak mass destruction on the United States, they, like the *New York Times*, can ascertain the identity of the male city employee from India or the female born-again Christian art therapist working in the greater New York City area.

In addition to issues involving court access, there are also significant issues with respect to the use of the rules of evidence that are otherwise available in federal court.²⁰⁰ In the typical

bush.html?_r=1&scp=29&sq=President%20Bush's%20News%20Conference&st=cse.

¹⁹⁵ *Id.*

¹⁹⁶ See, e.g., Glenn Kessler, *File the Bin Laden Phone Leak Under 'Urban Myths'*, WASH. POST, Dec. 22, 2005, at A02 (describing the anecdote as an "urban myth").

¹⁹⁷ Benjamin Weiser, *A Jury Torn and Fearful in 2001 Terrorism Trial*, N.Y. TIMES, Jan. 5, 2003, at A1.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Compare, e.g., MCA, 10 U.S.C. § 949a(b)(3)(D) (2006) (permitting "[h]earsay evidence not otherwise admissible under the rules of evidence" under certain circumstance), with FED. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court

criminal trial, numerous public policy concerns warrant the exclusion of much potential evidence, largely because our trial system does not entrust jurors with weighing the reliability of certain information.²⁰¹ The most oft-cited example of the stifling effect of these rigid rules of evidence is with respect to the admissibility of hearsay evidence. Consider, for example, if speculation is accurate that bin Laden phoned his mother shortly before the September 11th attacks to warn her that a major event was imminent.²⁰² If bin Laden's mother told a close friend about her son's telephone call, the admission of such evidence may be problematic in a federal trial against an enemy combatant.²⁰³ Military commission trials, however, obviate the problematic nature of such evidence given that the MCA empowers judges to admit that testimony which they deem reliable and probative.²⁰⁴ By contrast with civilian courts, military commissions are also staffed by military judges who are admitted to practice in federal court or before the highest court of a state,²⁰⁵ and who are better suited than lay jurors to properly weigh the evidence before them.²⁰⁶ Thus, much of the risk that would exist in a trial before a jury of laypersons is eliminated when admitting such evidence before a military commission.

In a similar vein, our federal court system is replete with protections, such as the exclusionary rule, which keeps out of court, evidence that has been unlawfully seized by police.²⁰⁷ Such a rule promotes proper adherence to police procedures that ensure the integrity of our law enforcement system.²⁰⁸ This consideration, however, is irrelevant with respect to the means by which the American military obtains evidence. It makes sense that "[t]hese rules do not apply to war, because courtroom outcomes do not 'regulate' how the military does its job on the battlefield."²⁰⁹

Finally, also absent from the laws of war is the right of a criminal defendant to confront his or her accusers. The United

pursuant to statutory authority or by Act of Congress.").

²⁰¹ YOO, *supra* note 84, at 218; Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 330 (2002).

²⁰² YOO, *supra* note 84, at 218.

²⁰³ See FED. R. EVID. 801(a)-(c), 802.

²⁰⁴ 10 U.S.C. § 949a(b)(2)(E)(ii) (2006).

²⁰⁵ § 948j(b).

²⁰⁶ See YOO, *supra* note 84, at 218.

²⁰⁷ *Weeks v. United States*, 232 U.S. 383, 393 (1914).

²⁰⁸ See WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 108 (West 4th ed. 2004).

²⁰⁹ YOO, *supra* note 84, at 218.

States criminal justice system, as reflected in the Supreme Court's recent ruling in *Crawford v. Washington*,²¹⁰ affords defendants such a right, but it would be virtually impossible to afford the right of confrontation in the context of the current wartime climate. Requiring accusers to appear in court and testify live against unlawful enemy combatants would "substantially hinder military operations by removing front-line soldiers and officers from the battlefield to prepare and to offer testimony before a tribunal."²¹¹

Additionally, intelligence agents and other sources could be required to appear in court despite the fact that the government has worked for so long to conceal their identity, let alone, their existence.²¹² "Requiring these witnesses to appear in court heightens the possibility of their exposure, endangering the agent's safety and compromising this Nation's access to vital intelligence concerning the location of terrorist cells and plans for future terrorist strikes."²¹³

