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THE PATRIOT ACT
AND BUSH'S MILITARY TRIBUNALS:
EFFECTIVE ENFORCEMENT OR ATTACKS
ON CIVIL LIBERTIES?

John Lichtenthal

“They that can give up essential liberty to obtain a little temporary safety
deserve neither liberty nor safety.” — Benjamin Franklin (Inscribed on the
pedestal of the Statue of Liberty)

The “War on Terrorism” has raged on for two years. To combat terrorism
abroad, the “war” has carried American fighting men and women around
the world to places such as Afghanistan, Iraq, and the Philippines. Here at
home, the government has been implementing tools against threats of do-
mestic terrorism. The Uniting and Strengthening America by Providing
Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“Pa-
triot Act”)¹ of 2001 and President Bush’s Military Order of November 13,
2001, have been two important tools in the fight against terrorism. These
two initiatives have drawn a great deal of criticism from the civil liberties
community due to the sometimes-drastic changes that these have made to
our legal system.

The enforcement of new, restrictive, security-based laws since Sep-
tember 11, 2001, is a major threat to our civil liberties. While civil liberties
in America have historically suffered during times of war, the nature of the
new “War on Terrorism” poses a threat that has not previously existed.
There has been no Congressional declaration of war, and there is no imme-
diate end to the “war” in sight. The infringement on our civil liberties, left
unchecked, is likely to continue indefinitely and could easily worsen.

Many of the enforcement provisions of the Patriot Act as well as
President George W. Bush’s Military Order² are unconstitutional; or at least
they seem to be. While the Patriot Act and Military Order are at first glance
violations of the Bill of Rights and the Fourteenth Amendment, the Su-
preme Court has historically been sympathetic to the kinds of arguments
and justifications that the Bush administration has used to support its in-
fringement of civil liberties. Using racist and questionable rulings³ from the

² Detention, Treatment, and Trial of Certain Non-Citizens in the War Against
³ See, e.g. Chae Chan Ping v. United States, infra note 16, Fong Yue Ting v.
United States, infra note 23, Downes v. Bidwell, infra note 31, Korematsu v. United
States, infra note 125, see also Natsu Taylor Saito, The Enduring Effect of the
Supreme Court, a strong case can be made for the constitutionality of the Bush initiatives.

Ultimately, however, these enforcement provisions are unwarranted and unnecessary attacks on our civil liberties. The possible long-term effects of these initiatives need to be evaluated. We need also to look to the past and come to terms with the darker side of American history that led to the constitutional arguments supporting the Bush initiatives.

September 11, 2001, changed our nation and the world. We are on a quest to make our nation and the entire world safer, but we must be careful what means we choose to reach that end. Are we to revive state-supported racism from our past to help us determine our immigration policies? Are we to allow the unchecked invocation of executive powers that are reserved for the most extreme circumstances when there is no definite end in sight?

Currently, the Bush initiatives relate most to those who are not citizens of the United States. Part I of this essay will look at how terrorism is defined, and the consequences of that definition. Part II will offer a historical evaluation of the effects of the Patriot Act on "others" — meaning those in our country who come from momentarily unpopular racial backgrounds. Part III will look at the constitutionality of the Bush administration's military proceedings and orders. Part IV will briefly evaluate the future of the Patriot Act.

PART I: THE DEFINITION OF "TERRORISM"

Section 802 of the Patriot Act amends the criminal code, 18 U.S.C. 2331, to add a new definition of "domestic terrorism" that includes activities that: (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population, (ii) to influence the policy of a government by mass destruction, assassination, or kidnapping, or (iii) to affect the conduct of the federal or a state government by mass destruction, assassination, or kidnapping, and (C) occur primarily within the territorial jurisdiction of the United States.4

"Acts dangerous to human life" is a phrase that is extremely broad in scope that could easily encompass many domestic political groups, such as Act Up, People for the Ethical Treatment of Animals (PETA), Operation

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Rescue, and the Puerto Rican Vieques demonstrators.\textsuperscript{5} This is an expansion of the Antiterrorism and Effective Death Penalty Act of 1996\textsuperscript{6} (AEDPA), where “the designation of a terrorist organization was made by the secretary of State and was defined as any . . . organization engaged in terrorist activity that threatens the security of the United States. The definition of national security included economic interests of the United States, and the definition of terrorism included almost any act of force.”\textsuperscript{7}

While the 1996 definition of terrorism is also quite broad, it was at least restricted to foreign groups designated by the Secretary of State to be terrorist organizations. Under the Patriot Act, the Secretary of State can designate any group that has ever engaged in violent activity a “terrorist organization.”\textsuperscript{8} Aware that this could pertain to domestic political groups, Attorney General John Ashcroft recently “assured the Senate that the U.S. government’s definition of terrorism has, since 1983, included as terrorists only ‘those who perpetrate premeditated, politically motivated violence against noncombatant targets.’ If that is true, it certainly begs the question of why the Bush Administration felt the need to redefine ‘terrorism’ to include a wide variety of domestic criminal acts.”\textsuperscript{9}

It goes without saying that American citizens who violate this or any other law are subject to the jurisdiction of American criminal courts, and are afforded the protections guaranteed in the Bill of Rights.\textsuperscript{10} For non-citizens, however, the consequences are far more menacing: Section 411 of the Patriot Act allows for the deportation of aliens for acts of terrorism.\textsuperscript{11} “Moreover, [the Patriot Act] allows the government to detain ‘aliens’ suspected of such activity for up to seven days without bringing criminal charges or initiating deportation proceedings. Aliens may be detained based solely on the Attorney General’s unreviewed belief that the alien is


\textsuperscript{9} Whitehead, supra note 2, at 1093, 1094.

\textsuperscript{10} Or are they? See discussion of “military tribunals” in Part III infra.

involved in terrorist activity." Aliens, then, can be detained without any oversight or control by the courts (further discussion in Part II, infra). Furthermore, simply paying dues to any one of these groups is an offence punishable by deportation, regardless of whether the person who paid dues knew of the group’s designation.  

