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Judicial Power To Determine the Status and Rights of Persons Detained Without Trial

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I. INTRODUCTION

When the United States was formed, Alexander Hamilton reiterated a trenchant warning that "the practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument[ ] of tyranny."[1] His warning remains relevant today, and the consequences of arbitrary detention, whether or not tyrannical in purpose, still threaten liberty and democratic values.

After the September 11 attacks on the United States in which terrorists hijacked four airplanes, crashing two of them into the World Trade Center and one into the Pentagon, the United States detained thousands of persons.[2] These detentions have raised several critical questions: Are there any legal limitations on executive discretion to detain persons accused of participation in acts of terrorism or who are suspected of posing significant threats to national security? Is arbitrary detention proscribed and, if so, what is the proper role of the judiciary in response? Are executive determinations of the status and rights of detainees reviewable by federal courts and, if so, what is the proper standard for judicial review?

Since September 11, the Bush administration has claimed a right to detain without trial any member of al Qaeda or the Taliban or other persons allegedly posing threats to national security. The United States has asserted the right to detain these individuals whether or not they were captured in Afghanistan and whether or not they are being detained in the United States, Afghanistan, Guantanamo Bay, or other locations, on the basis of an

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1. THE FEDERALIST NO. 84, at 533 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Hamilton also quotes Blackstone:

> To bereave a man of life . . . without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny . . . ; but confinement of the person, by secretly hurrying him to jail, . . . is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.

Id. (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 438).

2. *See* John Hendren, *Alleged Bomb Plotter to be Held Indefinitely, Pentagon Says*, L.A. TIMES, June 11, 2002, at A18, Dana Priest, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A01.

executive branch determination that they are "enemy" or "unlawful" combatants.[3] Further, the Bush administration has asserted that either there should be no judicial review of executive branch determinations, or if judicial review obtains, the judiciary should completely or nearly completely defer to these determinations.[4]

International law, the U.S. Constitution, federal case law, and other legal norms do not support the Bush administration's positions on detention and judicial review. Rather, these sources of law indicate that there are legal limits to the power to detain persons without trial, that judicial review of the propriety of detention must be made available, and that no legal standard of review permits complete deference to executive determinations of the legal status and rights of persons detained without trial.

This Essay takes up these challenges to the Bush administration's detention and judicial review policies. Part II focuses on international law—specifically, human rights (Part II.A) and the law governing prisoners of war (POWs) and others detained without trial during war (Part II.B). As documented in Part II.A of this Essay, human rights law applicable in all social contexts, including times of national emergency and war, prohibits arbitrary detention of persons and requires the availability of judicial review of the propriety of detention. The standard that human rights law prescribes involves contextual inquiry as to whether detention is reasonably needed under the circumstances. Thus, if the executive branch chooses to detain someone, the detainee has the right to judicial review of the detention, but the executive branch could meet the human rights standard for review by proving that the detainee poses a serious threat to national security such that detention is needed. By effectively foreclosing all judicial review of its determinations, however, the Bush administration has violated this tenet of international human rights law.

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3. *See, e.g.*, Hamdi v. Rumsfeld, 296 F.3d 278, 280, 282–83 (4th Cir. 2002); U.S. Dep't of Defense, *DOD News Briefing—Secretary Rumsfeld and Gen. Myers* (Jan. 11, 2002), http://www.defenselink.mil/news/Jan2002/t01112002_t0111sd.html. *See also* Lawyers Comm. for Human Rights, *A Year of Loss—Reexamining Civil Liberties since September 11*, at 25–28, 35 (2002), http://www.lchr.org/US_law/loss/loss_report.pdf [hereinafter Lawyers Committee Report].

4. For instance,

> [i]n its brief before this court, the government asserts that "given the [supposed] constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such." The government thus submits that we may not review at all its designation of an American citizen as an enemy combatant—that its determinations on this score are the first and final word.

Hamdi v. Rumsfeld, 296 F.3d at 283. *See also* Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus, *Hamdi*, 296 F.3d at 16 ("[A] court's proper role . . . would be to confirm that there is a factual basis supporting the military's determination that the detainee is an enemy combatant. This return and the accompanying declaration more than satisfy that standard of review."); *id.* at 18 ("[T]he military's determination . . . should be respected by the courts as long as the military shows some evidence for that determination."); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960–65 (2002); Amnesty Int'l, Press Release, *USA: One Year On—The Legal Limbo of the Guantanamo Detainees Continues* (Jan. 10, 2003), http://web.amnesty.org/ai.nsf/Index/AMR510022003 (noting that there are more than 600 detainees from at least 40 countries being detained at Guantanamo Bay, Cuba, without trial or access to attorneys or courts); Lawyers Committee Report, *supra* note 3, at 31–39.

Part II.B of this Essay identifies relevant international law concerning the status and rights of persons who do and do not have POW status. Under international law, POWs can be detained for the duration of an international armed conflict, but there are legal limits on the power of the United States to detain other persons during such a war. Part II.B also identifies the international legal norms governing both judicial review of determinations of POW status and judicial review of the propriety of detention of all non-POWs.

Part III addresses the status and rights of persons detained as security threats or POWs under U.S. case law by reviewing trends in federal court decisions concerning the judicial power and responsibility to determine the status and rights of persons detained, and by analyzing various standards that have been used for judicial review of such executive determinations. These trends demonstrate without exception that, contrary to the Bush administration's claims, the executive branch does not have complete and unreviewable power to classify persons as enemy or unlawful combatants and to detain such persons without trial. Overwhelming evidence also demonstrates that the executive branch assertion that there should be complete or nearly complete acceptance of executive determinations of the legal status and rights of detainees whenever judicial review pertains contradicts international law.

II. The Propriety of Detention and Necessity of Judicial Review Under International Law

A. Human Rights Standards in Time of Peace, National Emergency, or War

1. Permissible Detention Under Human Rights Law

Under international law, human rights standards that are both treaty-based and part of customary international law, and that are applicable in times of both peace and war,[5] establish standards for the propriety of deten-

5. Thus, human rights law applies during an armed conflict. *See, e.g.*, Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 239 (July 8) ("the protection of the International Covenant of Civil and Political Rights does not cease in times of war"), *reprinted in* 35 I.L.M. 809, 820 (1996); U.N. Human Rights Comm., General Comment No. 29, ¶¶ 3, 9, 11 & n.6, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001). *See also Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119 (1866); Kadic v. Karadzic, 70 F.3d 232, 242–44 (2d Cir. 1995); Francis Lieber, Bluntschli on the Law of War and Neutrality—A Translation From His Code of International Law (on file with the Harvard International Law Journal) ("Human rights remain in force during war."); Francisco Forrest Martin, *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict*, 64 Sask. L. Rev. 347, 386–87 (2001); Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 Va. J. Int'l L. 351, 357 & n.27 (1991); Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 Vand. J. Transnat'l L. 1, 17–18 (1978). *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 72, Jan. 23, 1979, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I] ("human rights during international armed conflict"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the

tion. These standards, recognized in nearly all major human rights instruments, include the prohibition of "arbitrary" arrest or detention.[6] For exam-

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Protection of Victims of Non-International Armed Conflicts, pmbl., Jan. 23, 1979, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II]; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, art. 2, G.A. Res. 44/128, U.N. GAOR, Supp. No. 49, at 206, U.N. Doc. A/44/49 (1989) ("in time of war"); Organization of American States, American Convention on Human Rights, art. 27(1), Nov. 22, 1969, 1144 U.N.T.S. 123 ("[i]n time of war") [hereinafter American Convention]; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15(1)–(2), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]; Organization of American States, Protocol to the American Convention on Human Rights to Abolish the Death Penalty, art. 2, June 8, 1990, O.A.S. T.S. No. 73 ("in wartime"); Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Apr. 28, 1983, Europ. T.S. No. 114 ("in time of war"); S.C. Res. 1199, pmbl., U.N. SCOR, 53d Sess., 3930th mtg., U.N. Doc. S/RES/1194 (1998) ("violations of human rights and of international humanitarian law"); The Julia, 12 U.S. (8 Cranch) 181, 193 (1814) (Story, J.) ("rights of humanity" pertain in time of war); 11 Op. Att'y Gen. 19, 21 (1864) ("the most sacred questions of human rights" are at stake concerning war-time courts-martial); *infra* note 35. Additionally, there is no general war-context exception to human rights duties contained in major human rights instruments. *See, e.g.*, U.N. Charter arts. 55(c), 56; Charter of the Organization of American States, art. 13, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (states "shall respect the rights of the individual"); *infra* note 6.

6. *See, e.g.*, International Covenant on Civil and Political Rights, art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171, 175 [hereinafter ICCPR]; American Convention, *supra* note 5, art. 7(1)–(3); Organization of African Unity, African Charter on Human and Peoples' Rights, art. 6, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 [hereinafter African Charter]; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 73 (1948) [hereinfter Universal Declaration]; European Convention, *supra* note 5, art. 5(1); Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001); Ma v. Reno, 208 F.3d 815, 830 (9th Cir. 2000); Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998); De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985); Chiminya Tachiona v. Mugabe, 216 F. Supp. 2d 262, 279–80 (S.D.N.Y. 2002); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1328–29, 1344, 1349–50, 1352, 1357–58, 1360 (N.D. Ga. 2002); Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386, 2002 WL 319887, at *6 (S.D.N.Y. Feb. 28, 2002); Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1538, 1541 (N.D. Cal. 1987); Rodriguez Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980); Helena Cook, *Preventive Detention—International Standards and the Protection of the Individual*, *in* Preventive Detention: A Comparative and International Law Perspective 1, 8 & n.17 (Stanislaw Frankowski & Dinah Shelton eds., 1992) (nonarbitrary detention must be "'reasonable in all the circumstances'" (quoting Report of the U.N. Human Rights Comm., U.N. Doc. A/45/40, Annex IX (1990))). *See also* Draft Code of Crimes Against the Peace and Security of Mankind, art. 18(h), [1996] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/48/10 (1996) (arbitrary imprisonment is a crime against humanity); Richard B. Lillich & Hurst Hannum, International Human Rights: Problems of Law, Policy and Practice 136 (3d ed. 1995) (United States recognizes that Article 9 of the Universal Declaration of Human Rights is one of several articles reflecting customary international law of universal application (citing Memorial of the United States, Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. Pleadings 182 n.36 (Jan. 12, 1980))). The European Convention sets forth a more restrictive standard tied to a list of six circumstances when detention is lawful. Article 5(1)(c) requires "reasonable suspicion of [the detainee's] having committed an offence," or that "it is reasonably considered necessary to prevent" the detained person from "committing an offence or fleeing after having done so." European Convention, *supra* note 5, art. 5(1)(c). *See* Murray v. United Kingdom, App. No. 14310/99, 19 Eur. H.R. Rep. 193 (1995) (Eur. Comm'n on H.R.); Fox, Campbell, and Hartley v. United Kingdom, Apps. Nos. 12244/86, 12245/86 and 12383/86, 13 Eur. H.R. Rep. 157 (1991) (Eur. Comm'n on H.R.).

The customary and treaty-based human right to freedom from arbitrary detention is not one that applies merely within a state's own territory. Not one of the human rights instruments cited here or in note 5, *supra*, sets forth such a limitation. Thus, the right applies whenever a state exercises its jurisdiction over a person.

ple, in typically straightforward fashion, the International Covenant on Civil and Political Rights (ICCPR) mandates: "No one shall be subject to arbitrary arrest or detention."[7] Additionally, the human right to freedom from arbitrary arrest or detention is part of a more general right to liberty and security of person. As noted in the ICCPR, a concomitant human right prohibits deprivation of liberty "except on such grounds and in accordance with such procedure[s] as are established by law."[8] Thus, detention of terrorist suspects and others must not be "arbitrary," there must be legal grounds for such detention, and detention must be in accordance with procedures established by law.

Freedom from "arbitrary" detention is a relative right, however. Whether or not detention of an alleged terrorist or direct supporter of terrorism is "arbitrary" has to be considered in context and with reference to various interests at stake, such as the detainee's rights to liberty and security, the rights of others to liberty and security,[9] and the interests of the government in maintaining law and democratic order.[10] Under human rights law, therefore, detention will not be deemed "arbitrary" if it is reasonably needed under the circumstances.

2. Judicial Review of Detention Under Human Rights Law

When a person is detained by a state, human rights law requires the availability of judicial review of the detention. As affirmed in the ICCPR, "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide

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7. ICCPR, *supra* note 6, art. 9(1).

