## Legal Responses to Terrorism
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INTRODUCTION

Among the important issues of this subject are the extent to which terrorism poses a genuine threat to society, and the extent to which normal practices of law enforcement and civil liberties should yield to an unusual threat. Most of the arguments have taken place as appeals to history, philosophy, or plain emotion. One more calculating approach was taken by looking at risk assessment techniques developed in dealing with such matters as nuclear power plant licensing, domestic chemical use, and pollution emissions:

Many people hold that terrorism poses an existential threat to the United States. But a look at the actual statistics suggests that it presents an acceptable risk – one so low that spending to further reduce its likelihood or consequences is scarcely justified.


Comments on the Foreign Affairs blog responded that it would be inappropriate to count the successes of counter-terrorism against its continued funding, and that we can never know what plots were foiled as a result of counter-terrorism efforts. These themes recur throughout our study, particularly in relation to the employment of extreme measures such as harsh interrogation techniques or domestic wiretapping, let alone employment of military force.

§ 1.02 INTERLOCKING GOVERNMENTAL CONTROLS

[A] Options – Force and Nonforce

The question of whether the struggle against terrorism could be called a “war” or “armed conflict” has intensified with the realization of how many executive actions of the Bush administration turned on the “global war on terrorism” phrase.

Within hours of the 9/11 attacks in the United States, President George W. Bush declared ‘a global war on terrorism’. Experts around the world assumed this declaration was a rallying cry, a rhetorical device to galvanise the nation to serious action. By November 2001, however, the evidence began to mount that the President was ordering actions that could only be lawful in a de jure armed conflict: targeting to kill without warning, indefinite detention without trial, and search and seizure on the high seas without consent.
The [Use of Force Committee of the International Law Association] has found evidence of at least two characteristics with respect to all armed conflict:

1. The existence of organised armed groups
2. Engaged in fighting of some intensity


[C] Security and Law Enforcement

add at page 13:

The law enforcement option involves acquisition of evidence pointed toward a criminal trial in a duly constituted court. The political emphasis on terrorism in the last few years has produced several demands for modification from that traditional approach, such as demands for a special terrorism court and demands for detention of dangerous persons without trial. These demands may proceed from the perception that convictions of shadow conspiracies are difficult, or that secret evidence may be necessary in some cases, or that some people are just too dangerous to be allowed a forum in which to plead their cause.

The idea of a special terrorism court has been promoted by some observers. The idea is to have a special court that deals with all criminal prosecutions of terrorist activity. In at least one version of the proposal, the court would be allowed to hear classified information that was not disclosed to the defendant so long as there was sufficient disclosed evidence to sustain a conviction. The “confidential intelligence information...may only be used to support an existing body of evidence known to the defendant and his counsel and introduced in open court proceedings.” Amos Guiora, *Creating a Domestic Terror Court*, 48 WASHBURN L.J. 617, 631 (2009).

Detention without trial has garnered some well-known supporters under the auspices of the Brookings Institution:

If the Obama administration chooses to maintain a system of non-criminal military detention – and for reasons set forth below, I think it should – it will necessarily also choose to have a national security court. This is so because federal courts constituting a “national security court” must supervise non-criminal detention under the constitutional writ of habeas corpus and a likely statutory jurisdiction conferred by Congress. Viewed this way, we have had a centralized and thinly institutionalized national security court for years in the federal courts of the District of Columbia, which have been supervising Guantánamo Bay military detentions.

A consensus is beginning to emerge in the public and political spheres concerning the non-criminal detention of terrorist suspects. Over the past several years, non-criminal detention of Al Qaeda and Taliban captives at Guantánamo Bay, Cuba has sharply divided the American polity. Since the change in administration, however, it has become increasingly clear that the United States – even under a Democratic administration and with substantial Democratic majorities in both houses of Congress – is not going to abandon long-term detention of terror suspects and revert to a pure law enforcement model for incapacitating them, and it is not going to deal with the population of Guantánamo on the basis of freeing everyone whom it cannot prosecute.

Chapter 2

U.S. LAW AND GLOBALIZED TERRORISM

§ 2.02 EXTRATERRITORIAL JURISDICTION

[A] Abduction for Trial in the U.S.

add at p. 42, note 3 “Unconscionable Exception”

The Toscanino and Noriega cases raise the issue of whether a court would dismiss a prosecution based on the mistreatment of the prisoner in U.S. custody. That issue has arisen in cases following disclosure of “harsh interrogation” techniques employed by the C.I.A. It is most notably presented in the debate over whether and where to try Khalid Sheikh Muhammad (KSM), whom the C.I.A. admits to having waterboarded 183 times before taking him to Guantanamo.

UNITED STATES v. GHAILANI

KAPLAN, District Judge:

Ahmed Khalfan Ghailani, an alleged member of Al Qaeda, was indicted in this Court in 1998 and charged with conspiring with Usama Bin Laden and others to kill Americans abroad by, among other means, bombing the United States Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, bombings in which 224 people reportedly were killed. Years later, he was captured abroad by a foreign state and subsequently turned over to the Central Intelligence Agency (“CIA”). He was held and interrogated by the CIA at one or more secret locations outside the United States for a substantial period. He then was shifted to a secure facility at the United States naval base at Guantanamo where he remained until June 2009, at which time he was produced in this Court for prosecution on the indictment. Ghailani now moves to dismiss the indictment on the ground that he was tortured by the CIA in violation of his rights under the Due Process Clause of the Constitution.

I

The Due Process Clause is “a historical product” the roots of which date at least to 1215, when King John pledged in the Magna Carta that “[n]o freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.” While it “would seem to refer solely and simply to procedure, to what the legislative branch enacted it to be,” it has proved to be of broader scope. It “is a summarized constitutional guarantee of respect for those personal immunities which . . . are ‘so rooted in the traditions
and conscience of our people as to be ranked as fundamental’ . . . or are ‘implicit
in the concept of ordered liberty.’”

In this case, Ghailani has not identified explicitly the component of his due
process rights that allegedly was violated. But he argues that both the CIA’s use
of “enhanced interrogation techniques” – in his word, torture – to question him
and the fact that use of those techniques was authorized by “the highest levels
of our government” are “so fundamentally unfair, ‘shocking to our traditional
sense of justice’, and ‘outrageous’” that due process requires the indictment to be
dismissed.

The government does not here respond to Ghailani’s assertions as to what
was done to him while in CIA custody. Nor does it join issue on the question
whether those assertions, if true, violated Ghailani’s right to due process of law.
Rather, it argues that Ghailani’s allegations of pretrial custodial abuse are
immaterial to this motion because dismissal of the indictment would not be a
proper remedy for the government’s alleged misconduct. In other words, the
government argues that there is no legally significant connection between the
alleged torture and any deprivation of the defendant’s liberty that might result
from this criminal prosecution.

If the government is correct in contending that Ghailani would not be
entitled to dismissal of this criminal prosecution on due process grounds even if
he was tortured in violation of his constitutional rights, it would be unnecessary
for this Court to address the details of Ghailani’s alleged treatment while in CIA
custody. Nor in that event would it be appropriate to express any opinion as to
whether that treatment violated his right to due process of law.

II

The Due Process Clause, so far as is relevant here, protects against
deprivations of liberty absent due process of law. The deprivation of liberty that
Ghailani claims may occur if this case goes forward is his imprisonment in the
event of conviction. In seeking dismissal of the indictment, however, he does not
deny that he is being afforded every protection guaranteed to all in the defense
of criminal prosecutions. Rather, Ghailani in effect argues that the case should
be dismissed to punish the government for its mistreatment of him before he was
presented in this Court to face the pending indictment.

For a due process violation to result in consequences adverse to the
government in a criminal case -- for example, the suppression of evidence or the
dismissal of an indictment -- there must be a causal connection between the
violation and the deprivation of the defendant’s life or liberty threatened by the
prosecution. That is to say, relief against the government in a criminal case is
appropriate if, and only if, a conviction otherwise would be a product of the
government misconduct that violated the Due Process Clause.12 For only in such

12 See, e.g., Rochin v. California, 342 U.S. 165, 173, 72 S. Ct. 205, 96 L. Ed. 183 (1952)
(“[C]onvictions cannot be brought about by methods that offend ‘a sense of justice.’”); see also
Breithaupt v. Abram, 352 U.S. 432, 435, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957) (recognizing that
circumstances may it be said that the deprivation of life or liberty that follows from a criminal conviction flows from the denial of due process. This conclusion thus rests directly on the text of the Due Process Clause itself.

This point finds support also in the Supreme Court’s consistent holdings that illegality in arresting or obtaining custody of a defendant does not strip a court of jurisdiction to try that defendant. “An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction.” [United States v. Crews, 445 U.S. 463, 474, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980).]

This doctrine, better known as the Ker-Frisbie rule, dates back well over a century and “rests on the sound basis that due process of law is satisfied when one present in court is convicted of a crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.” Moreover, the Court explicitly has refused to adopt an exclusionary rule that would operate on the defendant’s person:

Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.”17

This case follows a fortiori from the rationale of the Ker-Frisbie rule. Ghailani is charged here with complicity in the murder of 224 people. The government here has stated that it will not use anything that Ghailani said while in CIA custody, or the fruits of any such statement,20 in this prosecution. In consequence, any deprivation of liberty that Ghailani might suffer as a result of a conviction in this case would be entirely unconnected to the alleged due process violation. Even if Ghailani was mistreated while in CIA custody and even if that mistreatment violated the Due Process Clause, there would be no connection between such mistreatment and this prosecution. If, as Ker-Frisbie holds, the illegal arrest of a defendant is not sufficiently related to a prosecution to warrant its dismissal, it necessarily follows that mistreatment of a defendant is not sufficient to justify dismissal where, as here, the connection between the alleged misconduct and the prosecution is non-existent or, at least, even more remote. Certainly the government should not be deprived here “of the

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20 The government has identified one possible exception: a percipient witness whose identity remains classified and whose testimony may constitute fruit derived from statements made by the defendant in response to interrogations while in CIA custody. The government maintains that there is no basis for suppressing this potential witness’s testimony, and the issue is sub judice before this Court.
opportunity to prove his guilt through the introduction of evidence wholly untainted by [any government] misconduct.” Any remedy for any such violation must be found outside the confines of this criminal case.

*United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), is not to the contrary. The defendant in that case allegedly was brought before the trial court as a result of being abducted and tortured by government agents, conduct that he claimed violated his right to due process of law. Upon conviction, he appealed on the ground that the agents’ actions violated his right to due process and that the district court’s jurisdiction over him was a product of that violation. The Second Circuit reversed the conviction and remanded to enable the defendant to attempt to prove that the agents’ conduct was sufficiently outrageous to have violated the *Due Process Clause*. But *Toscanino* does not support Ghailani here.

As an initial matter, *Toscanino* was concerned with “denying the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part.” To whatever extent it is authoritative, a subject discussed below, the case is limited to situations in which the alleged outrageous government conduct brought the defendant within the court’s jurisdiction, and thus was a but-for cause of any resulting conviction, and compromised the fairness and integrity of the criminal proceedings. There is no similar connection between Ghailani’s alleged mistreatment while in CIA custody and this prosecution. Hence, to whatever extent that *Toscanino* remains viable, it does not apply here.

Second, as suggested already, it is doubtful that *Toscanino* remains authoritative. Several circuits have expressed doubt as to its continued viability in light of subsequent Supreme Court decisions. Moreover, the Second Circuit itself subsequently has relied heavily on the *Ker-Frisbie* rule in deciding a case very similar to the one currently before this Court.

In *Brown v. Doe*, [2 F.3d 1236 (2d Cir. 1993),] a defendant convicted of felony murder and robbery in state court sought federal habeas corpus relief on the ground, *inter alia*, that his substantive due process rights had been violated by repeated brutal beatings by police following his arrest. He alleged that this pretrial custodial abuse “was so outrageous and so offensive to due process of law that it bar[red] his prosecution and require[d] dismissal of the indictment.”

In affirming the district court’s denial of relief, the Second Circuit held that the *Due Process Clause* was the appropriate source of constitutional protection against the alleged pretrial abuse, but it concluded that the requested remedy was inappropriate. In light of the *Ker-Frisbie* line of cases, the court reasoned that “if there is no authority for barring the prosecution of a defendant who was illegally taken into custody, we are in no position to strip New York State of its power to try a defendant . . . who was lawfully arrested and convicted on untainted evidence.” Moreover, “the wrong committed by the police has its own

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26 See, e.g., *United States v. Best*, 304 F.3d 308, 312 (3d Cir. 2002); *United States v. Matta-Ballesteros*, 71 F.3d 754, 763 (9th Cir. 1995); *United States v. Mitchell*, 957 F.2d 465, 470 (7th Cir. 1992); *United States v. Darby*, 744 F.2d 1508, 1531 (11th Cir. 1984).
remedies. It is unnecessary to remedy that wrong by absolving [petitioner] of his own crime, and there is no interest of justice served by a result in which the community suffers two unpunished wrongs.” The court concluded that “[t]he remedy of dismissal is not required to vindicate [petitioner’s] due process rights. Other and more appropriate remedies are available,” potentially including civil remedies under 42 U.S.C. § 1983 and criminal prosecution of the police who assaulted him.

Brown confirms this Court’s view that Toscanino, if it retains any force, does so only where the defendant’s presence before the trial court is procured by methods that offend the Due Process Clause. Dismissal of the indictment in the absence of a constitutional violation affecting the fairness of the criminal adjudication itself is unwarranted.

Conclusion

If, as Ghailani claims, he was tortured in violation of the Due Process Clause, he may have remedies. For the reasons set forth above, however, those remedies do not include dismissal of the indictment. The defendant’s motion to dismiss the indictment on the grounds of allegedly outrageous government conduct in violation of his Fifth Amendment due process right is denied.33

United States v. Slough, 677 F. Supp.2d 112 (D.D.C. 2009). This case dealt with the prosecution of five “contractor security personnel” employed by the Blackwater security company who allegedly went on a shooting rampage at a Baghdad intersection during the tense days of September 2007. The defendants were charged with unjustified killing of 17 Iraqi civilians, to which they answered that they were responding to being fired upon by someone in the crowded intersection.

The defendants have been charged with voluntary manslaughter and firearms violations arising out of a shooting that occurred in Baghdad, Iraq on September 16, 2007. They contend that in the course of this prosecution, the government violated their constitutional rights by utilizing statements they made to Department of State investigators, which were compelled under a threat of job loss. The government has acknowledged that many of these statements qualify as compelled statements under Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967), which held that the Fifth Amendment privilege against self-incrimination bars the government from using statements compelled under a threat of job loss in a subsequent criminal prosecution. The Fifth Amendment automatically confers use

33 In light of its holding that dismissal is not warranted, the Court need not address the government’s second legal argument that the Due Process Clause of the Fifth Amendment does not apply to the alleged government misconduct at issue.
and derivative use immunity on statements compelled under Garrity; this means that in seeking an indictment from a grand jury or a conviction at trial, the government is prohibited from using such compelled statements or any evidence obtained as a result of those statements.

The government has also acknowledged that its investigators, prosecutors and key witnesses were exposed to (and, indeed, aggressively sought out) many of the statements given by the defendants to State Department investigators. Under the binding precedent of the Supreme Court in Kastigar v. United States, 406 U.S. 441 (1971), the burden fell to the government to prove that it made no use whatsoever of these immunized statements or that any such use was harmless beyond any reasonable doubt.

Judge Urbina held three weeks of hearings and decided that the criminal investigation team had relied extensively on the compelled statements provided to the State Department and violated the defendants’ fifth amendment rights in obtaining the indictments.

When a judge, upon close examination of the procedures that bring a criminal matter before the court, concludes that the process aimed at bringing the accused to trial has compromised the constitutional rights of the accused, it behooves the court to grant relief in the fashion prescribed by law. Such is the case here.

These indictments were dismissed. But Ghailani and the cases on which it relies indicate that violation of rights in obtaining information simply means suppression of the information, not dismissal of the entire case.

If Slough means that dismissal is the appropriate remedy for violation of constitutional rights in bringing a case to trial, does that mean that KSM and others cannot be tried because of their mistreatment at the hands of U.S. agents? But the court implies that the prosecution could go forward with another indictment or even just a criminal complaint so long as the government does not use anything tainted by the compelled statements: “in seeking an indictment from a grand jury or a conviction at trial, the government is prohibited from using such compelled statements or any evidence obtained as a result of those statements.” And Ghailani specifically says that we can torture defendants and still prosecute them, so no dismissal for KSM. Indeed, with KSM there was probably ample evidence against him prior to his opening his own mouth (hard to know exactly why he was waterboarded 183 times).

Where does the dignity of Article III courts fit into all this? Can a judge feel very good about sitting in judgment over someone who has been tortured by the agents of his or her own government? At least some judges answer that “there is no interest of justice served by a result in which the community suffers two unpunished wrongs.” But this answer may be too simplistic. In the search or compelled statement scenarios, exclusion of evidence is a remedy that seems
germane and usually proportional to the violation. The problem with outrageous conduct that is unrelated to evidence is that the only thing suppressible is the prosecution itself. That is an extremely severe remedy, but the violation is also very severe and is apparently not going to be redressed by the other remedies to which these judges allude – the civil actions thus far have been dismissed on the basis of “state secrets” and Obama has made it clear there will be no prosecutions. So a proper policy analysis could consider which of the two societal harms is greater, not just assuming that we have one to prosecute and the other to forego.

With regard to remedies for constitutional violations, the federal courts have addressed the balancing of interests in only a handful of cases involving effective assistance of counsel. For example, in *United States v. Gouveia*, 704 F.2d 1116, 1124 (9th Cir. 1983), rev’d, 467 U.S. 180 (1984), the Ninth Circuit dealt with a situation in which two prisoners were accused of murdering a fellow prisoner but they were held in administrative segregation without counsel for many months before being charged. The court held that this violated their sixth amendment right to counsel and was incurable:

In fashioning an appropriate remedy for appellants we are guided by the Supreme Court’s recent decision in *United States v. Morrison*, 449 U.S. 361 (1981). There the Court stated that the remedy for Sixth Amendment deprivations “should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interest.” The correct approach is to identify the taint and devise a remedy that neutralizes the prejudice suffered so that the defendant is assured the effective assistance of counsel and a fair trial.

The “taint” in the present case is that lengthy preindictment isolation without the assistance of counsel handicapped appellants’ ability to defend themselves at trial. Prison crimes present suspects with unique investigatory and evidentiary obstacles. And, to repeat, the passage of time greatly exacerbates these difficulties. The length of delay in appointing counsel for appellants who were likewise denied the opportunity to take measures to preserve their own defense means that the critical initial stage of investigation was forever lost to appellants.

This case then is qualitatively different from the right to counsel cases in which the question is the right to counsel’s presence at a pretrial confrontation between government and accused. When, for example, the government subjects a suspect to a custodial interrogation or a post-indictment lineup without the presence of counsel the prejudice suffered is both specific and curable. Suppression of the confession or evidence that is obtained or derived from the prohibited confrontation protects the right. Here, however, government conduct has rendered counsel’s assistance to appellants ineffective and the resulting harm is not capable of after the fact remedy. With respect to remedies appellants are in a position similar to suspects who are
denied a speedy trial. Here, as there, the only certain remedy is to
dismiss the indictments against them.