It must be remembered that "non-citizen" includes all resident aliens, be they legal or illegal, temporary or permanent. Understanding the consequences of the Bush Initiatives on civil liberties, then, requires a review of immigration law, past and present.

PART II: IMMIGRATION

Not only does the Patriot Act subject aliens to deportation, it also substantially changes immigration law. Sections 411 and 412 of the Patriot Act deal with immigration law. These sections grant the executive broad powers over immigrants, such as authority to take custody of aliens with minimal (or no) judicial oversight. The provisions and consequences of these sections are based on and justified by a long history of civil rights abuses in our nation’s immigration laws.

A. The Birth of Immigration Policy: the Chinese Exclusion Acts and Plenary Power

The Constitution gives Congress the power to "establish a uniform Rule of Naturalization . . . throughout the United States." The Supreme Court first ruled on immigration law in the Chinese Exclusion Case. This ruling gave birth to the "Plenary Power" doctrine, asserting:

[If . . . the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

13 ACLU, supra note 4.
17 Id. at 606.
In short, Plenary Power is a doctrine centered on the idea that Congress and the Executive branch have nearly complete control over immigration and are generally not subject to judicial review. The Constitutional basis for the doctrine lies in Congress’ powers over naturalization, the executive’s enforcement of that power, and the executive’s dominance over foreign affairs. Naturalization is not mentioned at all in the Constitution under the powers of the judiciary. The Supreme Court’s adoption of the Plenary Power doctrine started the judiciary down a road of racism and broad deference to the executive and legislative branches that, as will be shown, it would seldom deviate from.

In the *The Chinese Exclusion Case*, a Chinese-born resident of California left the United States for a period of just over a year, and wished to return. According to the law at the time, and according to the Burlingame Treaty of 1868 with China, the man had a legal right of entry. A few days before his arrival in the port of San Francisco, a new federal law went into effect excluding all Chinese workers, regardless of whether they had undergone the proper procedures to leave and return or not.

Writing for the court, . . . Justice Field acknowledged that the statute did conflict with the treaty, but said the 1888 law would nonetheless be enforced under the “last in time rule,” according to which courts will enforce a later-enacted federal statute that conflicts with a treaty even if the result is a violation of international law. This is but one of several similar doctrines that make it difficult to get international law enforced in U.S. courts. Others include the courts’ refusal to enforce treaties or treaty provisions deemed “non-self-executing,” and the courts’ deference to congress and/or the executive branch on “political questions.

Important themes were set that would permanently affect immigration law. First, the Court would uphold openly racist immigration law. Second, the Court would not uphold international laws or treaties in the face of American immigration laws passed subsequent to the treaty or interna-

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18 See U.S. CONST. art. I, § 9, art. II, §§ 1, 2.
19 *Supra* note 16.
22 *Id.* at 15.
tional agreement. Third, thanks to the Plenary Power doctrine, the legislative and executive branches would be left to determine immigration policy with minimal interference from the Court.

This holding was extended in 1893 with *Fong Yue Ting v. United States*\(^23\) In this case, the Court upheld the deportation of Chinese workers who could not obtain certificates of residence because the governing statute required the application to be accompanied by the testimony of "at least one credible white witness."\(^24\) The Court cited its earlier ruling in the *Chinese Exclusion Case*\(^25\), and reasoned that "[t]he right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."\(^26\) Race became (and would remain) an important factor in immigration law.

Both the *Chinese Exclusion Case* and *Fong Yue Ting* are still binding precedent, and are still cited in immigration cases. In 1985, the Eleventh Circuit Court of Appeals upheld the American interdiction of Haitian refugees in international waters in *Jean v. Nelson*.\(^27\) The court found that noncitizens who have not been admitted to the country "have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress."\(^28\)

The case for civil rights and liberties was not, however, completely lost in these early Supreme Court battles.

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws. Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the

\(^{23}\) 149 U.S. 698; 13 S. Ct. 1016 (1893).

\(^{24}\) Id. at 727.

\(^{25}\) *Supra* note 16.

\(^{26}\) Id. at 707.

\(^{27}\) 727 F.2d 957 (11th Cir. 1985).

\(^{28}\) Id. at 968.
United States are entitled to the protection guaranteed by those amendments. . .29

The rights of a noncitizen from now on would be determined primarily by location. An alien within the jurisdiction of the United States was subject to constitutional protection.30

However, immigration law based on Plenary Power was here to stay. While race could not affect an alien’s rights once he or she was within the territory of the United States, it remained an acceptable factor for exclusion and/or deportation. In the same year that the Supreme Court ruled that aliens within the jurisdiction of the United States were reached by the Constitution, they also reaffirmed Plenary Power in Downes v. Bidwell.31

Justice Brown, who just five years earlier had written the Court’s opinion upholding legalized segregation in Plessy v. Ferguson, said that we should not worry about the possibility of despotism resulting from the exercise of plenary power because “there are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests.”32

Plenary Power has a dubious beginning not limited only to Chinese immigration. The Supreme Court invoked the still-forming doctrine of Plenary Power to extend federal criminal jurisdiction into Native American reservations in United States v. Kagama.33 The court found that Native Americans “were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social rela-

29 Wong Wing v. United States, 163 U.S. 228, 238, 16 S. Ct. 977 (1896) (internal quotations omitted) (citing Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S. Ct. 1064 (1886)).


31 182 U.S. 244, 21 S. Ct. 770 (1901).