8. *Id*. Similar provisions exist in other human rights instruments. *See, e.g.*, AFRICAN CHARTER, *supra* note 6, art. 6; AMERICAN CONVENTION, *supra* note 5, art. 7(2); EUROPEAN CONVENTION, *supra* note 5, art. 5(1).

9. The need to accommodate interests of others is also reflected indirectly in Article 5(1) of the ICCPR, which states that nothing in the covenant "may be interpreted as implying for any . . . group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation." ICCPR, *supra* note 6, art. 5(1). *See also* AFRICAN CHARTER, *supra* note 6, art. 27; AMERICAN CONVENTION, *supra* note 5, art. 32(2); EUROPEAN CONVENTION, *supra* note 5, art. 17.

10. Although not addressing international law as such, dicta in U.S. cases recognize that governmental or national interests in security should also be weighed by the judiciary. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690, 696 (2001) ("[T]errorism or other special circumstances" might allow "special arguments . . . [to] be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security," but detention of an alien awaiting deportation must be limited to time reasonably necessary to secure removal of the alien and not beyond six months. Yet, "[f]reedom . . .—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that" is protected by the Fifth Amendment.); United States v. Salerno, 481 U.S. 739, 748, 750–52 (1987) ("Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons," so long as the government has met its burden of justification "by clear and convincing evidence."). The fact that various interests have to be weighed in context refutes the idea that decisions of the executive branch in the interest of national security must be determinative.

without delay on the lawfulness of his detention and order his release if the detention is not lawful."[11] Access to courts for judicial determination of rights and the right to an effective remedy are also guaranteed more generally under Article 14(1) of the ICCPR[12] and supplemented by General Comments of the Human Rights Committee created by the Covenant.[13] The human rights standard concerning judicial review should involve contextual inquiry into whether detention is reasonably needed under the circumstances and, thus, is not "arbitrary."

However, within the text of the ICCPR the right to judicial review of detention is impliedly a derogable right—that is, one that could be derogated from "[i]n time of public emergency which threatens the life of the nation," when the existence of such an emergency is officially proclaimed and a denial of judicial review is "strictly required by the exigencies of the situation."[14] Such a denial, however, must not be inconsistent with the state's other obligations under international law (e.g., its obligations under the laws of war and the customary prohibitions against "denial of justice" to aliens)[15] and may "not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."[16] Thus, derogations are not permissible

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11. *See* ICCPR, *supra* note 6, art. 9(4). Similar provisions exist in other human rights instruments. *See, e.g.*, AFRICAN CHARTER, *supra* note 6, art. 7(1); AMERICAN CONVENTION, *supra* note 5, art. 7(5)–(6); EUROPEAN CONVENTION, *supra* note 5, art. 5(3)–(4); Universal Declaration, *supra* note 6, arts. 8, 10; American Declaration of the Rights and Duties of Man, arts. XVIII, XXV, XXVI, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/ser.L./V./I.4, rev. (1965); Velasquez Rodriguez Case, Judgment, Inter-Am. C.H.R. (Ser. C), No. 4, ¶ 186 (1988) (victim suffered "arbitrary detention, which deprived him of his physical liberty without legal cause and without a determination of the lawfulness of his detention by a judge or competent tribunal"); U.N. Human Rights Comm., General Comment No. 8, ¶ 4, Report of the Human Rights Comm., U.N. GAOR, 37th Sess., Supp. No. 40, Annex 5, at 95 (1982) ("if so-called preventive detention is used, for reasons of public security, . . . it must not be arbitrary, . . . information of the reasons must be given . . . and court control of the detention must be available"). If a detainee is also "arrested," the detainee has additional rights. *See, e.g.*, ICCPR, *supra* note 6, art. 9(2)–(3). Moreover, review by a military commission will not comply with the requirement of judicial review. *See generally infra* notes 13–15, 18–22.

12. *See* ICCPR, *supra* note 6, art. 14(1) ("everyone shall be entitled to a fair . . . hearing by a competent, independent and impartial tribunal").

13. General Comment No. 29, *supra* note 5, ¶¶ 11, 15–16; U.N. Human Rights Comm., General Comment No. 24, ¶¶ 8, 11–12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994)]; U.N. Human Rights Comm., General Comment No. 20, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992); U.N. Human Rights Comm., General Comment No. 15, ¶¶ 1–2, 7, U.N. GAOR, 41st Sess., Supp. No. 40, Annex VI, at 117, U.N. Doc. A/41/40 (1986); U.N. Human Rights Comm., General Comment No. 13, ¶¶ 1–4, U.N. GAOR, 39th Sess., Supp. No. 40, at 143, U.N. Doc. A/39/40 (1984). *See also* Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 82 (Tex. 2000) ("The Covenant not only guarantees foreign citizens equal treatment in the signatories' courts, but also guarantees them equal access to these courts."); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 75 n.97, 198–203, 262 n.483, 256–72 nn.468–527, 362, 375–76 (1996) (citing numerous cases).

14. *See* ICCPR, *supra* note 6, art. 4(1)–(2).

15. The customary prohibition against "denial of justice" to aliens generally requires that aliens have access to courts and the right to an effective remedy. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 711 & cmts. a–c, h (1987) [hereinafter RESTATEMENT]; PAUST, *supra* note 13, at 199, 259–61 n.481 (and cases cited), 290.

16. ICCPR, *supra* note 6, art. 4(1). Similar provisions exist in other human rights instruments. *See, e.g.*, AMERICAN CONVENTION, *supra* note 6, art. 27(1). Equal protection and the norm of nondiscrimination are also standard in major human rights instruments. *See, e.g.*, ICCPR, *supra* note 6, arts. 2(1), 14(1),

merely because they would be reasonable; they must be "strictly required" by the exigencies of the situation.

A strong argument exists that, notwithstanding this language, no circumstances should ever "strictly require" the denial of judicial review of detention, given that under the applicable standard concerning detention a state has such a low burden to justify detention to a court. Because a state merely must demonstrate that detention is reasonably needed under the circumstances, the state should have to make this showing to a court. In fact, many authoritative international bodies have articulated this view. For example, the Human Rights Committee has recognized that freedom from arbitrary detention or arrest is a peremptory norm *jus cogens* (and is, thus, a right of fundamental and preemptive importance),[17] has expressly declared that a state "may not depart from the requirement of effective judicial review of detention,"[18] and has affirmed that "the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of the detention must not be diminished by a State party's decision to derogate from the Convention."[19] Similarly, the Inter-American Commission on Human Rights has recognized that judicial guarantees essential for the protection of nonderogable or peremptory human rights are also nonderogable in times of emergency,[20] that the human right to be brought promptly before a judge must be subject to judicial control, and that judicial protection must include the right to habeas corpus or similar petitions and cannot be suspended during a time of national emergency.[21] Finally, the European Court of Human Rights has recognized that detention by the Executive without judicial review of the propriety of detention is violative of fundamental hu-

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14(3), 26; AMERICAN CONVENTION, *supra* note 5, arts. 1(1), 24, 27(1).

17. *See* General Comment No. 29, *supra* note 5, ¶ 11; General Comment No. 24, *supra* note 13, ¶ 16. *See also* RESTATEMENT, *supra* note 15, § 702(e) & cmts. a, n; PAUST, *supra* note 13, at 375, 472. Peremptory norms *jus cogens* preempt other more ordinary norms. *See, e.g.*, JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 49–53 (2000).

18. *See* General Comment No. 29, *supra* note 5, at n.9 (quoting U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: Israel*, ¶ 21, U.N. Doc. CCPR/C/79/Add.93 (1998) [hereinafter *Concluding Observations*]). Thus, human rights law requires "effective," independent, and fair judicial review. *See id*; *supra* notes 11–13.

19. General Comment No. 29, *supra* note 5, ¶ 16; Amnesty Int'l, *Memorandum to the U.S. Government on the rights of people in U.S. custody in Afghanistan and Guantanamo Bay*, 4 & n.16, 22 & n.167 (Apr. 15, 2002), http://web.amnesty.org/ai.nsf/Index/AMR510532002 (a state "may not depart from the requirement of effective judicial review of detention" (quoting *Concluding Observations*, *supra* note 18, ¶ 21)). *See also infra* note 29 (concerning review of detention when the laws of war apply).

20. *See* Advisory Opinion No. OC-9/87, Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 of the American Convention on Human Rights), Inter-Am. C.H.R. (Ser. A) No. 9 (Oct. 6, 1987); Advisory Opinion No. OC-8/87, Judicial Guarantees in States of Emergency, ¶¶ 35, 38, 41–42, 48, Inter-Am. C.H.R. (Ser. A) No. 8 (Jan. 30, 1987) ("habeas corpus and . . . 'amparo' are among those judicial remedies that are essential for the protection of various rights," and are "essential judicial guarantees necessary to guarantee" various rights); JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS—THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY 45–46 & n.74 (1994); Cook, *supra* note 6, at 26. The Human Rights Committee also expressly affirmed "that the right to habeas corpus and amparo should not be limited." General Comment No. 29, *supra* note 5, at n.9.

21. *See* Castillo Petruzzi Case, Merits, Judgment, Inter-Am. C.H.R. (Ser. C) No. 52 (May 30, 1999).

man rights law.[22] Such widespread recognition and the *jus cogens* nature of the right to freedom from arbitrary detention affirm the nonderogability of judicial review and therefore require that the executive branch may not exercise its discretion to detain without independent, fair, and effective judicial review. Indeed, it is difficult to imagine a more arbitrary system of detention than one involving an executive branch unbounded by law and whose decisions are not subject to effective judicial review.

B. Detention Under the Laws of War During Times of International Armed Conflict

1. Detention of Prisoners of War

When an international armed conflict exists, certain persons, such as enemy combatants who are members of the armed forces of a party to the conflict, are entitled to POW status and protections under Article 4 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (the "Geneva POW Convention").[23] POWs can be detained during an armed conflict, but

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22. The Court has stated that

> everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court . . . . The . . . requirement . . . is of fundamental importance . . . to provide safeguards against arbitrariness . . . . National authorities cannot do away with effective control of lawfulness of decision by the domestic courts whenever they choose to assert that national security and terrorism are involved . . . .

Al-Nashif v. Bulgaria, App. No. 50963/94, Eur. Ct. H.R. (June 20, 2002), http://hudoc.echr.coe.int/hudoc/. *See also* Aksoy v. Turkey, 23 Eur. H.R. Rep. 553, 588–90 (1997); Brogan and Others v. United Kingdom, 145 Eur. Ct. H.R. (Ser. A) (1988) ("Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee."); Winterwerp v. The Netherlands, 33 Eur. Ct. H.R. (Ser. A) (1979) ("it is essential that the person concerned . . . should have access to a court and the opportunity to be heard"); FITZPATRICK, *supra* note 20, at 47–49; Cook, *supra* note 6, at 18; Joan Fitzpatrick, *Terrorism and Migration* 12 (Am. Soc'y of Int'l L., Task Force on Terrorism, Oct. 2002), http://www.asil.org/taskforce/fitzpatr.pdf.

23. GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, Aug. 12, 1949, 20 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]. Membership in the armed force of a state, nation, or belligerent group, or in militia or volunteer corps attached thereto, is the determining criterion under GPW Article 4(A)(1) and (3). *Id.* art. 4(A)(1), (3). *See* United States v. Noriega, 808 F. Supp. 791, 795 (S.D. Fla. 1992). Other requirements of having "a fixed distinctive sign recognizable at a distance," "carrying arms openly" during an attack, and generally following the laws of war expressly apply only in Article 4(A)(2), which concerns members of certain "militias and members of other volunteer corps." GPW, *supra*, art. 4(A)(2). These requirements do not appear in Article 4(A)(1), which applies to "[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces," *id.* art. 4(A)(1), Article 4(A)(3), which applies to "[m]embers of regular armed forces who profess allegiance to a government or an entity not recognized by the Detaining Power," *id.* art. 4(A)(3), or in any of the three remaining categories in Article 4(A). *See, e.g.*, George H. Aldrich, *Remarks*, 96 AM. J. INT'L L. 891, 894–96 (2002); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 5–6 n.15 (2001) [hereinafter Paust, *Courting Illegality*]; Steven R. Ratner, Jus ad Bellum *and* Jus in Bello *After September 11*, 96 AM. J. INT'L L. 905, 911 (2002). Similarly, Article 1 of the Annex to the 1907 HAGUE CONVENTION (NO. IV) RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, art. 1, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, states that belligerent status will "apply . . . to armies" and sets forth additional criteria to be met merely by "militia" or "volunteer corps." The customary 1863 Lieber Code also affirmed: "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or

the detaining country must release and repatriate them "without delay after the cessation of active hostilities,"[24] unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences.[25]

During an armed conflict, all persons who are not POWs, including so-called unprivileged or "unlawful combatants," have at least various nonderogable rights to due process under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (the "Geneva Civilian Convention")[26] and the first Protocol Additional to the Geneva Conventions ("Geneva Protocol I").[27] Thus, even if POW status is somehow lost, any detainee has due proc-

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other warlike acts are not individual crimes or offenses." U.S. Dep't of War, Instructions for the Government of the Armies of the United States in the Field by Order of the Secretary of War, General Orders No. 100, art. LVII (1863).