Admittedly, these many procedural aspects of the American criminal justice system are absent from military commission trials conducted under the laws of war. Yet under these circumstances, this is lawful. Unlawful enemy combatants are protected under Common Article 3 of Geneva III, which mandates that they be afforded "all the judicial guarantees which are recognized as indispensable by civilized peoples."²¹⁴ It in no way specifies that unlawful enemy combatants must be afforded all protections made available to American citizens under our Constitution. Rather, as Justice Stevens explained in *Hamdan*, Article 75 of the Additional Protocol to the Geneva Conventions details many of the judicial guarantees that are deemed "indispensable by civilized peoples."²¹⁵ A comparison of the MCA and these indispensable guarantees reveals that the two are strikingly similar.

Even some who are staunchly opposed to the Guantanamo military commissions agree that detainees "need not be given the

²¹⁰ 541 U.S. 36 (2004).

²¹¹ Brief of Former Attorneys General of the United States et al. as Amicus Curiae Supporting Respondents, *Hamden v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 467690, at *27-*28.

²¹² *Id.* at *28 n.14.

²¹³ *Id.*

²¹⁴ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

²¹⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006).

full panoply of criminal protections.”²¹⁶ Georgetown law professor, Neal Katyal, who represented Hamdan, has admitted that “[a] detainee may not be able to meet his lawyer right away, particularly if interrogation has just begun. A terrorist captured in Afghanistan should not be able to seek release because he was not read his Miranda rights.”²¹⁷ While Katyal would support the establishment of a national security court as a branch of the United States federal court system, there appears to be no persuasive reason for doing so.²¹⁸ The military commissions, as presently constituted, strike a proper balance between the rights of detainees and national security needs. In addition, detainees are afforded protections by all three branches of government. First, the military commissions themselves are constituted under the legislative and executive branches, which makes sense given that the laws of war operate under Articles I and II of the United States Constitution. Second, if these protections are insufficient, detainees are afforded a right of access to Article III courts. Katyal’s proposal would have little effect other than to confuse and further confound the separation of powers upon which our democracy is founded.

Importantly, in exchange for some of the protections available in the American civilian court system, the MCA otherwise affords detainees a full panoply of rights. For example, detainees who are charged with crimes are provided a copy of those charges in their native language²¹⁹ and those accused have the right to challenge commission members.²²⁰ Additionally, the MCA strictly prohibits outside influence on witnesses and trial participants.²²¹ During the trial itself an accused may represent him or herself or may be assisted by counsel.²²² Like those accused in our criminal justice system, detainees are presumed innocent until guilt is established beyond a reasonable doubt.²²³ Finally, just as would be true in a civilian court pursuant to double jeopardy principles, a detainee may not be tried a second time for the same offense.²²⁴

²¹⁶ Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19. Katyal represented Hamdan and persuaded the Supreme Court to strike down the Guantanamo tribunals. *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ MCA, 10 U.S.C. § 948s (2006).

²²⁰ § 949f(a).

²²¹ § 949b.

²²² § 949a(b)(C)–(D).

²²³ § 949l(c)(1).

²²⁴ § 949h(a).

The admissibility of hearsay evidence during a military commission trial has prompted the most debate, but it is important to note, as have some commentators, the existence of “robust safeguards,”²²⁵ that come into play when such evidence is at issue. Significantly, the parties are afforded not only the opportunity to challenge the introduction of such evidence but also the right to argue before the military judge the degree of weight that should be afforded to the evidence should it be deemed admissible.²²⁶ A corresponding right such as this is absent from the American criminal justice system, which relies on the trier of fact to make independent credibility determinations.

Finally, one would be remiss if he or she failed to recognize how much treatment of detainees has changed since September 11, 2001. The U.S. government has confirmed that inflicting physical pain and torture on detainees is simply unacceptable.²²⁷ While in the months following the terrorist attacks on our nation such methods were authorized, the government soon recognized the inhumanity of such treatment.²²⁸ Congress’s passage of the MCA finally outlawed humiliating and degrading treatment of detainees.²²⁹ The passage of the MCA makes untenable the position of those who contend that the former employment of torture on detainees justifies the Guantanamo Bay facility’s closure.

