

The Detention and Treatment of Aliens Three Years After September 11: A New New World?

Charles D. Weisselberg*

TABLE OF CONTENTS

INTRODUCTION.....	816
I. THE (NOT SO VERY) OLD WORLD.....	817
II. THE OLD NEW WORLD.....	824
A. <i>The Executive Branch: Investigation and Detention</i>	825
B. <i>The Legislative Branch: USA PATRIOT Act</i>	830
C. <i>The Courts: Media Access, Kim, and M.K.B.</i>	831
III. THE NEW NEW WORLD.....	836
A. <i>Guantánamo Bay</i>	836
B. <i>José Padilla and Yaser Esam Hamdi</i>	838
C. <i>Interrogation</i>	841
D. <i>Abu Ghraib and the Politics of War and Torture</i>	847
E. <i>The Rulings</i>	854
F. <i>A New New World?</i>	856
CONCLUSION.....	857

* Professor of Law and Director, Center for Clinical Education, University of California School of Law (Boalt Hall). I am grateful to Mary Dudziak, Philip Frickey, Ginny Irving, Michael Levy, Kristen Madigan, and Kathleen Vanden Heuvel for their advice and assistance, and to participants at the U.C. Davis Law Review Symposium for their comments. I would like to extend special thanks to Eric Hing and the editors and staff of the U.C. Davis Law Review for their outstanding editorial suggestions.

INTRODUCTION

When the editors of the *U.C. Davis Law Review* asked me to write about immigration detention for this symposium, the Supreme Court's 2003 Term had not yet begun. Written then, an article addressing the detention of noncitizens after September 11, 2001 might well have focused on the Bush Administration's recent policies and practices, with nods to the USA PATRIOT Act¹ and several Supreme Court decisions before and after September 11, such as *Zadvydas v. Davis*² and *Demore v. Kim*.³

Spring 2004 changed all that, however. It brought a rush of events that influenced policymakers (and perhaps justices), as well as several crucial end-of-Term Supreme Court decisions. First came revelations about the treatment of detainees at Abu Ghraib prison.⁴ A series of leaked Bush Administration memoranda soon followed, discussing the confinement, interrogation, and treatment of alleged enemy combatants.⁵ Then, on June 28, the Court issued *Rasul v. Bush*,⁶ ensuring federal court jurisdiction to review the detentions of alleged noncitizen combatants at Guantánamo Bay, Cuba. The Court simultaneously rejected the Administration's assertion of unreviewable executive power to detain alleged citizen combatants in *Hamdi v. Rumsfeld*.⁷ If September 11 ushered in a "new world" for the detention of noncitizens and their treatment while detained, perhaps these events have brought us into a "new new world."

The focus of this piece is immigration detention and the waxing and waning of executive power. Part I of this Article provides a brief review of immigration detention during the last century. It identifies some of the broad, recurrent themes of immigration law and executive authority. In Part II, I turn to the first few years after September 11, and the response to those events by our three branches of government. As I explain, the executive aggressively employed the immigration laws to

¹ See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 350 (2001) (codified in relevant part at 8 U.S.C. § 1226(a) (2001)).

² 533 U.S. 678 (2004).

³ 538 U.S. 510 (2003).

⁴ See *infra* notes 170-80 and accompanying text.

⁵ See *infra* notes 181-94 and accompanying text.

⁶ 124 S. Ct. 2686 (2004).

⁷ 124 S. Ct. 2633 (2004). Because the rights of noncitizens are often defined in reference to those of citizens, cases such as *Hamdi* are directly relevant to discussions of the treatment of noncitizens. See *infra* note 129 and accompanying text.

detain noncitizens, in ways that departed from traditional uses of immigration authority. Moreover, the federal courts by and large accommodated the actions of the Bush Administration. Part III addresses the most recent events that have shaped our “new new world.” I explore the reasons for the executive’s aggressiveness in the detention cases — in particular, the need for incommunicado interrogations — as well as the impact of Abu Ghraib and the Administration’s memoranda. I conclude with *Rasul* and *Hamdi* and views about what is yet to come.

I. THE (NOT SO VERY) OLD WORLD

In the “old world” of immigration law, territorial distinctions were king. During most of the twentieth century, noncitizens were classified in one of two categories for the purposes of immigration law: those who had effected a physical “entry” into the United States and those who had not. If the United States wished to turn away an arriving alien at a real or functional border,⁸ he or she might be placed in “exclusion” proceedings. If a noncitizen had entered the United States by emigrating with permission, using a tourist visa, or even crossing the border surreptitiously, he or she might be returned to another country through the “deportation” process.⁹ The entry doctrine had real consequences, for aliens in exclusion and deportation proceedings were treated quite differently. Those in deportation proceedings received greater rights and protections, while those in exclusion proceedings only enjoyed limited process. The basic logic underlying the territorial distinction was that noncitizens at the border merely seek the privilege of entry. Those who have crossed that border, however, often have acquired a right to be here and may have developed strong ties to this country.

This territorial doctrine may have made some sense in the abstract, but practical application stretched the underlying logic beyond the breaking point. Why should noncitizens at the border who have U.S. citizen family members in this country be treated less generously than aliens who are arrested just a mile inside the United States after crossing the border without inspection? And what about the thousands of noncitizens in exclusion proceedings who are released “temporarily” into the United States? The executive has long exercised the

⁸ By functional border, I mean a place such as an international airport within the interior of the United States.

⁹ See *Landon v. Plasencia*, 459 U.S. 21, 25-27 (1982) (describing difference between exclusion and deportation).

discretionary power to release or “parole” noncitizens into the United States for humanitarian reasons.¹⁰ Release on immigration parole does not affect a person’s immigration status.¹¹ Thus, an alien in exclusion proceedings, released into the United States on parole, is technically at the border, even though he or she may actually have lived and worked in this country for many years.

As perhaps the most poignant and important recent example, thousands of Cuban citizens who came to the United States in the 1980 boatlift from Mariel, Cuba were paroled into this country. Some have been ordered “excluded,” but cannot return to Cuba because we do not have a repatriation agreement with that country.¹² Under our laws, these noncitizens are still considered to be seeking admission at the border, even though they have lived here for almost twenty-five years. For these and other reasons, the entry doctrine is often called the entry “fiction,”¹³ and its application is difficult to justify.

Another set of principles, commonly and collectively called the “plenary power” doctrine, marked immigration law in the last century. The doctrine originated in the *Chinese Exclusion Case (Chae Chan Ping v. United States)*.¹⁴ It is a rough shorthand for the idea that authority over immigration into the United States flows from sovereignty itself, particularly the need for the government to control relations with other nations. This is inherently a non-judicial function. Thus, decisions implementing the power of exclusion and expulsion often receive deferential judicial review.¹⁵

¹⁰ Parole, long an administrative practice, is codified at 8 U.S.C. § 1182(d)(5)(A) (2000).

¹¹ See 8 U.S.C. § 1182(d)(5)(A) (2004); see also *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925).

¹² For an excellent political history of the boatlift and resettlement efforts, see DAVID ENGSTROM, *PRESIDENTIAL DECISION MAKING ADRIFT: THE CARTER ADMINISTRATION AND THE MARIEL BOATLIFT* (1997). See also *Mariel Cuban Detainees: Events Preceding and Following the November 1987 Riots: Hearing Before the House Comm. on the Judiciary Subcomm. on Courts, Civil Liberties and the Admin. of Justice*, 100th Cong. 31-48 (1988) (testimony of Michael G. Kozak, Principal Deputy Legal Adviser, State Department) (describing Cuban migration and efforts at negotiating repatriation agreement); WAYNE S. SMITH, *THE CLOSEST OF ENEMIES* (1987) (former head of U.S. Interests Section in Havana, describing boatlift).

¹³ See, e.g., T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 377 (2002); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 57 (2001); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 753 n.258 (1996).

¹⁴ 130 U.S. 581 (1889).

¹⁵ For descriptions of the plenary power doctrine, see T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L L. 862, 864-69 (1989); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 379-90 (2004); Louis Henkin,

The high water mark of the entry and plenary power doctrines came in *Shaughnessy v. United States ex rel. Mezei*,¹⁶ a much-criticized 1953 Supreme Court case.¹⁷ Ignatz Mezei, a noncitizen of somewhat uncertain ancestry, had lived in the United States for twenty-five years, was married to an American citizen, and was a patriotic resident during World War II. He left the United States to visit his dying mother, and sought to return several years later, through Ellis Island.¹⁸ A few years earlier, Congress authorized the executive to promulgate restrictions on immigration during periods of war or national emergency.¹⁹ This authorization was still in place when Mezei tried to return home.²⁰ Based on confidential information, Mezei was excluded without a hearing; the Attorney General determined that disclosing the information would be prejudicial to the public interest. The exclusion had an especially pernicious consequence. Because Mezei could not establish his origin with certainty, other nations would not take him and he remained confined on Ellis Island,²¹ truly a man without a country.

The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 HARV. L. REV. 853, 854-63 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256-78; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 166-80 (1983); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632-50 (1992); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14-18 (1984); Margaret Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1128-39 (1995); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 939-51 (1995).

¹⁶ 345 U.S. 206 (1953).

¹⁷ See, e.g., Aleinikoff, *supra* note 13, at 374; Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390 (1953); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 27 (1985); Motomura, *supra* note 15, at 1642-43.

I have elsewhere traced the history of Ignatz Mezei and his battles within and without the courts. See Weisselberg, *supra* note 15, at 964-84. Seventeen months after the Supreme Court upheld Mezei's detention, the Attorney General released Mezei into the United States on immigration parole. See *id.* at 983-84; see also Richard A. Serrano, *Detained, Without Details; As the Supreme Court Considers Whether to Hear Guantanamo Bay Prisoner Petitions, Both Sides Cite a Case from the Red Scare of the 1950s*, L.A. TIMES, Nov. 1, 2003, at A1.

¹⁸ See *Mezei*, 345 U.S. at 208; *United States ex rel. Mezei v. Shaughnessy*, 101 F. Supp. 66, 67 (S.D.N.Y. 1951), *aff'd in part, rev'd in part*, 195 F.2d 964 (2d Cir. 1952), *rev'd*, 345 U.S. 206 (1953).

¹⁹ Act of June 21, 1941, Pub. L. No. 114, 55 Stat. 252 (1950). The Act and the regulations were previously upheld in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

²⁰ *Mezei*, 345 U.S. at 210.

²¹ See *id.* at 208-09.

The Supreme Court narrowly upheld Mezei's exclusion and detention. The power to exclude aliens, Justice Clark wrote for the Court, is a fundamental sovereign attribute that is "largely immune from judicial control."²² Echoing prior decisions, he wrote, "Whatever the procedure authorized by Congress is, it is due process" of law.²³ Justice Jackson wrote the leading dissent (in which he parted from the views of his law clerk, a young William H. Rehnquist).²⁴ Jackson had been the Chief United States prosecutor at the Nazi war crimes trials in Nuremberg. He compared Mezei's detention without a hearing to "protective custody" in Nazi Germany, which was a system of "summary executive detention for secret reasons."²⁵ Thus, despite allegations of threats to national security, Jackson would have afforded Mezei the right to notice of the charges and a meaningful hearing.²⁶

With respect to noncitizens in the exclusion process, *Mezei* and the entry and plenary power doctrines generally held sway for the next half-century, even when the outcome was a person's prolonged detention.²⁷ For those in deportation proceedings, however, particularly permanent residents, the results have been different.²⁸ The Supreme Court clearly established that "[a]liens receive constitutional protections when they have come within the territory of the United States and developed

²² *Id.* at 210 (citations omitted).

²³ *Id.* at 212 (quoting *Knauff*, 338 U.S. at 544); see also *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (stating that exclusion decisions of executive "are due process of law" as to "foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law.")

²⁴ For a description of Rehnquist's memorandum to Jackson, see *Weisselberg*, *supra* note 15, at 968 n.191.

²⁵ *Mezei*, 345 U.S. at 225-26 (Jackson, J., dissenting).

²⁶ See *id.* at 226-27.

²⁷ See, e.g., *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc) (upholding extended detention of excludable Mariel Cuban); *Gisbert v. United States Attorney Gen.*, 988 F.2d 1437 (5th Cir. 1993) (same); *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984) (same); *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982) (same). Permanent residents placed in exclusion proceedings have fared differently, at least so long as they have not abandoned their residence. See *Landon v. Plasencia*, 459 U.S. 21, 32-37 (1982) (returning resident alien entitled to full hearing that comports with due process); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601-03 (1953) (holding that returning resident alien who served in merchant marine could not be excluded without notice and hearing).

²⁸ See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993) ("[T]hose seeking 'admission' and trying to avoid 'exclusion' were already within our territory (or at its border), but the law treated them as though they had never entered the United States at all; they were within United States territory but not 'within the United States.' Those who had been admitted (or found their way in) but sought to avoid 'expulsion' had the added benefit of 'deportation proceedings'; they were both within United States territory and 'within the United States.'").

substantial connections with this country.”²⁹ All people within our physical borders are “persons” within the meaning of the Due Process Clause.³⁰ Thus, “the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”³¹

In 1996, Congress abandoned the statutory distinction between exclusion and deportation, with effects that are still being determined. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”)³² uses the term “inadmissible” to describe those aliens formerly deemed “excludable,” as well as those who have entered the United States illegally.³³ The administrative process used to determine a noncitizen’s right to remain in the United States is now called a “removal” proceeding.³⁴ It applies whether that person was previously lawfully admitted to the country or is “inadmissible.”³⁵ IIRIRA gives the government ninety days to execute a final order of removal.³⁶ If a removal may not be accomplished within ninety days, certain criminal and inadmissible aliens may be detained beyond the removal period.³⁷

These amendments have raised vexing questions for the executive and the courts. Congress has erased — or at least recast — much of the statutory basis for the entry fiction. To the extent that IIRIRA might permit former permanent legal residents to be treated just like first-time entrants, courts must decide whether lesser protections afforded to

²⁹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *see also* *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (“[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality.”).

³⁰ *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (“Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (stating that Fifth Amendment protections “are universal in their application, to all persons within the territorial jurisdiction” of the United States, “without regard to any differences of . . . nationality.”)