Any attempt to add to all categories of combatants identified in GPW Article 4(A) criteria expressly applicable only to one of the six categories (i.e., those covered in Article 4(A)(2)) would be illogical, would contravene accepted canons of treaty interpretation, and would seriously threaten POW status, combat immunity, and protections for soldiers of various countries. Furthermore, such an interpretation is inconsistent with general state practice (which is also relevant for treaty interpretation). *See* Jordan J. Paust, *There Is No Need to Revise the Laws of War in Light of September 11th* (Am. Soc'y of Int'l L., Task Force on Terrorism, Nov. 2002), http://www.asil.org/taskforce/paust.pdf [hereinafter Paust, *No Need to Revise*]. For example, as a matter of state practice, military often wear camouflage to blend in with their surroundings and often do not have distinctive insignia recognizable at a distance, since they prefer not to be recognized at all. Additionally, U.S. and other soldiers in Afghanistan have been spotted wearing beards and local Afghan clothing. *See* Max Blenkin, *SAS Troops are the Mountain Phantoms—War on Terror*, DAILY TELEGRAPH (Sydney), Sept. 21, 2002, at 10; James Brooke, *Pentagon Tells Troops in Afghanistan: Shape Up and Dress Right*, N.Y. TIMES, Sept. 12, 2002, at B21 ("growing beards and donning local garb in an effort to blend in with the local people and their surroundings"); Ian Bruce, *U.S. Soldiers Ordered to Lose Beards*, HERALD (Glasgow), Sept. 16, 2002, at 11 (noting that soldiers wore "beards and adopted local dress to allow them to blend in on undercover missions"); Henry J. Kenny, *Mission: Free the Oppressed; U.S. Commandos Have Special Skills—and Philosophy*, CHI. TRIB., Sept. 29, 2002, at C3 (wearing "beards, riding donkeys into combat"); Glenn Mitchell, *Bin Laden Bolts After Surrender*, HERALD SUN (Melbourne), Dec. 13, 2001, at 15 ("convoy of five trucks carried U.S. troops wearing Afghan dress"); Michael R. Gordon, *Securing Base, U.S. Makes Its Brawn Blend In*, N.Y. TIMES, Dec. 3, 2001, at B1 ("the soldiers wear Afghan clothing").

24. GPW, *supra* note 23, art. 118.

25. *See id.* arts. 85, 99, 119, 129; United States v. Noriega, 746 F. Supp. 1506, 1524–28 (S.D. Fla. 1990).

26. GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC].

27. GENEVA PROTOCOL I, *supra* note 5. Concerning individual status and relevant rights to due process guaranteed by these treaties and customary international law, see GC, *supra* note 5, art. 3(1)(d) (all captured persons "shall in all circumstances" be tried in "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples"—thus incorporating all such guarantees by reference and as nonderogable Geneva protections, including the customary guarantees mirrored in Article 14 of the ICCPR); *id.* art 5 (Even persons who have engaged in activities hostile to state security and who are not entitled to rights under the convention "as would . . . be prejudicial to the security" of a state, shall "[i]n each case . . . nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention."); GENEVA PROTOCOL I, *supra* note 5, art. 75(4), (7); Prosecutor v. Delalic, Case No. IT-96-21-T, Trial Judgment ¶ 271 (Nov. 16, 1998) ("there is no gap between the Third and the Fourth Geneva Conventions"), http://www.un.org/icty/celebici/trialc2/judgement/index.htm.; U.S. DEP'T OF ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE 31 ¶ 73 (1956) [hereinafter FIELD MANUAL 27–10] ("If a person is determined by a competent tribunal, acting in conformity with Article 5, GPW . . . , not to fall within any of the categories listed in Article 4, GPW . . . , he is not entitled to be treated as a prisoner of war. He is, however, a 'protected person' within the meaning of Article 4, GC . . . ."); OSCAR M. UHLER ET AL., GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 51 (Ronald Griffin & C. W. Dumbleton trans., 1958) [hereinafter CIVILIAN COMMENTARY]

ess protections under the Geneva Conventions and Protocol I, human rights law, and other international laws as noted herein. In case of doubt as to the status of an accused criminal or detainee, the Geneva POW Convention requires that all persons "having committed a belligerent act and having fallen into the hands of the enemy" shall enjoy POW protections "until such time as their status has been determined by a competent tribunal."[28]

2. Detention of Other Persons

During an international armed conflict or war-related occupation, "a Party to the conflict" or an occupying power, can intern persons who are not POWs either in its own or the occupied territory under certain circumstances. To detain someone within the state's own territory, the person must be "definitely suspected of . . . [engaging] in activities hostile to the security of the State," and such detention must be "absolutely necessary," whereas to detain someone in occupied territory, the person must be "under definite suspicion of activity hostile to the security of the Occupying power" and the detention must be "necessary, for imperative reasons of security."[29] Intern-

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("Every person in enemy hands must have some status under international law. . . . *There is no* intermediate status; nobody in enemy hands can be outside the law.") (emphasis in original); *id.* at 595 ("applying the same system to all accused whatever their personal status"); Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677, 678–90 (2002) [hereinafter Paust, *Ad Hoc Rules*]; Paust, *Courting Illegality*, *supra* note 23, at 7 n.15, 11–18. *See also* JEAN DE PREUX ET AL., GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY 51 n.1 (A. P. de Heney, trans., 1960) [hereinafter POW COMMENTARY] (common Article 3 is a "safety clause" for cases of non-international conflict); *id.* at 76, 421, 423 (prisoners charged with war crimes retain benefits of the convention); General Comment No. 29, *supra* note 5, ¶¶ 15–16. Today, however, common Article 3 provides a minimum set of rights for persons also in international armed conflicts. *See, e.g.*, Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 218, 255 (June 27); Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion on Jurisdiction ¶¶ 65–74 (Aug. 10, 1995); JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 692–95, 813–14, 816–17 (2d ed. 2000); CIVILIAN COMMENTARY, *supra*, at 14, 58.

28. GPW, *supra* note 23, art. 5. *Cf.* Aldrich, *supra* note 23, at 898 (stating that customary law now requires a tribunal's determination also whenever a captive asserts the right to be a POW); *id.* (stating that the tribunal review requirement "applies to any person not appearing to be entitled to prisoner-of-war status . . . who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists" (quoting FIELD MANUAL 27-10, *supra* note 27, at ¶ 71(b) and citing GENEVA PROTOCOL I, *supra* note 5, art. 45(1))).

29. GC, *supra* note 26, art. 5. Under the convention, persons can be detained in U.S. territory if "definitely suspected of or engaged in activities hostile to the security of the" U.S.; a person can be detained in occupied territory if the person is "under definite suspicion of activity hostile to the security of the Occupying Power" and will forfeit rights of communication if "absolute military security so requires." *Id. See also* Paust, *Ad Hoc Rules*, *supra* note 27, at 681–83. Internment of persons in U.S. territory is further conditioned by Article 42 of the convention, which allows internment "only if the security of the Detaining Power makes it absolutely necessary." GC, *supra* note 26, art. 42. Internment in occupied territory is further conditioned by Article 78, which allows internment if "necessary, for imperative reasons of security." GC, *supra* note 26, art. 78. *See also* CIVILIAN COMMENTARY, *supra* note 27, at 257–58, 367–68 ("such measures can only be ordered for real and imperative reasons of security"); Jordan J. Paust et al., *Report of the ICJ Mission of Inquiry Into the Israeli Military Court System in the Occupied West Bank and Gaza*, 14 HAST. INT'L & COMP. L. REV. 1, 52–59 (1990). Thus, under Geneva law, review of the propriety of detention in U.S. or occupied territory must involve a high threshold of necessity. Persons interned

ment without trial can last for the duration of the international armed conflict[30] or occupation, but detainees are to be released sooner if detention is no longer required for definite security reasons (e.g., release must occur upon termination of the armed conflict or occupation and in any event "at the earliest date consistent with the security of the State or Occupying Power"[31]). While such persons are being detained, they "shall nevertheless be treated

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in U.S. territory "shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose." GC, *supra* note 26, art. 43. *See also* CIVILIAN COMMENTARY, *supra* note 27, at 260–61 (adding that appeals should be reviewed "with absolute objectivity and impartiality" concerning whether detention is "absolutely necessary"). Rights of persons interned in occupied territory "shall include the right of appeal," and "[a]ppeals shall be decided with the least possible delay" and "shall be subject to periodical review." GC, *supra* note 26, art. 78. *See also* CIVILIAN COMMENTARY, *supra* note 27, at 368–69; Paust et al., *supra*, at 56–59.

However, it should be noted that U.S. nationals and nationals of a neutral or co-belligerent country with which the United States has normal diplomatic relations are excluded from protections under Articles 42 and 78 of the Geneva Civilian Convention. *See* GC, *supra* note 26, art. 4. Nonetheless, they are protected under common Article 3 and Part II of the convention (covering protections in Articles 13–26), Article 75 of Protocol I, and human rights law. *See id*. arts. 3–4, 13; GENEVA PROTOCOL I, *supra* note 5, art. 75(1), (3), (6); PAUST ET AL., *supra* note 27, at 813–14, 816–17; CIVILIAN COMMENTARY, *supra* note 27, at 14, 58. This would be useful since the Commentary recognizes that persons detained in territory of the Parties to the conflict (such as Padilla and Hamdi in the United States) benefit from "the rule contained in Article 3," stating: "the rule contained in Article 3 will be applicable: i.e. the Court must afford 'all the judicial guarantees recognized as indispensable by civilized peoples.'" *Id.* at 58. The Commentary also states that "[t]his minimum requirement in the case of a non-international armed conflict, is a fortiori applicable in international conflicts." *Id.* at 14.

Guantanamo does not appear to be an appropriate territory within the meaning of Article 5, since it is not technically U.S. territory, although it is quite close to such status, and it is not war-related occupied territory. *See* Paust, *Courting Illegality*, *supra* note 23, at 25 n.70; Paust, *Ad Hoc Rules*, *supra* note 27, at 691–92 & n.68. Thus, detention at Guantanamo would be impermissible. Moreover, transfer of non-POWs out of any U.S.-occupied territory in Afghanistan or Iraq would be a grave breach of international law. *See, e.g.*, GC, *supra* note 26, arts. 49, 76, 147; Paust, *Courting Illegality*, *supra* note 23, at 24 n.68; Paust et al, *supra*, at 59.

30. *See* GC, *supra* note 26, art. 6. The application of the convention in the territories of parties to the conflict (as opposed to war-related occupied territory), and thus rights and competencies of the detaining power thereunder, "shall cease on the general close of military operations," a circumstance that can arise before the existence or formal recognition of an end of war or an armistice. *Id.* Thus, at least when the international armed conflict with the Taliban in Afghanistan ends, permissibility of detention under Article 5 of persons captured in Afghanistan or during that armed conflict will end. As a legal standard that is part of the laws of war, application of Article 6 (as with any rule of international law) should be within judicial power. *See, e.g.*, *infra* text accompanying notes 63–67. *But see* Ludecke v. Watkins, 335 U.S. 160, 169–70 (1948). Furthermore, since al Qaeda is not a state, nation, belligerent, or insurgent, the United States cannot be at war with al Qaeda as such (or with "terrorism" generally). Outside some context of war, the laws of war do not apply to operations merely directed against or involving al Qaeda. *See, e.g.*, Paust, *Courting Illegality*, *supra* note 23, at 8 n.16; Paust, *No Need to Revise*, *supra* note 23. S*ee also* Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1013–15 (2d Cir. 1974) (The United States could not technically be at war with the Popular Front for the Liberation of Palestine (PFLP), despite terrorist attacks by the nonstate, noninsurgent group.) Thus, outside the wartime context to which the laws of war apply, members of al Qaeda cannot be "enemy combatants," prisoners of war, unlawful combatants, or lawful detainees. Yet, they can be detained consistently with human rights law if detention is reasonably needed and therefore not "arbitrary." *See supra* Part II.A.1. Curiously, it is during recognized war, when the Geneva Conventions do apply, that detention of non-POWs rests upon the higher threshold of necessity. *See supra* note 29. Thus, with respect to permissibility of detention outside the context of actual armed conflict, it may have been a mistake for the Bush administration to have claimed that the United States is at "war" with al Qaeda and "terrorism."