32 Saito, supra note 15, at 29 (quoting Downes, Id. at 280).

33 118 U.S. 375, 6 S. Ct. 1109 (1886).
Furthermore, the exercise of Congressional authority in the reservations was necessary for the safety of the Native Americans and those around them.\textsuperscript{35}

Plenary Power was also used as a justification for the creation of colonies in Puerto Rico, Guam, and the Philippines. In \textit{Downes v. Bidwell}, the Supreme Court held that:

there is a provision [in the Constitution] that ‘new States may be admitted by the Congress into this Union.’ These words, of course, carry the Constitution with them, but nothing is said regarding the acquisition of new territories or the extension of the Constitution over them. The liberal-ity of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there in nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression.\textsuperscript{36}

This holding is still valid. “As recently as 1996, the House Committee on Resources found that the ‘compact’ currently governing U.S.-Puerto Rican relations does not meet the United Nations’ standards for self-government and that Congress still holds the power to unilaterally revoke local self-government and U.S. citizenship.”\textsuperscript{37}

Plenary Power is an outdated, unnecessary, and racist theory.\textsuperscript{38} It has been used to justify the exclusion and deportation of immigrants based solely on race, the deprivation of Native Americans of sovereignty, and the taking and holding of colonies that are deprived of self-determination. Nonetheless, the Supreme Court still recognizes the supremacy of Congressional power in the area of immigration.\textsuperscript{39}

\textsuperscript{34} \textit{Id.} at 381-82.
\textsuperscript{35} \textit{Id.} at 384.
\textsuperscript{36} \textit{Downes}, 182 U.S. at 286.
\textsuperscript{37} Saito, \textit{supra} note 15, at 28.
\textsuperscript{38} Saito, \textit{supra} note 15; Joo, \textit{supra} note 8.
\textsuperscript{39} See, e.g., \textit{Zadvydas v. Davis}, 533 U.S. 678, 695, 121 S. Ct. 2491 (2001), which references Plenary Power and states: “we nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions. . . . Nor do the cases before us require us to consider the political branches’ authority to control entry into the United States.”
B. The Detention of Noncitizens

"Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects." Since the Court in Wong Wing and Yick Wo held that the Fifth, Sixth, and Fourteenth Amendments apply to aliens within the jurisdiction of the United States, "with the exception of enemy aliens during wartime, the Supreme Court has upheld civil detention only where it is justified by an individualized showing of need after a full and fair adversarial hearing. This principle is so basic that it brooks virtually no dissent. Yet . . . recent immigration statutes, regulations, and practices suggest that in the immigration setting we have lost sight of these very basic principles."

Traditionally, the Supreme Court has restricted Plenary Power to substantive criteria governing the admission and removal of aliens. When it came to the removal of aliens, the Supreme Court, in Yamataya v. Fisher, stated:

[T]his Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends.

While the application of due process to immigration detention was articulated unambiguously in Yamataya, the subsequent history of the detention of aliens saw an erosion of aliens' due process rights.

The right to liberty is not absolute, but can be restricted only in accordance with both procedural and substantive due process. Accordingly, when the government takes an individual into custody, . . . it must have a legitimate substantive reason for the detention. The writ of habeas corpus

40 Id. at 690.
41 See Wong Wing and Yick Wo, supra note 23. See also, e.g., Bridges v. Wixon, 326 U.S. 135, 65 S. Ct. 1443 (1945).
43 189 U.S. 86, 100-101, 23 S. Ct. 611 (1903).
in turn ensures that individuals will have recourse to a court to challenge the legality of their detention.\textsuperscript{44}

When not applied to individuals as punishment in a criminal case, detention can only be allowed "in certain special and 'narrow' non-punitive 'circumstances'."\textsuperscript{45} This most notably applies to the setting of bail and holding of criminal suspects before a trial.\textsuperscript{46}

Non-punitive or preventative detention has been upheld for immigration cases as well.\textsuperscript{47} As with the holding of criminal suspects before trial, detention is permissible when there is a risk that the individual will flee or be a danger to the community.

With the exception of [enemy aliens in time of war], implicit in all of the Court's decisions regarding detention is the notion that the justification for detention must be particularized to the individual. Just as we cannot impose criminal sanctions on individuals absent a determination of individual culpability, so too we cannot lock up a person absent a showing that there is a demonstrated need to lock up that specific person.\textsuperscript{48}

When it comes to citizens of the United States, the Supreme Court has been very suspicious of statutes that hold members of a group responsible for the actions of others.\textsuperscript{49} In the case of immigrants, however, the Court has granted far more deference to the executive branch, congruent with the doctrine of Plenary Power and contrary to Fourteenth Amendment due process rights. In \textit{Carlson v. Landon},\textsuperscript{50} where two immigrants who were members of the Communist Party were held without bail pending a determination on their deportability, the Supreme Court held that aliens can be held responsible for the acts or philosophies of the groups to which they

belong, saying that "evidence of membership plus personal activity in supporting and extending the [Communist] Party's philosophy concerning violence gives adequate ground for detention."51

One year later, the Court, in *Shaughnessy v. United States ex. rel. Mezei,*52 expanded the government's power to hold aliens without individual determinations of necessity to permit indefinite detentions. Citing the *Chinese Exclusion Case,*53 the Court invoked the doctrine of Plenary Power by stating that "respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."54 Therefore, the alien in this case was required to stay on Ellis Island indefinitely because the Island constituted shelter and not a landing on American territory.55 Furthermore, the Court held that the Attorney General, acting for the President, "may exclude without a hearing when the exclusion is based on confidential information the disclosure of which may be prejudicial to the public interest."56

In 1996, Congress amended immigration law by imposing the mandatory detention of criminal aliens while they were in deportation proceedings,57 which "raise[s] serious constitutional problems because [it] require[s] detention even where there is no need for preventative detention, that is, where the alien is neither a risk of flight nor a danger to the community."58

The Supreme Court in *Zadvydas* refuted the notion, however, that aliens can be held indefinitely.59 Again citing the *Chinese Exclusion Case,* the Court held that Congress's power is subject to constitutional limitations60 and that "if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute."61 In response to this ruling, Attorney General Ashcroft stated that

51 *Id.* at 541.
52 345 U.S. 206, 73 S. Ct. 625 (1953).
53 *Id.* at 210.
54 *Id.* at 216 (citing *Harisiades v. Shaughnessy,* 342 U.S. 580, 590, 72 S. Ct. 512 (1952)).
55 *Id.* at 215.
56 *Id.* at 210-211.
59 *See supra* note 33.
60 *Zadvydas,* 533 U.S. at 695 (citing *INS v. Chadha,* 462 U.S. 919, 941-942, 103 S. Ct. 2764 (1983)).
61 *Zadvydas,* 533 U.S. at 699-700.
“although the [D]epartment [of Justice] stands ready to obey court orders . . . it will endeavor to detain such aliens on other grounds if possible.”