³¹ *Reno v. Flores*, 507 U.S. 292, 306 (1993).

³² Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (2003).

³³ *See* 8 U.S.C. § 1182(a)(6) (2003). The change from physical “entry” to “admission” may affect one group most of all — those aliens who have “entered without inspection.” Under the former law, someone who entered without inspection would still be deemed to have effected an entry, and would be placed in deportation proceedings. Under IIRIRA, he or she is deemed “inadmissible,” and treated similarly to those who had never achieved an entry at all. *See* Linda Bosniak, *A Basic Territorial Distinction*, 16 *GEO. IMMIGR. L.J.* 407, 408-10 (2002).

³⁴ *See* 8 U.S.C. § 1229(a) (2004).

³⁵ *See id.*

³⁶ *See* 8 U.S.C. § 1231(a)(1)(A) (2004).

³⁷ *See* 8 U.S.C. § 1231(a)(6) (2004).

former permanent residents are constitutional. Courts must also determine whether IIRIRA *increases* the protections afforded to formerly excludable aliens by putting aspects of their detention on a par with those of former residents.

One of the many significant questions raised by the statute was how long the government could detain a person beyond the ninety-day removal period. In June 2001, just months before September 11, the Supreme Court addressed the question of detention beyond the ninety-day removal period. In *Zadvydas v. Davis*,³⁸ the Court heard appeals from habeas corpus challenges to detention brought by two former permanent residents. Kestutis Zadvydas and Kim Ho Ma were ordered "removed" from the United States due to criminal convictions, but, for practical reasons, they could not be returned to their countries of origin.³⁹ The justices noted that a statute permitting indefinite detention would raise serious constitutional questions. Freedom from government custody "lies at the heart of the liberty that [the Due Process] Clause protects."⁴⁰ *Mezei* was different: Ignatz Mezei was seeking entry to the United States, while Zadvydas and Ma were already residents in this country. "This distinction between an alien who has effected an entry in the United States and one who has never entered runs throughout immigration law."⁴¹ Applying the canon of constitutional avoidance, the five-justice majority sidestepped a direct attack on *Mezei* and read a limitation into the executive's statutory detention authority. Detention beyond the removal period is not authorized by IIRIRA "once removal is no longer reasonably foreseeable."⁴²

The *Zadvydas* Court brushed aside an argument that the plenary power doctrine required deference, distinguishing between the executive's power to control immigration into the United States and its authority to imprison indefinitely those whom it cannot remove.⁴³ By characterizing the issue in these terms, the majority impliedly found that detention pending removal was, under these circumstances, so far attenuated from actual removal that it was not a core part of the power

³⁸ 533 U.S. 678 (2001).

³⁹ Zadvydas was born in a displaced persons camp in Germany to Lithuanian parents. Neither Germany nor Lithuania would accept his return. *See id.* at 684. Ma fled from Cambodia with his family when he was just two years old. He could not be removed because the United States did not have a repatriation treaty with Cambodia. *See id.* at 685-86.

⁴⁰ *See id.* at 690.

⁴¹ *Id.* at 693.

⁴² *Id.* at 699.

⁴³ *See id.* at 695-96.

to remove. And, with respect to the link between immigration and foreign affairs, which was often cited as a basis for judicial deference, the Court noted that the only foreign policy consideration at issue was a weak concern that the judiciary not interfere with the government's repatriation negotiations. Lower court judges, however, acting "with appropriate sensitivity," would be able to determine the likelihood of repatriation without adversely affecting negotiations with other countries.⁴⁴

Though it resolved one issue of statutory interpretation, *Zadvydas* raised others. The Court seemed to equate "entry" with "admission." Further, because IIRIRA treats as "removable" both inadmissible and previously admitted aliens, and the same statutory provision addresses post-removal detention of both classes, it may require similar limits on the detention of admitted and non-admitted aliens. Thus, as Justice Kennedy wrote for the four justices in dissent, under the majority's reasoning, release might be required for Mariel Cuban detainees, who have not been formally admitted for entry and who have been detained long beyond the removal period.⁴⁵ This issue subsequently split the circuits⁴⁶ and reached the Supreme Court.⁴⁷ In a recent decision, *Clark v. Martinez*, the Court resolved the question and applied the same limits to post-removal detention for both inadmissible and previously-admitted aliens.⁴⁸

In addition to *Zadvydas*, another June 2001 case must also be examined. In *INS v. St. Cyr*,⁴⁹ the Supreme Court struck down efforts to remove an important change in immigration law from the scope of judicial review. In the Anti-Terrorism and Effective Death Penalty Act of 1996

⁴⁴ See *id.* at 696.

⁴⁵ See *id.* at 716 (Kennedy, J., dissenting) ("The majority's rule is not limited to aliens once lawfully admitted. Today's result may well mandate the release of those aliens who first gained entry illegally or by fraud, and, indeed, is broad enough to require event that inadmissible and excludable aliens detained at the border be set free in our community.").

⁴⁶ Compare *Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003) (en banc), and *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002) (limiting post-removal detention of formerly "excludable" aliens), with *Sierra v. Romaine*, 347 F.3d 559 (3d Cir. 2003), *Rios v. INS*, 324 F.3d 296 (5th Cir. 2003), *Hoyte-Mesa v. Ashcroft*, 272 F.3d 989 (7th Cir. 2001), and *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003) (finding no time limitation).

⁴⁷ The Court granted petitions for writs of certiorari in two cases. See *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003), cert. granted, 124 S. Ct. 1143 (2004); *Martinez v. Ashcroft*, No. 03-35053 (9th Cir. Aug. 18, 2003), cert. granted sub nom. *Crawford v. Martinez*, 124 S. Ct. 1507 (2004). The Court consolidated the two cases for argument and decision. See *Martinez*, 124 S. Ct. at 1507.

⁴⁸ *Clark v. Martinez*, Nos. 03-878 and 03-7434, 2005 U.S. LEXIS 627, at *27 (Jan. 12, 2005). *Martinez* is discussed in greater detail in the conclusion to this Article.

⁴⁹ 533 U.S. 289 (2001).

("AEDPA")⁵⁰ and IIRIRA, Congress first narrowed and then essentially eliminated a longstanding discretionary form of administrative relief from deportation. That relief was reserved for noncitizens convicted of certain felony offenses. The government asserted that the legislation also stripped the federal courts of all jurisdiction — including habeas corpus jurisdiction — to review certain removal orders.⁵¹ The Court disagreed. Again employing the canon of constitutional avoidance, this time to duck a potential conflict with the Suspension Clause,⁵² a bare majority of the Court ruled that while the AEDPA and IIRIRA may have foreclosed some avenues of judicial review, it did not repeal federal habeas corpus jurisdiction.⁵³ The Justices reached the merits of St. Cyr's habeas corpus petition, finding that the changes in immigration law did not apply retroactively.⁵⁴

So what were the contours of the not-so-old pre-September 11 world of immigration detention and treatment? Territorial standing mattered — so much so that it largely survived a Congressional attempt to erase it. Assertions of governmental authority over immigration and foreign affairs also had great traction, and the executive was often accorded deference in acts directly linked to immigration and foreign affairs. Deference was heightened in times of war or national emergency, but within certain limits. And, whether motivated by special concern for the attendant consequences of removal or perhaps, less charitably, by a reluctance to cede any authority of the federal courts, the Supreme Court would look quite closely at a claim that Congress had stripped the Third Branch of its judicial review power.

II. THE OLD NEW WORLD

Then came September 11. In this part of the Article, I explore some of the immigration detention-related responses by the executive and legislative branches of government, and the Supreme Court's view of its own role. I defer discussions of *Hamdi*, *Padilla*, and the Guantánamo Bay cases to the next section.

⁵⁰ Pub. L. No. 104-132, § 401-443, 110 Stat. 1214 (1996).

⁵¹ The government argued that the court-stripping provisions were contained in § 401(e) of AEDPA and three sections of IIRIRA (8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C), 1252(b)(9) (Supp. V 1994)).

⁵² U.S. CONST. art. I, § 9, cl. 2.

⁵³ 533 U.S. at 314.

⁵⁴ Thus, noncitizens could still apply for discretionary relief from removal if they were convicted by guilty plea; this form of relief was available to them at the time of their pleas. *See id.* at 326.

A. *The Executive Branch: Investigation and Detention*

The first response to September 11 came from the executive. The Federal Bureau of Investigation ("FBI") launched a massive investigation into the attacks on the Pentagon and Twin Towers, called "PENTTBOM," focusing on the hijackers and those who may have aided them.⁵⁵ Within days of the attacks, investigators identified persons "of interest," and the Department of Justice ("DOJ") used any means legally available to detain people under investigation. Many individuals contacted by investigators were aliens found to be "out of immigration status," such as people who overstayed a visa. They were automatically arrested on immigration charges⁵⁶ and placed in closed proceedings. Ten days after the attacks, Chief Immigration Judge Michael J. Creppy issued a memorandum to all immigration judges and court administrators, advising them of special procedures for an undefined category of cases that were expected to require "additional security." The cases were to be separated from others on the docket, the courtroom closed to family members, visitors, and the press, and the release of information restricted. The courts could not even confirm or deny whether a case was on the docket or scheduled for a hearing.⁵⁷ At the same time, the Immigration and Naturalization Service ("INS") also amended its own regulations. The INS allowed itself an undetermined "reasonable" period of time to detain an alien pending a decision to file immigration charges "in the event of an emergency or other extraordinary circumstance."⁵⁸

It is difficult to know how many people were detained under these provisions. According to the DOJ's Inspector General, in the first eleven months following September 11, the INS held 762 aliens in custody as

⁵⁵ See OFFICE OF THE INSPECTOR GEN., DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1 (Apr. 2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> (last visited Nov. 1, 2004) ["OIG REPORT"]; William K. Rashbaum, *A Nation Challenged: The F.B.I.: From a Makeshift Base, Trying to Run a Smooth Terrorist Investigation*, N.Y. TIMES, Sept. 24, 2001, at B9; Peter Slevin, *For the FBI, a Chance at Redemption; Agency Is Under Pressure to Prove It Can Come Together Under New Leadership*, WASH. POST, Sept. 17, 2001, at A6.

⁵⁶ See OIG REPORT, *supra* note 55, at 2-14, 16.

⁵⁷ See Memorandum from Michael Creppy, to All Immigration Judges and Court Administrators 1-2 (Sept. 21, 2001), available at <http://news.findlaw.com/hdocs/docs/acu/creppy092101memo.pdf> (last visited Nov. 1, 2004).

⁵⁸ Interim Rule, 66 Fed. Reg. 48,334 (Sept. 20, 2001). The prior regulation afforded the INS twenty-four hours to determine whether to continue to keep an alien in custody and whether to charge him or her. *See id.*

part of the PENTTBOM investigation.⁵⁹ Human rights organizations put the numbers much higher, though precise figures were impossible to obtain because the government would not disclose the names of the detainees or the locations where they were held.⁶⁰ At least 611 of the detainees have been subject to the closed hearing procedures set out in Creppy's memorandum.⁶¹

Because these "September 11 detainees" were under investigation, DOJ adopted a policy of holding each of them without bond until cleared by the FBI.⁶² The clearance process was lengthy, lasting an average of eighty days from time of arrest.⁶³ As the DOJ's Inspector General later observed in a scathing report, "[f]or many detainees, this resulted in their continued detention in harsh conditions of confinement."⁶⁴ Many detainees were still awaiting clearance after receiving final orders of removal. In January 2002, the INS still had fifty-four detainees in

⁵⁹ Twenty-four aliens were already in custody at the time of the attacks, but were later detained as part of the PENTTBOM investigation. An additional 738 aliens were arrested on immigration charges between September 11, 2001 and August 6, 2002. See OIG REPORT, *supra* note 55, at 2; see also Letter from Daniel J. Bryant, Assistant Attorney General, to Honorable Carl Levin 1 (July 3, 2002), available at <http://www.immigration.com/newsletter1/752detained.pdf> (last visited Aug. 5, 2004) ["Bryant Letter"] (stating that, as of June 24, 2002, INS detained 752 individuals on immigration violations in connection with investigation into attacks).

⁶⁰ According to Human Rights First, "[C]ommunity-based organizations continue to report immigration sweeps and detentions in the Arab, South Asian and Muslim communities that suggest the numbers of those detained in this ongoing effort are much higher." DOJ Inspector General Continues to Examine Possible Abuse of Authority in Connection with Post-September 11 Detentions, available at http://www.humanrightsfirst.org/us_law/after_911/PDF/Post%209-11%20Detainees.pdf (last visited Aug. 3, 2004); see also Civil Rights Concerns in the Metropolitan Washington, D.C., Area in the Aftermath of the September 11, 2001 Tragedies: Before the District of Columbia, Maryland, and Virginia Advisory Committees to the U.S. Commission on Civil Rights, available at <http://www.usccr.gov/pubs/sac/dc0603/ch5.htm> (statement of Raj Purohit, counsel for Lawyers Committee for Human Rights) (last visited Aug. 3, 2004) (estimating more than 1100 detained in months after September 11, mostly Arab and Muslim men; government has refused to disclose identities and places of detention); Karen C. Tumlin, *Comment, Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1197 (2004) (counting 1185 September 11 detainees in first seven months, including those held on immigration violations, criminal charges and material witness warrants, but excluding those detained at Guantánamo Bay).

⁶¹ See Bryant Letter, *supra* note 59, at 1 (stating that as of May 29, 2002, 611 people have been subject to closed hearings).

⁶² As set out in the OIG Report, the policy "was not memorialized in writing" but was "clearly communicated to the INS and FBI officials in the field, who understood and applied" it. OIG REPORT, *supra* note 55, at 37. For an excellent discussion of the categorical "no bond" policy, see Margaret Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149 (2004).

⁶³ See OIG REPORT, *supra* note 55, at 52 tbl.3.