31. GC, *supra* note 26, arts. 5, 43.

with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by" the Geneva Civilian Convention.[32]

3. Judicial Review of Detention and Status Under the Laws of War

When doubt exists as to whether a person is a POW, such person has the right to have his status "determined by a competent tribunal."[33] If any person detained during an armed conflict is not a POW, such person nevertheless benefits from protections under common Article 3 of the Geneva Conventions, which applies today in all armed conflicts and which incorporates customary human rights to due process into the conventions.[34] Thus, whether non-POW detainees are to be prosecuted or merely detained as security threats, each such detainee has the right under customary and treaty-based human rights law to obtain judicial review of the propriety of his detention.[35]

III. Power and Responsibilities of U.S. Courts To Determine the Status and Rights of Detainees

A. The Applicability of International Law as Law of the United States

International law applies as the law of the United States primarily in two ways: first, treaties that the United States has entered into are binding on the United States and its nationals;[36] and second, customary international law is part of U.S. law.[37]

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32. *Id*. These rights include protections under common Article 3, which incorporates by reference customary human rights to due process. *See supra* note 27.

33. *See* GPW, *supra* note 23, art. 5. *See also* United States v. Noriega, 808 F. Supp. at 796 (must be "fair, competent, and impartial"); Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), Inter-Am. C.H.R. (Mar. 12, 2002), *reprinted in* 41 I.L.M. 532, 533–34 (2002).

34. *See supra* note 27.

35. *See supra* notes 11–13, 17–22. The Inter-American Commission on Human Rights has recognized that persons detained during the armed conflict in Grenada had the right to have the propriety of their detention heard and reviewed. *See* Coard v. United States, Case 10.951, Inter-Am. C.H.R. 54–55, OEA/Ser.L/V/II.106, doc.6 rev. (1999) ("Supervisory control over detention is an essential safeguard . . . . This is an essential rationale of the right of habeas corpus, a protection which is not susceptible to abrogation."). Concerning violations of this right by the Bush administration, see, *e.g.*, Paust, *Ad Hoc Rules*, *supra* note 27, at 678–81. Review of detention is also required under other articles of the Geneva Conventions. *See supra* note 29. Even prior to the complete outlawry of reprisals, hostage-taking, and collective punishment under the 1949 Geneva Conventions, when the seizure of certain persons in reprisal might have been permissible, it was necessary during warfare to have a judicial finding to avoid arbitrary decisions of military commanders and deprivation of individual rights. *See, e.g.*, United States v. List, 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 757, 1248–50, 1270 (1950).

36. *See, e.g.*, Paust, *supra* note 13, at 51–64, 143–46.

37. *Id.* at 5–9, 144–46; Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 Mich. J. Int'l L. 301, 301–21, 331–36 (1999). These sources also demonstrate that customary international law has several constitutional bases for incorporation, is part of the laws of the United States, is not mere "common law," and has been used by U.S. courts for more than 200 years. *See, e.g.*, Paust, *supra* note 13, at 5–6 (citing numerous cases and materials). *See also infra* text ac-

Treaties that the United States has ratified can be binding law of the United States for various purposes regardless of whether they are self-executing or partly self-executing. Applicability of the Geneva Civilian Convention illustrates this point. In *Hamdi v. Rumsfeld*, the Fourth Circuit panel concluded that the Geneva Civilian Convention is entirely non-self-executing,[38] but this conclusion is incorrect.[39] The panel assumed that a treaty must provide a private cause of action to be self-executing.[40] This is not the test, however.[41] Federal courts have repeatedly held that a treaty need only expressly or impliedly provide an individual right for it to be self-enforcing. Regardless, the Fourth Circuit panel's reasoning missed the point that a treaty can be partly non-self-executing for one purpose but still be directly operative for another, such as for use defensively or for habeas purposes.[42] Not only do

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companying notes 50–54, 59–63, 70–73. *But see* Al Odah v. United States, 321 F.3d 1134, 1145 (D.C. Cir. 2003) (Randolph, J., concurring) (ignoring these points as well as views of the Founders, numerous cases, and materials on point, and arguing that customary law is mere common law). That Judge Randolph's separate opinion in *Al Odah* adopts an argument unsupportable in view of such constitutional bases, the overwhelming views of the Founders and Framers, and overwhelming trends in judicial decision, and that the very few cases he cites to the contrary are inapt, see Paust, *supra*, at 301–14, 320–21, 335–36.

38. Hamdi v. Rumsfeld, 316 F.3d 450, 468 (4th Cir. 2003).

39. *See* United States v. Lindh, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) ("the GPW, insofar as it is pertinent here, is a self-executing treaty"); United States v. Noriega, 808 F. Supp. 791, 797–99 (S.D. Fla. 1992) (explaining that, were the issue before it, "the Court would almost certainly hold that the majority of provisions of [the GPW] are, in fact, self-executing"); *infra* notes 41, 43. The *Noriega* court noted that "[m]ost of the scholarly commentators . . . make a compelling argument for finding treaties designed to protect individual rights, like [GPW], to be self-executing," and that it would be "inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law." 808 F. Supp. 791, 797–99 (S.D. Fla. 1992) (reminding also that "'[i]t must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests'" (quoting POW COMMENTARY, *supra* note 27, at 23)).

40. *Hamdi*, 316 F.3d at 468.

41. *See, e.g.*, Baldwin v. Franks, 120 U.S. 678, 703–4 (1887) (Field, J., dissenting) ("when it declares the rights"); Edye v. Robertson, 112 U.S. 580, 598–99 (1884) ("whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined"); Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348–49 (1809) ("Whenever a right grows out of, or is protected by, a treaty, . . . it is to be protected."); Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) (if treaty "provides rights" (citing Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996))); People of Saipan v. United States, 502 F.2d 90, 101 (9th Cir. 1974) (Trask, J., concurring) (stating that if a "treaty contains language which confers rights or obligations on the citizenry of the compacting nation then, upon ratification, it becomes a part of the law of the land under Article VI"); Standt v. City of New York, 153 F. Supp. 2d 417, 423, 425 (S.D.N.Y. 2001); PAUST, *supra* note 13, at 54–59, and cases cited therein; PAUST ET AL., *supra* note 17, at 172–88. The Geneva Conventions meet this test and also contain mandatory language. *See infra* note 43.

42. *See* United States v. Duarte-Acero, 208 F.3d 1282, 1284 (11th Cir. 2000); United States v. Duarte-Acero, 132 F. Supp. 2d 1036, 1040 n.8 (S.D. Fla. 2001) (individuals can raise ICCPR claims "defensively"); PAUST ET AL., *supra* note 17, at 75–76, 194–95; Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 CONN. L. REV. 423, 467, 470 (1997); Thomas M. McDonnell, *Defensively Invoking Treaties in American Courts—Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents,* 37 WM. & MARY L. REV. 1401 (1996); John Quigley, *Human Rights Defenses in U.S. Courts*, 20 HUM. RTS. Q. 555 (1998); Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 DENV. J. INT'L L. & POL'Y 533, 562–63 (1998); David Sloss, *Ex parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L.

the Geneva Conventions expressly recognize private rights,[43] but they also retain the possibility of private causes of action for their breach—a practice that predates the conventions and exists more generally with respect to violations of the laws of war.[44] Further, the conventions openly contemplate "liability" and reparations.[45] Several federal statutes also provide an execut-

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REV. 1103, 1108 & n.19, 1121 & n.79, 1203 n.114, 1123 & n.85, 1129–30, 1141–42, 1199 (2001); Ruth Wedgwood, *Remarks*, 85 AM. SOC'Y INT'L L. PROC. 139, 141 (1991). *See also* RESTATEMENT, *supra* note 15, § 111 cmt. h ("Some provisions of an international agreement may be self-executing and others non-self-executing."), *quoted in Noriega*, 808 F. Supp. at 797 n.9.

43. *See, e.g.*, GC, *supra* note 26, arts. 5 ("individual . . . rights and privileges under the present Convention," "rights of communication," and "rights of fair and regular trial"), 8 ("[p]rotected persons may in no circumstance renounce in part or in entirety the rights secured to them by the present Convention"), 27 ("[p]rotected persons are entitled to . . . ."), 38 ("the following rights"), 43 (persons interned "shall be entitled to"), 48 ("right to leave"), 72 ("right to present evidence," "right to be assisted by a qualified advocate or counsel of their own choice," "right at any time to object"), 73 ("A convicted person shall have the right of appeal . . . ."), 75 ("right of petition for pardon or reprieve"), 76 ("right to receive . . . spiritual assistance," "right to be visited," "right to receive"), 78 (persons interned for security reasons shall have "the right of appeal"), 80 ("rights" of internees), 101 ("[i]nternees shall have the right . . . [t]hey shall also have the right"), 147 ("rights of fair and regular trial"); GPW, *supra* note 23, arts. 5 ("persons shall enjoy the protection"), 6 ("nor restrict the rights which it [GPW] confers upon them"), 7 ("Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention."), 14 ("are entitled"), 84 ("the rights and means of defence provided for in Article 105"), 85 ("shall retain . . . the benefits of the present Convention"), 98 ("shall continue to enjoy the benefits"), 105 ("shall be entitled to . . . these rights"), 106 ("Every prisoner of war shall have . . . the right of appeal . . . ."), 129 ("In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall . . . ."), 130 ("rights of fair and regular trial"); CIVILIAN COMMENTARY, *supra* note 27, at 9, 13, 52, 56–58, 64, 70–72, 74–80, 214–15; JEAN S. PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 11, 22 (1975) ("rights secured to them by the Conventions"); JEAN S. PICTET ET AL., GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD: COMMENTARY 65, 73–74, 77, 79–82 (Geneva Conventions are "devoted . . . solely to the protection of the individual"), 82–84 ("'rights which the Convention confers upon protected persons;'" POW COMMENTARY, *supra* note 27, at 23, 85, 87, 90–91, 415, 472, 484–87, 492–93, 625, 628; Rita Hauser, *International Law and Basic Human Rights*, 23 NAVAL WAR COLL. REV. 51 (1971); Theodore Meron, *The Geneva Conventions as Customary International Law*, 81 AM. J. INT'L L. 348, 351, 355, *passim* (1987); *supra* note 39. Indeed, most of the language setting forth rights and obligations in the Geneva Conventions is mandatory, and thus self-executing in nature, and sets standards designed for the protection of individual human beings. There are also numerous provisions from which rights can be implied, thus meeting tests set forth in *Edye*, 112 U.S. at 598–99, and *Owings*, 5 U.S. (9 Cranch) at 348–49.

44. *See, e.g.*, Paust, *supra* note 5 at 360–64 (1991); *infra* note 71.