The preventative and indefinite detention of aliens is a serious curtailment of due process rights, and was justified by the racist doctrine of Plenary Power. That trend continues and is greatly expanded in the Patriot Act.

Section 412 of the Patriot Act also raises serious due process concerns. It gives the Attorney General new power to detain aliens without a hearing and without a showing that they pose a danger or a flight risk. He need only certify that he has “reasonable grounds to believe” that the alien is “described in” various anti-terrorism provisions of the [Immigration and Naturalization Act], and the alien is then subject to potentially indefinite detention.

The Attorney General also has the right to detain aliens without charge for seven days, which “appears to be directly contrary to the Supreme Court’s holding that the Fourth Amendment requires that persons arrested be brought before a judge promptly . . . [and] [t]he Fourth Amendment applies to persons living in the United States, including aliens.”

The detained alien does, however, have the right to habeas corpus review of the Attorney General’s certification decision,

[B]ut the scope of that review will un-doubtedly be the subject of considerable dispute. The government is almost certain to argue that the habeas court is restricted to asking whether the Attorney General had any basis for his belief, based solely on the evidence available to him at the time of certification, and that the court has no authority to ascertain whether in fact the alien falls within the specified grounds of inadmissibility or removability. If courts accept that view, the alien would have no opportunity to present contradictory evidence, but would be limited to challenging the

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sufficiency of the government’s record. Such a process would afford the alien no meaningful opportunity to be heard.\footnote{Cole, supra note 36, at 1027-1028.}

Furthermore, the government is allowed the use of secret evidence in its proceedings against aliens. The Supreme Court first articulated this in \textit{U.S. ex rel. Knauff v. Shaughnessy}.\footnote{338 U.S. 537, 70 S. Ct. 309 (1950).} In this case, a German refugee of World War II, who had fled to England and worked “honorably” for the Royal Air Force, then worked as a highly praised civilian employee of the U.S. War Department in Germany and married a U.S. citizen, was denied entry into the United States.\footnote{Id.} The Court, relying on Plenary Power, allowed her exclusion on the basis of undisclosed evidence.\footnote{Id. at 543-544.} The Court then upheld the use of secret evidence again in \textit{Mezei},\footnote{345 U.S. at 215.} because the Attorney General asserted “the disclosure [of the evidence in question] would be prejudicial to the public interest.”\footnote{Id. at 208.} These two rulings came at the start of the Cold War, noticeably right after the Soviet Union detonated its first nuclear weapon and many in the United States were worried about Soviet spies infiltrating the country.\footnote{“The [Patriot] Act threatens to resurrect many of the abuses reminiscent of the Cold War. For example, in 1991 Congress repealed the much-criticized provision of the McCarran-Walter Act, which permitted the government to deny entry to any immigrant because their speech or writings supported Communism. Section 4511 of the [Patriot] Act resurrects this provision but substitutes terrorism for Communism.” Jules Lobel, \textit{The War on Terrorism and Civil Liberties}, 63 U. PITT. L. REV. 767,785-786 (2002).}

Since then, as the Cold War was ending, the issue was addressed by the District of Columbia’s Circuit Court of Appeals in \textit{Rafendie v. I.N.S.}\footnote{880 F.2d 506 (D.C. Cir. 1989).} In this case, the Court ruled that the use of secret evidence was forbidden. The issue came up again in 1995 in the Ninth Circuit with the case of \textit{American-Arab Anti-Discrimination Comm. v. Reno},\footnote{70 F3d 1045 (9th Cir. 1995).} which also held that secret evidence was unconstitutional. This case was reviewed and vacated by the...
Supreme Court, however, which held that immigration law "deprives the federal courts of jurisdiction" over the use of secret evidence.

Currently, immigration proceedings that are taking place (that are "related" to September 11, 2001) have been closed to the public. Not only is secret evidence to be used against immigrants; the immigration proceedings are also not subject to public scrutiny (see Part III(c) infra). First made as an Immigration Judge's order, this policy was later backed up and modified by the INS "with an interim rule allowing immigration judges to close hearings to protect sensitive law enforcement or national security information." "On June 28, at the Bush administration's request, the Supreme Court, without explanation, issued [a] stay, thus preventing the hearings from being opened to the public."

C. Immigration Law as Law Enforcement?

Deportation has always been a part of immigration law. Traditionally, removal came as the result of "violation of immigration laws, such as overstaying a visa or working without permission, . . . [or] the commission of criminal offenses or moral failings, including drug addiction or pauperism." This changed drastically in the 1980s and 1990s. Beginning with the Anti-Drug Abuse Act of 1988 and reaching a climax with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the list of offenses that make aliens removable has substantially increased; furthermore, many of the offenses mandate deportation. Many of the newer mandated deportable offenses are defined as "aggravated felonies," a

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76 Id. at 492.
78 Id.
80 Saito, supra note 71, at 9 (quoting Supreme Court Allows Secrecy to Stand in Deportation Cases, N.Y. TIMES, June 29, 2002).
84 Demleitner, supra note 75 at 1061.
phrase which was coined in the 1988 Anti-Drug Abuse Act and expanded in the IIRIRA of 1996. “Despite the term ‘aggravated felonies,’ not all of the offenses falling under this heading are felonies, nor would most people consider some of them aggravated... a conviction of an aggravated felony, therefore, prohibits a court from considering outstanding equities,” such as having U.S. citizen spouses or children, or having no ties to their country of origin.85