The Supreme Court reversed on the basis that sixth amendment right to
counsel did not attach until charges were filed. That meant the Court did not
need to address the remedy question.

add at page 53

[C] Investigation Abroad

In re TERRORIST BOMBINGS OF U.S. EMBASSIES IN EAST AFRICA
(Fourth Amendment Challenges)
552 F.3d 157 (2d Cir. 2008)


JOSÉ A. CABRANES, Circuit Judge:

Defendant-appellant Wadih El-Hage, a citizen of the United States,
challenges his conviction on numerous charges arising from his involvement in
the August 7, 1998 bombings of the American Embassies in Nairobi, Kenya and
Dar es Salaam, Tanzania. In this opinion we consider El-Hage's challenge to the
District Court's denial of his motion to suppress evidence obtained by the
government from an August 1997 search of his residence in Nairobi, Kenya and
electronic surveillance of telephone lines-land-based and cellular-conducted in

I. BACKGROUND

American intelligence became aware of al Qaeda’s presence in Kenya by mid-
1996 and identified five telephone numbers used by suspected al Qaeda
associates. From August 1996 through August 1997, American intelligence
officials monitored these telephone lines, including two El-Hage used: a phone
line in the building where El-Hage lived and his cell phone. The Attorney
General of the United States then authorized intelligence operatives to target El-
Hage in particular. This authorization, first issued on April 4, 1997, was
renewed in July 1997. Working with Kenyan authorities, U.S. officials searched
El-Hage's home in Nairobi on August 21, 1997, pursuant to a document shown
to El-Hage's wife that was “identified as a Kenyan warrant authorizing a search
for stolen property.” At the completion of the search, one of the Kenyan officers
gave El-Hage's wife an inventory listing the items seized during the search. El-
Hage was not present during the search of his home. It is uncontested that the
agents did not apply for or obtain a warrant from a U.S. court.

II. DISCUSSION

B. The District Court's Denial of El-Hage's Motion to Suppress
Evidence

2. Extraterritorial Application of the Fourth Amendment
In order to determine whether El-Hage's suppression motion was properly denied by the District Court, we must first determine whether and to what extent the Fourth Amendment's safeguards apply to overseas searches involving U.S. citizens. In United States v. Toscanino, a case involving a Fourth Amendment challenge to overseas wiretapping of a non-U.S. citizen, we observed that it was “well settled” that “the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens.” 500 F.2d 267, 280-81 (2d Cir. 1974); see also United States v. Verdugo-Urquidez, 494 U.S. 259, 283 n. 7 (1990) (Brennan, J., dissenting) (recognizing “the rule, accepted by every Court of Appeals to have considered the question, that the Fourth Amendment applies to searches conducted by the United States Government against United States citizens abroad”). Nevertheless, we have not yet determined the specific question of the applicability of the Fourth Amendment’s Warrant Clause to overseas searches. Faced with that question now, we hold that the Fourth Amendment's warrant requirement does not govern searches conducted abroad by U.S. agents; such searches of U.S. citizens need only satisfy the Fourth Amendment's requirement of reasonableness.

The Fourth Amendment to the U.S. Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Supreme Court has explained that “[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.” Brigham City v. Stuart, 547 U.S. 398, 403 (2006). “Nevertheless, because the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’ the warrant requirement is subject to certain exceptions.” Familiar exceptions to the warrant requirement arise from exigent circumstances, such as the risk of imminent destruction of evidence or the “hot pursuit” of a fleeing suspect. Warrantless searches are also permitted in connection with valid arrests, and on a consensual basis. Custodial “inventory searches” are also exempt from the warrant requirement. Exceptions have also been established for searches conducted outside of criminal investigations. For example, disciplinary procedures in public schools are not governed by a warrant requirement; neither are civil-service drug-testing programs, nor are searches conducted at international borders. Administrative searches, particularly those involving heavily regulated industries, may also be exempt from the warrant requirement under certain circumstances. In these contexts, when the government “seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for

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5 We interpret the statement in Toscanino that “[i]t is no answer to argue that the foreign country which is the situs of the search does not afford a procedure for issuance of a warrant,” 500 F.2d at 280, as nothing more than a rejection of the argument that the Fourth Amendment does not apply in foreign countries where U.S. agents cannot obtain local search warrants. In addition, we observe that one of Toscanino's holdings – that aliens may invoke the Fourth Amendment against searches conducted abroad by the U.S. government – is no longer valid in light of Verdugo-Urquidez, 494 U.S. 259, which we discuss below.
searching any particular place or person” the probable cause and warrant requirements give way to an evaluation of reasonableness. Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989).

The question of whether a warrant is required for overseas searches of U.S. citizens has not been decided by the Supreme Court, by our Court, or, as far as we are able to determine, by any of our sister circuits. While never addressing the question directly, the Supreme Court provided some guidance on the issue in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), where the Court examined whether an alien with “no voluntary attachment to the United States” could invoke the protections of the Fourth Amendment to suppress evidence obtained through a warrantless search conducted in Mexico. Relying on “the text of the Fourth Amendment, its history, and [the Court’s] cases discussing the application of the Constitution to aliens and extraterritorially,” the Supreme Court held that the Fourth Amendment affords no protection to aliens searched by U.S. officials outside of our borders. With respect to the applicability of the Warrant Clause abroad, the Court expressed doubt that the clause governed any overseas searches conducted by U.S. agents, explaining that warrants issued to conduct overseas searches “would be a dead letter outside the United States.” Elaborating on this observation in a concurring opinion, Justice Kennedy concluded:

The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment’s warrant requirement should not apply in Mexico as it does in this country.

Both Justice Stevens, in a concurring opinion, and Justice Blackmun, in dissent, also took a dim view of applying the Warrant Clause to searches conducted abroad, noting that U.S. judicial officers have no power to issue such warrants. Accordingly, in Verdugo-Urquidez, seven justices of the Supreme Court endorsed the view that U.S. courts are not empowered to issue warrants for foreign searches.

These observations and the following reasons weigh against imposing a warrant requirement on overseas searches.

First, there is nothing in our history or our precedents suggesting that U.S. officials must first obtain a warrant before conducting an overseas search.\footnote{While we cannot say that the practices of foreign governments have any bearing on the constitutionality of a similar practice by our government, we find it notable that El-Hage has not pointed to any instance in which another country imposed any comparable requirements on its own law enforcement officers.} This dearth of authority is not surprising in light of the history of the Fourth Amendment and its Warrant Clause as well as the history of international affairs.
A U.S. citizen who is a target of a search by our government executed in a foreign country is not without constitutional protection – namely, the Fourth Amendment's guarantee of reasonableness which protects a citizen from unwarranted government intrusions. Indeed, in many instances, as appears to have been the case here, searches targeting U.S. citizens on foreign soil will be supported by probable cause.

The interest served by the warrant requirement in having a “neutral and detached magistrate” evaluate the reasonableness of a search is, in part, based on separation of powers concerns – namely, the need to interpose a judicial officer between the zealous police officer ferreting out crime and the subject of the search. These interests are lessened in the circumstances presented here for two reasons. First, a domestic judicial officer's ability to determine the reasonableness of a search is diminished where the search occurs on foreign soil. Second, the acknowledged wide discretion afforded the executive branch in foreign affairs ought to be respected in these circumstances.

Second, nothing in the history of the foreign relations of the United States would require that U.S. officials obtain warrants from foreign magistrates before conducting searches overseas or, indeed, to suppose that all other states have search and investigation rules akin to our own. The American procedure of issuing search warrants on a showing of probable cause simply does not extend throughout the globe and, pursuant to the Supreme Court's instructions, the Constitution does not condition our government’s investigative powers on the practices of foreign legal regimes “quite different from that which obtains in this country.”

Third, if U.S. judicial officers were to issue search warrants intended to have extraterritorial effect, such warrants would have dubious legal significance, if any, in a foreign nation. A warrant issued by a U.S. court would neither empower a U.S. agent to conduct a search nor would it necessarily compel the intended target to comply. It would be a nullity, or in the words of the Supreme Court, “a dead letter.”

Fourth and finally, it is by no means clear that U.S. judicial officers could be authorized to issue warrants for overseas searches, although we need not resolve that issue here.

For these reasons, we hold that the Fourth Amendment's Warrant Clause has no extraterritorial application and that foreign searches of U.S. citizens conducted by U.S. agents are subject only to the Fourth Amendment's requirement of reasonableness.

3. The Kenyan Searches Were Reasonable and Therefore Did Not Violate the Fourth Amendment.

First, El-Hage insists that his Nairobi home deserves special consideration in light of the home's status as “the most fundamental bastion of privacy protected by the Fourth Amendment.” Second, he contends that the electronic surveillance was far broader than necessary because it encompassed “[m]any
calls, if not the predominant amount, [that] were related solely to legitimate commercial purposes, and/or purely family and social matters."

To determine whether a search is reasonable under the Fourth Amendment, we examine the “totality of the circumstances” to balance “on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *Samson v. California*, 547 U.S. 843, 848 (2006). As discussed in greater detail below, we conclude that the searches' intrusion on El-Hage's privacy was outweighed by the government's manifest need to monitor his activities as an operative of al Qaeda because of the extreme threat al Qaeda presented, and continues to present, to national security. In light of these circumstances, the Kenyan searches were reasonable, notwithstanding El-Hage's objections, and therefore not prohibited by the Fourth Amendment.

El-Hage's principal challenge to the reasonableness of the search of his Nairobi residence appears to derive from Supreme Court precedents applying rigorous scrutiny to searches of a suspect's home.

This general proscription is not without limits. In *United States v. Knights*, 534 U.S. 112, 114, 122 (2001), for instance, after balancing the relevant interests, the Court upheld a California statute requiring probationers to submit to searches of their homes, among other locations, regardless of whether the searches are authorized by a warrant or supported by probable cause. Accordingly, warrantless searches of homes, while subject to special scrutiny, are nevertheless also subject to a balancing test-weighing an individual's expectation of privacy against the government's need for certain information-for determining reasonableness under the Fourth Amendment.

Applying that test to the facts of this case, we first examine the extent to which the search of El-Hage's Nairobi home intruded upon his privacy. The intrusion was minimized by the fact that the search was not covert; indeed, U.S. agents searched El-Hage's home with the assistance of Kenyan authorities, pursuant to what was identified as a "Kenyan warrant authorizing [a search]."

As described above, U.S. intelligence officers became aware of al Qaeda's presence in Kenya in the spring of 1996. At about that time, they identified five telephone lines used by suspected al Qaeda associates, one of which was located in the same building as El-Hage's Nairobi home; another was a cellular phone used by El-Hage. After these telephone lines had been monitored for several months, the Attorney General of the United States authorized surveillance specifically targeting El-Hage. That authorization was renewed four months later, and, one month after that, U.S. agents searched El-Hage's home in Nairobi. This sequence of events is indicative of a disciplined approach to gathering indisputably vital intelligence on the activities of a foreign terrorist organization. U.S. agents did not breach the privacy of El-Hage's home on a whim or on the basis of an unsubstantiated tip; rather, they monitored telephonic communications involving him for nearly a year and conducted surveillance of his activities for five months before concluding that it was necessary to search his home. In light of these findings of fact, which El-Hage
has not contested as clearly erroneous, we conclude that the search, while undoubtedly intrusive on El-Hage's privacy, was restrained in execution and narrow in focus.

Balanced against this restrained and limited intrusion on El-Hage's privacy, we have the government's manifest need to investigate possible threats to national security. As the District Court noted, al Qaeda “declared a war of terrorism against all members of the United States military worldwide” in 1996 and later against American civilians. The government had evidence establishing that El-Hage was working with al Qaeda in Kenya. On the basis of these findings of fact, we agree with the District Court that, at the time of the search of El-Hage's home, the government had a powerful need to gather additional intelligence on al Qaeda's activities in Kenya, which it had linked to El-Hage.

b. The Surveillance of El-Hage's Kenyan Telephone Lines Was Also Reasonable.

El-Hage appears to challenge the reasonableness of the electronic surveillance of the Kenyan telephone lines on the grounds that (1) they were overbroad, encompassing calls made for commercial, family or social purposes and (2) the government failed to follow procedures to “minimize” surveillance.

It cannot be denied that El-Hage suffered, while abroad, a significant invasion of privacy by virtue of the government's year-long surveillance of his telephonic communications. The Supreme Court has recognized that, like a physical search, electronic monitoring intrudes on “the innermost secrets of one's home or office” and that “[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices.” Berger v. New York, 388 U.S. 41, 63 (1967). For its part, the government does not contradict El-Hage's claims that the surveillance was broad and loosely “minimized.” Instead, the government sets forth a variety of reasons justifying the breadth of the surveillance. These justifications, regardless of their merit, do not lessen the intrusion El-Hage suffered while abroad, and we accord this intrusion substantial weight in our balancing analysis.

Turning to the government's interest, we encounter again the self-evident need to investigate threats to national security presented by foreign terrorist organizations. When U.S. intelligence learned that five telephone lines were being used by suspected al Qaeda operatives, the need to monitor communications traveling on those lines was paramount, and we are loath to discount – much less disparage – the government's decision to do so.

Our balancing of these compelling, and competing, interests turns on whether the scope of the intrusion here was justified by the government's surveillance needs. We conclude that it was, for at least the following four reasons.

First, complex, wide-ranging, and decentralized organizations, such as al Qaeda, warrant sustained and intense monitoring in order to understand their features and identify their members.
Second, foreign intelligence gathering of the sort considered here must delve into the superficially mundane because it is not always readily apparent what information is relevant.

Third, members of covert terrorist organizations, as with other sophisticated criminal enterprises, often communicate in code, or at least through ambiguous language. Hence, more extensive and careful monitoring of these communications may be necessary.

Fourth, because the monitored conversations were conducted in foreign languages, the task of determining relevance and identifying coded language was further complicated.

Because the surveillance of suspected al Qaeda operatives must be sustained and thorough in order to be effective, we cannot conclude that the scope of the government's electronic surveillance was overbroad. While the intrusion on El-Hage's privacy was great, the need for the government to so intrude was even greater. Accordingly, the electronic surveillance, like the search of El-Hage's Nairobi residence, was reasonable under the Fourth Amendment.

In sum, because the searches at issue in this appeal were reasonable, they comport with the applicable requirement of the Fourth Amendment and, therefore, El-Hage's motion to suppress the evidence resulting from those searches was properly denied by the District Court.

In re TERRORIST BOMBINGS OF U.S. EMBASSIES IN EAST AFRICA (Fifth Amendment Challenges) 552 F.3d 177 (2d Cir. 2008)

JOSÉ A. CABRANES, Circuit Judge:

Defendants-appellants Mohamed Rashed Daoud Al-'Owhali and Mohamed Sadeek Odeh challenge their convictions on numerous charges arising from their involvement in the August 7, 1998 bombings of the American Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. In this opinion we consider their challenges to the District Court's rulings that denied, for the most part, their respective motions to suppress statements each of them made overseas to U.S. and non-U.S. officials.

I. BACKGROUND

A. Factual Overview

1. Al-'Owhali

Al-'Owhali was detained on August 12, 1998 by Kenyan authorities in “an arrest [that] was valid under Kenyan law.” Within one hour of his arrest, Al-'Owhali was transported to Kenyan police headquarters in Nairobi and interrogated by two members of the Joint Terrorist Task Force – an FBI Special Agent and a New York City police detective – operating out of New York City and two officers of Kenya's national police. The New York police detective presented Al.' Owhali with an Advice of Rights form often used by U.S. law
enforcement when operating overseas. The AOR, written in English, read in its entirety as follows:

We are representatives of the United States Government. Under our laws, you have certain rights. Before we ask you any questions, we want to be sure that you understand those rights.

You do not have to speak to us or answer any questions. Even if you have already spoken to the Kenyan authorities, you do not have to speak to us now.

If you do speak with us, anything that you say may be used against you in a court in the United States or elsewhere.

In the United States, you would have the right to talk to a lawyer to get advice before we ask you any questions and you could have a lawyer with you during questioning. In the United States, if you could not afford a lawyer, one would be appointed for you, if you wish, before any questioning.

Because we are not in the United States, we cannot ensure that you will have a lawyer appointed for you before any questioning.

If you decide to speak with us now, without a lawyer present, you will still have the right to stop answering questions at any time.

You should also understand that if you decide not to speak with us, that fact cannot be used as evidence against you in a court in the United States.

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Al-'Owhali told the American law enforcement agents that he could not read English and had a limited understanding of spoken English. Accordingly, the police detective “read the AOR aloud in English, going slowly and checking for visual signs of comprehension. Al-'Owhali appeared to [the detective to] understand, replied that he understood when asked, and signed his alias at the bottom of the AOR in Arabic when requested to do so.”

A one-hour interrogation ensued, in which Al-'Owhali responded in “broken English.”

Finding their ability to communicate with Al-'Owhali limited by the end of that hour, the agents decided to continue Al-'Owhali’s interrogation with the assistance of an interpreter. The special agent began this interview by reading the AOR in English, which the interpreter translated into Arabic. Al-'Owhali

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3 An FBI interpreter, who attended many of the relevant interrogations, later testified that “in his opinion, Al-'Owhali would likely have had difficulty understanding the AOR if it were only read to him aloud in English.”
stated that he “understood that the warning was the same one as from the morning session,” “understood his rights as described therein,” and “agreed to answer questions.” Al-'Owhali was then interviewed for about three hours and, thereafter, was questioned on eight other days: August 13, 14, 17, and 21-25. At the start of each of the interviews on August 13, 14, 17 and 21, the agents showed Al-'Owhali the signed AOR, asked whether he remembered his rights, and whether he would continue to answer their questions. Al-'Owhali consented on each occasion. Until August 21, he denied any involvement in the embassy bombings.

During the August 21 interview, the U.S. agents described the inculpatory evidence they had gathered on Al-'Owhali, and “[a]fter acknowledging that the agents 'knew everything,' Al-'Owhali said that he would tell the truth about his involvement in the bombing if he could be tried in the United States.” He explained that the reason he wanted to stand trial in the United States was “because the United States was his enemy, not Kenya.” The agents then terminated the interview in order to determine whether Al-'Owhali’s request could be met. The next day, August 22, an AUSA, in the company of the two U.S. agents and two Kenyan police officers, provided Al-'Owhali with a document of understanding (“DOU”), approved by the U.S. Department of Justice, stating:

I have been fully advised of my rights, including my right to remain silent and my right not to answer questions without a lawyer present. As I have been previously told, I understand that anything I say or have said can be used against me in court in the United States. I also understand that if I choose not to answer questions my refusal to answer questions cannot be held against me in court. I further understand that if I choose to answer questions, I can always change my mind and decide not to answer any further questions.

I understand that both Kenyan and American authorities are investigating the murder of the various American and Kenyan victims in and around the United States [E]mbassy in Nairobi.

I have a strong preference to have my case tried in an United States Court because America is my enemy and Kenya is not. I would like my past and present statements about what I have done and why I have done it to be aired in public in an American courtroom. I understand that the American authorities who are interviewing me want to know who committed the bombing of the embassy and how it was carried out.

I am willing to waive my rights and answer the questions of American authorities upon the condition that the undersigned law enforcement authorities make all best efforts to see that I am brought to the United States to stand trial. I understand that the undersigned prosecutor is only empowered to make recommendations to the Attorney General of the United States and other executive officials of the United States Government and I further understand that the United States Government only intends to act with the mutual agreement of the Kenyan government.
No other agreements or promises have been made other than as set forth in this document.

After being shown this document, but before it was read to him, Al-‘Owhali indicated that “he might wish to have an attorney review the DOU to make sure it was enforceable.” In response, the AUSA, through a translator, advised Al-‘Owhali of his Miranda rights, “recited entirely from [the AUSA’s] memory of a domestic Miranda warning” and without “reference to the AOR utilized on the first day of interrogation.”

The AUSA further explained that no American lawyer was available at that time in Kenya. After Al-‘Owhali stated that he understood his rights, the AUSA read the DOU to Al-‘Owhali, through a translator, verifying after each paragraph that Al-‘Owhali understood the contents of the document. Al-‘Owhali did not “assert his rights” or object to any provision of the DOU except for the “uncertainty associated with [the paragraph indicating that U.S. officials would make] just a ‘recommendation’ that he be brought to the United States.” The AUSA agreed to investigate the possibility of accommodating Al-‘Owhali’s request, and before exiting the room to consult with his superiors at the Department of Justice, verified (twice) that Al-‘Owhali was willing to proceed without counsel.