45. *See, e.g.*, GC, *supra* note 26, arts. 29 (state and individual responsibility), 148 (state "liability"); GPW, *supra* note 23, art. 131 (state "liability"); CIVILIAN COMMENTARY, *supra* note 27, at 210, 603 (addressing state liability for compensation); POW COMMENTARY, *supra* note 27, at 630 (state is "liable to pay. . . material compensation for breaches of the Convention"); Paust, *supra* note 5, at 360 – 69. *See also* Hilao v. Estate of Marcos, 103 F.3d 767, 777 (9th Cir. 1996) (regarding leader responsibility); Kadic v. Karadzic, 70 F.3d 232, 242–43 (2d Cir. 1995); Linder v. Portocarrero, 963 F.2d 332, 336–37 (11th Cir. 1992); Barrueto v. Larios, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002) (regarding individual responsibility); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1350–54, 1358 (N.D. Ga. 2002); *In re* World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939 (N.D. Cal. 2000) (private claims were settled by international agreement); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D.C. 1998); Xuncax v. Gramajo, 886 F. Supp. 162, 171–72 (D. Mass. 1995) (leader liability); S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/RES/674 (1990) (referring to the Geneva Civilian Convention and reminding Iraq that "it is liable for any loss, damage or injury arising in regard to Kuwait and third states and their nationals" for breaches of the convention, and inviting "[s]tates to collect relevant information regarding their claims, and those of their nationals"); Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 389–90 & n.221, 409–10 (1988).

ing function for various purposes, including for private lawsuits.[46] More importantly, habeas corpus legislation provides an executing function for any wholly or partly non-self-executing treaty of the United States by expressly implementing all treaties of the United States for habeas purposes.[47] An express purpose of the legislation is to allow a habeas petition for any person "in custody in violation of . . . treaties of the United States."[48]

International law also applies within the United States because customary international law, of which all of the 1949 Geneva Conventions form a part,[49] is directly part of U.S. law.[50] In *Rodriguez-Fernandez v. Wilkinson*,[51] the Court recognized that "arbitrary detention is [also] prohibited by customary international law" and "[t]herefore . . . [such detention] is judicially remedial as a violation of international law,"[52] since "[i]nternational law is a part of the laws of the United States which federal courts are bound to ascertain and administer in an appropriate case."[53] The district judge aptly added:

> Perpetuating a state of affairs which results in the violation of an alien's fundamental human rights is clearly an abuse of discretion on the part of the responsible agency officials. This Court is bound to declare such an abuse and to order its cessation. When Congress and the executive department . . . [decided to control certain aliens], it was their corollary responsibility to develop methods . . . without offending any of their

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46. *See, e.g.*, Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1359–60 (S.D. Fla. 2001) (finding the Alien Tort Claims Act to be "the appropriate piece of implementing legislation to enforce the rights" relating to Article 6 of the ICCPR); Ralk v. Lincoln County, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000) ("because the ICCPR is not self-executing, Ralk can advance no private right of action under the" treaty, but "could bring a claim under the Alien Tort Claims Act for violations of the ICCPR"); PAUST, *supra* note 13, at 179, 192–93, 207, 371–72; PAUST ET AL., *supra* note 17, at 194. The ICCPR is actually only partly non-self-executing (i.e., for purposes of creating a private cause of action); it can be used defensively, and has been executed for certain other purposes by various federal statutes. *See, e.g.*, United States v. Duarte-Acero, 208 F.3d 1282, 1284 (11th Cir. 2000) (despite declaration, ICCPR is supreme law of the land); United States v. Duarte-Acero, 132 F. Supp.2d 1036, 1040 n.8 (S.D. Fla. 2001) (declaration does not apply when raising "ICCPR claims defensively"); PAUST, *supra* note 13, at 193–94, 398.

47. *See* 28 U.S.C. § 2241 (2000). *See also* PAUST ET AL., *supra* note 17, at 194–95; Sloss, *supra* note 42, at 1203 n.114. Indeed, there are habeas cases that involve the ICCPR. *See, e.g.*, Caballero v. Caplinger, 914 F. Supp. 1374, 1378, 1379 n.6 (E.D. La. 1996). Even if the habeas statute did not execute such treaties, customary human rights law and customary provisions of the Geneva Conventions addressed in this Essay are directly incorporable as laws of the United States. *See infra* notes 49–50, 53.

48. 28 U.S.C. § 2241 (2000).

49. *See, e.g.*, PAUST ET AL., *supra* note 27, at 658, 689, 692–93, 695, 807, 823 (common Article 3 of the Geneva Conventions); Paust, *Ad Hoc Rules*, *supra* note 27, at 678 n.9.

50. *See, e.g.*, RESTATEMENT, *supra* note 15, § 111; PAUST, *supra* note 13, at 5–7, and numerous cases cited; *supra* note 37.

51. Rodriguez Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other gds.*, 654 F.2d 1382 (10th Cir. 1981).

52. *Id.* at 798.

53. *Id.* (citing The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815) (finding that courts are "bound by the law of nations, which is part of the law of the land")). *See also* The Paquete Habana, 175 U.S. 677, 700, 708, 714 (1900); Filartiga v. Pena-Irala, 630 F.2d 876, 886–87 (2d Cir. 1980).

> fundamental human rights . . . . [T]he courts cannot deny them protection from arbitrary governmental action . . . .[54]

The Supreme Court acknowledged in 1936 that the "operations of the nation in [foreign] territory must be governed by treaties . . . and the principles of international law,"[55] and in 1901 that executive military powers during a war-related foreign occupation are "'regulated and limited . . . directly from the laws of war . . . from the law of nations.'"[56]

In addition to international treaties and customary international law, domestic legal constraints also bind the United States. For example, the Supreme Court noted that "constitutional limits" also exist "on the President's powers as Commander-in-Chief or as the nation's spokesman in the arena of foreign affairs."[57] The Supreme Court has indicated that "'even the war power does not remove constitutional limitations safeguarding essential liberties.'"[58]

B. The Power and Responsibility of U.S. Courts To Determine the Legal Status and Rights of Detainees Under International Law

United States courts clearly have judicial power to determine the legal status and rights of detainees under international law. This power derives from the uniform views of the Founders and from Article III, Section 2 of the Constitution, which empowers the federal judiciary to identify, clarify, and apply rights and duties arising under treaties and customary international law.[59] The Supreme Court has reaffirmed this power in numerous decisions. For example, in *The Paquete Habana*,[60] the Supreme Court recognized that "[i]nternational law is part of our law, and must be ascertained and adminis-

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54. Rodriguez Fernandez v. Wilkinson, 505 F. Supp. at 799–800. For a discussion of uniform views of the Founders on the subject as well as cases recognizing that the President is bound by international law, see PAUST, *supra* note 13, at 143–46, 154–60 nn.2–38; *infra* notes 55–56, 61, 71–73, 75. The primary constitutional basis for this duty is mirrored in the President's duty to execute the law faithfully. *See* U.S. CONST. art. II, § 3. Since those in the executive branch are bound by international law, an order or directive to violate international law concerning detention, interrogation, or prosecution in a military commission, whether public or classified, would be patently illegal and of no lawful validity or effect. Concerning the duty of military personnel and others within the executive branch to disobey such an order, see, for example, Paust, *Courting Illegality*, *supra* note 23, at 28 n.81.

55. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

56. Dooley v. United States, 182 U.S. 222, 231 (1901) (quoting 2 HENRY W. HALLECK, INTERNATIONAL LAW 444 (1st ed. 1861)).

57. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934). *See also* Zweibon v. Mitchell, 516 F.2d 594, 626–27 (D.C. Cir. 1975).

58. *Zweibon*, 516 F.2d at 626–27.

59. *See* U.S. CONST. art. III, § 2; *id.* art. VI, cl. 2; 28 U.S.C. § 1331; RESTATEMENT, *supra* note 15, § 111 cmts. d–e; PAUST, *supra* note 13, at 6–9, 34–36 & n.38, 40–48 & nn.44–59, 51–55, 143–46, 198–203, *passim*; Paust, *supra* note 37, at 301–05, 307–08.

60. 175 U.S. 677 (1900). For further analysis of little known claims of the Executive, the actual holding of the case, and more recent errors with respect to the rationale and ruling and misuse of the case, see Jordan J. Paust, Paquete *and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT'L L. 981 (1994).

tered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[61] More specifically with respect to the matters in issue, in *Ex parte Quirin*,[62] the Supreme Court affirmed that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy . . . individuals."[63]

In *Owings v. Norwood's Lessee,*[64] the Supreme Court specifically addressed whether it and other federal courts had the power to hear claims based on rights expressly or impliedly afforded by treaties:

> The reason for inserting that clause in the constitution [Art. III, Section 2] was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals . . . . Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.[65]

The Supreme Court further emphasized these general points when, in response to claims in *Ex parte Quirin* that executive decisions denying access to courts to a class of persons are determinative and that, in any case, enemy aliens being detained should be denied access to courts,[66] it held that "neither the [President's] Proclamation nor the fact that they are enemy aliens forecloses considerations by the courts of petitioners' contentions."[67] Indeed,

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61. 175 U.S. at 700. *See also id*. at 708, 714 (a court is "bound to take judicial notice of, and to give effect to" international law; "it is the duty of this court"). Five years earlier, the same Court had recognized: "International law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation . . . ." Hilton v. Guyot, 159 U.S. 113, 163 (1895). For additional cases, see *infra* notes 63, 71–73, 75. S*ee also* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 261 (1984) (O'Connor, J.) (power "delegated by Congress to the Executive Branch" as well as a relevant congressional-executive "arrangement" must not be "exercised in a manner inconsistent with . . . international law").

62. 317 U.S. 1 (1942).

63. *Id*. at 27.

64. 9 U.S. (5 Cranch) 344 (1809).

65. *Id*. at 348–49.

66. *See Ex parte Quirin*, 317 U.S. at 23.

67. *Id*. at 25. *See also infra* notes 71, 77, 89–90, 97–98, 108–110. The majority in *Johnson v. Eisentrager*, 339 U.S. 763, 785, 771, 781 (1950), denied the reach of habeas corpus to certain imprisoned enemy alien belligerents, but they were not being detained without trial and had been tried and convicted in the theater of war in China for war crimes committed in China. *See also* United States v. Tiede, Crim. Case No. 78-001A, 85 F.R.D. 227 (U.S. Ct. for Berlin Mar. 14, 1979), *reprinted in* 19 I.L.M. 179, 193 & n.76 (distinguishing *Eisentrager*), 199–200 (distinguishing *Ex parte Quirin*) (1980). Moreover, the conduct at issue in *Eisentrager* occurred prior to the onset of obligations under the 1949 Geneva Conventions and human rights law addressed in this Essay. *See* Paust, *Courting Illegality*, *supra* note 23, at 25–26. For cases involving habeas review of detention of aliens outside the United States, see Paust, *Ad Hoc Rules*, *supra* note 27, at 692 n.69. *But see* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) (assuming that habeas is only available to persons within the sovereign territory of the United States and deciding that the United States does not exercise any sort of sovereign jurisdiction and control at Guantanamo Bay, Cuba). *Al Odah* likely was decided erroneously. The habeas statute does not require "sover-

as *Ex parte Quirin* recognizes, legal status and rights under international law are matters of law within the ultimate prerogative of the judiciary. Later, in *Youngstown Sheet and Tube Co. v. Sawyer*,[68] Justice Jackson affirmed that the Founders had omitted from the Constitution unreviewable presidential "powers *ex necessitate* to meet an emergency," noting that they knew how such powers would "afford a ready pretext for usurpation."[69] He proceeded to reassert the "control of executive powers by law," and assured that "it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military."[70] In fact, issues concerning POW status, the propriety of detention, and provisional characterizations by the Executive during war have been reviewed by courts according to international legal standards.[71]

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eignty" but only U.S. "jurisdiction." *See* 28 U.S.C. § 2241(a), (c)(3) (1994). The United States exercises "complete jurisdiction and control over and within" Guantanamo Bay of a sovereign nature under a treaty with Cuba, and as an occupying power exercising sovereign power inconsistent with the original purposes of the treaty. Per terms of the treaty Cuba only has "ultimate" sovereignty, and thus by necessary implication the United States clearly has some sovereign power at Guantanamo. *See* Paust, *Ad Hoc Rules*, *supra* note 27, at 691–93, and references cited. It is also of interest that in the Opinion and Judgment of the International Military Tribunal at Nuremberg (Oct. 1, 1946), *reprinted in* 41 Am. J. Int'l L. 172 (1947), the tribunal recognized that an occupying power exercises "sovereign" power in occupied territory.

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

69. *Id*. at 646, 649–50 (Jackson, J., concurring).

70. *Id*. *See also* Reid v. Covert, 354 U.S. 1, 14 (1957) ("expediency" of military prosecutions is no excuse); *Youngstown Sheet & Tube Co.*, 343 U.S. at 655 (in order to preserve a "free government . . . the Executive . . . [must] be under the law"); Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 8 (1936) (in an extradition context, declaring more generally: "the Constitution creates no executive prerogative to dispose of the liberty of the individual"); United States v. Lee, 106 U.S. 196, 219–21 (1882); United States v. Worrall, 2 U.S. (2 Dall.) 384, 393–94 (C.C. Pa. 1798) (Chase, J.).