⁶⁴ *Id.* at 71.

custody awaiting clearance *after* the end of the ninety-day removal period.⁶⁵ The Inspector General later criticized his Department for “the indiscriminate and haphazard manner in which the labels of ‘high interest,’ ‘of interest,’ or ‘of undetermined interest’ were applied to many aliens who had no connection to terrorism.”⁶⁶

There was internal disagreement within the Bush Administration about the application of *Zadvydas* and the legality of such lengthy confinement. The INS General Counsel’s Office issued a legal opinion in January 2002, concluding that the Agency could detain *during* the ninety-day period as long as it is “acting with reasonable dispatch” to arrange removal. Further, while the government is free to continue a criminal investigation, “detention must be related to removal and cannot be solely for the purpose of pursuing a criminal investigation.”⁶⁷ DOJ changed its policy to allow detainees to be released without FBI clearance if they had been held beyond the removal period.⁶⁸ That did not end the matter, however. In February 2003, the Office of Legal Counsel (“OLC”) revisited the issue at the request of the Deputy Attorney General’s office, and reached a different conclusion. According to OLC, there is no duty to act with “reasonable dispatch” or any particular speed within the removal period.⁶⁹ Further, it is permissible to detain beyond the ninety-day period if the delay is “related to the administration of the immigration laws and policies of the United States,” which would include investigating “whether the alien has terrorist or criminal connections.”⁷⁰

⁶⁵ *See id.* at 100.

⁶⁶ *Id.* at 70. The Inspector General issued subsequent reports on DOJ’s responses to its earlier report and recommendations, including with respect to the labeling of detainees as “of interest,” and the mechanisms by which they were investigated and cleared. For the most recent report, see OFFICE OF THE INSPECTOR GEN., DEP’T OF JUSTICE, ANALYSIS OF THE SECOND RESPONSE BY THE DEPARTMENT OF JUSTICE TO RECOMMENDATIONS IN THE OFFICE OF THE INSPECTOR GENERAL’S JUNE 2003 REPORT ON THE TREATMENT OF SEPTEMBER 11 DETAINEES 3-27 (Jan. 2004), available at <http://www.usdoj.gov/oig/special/0401/final.pdf> (last visited Aug. 3, 2004).

⁶⁷ OIG REPORT, *supra* note 55, at 101 (quoting INS opinion).

⁶⁸ *See id.* at 102. This still did not result in their prompt release, as the INS had not begun to request travel documents and process detainees for repatriation until they were cleared, and so even lifting a hold meant just that one barrier to release had been removed. *See id.* at 104.

⁶⁹ *See* PATRICK F. PHILBIN, DEPUTY ASSISTANT ATTORNEY GEN., OFFICE OF LEGAL COUNSEL, LIMITATIONS ON THE DETENTION AUTHORITY OF THE IMMIGRATION AND NATURALIZATION SERVICE, MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GEN. 1, 10 (Feb. 20, 2003), available at <http://www.usdoj.gov/olc/2003opinions.htm> (last visited Aug. 10, 2004).

⁷⁰ *Id.* at 14, 22.

If fully adopted by the Administration, OLC's position would mark a sharp departure from the established use of the executive's immigration authority. Over a century ago, the Supreme Court ruled that immigration officials may employ "detention, or temporary confinement, as part of the means necessary to give effect to . . . the exclusion or expulsion of aliens," but immigration officials do not have the power to impose punishment.⁷¹ Thus, while detention is an accepted part of immigration power, it must be in service of immigration proceedings or removal. There is no general authority under our immigration laws to detain aliens for criminal law purposes. And noncitizens who are investigated or prosecuted for domestic criminal acts generally are afforded the same rights and privileges as citizens.⁷²

OLC's opinion was sought because the Administration detained an alien beyond the ninety-day period to investigate his possible ties with al Qaeda. As the OLC memorandum concedes, the government lacked probable cause to file criminal charges against him or even to transfer him to military custody as an alleged enemy combatant.⁷³ OLC's claim — that detention after the entry of a final removal order is legitimate because it is related to the nation's immigration laws and policies — is a transparent end-run around the protections of the criminal justice system.⁷⁴ As David Cole writes, in the wake of September 11, the

⁷¹ *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (emphasis added). The Court struck down a statute that authorized imprisonment at hard labor as part of an order of deportation. See *id.* at 237.

⁷² The Fourth Amendment does not apply extra-territorially, such as to searches of an alien's residence in another country. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990). But, an alien prosecuted within the United States is entitled, for example, to the protections of the Fifth and Sixth Amendments. See, e.g., *id.* at 265-66 (contrasting phrase "the people" in Fourth Amendment with words "person" and "accused" in Fifth and Sixth Amendments); *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979) ("[A]n alien who is within the territorial jurisdiction of this country, whether it be at the border or in the interior, in a proper case and at the proper time, is entitled to those protections guaranteed by the Fifth Amendment in criminal proceedings which would include the *Miranda* warning.").

⁷³ See PHILBIN, *supra* note 69, at 2.

⁷⁴ The memorandum contends that post-removal period detention for the purpose of investigation is part of the immigration power primarily because of the link between removal and foreign affairs. Further, "releasing criminal or terrorist aliens into another country without providing adequate warning to the . . . receiving country can have adverse consequences for the security of that country," which can affect diplomatic relations and also impact our national security. *Id.* at 13. But the link to foreign affairs has been the traditional argument for broad executive authority to admit or remove aliens, and to detain them to effectuate the admission or removal. It is the act of admission or removal — not the detention — that is usually asserted to be connected to foreign affairs. Moreover, the U.S. government's immigration authority has not historically encompassed holding foreign nationals in the United States to protect the security of the national's own home country.

Administration used immigration procedures to “avoid those constitutional rights and safeguards that accompany the criminal process but that do not apply in the immigration setting”; these include access to courts and counsel, and a prompt probable cause determination.⁷⁵

It is natural to start with the PENTTBOM detainees to explore the impact of September 11 upon the overall practice of immigration detention. But the effect of the reaction to the attacks was much broader and was felt by other populations of noncitizens, especially Arab and Muslim communities.⁷⁶ The INS detained over 200,000 aliens during fiscal year 2002 (the year ending September 30, 2002), with an average daily detention population of 20,282.⁷⁷ The United States suspended refugee admissions for two months after September 11, and later began detaining all arriving asylum-seekers from thirty-three designated countries.⁷⁸ In fall 2002, the Attorney General announced a “Special Registration” program for foreign nationals from twenty-five countries, a process that requires a meeting and interview under oath with immigration officials.⁷⁹ By June 2003, immigration officials had arrested and detained over 2,700 persons who had registered, and had begun

And the continued incarceration of aliens ordered to be removed, whose home countries are ready to accept them back, solely for reasons of U.S. public safety or national security, is a scheme of preventive detention. When this preventive detention is severed from the act of removal, it is not properly part of the executive’s immigration authority, at least not as that authority has traditionally been asserted and exercised.

⁷⁵ DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 34 (2003).

⁷⁶ See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 331-45 (2002) (describing attempts to interview approximately 5000 men, almost all of them Arab or Muslim, and waves of arrests and detentions).

⁷⁷ See U.S. DEP’T OF HOMELAND SEC., 2002 YEARBOOK OF IMMIGRATION STATISTICS at 175 (2003), available at <http://uscis.gov/graphics/shared/aboutus/statistics/yearbook2002.pdf> (last visited Aug. 2, 2004).

⁷⁸ See Donald Kerwin, *Counterterrorism and Immigrant Rights Two Years Later*, 80 INTERPRETER RELEASES 1401, 1402-03 (2003).

⁷⁹ See Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363 (Jan. 16, 2003); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,642 (Dec. 18, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,136 (Dec. 16, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,526 (Nov. 22, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 56,032 (Sept. 6, 2002). For descriptions of the program, see Tumlin, *supra* note 60, at 1187-93 and Maia Jachimowicz & Ramah McKay, U.S. in Focus: “Special Registration” Program (Apr. 1, 2003), available at <http://www.migrationinformation.org/USfocus/display.cfm?ID=116#1> (last visited Aug. 3, 2004).

removal proceedings against over 13,000 noncitizens.⁸⁰

B. *The Legislative Branch: USA PATRIOT Act*

Congress did not wait long to jump into the fray. It passed the USA PATRIOT Act, which President Bush signed into law on October 26, 2001. Section 412(a) of the Act provides for mandatory detention of suspected terrorist aliens. Under the Act, the Attorney General “shall take into custody and not release (until removal is accomplished) any alien whom the Attorney General “has reasonable grounds to believe” has violated provisions of immigration laws relating to terrorism, espionage and national security or has “engaged in any other activity that endangers the national security.”⁸¹ The Attorney General or Deputy Attorney General must personally certify that the alien meets these criteria for detention.⁸² The Act provides express statutory authority to detain for additional six-month periods beyond the ninety-day removal period if “removal is unlikely in the reasonably foreseeable future,” but only if release “will threaten the national security of the United States or the safety of the community or any person.”⁸³ The Attorney General must review his certification every six months.⁸⁴ Detention under the USA PATRIOT Act may be challenged on federal habeas corpus, though all habeas appeals must go to the District of Columbia Circuit.⁸⁵

These provisions were discussed during the debates on the USA PATRIOT Act. Senators described the procedures as a compromise to give the government critically needed authority to prevent terrorism and, at the same time, provide constitutionally-necessary safeguards against prolonged and arbitrary incarceration.⁸⁶

⁸⁰ See Kerwin, *supra* note 78, at 1404 (reporting data from meeting with Bureau of Citizenship and Immigration Services); see also Rachel L. Swarns, *Thousands of Arabs and Muslims Could Be Deported, Officials Say*, N.Y. TIMES, June 7, 2003, at A1 (reporting that more than 13,000 Arab and Muslim men who came forward under Special Registration program may face deportation).

⁸¹ 8 U.S.C. § 1226(a)(1)-(3) (2004).

⁸² See *id.* § 1226(a)(4).

⁸³ *Id.* § 1226(a)(6).

⁸⁴ See *id.* § 1226(a)(7).

⁸⁵ See *id.* § 1226(b)(3).

⁸⁶ See, e.g., 147 CONG. REC. S11004 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy) (“The [detention provision in the] bill we vote on today is further improved. . . . This improvement is essential to preserve the constitutionality of the bill. . . . Despite these improvements, this remains a major and controversial new power for the Attorney General, and I would urge him and his successors to employ great discretion in using it.”); 147 CONG. REC. S10561 (daily ed. Oct. 11, 2001) (statement of Sen. Hatch) (“In response to the concern that the INS might detain a suspected terrorist indefinitely, Senator Kennedy,

One might think that, having won new power to detain suspected terrorists based on certification by the Attorney General, this tool would be vigorously employed by the Administration. But, as of March 2003, no one was detained under its provisions.⁸⁷ Not a single one of the 762 September 11 detainees was held under the USA PATRIOT Act. The reasons would probably surprise the members of Congress who fought to limit the period of detention under the Act. Simply put, the Act — which requires the personal certification of the Attorney General or Deputy Attorney General — is more unwieldy than detention procedures under previously-existing immigration laws, particularly as those procedures were modified after September 11.⁸⁸ As the Administration explained to Congress in May 2003, many people who could have been considered for certification under the Act have been held since September 11, but “traditional administrative bond proceedings have been sufficient to detain these individuals without bond.”⁸⁹

C. *The Courts: Media Access, Kim, and M.K.B.*

And what of the judicial branch post-September 11? September 11 forced the federal courts to consider challenges to the executive’s power to detain noncitizens. Some of the cases involved assertions of governmental authority that, on September 10, would have seemed quite

Senator Kyl, and I worked out a compromise that limits the provision.”); 147 CONG. REC. S10568 (daily ed. Oct. 11, 2001) (statement of Sen. Specter) (“[I]t was necessary to analyze the bill very carefully, not do it hurriedly, and give the Attorney General of the Department of Justice what he needed, consistent with constitutional rights.”); 147 CONG. REC. S10591 (daily ed. Oct. 11, 2001) (statement of Sen. Kyl) (“This compromise represents a bipartisan understanding that the Attorney General of the United States needs the flexibility to detain suspected terrorists. . . . The underlying certification, and all collateral matters, can be reviewed by the U.S. District Court of the District of Columbia, and the Attorney General is required to report to Congress every six months on the use of this detention provision.”); 147 CONG. REC. S10592 (daily ed. Oct. 11, 2001) (statement of Sen. Feinstein) (“This legislation also contains a heavily negotiated provision regarding the detention of aliens suspected of links to terrorism without charging them. Agreement was reached to one, limit to 7 days the length of time an alien may be held before being charged with criminal or immigration violations, two, allow the Attorney General to delegate the certification power only to the INS Commissioner, and three, specify that the merits of the certification are subject to judicial review.”).

⁸⁷ See OIG REPORT, *supra* note 55, at 28 n.29 (noting that no alien had been certified under these provisions as of March 26, 2003).

⁸⁸ Margaret Taylor makes this point quite forcefully in a comparison of the USA PATRIOT Act and other immigration provisions. See Taylor, *supra* note 62, at 149-55.

⁸⁹ Attachment to Letter from Jamie E. Brown, Acting Assistant Attorney General, to Honorable John Conyers, Jr. 35 (May 13, 2003), available at <http://www.house.gov/judiciary/patriotlet051303.pdf> (last visited Sept. 23, 2004).

extraordinary. Other cases revealed a judiciary that appeared to approach its role in a different way.

A number of federal courts heard challenges by media organizations seeking access to deportation proceedings. The federal courts split in these cases, though most deferred to the executive. The Supreme Court ducked the issue.

In *Detroit Free Press v. Ashcroft*,⁹⁰ the Sixth Circuit upheld the grant of a preliminary injunction to newspaper organizations seeking access to one detainee's closed deportation hearing. The court found that the government's across-the-board policy of closing hearings violated the First Amendment.⁹¹ Most courts disagreed, however, and ruled for the government. In *North Jersey Media Group, Inc. v. Ashcroft*,⁹² a district judge had found the closure provisions in the Creppy memorandum unconstitutional and entered a nationwide temporary injunction.⁹³ The U.S. Supreme Court granted a stay pending appeal,⁹⁴ and the Third Circuit reversed the district court's order declaring the Creppy memorandum unconstitutional. The D.C. Circuit added its voice in *Center for National Security Studies v. U.S. Department of Justice*,⁹⁵ refusing to order disclosure of information about the detainees and their confinement under the Freedom of Information Act. The court's statement of deference was emphatic:

The need for deference in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore. . . . [T]he judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security. . . . We therefore reject any attempt to artificially limit the long-recognized deference to the executive on national security issues.⁹⁶

Thus, in the lower courts, deference was generally the order of the day.