During the AUSA’s absence, Al-‘Owhali withdrew his request, stating that “he would be willing to talk even without a full guarantee because he trusted the U.S. officials to do the best they could to bring him to the United States.” The AUSA then returned to the interview room, verified again that Al-‘Owhali was willing to proceed without counsel and, upon Al-‘Owhali’s request, handed him the DOU to sign. Al-‘Owhali signed the statement. He was then interrogated for the next three-and-a-half hours; after that, he was interrogated for three hours on August 23 and 24, and for nine hours on August 25. During these interviews, Al-‘Owhali admitted his participation in the bombing of the American Embassy in Nairobi.

During the August 25 interrogation, Al-‘Owhali claimed that he possessed “time-sensitive information regarding an issue of public safety” and would disclose this information only if he was guaranteed a trial in the United States rather than Kenya. Accordingly, the AUSA, after obtaining the necessary approvals, prepared a second document of understanding (“second DOU”), which read:

I have been fully advised of my rights, including my right to remain silent and my right not to answer questions without a lawyer present.

I have indicated that there is additional information that I have which I stated I would share with the United States authorities upon my arriving in America and obtaining an attorney. I have also indicated that the information concerns a public safety issue. Because I would otherwise not make this disclosure before arriving in the United States and speaking to an attorney, but because American authorities do not wish to take the risk that the delay concerning the information I intend to impart later will cause loss of life, it is hereby agreed that I will tell
the United States authorities about this information prior to returning to America. In turn, the American authorities agree not to use the fact that I disclosed this particular information against me as evidence in the Government's case in chief if I should demand a trial of the charges that will be filed against me. The Government hereby agrees that if the Defendant is convicted, the Government will disclose the fact that I provided this information to the judge or jury determining or imposing sentence if requested to do so by the defendant. There is no promise that providing such information will affect my sentence.

I have decided to sign this document because I have been advised by the undersigned that I am now scheduled to be removed to the United States within the next 24 hours, travel conditions permitting, and the undersigned is aware of no objections from either the United States or Kenya governments to such removal.

The AUSA read the second DOU to Al-'Owhali, through a translator, and then Al-'Owhali signed it. After the Kenyan police left the room, at Al-'Owhali’s request, he disclosed the time-sensitive information to the U.S. agents. The next morning, Al-'Owhali was flown from Kenya to the United States and, during the flight, was again advised of his Miranda rights. Al-'Owhali “stated that he knew his rights, signed the advice of rights form, and invoked his right to appointed counsel.”

2. Odeh

On August 7, 1998, Pakistani immigration officials detained Odeh, following his arrival at the Karachi airport on a flight from Kenya, on the ground that he used a false passport. Odeh was held in Pakistani custody until August 14, during which time he was interrogated by Pakistani officials. On August 14, Odeh was transported to Nairobi, Kenya, and transferred from Pakistani custody to Kenyan custody. The next day, he was interrogated by two special agents of the FBI, an AUSA, and three Kenyan police officers. Odeh communicated with his interrogators, without difficulty, entirely in English. The U.S. officials explained to Odeh that whether or not he spoke with Pakistani authorities during his detention in Karachi had no bearing on his decision to speak to them. “Thereafter, when Odeh raised the issue of his admissions to the Pakistani authorities, he was told that the Americans did not know or care about what had transpired in Pakistan.” One of the FBI special agents read Odeh an AOR similar in all material respects to the one read to Al-'Owhali.

As the FBI special agent read the AOR, Odeh asked about the availability of a lawyer but did not specifically request one. After further discussion of the AOR and Odeh’s willingness to speak to U.S. officials, the interview temporarily ceased so that the AUSA could investigate whether Kenyan counsel was available to Odeh.

Believing that Odeh lacked financial resources, the AUSA inquired into the availability of appointed – but not privately retained – Kenyan counsel. A “high-ranking” Kenyan law enforcement officer informed the AUSA that under Kenyan law, appointed counsel was not provided at the investigative stage and it was
their “practice to continue questioning a person who requests an appointed attorney.” The AUSA informed Odeh of what he had learned from the Kenyan police officer, verified that Odeh had not already retained an attorney, and then orally informed him of his rights under Miranda:

Odeh was told that he had the right to remain silent and that invocation of the right to silence could not be used against him in court. He was also told that if he did speak to the American officials, statements that he made could be used against him. With respect to the right to counsel, AUSA [redacted] told Odeh that he was entitled to have an attorney present and to have an attorney appointed if he could not afford one. However, AUSA [redacted] informed Odeh that no American attorney was currently available to represent him in Kenya. AUSA [redacted] emphasized that Odeh was “the boss” with respect to answering questions without an attorney present.

The AUSA explained that Odeh could (1) exercise his right to remain silent; (2) invoke his right to have an attorney present, in which case the Americans would leave the room and he could then decide whether or not to speak with the Kenyan police; or (3) speak to both the American and Kenyan authorities without the presence of an attorney. Odeh suggested a fourth possibility: “speaking with the American officials outside the presence of the Kenyans.” While the U.S. and Kenyan authorities were investigating the viability of Odeh’s proposal, Odeh changed his mind and decided to speak to both the U.S. and Kenyan officials. Odeh then signed the AOR. Odeh never stated a desire to hire an attorney, and “[i]n fact, he asked the officials what would happen if he subsequently decided that he did not want to speak without a lawyer present.” In response, the AUSA “informed him that he always had the right to stop talking with the American officials.”

After signing the AOR on August 15, Odeh was interviewed for about seven hours. During the interrogation the next day, the AUSA again informed Odeh that he had the right to the presence of an attorney at the interview, even though no American attorney was available, and that if Odeh wanted an attorney, the Americans would not interrogate him. Odeh expressed his willingness to answer questions and did not request an attorney. Odeh was interrogated on a daily basis from approximately 9:00 a.m. to 6:00 p.m. until he was taken to the United States on August 27, 1998. During these sessions, “Odeh admitted that he was a member of al Qaeda but denied any participation in (or foreknowledge of) the embassy bombings.” When Odeh was transferred to American custody on August 27, he was given the standard Miranda warnings.

[At trial, Al-‘Owhali and Odeh moved to suppress their statements. The District Court granted in part and denied in part Al-‘Owhali’s motion and denied in full Odeh’s motions.]

II. DISCUSSION

B. Al-‘Owhali’s and Odeh’s Challenges to the Denial of their Motions to Suppress Inculpatory Statements
2. The Applicability of the Fifth Amendment and *Miranda* to the Admission at Trial of Inculpatory Statements Made in Foreign Custody to U.S. Agents

Like the District Court, we conclude that the admissibility at trial of statements made to U.S. agents by foreign nationals held in foreign custody is governed by the Fifth Amendment. Indeed, the government does not argue otherwise. Although we need not decide whether we agree with the District Court as to all aspects of its ruling on the Fifth Amendment and *Miranda*, it suffices to hold, as described in greater detail below, that insofar as *Miranda* might apply to interrogations conducted overseas, that decision is satisfied when a U.S. agent informs a foreign detainee of his rights under the U.S. Constitution when questioned overseas.

We note that U.S. agents acting overseas need not become experts in foreign criminal procedure in order to comply with *Miranda*; nor need they advocate for the appointment of local counsel on a foreign suspect's behalf. While doing so may provide additional grounds for finding that any statements obtained in the course of interrogations were made voluntarily, it is not required by either the Fifth Amendment or *Miranda*. If the suspect chooses to make a knowing and voluntary waiver of his rights after a warning adapted to the circumstances of questioning overseas and chooses to speak with a U.S. agent, then neither the Fifth Amendment nor *Miranda* will bar the admission of his statement at trial.

a. The Fifth Amendment Right Against Self-Incrimination in Domestic Trials

We note at the outset that our analysis of the applicability of the Fifth Amendment to this prosecution differs from our analysis of the Fourth Amendment's applicability. While a violation of the Fourth Amendment's prohibition of unreasonable searches and seizures occurs at the time of the search or seizure, regardless of whether unlawfully obtained evidence is ever offered at trial, a violation of the Fifth Amendment's right against self-incrimination occurs only when a compelled statement is offered at trial against the defendant. Accordingly, the Fourth Amendment's prohibition of unreasonable searches and seizures regulates the activities of the government when investigating crimes, while the Fifth Amendment's privilege against self-incrimination regulates the admissibility of a defendant's statements at trial.

Because a putative violation of the Fourth Amendment is “fully accomplished” at the place and time of the alleged intrusion, a claimed violation occurring overseas entails an analysis of the extraterritorial application of the Fourth Amendment. No such analysis is necessary with respect to the Fifth Amendment's privilege against self-incrimination because that provision governs the admissibility of evidence at U.S. trials, not the conduct of U.S. agents investigating criminal activity. For this reason, it naturally follows that, regardless of the origin – i.e., domestic or foreign – of a statement, it cannot be admitted at trial in the United States if the statement was “compelled.” Similarly, it does not matter whether the defendant is a U.S. citizen or a foreign national: “no person” tried in the civilian courts of the United States can be compelled “to be a witness against himself.”

Indeed, the principles animating the privilege against self-incrimination
apply with equal force to both citizens and foreigners who are haled into our courts to answer criminal charges. For these reasons, we have previously required that, in order to be admitted in our courts, inculpatory statements obtained overseas by foreign officials must have been made voluntarily. See United States v. Yousef, 327 F.3d 56, 145 (2d Cir. 2003) (“[S]tatements taken by foreign police in the absence of Miranda warnings are admissible if voluntary.”).

Accordingly, we hold that foreign nationals interrogated overseas but tried in the civilian courts of the United States are protected by the Fifth Amendment’s self-incrimination clause.

b. The Application of Miranda to U.S. Interrogations Conducted Overseas

Having determined that the Fifth Amendment right against self-incrimination governs the admissibility at trial of statements made overseas, we turn to the related question of Miranda’s applicability to overseas interrogations conducted by U.S. agents. The Supreme Court has not ruled on this particular question, but it has held that the framework established by “Miranda . . . govern[s] the admissibility of statements made during custodial interrogation in both state and federal courts.” Dickerson v. United States, 530 U.S. 428, 432 (2000). Proceeding on the assumption that the Miranda framework generally governs the admissibility of statements obtained overseas by U.S. agents, we conclude that the application of that framework to overseas interrogations may differ from its domestic application, depending on local circumstances, in keeping with the context-specific nature of the Miranda rule.

In [Miranda], the Court set forth “constitutional guidelines” conditioning the admissibility of statements obtained in custodial interrogations on whether a suspect had been warned that he:

- has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Undergirding these guidelines are two objectives: “trustworthiness and deterrence.”

Recognizing that the threat of suppression in U.S. courts for failure to comply with Miranda holds little sway over foreign authorities, we have declined to suppress un-warned statements obtained overseas by foreign officials. Instead of applying Miranda in such cases, we have required that “[w]henever a court is asked to rule upon the admissibility of a statement made to a foreign police officer, the court must consider the totality of the circumstances to determine whether the statement was voluntary. If the court finds the statement involuntary, it must exclude this because of its inherent unreliability.”

When U.S. law enforcement agents or officials are involved in overseas interrogation, however, the deterrence rationale retains its force. In such circumstances, the twin goals of ensuring trustworthiness and deterring misconduct might compel the application of Miranda. We suggested as much in Yousef, 327 F.3d at 56. In Yousef, we observed that “statements taken by foreign
police in the absence of *Miranda* warnings are admissible if voluntary,” subject to two exceptions. One of these exceptions – the so-called “joint venture doctrine” – appears to have been “implicitly adopted” by our Court, even though we have “failed to define its precise contours.” In light of these precedents, we proceed on the assumption that the *Miranda* “warning/waiver” framework generally governs the admissibility in our domestic courts of custodial statements obtained by U.S. officials from individuals during their detention under the authority of foreign governments.\(^{18}\)

Even if we were to conclude, rather than assume, that *Miranda* applies to overseas interrogations involving U.S. agents, that would not mean that U.S. agents must recite verbatim the familiar *Miranda* warnings to those detained in foreign lands. Indeed, the *Miranda* Court itself stated that its “decision in no way creates a constitutional straitjacket” and that “other procedures which are at least as effective in apprizing accused persons of their right of silence and in assuring a continuous opportunity to exercise it” could pass constitutional muster.

Where *Miranda* has been applied to overseas interrogations by U.S. agents, it has been so applied in a flexible fashion to accommodate the exigencies of local conditions. This context-specific approach is wholly consistent with our reading of the Supreme Court decisions construing the *Miranda* framework, and we now apply that approach to the facts of this case.

3. Application of the Fifth Amendment and *Miranda* to Defendants' Statements

a. The AOR

Turning first to the AOR, we observe that it provided five notices to Al-Owhali and Odeh. It warned them that under U.S. law: (1) they had the right to remain silent; (2) if they chose to speak, anything they said could be used against them in court; (3) in the United States, they would have had the right to consult with a lawyer and to have a lawyer present during questioning; (4) in the United States, a lawyer would have been appointed for them if they could not afford one; and (5) if they chose not to speak, that fact could not be used against them in a U.S. court. It further advised them that “[b]ecause we are not in the United

\(^{18}\) The other exception noted by the Yousef Court pertains to “statements obtained under circumstances that ‘shock the judicial conscience.’” 327 F.3d at 146. [Ed. note: see Ghailani, p. 4 supra.]

\(^{19}\) Our recognition that Miranda might apply to foreign detainees held overseas should in no way impair the ability of the U.S. government to gather foreign intelligence. First, Miranda’s “public safety” exception, see New York v. Quarles, 467 U.S. 649 (1984), would likely apply overseas with no less force than it does domestically. When exigent circumstances compel an un-warned interrogation in order to protect the public, Miranda would not impair the government’s ability to obtain that information. Second, we emphasize that the Miranda framework governs only the admission of custodial statements at U.S. trials. Insofar as U.S. agents do not seek to introduce statements obtained through overseas custodial interrogations at U.S. trials, Miranda’s strictures would not apply.
States, we cannot ensure that you will have a lawyer appointed for you before any questioning.” The District Court held that the AOR ran afoul of *Miranda* because it suggested that defendants lacked the right to the presence and appointment of counsel because they were held outside of the United States. We do not believe that the AOR was as deficient as the District Court believed it to be, but, as explained below, we also think that the advice as to the right to counsel could have been made clearer. In any event, we need not rule definitively on the adequacy of the AOR because we agree fully with the District Court that the subsequent oral advice fully complied with whatever *Miranda* requirements were applicable.

The AOR presented defendants with a factually accurate statement of their rights under the U.S. Constitution and how those rights might be limited by the governing non-U.S. criminal procedures. In addition, it advised defendants of a right normally not contained in *Miranda* warnings – that the defendants’ silence could not be used against them at an American trial. This additional warning amplified the AOR’s cautionary message and thus reinforces the warning’s adequacy under *Miranda*.

Like the District Court, we consider the first two warnings in the AOR – the right to remain silent and the introduction at trial of any statements made thereafter – to be entirely consistent with the text and teaching of *Miranda*.

With respect to the rights to presence and appointment of counsel, however, we disagree with the District Court’s conclusion that the AOR “wrongly convey[ed] to a suspect that, due to his custodial situs outside the United States, he currently possesse[d] no opportunity to avail himself of the services of an attorney before or during questioning by U.S. officials.”

In our view, the AOR presented defendants with a factually accurate statement of their right to counsel under the U.S. Constitution; it also explained that the effectuation of that right might be limited by the strictures of criminal procedure in a foreign land. In cases where a suspect has no entitlement to counsel under the law of the foreign land, it would be misleading to inform him falsely that he was guaranteed the presence or appointment of an attorney – and *Miranda* does not require the provision of false assurances.

The warning at issue here was candid: It explained the rights provided by the U.S. Constitution, while recognizing that, because defendants were detained outside the United States, U.S. law did not govern the terms of their detention or interrogation. Rather than indicating that defendants had no right to appointed counsel, the AOR stated that defendants may have to look to local law for the effectuation of those rights. Indeed, the facts presented by Odeh’s case bear this out. Upon hearing the AOR’s warnings, Odeh did not assume that counsel was unavailable; instead, he inquired whether counsel was available under Kenyan law. For these reasons, we do not equate the language of the AOR with a statement that counsel was unavailable. Instead, we read that language as a candid acknowledgment of the possible disparity between rights established by the U.S. Constitution, on the one hand, and the availability of counsel and entitlement to the assistance of counsel under the law of the detaining authority,
Because compliance with *Miranda* does not require law enforcement to advocate on behalf of suspects detained in the United States, we see no basis for adopting a different rule for detainees held overseas by foreign powers. It is true that the rights of foreign detainees to the presence and appointment of counsel will depend on foreign law, but, as noted above, *Miranda* does not require the provision of legal services.

We are aware that, as defendants urge, foreign detainees may run the risk of refusing to speak to U.S. officials only to find themselves forced to speak to their foreign jailors. This would be so, however, even if U.S. agents made efforts to secure counsel on their behalf and those efforts proved fruitless. The risk of being forced to speak to their foreign jailors would also exist, moreover, if U.S. agents were not involved at all. Of course, statements obtained under these circumstances could not be admitted in a U.S. trial if the situation indicated that the statements were made involuntarily.

Our decision not to impose additional duties on U.S. agents operating overseas is animated, in part, by our recognition that it is only through the cooperation of local authorities that U.S. agents obtain access to foreign detainees. We have no desire to strain that spirit of cooperation by compelling U.S. agents to press foreign governments for the provision of legal rights not recognized by their criminal justice systems.

Although we do not find the advice of rights concerning counsel as deficient as did the District Court, we think the wording that was used created a needless risk of misunderstanding by stating, albeit accurately, what the right to counsel would have been had the interrogation occurred in the United States. An advice of rights should state only what rights are available, not what rights would be available if circumstances were different. This does not mean that U.S. agents need to determine what rights are in fact available under local law. All they need to say is that counsel rights depend on local law, and that U.S. agents will afford the accused whatever rights are available under local law. Thus, an AOR used hereafter might usefully advise as to counsel rights in the following language:

> Whether you can retain a lawyer, or have a lawyer appointed for you, and whether you can consult with a lawyer and have a lawyer present during questioning are matters that depend on local law, and we cannot advise you on such matters. If local authorities permit you to obtain counsel (retained or appointed) and to consult with a lawyer at this time, you may attempt to obtain and consult with an attorney before speaking with us. Similarly, if local authorities permit you to have a lawyer present during questioning by local authorities, your lawyer may attend any questioning by us.

For these reasons, we conclude that the AOR substantially complied with whatever *Miranda* requirements were applicable, but we need not rule definitively on the matter because of the adequacy of the subsequent oral warning, and because the error, if any, in excluding the statements obtained prior to the oral warning benefitted defendants and was therefore harmless.
c. Defendants' Waiver of their *Miranda* Rights and their Subsequent Statements

Al-'Owhali and Odeh contend that the conditions of their confinement made their *Miranda* waivers and subsequent statements involuntary. Al-'Owhali urges that his “secret and relentless interrogation over a ten day period of incommunicado and solitary confinement in a Kenyan prison” renders all of the statements he made during his incarceration, including his *Miranda* waiver, involuntary. According to Al-'Owhali, his “only chance to escape this prolonged isolation and interrogation, and to have an attorney to consult, was to confess his involvement in the bombing, which would enable him to go to America, where he would have an attorney.” Similarly, Odeh argues that his “choice was not really between remaining silent or talking, but between talking to the Kenyans alone or talking to them and the Americans.” The circumstances in which he made this choice were “disturbing,” in his view, because he agreed to make a statement only after having been left alone with Kenyan police officers, whom he accuses of having a “reputation for torture.” With respect to whether the waiver was knowing under the *Miranda* framework, Odeh argues that it was not because he did not “underst[and] that he had the option of delaying the interrogation for even a day or two in order to obtain counsel” and “was not provided with the option of speaking with the Jordanian consulate, or the chance to consult with his wife.”

These assertions, even if true, have no bearing on whether Odeh's waiver was made knowingly. *Miranda* does not require that a suspect be informed that he may delay questioning, obtain assistance from his consulate, or contact his wife, and where a defendant's “voluntary decision to speak was made with full awareness and comprehension of all the information *Miranda* requires the police to convey, the waiver [is] valid.”