71. *See, e.g.*, *Ex parte Quirin*, 317 U.S. at 27–28 ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 131 (1866) (despite the insistence that Milligan was a prisoner of war, concluding that "[i]t is not easy to see how he can be treated as a prisoner of war under the facts"); *id.* at 134 (Chase, C.J., dissenting) ("Milligan was imprisoned under the authority of the President, and was not a prisoner of war," thus demonstrating that the Court ultimately decides who is a POW); United States v. Guillem, 52 U.S. (11 How.) 47 (1850) (holding that a neutral crew could not be made POWs—and have its property confiscated—by the Executive, even if they were on an enemy vessel); The Nereide, 13 U.S. (9 Cranch) 398, 429 (1815); Colepaugh v. Looney, 235 F.2d 429, 431 (10th Cir. 1956) (regarding "access to the courts for determining the applicability of the law of war to a particular case," the Executive "could not foreclose judicial consideration of the cause of restraint, for to do so would deny the supremacy of the Constitution and the rule of law under it as construed and expounded in the duly constituted courts of the land," and would "subvert the rule of law to the rule of man"); *In re* Territo, 156 F.2d 142 (9th Cir. 1946); United States v. Noriega, 808 F. Supp. 791, 793–96 (S.D. Fla. 1992); United States v. Noriega, 746 F. Supp. 1506, 1525–29 (S.D. Fla. 1990); *Ex parte* Toscano, 208 F. 938, 942–44 (S.D. Cal. 1913) (Executive detention of belligerents from Mexico during a Mexican civil war was appropriate under Article 11 of the Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 Oct. 1907, 36 Stat. 2310, 1 Bevans 654, and was not unreasonable under the circumstances; habeas "petitioners are completely within the provisions" of the treaty, and "the President has full authority . . . [under the treaty], and it was and is his duty to execute said treaty provisions."); *Ex parte* Orozco, 201 F. 106, 111–12 (W.D. Tex. 1912) (The arrest and imprisonment without trial of a person suspected of organizing an expedition against Mexico in violation of neutrality "merely upon an order directed by the President" were illegal and "[could not] be sustained in a court of justice," since "civil courts . . . were competent to deal with all disturbers of the peace and with all persons offending against the neutrality."); *id.* (second guessing whether "intervention

In other contexts, the judiciary has addressed the propriety of seizures of persons or property abroad in violation of international law[72] and has made final determinations concerning the seizure of enemy or neutral property in time of armed conflict, often in conflict with the determinations of the executive branch.[73] In *Brown v. United States*,[74] Justice Story cautioned that the

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of the military was necessary" at all); *id.* at 118 (noting that despite the President's "earnest[ ] and persistent[ ] endeavor[ ] to enforce" neutrality, even "actuated by the high motive to faithfully execute the laws," such does not affect "the determination of legal questions," and finding that the Executive actions were "assaults of arbitrary power" and "unlawful"); *id.* at 111 ("'the executive has no right to interfere with or control the action of the judiciary'" concerning "proceedings against persons charged with being concerned in hostile expeditions" (quoting 21 Op. Att'y Gen. 267, 273 (1895))); *In re* Fagan, 8 F. Cas. 947, 949 (D. Mass. 1863) (No. 4604) (with respect to "persons detained under military authority as soldiers or prisoners of war, or spies," "[t]he writ of habeas corpus is unquestionably applicable . . . and had long been actually and frequently used therein."); *In re* Keeler, 14 F. Cas. 173, 175 (D. Ark. 1843) (No. 7637) (the court will decide if detention is unlawful and will consider "the circumstances" to decide whether "reasonable grounds" support the habeas petition, but if "upon his own showing" petitioner is "clearly a prisoner of war and lawfully detained," denial of habeas is proper; moreover, "a strong case ought to be made out" by the petitioner so as not to unduly interfere with lawful military authority); Juando v. Taylor, 13 F. Cas. 1179, 1183 (S.D.N.Y. 1818) (No. 7558) ("the parties in this war must be considered as regularly at war under the government and protection of the common laws of war; to be treated as prisoners of war"); Respublica v. Chapman, 1 U.S. (1 Dall.) 53, 59 (Pa. 1781) ("Those persons were, accordingly, treated as Prisoners of War."); Straughan v. United States, 2 Ct. Cl. 603, 604 (1866) (Loring, J., dissenting) (detainee was concluded not to be a prisoner of war and "his seizure and detention was a violation of the law of nations, a . . . wrong for which . . . the individual sufferers were entitled to reparation" from Great Britain); Herring v. Lee, 22 W. Va. 661, 668 (W. Va. 1883); Grinnan v. Edwards, 21 W. Va. 347, 357–58 (W. Va. 1883); Johnson v. Jones, 44 Ill. 142, 149–52 (Ill. 1867) (allegation that an imprisoned member of a secret society that sought to overthrow the Union 'was in fact engaged in levying war against the government of the United States' . . . is too vague and general," and detainee "did not become a belligerent, whatever may have been his sympathies, or however wicked his plots"); Holland v. Pack, 7 Tenn. (Peck) 151, 153 (Tenn. 1823) (Indians at war are prisoners of war and are treated "not as offenders against the laws of this state or of the United States."). *See also* Lloyd v. United States, 73 Ct. Cl. 722, 748 (1931) (recognizing that prisoners of war have personal rights and can have "[c]laims for losses based on personal injuries, death, [or] maltreatment") ; Smith v. Shaw, 12 Johns. 257, 265 (N.Y. Sup. Ct. 1815) (Kent, C.J.) (civilian who allegedly was an enemy spy exciting mutiny and insurrection during war could not be detained by U.S. military for trial in a military tribunal); *In re* Stacy, 10 Johns. 328, 332 (N.Y. Sup. Ct. 1813) (habeas writ issued in wartime against a military commander holding a civilian charged with treason in aid of the enemy, since U.S. military did not have jurisdiction to detain him despite alleged threat to national security); Arndt-Ober v. Metro. Opera Co., 169 N.Y.S. 304, 306 (N.Y. Sup. Ct. 1918) ("a prisoner of war . . . is in no worse position than any other individual who is in custody for an offense" and "is entitled . . . to maintain an action"). *See also infra* notes 77, 89–90, 97, 108–109. Writs of habeas corpus were issued against commanding generals even within the Confederacy during the Civil War with respect to those arrested for treason and conspiracy against the Confederate states. *See, e.g.*, *Ex Parte* Peebles, Robards 17 (Tex. 1864) (when "the evidence is not legally sufficient," applicants are entitled to be discharged).

72. *See, e.g.*, Ford v. United States, 273 U.S. 593, 606 (1927) (executive branch violation of a treaty would affect jurisdiction); United States v. Toscanino, 500 F.2d 267, 276–79 (2d Cir. 1974) (courts should assure "that the Executive lives up to our international obligations" (quoting Shapiro v. Ferrandina, 478 F.2d 894, 906 n.10 (2d Cir. 1973))); United States v. Yunis, 681 F. Supp. 896, 906 (D.D.C. 1988) ("The government cannot act beyond the jurisdictional parameters set forth in principles of international law . . . ."); United States v. Ferris, 19 F.2d 925, 926 (N.D. Cal. 1927) (Executive seizure in violation of customary international law and a treaty obviated jurisdiction and is "not to be sanctioned by any court."). *See* also United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990) (Rehnquist, C.J.) (explaining in dictum that, with respect to U.S. use of armed force abroad, "restrictions on searches and seizures which occur incident to such American action . . . . [can] be imposed by . . . treaty"); Cook v. United States, 288 U.S. 102 (1933) (seizure of ship in violation of treaty).

73. *See, e.g.*, The Paquete Habana, 175 U.S. 677 (1900) (regarding illegal seizures and detention of

President during war "has a discretion vested in him . . . but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims."[75] Later, in *Sterling v. Constantin*,[76] the Court affirmed that the line between permissible discretion and law is one that must be drawn by the judiciary:

> It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the . . . [Executive] may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, . . . is conclusively supported by mere executive fiat. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken . . . [but] the officer may show the necessity in defending an action [before the judiciary].[77]

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enemy ships, cargo, and crew outside the United States in time of armed conflict); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); The Flying Fish, 6 U.S. (2 Cranch) 170 (1804). *See also* Juragua Iron Co. v. United States, 212 U.S. 297 (1909); United States v. Lee, 100 U.S. at 219–21; Miller v. United States, 78 U.S. (11 Wall.) 268, 314–16 (1870) (Field, J., dissenting) ("The power to prosecute war . . . is a power to prosecute war according to the law of nations, and not in violation of that law."); The Prize Cases, 67 U.S. (2 Black) 635 (1862) (involving judicial determination of the propriety of a blockade and seizures under the laws of war, with an admonition that the President "is bound to take care that the laws be faithfully executed," including the laws of war); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (President cannot authorize seizure of a vessel in violation of a treaty); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (war's "extent and operations are . . . restricted by . . . the law of nations"); Johnson v. Twenty-One Bales, 13 F. Cas. 855, 863 (C.C.D.N.Y. 1814) (No. 7417); Elgee's Adm'r v. Lovell, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4344) ("no proclamation of the president can change or modify [the law of nations]"); 11 Ops. Att'y Gen. 297, 299–300 (1865) (laws of war and more general laws of nations "are of binding force upon the departments and citizens of the Government," and neither Congress nor the Executive can "abrogate them or authorize their infraction"). *Bas* also involved a judicial determination whether a war existed and who was an "enemy." *See* 4 U.S. (4 Dall.) at 39 (Moore, J.), 40–42 (Washington, J.), 43–45 (Chase, J.), 46 (Paterson, J.).

74. Brown v. United States, 12 U.S. (8 Cranch) 110 (1814).

75. *Id*. at 153 (Story, J., dissenting). The majority did not disagree and affirmed that while exercising presidential discretion, the Executive can only pursue the law. *See id*. at 128–29 (Marshall, C.J.). For uniform views of the Founders and other cases recognizing that the President is bound by international law, see PAUST, *supra* note 13, at 143–46, 155–60 & nn.6–38. For the opinion of a former Legal Advisor of the U.S. Department of State, see Monroe Leigh, *Is the President above Customary International Law?*, 86 AM. J. INT'L L. 757, 760, 762–63 (1992) ("When the President orders a violation of customary international law, . . . he abuses his discretion and may be compelled by . . . the courts to obey the dictates of customary international law.").

76. Sterling v. Constantin, 287 U.S. 378 (1932).

77. *Id*. at 400–01. Concerning the extent of judicial review, see *id*. at 403 ("the findings of fact made by the District Court are fully supported by the evidence"). *See also* United States v. United States District Court, 407 U.S. 297, 299–301, 316–17 (1972) (members of the executive branch "should not be the sole judges" of their actions, with respect to an executive claim that a wiretap to gather intelligence was "a reasonable exercise of the President's power . . . to protect the national security"; Woods v. Cloyd W. Miller Co., 333 U.S. 138, 146–47 (1948) (Jackson, J., concurring); Korematsu v. United States, 323 U.S. 214, 218 (1944) (Black, J.) ("'we cannot reject as unfounded the judgment of the military'" when there is "'ground for believing'" (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943))); *id*. at

The Court then quoted *Mitchell v. Harmony*:[78] "'Every case must depend on its own circumstances.'"[79]

Judicial review of military actions taken under circumstances of claimed "necessity" during war has also occurred in other cases and has involved contextual inquiry into whether the military actions were required, "reasonable," or plainly justified.[80] Thus, exercise of war or national security powers must not only fall within the limits of law, but also must not take exception in the name of "necessity" or under some theory of ends-means justification. To this sort of claim, the Supreme Court gave an apt reply in *Ex Parte Milligan*:[81]

> Time has proven the discernment of our ancestors . . . . Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law . . . . The Constitution of the United States is

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234 (Murphy, J., dissenting) ("the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled," and "[t]he judicial test . . . is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger"); *Hirabayashi*, 320 U.S. at 98 ("[v]iewing these data in all their aspects," the political branches "could reasonably have concluded" that detention was necessary); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, C.J.) (deciding that there was not sufficient evidence that petitioners were levying war against the United States); United States *ex rel*. Zdunic v. Uhl, 137 F.2d 858, 861 (2d Cir. 1943) ("[O]n these and any other disputed facts [an alleged German enemy alien] is entitled to a judicial inquiry before the court can determine whether his relation to the German 'nation or government' brings him within the statutory definition of alien enemies."); *Ex parte* Merryman, 17 F. Cas. 144, 148–50 (C.C.D. Md. 1861) (No. 9487); Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1944) ("[T]he shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."); Cruikshank v. United States, 431 F. Supp. 1355, 1359 (D. Haw. 1977) ("The Government should not have the 'discretion' to commit illegal acts . . . . In this area, there should be no policy option . . . [and] there is no exception to this rule for the acts of the CIA."); Johnson v. Jones, 44 Ill. 142, 147–48, 160–61 (Ill. 1867), *quoted in Ex parte* Orozco, 201 F. 106, 115–17 (W.D. Tex. 1912); PAUST, *supra* note 13, at 472 & n.37 (concerning arbitrary arrests and detention of Vietnam War protesters); *supra* note 71; *infra* note 80.