Two noteworthy cases reached the U.S. Supreme Court. One was a decision on the merits; the other case was a denial of certiorari. Both revealed the justices' change in perspective.

⁹⁰ 303 F.3d 681 (6th Cir. 2002).

⁹¹ *See id.* at 692-93.

⁹² 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

⁹³ *See id.* at 204.

⁹⁴ *Ashcroft v. North Jersey Media Group, Inc.*, 536 U.S. 954 (2002) (granting stay).

⁹⁵ 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

⁹⁶ *Id.* at 928.

Demore v. Kim was a challenge to a statute⁹⁷ requiring the Attorney General to take into custody, pending removal proceedings, an alien convicted of certain criminal offenses. Kim argued that the law was unconstitutional because it did not permit him to make an individualized showing that detention was not necessary to satisfy any legitimate governmental purpose, such as assuring that he would be available for removal or protecting the community.⁹⁸ Five justices upheld the statute, including Justice O'Connor, who had sided with the majority in *Zadvydas*. Three justices would not even have reached the constitutional question. They would have held that another part of the statute, 8 U.S.C. § 1226(e), strips federal courts of jurisdiction to set aside decisions to detain aliens convicted of these felonies while removal proceedings are ongoing.⁹⁹

According to the Court, Congress' categorical requirement of detention was a reasonable response to the INS's inability to deport aliens convicted of criminal offenses.¹⁰⁰ No opportunity for an individualized showing was required. The majority characterized Congress' blunt approach as consistent with *Carlson v. Landon*,¹⁰¹ where, fifty years earlier, the Court upheld the detention of people who were deportable because of participation in Communist activities.¹⁰² In exercising its power over immigration, "Congress regularly makes rules that would be unacceptable if applied to citizens."¹⁰³ Of course, that unelaborated statement does little to address the quantum of differential treatment that is constitutionally acceptable. *Zadvydas*, the majority said, was distinguishable. The detention in *Zadvydas* was potentially indefinite. Kim's detention was for a limited time.¹⁰⁴

Justice Souter wrote the primary dissent. "The *Zadvydas* opinion," he observed, "opened by noting the clear applicability of general due process standards: physical detention requires both a 'special justification' that outweighs an individual's interests and 'adequate

⁹⁷ 8 U.S.C. § 1226(c) (2004).

⁹⁸ See *Demore v. Kim*, 538 U.S. 510, 514 (2003).

⁹⁹ See *id.* at 533 (O'Connor, J., concurring in part and dissenting in part, joined by Scalia, J. and Thomas, J.). These three justices dissented from the majority's determination of federal court jurisdiction to hear the merits. The three then joined with Chief Justice Rehnquist and Justice Kennedy on the merits question, producing a five-justice majority to uphold the statute.

¹⁰⁰ See *id.* at 528.

¹⁰¹ 342 U.S. 524 (1952).

¹⁰² See *Kim*, 538 U.S. at 523-25.

¹⁰³ *Id.* at 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)).

¹⁰⁴ See *id.* at 528.

procedural protections.”¹⁰⁵ Nowhere in *Zadvydas* did the Court suggest that the liberty interest in avoiding confinement, “even for aliens already ordered removed, was conceptually different from the liberty interests of citizens” in the Court’s leading cases on non-criminal detention,¹⁰⁶ such as *United States v. Salerno*,¹⁰⁷ *Jackson v. Indiana*,¹⁰⁸ and *Foucha v. Louisiana*.¹⁰⁹ In fact, to the extent that *Kim* concerned detention pending a determination of removal and *Zadvydas* addressed detention after the entry of a final removal order — when the individual’s right to remain in the United States had already been extinguished — *Kim* had the stronger claim to a protected interest.¹¹⁰ The dissenters also took issue with the majority’s reading of *Carlson*, saying that the detention there was not mandatory, and was thus quite different from the detention in the case at bench.¹¹¹

Kim forms a remarkable contrast with *Zadvydas*. The majority and dissenting justices in *Kim* fought over the meaning of *Carlson*, but *Carlson* surely did not determine the outcome of *Kim*. The real clash in *Kim* was over very different conceptions of the value of liberty, specifically the extent to which the justices would tolerate restrictions for resident aliens that they would not brook for citizens. One cannot read the language of liberty in *Zadvydas* and *Kim* without concluding that there was a shift in the Court in the two years after *Zadvydas* — the two years immediately after September 11. Studying *Kim*, it is difficult to imagine that *Zadvydas* and possibly even *St. Cyr* would have been decided the same way after September 11. For the Supreme Court’s treatment of immigration detention, September 11 ushered in a new world.

The second case that reached the Supreme Court reveals some of the contours of that new world. Generally, one should be wary of drawing any conclusions from a decision to deny certiorari, yet *M.K.B. v. Warden* was truly a remarkable proceeding. If little is known about it, that may be due to the fact that the lower court records were sealed, the petition for writ of certiorari substantially redacted, and the Solicitor General’s brief in opposition to certiorari filed under seal. The case became known

¹⁰⁵ *Id.* at 553 (Souter, J., dissenting) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) and *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

¹⁰⁶ *See id.*

¹⁰⁷ 481 U.S. 739 (1987) (discussing pre-trial detention under Bail Reform Act of 1984).

¹⁰⁸ 406 U.S. 715 (1972) (analyzing pre-trial detention of defendants unfit to stand trial).

¹⁰⁹ 504 U.S. 71 (1992) (discussing commitment of defendants found not guilty by reason of insanity).

¹¹⁰ *See Kim*, 538 U.S. at 554 (Souter, J., dissenting).

¹¹¹ *See id.* at 568-74.

only through a clerk's error. A reporter spotted the case in a published argument calendar of the U.S. Court of Appeals for the Eleventh Circuit, which briefly listed the case. The court quickly withdrew the calendar, and later heard oral argument in a closed courtroom.¹¹²

"M.K.B." filed his petition for a writ of certiorari in June 2003. Few facts are available through the public version of the petition. Married to a U.S. citizen, M.K.B. is a Middle Eastern man who was detained shortly after September 11. His lawyer was told by INS counsel that "'the FBI has an interest in Mr. []' and that unless the FBI closes its investigation of Mr. [], INS would object to any adjustment of status and to any request for Mr. []'s release." The Immigration Judge would not conduct a proper bond hearing. Eventually, the INS agreed to M.K.B.'s release on a nominal bond while immigration proceedings were pending, and bond was posted in March 2002.¹¹³ Press accounts provide a few additional details. They identify M.K.B. as an Algerian-born resident of Florida. He worked as a waiter at a restaurant where two of the September 11 hijackers had dined.¹¹⁴

The case originated as a habeas corpus petition challenging M.K.B.'s detention.¹¹⁵ In the Supreme Court, he argued that the two lower courts violated the First Amendment and the public's right of access to the courts by sealing the records in the district court and in the court of appeals.¹¹⁶ The Reporters Committee for Freedom of the Press filed an amicus curiae brief, and also sought to intervene with a coalition of news organizations.¹¹⁷ The Solicitor General initially waived the right to file a brief in opposition, but the Court requested one, and the brief opposing

¹¹² See Dan Christensen, *Secrecy Within; Algerian Native's Federal Appeal in Miami Has Court Altering Records, Closing Hearing in Name of Security*, MIAMI DAILY BUS. REV., Mar. 12, 2003, at A1; see also Warren Richey, *Secret 9/11 Case Before High Court; The Justices Consider a Petition for a Case with No Public Record*, CHRISTIAN SCI. MONITOR, Oct. 30, 2003, at 1 (noting unprecedented lack of record for case being reviewed by Supreme Court).

¹¹³ Redacted Petition for Writ of Certiorari at 3-7, *M.K.B. v. Warden*, 124 S. Ct. 368 (2003) (No. 03-6747), available at <http://news.findlaw.com/hdocs/docs/scotus/mkbwarden62703cpet.pdf> (last visited Aug. 5, 2004) ["Redacted Petition"]. The brackets indicate redacted information.

¹¹⁴ See Linda Greenhouse, *News Groups Seek to Open Secret Case*, N.Y. TIMES, Jan. 5, 2004, at A12; *U.S. Requests Secrecy in 9/11 Detainee's Case*, WASH. POST, Jan. 6, 2004, at A10.

¹¹⁵ See Redacted Petition, *supra* note 113, at 9.

¹¹⁶ See *id.* at 9-10.

¹¹⁷ See Brief of Amici Curiae The Reporters Committee for Freedom of the Press in Support of Petitioner, *M.K.B. v. Warden*, 124 S. Ct. 368 (2003) (No. 03-6747), available at <http://www.rcfp.org/news/documents/20031103-mkbvwarden.pdf> (last visited Aug. 5, 2004); Motion to Intervene of the Reporters Committee for Freedom of the Press, *M.K.B.* (No. 03-6747), available at <http://www.rcfp.org/news/documents/20040102-mkbvwarden.pdf> (last visited Aug. 5, 2004).

certiorari was filed under seal. The Court denied the petition and the motion to intervene on February 23, 2004.¹¹⁸

Until late spring 2004, the Supreme Court seemed prepared to uphold secret proceedings and secret detentions. In the Third Circuit's *North Jersey Media Group, Inc. v. Ashcroft*, the Supreme Court stayed the district court's injunction and denied review, despite a clear circuit split. As a result, the administrative proceedings remained shut to the public. Importantly, however, the federal court case was open for all to see. *M.K.B.*, however, took matters one step further. In *M.K.B.*, the court records were sealed and the circuit argument was closed to the public. For noncitizens in the United States, the "old new world" was a very dark, cold, and quiet place indeed.

III. THE NEW NEW WORLD

The "new new world" dawned on June 28, 2004, when the Court decided *Rasul v. Bush*, *Hamdi v. Rumsfeld*, and *Rumsfeld v. Padilla*. This part of the Article discusses the events leading up to those rulings, starting with the detentions at Guantánamo Bay, the government's approach to interrogation (which was a key reason for the Bush Administration's hard-line legal position), other events, and then the Supreme Court's holdings. As we will see, the "new new world" rejects the idea of unreviewable executive power to detain — and for good reason — but the scope of judicial review is still largely unclear.

A. Guantánamo Bay

After entering Afghanistan in October 2001, the United States took custody of thousands of individuals allegedly affiliated with al Qaeda or the Taliban. Military personnel would initially determine whether a person was an "enemy combatant," meaning a person who was part of or supported forces hostile to the United States or its coalition partners, and who engaged in an armed conflict against the United States. Military officials detained many alleged enemy combatants for several reasons, including to prevent them from continuing to fight against the United States and to gather intelligence.¹¹⁹ A significant question became where to hold them.

¹¹⁸ See 124 S. Ct. 1405 (2004).

¹¹⁹ See generally Brief for the Respondents at 4-5, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343); U.S. DEP'T OF DEF., GUANTANAMO DETAINEES 4-6, available at <http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf> (last visited Aug. 11, 2004).

The Bush Administration did not want to give the detainees access to the courts of our country. The United States considered several options to hold these detainees out of the reach of the courts, including incarcerating them at the U.S. naval base at Guantánamo Bay, Cuba. The United States has operated that naval base under a lease agreement for a century.¹²⁰ The Defense Department obtained a legal opinion from DOJ's Office of Legal Counsel. In a memorandum dated December 28, 2001, OLC concluded that "the correct answer" is that federal courts would lack jurisdiction over habeas corpus petitions filed by noncitizens at Guantánamo Bay, but that there was "some litigation risk" of an opposite result.¹²¹ Within two weeks, the Defense Department began transferring alleged enemy combatants to the naval base at Guantánamo Bay.

Several legal actions were brought to challenge the detentions. One case, *Rasul v. Bush*, was a habeas corpus petition filed in the U.S. District Court for the District of Columbia on behalf of Australian and British subjects. They had been seized in Pakistan or Afghanistan and transported to Guantánamo Bay in January 2002. The petition alleged that the U.S. military holds the petitioners "virtually incommunicado." They "have been or will be repeatedly interrogated," though they have not been charged with any crime, notified of any possible charges, brought before any military or civilian tribunal, provided with counsel or the means to contact counsel, or informed of their rights under international instruments, including the Geneva Conventions.¹²² As the petitioners later put it to the Supreme Court, they have been "held in a law-free zone."¹²³

Another case, *Al Odah v. United States*, was a civil action brought by twelve detained Kuwaiti nationals and their family members. The complaint alleged that the detainees were humanitarian aid workers in Afghanistan or Pakistan and were seized by local villagers, who turned

¹²⁰ See Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418.

¹²¹ Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Attorneys General, to William J. Haynes, II, General Counsel, Department of Defense 1 (Dec. 28, 2001), available at <http://msnbc.msn.com/id/5022681/site/newsweek> (last visited Aug. 11, 2004).

¹²² Petition for Writ of Habeas Corpus at ¶ 36, *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002) (Civ. No. 02-299), available at <http://news.findlaw.com/hdocs/docs/terrorism/rasulbush021902pet.html> (last visited Aug. 14, 2004). Another petition was filed on behalf of another Australian citizen detained at Guantánamo Bay. See Petition for Writ of Certiorari at 2 n.2, *Rasul* (No. 03-334).

¹²³ Petition for Writ of Certiorari at 12, *Rasul* (No. 03-334).

them over to U.S. authorities for money. The detainees sought notice of the charges, access to counsel, a chance to meet with their families, and "access to the courts or some other impartial tribunal."¹²⁴

The district court treated both cases as habeas corpus petitions and dismissed them for lack of jurisdiction, finding that the military base at Guantánamo Bay was outside of the sovereign territory of the United States.¹²⁵ The court of appeals affirmed.¹²⁶ On November 10, 2003, the Supreme Court consolidated the cases and granted review limited solely to the jurisdictional question.¹²⁷ A wide array of *amici* filed briefs in support of the detainees. These included former diplomats, former military officers, 175 members of both Houses of Parliament, and former prisoners of war.¹²⁸ The world was watching. The cases were set for argument on April 20, 2004.