If the United States is truly committed to safeguarding the nation at this time of extreme peril, trial by military commission is not only prudent but is indeed necessary to achieve that goal. As one editorialist has noted, “By keeping terrorists out of America, Guantanamo protects Americans’ physical safety. By keeping them out of our justice system, it also protects our freedom.”²³⁰

²²⁵ Morris D. Davis, *The Guantanamo I Know*, N.Y. TIMES, June 26, 2007, at A21.

²²⁶ *Id.* (summarizing the provisions of the MCA, 10 U.S.C. § 949a(b)(2)(F)(i)–(ii)).

²²⁷ See Mark Mazzetti, *Nominee for C.I.A. Counsel Offers Few Details in His Senate Confirmation Hearing*, N.Y. TIMES, June 20, 2007, at 14 fig., available at <http://www.nytimes.com/imagepages/2007/07/21/washington/21interrogate.ready.html>.

²²⁸ See *id.*; see also Exec. Order No. 13,438, 72 Fed. Reg. 39,719 (July 17, 2007) (authorizing an order to block aid to, and freeze assets of, detainees suspected of being terrorists, in addition to orders authorizing the infliction of physical pain on detainees).

²²⁹ Mazzetti, *supra* note 227, at fig.

²³⁰ Taranto, *supra* note 171.

B. Bush Legacy

*“To his critics, Mr. Bush is a ‘King George’ bent on an ‘imperial presidency.’ But the inescapable fact is that war shifts power to the branch most responsible for its waging: the executive.”*²³¹

Unlike the 1860s, the United States exists in a different global village²³² today. Yet the parallels between President Lincoln’s suspension of habeas corpus during the Civil War and President Bush’s expansion of executive power to try suspected terrorists in military tribunals before affording them Article III review during the Wars on Terror are remarkable. What is shocking is the failure by many to put the current crisis, including war-making, in historical perspective. As always, there is much to be learned from history.²³³

Like Lincoln, President Bush refused to be a passive actor at a time when the nation’s security was jeopardized. Instead, both men acted prudently, taking the action they deemed both necessary and proper under the circumstances.²³⁴ Lincoln responded to the exigencies of war with the widespread suspension of habeas corpus. Faced with similar exigencies, Bush responded by delaying the time during which detainees, non-U.S. citizens, could seek Article III court review.

Despite the fact that the threat to national security today is at least as great as that which Lincoln encountered during the Civil War, the Bush Administration had come nowhere as close as Lincoln in affecting civil liberties afforded by the Constitution. During the Civil War under the aegis of the Lincoln Administration, there were 75,961 Union army trials.²³⁵ Of these, 5,460 were trials before military commissions, and most were

²³¹ John Yoo, Op-Ed., *How the Presidency Regained Its Balance*, N.Y. TIMES, Sept. 17, 2006, § 4, at 15, available at 2006 WLNR 16121406 .

²³² See *supra* note 168 and accompanying text.

²³³ See *What Would Abe Do?: Lincoln’s Presidency is a Lesson for Today*, SACRAMENTO BEE, Feb. 20, 2006, at B4; Charleston, *supra* note 31.

²³⁴ Mackubin Thomas Owens, *War and Peace; Lincoln and Bush on Vigilance and Responsibility*, WEEKLY STANDARD, Dec. 21, 2005, <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/5281bdmp.asp> (“The means to preserv[ing] the end of republican government are dictated by prudence, which according to Aristotle is, the virtue most characteristic of the statesman.”).

²³⁵ E-mail from Thomas P. Lowry, historian and author, to Hon. Frank J. Williams, Chief Justice, Supreme Court of RI (Dec. 8, 2005, 17:33 EST) (on file with author) (reporting his research in National Archives Record Group 153).

trials of civilian United States citizens.²³⁶ In stark comparison, the Bush Administration prosecuted only three terrorists through military commissions. Only thirteen of the remaining 240 detainees at the Guantanamo Bay detention facility have even been assigned to prosecution before military commission.²³⁷

One commentator described Lincoln as having exercised “a wide range of extraordinary powers . . . as a matter of necessity to insure the survival of the state.”²³⁸ Although it was necessary, President Lincoln’s suspension of the writ of habeas corpus was radical in comparison with provisions of the MCA, which merely supplants the right of habeas corpus with an intricate appellate review process, including eventual review by an Article III court. Indeed, every previous wartime President imposed far more Draconian security restrictions than any now contemplated without any “long-term or corrosive effect on society.”²³⁹