We now consider the question of whether the circumstances of Al-'Owhali and Odeh's confinement rendered their statements involuntary. In order to do so, “we must examine the totality of the circumstances. Specifically, these circumstances include 1) the accused's characteristics, 2) the conditions of the interrogation, and 3) the conduct of the police.”

As described above, the District Court found that Al-'Owhali had a basic understanding of spoken English, received two years of university-level education, and was familiar with political and world events. With respect to the conditions of his confinement, the District Court found that Al-'Owhali was held in “incommunicado detention” for fourteen days, at first in a ten-by-eleven foot cell and then in an eight-by-eight foot cell, and during this time, he received medical attention “as needed.” The District Court noted “[a] photograph of Al-'Owhali in his cell, taken at some point during his U.S. interrogation in Kenya, show[ing] him smiling and striking a triumphant pose.” The District Court described the interrogation sessions, which were “intermittent and reasonable in duration,” as follows:

Al-'Owhali was never in handcuffs during any of his interviews in Kenya. All interviews were held in a library-like room fitted with
tables and chairs. Frequent breaks were taken to allow Al-'Owhali to use the restroom, pray, and eat. Prayer breaks lasted for about 15 minutes. Bottled water was provided upon request; food was often provided by the agents. No threats were made by the U.S. agents, nor were any promises made.

The District Court also took note of the “evidence that Al-'Owhali regarded his sessions with [an FBI agent] as a cat-and-mouse game between trained professionals.”

We have no reason to doubt the District Court’s conclusion that Al-'Owhali was “a well-educated and intelligent individual ... [whose] demeanor before the Americans was one indicative of confidence, not of intimidation.” Indeed, Al-'Owhali does not appear to argue otherwise, as his challenge to the voluntariness of his incommunicado detention in Kenya. The District Court found the conditions of his confinement, “although non-ideal far from oppressive.” Al-'Owhali argues, however, that the length of time he was held in detention imposed “terrible psychological and coercive pressures” on him.

Without minimizing in any way the potentially coercive effects of incommunicado detention lasting for fourteen days, we must consider this fact as only one data point – albeit a significant one – in our totality-of-the-circumstances analysis. Weighing against the potentially coercive circumstances of Al-'Owhali’s confinement are the District Court’s careful findings of fact regarding Al-'Owhali’s personal characteristics (his education, his knowledge of English and current events, and his demeanor) and the restrained conduct of his interrogators (who never resorted to threats, promises, or coercion to obtain information from him, and who informed him of his rights from the very beginning). In addition, we must consider the District Court’s conclusion that what truly motivated Al-'Owhali to inculpate himself was his own overriding desire that he be tried in the United States. As he declared to the U.S. agents interviewing him, it was the United States which was his enemy, not Kenya. Particularly significant is the fact that the suggestion that he be tried in America was initiated entirely by Al-'Owhali. And when Al-'Owhali was dissatisfied by the less-than-firm assurances offered in the first DOU, he demanded that AUSA [redacted] do better.

All of this evidence militates powerfully against the potentially coercive effects of his detention and in support of the findings of the District Court. For these reasons, we affirm the decision of the District Court that the statements made by Al-'Owhali while in Kenyan detention were voluntary.

Odeh does not argue explicitly that his post-warning statements were made involuntarily. Nevertheless, his arguments directed generally against the voluntariness of his Miranda waiver apply with equal lack of force to the statements he made thereafter. The only question that concerns us in this regard is whether, unlike Al-'Owhali, Odeh’s fourteen-day incommunicado detention rendered involuntary his post-warning statements. We conclude that it did not.
Like Al-'Owhali, Odeh was educated at the university level. In addition, he speaks English and Arabic, and received military training and experience “for several years” in Afghanistan. Odeh was held “incommunicado,” like Al-'Owhali, for fourteen days in Kenyan custody. During this time, there were no threats or promises made,” and Odeh does not allege that he was mistreated. As the District Court remarked, Odeh’s detention “cannot be said to have induced his statements since he began confessing from the very first day of questioning.” We agree. Odeh began speaking with U.S. agents the day after he arrived in Kenya from Pakistan. We need not speculate on his reasons for doing so, but that decision cannot be attributed to the coercive effects of a fourteen-day detention that was yet to come. Accordingly, we conclude that, in light of the District Court's findings regarding Odeh's personal characteristics, the absence of oppressive interrogation methods, and his decision to speak with U.S. officials immediately upon encountering them, Odeh's post-warning statements cannot be attributed to the coercive effects of his incommunicado detention.

Accordingly, we conclude that the motions of Al-'Owhali and Odeh to suppress their inculpatory statements were properly denied by the District Court.
Chapter 3

MATERIAL SUPPORT OF TERRORISM

§ 3.03 DESIGNATED FTO’S AND THE RIGHT OF ASSOCIATION

[A] PROHIBITING MATERIAL SUPPORT

add at p. 124

[at the instructor’s discretion, the Holder opinion can be substituted for all the cases in existing § 3.03[A] except that the Notes after those cases should still be read in conjunction with this case]

HOLDER v. HUMANITARIAN LAW PROJECT


CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Congress has prohibited the provision of “material support or resources” to certain foreign organizations that engage in terrorist activity. 18 U.S.C. § 2339B(a)(1). That prohibition is based on a finding that the specified organizations “are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose). The plaintiffs in this litigation seek to provide support to two such organizations. Plaintiffs claim that they seek to facilitate only the lawful, nonviolent purposes of those groups, and that applying the material-support law to prevent them from doing so violates the Constitution. In particular, they claim that the statute is too vague, in violation of the Fifth Amendment, and that it infringes their rights to freedom of speech and association, in violation of the First Amendment. We conclude that the material-support statute is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue. We do not, however, address the resolution of more difficult cases that may arise under the statute in the future.

I

[If you have read the four Ninth Circuit opinions, this section can be skipped.]

This litigation concerns 18 U.S.C. § 2339B, which makes it a federal crime to “knowingly provid[e] material support or resources to a foreign terrorist
organization.”¹ Congress has amended the definition of “material support or resources” periodically, but at present it is defined as follows:

“[T]he term ‘material support or resources’ means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.”

In 1997, the Secretary of State designated 30 groups as foreign terrorist organizations. See 62 Fed. Reg. 52650. Two of those groups are the Kurdistan Workers’ Party (also known as the Partiya Karkeran Kurdistan, or PKK) and the Liberation Tigers of Tamil Eelam (LTTE). The PKK is an organization founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey. The LTTE is an organization founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. The District Court in this action found that the PKK and the LTTE engage in political and humanitarian activities. The Government has presented evidence that both groups have also committed numerous terrorist attacks, some of which have harmed American citizens. The LTTE sought judicial review of its designation as a foreign terrorist organization; the D. C. Circuit upheld that designation. The PKK did not challenge its designation.

Plaintiffs in this litigation are two U.S. citizens and six domestic organizations: the Humanitarian Law Project (HLP) (a human rights organization with consultative status to the United Nations); Ralph Fertig (the HLP’s president, and a retired administrative law judge); Nagalingam Jeyalingam (a Tamil physician, born in Sri Lanka and a naturalized U.S. citizen); and five nonprofit groups dedicated to the interests of persons of Tamil descent. In 1998, plaintiffs filed suit in federal court challenging the constitutionality of the material-support statute, § 2339B. Plaintiffs claimed that they wished to provide support for the humanitarian and political activities of the PKK and the LTTE in the form of monetary contributions, other tangible aid, legal training, and political advocacy, but that they could not do so for fear of prosecution under § 2339B.

¹ In full, 18 U.S.C. § 2339B(a)(1) provides:

UNLAWFUL CONDUCT.--Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . . that the organization has engaged or engages in terrorist activity . . . . or that the organization has engaged or engages in terrorism . . . .

The terms “terrorist activity” and “terrorism” are defined in 8 U.S.C. § 1182(a)(3)(B)(iii), and 22 U.S.C. § 2656f(d)(2), respectively.
As relevant here, plaintiffs claimed that the material-support statute was unconstitutional on two grounds: First, it violated their freedom of speech and freedom of association under the First Amendment, because it criminalized their provision of material support to the PKK and the LTTE, without requiring the Government to prove that plaintiffs had a specific intent to further the unlawful ends of those organizations. Second, plaintiffs argued that the statute was unconstitutionally vague.

Plaintiffs moved for a preliminary injunction, which the District Court granted in part. The District Court held that plaintiffs had not established a probability of success on their First Amendment speech and association claims. But the court held that plaintiffs had established a probability of success on their claim that, as applied to them, the statutory terms “personnel” and “training” in the definition of “material support” were impermissibly vague.

The Court of Appeals affirmed. 205 F.3d 1130, 1138 (CA9 2000). The court rejected plaintiffs’ speech and association claims, including their claim that § 2339B violated the First Amendment in barring them from contributing money to the PKK and the LTTE. But the Court of Appeals agreed with the District Court that the terms “personnel” and “training” were vague because it was “easy to imagine protected expression that falls within the bounds” of those terms.

With the preliminary injunction issue decided, the action returned to the District Court, and the parties moved for summary judgment on the merits. The District Court entered a permanent injunction against applying to plaintiffs the bans on “personnel” and “training” support. The Court of Appeals affirmed. 352 F.3d 382 (CA9 2003).

Meanwhile, in 2001 [Patriot Act], Congress amended the definition of “material support or resources” to add the term “expert advice or assistance.” In 2003, plaintiffs filed a second action challenging the constitutionality of that term as applied to them.

The District Court held that the term “expert advice or assistance” was impermissibly vague. The District Court rejected, however, plaintiffs’ First Amendment claims that the new term was substantially overbroad and criminalized associational speech.

The parties cross-appealed. While the cross-appeals were pending, the Ninth Circuit granted en banc rehearing of the panel’s 2003 decision in plaintiffs’ first action (involving the terms “personnel” and “training”). The en banc court heard reargument on December 14, 2004. Three days later, Congress again amended § 2339B and the definition of “material support or resources.” Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA).

In IRTPA, Congress clarified the mental state necessary to violate § 2339B, requiring knowledge of the foreign group’s designation as a terrorist organization or the group’s commission of terrorist acts. Congress also added the term “service” to the definition of “material support or resources,” and defined “training” to mean “instruction or teaching designed to impart a specific skill, as opposed to general knowledge.” It also defined “expert advice or assistance” to
mean “advice or assistance derived from scientific, technical or other specialized knowledge.” Finally, IRTPA clarified the scope of the term “personnel” by providing:

No person may be prosecuted under [§ 2339B] in connection with the term ‘personnel’ unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.”

Shortly after Congress enacted IRTPA, the en banc Court of Appeals issued an order in plaintiffs’ first action. The en banc court affirmed the rejection of plaintiffs’ First Amendment claims for the reasons set out in the Ninth Circuit’s panel decision in 2000. In light of IRTPA, however, the en banc court vacated the panel’s 2003 judgment with respect to vagueness, and remanded to the District Court for further proceedings. The Ninth Circuit panel assigned to the cross-appeals in plaintiffs’ second action (relating to “expert advice or assistance”) also remanded in light of IRTPA.

The District Court consolidated the two actions on remand. The court also allowed plaintiffs to challenge the new term “service.” The parties moved for summary judgment, and the District Court granted partial relief to plaintiffs on vagueness grounds.

The Court of Appeals affirmed once more. The court first rejected plaintiffs’ claim that the material-support statute would violate due process unless it were read to require a specific intent to further the illegal ends of a foreign terrorist organization. The Ninth Circuit also held that the statute was not overbroad in violation of the First Amendment. As for vagueness, the Court of Appeals noted that plaintiffs had not raised a “facial vagueness challenge.” The court held that, as applied to plaintiffs, the terms “training,” “expert advice or assistance” (when derived from “other specialized knowledge”), and “service” were vague because they “continue[d] to cover constitutionally protected advocacy,” but the term “personnel” was not vague because it “no longer criminalize[d] pure speech protected by the First Amendment.”

II

Given the complicated 12-year history of this litigation, we pause to clarify the questions before us. Plaintiffs challenge § 2339B’s prohibition on four types of material support – “training,” “expert advice or assistance,” “service,” and “personnel.” They raise three constitutional claims. First, plaintiffs claim that § 2339B violates the Due Process Clause of the Fifth Amendment because these four statutory terms are impermissibly vague. Second, plaintiffs claim that §
2339B violates their freedom of speech under the First Amendment. Third, plaintiffs claim that § 2339B violates their First Amendment freedom of association.

Plaintiffs do not challenge the above statutory terms in all their applications. Rather, plaintiffs claim that § 2339B is invalid to the extent it prohibits them from engaging in certain specified activities. With respect to the HLP and Judge Fertig, those activities are: (1) “train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes”; (2) “engag[ing] in political advocacy on behalf of Kurds who live in Turkey”; and (3) “teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief.” With respect to the other plaintiffs, those activities are: (1) “train[ing] members of [the] LTTE to present claims for tsunami-related aid to mediators and international bodies”; (2) “offer[ing] their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government”; and (3) “engag[ing] in political advocacy on behalf of Tamils who live in Sri Lanka.”

III

Plaintiffs claim, as a threshold matter, that we should affirm the Court of Appeals without reaching any issues of constitutional law. They contend that we should interpret the material-support statute, when applied to speech, to require proof that a defendant intended to further a foreign terrorist organization’s illegal activities. That interpretation, they say, would end the litigation because plaintiffs’ proposed activities consist of speech, but plaintiffs do not intend to further unlawful conduct by the PKK or the LTTE.

We reject plaintiffs’ interpretation of § 2339B because it is inconsistent with the text of the statute. Section 2339B(a)(1) prohibits “knowingly” providing material support. It then specifically describes the type of knowledge that is required: “To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism . . . .” Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.

IV

We turn to the question whether the material-support statute, as applied to plaintiffs, is impermissibly vague under the Due Process Clause of the Fifth Amendment. “A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” We consider whether a statute is vague as applied to the particular facts at issue, for “[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.” We have said that when a statute “interferes with the right of free speech or of association, a more stringent vagueness test
should apply.” “But ‘perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.’”

The Court of Appeals did not adhere to these principles. Instead, the lower court merged plaintiffs' vagueness challenge with their First Amendment claims, holding that portions of the material-support statute were unconstitutionally vague because they applied to protected speech — regardless of whether those applications were clear. The court stated that, even if persons of ordinary intelligence understood the scope of the term “training,” that term would “remain impossibly vague” because it could “be read to encompass speech and advocacy protected by the First Amendment.” It also found “service” and a portion of “expert advice or assistance” to be vague because those terms covered protected speech.

Under a proper analysis, plaintiffs' claims of vagueness lack merit. Plaintiffs do not argue that the material-support statute grants too much enforcement discretion to the Government. We therefore address only whether the statute “provide[s] a person of ordinary intelligence fair notice of what is prohibited.”

As a general matter, the statutory terms at issue here are quite different from the sorts of terms that we have previously declared to be vague. We have in the past “struck down statutes that tied criminal culpability to whether the defendant's conduct was ‘annoying’ or ‘indecent’ — wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.” — [and another] ordinance that punished “vagrants,” defined to include “rogues and vagabonds,” “persons who use juggling,” and “common night walkers.” Applying the statutory terms in this action — “training,” “expert advice or assistance,” “service,” and “personnel” — does not require similarly untethered, subjective judgments.

Plaintiffs also contend that they want to engage in “political advocacy” on behalf of Kurds living in Turkey and Tamils living in Sri Lanka. They are concerned that such advocacy might be regarded as “material support” in the form of providing “personnel” or “services,” and assert that the statute is unconstitutionally vague because they cannot tell.

As for “personnel,” Congress enacted a limiting definition in IRTPA that answers plaintiffs' vagueness concerns. Providing material support that constitutes “personnel” is defined as knowingly providing a person “to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization.” The statute makes clear that “personnel” does not cover independent advocacy: “Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.”

“[S]ervice” similarly refers to concerted activity, not independent advocacy. The statute prohibits providing a service “to a foreign terrorist organization.” The use of the word “to” indicates a connection between the service and the foreign group. We think a person of ordinary intelligence would understand that
independently advocating for a cause is different from providing a service to a group that is advocating for that cause.

V

A

We next consider whether the material-support statute, as applied to plaintiffs, violates the freedom of speech guaranteed by the First Amendment. Both plaintiffs and the Government take extreme positions on this question. Plaintiffs claim that Congress has banned their “pure political speech.” It has not. Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations. As the Government states: “The statute does not prohibit independent advocacy or expression of any kind.” Section 2339B also “does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so.” Congress has not, therefore, sought to suppress ideas or opinions in the form of “pure political speech.” Rather, Congress has prohibited “material support,” which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.

For its part, the Government takes the foregoing too far, claiming that the only thing truly at issue in this litigation is conduct, not speech. Section 2339B is directed at the fact of plaintiffs’ interaction with the PKK and LTTE, the Government contends, and only incidentally burdens their expression. The Government argues that the proper standard of review is therefore the one set out in United States v. O’Brien, 391 U.S. 367 (1968). In that case, the Court rejected a First Amendment challenge to a conviction under a generally applicable prohibition on destroying draft cards, even though O’Brien had burned his card in protest against the draft. In so doing, we applied what we have since called “intermediate scrutiny,” under which a “content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”

The Government is wrong that the only thing actually at issue in this litigation is conduct, and therefore wrong to argue that O’Brien provides the correct standard of review. O’Brien does not provide the applicable standard for reviewing a content-based regulation of speech, see R. A. V. v. St. Paul, 505 U.S. 377 (1992); Texas v. Johnson, 491 U.S. 397 (1989), and § 2339B regulates speech on the basis of its content. Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under § 2339B depends on what they say. If plaintiffs’ speech to those groups imparts a “specific skill” or communicates advice derived from “specialized knowledge” – for example, training on the use of international law or advice on petitioning the United Nations – then it is
barred. On the other hand, plaintiffs’ speech is not barred if it imparts only general or unspecialized knowledge.

The Government argues that § 2339B should nonetheless receive intermediate scrutiny because it generally functions as a regulation of conduct. That argument runs headlong into a number of our precedents, most prominently Cohen v. California, 403 U.S. 15 (1971). Cohen also involved a generally applicable regulation of conduct, barring breaches of the peace. But when Cohen was convicted for wearing a jacket bearing an epithet, we did not apply O’Brien. Instead, we recognized that the generally applicable law was directed at Cohen because of what his speech communicated – he violated the breach of the peace statute because of the offensive content of his particular message. We accordingly applied more rigorous scrutiny and reversed his conviction.

This suit falls into the same category. The law here may be described as directed at conduct, as the law in Cohen was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. As we explained in Texas v. Johnson: “If the [Government’s] regulation is not related to expression, then the less stringent standard we announced in United States v. O’Brien for regulations of noncommunicative conduct controls. If it is, then we are outside of O’Brien’s test, and we must [apply] a more demanding standard.”

B

The First Amendment issue before us is more refined than either plaintiffs or the Government would have it. It is not whether the Government may prohibit pure political speech, or may prohibit material support in the form of conduct. It is instead whether the Government may prohibit what plaintiffs want to do – provide material support to the PKK and LTTE in the form of speech.

Everyone agrees that the Government’s interest in combating terrorism is an urgent objective of the highest order. Plaintiffs’ complaint is that the ban on material support, applied to what they wish to do, is not “necessary to further that interest.” The objective of combating terrorism does not justify prohibiting their speech, plaintiffs argue, because their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism.

Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question. When it enacted § 2339B in 1996, Congress made specific findings regarding the serious threat posed by international terrorism. One of those findings explicitly rejects plaintiffs’ contention that their support would not further the terrorist activities of the PKK and LTTE: “[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”

Plaintiffs argue that the reference to “any contribution” in this finding meant only monetary support. There is no reason to read the finding to be so limited,
particularly because Congress expressly prohibited so much more than monetary support in § 2339B. Indeed, when Congress enacted § 2339B, Congress simultaneously removed an exception that had existed in § 2339A(a) (1994 ed.) for the provision of material support in the form of “humanitarian assistance to persons not directly involved in” terrorist activity. That repeal demonstrates that Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.