B. José Padilla and Yaser Esam Hamdi

Concurrent with the litigation of the Guantánamo Bay cases, military officials detained two United States citizens, José Padilla and Yaser Esam Hamdi, as alleged enemy combatants. Though they are citizens and not aliens, their cases are relevant to any analysis of the executive's authority in a time of war. The power of the government with respect to aliens is frequently compared with its treatment of citizens,¹²⁹ and if the executive may detain citizens as enemy combatants with little or no meaningful judicial review, its authority will *a fortiori* extend to noncitizens. Moreover, the lower court records, particularly in *Padilla*, are intensely interesting. They afford real insight into the nature and the scope of the assertion of executive power.

Authorities arrested José Padilla on May 8, 2002 after he arrived on a flight at Chicago's O'Hare airport. The government held him on a material witness warrant issued from the Southern District of New York in connection with a grand jury investigation. Padilla went to court in

¹²⁴ *Al Odah v. United States*, 215 F. Supp. 2d 55, 58 (D.D.C. 2002) (quoting complaint).

¹²⁵ *See id.* at 65, 72-73.

¹²⁶ *See Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003). Certiorari was granted under the case's original name, but consolidated for argument and decision with *Rasul*.

¹²⁷ *See id.*

¹²⁸ The Supreme Court briefs in the cases are collected at http://www.jenner.com/news/news_item.asp?id=00001252072 (last visited Aug. 11, 2004).

¹²⁹ *See, e.g., Demore v. Kim*, 538 U.S. 510, 521-23 (2003); *Mathews v. Diaz*, 426 U.S. 67, 78-82 (1976).

New York, where counsel was appointed for him.¹³⁰ On June 9, 2002, just prior to Padilla's next court date, President Bush signed a directive addressed to the Secretary of Defense, designating Padilla as an enemy combatant and instructing the Secretary to detain him.¹³¹ Padilla was brought to a Navy brig in South Carolina. Two days later, Padilla's appointed counsel filed a habeas corpus petition in New York, challenging his confinement by the military.¹³² During litigation, the government submitted a declaration by Michael H. Mobbs, an official of the Department of Defense. Mobbs asserted that Padilla met with al Qaeda members and leaders in 2001 and planned to build and detonate a "dirty bomb" in the United States.¹³³

Yaser Esam Hamdi, an Afghani resident, was taken into custody by Northern Alliance forces in fall 2001. He was transferred to U.S. custody and brought to Guantánamo Bay in January 2002. In April, the government determined that Hamdi was a U.S. citizen and took him to the Norfolk Naval Station brig in April 2002. Like Padilla, Hamdi was classified as an "enemy combatant" and held incommunicado.¹³⁴ A habeas corpus petition was filed on his behalf while he was in Norfolk. Hamdi was later transferred to the same facility as Padilla, a naval brig in South Carolina.

In both cases, the government asserted inherent and statutory authority to hold U.S. citizens as "enemy combatants."¹³⁵ The Administration alleged that the inherent power flowed from the President's constitutional authority as Commander in Chief. The government also asserted statutory authority under the Authorization

¹³⁰ See *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715-16 (2004); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 571-72 (S.D.N.Y. 2002).

¹³¹ The directive is available at http://news.findlaw.com/hdocs/docs/padilla/padilla_bush60902det.pdf (last visited Aug. 13, 2004).

¹³² See [Petition for] Writ of Habeas Corpus, *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02 CIV. 4445), available at <http://news.findlaw.com/hdocs/docs/padilla/padillaus61102pet.pdf> (last visited Aug. 13, 2004).

¹³³ See [Unsealed] Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, *Padilla* (No. 02 CIV. 4445), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702mobbs.pdf> (last visited Aug. 13, 2004). The district court opinion notes that the government submitted sealed and unsealed versions of the declaration. *Padilla*, 233 F. Supp. 2d at 572-73.

¹³⁴ See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635-36 (2004).

¹³⁵ See, e.g., Brief for the Petitioner at 27-50, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027); Brief for the Respondent at 12-22, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696). The Solicitor General's briefs are available at <http://www.usdoj.gov/og/briefs/2003/3mer/2mer/toc3index.html> (last visited Aug. 13, 2004).

for Use of Military Force Joint Resolution (“AUMF”),¹³⁶ passed by Congress one week after September 11. The AUMF authorized 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” or harbored those organizations or persons, in order to prevent future acts of terrorism.¹³⁷ However, a different statute, passed in 1971, provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹³⁸ Assertions of inherent authority are difficult to square with this statute. If the detentions were not authorized by the AUMF, it would be difficult for the government to detain U.S. citizens as enemy combatants.

The two men fared differently in the lower courts. In *Hamdi*, the district court ruled that Hamdi’s father could file the petition on his behalf, and the judge appointed counsel.¹³⁹ The order was stayed pending appeal. The Fourth Circuit remanded, and found Hamdi’s detention proper if he was an enemy combatant captured in Afghanistan. The court required further proceedings to review Hamdi’s designation as an enemy combatant, but warned the district court that if dismissal was “not appropriate, deference to the political branches certainly [was].”¹⁴⁰ On remand to the district court, the government filed a declaration from Michael Mobbs. Mobbs alleged that Hamdi travelled to Afghanistan in summer 2001, “affiliated” with a Taliban unit, and received weapons training. He remained with his unit after September 11. Hamdi had a weapon when his unit surrendered to Northern Alliance forces. He was in the Northern Alliance prison at Mazar-e-Sharif before being handed over to U.S. forces in Kandahar.¹⁴¹ The district court found the declaration insufficient and ordered the government to produce additional documents.¹⁴² The Fourth Circuit granted a stay of that order and, on an interlocutory appeal, found that the AUMF authorized Hamdi’s detention. Further, the declaration was sufficient to justify the detention, and the district court erred by

¹³⁶ Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹³⁷ *Id.*

¹³⁸ 18 U.S.C. § 4001(a) (2004).

¹³⁹ See Order, *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002) (Civ. No. 2:02cv439), available at <http://news.findlaw.com/hdocs/docs/hamdi/hamdirums61102ord.pdf> (last visited Aug. 13, 2004).

¹⁴⁰ See *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).

¹⁴¹ See *Hamdi v. Rumsfeld*, 316 F.3d 450, 461 (4th Cir. 2003).

¹⁴² See *Hamdi*, 243 F. Supp. 2d at 528-29.

requiring further inquiry.¹⁴³

In *Padilla*, the district court found that the President had the statutory authority to order the detention of enemy combatants under the AUMF.¹⁴⁴ The judge ruled, however, that Padilla could contest his designation as an enemy combatant, and had the right to counsel in doing so.¹⁴⁵ The government sought reconsideration of the order granting access to counsel, but the district court adhered to its decision.¹⁴⁶ On an interlocutory appeal, the Second Circuit held that the President lacked both inherent and statutory authority to detain Padilla as an enemy combatant, and that Padilla should be released from military custody within thirty days.¹⁴⁷

The Supreme Court granted certiorari in *Hamdi* on January 9, 2004.¹⁴⁸ One month later, review was granted on the government's petition in *Padilla*.¹⁴⁹ The two cases were set for argument together on April 28, 2004, just one week after the Guantánamo Bay cases.

C. Interrogation

One might ask why the government was so insistent on holding Hamdi, Padilla, and the Guantánamo Bay detainees *incommunicado*. The mere fact that the government sought to interrogate and investigate them seems to be insufficient justification. The government detains many people who are under investigation for criminal charges, including those whom the authorities wish to question. The norm in our country is to afford these individuals the right to meet with counsel. So why was the government so anxious to prevent lawyers from seeing Hamdi, Padilla, and the people at Guantánamo Bay? Why did the government seek stays of and interlocutory appeals from the orders granting access to counsel? An unusually candid answer was provided by the Director of the Defense Intelligence Agency ("DIA"), Vice Admiral Lowell E. Jacoby, in a declaration submitted to the district court in *Padilla*. The declaration, which was part of the motion to reconsider the order granting Padilla access to counsel, gives real insight into the interrogation and intelligence-gathering process.

¹⁴³ See *Hamdi*, 316 F.3d at 462, 467-68, 471-76.

¹⁴⁴ See *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002).

¹⁴⁵ See *id.* at 603-05.

¹⁴⁶ See *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

¹⁴⁷ See *Padilla v. Rumsfeld*, 352 F.3d 695, 702, 724 (2d Cir. 2003).

¹⁴⁸ 124 S. Ct. 981 (2004).

¹⁴⁹ 124 S. Ct. 1353 (2004).

According to Admiral Jacoby,

Interrogation is a fundamental tool used in the gathering of intelligence. Interrogation is the art of questioning and examining a source to obtain the maximum amount of usable, reliable information in the least amount of time to meet intelligence requirements.

* * *

DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or even years, after the interrogation process began.

Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example — even if only for a limited duration or for a specific purpose — can undo months of work and may permanently shut down the interrogation process. Therefore, it is critical to minimize external influences on the interrogation process.¹⁵⁰

Admiral Jacoby emphasized the specific harm that would, in his view, result from permitting Padilla access to counsel:

As with most detainees, Padilla is unlikely to cooperate if he believes that an attorney will intercede in his detention. DIA's assessment is that Padilla is even more inclined to resist interrogation than most detainees. DIA is aware that Padilla has had extensive experience in the United States criminal justice system and had access to counsel when he was being held as a material witness. These experiences have likely heightened his expectations

¹⁵⁰ Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency 4-5, *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002), available at http://www.cnss.org/Jacoby_Declaration.pdf (last visited Aug. 13, 2004).

that counsel will assist him in the interrogation process. Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla.

* * *

Padilla has been detained without access to counsel for seven months — since the DoD took control of him on June 9, 2002. Providing him access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break — probably irrevocably — the sense of dependency and trust that the interrogators are trying to create.¹⁵¹

Admiral Jacoby's declaration sets out the psychological theory of interrogation and the reasons for Padilla's isolation. The theory he describes is the cornerstone of many types of interrogations. The same basic techniques are reflected in other intelligence documents, including a declassified CIA resource — remarkably entitled the "Human Resource Exploitation Manual - 1983" — used at the U.S. Army School of Americas to train Central American military officers in the 1980s.¹⁵² The manual has sections devoted to the physical layout of cellblocks and the interrogation room.¹⁵³ It describes the importance of developing rapport between the interrogator and the subject.¹⁵⁴ A U.S. Army field manual

¹⁵¹ *Id.* at 8.

¹⁵² See Gary Cohn et al., *Torture Was Taught by CIA; Declassified Manual Details the Methods Used in Honduras; Agency Denials Refuted*, BALTIMORE SUN, Jan. 27, 1997, at 1A (describing use of manual); see also Policy, *CIA Manual Spells out Interrogation Techniques*, L.A. TIMES, May 1, 1997, at A5.

¹⁵³ See CENT. INTELLIGENCE AGENCY, HUMAN RESOURCE EXPLOITATION MANUAL - 1983 ¶¶ E-1 to -42 (copy on file with author). The room "is the battlefield upon which the 'questioner' and the subject meet. However, the 'questioner' has the advantage in that he has total control over the subject and his environment." *Id.* ¶ E-33.

¹⁵⁴ The questioner "must achieve rapport with the subject but remain a detached observer." *Id.* ¶ H-24. A goal of the opening phase of interrogation is to establish rapport with the subject. See *id.* ¶ I-1. A 1963 CIA resource is more explicit. See CENT. INTELLIGENCE AGENCY, KUBARK MANUAL (1963), available at <http://www.ballistichelmet.org/school/kubark7.html> (last visited Mar. 12, 2004). "As a general rule, it is difficult to succeed in the CI [counterintelligence] interrogation of a resistant source unless the interrogating service can control the subject and his environment for as long as proves necessary." *Id.* § VIIB. Portions of the *Human Resource Exploitation Manual - 1983* appear to have been taken from the *Kubark Manual*. Both were obtained by reporters from the *Baltimore Sun* pursuant to a Freedom of Information Act request. See Mark Bowden, *The Dark Art of Interrogation*, ATL. MONTHLY, Oct. 2003, at 57-58. Of course, these CIA materials are dated and may not be representative of current methods. But, the cited portions of the manuals are consistent with the overall approach described by Jacoby.

advises that “[e]ach interrogation is different, but all approaches in interrogations have the following purposes in common: Establish and maintain control over the source and the interrogation. . . . Establish and maintain rapport between the interrogator and the source. . . . [and] [m]anipulate the source’s emotions and weaknesses to gain his willing cooperation.”¹⁵⁵ Another counterintelligence Army manual tells interrogators how to set up the interrogation room and cautions against techniques that break rapport with the subject.¹⁵⁶

The theory of interrogation in the Jacoby declaration is essentially the same approach applied in police stations everyday in this country, with one significant difference: domestic law enforcement agencies are usually unable to isolate a suspect for a prolonged period of time. Suspects in police custody are entitled to the familiar *Miranda* warnings, and officers are to cease questioning if a suspect invokes the right to remain silent or the right to counsel.¹⁵⁷ Moreover, under the Fourth Amendment, a person arrested by police must generally receive a judicial determination of probable cause within forty-eight hours of arrest,¹⁵⁸ and this determination is frequently combined with an appearance in court. Thus, as a practical matter, there is an outer limit to the length of custodial interrogation by domestic law enforcement agencies.¹⁵⁹

¹⁵⁵ U.S. ARMY, FIELD MANUAL 34-52 (Interrogation Process; Approach) (1987), available at <http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/chapter3.htm> (last visited Aug. 15, 2004). The 2003 report of a Defense Department working group, established by Secretary of Defense Rumsfeld, specifically cites *Field Manual 34-52* and these provisions. See WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY AND OPERATIONAL CONSIDERATIONS 53 (2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf> (last visited Aug. 15, 2004).

¹⁵⁶ See U.S. ARMY, FIELD MANUAL 34-60, D-39, D-41 (1990) (copy on file with author).