The Patriot Act further expands the list of removable offenses. Section 411 of the Act permits “the Secretary of State [to] designate any group that has ever engaged in violent activity, a ‘terrorist organization.’ This legislation has the effect of denying admission to the group’s non-citizen members and would also make payment of membership dues a removable offense.”86 Furthermore, since the definition of terrorist activity is so broad under section 802 of the Patriot Act, “an immigrant who grabs a knife or other weapon in an altercation or in committing a crime of passion, may be subjected to removal as a ‘terrorist.’”87

The effect of this legislation has been a dragnet type of approach of law enforcement on aliens and immigrants. “Since September 11, 2001, the United States has witnessed the mass arrests of Arab and Muslim immigrants. While none of these men have been charged with terrorism-related offenses,88 most of them have been held in immigration detention. Some have been deported because of immigration violations or prior criminal convictions which were not related to September 11.”89

The effect of using immigration law as law enforcement, then, has not yielded any positive results in the War on Terrorism. “As Senator Russ Feingold has aptly noted, ‘in a rush to find terrorists, the Department [of Justice] appears to have disrupted the lives of hundreds of people, most of whom will prove to be wholly innocent of any connection to terrorism.’”90

85 Id. at 1065-66.
87 Id. at 437.
88 Zacarias Moussaoui, who is currently the only man being charged with plotting the September 11, 2001 terrorist attacks, was already in custody before September 11, 2001 for a passport violation. See Christopher Drew, After the Attacks: The Plot; Four People Flown to New York for Questioning in Connection With Attacks, N.Y. TIMES, Sept. 17, 2001, at A-4.
89 Demleitner, supra note 75, at 1059.
90 Marie A. Taylor, Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities, 17
In fact, the use of such dragnet techniques may be harmful to the war on terrorism. "For example, questioning 5,000 residents of Arab descent about possible terrorist plots may yield some information helpful to national security, although even that is dubious, but in the long term it alienates the very community from which the FBI or CIA can recruit informants to wage the long term fight against terrorism."91

PART III: BUSH ADMINISTRATION MILITARY PROCEEDINGS

On November 13, 2001, President George W. Bush issued a Military Order, titled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."92 In the context of the "War on Terrorism" and our established legal system, the Order creates some confusion. The Order guarantees "a full and fair trial,"93 yet has been criticized for denying "basic constitutional rights, such as an independent court, a jury trial, an appeal to independent judges, and a right to have full access to the evidence used to support a conviction."94 The rationale behind this, as President Bush put it, was simple: "the option to use a military tribunal in a time of war makes a lot of sense."95 The confusion in this matter is best expressed by this statement, first because Congress alone has the power to declare war and has not done so,96 and second because the detainees are not being treated as prisoners of war and are not afforded the protection of the Geneva Convention.97

"According to Donald Rumsfeld, U.S. Secretary of Defense, 'the detainees are not being labeled as prisoners of war because they did not engage in warfare according to the precepts of the Geneva Convention –

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91 Lobel, supra note 66, at 771.
93 Id. §§ 4(c)(2), 4(c)(5), at 57,835.
95 Id. at 639 (quoting Paul Leavitt & Kevin Johnson, Bush Says Military Tribunals Necessary “In Time of War”, USA TODAY MAG., Nov. 20, 2001, at 5A).
they hide weapons, do not wear uniforms and try to blur the line between combatant and noncombatant.'”

In addition to the “enemy combatants” held at Guantanamo Bay, the government is currently holding Jose Padilla and Yaser Hamdi in military brigs here in the United States, because both Padilla and Hamdi are U.S. citizens. However, similar to the detainees at Guantanamo, and perhaps more similar to the immigrant detainees held here in the United States, both Padilla and Hamdi are being held “without bail, criminal charges, access to attorneys or the right to remain silent.”

Meanwhile, John Walker Lindh, a white American citizen, was transferred from military to civilian custody. “The government has not explained why Hamdi’s rights differ from those of Lindh, who has been notified of the charges against him and was brought before a civilian court with all of the constitutional protections normally accorded criminal defendants, including the right to counsel. The only factors that seem to distinguish the two cases are race and national origin.”

It is important to note that these military tribunals offer significantly fewer protections for the accused then do U.S. civilian courts.

[M]ilitary tribunals may be closed proceedings, even to the accused himself; there are no juries, defendants are judged instead by a group consisting of between three and seven members, where each member is a commissioned officer of the United States military; military tribunals may be held extraterritorially, e.g. in foreign countries or upon U.S. naval ships; defendants have no right to counsel while being interrogated, and will not have the benefit of receiving exculpatory evidence in possession of the prosecution, as they would if prosecuted in a non-tribunal setting; and guilt need only “have probative value to a reasonable person,” it need not be established beyond a reasonable doubt.

100 Saito, supra note 71, at 13.
101 Janik, supra note 92, at 510-11.
In fact, the military tribunals do not even offer the protections guaranteed by military courts-martial in the U.S., which:

include numerous due process safeguards, including the requirement of public proceedings and provisions protecting the right of the accused to counsel of choice, to cross-examine witnesses, to not be forced to confess or testify against himself, to be presumed innocent until proven guilty, to have guilt established beyond reasonable doubt, and to appellate review of convictions. Many of these fundamental protections were not provided for in the President’s [Military Order].

A. History of Military Tribunals by Executive Order

The legal justification for Bush’s military tribunals is questionable and thin in many cases. The foundation of Bush’s power to call the tribunals rests with the Constitution and the president’s power as Commander-in-Chief of the armed forces. Support also comes from mentions of the president’s power over procedure in military tribunals in the Uniform Code of Military Justice. Furthermore, Congress did authorize Bush to use military force against Al Qaeda.

The key elements of Bush’s authority, however, come from case law. The Supreme Court has ruled, albeit rarely, on the use of military tribunals. According to the Court’s ruling in U.S. ex rel. Toth v. Quarles, Congress lacks the authority to try civilians in military court. The executive’s power to create military tribunals has precedent in the Civil War and World War II.