We are convinced that Congress was justified in rejecting that view. Material support meant to “promot[e] peaceable, lawful conduct” can further terrorism by foreign groups in multiple ways. “Material support” is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups – legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks. “Terrorist organizations do not maintain organizational ‘firewalls’ that would prevent or deter . . . sharing and commingling of support and benefits.” “[I]nvestigators have revealed how terrorist groups systematically conceal their activities behind charitable, social, and political fronts.” M. LEVITT, HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD 2-3 (2006). “Indeed, some designated foreign terrorist organizations use social and political components to recruit personnel to carry out terrorist operations, and to provide support to criminal terrorists and their families in aid of such operations.”

Money is fungible, and “[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.”

Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States’ relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks. We see no reason to question Congress’s finding that “international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over persons involved in a variety of terrorist acts, including hostage taking, murder of an internationally protected person, and aircraft piracy and sabotage.” The material-support statute furthers this international effort by prohibiting aid for foreign terrorist groups that harm the United States’ partners abroad:

For example, the Republic of Turkey – a fellow member of NATO – is defending itself against a violent insurgency waged by the PKK. That nation and our other allies would react sharply to Americans furnishing material support to foreign groups like the PKK, and would hardly be mollified by the explanation that the support was meant only to further those groups’ “legitimate” activities. From Turkey’s perspective, there likely are no such activities.

In analyzing whether it is possible in practice to distinguish material support for a foreign terrorist group’s violent activities and its nonviolent
activities, we do not rely exclusively on our own inferences drawn from the record evidence. We have before us an affidavit stating the Executive Branch’s conclusion on that question. The State Department informs us that “[t]he experience and analysis of the U.S. government agencies charged with combating terrorism strongly suppor[t]” Congress’s finding that all contributions to foreign terrorist organizations further their terrorism.

That evaluation of the facts by the Executive, like Congress’s assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs. The PKK and the LTTE have committed terrorist acts against American citizens abroad, and the material-support statute addresses acute foreign policy concerns involving relationships with our Nation’s allies. We have noted that “neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.” Boumediene v. Bush, 553 U.S. 723, 797 (2008). It is vital in this context “not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.”

Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government’s reading of the First Amendment, even when such interests are at stake. We are one with the dissent that the Government’s “authority and expertise in these matters do not automatically trump the Court’s own obligation to secure the protection that the Constitution grants to individuals.” But when it comes to collecting evidence and drawing factual inferences in this area, “the lack of competence on the part of the courts is marked,” and respect for the Government’s conclusions is appropriate.

At bottom, plaintiffs simply disagree with the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization – even seemingly benign support – bolsters the terrorist activities of that organization. That judgment, however, is entitled to significant weight, and we have persuasive evidence before us to sustain it. Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government’s interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups’ nonviolent ends.

We turn to the particular speech plaintiffs propose to undertake. First, plaintiffs propose to “train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes.” Congress can, consistent with the First Amendment, prohibit this direct training. It is wholly foreseeable that the PKK could use the “specific skill[s]” that plaintiffs propose to impart, § 2339A(b)(2), as part of a broader strategy to promote terrorism. The PKK could, for example, pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks. See generally A. MARCUS, BLOOD AND BELIEF: THE PKK AND THE KURDISH FIGHT FOR INDEPENDENCE 286-295 (2007) (describing the
PKK’s suspension of armed struggle and subsequent return to violence). A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote.

Second, plaintiffs propose to “teach PKK members how to petition various representative bodies such as the United Nations for relief.” The Government acts within First Amendment strictures in banning this proposed speech because it teaches the organization how to acquire “relief,” which plaintiffs never define with any specificity, and which could readily include monetary aid. Indeed, earlier in this litigation, plaintiffs sought to teach the LTTE “to present claims for tsunami-related aid to mediators and international bodies,” which naturally included monetary relief. Money is fungible, and Congress logically concluded that money a terrorist group such as the PKK obtains using the techniques plaintiffs propose to teach could be redirected to funding the group’s violent activities.

In responding to the foregoing, the dissent fails to address the real dangers at stake. It instead considers only the possible benefits of plaintiffs’ proposed activities in the abstract. The dissent seems unwilling to entertain the prospect that training and advising a designated foreign terrorist organization on how to take advantage of international entities might benefit that organization in a way that facilitates its terrorist activities. In the dissent’s world, such training is all to the good. Congress and the Executive, however, have concluded that we live in a different world: one in which the designated foreign terrorist organizations “are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”

If only good can come from training our adversaries in international dispute resolution, presumably it would have been unconstitutional to prevent American citizens from training the Japanese Government on using international organizations and mechanisms to resolve disputes during World War II. It would, under the dissent’s reasoning, have been contrary to our commitment to resolving disputes through “deliberative forces” for Congress to conclude that assisting Japan on that front might facilitate its war effort more generally. That view is not one the First Amendment requires us to embrace.

All this is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It is also not to say that any other statute relating to speech and terrorism would satisfy the First Amendment. In particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations. We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.

VI
Plaintiffs’ final claim is that the material-support statute violates their freedom of association under the First Amendment. Plaintiffs argue that the statute criminalizes the mere fact of their associating with the PKK and the LTTE, thereby running afoul of cases in which we have overturned sanctions for joining the Communist Party.

The Court of Appeals correctly rejected this claim because the statute does not penalize mere association with a foreign terrorist organization. As the Ninth Circuit put it: “The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. . . . What [§ 2339B] prohibits is the act of giving material support . . .”

Plaintiffs also argue that the material-support statute burdens their freedom of association because it prevents them from providing support to designated foreign terrorist organizations, but not to other groups. Any burden on plaintiffs’ freedom of association in this regard is justified for the same reasons that we have denied plaintiffs’ free speech challenge. It would be strange if the Constitution permitted Congress to prohibit certain forms of speech that constitute material support, but did not permit Congress to prohibit that support only to particularly dangerous and lawless foreign organizations. Congress is not required to ban material support to every group or none at all.

* * *

The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to “provide for the common defence.” As Madison explained, “[s]ecurity against foreign danger is . . . an avowed and essential object of the American Union.” The Federalist No. 41. We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.

The judgment of the United States Court of Appeals for the Ninth Circuit is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

JUSTICE BREYER, with whom JUSTICES GINSBURG and SOTOMAYOR join, dissenting.

Like the Court, and substantially for the reasons it gives, I do not think this statute is unconstitutionally vague. But I cannot agree with the Court’s conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations’ lawful political objectives. In my view, the Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government’s compelling interest in combating terrorism.
In my view, the Government has not made the strong showing necessary to justify under the First Amendment the criminal prosecution of those who engage in these activities. All the activities involve the communication and advocacy of political ideas and lawful means of achieving political ends. Even the subjects the plaintiffs wish to teach – using international law to resolve disputes peacefully or petitioning the United Nations, for instance – concern political speech. We cannot avoid the constitutional significance of these facts on the basis that some of this speech takes place outside the United States and is directed at foreign governments, for the activities also involve advocacy in this country directed to our government and its policies. The plaintiffs, for example, wish to write and distribute publications and to speak before the United States Congress.

Although in the Court’s view the statute applies only where the PKK helps to coordinate a defendant’s activities, the simple fact of “coordination” alone cannot readily remove protection that the First Amendment would otherwise grant. That amendment, after all, also protects the freedom of association. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982) “Coordination” with a political group, like membership, involves association.

The Government does identify a compelling countervailing interest, namely, the interest in protecting the security of the United States and its nationals from the threats that foreign terrorist organizations pose by denying those organizations financial and other fungible resources. I do not dispute the importance of this interest. But I do dispute whether the interest can justify the statute’s criminal prohibition. To put the matter more specifically, precisely how does application of the statute to the protected activities before us help achieve that important security-related end?

The Government makes two efforts to answer this question. First, the Government says that the plaintiffs’ support for these organizations is “fungible” in the same sense as other forms of banned support. Being fungible, the plaintiffs’ support could, for example, free up other resources, which the organization might put to terrorist ends.

The proposition that the two very different kinds of “support” are “fungible,” however, is not obviously true. There is no obvious way in which undertaking advocacy for political change through peaceful means or teaching the PKK and LTTE, say, how to petition the United Nations for political change is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible. It is far from obvious that these advocacy activities can themselves be redirected, or will free other resources that can be directed, towards terrorist ends. Thus, we must determine whether the Government has come forward with evidence to support its claim.

The Government has provided us with no empirical information that might convincingly support this claim. Instead, the Government cites only to evidence that Congress was concerned about the “fungible” nature in general of resources, predominately money and material goods. It points to a congressional finding
that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” The most one can say in the Government's favor about these statements is that they might be read as offering highly general support for its argument. The statutory statement and the House Report use broad terms like “contributions” and “services” that might be construed as encompassing the plaintiffs' activities. But in context, those terms are more naturally understood as referring to contributions of goods, money, or training and other services (say, computer programming) that could be diverted to, or free funding for, terrorist ends. Peaceful political advocacy does not obviously fall into these categories.

Second, the Government says that the plaintiffs’ proposed activities will “bolster a terrorist organization’s efficacy and strength in a community” and “undermine this nation’s efforts to delegitimize and weaken those groups.” In the Court’s view, too, the Constitution permits application of the statute to activities of the kind at issue in part because those activities could provide a group that engages in terrorism with “legitimacy.” The Court suggests that, armed with this greater “legitimacy,” these organizations will more readily be able to obtain material support of the kinds Congress plainly intended to ban – money, arms, lodging, and the like.

But this “legitimacy” justification cannot by itself warrant suppression of political speech, advocacy, and association. Speech, association, and related activities on behalf of a group will often, perhaps always, help to legitimate that group. Thus, were the law to accept a “legitimating” effect, in and of itself and without qualification, as providing sufficient grounds for imposing such a ban, the First Amendment battle would be lost in untold instances where it should be won. Once one accepts this argument, there is no natural stopping place. The argument applies as strongly to “independent” as to “coordinated” advocacy.

What is one to say about these arguments – arguments that would deny First Amendment protection to the peaceful teaching of international human rights law on the ground that a little knowledge about “the international legal system” is too dangerous a thing; that an opponent’s subsequent willingness to negotiate might be faked, so let’s not teach him how to try? What might be said of these claims by those who live, as we do, in a Nation committed to the resolution of disputes through “deliberative forces”?

In my own view, the majority’s arguments stretch the concept of “fungibility” beyond constitutional limits. Neither Congress nor the Government advanced these particular hypothetical claims. I am not aware of any case in this Court in which the Court accepted anything like a claim that speech or teaching might be criminalized lest it, e.g., buy negotiating time for an opponent who would put that time to bad use.

The majority, as I have said, cannot limit the scope of its arguments through its claim that the plaintiffs remain free to engage in the protected activity as long as it is not “coordinated.” That is because there is no practical way to organize classes for a group (say, wishing to learn about human rights law) without “coordination.”
I concede that the Government’s expertise in foreign affairs may warrant deference in respect to many matters, e.g., our relations with Turkey. But it remains for this Court to decide whether the Government has shown that such an interest justifies criminalizing speech activity otherwise protected by the First Amendment. And the fact that other nations may like us less for granting that protection cannot in and of itself carry the day.

Finally, I would reemphasize that neither the Government nor the majority points to any specific facts that show that the speech-related activities before us are fungible in some special way or confer some special legitimacy upon the PKK. Rather, their arguments in this respect are general and speculative. Those arguments would apply to virtually all speech-related support for a dual-purpose group’s peaceful activities (irrespective of whether the speech-related activity is coordinated).

In sum, these cases require us to consider how to apply the First Amendment where national security interests are at stake. When deciding such cases, courts are aware and must respect the fact that the Constitution entrusts to the Executive and Legislative Branches the power to provide for the national defense, and that it grants particular authority to the President in matters of foreign affairs. Nonetheless, this Court has also made clear that authority and expertise in these matters do not automatically trump the Court’s own obligation to secure the protection that the Constitution grants to individuals. In these cases, for the reasons I have stated, I believe the Court has failed to examine the Government’s justifications with sufficient care. It has failed to insist upon specific evidence, rather than general assertion. It has failed to require tailoring of means to fit compelling ends. And ultimately it deprives the individuals before us of the protection that the First Amendment demands.

That is why, with respect, I dissent.

UNITED STATES v. FARHANE
634 F.3d 127 (D.C. Cir. 2011)

RAGGI, Circuit Judge:

Defendant Rafiq Sabir, whose birth name is Rene Wright, is a United States citizen and licensed physician who, in May 2005, swore an oath of allegiance to al Qaeda and promised to be on call to treat wounded members of that terrorist organization in Saudi Arabia. Convicted after a jury trial in the United States District Court for the Southern District of New York of conspiring to provide and actually providing or attempting to provide material support to a terrorist organization in violation of 18 U.S.C. § 2339B, and sentenced to a 300–month term of incarceration, Sabir now challenges his conviction on various grounds.

I. Background

A. 2001: The Initial FBI Investigation into Co–Defendant Tarik Shah

Defendant Rafiq Sabir is a New York licensed physician, trained at Columbia University, who specializes in emergency medicine. In 2001, the Federal Bureau of Investigation began investigating Sabir’s longtime friend Tarik Shah for the possible transfer of money to
insurgents in Afghanistan. As part of that investigation, an FBI confidential informant known as “Saeed” cultivated a relationship with Shah, in the course of which Shah was recorded speaking openly about his commitment to *jihad* (holy war) in order to establish *Sharia* (Islamic law) and about his wish to provide “deadly and dangerous” martial arts training to *mujahideen* (*jihad* warriors). During these conversations, Shah repeatedly identified Sabir as his “partner.”

**B. 2004: Shah Offers to Support al Qaeda**

On March 3, 2004, Saeed and Shah traveled to Plattsburgh, New York, where Saeed introduced Shah to Ali Soufan, an undercover FBI agent posing as a recruiter for al Qaeda. In a series of recorded meetings with Agent Soufan, Shah detailed his martial arts expertise and offered to travel abroad to train al Qaeda combatants. Shah also told Soufan about Sabir, “an emergency room doctor” who had been his “trusted friend” for more than 25 years. Explaining that he knew Sabir’s “heart,” Shah proposed that the two men join al Qaeda as “a pair, me and a doctor.” At a subsequent meeting with Saeed, Shah reported that he had spoken in person with Sabir about this plan.

**C. 2005: Shah and Sabir Swear Allegiance to al Qaeda and Attempt To Provide Material Support**

For most of the time between May 2004 and May 2005, Sabir was out of the United States, working at a Saudi military hospital in Riyadh. On May 20, 2005, during a visit to New York, Sabir met with Saeed and Agent Soufan at Shah's Bronx apartment. Sabir told Soufan that he would soon be returning to Riyadh. He expressed interest in meeting with *mujahideen* operating in Saudi Arabia and agreed to provide medical assistance to any who were wounded. He suggested that he was ideally situated to provide such assistance because he would have a car in Riyadh and “carte blanche” to move freely about the city.

To ensure that Shah and Sabir were, in fact, knowingly proffering support for terrorism, Soufan stated that the purpose of “our war, ... our *jihad*” is to “[e]xpel the infidels from the Arabian peninsula,” and he repeatedly identified “Sheik Osama” (in context a clear reference to Osama bin Laden) as the leader of that effort. Shah quickly agreed to the need for war to “[e]xpel the Jews and the Christians from the Arabian Peninsula,” while Sabir observed that those fighting such a war were “striving in the way of Allah” and “most deserving” of his help.

To permit *mujahideen* needing medical assistance to contact him in Riyadh, Sabir provided Soufan with his personal and work telephone numbers. When Shah and Soufan noted that writing down this contact information might create a security risk, Sabir encoded the numbers using a code provided by Soufan.

Sabir and Shah then participated in *bayat*, a ritual in which each swore an oath of allegiance to al Qaeda, promising to serve as a “soldier of Islam” and to protect “brothers on the path of Jihad” and “the path of al Qaeda.” The men further swore obedience to “the guardians of the pledge,” whom Soufan expressly identified as “Sheikh Osama,” *i.e.*, Osama bin Laden, and his second in command, “Doctor Ayman Zawahiri.”

**D. Prosecution and Conviction**

Shah and Sabir were arrested on May 28, 2005. [The indictment alleged that] Sabir would provide “medical support to wounded jihadists,” . . . “knowing that al Qaeda had engaged and engages in terrorist activity” and “terrorism.”
After Shah pleaded guilty on April 4, 2007, a jury found Sabir guilty on both the conspiratorial and substantive charges against him, and, on November 28, 2007, the district court sentenced him principally to 300 months' incarceration.

II. Discussion


To the extent Sabir asserts that § 2339B is overbroad in limiting “a doctor's right to practice medicine,” he cites no authority locating such a right within the Constitution, much less in the First Amendment. The Supreme Court has long held that “there is no right to practice medicine which is not subordinate to the police power of the states . . . and also to the power of Congress.”

The provision of personnel is prohibited by § 2339B only when an individual knowingly provides, attempts to provide, or conspires to provide a foreign terrorist organization with one or more individuals, including himself, “to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct [its] operation.” Sabir's offer to serve as an on-call doctor for the organization, standing ready to treat wounded mujahideen in Saudi Arabia, falls squarely within the core of this prohibition, defeating any suggestion either that he lacked notice that his conduct was unlawful or that the statute was enforced arbitrarily with respect to him.

In an effort to avoid this conclusion, Sabir argues that his offer of life-saving medical treatment was simply consistent with his ethical obligations as a physician and not reflective of any provision of support for a terrorist organization. The record does not support this characterization. Sabir was not prosecuted for performing routine duties as a hospital emergency room physician, treating admitted persons who coincidentally happened to be al Qaeda members. Sabir was prosecuted for offering to work for al Qaeda as its on-call doctor, available to treat wounded mujahideen who could not be brought to a hospital precisely because they would likely have been arrested for terrorist activities. In offering this support for al Qaeda, Sabir did not simply honor his Hippocratic oath. He swore a further oath of allegiance to al Qaeda, making clear that his treatment of wounded mujahideen would be provided not as an independent physician but as “one of the soldiers of Islam,” duty bound to obey al Qaeda's leaders.

Sabir submits that, even if the training, personnel, and expert assistance provisions of the material support statute are not unconstitutionally vague as applied to his case, they are rendered so by vagueness in the statutory exemption of “medicine” from the definition of “material support.” [As he asked in the District Court,] “How is a person of ordinary intelligence supposed to determine we are talking about medicine, only medicine, but not the provision of medical treatment by a doctor?”

In the context of a statute focused on things that might be provided to support a terrorist organization, “medicine” is reasonably understood as a substance or preparation rather than as an art or science. “Providing medicine” is how common usage refers to the prescription of a substance or preparation to treat a patient. By contrast, “practicing medicine” is how common usage describes Sabir's proposed activity, i.e., employing the art or science of medicine to treat a patient. Where the word “provide” is used to describe the latter activity, reference ordinarily is made to “medical care,” or “medical treatment,” rather than to “medicine” alone.
Accordingly, we identify no merit in Sabir's claim that § 2339B is unconstitutionally vague as applied to his case, and we decline to reverse his conviction as violative of the notice requirement of due process.

B. The Trial Evidence Was Sufficient To Support Sabir's Conviction

1. Count One: Conspiracy

In challenging his conviction for conspiracy to provide material support to a known terrorist organization, Sabir contends principally that the government failed to prove the existence of an agreement to violate § 2339B. We are not persuaded.

Testimonial evidence established that Shah and Sabir had long voiced interest in supporting jihad and mujahideen. It is against this background that a jury would listen to the recorded conversation of March 4, 2004, in which Shah proposed to a federal undercover agent that Shah and Sabir—close friends for 25 years—join al Qaeda as “a pair, me and a doctor,” to support that organization’s pursuit of jihad. More significantly, during the May 20, 2005 meeting at which Shah and Sabir formally swore allegiance and promised support to al Qaeda, Shah by providing al Qaeda members with martial arts training and Sabir by treating wounded al Qaeda members in Riyadh, Sabir acknowledged that he and Shah had talked “for a long time” about supporting jihad. Sabir plainly viewed his and Shah's actions at the May 20 meeting as part of their common agreement. When Agent Soufan observed that neither man was obligated to support al Qaeda, Sabir responded that to fail to do so would be to “abandon[ ] my brother (Shah)” with respect to “the very thing we agreed upon ... in the first place.”