Despite Lincoln’s acts, the Supreme Court’s decision in *Milligan*, although ultimately ruling that Milligan had the right to habeas corpus, validates the principle that Congress may suspend the Great Writ. Although the Court concluded that the suspension did not apply to Milligan, who was not a member of the Confederate forces and was not captured on the battlefield, the decision paved the way for the suspension of habeas corpus with respect to alien enemy combatants today. Complicating the suspension clause and *Milligan*’s holding is that warfare today is markedly different from that employed during the Civil War and even in World War II. Today we are fighting a global war on multiple battlegrounds, spanning several continents that is largely driven by intelligence operations, and not lines of battle.

²³⁶ E-mail from Thomas P. Lowry, historian and author, to Hon. Frank J. Williams, Chief Justice, Supreme Court of RI (Dec. 9, 2005, 14:16 EST) (on file with author).

²³⁷ Randy James, *A Brief History of Military Commissions*, TIME, May 18, 2009, <http://www.time.com/time/nation/article/0,8599,1899131,00.html>.

²³⁸ CUTLER, *supra* note 59, at 146; see J. G. RANDALL, LINCOLN: THE LIBERAL STATESMAN 123 (1947) (“No president has carried the power of presidential edict and executive order (independently of Congress) so far as he did.”). President Lincoln’s authorization of a blockade of the South and expansion of the army were among the extraordinary steps he took to protect the Union. MCPHERSON, *supra* note 33, at 210 (noting that both actions were “apparent violation[s] of the Constitution”).

²³⁹ Winik, *supra* note 180 (noting that the Bush Administration’s restriction on liberties pales in comparison to the restrictions that occurred under Presidents John Adams, Abraham Lincoln, Woodrow Wilson, and Franklin Roosevelt); see POORE, *supra* note 61, at 210 (reprinting General Order No. 84, which carried out the Lincoln Administration’s suspension of two newspapers—the *Chicago Times* and the *New York World*—during the Civil War).

It is therefore difficult to define who, under *Milligan*, has been captured on battlefields. Further complicating the problem is the arduous task of determining who is a member of the *Taliban* or of *al Qaeda*, thereby making it difficult to define who falls within *Milligan's* category of individuals whose habeas rights can be suspended. Although these inquiries are difficult, such difficulty is by no means a reason to justify jeopardizing national security.

IV. THE FUTURE OF HABEAS CORPUS AND THE ROLE OF EXECUTIVE POWERS

On January 20, 2009, Barack Obama took the oath of office as the forty-fourth President of the United States, setting the stage for a new approach to balancing civil liberties and national security.

Our new, and current, President often invokes the words and images of Lincoln. Indeed, President Obama has many similarities to Lincoln: both lawyers from humble beginnings, later serving in the Illinois Legislature; both masters of the English language; and both who seemed, at least at first, unlikely to be successful candidates for President.

Hopefully Abraham Lincoln is more than a convenient symbol to President Obama, as our sixteenth President is today revered by both political parties. Instead, it is necessary that our forty-fourth President truly emulates Lincoln's character, his political courage, and his determination to unite the country. We can also hope that President Obama will continue to take, as his predecessor has done, effective actions against those who would do us harm.

During his presidential campaign, Mr. Obama routinely challenged the military commissions system. As he stated in August 2008, rather than rely on military commissions, "It's time to better protect the American people and our values by bringing swift and sure justice to terrorists through our courts and our Uniform Code of Military Justice."²⁴⁰ Mr. Obama's plan was based, at least in part, on the ideal that such a shift from the Bush Administration would "create a global wave of diplomatic and popular goodwill that could accelerate the transfer of some detainees to other countries."²⁴¹

True to his campaign promises, the new President, shortly

²⁴⁰ Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A01 (quoting Senator Obama).