¹⁵⁷ See *Miranda v. Arizona*, 384 U.S. 436, 444, 473-74 (1966). It must be said, however, that officers do not always comply. See, e.g., *Missouri v. Seibert*, 124 S. Ct. 2601, 2606-07 (2004) (describing interrogation in which officer deliberately withheld warnings); *People v. Neal*, 31 Cal. 4th 63, 72-77 (2003) (recounting interrogation by officer who deliberately refused to honor repeated invocations of right to counsel).

¹⁵⁸ See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991) (Fourth Amendment requires prompt judicial determination of probable cause, generally satisfied by determination within 48 hours of arrest).

¹⁵⁹ Further, a statement (and its fruits) may become unusable in a criminal prosecution if secured through prolonged interrogation. In addition to *Miranda*, the admissibility of defendants’ statements in criminal trials is measured by the Due Process Clause and the voluntariness doctrine. The length of questioning is often discussed as an important factor in the “totality of circumstances” that bear on voluntariness. See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 396 (1978) (describing four-hour interrogation); *Greenwald v. Wisconsin*, 390 U.S. 519, 519-20 (1968) (describing 15 hours of intermittent interrogation); *Davis v. North*

These differences aside, police interrogation also depends upon isolating the suspect and developing a relationship with him or her. In *Miranda*, the Supreme Court reviewed interrogation training manuals and described the essential technique, which is to be alone with the suspect, “deprive him of any outside support,” and exude an “aura of confidence in his guilt [which] undermines his will to resist.”¹⁶⁰ Decades later, this remains the primary psychological approach to police interrogation. The most prominent manual in the United States promotes techniques pioneered by Fred Inbau and John Reid. It contains an entire chapter on the physical arrangement of the interrogation room, all with the purpose of isolating the suspect.¹⁶¹ One expert characterizes the manual’s techniques this way: “Against the backdrop of a physical environment that promotes feelings of social isolation, sensory deprivation, and a lack of control, Inbau et al. . . . describe[] in vivid detail a . . . procedure designed to overcome the resistance of reluctant suspects.”¹⁶² The leading interrogation scholar in the United Kingdom, Gisli Gudjonsson, writes that “confessions are best construed as arising through the existence of a particular relationship between the suspect, the environment and significant others within that environment.”¹⁶³ Gudjonsson notes “how much emphasis police manuals place on isolating the suspect from any external influence that may reduce a willingness to confess.”¹⁶⁴ Police interrogators often develop a “theme” that presents a suspect with a moral but not a legal excuse for the

Carolina, 384 U.S. 737, 746-47 (1966) (describing 15 days of incommunicado interrogation); *Culombe v. Connecticut*, 367 U.S. 568, 607-21 (1961) (describing five days of questioning); *Ashcraft v. Tennessee*, 322 U.S. 143, 153-54 (1944) (describing questioning by relays of officers for 36 hours).

¹⁶⁰ *Miranda*, 384 U.S. at 455.

¹⁶¹ FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 51-64 (4th ed. 2001). “Although many police interrogation manuals have been produced . . . , undoubtedly the most authoritative and influential manual is the one written by Inbau, Reid and Buckley.” GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY* 31 (1992). Different editions of the Inbau and Reid treatise have been featured in U.S. Supreme Court decisions, beginning with *Miranda*. See, e.g., *Davis v. United States*, 512 U.S. 452, 470 n.4 (1994) (Souter, J., concurring); *Stansbury v. California*, 511 U.S. 318, 324 (1994) (per curiam); *Oregon v. Elstad*, 470 U.S. 298, 328 (1985) (Brennan, J., dissenting); *Miranda*, 384 U.S. at 449-55.

¹⁶² Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221, 222 (1997); see also A. DANIEL YARMEY, *UNDERSTANDING POLICE AND POLICE WORK: PSYCHOSOCIAL ISSUES* 157 (1990) (“The interrogation area is manipulated to give the suspect the expectation that the forces of the law are invincible. The suspect may be ‘softened up’ by being put into isolated and unfamiliar surroundings and deprived of sleep and/or food.”).

¹⁶³ GUDJONSSON, *supra* note 161, at 66.

¹⁶⁴ *Id.* at 68.

crime.¹⁶⁵ Then, after the suspect has passively related to the theme, “a rapport and trust develops. The interrogator is perceived as a credible, sympathetic individual whom the suspect does not want to offend or challenge.”¹⁶⁶ This moves the suspect to a state of acceptance.¹⁶⁷

So why is all this important? Admiral Jacoby’s declaration made clear that the denial of access to counsel to Padilla (and, by extension, to the other detainees) raised questions wholly unlike those that typically surround the right to counsel in other contexts. The issue was not whether to seize assets and beggar a litigant, forcing him or her to proceed pro se or with different counsel; nor was the question whether this was the sort of proceeding in which the Constitution requires appointed counsel.¹⁶⁸ For reasons of national security, the government wanted — and claimed that it needed — a free hand to interrogate valuable subjects, and this assertion was grounded in the most widely accepted and understood theory of interrogation, the same basic approach that yields confessions that courts see everyday.

By tying the request to the theory of interrogation, the government sought to show that it was acting in good faith in claiming that the detentions were for a vital purpose other than criminal investigation or punishment. But the Administration also asked for something quite unique. It wanted the judiciary to trust it for an open-ended period of time; Admiral Jacoby said that these interrogations can take months or even years. Jacoby’s declaration was discussed during oral argument in the Supreme Court in *Hamdi*, when government counsel was pressed about the outer bounds of the length of detention.¹⁶⁹ On this record, a judicial decision affording access to counsel would be a rejection of the balance of values that Jacoby and the Administration urged be struck, a renunciation of the ranking of national security over the historic role of counsel. A decision to deny counsel would accept the government’s balance of values — its argument that national security outweighs the

¹⁶⁵ See INBAU ET AL., *supra* note 161, at 232-303 (describing theme development).

¹⁶⁶ Brian C. Jayne, *The Psychological Principles of Criminal Interrogation*, in CRIMINAL INTERROGATION AND CONFESSIONS 346 (3d ed. 1986).

¹⁶⁷ See *id.*

¹⁶⁸ See, e.g., *Murray v. Giarratano*, 492 U.S. 1 (1989) (finding no federal constitutional right to counsel for state post-conviction proceeding); *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989) (holding drug forfeiture statute does not contain exception for attorneys’ fees); *Wheat v. United States*, 486 U.S. 153 (1988) (stating prospective conflict may permit court to disqualify counsel of choice).

¹⁶⁹ See Transcript of Oral Argument at 28-30, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-6696.pdf (last visited Aug. 18, 2004).

need for assistance of counsel — and its call for blind trust.

D. *Abu Ghraib and the Politics of War and Torture*

The timing could not have been worse for the Administration. Just as it was asking the courts to allow detentions and questioning to proceed unhindered and unexamined, came the news from Abu Ghraib prison in Iraq.

In March 2004, the military revealed that a number of soldiers in Iraq had been removed from duty due to allegations involving mistreatment of prisoners.¹⁷⁰ But the extent of the allegations and the investigations into them were kept secret. On April 28, the same day as the oral arguments in *Hamdi and Padilla*, “60 Minutes II” broadcast shocking photographs from Abu Ghraib.¹⁷¹ Two days later, Seymour Hersh posted an online story, revealing that U.S. Army Major General Antonio M. Taguba had already completed an investigation into alleged mistreatment of Iraqi detainees.¹⁷²

General Taguba’s report was a stunner. He found that “numerous incidents of sadistic, blatant and wanton criminal abuses were inflicted on several detainees,” including beatings, videotaping of naked detainees while forcing them to engage in sexual acts, and threatening detainees with weapons and dogs.¹⁷³ Taguba also reviewed an assessment made the previous fall by Major General Geoffrey D. Miller of counter-terrorism interrogation operations in Iraq. Miller had served at Guantánamo Bay, and he used procedures from Guantánamo as baselines in his assessment. Miller had recommended a more unified strategy of detention and interrogation, including having detention operations “act as an enabler for interrogation.”¹⁷⁴ Taguba found that “at lower levels,” detention officers were “tasked to set conditions for

¹⁷⁰ See *Abuse of Iraqi POWs by GIs Probed* (Apr. 28, 2004), available at <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml> (last visited Aug. 14, 2004).

¹⁷¹ See *id.* The photographs were enormously powerful. One writer compared the impact of the images to the infamous photograph of Emmett Till, whose lynching remains a signal event in American race relations. See Diane McWhorter, *Till Case Reminds Us of People’s Capacity for Brutality*, USA TODAY, May 20, 2004, at 13A.

¹⁷² See Seymour Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far up Does the Responsibility Go?*, NEW YORKER, Apr. 30, 2004, available at http://www.newyorker.com/fact/content/?040510fa_fact (last visited Aug. 14, 2004).

¹⁷³ ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16-17, available at <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html> (last visited Aug. 14, 2004).

¹⁷⁴ *Id.* at 8.

detainees for subsequent [military intelligence] interrogations."¹⁷⁵

The revelations and the photographs sparked an outcry at home and abroad. Congress convened hearings.¹⁷⁶ Editorials questioned the military's handling of detentions and interrogations.¹⁷⁷ Secretary of State Colin Powell acknowledged the scandal's "terrible impact" on America's image.¹⁷⁸ Karl Rove reportedly said that it would take a generation to repair the injury to America's image in the Middle East.¹⁷⁹ The foreign press was highly critical.¹⁸⁰

Then came round two. Just as the government struggled to restore faith in the military and demonstrate that U.S. detention practices complied with human rights norms, a series of leaked memoranda revealed discussions within the Bush Administration about both its obligations under international law and harsh interrogation methods, including torture. *Newsweek* broke the story on May 17, 2004.¹⁸¹ A

¹⁷⁵ *Id.* at 12.

¹⁷⁶ See Elisabeth Bumiller, *The Struggle for Iraq: An Assessment*, N.Y. TIMES, May 8, 2004, at A1; Eric Schmitt, *The Struggle for Iraq: The Senate*, N.Y. TIMES, May 12, 2004, at A1; David von Drehle, *Lessons of a By-the-Book Soldier; At Hearing, Taguba Provides Straight Talk During a Time of Elusive Truths*, WASH. POST, May 12, 2004, at A18.

¹⁷⁷ See, e.g., *Iraq: How To Repair America's Moral Authority; Rumsfeld's Ouster is a Necessary First Step in Restoring U.S. Credibility*, BUS. WK. ONLINE (May 24, 2004) available at http://www.businessweek.com/magazine/content/04_21/b3884159_mz029.htm; *Retreat On Rules For Wartime Dishonors Core U.S. Values*, USA TODAY, May 14, 2004, at 8A; *The Abu Ghraib Spin*, N.Y. TIMES, May 12, 2004, at A22; *The Nightmare at Abu Ghraib*, N.Y. TIMES, May 3, 2004, at A22; *Mr. Rumsfeld's Responsibility*, WASH. POST, May 6, 2004, at A34; *Upholding Values*, ST. LOUIS POST-DISPATCH, May 7, 2004, at B8.

¹⁷⁸ Jim Miklaszewski et al., *Abuse Scandal 'Terrible' for U.S., Powell Concedes; Administration Denies Reports It Promoted Tough Questioning of Prisoners* (May 17, 2004), available at <http://www.msnbc.msn.com/id/4855930> (last visited Aug. 14, 2004).

¹⁷⁹ See Mark Bowden, *Lessons of Abu Ghraib*, ATL. MONTHLY, July/Aug. 2004, at 37 (reporting Rove's comments).

¹⁸⁰ See, e.g., Richard Beeston, *Brutality Became the Byword for Abu Ghraib*, TIMES (London), May 5, 2004, at 4; Anna Cock, *I'm Sorry — These Acts Were Blatantly Sadistic, Cruel and Inhuman — America's Shame*, SUNDAY TELEGRAPH (Sydney), May 9, 2004, at 4; Luke Harding, *Analysis: Torture at Abu Ghraib — Actions of a Few, or a Policy from the Top?*, GUARDIAN (London), May 17, 2004, at 5; Bibhuti Bhusan Nandy, *An American Gulag — Torture at Abu Ghraib Part of US Intelligence Policy*, STATESMAN (India), June 3, 2004; Karim Raslan, *Diminishing Reservoir of Goodwill*, SO. CHINA MORNING POST, May 15, 2004, at 15; *Bush Must Issue 'Stop Abuse' Order*, NEW STRAITS TIMES (Malay.), May 10, 2004, at 2; *How America Destroyed its Moral Authority and Revealed its Brute Imperialism*, HERALD (Glasgow), May 8, 2004, at 12; *Photos Undermine U.S.'s Stated Goals*, NATION (Thail.), May 7, 2004; see also Trudy Rubin, *Worldview: It Makes War on Terror Harder*, PHILA. INQUIRER, May 5, 2004, available at <http://www.philly.com/mld/inquirer/8590014.htm?1c> (last visited Aug. 18, 2004) (quoting Washington correspondent for Lebanese daily *As-Safir* as stating that Administration did not appreciate "the enormity of the impact" of Abu Ghraib on the Mideast).

¹⁸¹ See Michael Isikoff, *Memos Reveal War Crimes Warnings*, MSNBC NEWS, May 17, 2004,

number of the memoranda were made public. In the face of mounting criticism, on June 22, 2004, the White House released fourteen documents relating to detention and interrogation practices.¹⁸² At a time when the executive was asking the courts not to interfere with its detention of alleged enemy combatants, these memoranda could only have troubled lower court judges and Supreme Court justices. A full discussion of the documents is far beyond the scope of this piece, but a few points are relevant here.

One issue addressed in the memoranda was whether the United States would afford the protections of the Third Geneva Convention¹⁸³ and the War Crimes Act¹⁸⁴ to al Qaeda and Taliban detainees. DOJ's Office of Legal Counsel concluded that these protections did not apply; al Qaeda and Taliban detainees were not entitled to be treated as prisoners of war.¹⁸⁵ The White House Counsel agreed with OLC's advice and communicated that to the President.¹⁸⁶ Secretary of Defense Donald Rumsfeld instructed military commanders that al Qaeda and Taliban detainees were not entitled to prisoner of war status, but that they should be treated "humanely" and "to the extent appropriate and consistent with military necessity" consistent with the Convention.¹⁸⁷ On

available at <http://msnbc.msn.com/id/4999734/site/newsweek> (last visited Aug. 15, 2004).