Accordingly, we identify no merit in Sabir's sufficiency challenge to his conviction for conspiracy to provide material support to a known terrorist organization.

2. Count Two: Attempt

Equally meritless is Sabir's argument that the evidence was insufficient to support his conviction for attempting to provide material support to a known foreign terrorist organization. A conviction for attempt requires proof that a defendant (a) had the intent to commit the object crime and (b) engaged in conduct amounting to a substantial step towards its commission.

Sabir does not challenge the sufficiency of the evidence establishing his intent to provide material support to a foreign terrorist organization. Nor could he. Instead, Sabir focuses on the “substantial step” element of attempt.

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23 The intent required to prove attempted material support for a foreign terrorist organization should not be confused with an intent to further terrorism. Just as that latter intent is not required to prove an actual § 2339B violation, see Holder v. Humanitarian Law Project, 130 S.Ct. at 2717 (“Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities.”), it is not required to prove a conspiracy or attempt to violate that statute. Nevertheless, in this case, much of the evidence proving Sabir's intent to provide material support also indicates his intent to further terrorism.
The conduct here at issue, material support to a foreign terrorist organization, is different from drug trafficking and any number of activities (e.g., murder, robbery, fraud) that are criminally proscribed because they are inherently harmful. The material support statute criminalizes a range of conduct that may not be harmful in itself but that may assist, even indirectly, organizations committed to pursuing acts of devastating harm. Thus, as the Supreme Court recently observed, the very focus of the material support statute is “preventative” in that it “criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur.” Holder v. Humanitarian Law Project, 130 S.Ct. at 2728. Accordingly, while a substantial step to commit a robbery must be conduct planned clearly to culminate in that particular harm, a substantial step towards the provision of material support need not be planned to culminate in actual terrorist harm, but only in support—even benign support—for an organization committed to such harm.

The indictment charged Sabir with attempting to supply al Qaeda with material support in three of the forms proscribed in 18 U.S.C. § 2339A(b)(1): “personnel, training, and expert advice and assistance.” We conclude that the evidence was sufficient to support Sabir’s conviction for attempting to provide material support in the form of personnel – specifically, himself – to work for al Qaeda as a doctor on-call to treat wounded jihadists in Saudi Arabia. By coming to meet with a purported al Qaeda member on May 20, 1995; by swearing an oath of allegiance to al Qaeda; by promising to be on call in Saudi Arabia to treat wounded al Qaeda members; and by providing private and work contact numbers for al Qaeda members to reach him in Saudi Arabia whenever they needed treatment, Sabir engaged in conduct planned to culminate in his supplying al Qaeda with personnel, thereby satisfying the substantial step requirement.

In sum, we conclude that the totality of the evidence was more than sufficient to permit a reasonable jury to find that on May 20, 2005, Sabir took a substantial step intended to culminate in the provision of himself as personnel to work under the direction of al Qaeda. Accordingly, we uphold his convictions for both conspiring and attempting to provide material support to a foreign terrorist organization.

The judgment of conviction is affirmed.

DEARIE, Chief District Judge, dissenting in part.

I write to voice my strong disagreement with the majority's conclusion that the evidence is legally sufficient to sustain the attempt conviction. I otherwise concur.

This is not an attempt. I agree that application of the familiar “substantial step” formula must be made on a case-by-case basis and that in some cases the adequacy of the proof may not be readily determined, but this is not such a case. I agree that the distinction between various forms of material support may prove meaningful in some cases, but again this is not such a case. Whatever the label, the substantive crime was so remote in time, place and objective that one is left only to speculate as to what, if anything, would have happened had Sabir in fact been in a position to pursue the conspiratorial goal.

There is no question that, construed in the government's favor, the evidence supports the conspiracy count. A rational jury could have found that, at the single meeting with his co-conspirator and the undercover agent, Sabir indeed agreed to provide medical support to wounded al Qaeda somewhere in Saudi Arabia at some point in the future. Fairly stated, the majority further concludes that once Sabir offered these services, he took a substantial step toward becoming the organization's “on call” doctor. The remaining evidence to support the attempt conviction is Sabir's swearing an oath to al Qaeda, which the government
acknowledges is not a criminal act, and his providing contact numbers, which the decisions of this Circuit confirm is not a substantial step toward the commission of a crime.

The majority does not affirm on the ground that Sabir's actions were an attempt to provide actual medical support to wounded jihadists in Saudi Arabia. Rather, the majority focuses elsewhere, concluding that “[w]hether or not Sabir's May 20, 2005 actions were a substantial step in the provision of expert medical services to terrorists,” Sabir's actions on this date “were a substantial step in the provision of Sabir himself as personnel.”

The majority proposes that Sabir went beyond attending a meeting and agreeing to serve; he “took a step essential to provide al Qaeda with personnel in the form of an on-call doctor” by “provid[ing] the means by which mujahideen in Riyadh could reach that doctor at any time.” This observation might have some significance if Sabir's “enlistment” came at or near some jihadist camp or battleground, and he was situated, equipped and ready to assist; but the location in question was almost 7,000 miles away, and no preparations to be “on call” had been made or even discussed, leaving the actual provision of material support entirely a matter of speculation and surmise.

Just as troubling as the majority's “substantial step” analysis is its suggestion that a person actually completes the crime of providing “material support in the form of personnel as soon as he pledges to work under the direction of the organization.” In so suggesting, the majority enters largely untested statutory waters.

By transforming offers to provide services into attempted provision of personnel, the majority's holding may sanction multiple punishments for a single offense. An attempt requires a substantial step toward criminality; a conspiracy requires agreement with another wrongdoer. On these facts, however, the majority substitutes evidence of agreement and intent for evidence of the substantive crime. As the majority concludes, at the May 2005 meeting, Sabir “formalize[d] his promise” to work for al Qaeda. Thus, it is hard to see how the conspiracy and attempt convictions meaningfully differ.

Conspiracy charges unaccompanied by a completed substantive crime are relatively rare, and can be troubling when the available evidence leaves one to speculate whether the criminal objective would have been realized. In this case, such concern is compounded by the need to find the line between radical beliefs and radical action. The law of attempt has evolved to take the guesswork out of finding that line. At the one meeting Sabir attended, he indeed chanted the mantra of the terrorist, led by the government agent and inspired by his co-defendant. But we are left to wonder whether his apparent enthusiasm would have, or even could have, led to action on his part. That should not be, and no imaginable view of the evidence removes this uncertainty.

“The problem faced by the drafters [of the Model Penal Code] was that to punish as an attempt every act done to further a criminal purpose, no matter how remote from accomplishing harm, risks punishing individuals for their thoughts alone, before they have committed any act that is dangerous or harmful.” I submit that the majority has done just that by abandoning the notion, fundamental to attempt jurisprudence, that we punish criminal deeds and not thoughts or intentions. The majority declares, however, that the crime at issue “is of a quite different sort.” Whatever the “sort” of offense, Sabir was not charged with mere membership in al Qaeda or for being sympathetic to some radical Islamic cause. Signing on to the al Qaeda roster of loyalists (as reprehensible as that may be) is not, and could not be, the crime at issue, since “Section 2339B does not criminalize mere membership in a designated foreign terrorist organization. It instead prohibits providing ‘material support’ to such a group.” Holder, 130 S.Ct. at 2718.
The majority asserts that “a reasonable jury could have concluded that,” based on his May 20, 2005 actions, “Sabir crossed the line from simply professing radical beliefs or joining a radical organization to attempting [the] crime” of providing himself to work under al Qaeda's control. The only evidence tending to show such control is the oath. But the litigants, and presumably the majority, agree that the oath alone is not a basis for imprisonment. At best, the oath reflects an agreement and intention to follow directions, but “mere intention to commit a specified crime does not amount to an attempt.” Despite the majority's apparent preoccupation with Sabir's state of mind, the independent evidence of attempt in this case remains a pair of phone numbers. Those evidentiary morsels cannot sustain the substantive conviction.

As recent history tragically illustrates, provision of material support of any form to a terrorist organization emboldens that organization and increases the likelihood of future terrorist attacks. That is why Congress enacted statutes criminalizing such activity. Simply stated, however, the majority has at once unwisely re-written the law of attempt, raised freedom-of-association concerns and possibly treaded on double jeopardy protection, “opening the door to mischievous abuse.” Regardless of Sabir's inclination, as a matter of law, any step he took toward that end was insubstantial and any support he furnished unquestionably immaterial.

In the end, a man stands guilty, and severely punished, for an offense that he did not commit. Therefore, I respectfully dissent.

§ 3.04 CONSPIRACY AND MATERIAL SUPPORT PROSECUTIONS

[This section first updates cases that are summarized in the main edition. Then there are descriptions of new cases brought or decided since 2007.]

**Abujihaaad** (p. 163) – Abujihaaad, a former member of the U.S. Navy, was convicted of providing material support to terrorists and delivering classified information on the movements of a U.S. Navy battle group to Azzam Publications, a London-based organization alleged to have provided material support to persons engaged in terrorism. The jury verdict on material support was set aside by the judge after trial.

**Bly Training Camp** (p. 162) – Oussama Kassir was convicted on two different sets of counts charging material support. One set of offenses had to do with setting up and beginning to operate the training camp in Oregon, all in conjunction with Abu Hamza al-Masri, the London cleric still awaiting extradition to the U.S. (see Abu Hamza below for the British conviction). The other set of charges were based on Kassir's maintaining several websites collectively known as the "Islamic Media Center" (“IMC”), which distributed jihadi propaganda and instructions on how to build bombs and manufacture poisons. Kassir argued that the website charges made the statute void for vagueness, especially in light of the impact on freedom of expression. In the process of responding to that argument, the court offered this curt answer regarding the first amendment in a mere footnote:
Although, as in the instant case, the statute can criminalize the distribution of certain written materials, this does not mean the statute reaches constitutionally protected speech. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 499 (1949) (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.”); see also *Rice v. Paladin Enters.*, 128 F.3d 233, 244 (4th Cir. 1997) (citing Laurence H. Tribe, American Constitutional Law 837 (2d ed. 1988) (“The law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their own bombs out of old Volkswagen parts.”)).

**Fort Dix Plot** (p. 164) – Five of the six defendants were convicted of conspiracy. During the trial, the jury viewed secretly recorded videotapes of the defendants performing small-arms training at a shooting range in the Pocono Mountains in Pennsylvania and watching training videos amongst themselves that included depictions of American soldiers being killed and of known foreign Islamic radicals urging jihad against the United States.

**al Marri** (see § 8.05, p. 530) – After being held in executive detention for six years since June 2003, al Marri pleaded guilty to one count of conspiracy to provide material support to al Qaeda. He allegedly was sent to the U.S. as a personal contact of Khalid Sheikh Mohammed on September 10, 2001. He was arrested in December 2001 on a material witness warrant based on inquiries into his visa status and was later indicted on credit card fraud, false statements and identity fraud charges. Those charges were dismissed on June 23, 2003, when al Marri was designated an enemy combatant and transferred to the Naval Brig in South Carolina. In 2007, a panel of the Fourth Circuit ordered that he be released or remanded to civilian authorities for trial, but the full court en banc fractured into a compromise order remanding to the district court for hearings on whether he could be classified as an enemy combatant. The Supreme Court granted certiorari in 2008 and then in March 2009 approved the Justice Department’s request to transfer him to civilian authorities for trial.

**Moussaoui** (see § 5.03, p. 281) – Moussaoui was the subject of a long and torturous trial laden with difficulties of his attempt to obtain access to classified detainees. He eventually pleaded guilty in April 2005 to various violations, admitting that he conspired with al Qaeda to hijack and crash planes into prominent U.S. buildings as part of the 9/11 attacks.

**Sattar & Stewart** (p. 135) – The convictions of Lynne Stewart, Sheikh Rahman’s lawyer, and her interpreter were affirmed by the Second Circuit. *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009). The two were proved to have violated the terms of prison Special Administrative Measures (SAM) by using cell phones and other means to relay messages to the Sheikh’s supporters. The court summarized that

we reject both Stewart’s argument that, as a lawyer, she was not bound by the SAMs, and her belated argument collaterally attacking their
constitutionality. We affirm as to Sattar’s conviction of conspiring to murder persons in a foreign country in violation of 18 U.S.C. § 956, and his conviction of soliciting persons to commit crimes of violence – viz., murder and conspiracy to commit murder – in violation of 18 U.S.C. § 373. We affirm as to Stewart’s and Yousry’s convictions of providing and concealing material support to the conspiracy to murder persons in a foreign country in violation of 18 U.S.C. § 2339A and 18 U.S.C. § 2, and of conspiring to provide and conceal such support in violation of 18 U.S.C. § 371. We conclude that the charges were valid – that 18 U.S.C. § 2339A is neither unconstitutionally vague as applied nor a “logical absurdity,” as Stewart asserts – and that the evidence was sufficient to sustain the convictions. We also reject Stewart’s claims that her purported attempt to serve as a “zealous advocate” for her client provides her with immunity from the convictions.

The court of appeals remanded for resentencing with terrorism enhancement, and on July 15, 2010, the district court resentenced Stewart to 10 years imprisonment.

**Prosecutions since 2007, in alphabetical order:**

**Abdulmutallab** (the “Christmas Day Bomber” aka “Underwear Bomber”) – Umar Farouk Abdulmuttalab boarded a flight from Amsterdam to Detroit with explosives sewn into his underwear and attempted to detonate the explosives as the plane neared Detroit. He caught his clothing on fire, was subdued by passengers, and taken into custody. He was then charged with several counts of attempted murder, aircraft sabotage, and illegal use of explosives. Abdulmutallab is the youngest of 16 children of Alhaji Umaru Mutallab, a Nigerian banker reputed to be one of the wealthiest men in Africa, who reported to the U.S. embassy in November 2009 that he was concerned his son might be a threat to the U.S. after Umar had become increasingly radicalized and then went missing. Umar apparently had traveled to Yemen where he received training and explosives from al Qaeda recruiters, then traveled to Ethiopia, to Ghana where he paid for the Detroit ticket in cash on December 16, then to Nigeria where he boarded the flight to Amsterdam, and then finally the flight to Detroit.

Abdulmutallab has become the poster-child for the conflict over whether to treat suspected bombers as criminals – he was given Miranda warnings shortly after his arrest and has been cooperating fully with authorities in identifying Yemeni training operations, including information about Anwar al-Awlaki.

**Abu Ali** – Ali was convicted of providing material support to al Qaeda based on his extensive involvement with an active cell in Medina, Saudi Arabia. He was arrested by Saudi authorities, interrogated, and handed over to the FBI. In Nov. 2005, Ali was convicted on all counts of an indictment charging him with, among other violations, providing material support to al Qaeda, conspiracy to assassinate the U.S. President, and conspiracy to commit air piracy and
conspiracy to destroy aircraft. Ali was sentenced to 30 years in prison. The use of classified information at his trial in the U.S. is considered at p. 85 infra.

**Ahmed & Sadequee** – Sayed Ahmed and Ehsanul Islam Sadequee were convicted of violation of 2339A despite never having made direct contact with any known terrorist actor. Ahmed, a Georgia Tech engineering student, and Sadequee, a Fairfax native and Georgia resident who tried but failed to join the Taliban in 2001, engaged in online chats with others about their mutual interpretation of Islam and jihad, discussing “hypothetical scenarios” of attacks on the U.S. and Canada. When the Canadian correspondents were arrested, Ahmed was named as a co-conspirator but government informants indicated there was “no imminent danger.” Ahmed and Sadequee made “casing videos” of several D.C. buildings, including the World Bank, which Sadequee sent to persons later convicted of involvement with LeT in Britain.

**Amawi** – Three Ohio men were convicted of material support in this case. In the words of the DOJ press release, the three conspired to “kill or maim persons outside the United States, including U.S. armed forces personnel in Iraq. As part of the conspiracy, the defendants conducted firearms training and accessed and copied instructions in the construction and use of explosives – including IEDs and suicide bomb vests. In addition, the defendants conspired to recruit others to participate in jihad training; researched and solicited funding sources for such training; and proposed sites for training in firearms, explosives and hand-to-hand combat to prospective recruits. The government also proved that all defendants conspired to provide material support and resources, including personnel, money, explosives and laptop computers, to terrorists, including a co-conspirator in the Middle East, who had requested such materials for use against U.S. and coalition forces in Iraq. For example, among other activities, Amawi communicated with a contact in the Middle East on chemical explosives and traveled to Jordan in August 2005 with laptop computers intended for delivery to mujahideen ‘brothers.’”

**California Prison Plot** – Kevin James, who formed a radical Islamic organization while in California state prison, and two of his recruits, Levar Washington and Gregory Patterson, pleaded guilty to terrorism conspiracy charges, admitting they conspired to attack U.S. military facilities and Jewish facilities in Los Angeles.

**Chicago “Wannabes”** – This material support prosecution is unusual (and maybe problematic) in that the defendants appear to have had neither a concrete plan of action nor a specific group to whom they wanted to provide assistance. In 2004 two cousins, Zubair Ahmed and Khaleel Ahmed, traveled to Egypt seeking to find access to terrorist training camps but came home a month later. They pleaded guilty to conspiracy to provide material support to unnamed terrorists. The January 2009 DOJ press release says that they “received instruction on firearms from another individual in Cleveland” and “sought training in counter-surveillance techniques and sniper rifles with this individual. Specifically, defendant Zubair Ahmed discussed his desire to learn how to use and move with a .50-caliber machine gun. As part of the conspiracy, the defendants also communicated with each other using code words and in a foreign
language to disguise their preparations and plans to engage in acts abroad that would result in the murder or maiming of U.S. military forces in Iraq and Afghanistan. Furthermore, Zubair and Khaleel Ahmed researched the purchase of firearms, methods of obtaining firearms instruction (including at least one visit to a firing range) and methods of obtaining instruction in gunsmithing. In addition, the defendants collected and distributed videos of attacks on U.S. military forces overseas, manuals on military tactics and military manuals on weaponry.

**Finton** – In the same scenario as Smadi, on the same day (September 24, 2009), Michael Finton (who had taken the name Talib Islam) was arrested after triggering a cell phone to detonate what he thought was a vehicle of explosives that he had parked outside the federal building in Springfield, Illinois.

**Ghazi** – In a rather unusual instance of penetration into the Colombian drug cartels, al Ghazi was recorded over an extended period of negotiating to sell millions of dollars worth of weapons to the FARC, including thousands of machine guns, millions of rounds of ammunition, rocket-propelled grenade launchers (“RPGs”), and surface-to-air missile systems (“SAMs”). He was found guilty in March 2009 of (1) conspiracy to murder U.S. officers and employees; (2) conspiracy to acquire and export anti-aircraft missiles; and (3) conspiracy to provide material support and resources to the FARC, a designated foreign terrorist organization; and money laundering. He was found not guilty of conspiracy to murder U.S. nationals.

**Headley** – David Headley is accused of aiding the 2008 Mumbai hotel attacks as well as conspiring to attack the Danish newspaper which published the infamous cartoon of Mohammed. Headley was born in Washington, D.C., to a Pakistani father and American mother. He lived until age 17 in Pakistan with his father in a traditional Muslim household. Moving back to the U.S. to live with his mother, he worked a series of odd jobs and was convicted on heroin-smuggling charges in 1998; he shortened his prison term by working for the DEA for some period. He then allegedly received training from the Lashkar-e-Taiba (LeT) from February 2002 to December 2003 and returned to the U.S. to provide a base of assistance to its activities.