78. 54 U.S. (13 How.) 115 (1851).

79. Sterling, 287 U.S. at 401 (quoting Mitchell v. Harmony, 54 U.S. (13 How.) 115 at 134 (1851)).

80. *See, e.g.*, Raymond v. Thomas, 91 U.S. 712, 716 (1875) (finding a military order arbitrary and void under the circumstances, and adding, "[i]t is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires" as determined by the courts); United States v. Russell, 80 U.S. (13 Wall.) 623, 627–28 (1871) (judicial inquiry required even where there was "a state of facts which plainly lead to the conclusion that the emergency was such that it justified" an action); *Mitchell*, 54 U.S. at 134–35 (concerning judicial review of a military seizure, "it is not sufficient to show that [an executive officer] exercised an honest judgment . . . ; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe"). *See also* PAUST, *supra* note 13, at 143–46, and cases cited; *supra* notes 55–56, 60–61, 63, 67, 71–75, 77. Even executive efforts to conduct foreign intelligence surveillance and to obtain related evidence, for example, against foreign terrorists under the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801, are subject to a "probable cause" hearing by a Foreign Intelligence Surveillance court, *see* § 1805(a)(3), (b), review by a FISA Court of Review, and possible review by the Supreme Court, *see* § 1803(a)–(b). *See also* United States v. Squillacote, 221 F.3d 542, 553–54 (4th Cir. 2000)).

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

> a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence . . . .[82]

The Court also emphasized that precisely at such times "the President . . . is controlled by law, and has his appropriate sphere of duty, which is to execute [and not violate] the laws,"[83] adding, "[b]y the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers."[84]

During a heroic moment in judicial history, District Judge Herbert J. Stern, sitting in a specially convened Court of the United States in Berlin during prosecution of aircraft hijackers, refused claims of U.S. prosecutors that rights of the accused would be determined by the executive branch and that the proceedings and other governmental actions did not have to comply with the United States Constitution.[85] In reply to prosecutors' arguments on the grounds that important "foreign affairs" and "national interests" were at stake, Judge Stern noted that judges in that very city some forty years earlier had heard similar claims, but that they were clearly unacceptable:

> When was it that Judges were supposed to worry about that in deciding what the law is? . . . in construing the rights of human beings? And when did it become permissible for lawyers in a courtroom or a litigant to tell the Judge that the piece of litigation is so important to the litigant that the Judge is ordered to find a certain way? What system of justice are you referring to? . . . What Judge would do it for you?

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82. *Id*. at 120–21. *See also* Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Murphy, J., concurring) (citing *Ex parte Milligan*).

83. *Ex parte* Milligan, 71 U.S. (4 Wall.) at 121. *See also* U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed"—thus, there is simply no discretion to violate law); Kendall v. United States, 37 U.S. (12 Pet.) 524, 612–13 (1838) (whatever discretion the President may have concerning implementation of law, the President can never lawfully violate the law); *supra* notes 71–73, 75.

84. *Ex parte* Milligan, 71 U.S. (14 Wall.) at 119.

85. *See* United States v. Tiede, Crim. Case No. 78-001A, 86 F.R.D. 227 (U.S. Ct. for Berlin Mar. 14, 1979), *reprinted in* 19 I.L.M. 179, 188, 191–92 (1980); HERBERT J. STERN, JUDGMENT IN BERLIN 95–96 (1984). Judge Stern was a federal district judge from New Jersey. *Tiede*, like *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), is one of the lower federal court cases recognizing that the U.S. Constitution applies abroad to restrain executive actions against aliens, since the United States is entirely a creature of the Constitution and, thus, it can take no action here or abroad inconsistent with the Constitution. *See also* Reid v. Covert, 354 U.S. 1, 6, 12, 35 n.62 (1957)); United States v. Lee, 106 U.S. 196, 219–21 (1882); *Ex parte* Orozco, 201 F. 106, 112 (W.D. Tex. 1912); Paust, *Courting Illegality*, *supra* note 23, at 18–20.

> . . . That's a vile thing for a Judge to listen to. He can't be a judge if he listens to that.[86]

Instead, Judge Stern upheld predominant trends in judicial decision and traditional expectations that judicial attention to law must not be lessened merely because of the executive prerogative to conduct foreign relations as such and to prosecute alleged terrorist hijackings. The court noted that although laws might not directly regulate executive discretion concerning the conduct of otherwise permissible governmental operations, the Executive, in choosing among permissible options, must not violate the law. More specifically: "the talismanic incantation of the word 'occupation' cannot foreclose judicial inquiry into the nature and circumstances of the occupation, or the personal rights of two defendants which are at stake."[87]

C. Two Recent Cases

1. Affirming Judicial Responsibility

Recently, a Fourth Circuit panel has reiterated the view that the courts have the competence to review the legal status and rights of detainees. In *Hamdi v. Rumsfeld* (*Hamdi I*),[88] the Fourth Circuit panel emphasized the importance of "meaningful judicial review" and denounced the "sweeping proposition . . . that with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel."[89] On remand, the district court noted that the Bush administration "conceded that their determination of Hamdi's status was subject to judicial review,"[90] and added:

> While it is clear that the Executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on . . . individual liberties . . . . The standard of judicial inquiry must . . . recognize that the "concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the

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86. *See* STERN, *supra* note 85, at 371–72.

87. *Tiede*, 19 I.L.M. at 193 n.78.

88. 296 F.3d 278 (4th Cir. 2002).

89. *Id*. at 283. The panel also recognized that if petitioner was "an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Id*. *See also supra* notes 67–71. Subsequently, the House of Delegates of the American Bar Association issued a recommendation that

> U.S. citizens and residents who are detained within the United States based on their designation as 'enemy combatants' be afforded the opportunity for meaningful judicial review of their status, under a standard according such deference to the designation as the reviewing court determines to be appropriate to accommodate the needs of the detainee and the requirements of national security.

A.B.A. House of Delegates, Recommendation, *in* Revised Report 109 (Feb. 10, 2003).

90. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003).

> term 'national defense' is the notion of defending those values and ideals which sets this Nation apart . . . .[91]

Addressing significant policies at stake in a constitutional democracy with respect to a viable check and separation of powers, the district court added that judicial acceptance of an executive determination as sufficient justification for detention "would in effect be abdicating any semblance of the most minimal level of judicial review," such that "this Court would be acting as little more than a rubber-stamp."[92] The district court went on to state that under "a government of checks and balances," a court cannot allow detention with "few or no standards" or on the "sparse facts" presented to support an executive decision to detain.[93] Indeed, allowing the Executive to make a final determination with respect to the content and application of international law governing the status of persons, individual rights, and permissibility of detention would necessarily involve a violation of the separation of powers,[94] and would not be excusable under international law.[95]

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91. *Id.* at 532 (quoting United States v. Robel, 389 U.S. 258, 264 (1967)). *Robel* also affirmed that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.'" 389 U.S. at 263–64 (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934)). Concerning standards for judicial review, see *supra* note 71. In other contexts, claims of arbitrary detention have necessitated that the facts and decisions be "carefully reviewed" or that there be "meaningful review" of decisions. *See, e.g.*, Ma v. Ashcroft, 257 F.3d 1095, 1099 (9th Cir. 2001) ("carefully reviewed" the record and decision of the district court); Najjar v. Reno, 97 F. Supp. 2d 1329, 1354 (S.D. Fla. 2000) (there must be "meaningful review" of an immigration judge's decision that petitioner is a threat to national security based on classified evidence presented *in camera* and *ex parte*); Kiareldeen v. Reno, 71 F. Supp. 2d 402, 408–15 (D.N.J. 1999) (issuing writ of habeas corpus since due process was denied when the government relied on secret evidence presented *in camera*, unclassified summaries of information, and uncorroborated hearsay that detainee rebutted, rendering "illusory any opportunity [for the detainee] to defend himself"); *id.* at 416 ("due process concerns are not satisfied unless the government provides the detainee with an opportunity to cross-examine the affiant, or at a minimum, submits a sworn statement by a witness who can address the reliability of the evidence"); *supra* note 10.

92. *Hamdi*, 243 F. Supp. 2d at 535.

93. *Id*. at 536.

94. *See also supra* notes 52–54, 59–63, 67, 71–73, 75. It would also involve an unconstitutional judicial suspension of the writ of habeas corpus. Only Congress has that power. *See, e.g.*, *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, C.J.); *Ex parte* Merryman, 17 F. Cas. 144 (C.C. Md. 1861) (No. 9487); *Ex parte* Benedict, 3 F. Cas. 159 (N.D.N.Y. 1862) (No. 1292); Paust, *Courting Illegality*, *supra* note 23, at 22 & n.53. It would be incorrect to claim that the federal judiciary does not have a share of the war powers. As the cases cited demonstrate, significant judicial powers and responsibilities clearly exist during war, especially regarding "judgments on the exercise of war powers." *But see* Padilla *ex rel*. Newman v. Bush (Padilla I), 233 F. Supp. 2d 564, 607 (S.D.N.Y. 2002).

95. *See generally* United States v. Altstoetter (The Justice Case), 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 983–84 (1951); Paust, *Courting Illegality*, *supra* note 23, at 28 & n.81.

2. Functionally Abdicating Responsibility To Provide a "Meaningful Judicial Review"

Two recent decisions, however, have not been equally attentive to judicial responsibility. The first of these, *Padilla v. Bush* (*Padilla I*),[96] provided for far too much judicial deference to executive determinations of the status and rights of persons detained without trial. While the district court in *Padilla I* recognized that a U.S. national detained as an "enemy combatant" has the right by habeas corpus "to challenge the government's naked legal right to hold him as an unlawful combatant on any set of facts whatsoever,"[97] and has the right to counsel for the purpose of presenting facts to the court concerning the propriety of an executive determination of his status and detention,[98] it stretched the notion of "deference" owed to executive provisional characterizations so thin as to amount to a functional judicial abdication of responsibility to provide a "meaningful judicial review," as had been required in *Hamdi I*.[99] According to the court in *Padilla I*, the district court was to "examine only whether the President had some evidence to support his finding."[100] This is simply not sufficient for "meaningful," or independent, fair, and "effective" judicial review, as required by human rights law. There must be independent inquiry whether detention is reasonably needed under the circumstances. Further, in time of war, there must be independent inquiry whether detention is absolutely necessary.[101]

A second abdication of the judicial responsibility of review took place when *Hamdi* returned to the Fourth Circuit (*Hamdi II*).[102] The panel in *Hamdi II* decided that Hamdi was "not entitled to challenge the facts presented" by the executive branch,[103] even under its seemingly more significant "meaningful review" standard. The panel characterized its earlier decision in *Hamdi I* as merely having "sanctioned a limited and deferential inquiry into Hamdi's status,"[104] and noted that it had instructed that the district court "must consider the most cautious procedures first" since they "may promptly resolve Hamdi's case,"[105] and "should proceed cautiously in reviewing military operations."[106] The circuit panel acknowledged that *Ex parte Milligan*[107]

96. 233 F. Supp. 2d 564 (S.D.N.Y. 2002).
97. *Id*. at 570, 599.
98. *Id*. at 569, 599–605.
99. *Supra* notes 89, 91–92. Concerning judicial tests, see *Hamdi v. Rumsfeld* (*Hamdi II*), 316 F.3d 450, 468 (4th Cir. 2003); *supra* notes 54, 60–61, 71–73, 75, 77, 79–80.
100. 233 F. Supp. 2d at 610. This was the standard that the administration had sought in *Hamdi*. *See Hamdi*, 296 F. 3d at 283; *supra* note 4.
101. *See supra* note 29.
102. *Hamdi II*, 316 F.3d at 450.
103. *Id.* at 476.
104. *Id.* at 461.
105. *Id*.
106. *Id*. at 462.
107. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