¹⁸² See *Press Briefing by White House Counsel Judge Alberto Gonzales et al.* (June 22, 2004), available at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> (last visited Aug. 15, 2004) [*"Press Briefing"*].

¹⁸³ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135. (entered into force Oct. 21, 1950).

¹⁸⁴ 18 U.S.C. § 2441 (1997).

¹⁸⁵ See generally Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense (Jan. 22, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf> (last visited Aug. 15, 2004) ("Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees"); Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defense (Jan. 9, 2002), available at <http://msnbc.msn.com/id/5025040/site/newsweek> (last visited Aug. 15, 2004) ("Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees").

¹⁸⁶ See Memorandum from Alberto R. Gonzales, to the President (Jan. 25, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf> (last visited Aug. 15, 2004) ("Decision Re Application of The Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban"). White House Counsel Gonzales was nominated for the post of Attorney General during the second Bush Administration. His confirmation hearing was held on January 6, 2005. During that hearing, Gonzales continued to maintain that "the decision not to apply Geneva in our conflict with Al Qaeda was absolutely the right decision." *Excerpts from Judiciary Committee Hearing on Attorney General Nominee*, N.Y. TIMES, Jan. 7, 2005, at A18.

¹⁸⁷ Memorandum from Donald R. Rumsfeld, Secretary of Defense, to Chairman of the Joint Chiefs of Staff (Jan. 19, 2002) ("Subject: Status of Taliban and al Qaida"), available at

February 7, 2002, President Bush issued his determination, accepting OLC's conclusion that the Convention did not apply, and also adopting the position set out by Secretary Rumsfeld, that detainees be treated humanely and "to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."¹⁸⁸

But just what can it mean to reject the formal application of the Third Geneva Convention yet afford humane treatment "consistent" with the Convention to the extent allowed by military necessity? When does "military necessity" justify treatment that is not consistent with the Geneva Convention? The Administration's internal documents give some insight to this question in the context of interrogation. In a letter and memorandum addressed to White House Counsel Alberto R. Gonzales, OLC concluded that tactics must be of an extreme nature to constitute torture as proscribed by federal law and international accords.¹⁸⁹ After the release of these documents in June 2004, Gonzales strongly denied that the U.S. had engaged in torture, "[w]hatever broad language might be included in this legal memo."¹⁹⁰ The White House, however, also released documents discussing specific interrogation

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.19.pdf> (last visited Aug. 15, 2004).

¹⁸⁸ Memorandum from George W. Bush, President, to Dick Cheney, Vice President et al. 2 (Feb. 7, 2002) ("Subject: Humane Treatment of al Qaeda and Taliban Detainees"), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (last visited Aug. 15, 2002).

¹⁸⁹ OLC concluded that the prohibition against torture contained in 18 U.S.C. §§ 2340 and 2340A, which implement the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.S.T.S. 85, requires that the victim "experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result." Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President 13 (Aug. 1, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> (last visited Aug. 15, 2004) ("Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A"). The memorandum also discusses defenses to a charge of torture, such as necessity and self-defense. *See id.* at 39-46; *see also* Letter from John C. Yoo, Deputy Assistant Attorney General, to the Honorable Alberto R. Gonzales, Counsel to the President, 3-6 (Aug. 1, 2002) (concluding that U.S. government's obligations under Convention Against Torture are same as under §§ 2340-2340A), and, further, that interrogators of al Qaeda operatives should not be subject to prosecution by International Criminal Court), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020801.pdf> (last visited Aug. 15, 2004).

¹⁹⁰ *See Press Briefing, supra* note 182. During his January 2005 confirmation hearing, Gonzales said that he was "deeply troubled and offended by reports of abuse." *Excerpts from Judiciary Committee Hearing on Attorney General Nominee, supra* note 186. He also stated that the President has "made clear that America stands against and will not tolerate torture under any circumstances." *Id.*

techniques, including some that were quite harsh.¹⁹¹ In April 2003, Rumsfeld issued a revised list of approved techniques for military interrogators. Most techniques could be employed by interrogators in their discretion; four of the techniques, however, could not be applied unless officials “specifically determine[d] that military necessity [required their] use and [notified Rumsfeld] in advance.”¹⁹² Rumsfeld’s memorandum expressly acknowledges that other nations believing that detainees are entitled to prisoner of war protections may consider these four techniques to be inconsistent with the Geneva Convention.¹⁹³ Thus, as these Administration documents established, treating detainees “in a manner consistent with the principles of Geneva” was not the same as actually complying with the Geneva Convention, at least in the eyes of other nations.¹⁹⁴ There was room for deviation from the Third Geneva

¹⁹¹ In one set of documents, interrogation tactics were described by category. “Category I” techniques include yelling, deception, and falsely identifying the interrogator as an interrogator from a country known to afford harsh treatment to detainees. “Category II” techniques include use of stress positions, use of an isolation facility up to 30 days, 20-hour interrogations, use of a hood, removal of clothing, forced shaving, and deprivation of light and sound. “Category III” techniques are more severe, such as mild physical contact, exposure to cold weather or water, and use of a wet towel and water “to induce the misperception of suffocation.” See Memorandum from Jerald Pfifer, Lt. Commander, U.S. Army, to Commander, Joint Task Force 170, 1-3 (Oct. 11, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf> (last visited Aug. 15, 2004) (“Subject: Request for Approval of Counter-Resistance Strategies”).

Secretary Rumsfeld initially approved all Category I and II techniques and one Category III technique in December 2002, but rescinded the order six weeks later, pending further study. See Memorandum from William J. Haynes, II, General Counsel of the Department of Defense, to Secretary of Defense (Nov. 27, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02Ppdf> (last visited Aug. 15, 2004) (“Action Memo for Secretary of Defense” and approved by Secretary Rumsfeld on Dec. 2, 2002); Action Memorandum from Donald R. Rumsfeld, Secretary of Defense, to Commander USSOUTHCOM (Jan. 15, 2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.01.15.pdf> (last visited Aug. 15, 2004) (“Subject: Counter-Resistance Techniques”).

¹⁹² Memorandum from Donald R. Rumsfeld, Secretary of Defense, to the Commander, U.S. Southern Command (Apr. 16, 2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf> (last visited Aug. 16, 2004) (“Subject: Counter-Resistance Techniques”).

¹⁹³ See *id.* at Tab A (techniques B, I, O and X). The four techniques are: providing a reward or removing a privilege; attacking or insulting the ego of a detainee; the “Mutt and Jeff” routine; and isolating the detainee. *Id.*

¹⁹⁴ Rumsfeld’s memorandum acknowledges that other countries may consider these techniques to be at odds with the Geneva Convention; the memorandum does not concede that these other nations have correctly interpreted a country’s obligations under the Convention. But, if the Administration aims to demonstrate that the United States is abiding by its international obligations, what may matter most politically is the interpretation of those obligations by other nations and the foreign press.

Convention because of "military necessity."

None of this played well on the world stage. The Administration's uncharitable definition of torture, as well as its narrow reading of its obligations under domestic and international law, gave ammunition to critics around the world who saw the United States as acting at the edge of the law, if not outside of it.¹⁹⁵

The events at Abu Ghraib broke, and the Administration's documents were released, shortly before the Supreme Court decided the detention cases. One cannot say with any certainty that they affected the outcomes of the cases or the manner in which the opinions were crafted. But one can imagine at least three ways in which those events impacted the Court.

First, the executive was seeking the power to detain and interrogate citizens and noncitizens with little or no judicial review. Abu Ghraib and the released documents conceivably helped a majority of the Court conclude that concentrating such power in the executive was not a good idea, even in a time of undeclared war.

Second, since at least the late 1940s, the Court has been increasingly aware of its role in world affairs. For example, in *Shelley v. Kraemer*,¹⁹⁶ *Brown v. Board of Education*,¹⁹⁷ and other desegregation cases, the Attorney General submitted briefs to the Supreme Court arguing that segregation practices had enormous foreign policy repercussions for the United States.¹⁹⁸ The intense foreign interest in the present matters before the Court — shown by the amicus briefs in the cases — coupled with the beating the United States took in the world press after Abu Ghraib, may have led some justices to conclude that the Court needed to send a signal to the rest of the world that the Administration's power would not go unchecked.

¹⁹⁵ See, e.g., Edward Alden, *Dismay at Attempt to Find Legal Justification for Torture: International Lawyers Call for Government Advisers Behind Interrogation Memo to Face Professional Sanctions*, FIN. TIMES (London), June 10, 2004, at 7; Doug Beazley, *U.S. Has a Whole New Code of Ethics*, EDMONTON SUN (Alta.), May 22, 2004, at 11; Robert Bridge, *We Came, We Saw, We Broke the Law*, MOSCOW NEWS (Russ.), May 19, 2004, at 18; Wen Jianqiao, *Commentary: Prisoner Abuse Scandal Sinks U.S. Ship of Freedom, Democracy, Human Rights*, XINHUA (Beijing), May 18, 2004; Rebecca Mcquillan, *Has Democracy's Torch-Bearer Crossed Over to the Dark Side?*, HERALD (Glasgow), May 22, 2004, at 13; *Authorising Torture*, NEW STRAITS TIMES (Malay.), June 14, 2004, at 12; *Justifying Torture Brings Shame to U.S.*, TORONTO STAR, June 10, 2004, at A28.

¹⁹⁶ 334 U.S. 1 (1948).

¹⁹⁷ 347 U.S. 483 (1954).

¹⁹⁸ See, e.g., Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 103-13 (1988).

Third, though the practice is much debated,¹⁹⁹ the Court has recently been more willing to consider the impact of international law and norms, and decisions of other nations, in interpreting our own Constitution. Decisions such as *Lawrence v. Texas* reveal a majority of the Court consciously considering comparative constitutional law and the values upon which our Constitution is based.²⁰⁰ These justices may have felt that the United States shares the values of many of the nations whose citizens and press recently condemned us. Thus, interpreting U.S. law to limit the executive's detention power is most consistent with those values.

But perhaps the best indication that these events might affect the Supreme Court was that the Bush Administration seemed really worried about that possibility. In one of the oddest media events in recent memory, Deputy Attorney General James Comey called a press conference on June 1, 2004 to reveal what Padilla had allegedly told interrogators. Comey said that the reason for the press conference was the government's recent compilation of information about Padilla in response to a request by Senator Orrin Hatch. Comey adopted a reporter's sarcastic suggestion that the timing of the conference was just "a coincidence considering that the Supreme Court is about the rule on the Padilla issue,"²⁰¹ and commentators questioned Comey's motives.²⁰²

¹⁹⁹ See, e.g., Vicki Jackson, *Yes Please, I'd Love to Talk With You: The Court Has Learned from the Rest of the World Before. It Should Continue to Do So*, LEGAL AFF. 43 (July/Aug. 2004); Richard Posner, *No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Legal Decision as a Precedent in Any Way*, LEGAL AFF. 40 (July/Aug. 2004).

²⁰⁰ See *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and stating that "to the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."); *id.* at 586, 598 (Scalia, J., dissenting, joined by Rehnquist, C.J. and Thomas, J.) ("The Court's discussion of these foreign views . . . is . . . meaningless dicta."); see also *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003) (noting that skills needed in global marketplace and today's military can only be developed through diverse student body).

²⁰¹ James Comey, *Transcript of News Conference on Jose Padilla*, June 1, 2004, available at <http://www.cnn.com/2004/LAW/06/01/comey.padilla.transcript> (last visited Aug. 17, 2004).

²⁰² See, e.g., Jonathan Turley, *Commentary: You Have Rights — if Bush Says You Do*, L.A. TIMES, June 3, 2004, at B11 ("After insisting for two years that details of the case of Jose Padilla . . . had to be kept secret even from the federal courts, the Justice Department suddenly released detailed information on his interrogations and their results. What made this press conference particularly notable was its intended audience: the U.S. Supreme Court."); Scott Turow, *Trial by News Conference? No Justice in That*, WASH. POST, June 13, 2004, at B01 ("Comey said there was nothing strategic about the timing of the release of this information. I am skeptical. The horrors at Baghdad's Abu Ghraib prison, which came to light after the Padilla case had been submitted to the court, chillingly demonstrate the hazards of denying prisoners access to lawyers and courts. With the news seeming to argue Padilla's case for him, the Justice Department was happy to push back with a news

Padilla's lawyer called Comey's comments "an opening statement at a trial which they refuse to let go forward."²⁰³

For close observers of the case, however, the released documents may have only underscored the need for a hearing on the government's evidence. In the Mobbs declaration and in its brief in the Supreme Court, the government made much of the allegation that Padilla had planned to detonate a "dirty bomb" in the United States.²⁰⁴ But the documents released by DOJ on June 1 told a different story. Al Qaeda operatives thought that the dirty bomb plot was not practical, and so instead asked Padilla to destroy apartment buildings by causing natural gas explosions.²⁰⁵ This plot, while of course serious, was different in nature and scale from the alleged plan to detonate a radioactive device. The discrepancy in the government's stories did not go unnoticed in the press²⁰⁶ and may have lent support to the need for a thorough hearing so that the facts could be reliably found.

E. The Rulings

The Supreme Court announced its decisions on June 28, 2004.

In *Rasul v. Bush*, the consolidated Guantánamo Bay cases, the Court ruled 6-3 that the federal courts have jurisdiction to hear habeas corpus petitions brought by detainees at Guantánamo Bay who were challenging the legality of their confinement.²⁰⁷ As the Court stated, the United States has complete jurisdiction and control over the base at Guantánamo Bay.²⁰⁸ Moreover, the petitioners' allegations that they have

event of its own, designed to show that Padilla, by his own word, was a very bad guy.").

²⁰³ Richard B. Schmitt, *Government Says Padilla Plotted High-Rise Attacks; Allegations Are Released as the Supreme Court Prepares to Rule on His Arrest and Detention*, L.A. TIMES, June 2, 2004, at A1 (quoting Donna Newman, counsel for Padilla).

²⁰⁴ See Brief for the Petitioner at 5, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027); *supra* note 133 and accompanying text (regarding Mobbs declaration).