²⁴¹ *Id.*

after taking office in January 2009, signed several executive orders which would close the detention facility at Guantanamo Bay within one year,²⁴² end the Central Intelligence Agency's worldwide network of secret rooms to imprison terror suspects, as well as the requirement that all U.S. personnel conduct interrogations "follow[ing] the noncoercive methods of the Army Field Manual."²⁴³ In addition, the President obtained a 120-day suspension of the military commissions.²⁴⁴ President Obama declared that such executive orders would send to the world the message that the "United States intends to prosecute the ongoing struggle against violence and terrorism . . . vigilantly . . . in a manner that is consistent with our values and our ideals."²⁴⁵

The President also directed that each detainee's case be reviewed to determine who could be repatriated to third-party nations or referred to an American civilian court.²⁴⁶ President Obama personally reviewed the case of Ali al-Marri, detained without charge in a military jail in South Carolina.²⁴⁷ President Lincoln, too, personally reviewed certain cases before the military commissions of the Civil War. After the Sioux uprising in Minnesota, where hundreds of white settlers were killed in 1862, the military court had sentenced 303 Sioux to death.²⁴⁸ These cases came before Lincoln to review as final judge. Yet despite great pressure to approve these verdicts, Lincoln ordered that the complete records of the trials be sent to him. Working deliberately, Lincoln reviewed each case one by one. Even though he was in the midst of administering the government during the Civil War, Lincoln carefully worked through the transcripts for a month to sort out those who were guilty of serious crimes.²⁴⁹ Ultimately, Lincoln commuted the sentences of 266 defendants,

²⁴² Exec. Order No. 13,493, 74 Fed. Reg. 4,901 (Jan. 22, 2009); Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009); Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009).

²⁴³ Scott Shane et al., *Obama Reverses Key Bush Policy, but Questions on Detainees Remain*, N.Y. TIMES, Jan. 23, 2009, at A16.

²⁴⁴ Peter Finn, *Obama Set to Revive Military Commissions; Changes Would Boost Detainee Rights*, WASH. POST, May 9, 2009, at A01.

²⁴⁵ Bobby Ghosh, *Obama Orders Gitmo Closed. Now the Hard Part*, TIME, Jan. 22, 2009, <http://www.time.com/time/nation/article/0,8599,1872158,00.html>.

²⁴⁶ Jess Bravin & Siobhan Gorman, *Obama Closes Detention Network*, WALL ST. J., Jan. 23, 2009, at A3; see Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009).

²⁴⁷ Shane et al., *supra* note 243.

²⁴⁸ DAVID HERBERT DONALD, LINCOLN 394 (1995).

²⁴⁹ *Id.* at 394.

and only thirty-eight of the original 303 were executed.²⁵⁰ Although Lincoln was criticized for this act of clemency, he responded: “I could not afford to hang men for votes.”²⁵¹

Despite President Obama’s criticism of the military commissions system, and his suspension of its use, the commissions did remain, as his Secretary of Defense stated, “very much on the table.”²⁵² Then, only a few months after he suspended such tribunals, President Obama brought them back—but not without changes. The new rules and procedures of the commissions were intended to “offer terrorism suspects greater legal protections.”²⁵³ Such protections “would block the use of evidence obtained from coercive interrogations, tighten the admissibility of hearsay testimony and allow detainees greater freedom to choose their attorneys.”²⁵⁴ Most detainees will be transferred from Guantanamo to some domestic United States prison, where they will remain until they receive a habeas corpus hearing (although those who pose the highest security risk will remain at Guantanamo to be tried by military tribunal).²⁵⁵ The President declared that these changes were “the best way to protect our country, while upholding our deeply held values.”²⁵⁶

President Obama may also consider following Lincoln’s example of employing preventative detention measures to hold members of foreign terrorist organizations before they are able to carry out attacks. During the Civil War, Lincoln detained some 13,000 citizens in northern states—not even foreign detainees—preemptively under the fear that they either would engage in or encourage acts of rebellion against the Union. He defended the detentions with his ever keen understanding of military necessity:

Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert? This is none the less injurious when effected by getting a father, or brother, or friend, into a public meeting, and there working upon his feelings, till he is persuaded to write the soldier boy, that he is fighting in a bad cause, for a wicked administration

²⁵⁰ *Id.*

²⁵¹ *Id.* at 395.

²⁵² William Glaberson, *U.S. May Revive Guantanamo Military Courts*, N.Y. TIMES, May 2, 2009, at A1.

²⁵³ Finn, *supra* note 244.

²⁵⁴ *Id.*

²⁵⁵ Elisabeth Bumiller, *1 in 7 Detainees Rejoined Jihad, Pentagon Finds*, N.Y. TIMES, May 21, 2009, at A1; James, *supra* note 237.