**Hutaree** – This “Christian militia” group was formed in 2008 and began preparing for apocalyptic battle with the forces of the Antichrist, which they defined to mean state and federal law enforcement personnel. In March 2010, nine Hutaree members were arrested in Michigan, Ohio, and Indiana for alleged involvement in a plot to attack police with illegal explosives and firearms. They were indicted by a federal grand jury in Detroit on charges of seditious conspiracy, attempted use of weapons of mass destruction, teaching the use of explosive materials, and possessing a firearm during a crime of violence. The indictment alleges that they planned to kill one police officer and then attack the assembled law enforcement personnel at the funeral.

**Masri** – There are several persons with the adopted surname of al-Masri, which means “the Egyptian.”
Abu Hamza al-Masri – This British-based radical was born Mustafa Kamel Mustafa in Egypt in 1958. He studied civil engineering in England on a student visa. In the early 1990s, he went to Bosnia to fight against the Serbs. Abu Hamza lost both his hands and the use of his left eye as a result of wounds sustained in Afghanistan. In 1997 he returned to England and became Imam of the Finsbury Park Mosque. The US has asked for his extradition to face charges stemming from the alleged attempt to establish a terrorist training camp in Bly, Oregon. His assistant at the mosque, Haroon Rashid Aswat, is wanted by both U.S. and British authorities for the Bly operation as well as for his alleged involvement in the London subway bombings of 7/7/2005. Several of the subway bombers frequented the mosque along with other attempted bombers.

On 7 February 2006, Abu Hamza was found guilty on eleven charges and not guilty on four:

1. Guilty of six charges of soliciting murder; not guilty on three further such charges
2. Guilty of three charges related to “using threatening, abusive or insulting words or behaviour with the intention of stirring up racial hatred” under the Public Order Act 1986, not guilty on one further such charge
3. Guilty of one further charge of owning recordings related to “stirring up racial hatred”
4. Guilty of one charge of possessing a “terrorist encyclopedia” under the Terrorism Act of 2006 (see Appendix)

Abu Khabab al-Masri (born Midhat Mursi al-Sayid Umar) was a chemist and explosives expert. He was thought to be part of Osama bin-Laden’s inner circle. The United States had a $5 million bounty on his head. He was targeted in a missile attack in 2005 but survived and is believed to have been killed in a missile attack on 28 July 2008 by US drone-launched missiles.

Abu Obaidah al-Masri, an Egyptian-born militant described by both US and British counter-terrorism officials as head of external operations for al-Qaeda’s core leadership in Pakistan and Afghanistan, apparently died in 2008, probably of hepatitis. He was the target of some of the missile attacks by NATO forces that have been criticized for causing civilian deaths.

Abu Zubair al-Masri, an Egyptian described as being “high up in the al-Qaeda pecking order” and another explosives expert, was apparently killed in another missile attack along the Afghanistan-Pakistan border.

Mohamed – Ahmed Abdellatif Sherif Mohamed and another defendant were arrested when police found bombmaking material in their vehicle during a traffic stop. Mohamed had posted a videoclip on YouTube providing instruction regarding remote-controlled detonation. According to the plea agreement, Mohamed admitted to investigators that his purpose in creating the video was to “support attempts by terrorists to murder employees of the United States, including members of the uniformed services, while such persons were engaged in or on account of the performance of their official duties.” Murder of U.S.
employees violates 18 U.S.C. 1114, and that statute in turn is one of the
predicate offenses for a 2339A material support charge. The prosecution made
no claim that Mohamed knew or could have known the identity of the persons
who might download and make use of his video, let alone the specifics of any
particular plan of attack that the video might facilitate. Unlike al Timimi, there
was no showing that anyone had acted on his exhortations, but he himself had
committed overt acts in assembling the explosive paraphernalia.

Paul – In June 2008, Christopher Paul pleaded guilty to conspiring with
members of a German terrorist cell to use a weapon of mass destruction
(explosive devices) against Americans vacationing at foreign tourist resorts,
against Americans in the United States, as well against U.S. embassies,
diplomatic premises and military bases in Europe.

Smadi – Hosam Maher Husein Smadi was indicted in Dallas after attempting
to plant a vehicle-borne explosive in the parking garage of a downtown building.
Unbeknownst to him, his “accomplices” were undercover FBI informants who
had been monitoring him for several months while posing as al Qaeda
operatives. They supplied him with an inert device, wired to appear authentic,
and a cellphone by which he was to trigger the device after leaving it under
the building. After he followed those steps, he was arrested.

Toledo Cell – Three men in Toledo were convicted of conspiracy to kill U.S.
nationals overseas, explosives violations, and providing material support to
terrorists. At trial, the government proved that all three defendants engaged in
a conspiracy, beginning sometime prior to June 2004, to kill or maim persons
outside the United States, including U.S. armed forces personnel in Iraq. As part
of the conspiracy, the defendants conducted firearms training and accessed and
copied instructions in the construction and use of explosives – including IEDs
and suicide bomb vests. In addition, the defendants conspired to recruit others
to participate in jihad training; researched and solicited funding sources for such
training; and proposed sites for training in firearms, explosives and hand-to-
hand combat to prospective recruits. The three were in communication with at
least one active insurgent in the Middle East.

Zazi (NY subway plot) – Najibullah Zazi pleaded guilty to conspiracy to use
weapons of mass destruction (explosive bombs) against persons or property in
the United States, conspiracy to commit murder in a foreign country and
providing material support to al-Qaeda. Zazi is an Afghan native who obtained
permanent resident status while living in New York. In 2008, he and
unidentified “others” traveled to Pakistan and then to Waziristan where they
received training in the making and use of explosives. Zazi then moved to
Colorado, took a job as an airport shuttle-bus driver and began assembling bomb
parts. In September 2009, he drove from Colorado to New York with TATP
[Triacetone Triperoxide] explosives to attack the New York subway system.
Upon learning that he was under investigation, he abandoned the TATP and fled
to Colorado. Two other New York residents, Medunjanin and Ahmedzay, have
been charged in the plot but have not come to trial.
Hashmi – Syed Hashmi pleaded guilty to one count of providing material support to al Qaeda. He was a Queens native who became radicalized in college, then went to London for graduate school. While there he hosted an al Qaeda operative, to whom he also allowed use of his cell phone and storage of waterproof clothing destined for camps in Waziristan.

Alishtari – Abdul Tawala Ibn Ali Alishtari, aka Michael Mixon, a New York businessman, was sentenced to 10 years in prison after pleading guilty to material support and money laundering by conspiring to transfer $152,500 to provide military equipment to “fighters” in Afghanistan and Pakistan. Unfortunately for Alishtari, the man with whom he was working to transfer the money was actually an undercover law enforcement officer.
Chapter 4

CIVIL ACTIONS

§ 4.01 CIVIL ACTIONS

add at page 177:

_Boim v. Holy Land Found. for Relief & Dev_. , 549 F.3d 685 (7th Cir. 2008). On rehearing _en banc_, the Seventh Circuit modified the panel opinion in this case. Much of the reasoning of the panel remained intact, so only excerpts of the en banc opinion are offered here. The en banc majority departed from the panel by treating HLF as a primary actor rather than an aider and abettor and offered a more relaxed view of causation. The en banc court remanded for further proceedings against HLF because it agreed with the panel that there could be no collateral estoppel effect regarding its knowledge of Hamas’ activities. The en banc court, however, disagreed with the panel regarding the reliability of the testimony of Dr. Paz and reinstated the judgments against American Muslim Society and the Quranic Literacy Institute.

In its causation analysis, the majority discussed cases in which one person provided materials (e.g., a weapon) that was then used by another in harming the plaintiff.

[In a tort case from Oklahoma,] thirty to forty junior high school students showed up one day for their music class, but the instructor failed to show so the kids began throwing wooden erasers, chalk, and even a Coke bottle at each other. One of the students was struck in the eye by an eraser, and sued. One of the defendants, Keel, apparently had not thrown anything. But he had retrieved some of the erasers after they had been thrown and had handed them back to the throwers. There was no indication that Keel had handed the eraser to the kid who threw it at the plaintiff and injured her, but the court deemed that immaterial. It was enough that Keel had participated in the wrongful activity as a whole. He thus was liable even though there was no proven, or even likely, causal connection between anything he did and the injury. “One who commands, directs, advises, encourages, procures, instigates, promotes, controls, aids, or abets a wrongful act by another has been regarded as being as responsible as the one who commits the act so as to impose liability upon the former to the same extent as if he had performed the act himself.” The court did not use the term “material support,” but in handing erasers to the throwers Keel was providing them with material support in a literal sense. It was enough to make him liable that he had helped to create a danger; it was immaterial that the effect of his help could not be determined – that his acts could not be found to be either a necessary or a sufficient condition of the injury.

The cases that we have discussed do not involve monetary contributions to a wrongdoer. But then criminals and other intentional tortfeasors do not usually solicit voluntary contributions. Terrorist organizations do. But this
is just to say that terrorism is sui generis. So consider an organization solely involved in committing terrorist acts and a hundred people all of whom know the character of the organization and each of whom contributes $1,000 to it, for a total of $100,000. The organization has additional resources from other, unknown contributors of $200,000 and it uses its total resources of $300,000 to recruit, train, equip, and deploy terrorists who commit a variety of terrorist acts one of which kills an American citizen. His estate brings a suit under section 2333 against one of the knowing contributors of $1,000. The tort principles that we have reviewed would make the defendant jointly and severally liable with all those other contributors. The fact that the death could not be traced to any of the contributors ... and that some of them may have been ignorant of the mission of the organization (and therefore not liable under a statute requiring proof of intentional or reckless misconduct) would be irrelevant. The knowing contributors as a whole would have significantly enhanced the risk of terrorist acts and thus the probability that the plaintiff's decedent would be a victim, and this would be true even if Hamas had incurred a cost of more than $1,000 to kill the American, so that no defendant's contribution was a sufficient condition of his death.

This case is only a little more difficult because Hamas is (and was at the time of David Boim's death) engaged not only in terrorism but also in providing health, educational, and other social welfare services. The defendants other than Salah directed their support exclusively to those services. But if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization’s nonterrorist activities does not get you off the liability hook, as we noted in a related context in Hussain v. Mukasey, 518 F.3d 534, 538-39 (7th Cir.2008). The reasons are twofold. The first is the fungibility of money. If Hamas budgets $2 million for terrorism and $2 million for social services and receives a donation of $100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking $100,000 out of its social services “account” and depositing it in its terrorism “account.” Second, Hamas's social welfare activities reinforce its terrorist activities both directly by providing economic assistance to the families of killed, wounded, and captured Hamas fighters and making it more costly for them to defect (they would lose the material benefits that Hamas provides them), and indirectly by enhancing Hamas's popularity among the Palestinian population and providing funds for indoctrinating schoolchildren. Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities. And that is the only knowledge that can reasonably be required as a premise for liability. To require proof that the donor intended that his contribution be used for terrorism – to make a benign intent defense – would as a practical matter eliminate donor liability except in cases in which the donor was foolish enough to admit his true intent.

In response, Judge Rovner, the author of the panel opinion, had this to say:
At this late stage in the litigation, we are now turning to a fundamental question: Are we going to evaluate claims for terrorism-inflicted injuries using traditional legal standards, or are we going to re-write tort law on the ground that “terrorism is sui generis”? My colleagues in the majority have opted to “relax[]” – I would say eliminate – the basic tort requirement that causation be proven, believing that “otherwise there would be a wrong and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury.” The choice is a false one. The panel took pains to identify a number of ways in which the plaintiffs might establish a causal link between the defendants’ financial contributions to (and other support for) Hamas and the murder of David Boim. It is not the case that the plaintiffs were unable show causation, it is rather that they did not even make an attempt; and that was the purpose of the panel’s decision to remand the case. But rather than requiring the plaintiffs to present evidence of causation and allowing the factfinder to determine whether causation has been shown, the majority simply deems it a given, declaring as a matter of law that any money knowingly given to a terrorist organization like Hamas is a cause of terrorist activity, period. This sweeping rule of liability leaves no role for the factfinder to distinguish between those individuals and organizations who directly and purposely finance terrorism from those who are many steps removed from terrorist activity and whose aid has, at most, an indirect, uncertain, and unintended effect on terrorist activity. The majority’s approach treats all financial support provided to a terrorist organization and its affiliates as support for terrorism, regardless of whether the money is given to the terrorist organization itself, to a charitable entity controlled by that organization, or to an intermediary organization, and regardless of what the money is actually used to do.

The majority’s opinion is remarkable in two additional respects. By treating all those who provide money and other aid to Hamas as primarily rather than secondarily liable – along with those who actually commit terrorist acts – the majority eliminates any need for proof that the aid was given with the intent to further Hamas’s terrorist agenda. Besides eliminating yet another way for the factfinder to distinguish between those who deliberately aid terrorism from those who do so inadvertently, this poses a genuine threat to First Amendment freedoms. Finally, the majority sustains the entry of summary judgment on a basic factual question – Did Hamas kill David Boim? – based on an expert’s affidavit that both relies upon and repeats multiple examples of hearsay. Rather than sustain the panel’s unexceptional demand that the expert’s sources be proven reliable, the majority gives its blessing to circumventing the rules of evidence altogether.

Thus, although I concur in the decision to remand for further proceedings as to HLF, I otherwise dissent from the court’s decision.
In re Terrorist Attacks on September 11, 2001, 538 F.3d 71 (2d Cir. 2008). The Second Circuit affirmed the district court in the particular aspects appealed by the plaintiffs:

We conclude that the FSIA protects the appellees – most obviously, the Kingdom itself. First, we hold that the FSIA applies to individual officials of foreign governments in their official capacities, and therefore to the Four Princes. Second, we affirm the district court’s conclusion that the [Saudi High Commission for Relief to Bosnia and Herzegovina] is an “agency or instrumentality” of the Kingdom, to which the FSIA likewise applies.

Further, we conclude that none of the FSIA’s exceptions applies. The plaintiffs’ claims do not come within the statutory exception for state-sponsored terrorist acts, 28 U.S.C. § 1605A (“Terrorism Exception”), because the Kingdom has not been designated a state sponsor of terrorism by the United States. As to the exception for personal injury or death caused by a foreign sovereign’s tortious act, § 1605(a)(5) (“Torts Exception”), we decline to characterize plaintiffs’ claims – expressly predicated on a state-sponsored terrorist act – as sounding in tort. Nor do the plaintiffs’ claims come within the statutory exception for a foreign sovereign’s commercial activity, § 1605(a)(2) (“Commercial Activities Exception”), because the defendants’ specific alleged conduct – supporting Muslim charities that promote and underwrite terrorism – is not conduct in trade, traffic or commerce.

Accordingly, we agree with the district court that it lacked subject matter jurisdiction over the claims against the Kingdom, the Four Princes in their official capacities, and the SHC. We likewise affirm the district court’s dismissal of the claims against the Four Princes (in their personal capacities) and Mohamed for want of personal jurisdiction, and the denial of the plaintiffs’ motions for jurisdictional discovery.
§ 4.02 ASSET SEIZURE AND FORFEITURE

AL HARAMAIN ISLAMIC FOUNDATION v.
U.S. DEPT. OF TREASURY
2009 U.S. Dist. LEXIS 103373 (D. Ore. 2009)

KING, Judge:

Plaintiffs Al Haramain Islamic Foundation, Inc., an Oregon corporation ("AHIF-Oregon"), and Multicultural Association of Southern Oregon ("MCASO") challenge the determination that AHIF-Oregon is a Specially Designated Global Terrorist ("SDGT"). They also challenge the blocking order freezing AHIF-Oregon's assets pending that determination, an order which was finalized with the designation. They have sued the Treasury Office of Foreign Assets Control ("OFAC") alleging violations of the Due Process Clause and the Fourth Amendment, and raising constitutional and statutory challenges to the asset seizure statute itself. I previously ruled on portions of the cross-motions for summary judgment, but deferred ruling on several issues and requested additional briefing. *Al Haramain Islamic Found., Inc. v. U.S. Dept. of the Treasury*, 585 F. Supp. 2d 1233 (D. Ore. 2008) ("AHIF").

BACKGROUND

OFAC concluded, pursuant to the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701, and its associated executive order, EO 13,224 (Sept. 23, 2001), that AHIF-Oregon is “owned or controlled” by SDGTs and that it provided financial, material, or other support to SDGTs as a branch office of the larger AHIF organization headquartered in Saudi Arabia.

I. Legal Framework

Pursuant to the IEEPA, the President may declare a national emergency to “deal with any unusual or extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States[,]” President George H.W. Bush issued an executive order declaring a national emergency on September 23, 2001 due to the events of September 11. He authorized the Secretary of the Treasury to block contributions of funds, goods or services “to or for the benefit of” the 27 individuals and entities he listed in an annex to the executive order. E.O. 13,224.

In that executive order, the President also delegated authority to the Secretary of Treasury to designate other foreign groups or individuals who have committed or who pose a risk of committing acts of terrorism, or who are “owned or controlled by, or . . . act for or on behalf of those” entities designated by the President or those subsequently designated by the Secretary of Treasury. E.O.

1 I refer to plaintiff Al Haramain Islamic Foundation, Inc. as AHIF-Oregon throughout this opinion to distinguish it from the world-wide organization of the Al Haramain Islamic Foundation headquartered in Saudi Arabia, which I refer to as AHIF or AHIF-SA.
13,224 at §§ 1(b) and (c). Finally, the President delegated authority to the Secretary of Treasury to designate entities who “assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism” or provide support for “those persons” designated by the President or by the Secretary of Treasury, or for being “otherwise associated” with a designated entity. Id. at §§ 1(d)(i) and (ii). According to the order, the Secretary of Treasury may utilize his designation authority only after consulting with the Secretary of State and the Attorney General. The entities designated by the President or by the Secretary of Treasury are referred to as SDGTs.

Pursuant to the IEEPA, the President may investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

Pursuant to regulations issued by OFAC, a designated entity may seek a license to engage in any transaction involving blocked property. Such an entity may seek “administrative reconsideration” of a designation. The IEEPA and regulations implementing the executive order specify criminal and civil penalties for violations of licenses, rulings, regulations, or orders.

II. Factual Background

OFAC froze AHIF-Oregon’s assets and property on February 19, 2004, pending investigation. It was not until February 6, 2008, when OFAC “redesignated” AHIF-Oregon as an SDGT, thereby finalizing the blocking order, that AHIF-Oregon received a comprehensive explanation for the blocking order. OFAC redesignated AHIF-Oregon because it believed AHIF-Oregon is “owned or controlled” by Soliman H.S. Al-Buthe and Aqeel Al-Aqil, or acted on behalf of them. In addition, OFAC reported that, “As a branch of the Saudi charity Al-Haramain Islamic Foundation, [AHIF-Oregon] had acted for or on behalf of, or has assisted in, sponsored, or provided financial, material, or technological support for, or financial or other services to or in support of Al Qaida and other SDGTs.”

Accordingly, AHIF-Oregon’s relationship to the world-wide organization of the Al Haramain Islamic Foundation that was headquartered in Saudi Arabia (“AHIF” or “AHIF-SA”) is central to the government’s justification for designating AHIF-Oregon. AHIF-SA was a Saudi Arabian-based charity that at one point purportedly operated in fifty countries, with an annual budget of between $30 and $80 million. In addition to charitable activities, AHIF-SA was involved in terrorist operations. I specifically outlined many such activities in AHIF, including that it was involved in terrorist activities as far back as the attacks against the Kenyan and Tanzanian U.S. Embassies in 1998. In fact, AHIF-SA was named in the 9-11 Commission’s Staff Report on Terrorist
Financing, published in 2004, as an organization that supported al Qaeda and related terrorist groups. AHIF-SA was not designated until June 19, 2008, near the end of the deadline for the briefing on the parties' cross-motions for summary judgment, but many of its branch offices were designated between 2002 and 2004.

Soliman H.S. Al-Buthe, a Saudi national, was an AHIF-SA official, primarily responsible for AHIF-SA's internet and charitable works in the United States. He helped found AHIF-Oregon. Aqeel Al-Aqil, also a Saudi national, was the Director of AHIF until he was purportedly removed in January of 2004. He was also one of the founders of AHIF-Oregon.