²⁰⁵ See *Summary of Alleged Activities Derived from Documents and U.S. Dep't of Defense Interviews with Jose Padilla* 3-5 (June 1, 2004), available at <http://news.findlaw.com/nytimes/docs/padilla/pad52804dodsum.html> (last visited Aug. 17, 2004). The *Summary* was released with a cover letter from Deputy Secretary of State Paul Wolfowitz to James Comey.

²⁰⁶ See, e.g., Marie Cocco, *U.S. View in Terror Cases: Trust Us*, NEWSDAY, June 3, 2004, at A45 ("There was never any dirty bomb. Or even a plot to explode a dirty bomb. . . . When Attorney General John Ashcroft announced that Padilla had been . . . thrown into a military brig, he said it was because the government had 'disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive dirty bomb.' Never mind. Now we are supposed to believe the revised version.").

²⁰⁷ See *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004).

²⁰⁸ See *id.* at 2696.

been held for more than two years without charges and access to counsel “unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’”²⁰⁹ Further, for the *Al Odah* petitioners who also sought jurisdiction under the federal question statute, the justices noted that federal courts “have traditionally been open to nonresident aliens.”²¹⁰ The Court did not, however, address the merits of the detainees’ claims.²¹¹ Because the Court granted review only to hear the jurisdictional question, that was the only question answered by the decision.

In *Hamdi v. Rumsfeld*, eight justices refused to accept the contention that the government could detain Hamdi without a hearing. Justice O’Connor wrote a plurality opinion for the Court, finding the AUMF sufficient to authorize the President to detain alleged enemy combatants for the duration of the conflict.²¹² Nevertheless, a majority of justices rejected the claim that separation of powers concerns and the “limited institutional capabilities of courts in matters of military decision-making,” restricted the courts to reviewing only the broad detention scheme, and not individual detention decisions.²¹³ National security concerns do not automatically outweigh individual liberties. “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”²¹⁴

After weighing the competing interests at stake, the Court ruled that Hamdi must receive notice of the factual basis for classifying him as an enemy combatant “and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”²¹⁵ The opinion expressly rejects any analogy between the role of a military interrogator and that of a neutral adjudicator, and concludes that Hamdi had thus far

²⁰⁹ *Id.* at 2698 n.15 (citations omitted).

²¹⁰ *Id.* (citation omitted).

²¹¹ *See id.* at 2699.

²¹² *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) (O’Connor, J., joined by Rehnquist, C.J., Kennedy, J., and Breyer, J.). Providing a fifth vote on the issue of statutory authority, Justice Thomas agreed that the President has the power to detain, though he thought that the breadth of that authority was not adequately explained. *See id.* at 2680 (Thomas, J., dissenting).

²¹³ *Id.* at 2645 (plurality opinion) (quoting Brief for Respondents). On this and other aspects of judgment of remand, the plurality was joined by Justices Souter and Ginsburg. *See id.* at 2660 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).

²¹⁴ *See id.* at 2648 (plurality opinion) (citation omitted).

²¹⁵ *Id.*

received no process.²¹⁶ The plurality also turned aside the government's argument for a highly deferential "some evidence" standard of review.²¹⁷ Further, on remand, Hamdi "unquestionably has the right to access to counsel."²¹⁸ Justices Scalia and Stevens dissented, finding that the government should charge Hamdi with treason, seek a suspension of the writ of habeas corpus, or release him.²¹⁹ Only Justice Thomas would have given the Bush Administration the authority it sought.²²⁰

Padilla fared less well. In a 5-4 ruling, the Court decided that he should have filed his habeas corpus petition in South Carolina, not in the Southern District of New York.²²¹ But this was only a temporary setback for Padilla. Four days after the Court ruled in his case, he filed a new habeas corpus petition in South Carolina, citing the decision in *Hamdi*.²²²

F. A New New World?

While the government wrung one important concession from the Supreme Court — that the AUMF authorizes the detention of alleged enemy combatants — on the whole, the Administration suffered an enormous defeat. In *Rasul*, the government lost its argument against all federal jurisdiction in the detainees' cases. In *Hamdi*, the Court roundly rejected the balance of values that Admiral Jacoby and the

²¹⁶ "An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker." *Id.* at 2651 (citing Brief for Respondents, and noting Brief's discussion of "secure interrogation environment" and "a relationship of trust and dependency").

²¹⁷ *Id.* at 2645. Courts sometimes review agency determinations under this standard, which merely requires a court to decide whether there is "any evidence in the record that could support the conclusion." *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 455-56 (1985). But, as the *Hamdi* Court recognized, this extremely deferential standard assumes that the agency has first afforded the individual an adversarial hearing. Thus, the agency record is one that has already been fully developed. "This standard therefore is ill suited to the situation in which a habeas petitioner has reviewed no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker." *Hamdi*, 124 S. Ct. at 2651 (plurality opinion). Justices Souter and Ginsburg did not disagree with the plurality's conclusion about the "some evidence" standard. But they also did not adopt the plurality's resolution of the constitutional issue, which they would not have reached. *See id.* at 2660 (Souter, J., and Ginsburg, J., concurring in part and dissenting in part).

²¹⁸ *Hamdi*, 124 S. Ct. at 2652.

²¹⁹ *See id.* at 2660, 2671 (Scalia, J., joined by Stevens, J., dissenting).

²²⁰ *See id.* at 2674 (Thomas, J., dissenting).

²²¹ *See Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2727 (2004).

²²² *See* Petition for Writ of Habeas Corpus, *Padilla v. Commander C.T. Hanft, USN*, No. 2:04-2221-26-AJ (D.S.C.), available at <http://news.findlaw.com/hdocs/docs/padilla/padillahanft70204pet.pdf> (last visited Aug. 17, 2004).

Administration urged the Court to strike. National security, while important, does not automatically outweigh individual liberties. On the question of blind trust in the executive, the Court just said no.

These rulings seem palpably different than those that came before. One may contrast, for example, the balancing of interests in *Hamdi* with the justices' unwillingness in *Demore v. Kim* to consider whether a person could be held without the opportunity for an individualized detention hearing. True, *Hamdi* was an American citizen, and *Kim* was not. Under the plenary power doctrine, this might have weighed in favor of deference to the executive in *Kim*. Nevertheless, courts also tend to defer to the executive in matters of national security, and that reason for deference did not carry the day in *Hamdi*.

If *Rasul* and *Hamdi* together signal a "new new world" in the detention and treatment of noncitizens, perhaps they are best understood as tempering the post-September 11 decisions. I do not believe that the "new new world" is simply a return to the Court's values and modes of decisionmaking in June 2001. No one can erase our collective memory of the attacks on the Twin Towers and the Pentagon. In the wake of these attacks, members of the Court — like the rest of the American people — surely take more seriously the possibility that our nation may be attacked again.

But seemingly weighing against these concerns is a greater willingness to question the duration and legitimacy of governmental power, even when the executive asserts that power in service of the nation's security. A claim of national security is not a magical incantation that dissolves all powers of judicial review. There is a new understanding that such invocations do not trump all individual liberties. The willingness to question the executive's power may be born of a firmer awareness of the international role of the Court, and the need to remind our executive and the international community that the United States is a government of checks and balances. If so, that may have implications for the way in which the Court now approaches its cases. Regardless of the reasons, however, we should see fewer instances of the sort of absolute, uncritical deference to the executive demonstrated by the Fourth Circuit in *Hamdi* and the D.C. Circuit in *Center for National Security Studies v. U.S. Department of Justice*.

CONCLUSION

The terrorist attacks of September 11, 2001 came during a time of transformation for our immigration laws. In the first few years following the attacks, the understandable inclination to defer to the executive

during crises held sway, while also distorting rulings in this changing field. Courts should now be more willing to question the assertion of executive authority, and more capable of weighing that assertion against the loss of individual liberties. Clearly, many dangers still face our nation. Yet, as Justice O'Connor put it in *Hamdi*, this is when we must keep our commitments to our own principles.

Just how far this new approach will carry the federal courts remains to be seen. We can, however, track a few indicators that may reveal the shape of the "new new world." We may start by looking at the proceedings on remand in *Rasul* as well as immigration detention cases in the Supreme Court's current Term.²²³

With respect to the subsequent proceedings in *Rasul*, the Supreme Court's ruling left the merits of the habeas corpus petitions for the lower courts to resolve. On remand, the government has once again offered arguments that the detainees at Guantánamo Bay are outside of the sovereign territory of the United States and "have no cognizable constitutional rights."²²⁴ The Administration dismisses as "cryptic dicta in a footnote in *Rasul*" the Court's statement that the petitioners have unquestionably described custody in violation of law.²²⁵ The government has sought to impose severe restrictions on the detainees' access to counsel, insisting that meetings between the lawyers and their clients may be monitored.²²⁶ If the "new new world" is driven in part by the need to demonstrate American values to the international community, the courts may not be receptive to such aggressive advocacy on the part of the government. On October 20, 2004, the district court ruled that the petitioners are entitled to counsel and that the government's proposed monitoring impermissibly burdens the attorney-client relationship and

²²³ The proceedings on remand in *Hamdi* are interesting but not very revealing. Hamdi and the government reached a settlement agreement. Pursuant to the agreement, Hamdi was released from custody on October 11, 2004. The United States flew him to Saudi Arabia. See Jerry Markon, *Hamdi Returned to Saudi Arabia: U.S. Citizen's Detention as Enemy Combatant Sparked Fierce Debate*, WASH. POST, Oct. 12, 2004, at A2. Among other things, Hamdi gave up any claim on U.S. nationality, renounced terrorism, agreed not to affiliate with the Taliban or engage in any combatant act against the United States. See *Yaser Esam Hamdi v. Donald Rumsfeld, Agreement*, available at <http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt2.html> (last visited Oct. 28, 2004).

²²⁴ Response to Complaint in Accordance with Court's Order of July 25, 2004 at 9, *Al Odah v. United States*, Civ. No. 02-CV-0828 (D.D.C.), available at <http://www.goldsteinhowe.com/blog/files/alodah.doj.response.pdf> (last visited Aug. 18, 2004).

²²⁵ *Id.* at 16 n.6.

²²⁶ See *id.* at 4-8, 23-29.

undermines the attorney-client privilege.²²⁷

We may also look at a recent Supreme Court case. On January 12, 2005, the Court decided *Clark v. Martinez*,²²⁸ and addressed a question left open in *Zadvydas*.²²⁹ *Martinez* involved the long-term detention of two removable aliens who were “excludable” under pre-IIRIRA law. Would the Court interpret the post-removal period provisions of IIRIRA exactly as in *Zadvydas*, or would the justices find that old notions of territorial standing require a different construction of the statute? Would the Court view the foreign relations and national security aspects of these cases differently than in *Zadvydas*, which involved the detention of people who had already been admitted for residence in the United States?

In a 7-2 decision, the Court interpreted the statute exactly as in *Zadvydas*.²³⁰ The majority, led by Justice Scalia (who had dissented in *Zadvydas*),²³¹ framed the question simply as whether a statutory provision should receive a different construction because it was being applied to a different category of aliens.²³² He answered, “To give these same words a different meaning for each category would be to invent a statute rather than interpret one.”²³³ Although the Court had avoided the constitutional question in *Zadvydas*, and the detention of the noncitizens in *Martinez* did not present the identical constitutional question, the avoidance canon would carry the day.

Justice Thomas, joined in part by Chief Justice Rehnquist, dissented.²³⁴ He argued that the old entry fiction should lead to a different result. Justice Thomas asserted that aliens who had not been admitted were differently situated than those who had.²³⁵ Further, the two groups did not present the same security considerations.²³⁶

The majority was unpersuaded by the territorial distinction or the alleged threats to national security. With respect to security, the Court

²²⁷ See Memorandum Opinion at 24, *Al Odah* (Civ. No. 02-CV-0828), available at <http://www.dcd.uscourts.gov/02-828a.pdf> (last visited Oct. 27, 2004).

²²⁸ Nos. 03-878 and 03-7434, 2005 U.S. LEXIS 627, at *1 (Jan. 12, 2005).

²²⁹ See *supra* notes 45-48 and accompanying text.

²³⁰ See *Martinez*, 2005 U.S. LEXIS 627, at *27.

²³¹ See *Zadvydas v. Davis*, 533 U.S. 678, 702 (2001) (Scalia, J., dissenting). Justice Scalia had been the most forceful of the dissenters in *Zadvydas*. He wrote separately from Justice Kennedy (who also dissented) to say that, unlike Justice Kennedy, he could find *no* circumstances in which a court could release a detained non-removable alien. See *id.*

²³² See *Martinez*, 2005 U.S. LEXIS 627, *12-*13.

²³³ *Id.* at *13.

²³⁴ See *id.* at *29 (Thomas, J., dissenting).

²³⁵ See *id.* at *31-*33 (Thomas, J., dissenting).

²³⁶ See *id.* at *33-*34 (Thomas, J., dissenting).

cited the (never-used) detention provisions of the USA PATRIOT Act.²³⁷ Justice O'Connor joined the majority and also wrote separately to emphasize this point. As she noted, the executive "has other statutory means for detaining aliens whose removal is not foreseeable and whose presence poses security risks."²³⁸

Although *Martinez* is dressed up as a simple statutory construction case, the opinion is surely a product of our "new new world." My colleague, Philip Frickey, sensibly writes that the avoidance canon is not really a rule of statutory interpretation; rather, it is a powerful tool of public law on the borderline between constitutional and subconstitutional law. It is a mechanism that protects underenforced constitutional norms.²³⁹ *Hamdi* and *Rasul* involve mostly the same norms as *Martinez*. If the Court was troubled by the detentions in *Hamdi* and *Rasul*, the justices may also have wished to limit the detentions in *Martinez*. Extending the avoidance canon to the detainees in *Martinez* may have provided the simplest and least controversial way for the Court to provide relief. And, at the very least, the way in which the majority brushed aside the security concerns in *Martinez* shows that the Court is not paralyzed by claims of national security. This re-found capacity to question the duration and legitimacy of executive authority is a central feature of our "new new world."

²³⁷ See *id.* at *26 n.8.

²³⁸ See *id.* at *28 (O'Connor, J., concurring).

²³⁹ See Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. (forthcoming 2005).