²⁵⁶ James, *supra* note 237.

of a contemptable government, too weak to arrest and punish him if he shall desert. I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal, a great mercy.²⁵⁷

Undoubtedly, the President learned the impracticalities of trying certain terrorist suspects in civilian courts. But what President Obama seems to have realized is that certain rights enjoyed in a civilian criminal tribunal are impossible to maintain in the face of the current national security threat. In sensitive cases involving evidence secretly compiled by an intelligence agency, for example, it is imprudent to have such information aired in an open, civilian court. Justice can still be served under a different framework which protects national security interests but ensures a fair and impartial hearing. Abraham Lincoln knew of this necessity during the Civil War, as did Franklin D. Roosevelt during the Second World War. We are fortunate President Obama has himself embraced this necessity today.

Reversing his original determination to end the military commissions was an act of political courage. Surely the President, feeling the loneliness of command, knew the ire such a decision would draw—especially from his most ardent campaign supporters. One human rights advocate declared that “[b]y resurrecting this failed Bush administration idea, President Obama is backtracking dangerously on his reform agenda.”²⁵⁸ Yet as Justice Oliver Wendell Holmes wisely noted, “war opens dangers that do not exist at other times.”²⁵⁹ “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that . . . no Court could regard them as protected by any constitutional right.”²⁶⁰

CONCLUSION

*“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”*²⁶¹

²⁵⁷ Letter to Erastus Corning and Others, *supra* note 72, at 266–67.

²⁵⁸ *Anger at Obama Guantanamo Ruling*, BBC NEWS, May 15, 2009, <http://news.bbc.co.uk/2/hi/americas/8052999.stm>.

²⁵⁹ *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

²⁶⁰ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J., majority opinion).

²⁶¹ U.S. CONST. art. II, § 1, cl. 8 (prescribing the oath to be recited by every President upon entering office).

Two hundred and thirty-one years later the unalienable rights cherished by our founding fathers have not vanished. We are still a nation firmly committed to affording civil liberties. But in the current wartime climate, amidst the terror that has jeopardized our country and many other nations, we have increased our commitment to national security. Indeed, it has been recognized that “without a strong defense, there’s not much expectation or hope of having other freedoms.”²⁶²

Through its decision in *Boumediene*, the Supreme Court not only devalued the constitutional balance achieved by the MCA, but also struck back against President Bush’s exertion of executive war powers as endorsed by Congress through the MCA and DTA. It remains to be seen whether President Obama will respond by reasserting executive power in the name of national security. As the Wars on Terror continue without any end in sight, the primary goal of protecting and defending our country should remain a priority. While civil liberties unquestionably are of great importance to America’s viability, such liberties would be worthless without the assurances of a secure nation.

Unquestionably, a society that prizes some civil liberties more than its personal security will eventually fall, as it will be without a means of thwarting those who seek to destroy it.²⁶³ The United States government’s efforts would undoubtedly be hindered without the full, unrestricted ability to protect its citizens. We must accept temporary²⁶⁴ infringements on certain civil liberties to curb future acts of terrorism on our soil.²⁶⁵ Our nation’s survival depends on it. In the words of Supreme Court Justice Robert H. Jackson, the Constitution is not a “suicide pact.”²⁶⁶

²⁶² Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House’s War on Terror*, NEW YORKER, July 3, 2006, at 44.

²⁶³ *See id.*

²⁶⁴ These infringements are, in fact, temporary. Even during the Civil War, when Abraham Lincoln saw the end of the War in sight, he advised his generals to lighten up and restore habeas corpus. Numerous letters expressing these sentiments are reprinted in 6 COLLECTED WORKS, *supra* note 3, at 210–11, 214.

²⁶⁵ POSNER, *supra* note 4, at 90. Posner makes the comparison between the infringement on civil liberties and the Fourth Amendment search and seizure requirements. *Id.* at 88–91. By requiring that searches be based on probable cause, which was an “invention of the Supreme Court,” the Fourth Amendment ensures protection from “unreasonable searches and seizures.” *Id.* at 88. This is, of course, analogous to the balance between an individual’s need for privacy and the public’s need for security. *Id.* at 90–91.

²⁶⁶ *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