"does indicate" that detention "must be subject to judicial review,"[108] "including the military's determination that he is an 'enemy combatant' subject to detention during the ongoing hostilities,"[109] and recognized that petitioner has the right "to ask that the government provide the legal authority upon which it relies for that detention and the basic facts relied upon to support a legitimate exercise of that authority."[110] Nonetheless, instead of providing a proper check on executive power in wartime based upon law when liberty and other legal rights might be directly in peril, the circuit panel, in contrast to venerable Supreme Court precedent,[111] thought that a supposed "importance of limitations on judicial activities" should be "inferred,"[112] and "any inquiry must be circumscribed to avoid encroachment into . . . military affairs."[113] Yet, it is precisely when law and legal rights are being trespassed that the judiciary must remain active, "play its distinctive role,"[114] and not abandon in whole or in part "the explicit enumeration of powers"[115] and its historic role in our democracy.[116] It is in such situations that the judiciary should ensure that it provides meaningful, independent, fair, and effective judicial review. Even with the judiciary playing its proper role, the government's burden under human rights law does not seem difficult with respect to persons who pose real threats to security, and is generally met if detention is reasonably needed under the circumstances. However, for the court to justify the detention of certain persons under Geneva law, it must deem the detentions absolutely or imperatively "necessary" under the circumstances.[117]

The *Padilla* court has since scaled back its extremely deferential standard for evaluating executive determinations (*Padilla II*). Upon reconsideration, the district court in *Padilla II* clarified its "some evidence" standard to provide for greater review of executive determinations than what the Fourth Circuit panel in *Hamdi II* finally required. The district court in *Padilla II* stated that it "would not be free simply to take" executive "fears" as a test,

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108. *Hamdi II*, 316 F.3d at 464. *See also supra* note 71.

109. *Hamdi II*, 316 F.3d at 471. The panel seemed to stress that the habeas request and "deference" concerned Hamdi's initial detention "in the field," *id*. at 465, "in a zone of active combat," *id*. at 459, but the primary focus of the habeas petition was on the propriety of continued detention in the United States where courts are clearly open and functioning.

110. *Id*. at 472.

111. *See, e.g.*, *supra* notes 53, 55, 56, 61, 63, 70–73, 75, 77, 80.

112. *Hamdi II*, 316 F.3d at 462. The circuit panel then supports this claim by citing, of all cases, *Ex parte Quirin*. *Id*. *Compare supra* text accompanying notes 66–67; *supra* note 111.

113. *Hamdi II*, 316 F.3d at 473.

114. *Id*. at 464.

115. *Id*. at 463.

116. *But see id*. at 463–64. Professor Gerald Neuman also offers relevant insight concerning the historic reach of habeas corpus in England. He notes that it served to assure that those who detain "explain the reason for the detention, so that the court could decide whether the detention was lawful." Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555, 563 (2002). He also notes that under the First Judiciary Act of 1789, its purpose was to assure that judges "grant the writ 'for the purpose of an inquiry into the cause of commitment.'" *Id.* at 569.

117. *See supra* note 29.

"and on that basis alone deny Padilla access to a lawyer."[118] Instead, Padilla "has the right to present facts" and must have access to a lawyer for that purpose,[119] the court cannot focus "'exclusively on the evidence relied on by the executive'" in determining whether "some evidence" supports the executive branch determination,[120] and even under the "some evidence" standard the court "cannot confirm that Padilla has not been arbitrarily detained without giving him an opportunity to respond to the government's allegations."[121] Thus, Padilla "is entitled to present evidence that conflicts with what is set forth" by the executive branch "and to have that evidence considered."[122]

Nevertheless, contrary to international law addressed in Part II of this Essay, the district court in *Padilla II* tried to distinguish *Hamdi II* by arguing that the different circumstances with respect to the capture and detention of the persons merited different levels of deference to the executive. As in *Hamdi II*, *Padilla II* assumed that "if the petitioner does not dispute that he was captured in a zone of active combat operations abroad and the government adequately alleges that he was an unlawful combatant, the petitioner has no right to present facts" to dispute the government.[123] Additionally, *Padilla II* assumed that the "undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces" should be determinative.[124] Padilla, unlike Hamdi, "was detained in this country . . . by law enforcement officers pursuant to a material witness warrant. He was not captured on a foreign battlefield by soldiers in combat."[125] However, the argument for complete judicial abdication originally set forth in *Hamdi II* and the assumptions in *Padilla II* concerning the place of capture do not comply with international law and predominant trends in judicial decision documented in this Essay and do not make sense. For example, a journalist detained in a zone of active combat should be allowed to challenge the government's determination that he poses a threat, especially since numerous cases noted in this Essay demonstrate the propriety of judicial power to second-guess decisions of the executive branch that are made in time of war, even in a zone of active hostilities.[126]

What is somewhat frightening about the claims made by the executive branch in *Padilla II* is that the government stated openly that there are "'numerous examples of situations where'" interrogation of persons detained

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118. Padilla v. Rumsfeld (Padilla II), 243 F. Supp. 2d 42, 53 (S.D.N.Y. 2003).
119. *Id*. at 53–54.
120. *Id*. at 54 (quoting the government's argument).
121. *Id.*
122. *Id*. at 56.
123. *Padilla II*, 243 F. Supp. 2d at 56.
124. *Id*. at 57.
125. *Id*.
126. *See supra* notes 55–56, 58, 61, 70–73, 75, 78, 80, 82.

without trial and without access to an attorney as part of a "delicate subject-interrogator relationship" should proceed "'months, or even years, after the interrogation process began.'"[127] Similarly disturbing is the government's belief that persons should be denied access to an attorney if there is a need for ongoing intelligence, as new information is learned that may suggest new lines of inquiry, thus suggesting that the detainee has a new "intelligence value."[128] The problem with this approach is that international law requires access to courts for review of the propriety of detention, and detention in times of armed conflict can continue only so long as the person detained is a real security threat, as determined under a necessity standard.[129] The executive branch's claims that persons should be detained for intelligence value makes it all the more clear that judicial review of executive branch determinations must be effective, fair, and meaningful.

Part of the government's argument for seemingly unending detention incommunicado raises other concerns. The "delicate relationship" alluded to is designed for its "psychological impacts," to create "an atmosphere of dependency,"[130] and to instill in the mind of the detainee the feeling "that help is not on the way" and thus to break down human will.[131] Yet customary and treaty-based human rights law requires, without exception, that no persons shall be subjected to torture or to cruel, inhumane, or degrading treatment.[132] The same absolute prohibition exists in customary and treaty-based laws of war. For example, common Article 3 of the Geneva Conventions requires that all persons detained "shall in all circumstances be treated humanely," and that "[t]o this end . . . at any time and in any place . . . cruel treatment and torture" are proscribed in addition to "outrages upon personal dignity, in particular, humiliating and degrading treatment."[133] Article 5 of the Geneva Civilian Convention reiterates that "[i]n each case" persons detained as security threats shall "be treated with humanity,"[134] a requirement

127. *Padilla II*, 243 F. Supp. 2d at 49 (quoting a declaration by Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency).

128. *Id.* at 50.

129. *See supra* note 29.

130. *Padilla II*, 243 F. Supp. 2d at 49.

131. *Id.* at 50.

132. *See, e.g.*, ICCPR, *supra* note 6, art. 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pmbl., arts. 1, 16, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. This human right is nonderogable. *See, e.g.*, ICCPR, *supra* note 6, art. 4(2). It is also a customary right *jus cogens*. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 243–44 (2d Cir. 1995); Filartiga v. Pena-Irala, 630 F.2d 876, 878, 882 (2d Cir. 1980); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1347–48 (N.D. Ga. 2002) ("Cruel, inhuman, or degrading treatment is a discrete and well-recognized violation of customary international law."); Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1360–61 (S.D. Fla. 2001); Xuncax v. Gramajo, 886 F. Supp. 162, 184–89 (D. Mass. 1995); Abebe-Jiri v. Negewo, 1993 WL 814304 (N.D. Ga. Aug. 20, 1993); Restatement, *supra* note 15, § 702(d) cmt. n.

133. GC, *supra* note 26, art. 3. Torture and inhuman treatment are also grave breaches under Article 147 of the convention. The same types of prohibition are contained in Geneva Protocol I, *supra* note 5, art. 75(2)(a), (b), (e).

134. GC, *supra* note 26, art. 5.

that is also reflected in Article 27.[135] Additionally, Article 31 requires that "[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them,"[136] and Article 33 prohibits "all measures of intimidation."[137] Given these prohibitions, it would seem that psychological interrogation techniques used for months, if not years, in order to break down human will and instill a sense of hopelessness is contrary to several of the proscriptions outlined above. Equally disturbing are recent reports of unlawful interrogation techniques used in Afghanistan.[138] Courts should be vigilant in assuring that these types of violations of international law do not take place.

IV. Conclusion

While responding to terrorism and threats to national security, judicial robes must not be used to smother liberty and due process. If this occurs, the judiciary will in some measure be complicit in terrorist attacks on human and constitutional rights. Destruction of American values, overreaction, the weakening of real bases of strength of our democratic institutions, and lawless law enforcement can fulfill terrorist ambitions and are ultimately more threatening than actual terrorist attacks. Judges in a democracy committed to law and human dignity cannot countenance such a result.

Our forebears knew that lawless overreaction by those with executive power was a threat to human rights and our democracy that must be opposed by the judiciary and the American people.[139] Modern patriots of human rights and democratic freedoms must also take their stand.

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135. *Id*. art. 27.

136. *Id*. art. 31. *See also* Civilian Commentary, *supra* note 27, at 219 ("The prohibition . . . is general in character . . . . It covers all cases, whether the pressure is direct or indirect, obvious or hidden.").

137. GC, *supra* note 26, art. 33.

138. *See, e.g.*, Carlotta Gall, *U.S. Military Investigating Death of Afghan in Custody*, N.Y. Times, Mar. 4, 2003, at A14; Jonathan Turley, *U.S. "Interrogations" Border on Torture*, Times Union (Albany), Mar. 11, 2003, at A7. For reports of torture, cruel, or inhumane techniques allegedly used elsewhere, see, *e.g.*, Raymond Bonner et al., *Threats and Responses: Interrogations; Questioning Terror Suspects In a Dark and Surreal World*, N.Y. Times, Mar. 9, 2003, at 1; Andrew Gumbel, *America Admits Suspects Died in Interrogation*, Independent (London), Mar. 7, 2003; Dan Chapman, *Al-Qaida Cases Blur Rules on Interrogation*, Atlanta J. & Const., Mar. 4, 2003, at A1 (addressing sleep deprivation, forced standing for hours, and "stress-and-duress" techniques). What constitutes cruel or inhumane treatment will involve more than the normal indignity of detention and interrogation. *Compare* Soering v. United Kingdom, 11 Eur. Ct. H.R. (Ser. A) at 439, ¶¶ 100, 111 (1989); Ireland v. United Kindgom, 25 Eur. Ct. H.R. (Ser. A) at 149, ¶ 96 (British techniques of wall-standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink), 147 (European Commission finding of inhumane treatment in violation of human rights and torture prohibitions), 167 (Court decided that the techniques caused intense physical and mental suffering and acute psychiatric disturbances constituting inhuman, degrading, humiliating, and debasing treatment, but not torture) (1977).

139. *See generally* Paust, *supra* note 13, at 169–80, 192, 194, 329–30, 339–40, *passim*; Jordan J. Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 Hast. Const. L.Q. 719, 724, 727 n.24, 740–41, 743, 746–48, 750–52 (1982); *supra* text accompanying notes 1, 70, 82–84, 91–93. *See also* Harold Honju Koh, *A United States Human Rights Policy for the 21st Century*, 46 St. Louis U. L.J. 293, 335 (2002) ("we have developed an elaborate system of domestic and international laws, institutions and decision-making procedures, precisely so that they may

"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[140]

be consulted and obeyed, not ignored, at a time like this").

140. THOMAS PAINE, *Dissertation on First Principles of Government*, *in* 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (P. Foner ed., 1945).