During the Civil War, military commissions were used mainly against suspected Confederates. After the Civil War, the Supreme Court

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103 U.S. CONST., art. II, § 2.
107 Military commissions were also used against civilians, Democrats, and the Dakota Souix. For a brief account of these commissions, see Belknap, A Putrid Pedi-
in *Ex parte Milligan*{superscript 108} ruled on the trial of a resident of Indiana accused of treason.

[The Supreme Court] held that trying a citizen who was not a member of the armed forces before such a tribunal, rather than in a civilian federal court authorized by Congress, in an area where such courts were open and satisfactorily administering criminal justice, violated both the Sixth Amendment's guarantee of a speedy and public trial before an impartial jury and the Fifth Amendment's requirement that all prosecutions not involving members of the military be initiated by grand jury indictment. The Court rejected the contention that the emergency created by a war justified using military commissions in areas not within a theater of operations.{superscript 109}

This ruling came in a situation where the president had a Congressional declaration of war, and yet he was still denied the right to try citizens in military courts.

Years later, after the Second World War, the Court upheld the power of the executive and the military to try foreign combatants in military tribunals. In *In re Yamashita*,{superscript 110} the Court held that:

[A]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war.{superscript 111}

In *Johnson v. Eisentrager*,{superscript 112} the Supreme Court upheld the trial and conviction of German prisoners of war that continued to fight against the United States after the surrender of Germany, noting that it was well established that military had jurisdiction over "enemy belligerents."{superscript 113}

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{superscript 108} 71 U.S. 2, 18 L. Ed. 281 (1866).


{superscript 110} 327 U.S. 1, 66 S. Ct. 340 (1946).

{superscript 111} *Id.* at 11.


{superscript 113} *Id.* at 786.
In *Ex parte Quirin*, the men at trial in a military tribunal were not in a foreign theatre of operations. In this case, several German soldiers engaged in a sabotage mission in the United States. President Roosevelt ordered that the saboteurs be tried in a military court in Washington, D.C. Noting that civilian courts were functioning at the time (a reference to *Mili\-\-ligan*), the Court held that "the law of war draws a distinction between . . . those who are lawful and unlawful combatants," and that the acts of the saboteurs "constitute an offense against the law of war which the Constitution authorizes to be tried by military commission."

The problem for the Bush administration is the historical "need" for military courts. "During World War I, America wisely resisted subjecting those who were not members of the armed forces to military justice." Furthermore, the proceeding in *Quirin* was likely done in a military court more for the protection of government agencies then for the protection of military secrets. The proceedings were secret. "Had [*Ex parte Quirin*] been public, the feverish adulation the [FBI] was receiving would have cooled considerably, for it would have revealed that in the saboteur case, the Bureau had been more blundering than brilliant. A public trial would also have damaged the reputation of the Coast Guard."

In creating an unprincipled exception to [*Milligan*], the Court fashioned new law pleasing not only to a World War II Attorney General, but also to Vice President Dick Cheney. *Quirin* is one of the primary precedents Cheney cites to justify the military commissions President Bush has authorized to try Al Qaeda terrorists.

Furthermore, Roosevelt was acting with a Congressional declaration of war; President Bush is not.

Since Roosevelt was held to be acting within his executive power pursuant to Congress' declaration of war under Article 15 of the Articles of War, the Court did not determine 'to what extent the President as Commander in Chief has constitutional power to create military commissions with-

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114 317 U.S. 1, 63 S. Ct. 2 (1942).
115 *Supra* note 108.
116 *Id.* at 30-31.
117 *Id.* at 46.
118 Belknap, *supra* note 101, at 481.
119 *Id.* at 478.
120 *Id.* at 477.
out the support of Congressional legislation.' Thus, the case does not directly address the precise issue that arises under the current Executive Order, leaving open the question of the legitimacy of the currently proposed military tribunals in a time of undeclared war.\textsuperscript{121}

Bush's reliance on Congress' Authorization for use of Military Force is misplaced. The Resolution, as the title suggests, only allows for the use of force.\textsuperscript{122} Nothing is specifically stated about the use of military tribunals.

\textbf{B. The Detention and Trial of U.S. Citizens}

Jose Padilla and Yaser Hamdi seem to be trapped between these historical rulings. They are both citizens, and seem to be protected by \textit{Ex parte Milligan}, and yet the Bush administration has labeled them "enemy combatants," and since they were captured in Afghanistan, they would seem to fall under the rulings of \textit{In re Yamashita and Johnson}. The Fourth Circuit, in \textit{Hamdi v. Rumsfeld}\textsuperscript{123} has ruled that:

\begin{quote}
no evidentiary hearing or factual inquiry [on the part of the court] is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch."\textsuperscript{124}
\end{quote}

This line of reasoning harkens back to the Supreme Court's ruling in \textit{Korematsu v. United States}\textsuperscript{125} that allowed for the detention of 120,000 citizens of Japanese ancestry without charge or trial because "the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures."\textsuperscript{126} In 1984, the criminal conviction of Fred Korematsu was overturned at a rehearing of the case, where "unearthed documents had revealed that no military necessity existed to justify the incarceration, and that government decision makers knew this

\begin{footnotes}
\item[121] Whitehead, \textit{supra} note 2, at 1121.
\item[123] 316 F.3d 450 (2003).
\item[124] \textit{Id.} at 473.
\item[125] 323 U.S. 214, 65 S. Ct. 193 (1944).
\item[126] \textit{Id.} at 223.
\end{footnotes}
at the time, and later lied about it to the Supreme Court.”

The warning left by Judge Patel at the rehearing, that “institutions, including courts, during national crisis must exercise close scrutiny and vigilance in order to ‘protect all citizens from [ ] petty fears and prejudices,’” seems largely to have been ignored. In line with the racist immigration rulings of the late 1800s, Korematsu legitimated and legalized the ill treatment of people by the government because of nothing other then their race.

Critics of Bush’s military tribunals echo the warning of Judge Patel. Michael C. Dorf, writing about the detention and trial of Yaser Hamdi, warns:

[T]he government asserts that domestic courts have no authority to question the military’s determination that a citizen is an enemy combatant. Yet the consequence of such a determination is that the citizen may not be entitled to all of the procedural protections of the Bill of Rights. . . . if the government’s view prevails, and it alone decides who is an enemy combatant, then there is nothing to stop it from declaring anyone – you, me, or Tom Daschle – an enemy combatant who can be detained indefinitely without trial.

Criticism of the Tribunals

Supporters of the military tribunals point out the positives of the procedures. Bruce Fein, former Associate Deputy Attorney General under the Reagan administration, noted, “[a]t time of warfare, expedition is critical.” Secrecy is another advantage, as it would prevent the government from making public sensitive or classified information. In the words of John Ashcroft, “[f]rankly, you don’t want to compromise intelligence information in times of war.” Former Solicitor Robert Bork noted, “[a]n open trial . . . covered by television, would be an ideal stage for Osama bin Laden

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128 Id. at 47 (citing Korematsu, 584 F. Supp. at 1420 (internal quotations omitted)).
129 See Serrano, supra note 120.
131 Belknap, supra note 101 at 434.
132 Id.
to spread his propaganda to all the Muslims in the world."\textsuperscript{133} The military tribunals would also be beneficial to jurors, as they would be protected from reprisals from terrorists.\textsuperscript{134}

But many of these advantages can be achieved through other means. The Classified Information Procedures Act\textsuperscript{135} outlines how classified information could be handled at trial. Furthermore, efforts were taken at the 1993 World Trade Center bombing trial and the McVeigh trial to protect classified information. For example, in the McVeigh trial:

the news media sought access to a variety of documents that had been filed under seal. In granting partial access, Judge Matsch specifically articulated the importance of open criminal trials. Extensively quoting Chief Justice Berger, he stressed the "crucial prophylactic aspects" of public trials and the vital importance of "satisfying the appearance of justice" . . . by allowing people to observe it." At the same time, Judge Matsch carefully identified and articulated certain circumstances where there is no tradition of access and where secrecy is necessary.\textsuperscript{136}

Provisions were also made at the 1993 World Trade Center bombing trial to protect the anonymity of the jurors.\textsuperscript{137}

Furthermore, what are the consequences of military courts that seem well beyond judicial rules or controls? It is interesting to note that the first grievance listed against King George III in the Declaration of Independence was that "[h]e has affected to render the military independent of, and superior to the civil power."\textsuperscript{138} These tribunals would constitute a similar abuse of executive authority.

Keeping the tribunals secret and free from judicial oversight or appeal, Bush is clearly overexerting his powers as the president. The threat of future attacks or the implied (yet undeclared) state of war does not allow the

\textsuperscript{133} Id.
\textsuperscript{134} Id. at 435.
\textsuperscript{137} Id. at 141.
\textsuperscript{138} DECL. OF INDEPENDENCE para. 15 (U.S. 1776).
executive to "escape control of executive powers . . . through assuming his military role."\textsuperscript{139}

One of the greatest checks on Bush’s military tribunals comes from the First Amendment right to free access. In \textit{Richmond Newspapers, Inc. v. Virginia},\textsuperscript{140} the Supreme Court noted that "to work effectively, it is important that society’s criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it."\textsuperscript{141}

Furthermore, the military tribunals blur the separation of powers in the Constitution. President Bush is relying on his presidential powers as Commander in Chief of the military as well as his power over foreign affairs as the basis for his authority to create the tribunals.\textsuperscript{142} This may overlap, but surely does not trump, the judicial branch’s right to hear cases and controversies\textsuperscript{143} or the legislative branch’s power to establish tribunals inferior to the Supreme Court.\textsuperscript{144} The Constitution clearly grants the legislative and judicial branches powers over courts. President Bush’s reading of executive power requires judicial deference that is greater than what was shown in plenary power cases, where the matter is clearly within the legislative- and executive-dominated areas of immigration law and foreign policy.\textsuperscript{145}

Even the U.S. State Department has criticized other countries for using military tribunals such as the ones created by President Bush. In the 2000 edition of its annual Human Rights Report, the State Department criticized Egypt’s use of military courts to try terrorist defendants, stating that the courts:

have deprived hundreds of civilian defendants of their constitutional right to be tried by a civilian judge. . . [and they] do not ensure civilian defendants due process before an independent tribunal. While military judges are lawyers, they are also military officers appointed by the Minister of Defense and subject to military discipline. They are neither as

\textsuperscript{139} \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579, 646, 72 S. Ct. 863 (1952) (Jackson, J., concurring).
\textsuperscript{140} 448 U.S. 555, 100 S. Ct. 2814 (1980).
\textsuperscript{141} \textit{Id.} at 571-572.
\textsuperscript{142} U.S. \textsc{CONST.} art. II, §§ 1, 2.
\textsuperscript{143} \textit{Id.} at art. III, § 2.
\textsuperscript{144} \textit{Id.} at art. I, § 8.
\textsuperscript{145} \textit{Id.} at art. I, § 8, art. III, § 2.
independent nor as qualified as civilian judges in applying the civilian Penal Code.\footnote{146}

How can the government create military tribunals so strikingly similar to the ones that they criticized just a short time before? By doing so, “Bush [has] undermined the anti-terrorist coalition, ceding to nations overseas the high moral and legal ground long held by U.S. justice. And on what leg does the U.S. now stand when China sentences an American to death after a military trial devoid of counsel chosen by the defendant?”\footnote{147}

PART IV: FUTURE OF THE PATRIOT ACT

Currently, the Patriot Act and many related issues are before courts all across the country. The ACLU has led a charge against many of the enforcement and surveillance provisions of the Patriot Act and many aspects of the military tribunals.\footnote{148} Many of the suits challenging the Patriot Act stem from the Freedom of Information Act,\footnote{149} but the Act has provisions that exempt information that is expected to interfere with enforcement proceedings\footnote{150} or that has been specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy.\footnote{151}

The Patriot Act has a “Sunset” provision in section 224 that, on December 31, 2005, would suspend the Act:

The Sunset provision was intended to give Congress and the public the chance to evaluate how law enforcement exercised some of its broad new powers and to decide whether the serious reduction of American privacy and civil liberties brought about by the enactment of the USA Patriot Act was worthwhile. Unfortunately, there is little or


\footnote{149} 5 U.S.C. § 552.

\footnote{150} Id. at § 552(b)(7)(A).

\footnote{151} Id. at § 552(b)(1).
no reporting currently required by intelligence agencies or law enforcement about how they use these new powers.\footnote{Shulman, supra note 80, at 443.}

The Sunset provision does not, however, cover the entire Act. "[M]ost of the Act, including the provisions involving immigrants, new crimes, and some of the new expended surveillance powers such as the 'sneak and peak' searches are not included in the sunset provision."\footnote{Lobel, supra note 66, at 790.}

The Bush administration has resisted submitting to Congressional oversight of Patriot Act enforcement.\footnote{Whitehead, supra note 2.} Section 904 of the Patriot Act allowed members of the executive branch, such as John Ashcroft and Donald Rumsfeld, to defer the date for submitting required intelligence reports to Congress for over a year, until February 2002.\footnote{USA PATRIOT Act, Pub. L. No. 107-56 § 904, 115 Stat. 272, 387-88.} Ashcroft carried the argument one step further and stated:

Congress's power of oversight is not without limits . . . . In some areas . . . . I cannot and will not consult you . . . . I cannot and will not divulge the contents, the context, or even the existence of such advice to anyone - including Congress - unless the President instructs me to do so. I cannot and will not divulge information, nor do I believe that anyone here would wish me to divulge information, that will damage the national security of the United States, the safety of its citizens or our efforts to ensure the same in an ongoing investigation.\footnote{Whitehead, supra note 2, at 1090.}

The situation for civil liberties only looks to worsen in the near future. The Department of Justice is currently drafting a sequel to the Patriot Act, dubbed "Patriot Act II." The new legislation would expand the executive powers granted in the first Act and further erode civil liberties. The Act would provide for the summary deportation of immigrants without charges if the Attorney General suspects that the immigrant may be a risk to national security.\footnote{ACLU, How "Patriot Act 2" Would Further Erode the Basic Checks on Government Power That Keep America Safe and Free (2003), at http://www.aclu.org/SafeandFree/SafeandFree.cfm?id=12161&c=206, last visited April 22, 2004.} Even immigrants who, according to John Ashcroft, do not pose a suspected national security threat could still be deported without a hearing if that person has committed a minor criminal offense, even in the
distant past. The arrest of terrorism suspects could be kept secret. The members of groups that, under the first Patriot Act, were deemed terrorist organizations because their activities are "dangerous to human life," could be subject under Patriot Act II to the forfeiture of civil assets, new death penalties, and an unprecedented power of the government to revoke U.S. citizenship, which would leave people stateless, undocumented, and possibly subject to indefinite detention (see Part II, supra).

CONCLUSION

The only way to reverse the trend set by the Patriot Act and President George W. Bush's military tribunals is to speak out against them and get them overturned by Congress. Public dissent and Congressional action seem to be the only way to stop executive-branch abuses of power.

It seems unlikely that the Supreme Court will stop the Patriot Act or Bush's military tribunals. While there is history behind many of the immigration, enforcement, and tribunal provisions, that history is based on racist and outdated Supreme Court rulings which, as Justice Jackson noted in his now-famous dissent to the Korematsu ruling, "[lay] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

In discussing President Lincoln's suspension of civil liberties during the Civil War, the restrictions imposed during World War I, and the World War II internment of Japanese Americans, Chief Justice [William Rehnquist] says, in essence, that while such measures may be somewhat extreme, these things happen in times of war and it is not the Court's place to intervene. According to Chief Justice Rehnquist, it is best to allow such things to be worked out politically for history shows that "normal" constitutional protections will re-assert themselves when the crisis is over.

The Chief Justice is not alone in his evaluation of the place of civil liberties in society during a time of crisis or war. The Roman statesman

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158 Id.
159 Id.
160 Id.
161 Serrano, supra note 120.
162 Korematsu, 323 U.S. at 246.
163 Saito, supra note 70 at 61, (citing William H. Rehnquist, Jr., All the Laws But One: Civil Liberties in Wartime (Alfred A. Knopf ed., 2000)).
Cicero noted “Silent leges inter arma,” or “the power of law is suspended in time of war.”\(^{164}\) Oliver Cromwell put it that “necessity hath no law.”\(^{165}\) Franklin D. Roosevelt’s Attorney General noted that “the Constitution has not greatly bothered any wartime President.”\(^{166}\)

Even if this is all true, if the suspension of civil liberties during time of war is warranted; if racist laws are allowed to dictate immigration law; if the power of the executive is allowed to go on unchecked; if the damage to our credibility worldwide is a tolerable consequence; if everything will “go back to normal” when the crisis is over; one fundamental and glaring reality remains: this “war” is undeclared and is “a marathon . . . not a sprint,” and “is not something that begins with a significant event or ends with a significant event.”\(^{167}\)

“Going back to normal” will only happen, if at all, when George W. Bush says it will happen. The “war” will end only when we are told that it will end. The civil rights and liberties that are surrendered in the name of crisis will only be returned when the unchecked and discretionary judgment of the executive deems it safe to do so.

The rule of law is challenged when those in power can wield arbitrary power such as this. Simply put, the Constitution itself looses its meaning as long as danger is deemed an acceptable justification for the suspension of civil liberties and constitutional protections.

\(^{164}\) Lobel, \textit{supra} note 66, at 767.
\(^{165}\) \textit{Id.}
\(^{166}\) \textit{Id.}
\(^{167}\) Lobel, \textit{supra} note 66, at note 48, (citing Donald Rumsfeld, \textit{Department of Defense News Briefing} (Sept. 20, 2001) and \textit{Department of Defense News Briefing} (Sept. 25, 2001)).