Just after freezing AHIF-Oregon's assets in February of 2004, OFAC issued a press release explaining it had blocked AHIF-Oregon's assets “to ensure the preservation of its assets pending further OFAC investigation.” It described AHIF-Oregon’s “parent” as being headquartered in Saudi Arabia, and described OFAC’s other blocking actions against the AHIF branches in Bosnia, Somalia, Indonesia, Tanzania, Kenya, and Pakistan.

OFAC provided unclassified documents to AHIF-Oregon in April 2004, asserting that it was considering designating AHIF-Oregon as an SDGT on the basis of that information as well as classified documents it did not disclose. OFAC provided no further explanation at that time for its belief that AHIF-Oregon might qualify as an SDGT.

AHIF-Oregon responded to the documents OFAC provided, believing that, on the basis of these records, OFAC was targeting it for distributing the Koran to prisoners and others, and for raising funds for Chechen refugees.

OFAC mailed a supplemental record on July 23, 2004, which included documents about AHIF-SA and its branches, newspaper articles about jihad in Chechnya and Saudi financial support for Chechen fighters, as well as newspaper articles about terrorism in Africa, Asia and Europe. AHIF-Oregon objected to inclusion of documents related to AHIF-SA because it asserted it had no control over it and had no relationship with its branches. AHIF-Oregon also submitted documentation to show that Russia supported its efforts in Chechnya.

OFAC provided additional documents on August 20, 2004.

On September 9, 2004, OFAC designated AHIF-Oregon and its director Al-Buthe as SDGTs under the criteria of 1(c) – the “owned or controlled” provision – and (d) – the “support” provision – without giving any further reasoning in the designation letter. It issued a press release which reported “[t]he investigation shows direct links between the U.S. branch and Usama bin Laden,” mentioned allegations of criminal violations of tax laws, and mentioned Al-Aqil and the fact that he had been previously designated, but did not state that Al-Aqil owns or controls AHIF-Oregon. AR 1872. The press release also noted suspected financing of Chechen mujahideen and the designations of other branches of AHIF.

In November 2007, approximately three months after plaintiffs commenced this lawsuit, OFAC notified AHIF-Oregon and Al-Buthe that it was considering
redesignating them. It provided unclassified documents, including translations of Russian and Arabic newspapers from 2000 to 2004, that it had not provided earlier.

It was not until February 2008 that OFAC finally gave AHIF-Oregon a comprehensive explanation for the designation and blocking order. OFAC redesignated AHIF-Oregon because it believed AHIF-Oregon is “owned or controlled” by Soliman H.S. Al-Buthe and Aqeel Al-Aqil, or acted on behalf of them. OFAC also concluded that because AHIF-Oregon was a branch of the AHIF-SA, “it had acted for or on behalf of, or has assisted in, sponsored, or provided financial, material, or technological support for, or financial or other services to or in support of Al Qaida and other SDGTs.”

I found in AHIF that OFAC had insufficient evidence showing Al-Aqil retained ownership or control over AHIF-Oregon after he resigned from AHIF-Oregon’s Board of Directors in 2003. In contrast, I found substantial evidence of Al-Buthe’s ownership or control over AHIF-Oregon at the time of the designation and redesignation. I found that, unlike Al-Aqil, AHIF-Oregon and Al-Buthe never severed ties. Furthermore, I concluded that there is sufficient evidence in the classified and unclassified record demonstrating that AHIF-Oregon supported SDGTs as a branch of AHIF. AHIF-Oregon had not attempted to separate itself from the larger organization, and had not sought delisting under OFAC’s regulations. On at least one occasion, AHIF-Oregon supported AHIF-SA financially. The combination of circumstances surrounding Al-Buthe’s personal delivery of over $150,000 to AHIF-SA from AHIF-Oregon’s bank account in March 2000 could reasonably be construed by OFAC as evidence of financial support for terrorist activities. The donor intended the money to be used for “our muslim brothers in Chychnia,” and Al-Buthe personally transported the money in travelers’ checks and a cashier’s check rather than wiring the money and avoiding fees, at a time when AHIF-SA’s website carried articles supportive of Chechen mujahideen and a link through which funding could be provided to the mujahideen. Indeed, photographs of mujahideen leaders were found at AHIF-Oregon’s office in 2004, well after the donation, along with passports belonging to deceased Russian soldiers, a map noting the location of mujahideen military battles, videos showing violence against Russian soldiers by mujahideen in Chechnya, and photographs of deceased mujahideen and Russian soldiers.

Based on my review of the classified and unclassified record, I concluded that the government was entitled to summary judgment on [several of] AHIF-Oregon’s Counts, finding that the designation and redesignation were supported by substantial evidence. I also dismissed [other claims related to vagueness and first amendment rights].

I deferred ruling on AHIF-Oregon’s claim under the Due Process Clause [and] its claim under the Fourth Amendment.

**DISCUSSION**

The issues remaining in the case are: (1) whether the due process violation AHIF-Oregon suffered is harmless; (2) whether OFAC’s seizure of assets falls within an exception to the Fourth Amendment’s warrant and probable cause
requirements; (3) whether AHIF-Oregon is entitled to attorneys’ fees; and (4) whether the regulatory prohibition on providing “services” “on behalf of or for the benefit of” a designated entity is vague in violation of the MCASO’s Fifth Amendment rights, an issue raised in MCASO’s Request for Clarification.

I. The Violation of AHIF-Oregon’s Due Process Rights was Harmless

Although I held in AHIF that AHIF-Oregon was properly redesignated as an SDGT for its relationship with Al-Buthe and AHIF, as I summarized above, I concluded that the government violated AHIF-Oregon’s due process rights in delaying its notice to AHIF-Oregon about the reasons for contemplating a designation action. I held in AHIF that OFAC’s September 9, 2004 designation represented the culmination of the investigation of AHIF-Oregon and finalization of the February 2004 blocking order. The notice to AHIF-Oregon contained in the September 2004 letter and press release came too late to constitute notice for purposes of the Due Process Clause. At that point, the administrative record had been closed and AHIF-Oregon had no further opportunity to persuade OFAC to come to a different decision, absent a request for reconsideration. I concluded that AHIF-Oregon was entitled to post-deprivation notice, after the February 2004 blocking order, without “unreasonable delay,” and certainly before the September 9, 2004 designation finalizing the blocking order.

Despite the government’s unconstitutional notice, I concluded that the question is whether I can say “any due process violation was harmless beyond a reasonable doubt.” I requested additional briefing from the parties on this question, instructing the parties to consider my conclusion that OFAC’s redesignation was rational and supported by substantial evidence.

A. The Due Process Violation Was Not a Structural Error

AHIF-Oregon contends the due process violation was a structural error, along the lines of giving the jury an incorrect reasonable doubt instruction, excluding individuals from the jury on the basis of race, denying a public trial, denying the right to self-representation, denying assistance of counsel, admitting an improperly obtained confession, or having a biased judge preside over the trial. AHIF-Oregon likens its experience to a criminal trial without an indictment or a civil trial without a complaint.

A structural error is defined as “an error that permeate[s] the entire conduct of the trial from beginning to end or affect[s] the framework within which the trial proceeds.” I do not view this due process violation as so serious that I could say it permeated and undermined the entire designation process. A structural error would perhaps exist in the situation where OFAC froze an organization’s assets and failed to issue any press releases or provide any documents. Here, however, AHIF-Oregon was given some idea of the reasons for the government’s blocking order, pending investigation, in February of 2004. OFAC provided

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7 OFAC is under no obligation to consider a request for reconsideration in a timely manner. It took OFAC three years to evaluate AHIF-Oregon’s request.
unclassified documents to AHIF-Oregon in April 2004, asserting that it was considering designating AHIF-Oregon as an SDGT on the basis of that information, along with classified information it did not disclose. The fact that AHIF-Oregon was aware that providing funds to Chechnya might be of concern to the agency, and that AHIF-Oregon knew its relationship to the larger organization, which funded terrorism, was of concern, gave it at least some insight into the agency’s rationale. Additionally, it was told it may be in violation of the IEEPA. In other words, it had some of the factual reasons and the general legal authority for the blocking order and the proposed designation. As a result, the error falls more in line with one that “may . . . be quantitatively assessed in the context of other evidence presented.” Id. The court can consider whether what AHIF-Oregon contends it would have submitted could outweigh the evidence in the record supporting the designation.

B. The Due Process Violation Was Harmless

The government bears the burden of proving that the due process error is harmless beyond a reasonable doubt. The purpose of the “harmless error standard” is to “avoid setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial, because reversal would entail substantial social costs.”

AHIF-Oregon asserts that it would have changed its strategy with regard to its investigation of the facts, the information it presented to OFAC, and how it and its board members behaved. AHIF-Oregon contends specifically that if it had known Al-Buthe’s ownership and control were at issue, it would have challenged his designation and he would have resigned from the board. It also argues it would have provided evidence demonstrating it had never had any interactions with al Qaeda or other SDGTs, that its money never went to an SDGT, and that it had no control or involvement over AHIF-SA’s activities. AHIF-Oregon argues that, because it had no knowledge of what was at issue, my decision to uphold the redesignation was based on an incomplete administrative record.

The government responds by suggesting that the redesignation corrected any due process violation. In AHIF, I described the redesignation notice as a “lengthy explanation” and questioned why OFAC could not have issued such an explanation as a proposed decision just after the blocking order. Such a comprehensive notice would have provided AHIF-Oregon with the facts and law and would have given it the opportunity to respond to OFAC’s concerns in a knowing and intelligent way. I disagree with the government, however, that the redesignation cured the earlier deficient notice. The redesignation itself came too late to provide the requisite notice to AHIF-Oregon; the administrative record was closed upon issuance of the redesignation.

The question for me is whether AHIF-Oregon would have presented something different that would have changed OFAC’s decision or would have made me find the redesignation to be arbitrary and capricious. After careful review of the record and AHIF-Oregon’s briefing, the answer is no. I find that any due process violation was harmless. As a result of the records OF AC provided to AHIF-Oregon, as well as the initial designation, the organization was aware that its
provision of funds to Chechnya was of concern to the agency. It submitted a lengthy explanation for that conduct. Similarly, it knew that its relationship to the larger organization was at issue and in its responses to the agency it attempted to minimize that relationship.

AHIF-Oregon contends that had it known Al-Buthe’s membership on the board was problematic, he would have resigned. Al-Buthe’s resignation would not have changed the outcome, however. I upheld the organization’s designation on the “owned or controlled” prong not just because Al-Buthe is on the board, but because other indicia of Al-Buthe’s control is present such that the government could have a rational concern about Al-Buthe acting through AHIF-Oregon. He was more heavily involved with AHIF-Oregon than was Al-Aqil. Not only was Al-Buthe one of the founders, but he was its treasurer and was one of only two people with access to its bank account. He raised funds from Saudi Arabian sources and disbursed those funds to AHIF-Oregon and he was the individual who delivered the money to AHIF-SA for use in Chechnya. Additionally, he continues to be heavily involved with the organization. In fact, even now, he is the source, or the fundraiser, of much of the money the organization has used to pay its attorneys. Al-Aqil, in contrast, resigned from the board in March of 2003 and from AHIF-SA’s board in January of 2004. The administrative record contains no evidence Al-Aqil was involved with AHIF-Oregon after his resignation or at the time of AHIF-Oregon’s designation.

Given my acceptance of the government’s argument that money is fungible, that even money used for charitable purposes frees up other money for violent activities, and that the law prohibits giving any financial support to or in support of terrorist acts, I am persuaded beyond a reasonable doubt that nothing AHIF-Oregon could have done would have changed the agency’s decision, or would have changed my evaluation of the agency’s decision.

II. OFAC Did Not Violate the Fourth Amendment

The government’s blocking order pending investigation was based on its “reason to believe” that AHIF-Oregon “may be engaged in activities that violate” the IEEPA. I found such an order constitutes a “meaningful interference with an individual’s possessory interests in that property” such that it is a “seizure” for purposes of the Fourth Amendment. Although the blocking is a seizure, such an action is constitutional if it is reasonable.

In analyzing whether the Fourth Amendment’s warrant and probable cause requirements apply, courts look first to whether the seizure would have been unreasonable at the time the Fourth Amendment was framed. If historical practices provide no insight, “we have analyzed a search or seizure in light of traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”

A. The History of the Fourth Amendment is Not Revealing
Plaintiffs concede there is little legal guidance about seizures of property at the time of the Framers. They contend that forfeiture is the closest analogy. In the forfeiture context, the government must comply with the Fourth Amendment, and by federal statute, the government may only temporarily seize property after complying with the warrant and probable cause requirements. The government disagrees that forfeiture is analogous since forfeiture involves a permanent transfer of title. I, too, find the fit inapposite. Indeed, the purposes behind forfeiture are different from those under the asset seizure program in that forfeitures “are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct.” Here, as I examine more fully below, the purpose of asset seizure is not as much punishment as it is prevention.

The government reiterates its position that the Fourth Amendment does not apply because no court has ever considered whether seizures undertaken pursuant to the Trading With the Enemy Act (“TWEA”) and IEEPA must comply with the Fourth Amendment. As the government explains, in almost one hundred years of blocking actions, no court has considered whether such seizures need comply with the Fourth Amendment. This precedent, combined with the fact that the President announced a national emergency pursuant to specific Congressional authorization, and the fact that the blocking action involves the interests of foreign nationals, are relevant considerations.

In short, as the government puts it,

Requiring the Executive to obtain a warrant prior to imposing economic sanctions would be entirely inconsistent with the historical record and the long-established principle that the judiciary’s role in foreign affairs is limited, as it would inject the judiciary into every executive decision to carry out financial sanctions involving assets in which foreign nationals have an interest.

Having found nothing in the historical practices suggesting the seizure would have been unreasonable at the time the Fourth Amendment was framed, and having concluded that the historical treatment of seizures under the TWEA and IEEPA informs the reasonableness of the government’s actions, I now evaluate the exceptions posed by the government.

B. The Special Needs Exception Applies

According to the government, no probable cause or warrant requirement is necessary because the seizure of AHIF-Oregon’s assets is per se reasonable. The government concludes that because AHIF-Oregon is a donor to international terrorist groups, its diminished expectation of privacy is outweighed by the government’s strong interest in stopping terrorist financing. The government also compares the outcome of its balancing test to border searches, suggesting that, as in border searches, the interest of the “sovereign” outweighs any privacy interests.

Searches and seizures, however, are usually only “reasonable” when supported by probable cause and a warrant, except for “specifically established and well-
delineated exceptions. Over and over again [the Supreme] Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without approval by judge or magistrate, are per se unreasonable under the Fourth Amendment[.]

Aside from its argument that the blocking action is per se reasonable, which I am unwilling to accept, the government relies on the special needs exception. The special needs exception to the Fourth Amendment requirement for probable cause and a warrant was first articulated by Justice Blackmun in his concurring opinion in New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985). He stated, “Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.” The special needs exception has been applied in a host of non-criminal searches such as searches of prisoners, parolees, and probationers, border searches, immigration stops and searches, airport security, administrative searches, and military searches.

Accordingly, the two factors that must be present for the special needs exception to apply are: (1) the primary purpose of the seizure must be beyond criminal law enforcement, and (2) a warrant and probable cause must be impracticable.

I find the first factor met. When analyzing the government’s actions under this factor, courts undertake a “close review” to find whether the “purpose actually served ... is ultimately indistinguishable from the general interest in crime control.” “The nature of the 'emergency,' which is simply another word for threat, takes the matter out of the realm of ordinary crime control.” In re: Sealed Case, 310 F.3d 717, 745-46 (FISA Ct. Rev. 2002)

Applying these cases, then, the primary focus of the asset seizure scheme used to freeze AHIF-Oregon’s assets is not for criminal law enforcement purposes. Rather, the President declared a national emergency due to the terrorist attacks in New York, Pennsylvania and the Pentagon, and directed that assets and property in the hands of specified governments, entities and individuals be frozen to stop future attacks. The purpose of the asset seizure scheme is not to obtain information about whether the asset owner has committed an act of terrorism, but rather is to withhold assets to ensure future terrorist acts are not committed. Director Szubin also explains that blocking assets preserves them for future legal judgments and allows the President to use the assets in negotiations with foreign governments.

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8 I respectfully disagree with KindHearts for Charitable Humanitarian Development, Inc. v. Geithner. In that case, the court considered the “method” and “modus operandi” of the asset seizure program, rather than the purpose behind the program, and concluded the blocking actions had “more in common with ordinary law enforcement activity.” As is clear from the cases I cite above, the focus of the inquiry is on the programmatic purpose of the activity, not the method by which the activity is carried out.
My finding is consistent with cases in the context of searches of mass transit operations, like ferries and airplanes, in which courts have concluded that “[p]reventing or deterring large-scale terrorist attacks present problems that are distinct from standard law enforcement needs and go well beyond them.”

As for the second factor, the government has persuasively explained why it is impracticable to obtain a warrant. First, the government must act quickly to prevent asset flight. I agree with plaintiffs that this reason alone would be insufficient to satisfy the impracticability requirement since the government could seize first and obtain a warrant later. The government has also explained, however, how impossible it would be to meet the specificity requirements in an application for a warrant, and how difficult it would be to track down assets belonging to the designated individual and apply for a warrant in each jurisdiction in which the asset is located.

Pursuant to the Fourth Amendment, a warrant requires a description of the “place to be searched and the persons or things to be seized.” Here, however, as Szubin explains in his supplemental declaration, OFAC and the President have Congressional authority to seize a wide variety of property interests, ranging from money to mortgages, options to insurance policies, merchandise to accounts payable, located both in the United States and elsewhere, the existence of which are not always known to the agency at the time of the blocking order. As a result, it would be difficult to apply for a warrant for every asset in each jurisdiction in which the asset might be located. Such a requirement would interfere with the President’s and OFAC’s ability to act fast in blocking assets that are often very liquid and transferrable.

In sum, I find OFAC’s seizure of AHIF-Oregon’s assets was reasonable within the meaning of the Fourth Amendment because it was supported by the special needs of the government.

KINDHEARTS FOR CHARITABLE HUMANITARIAN DEVELOPMENT, INC. v. GEITHNER
U.S. Dist. LEXIS 45175 (N.D. Ohio 2010)

Carr, Chief Judge:

Plaintiff KindHearts for Charitable Humanitarian Development, Inc. (KindHearts) challenged defendants’ block pending investigation (BPI) of KindHearts’ assets and provisional determination, by the Office of Foreign Assets Control (OFAC) of the United States Treasury Department, that KindHearts is a Specially Designated Global Terrorist (SDGT).


On August 18, 2009, I found that in blocking KindHearts’ assets, the government violated KindHearts’ constitutional and statutory rights.
I. Fourth Amendment Violation

A. Reasonableness

The government first contends that the Fourth Amendment analysis in my August 18 Order was incomplete. This is so, it argues, because I concluded that OFAC violated KindHearts’ Fourth Amendment rights without separately analyzing whether OFAC’s seizure of KindHearts’ assets was “reasonable.”

The government argues that the core of the Fourth Amendment is “reasonableness,” and that a seizure may be consistent with the Fourth Amendment if it is reasonable, even if it is not supported by a warrant and probable cause. The government urges me to conclude that under the “totality of the circumstances,” the seizure here was reasonable.

In my August 18 Order, I first concluded that OFAC’s actions amounted to a seizure of KindHearts’ assets. I then determined that OFAC’s blocking of KindHearts’ assets violated the Fourth Amendment because OFAC did not obtain prior judicial review, and neither the special needs nor exigency exception applied.\(^9\)

The government’s reasonableness argument echoes its prior argument that the BPI falls within the special needs exception to the warrant requirement. The government contends specifically: 1) the government has a strong interest in acting quickly to protect national security; 2) KindHearts’ interest is limited; 3) procedural safeguards built into the blocking program protect KindHearts’ interests; and 4) the specific facts underlying the BPI support a finding of reasonableness.

Even assuming arguendo that the government is correct that a “reasonable” seizure may comply with the Fourth Amendment absent a warrant and probable cause, or exception thereto, I find the seizure here was not reasonable.

In assessing the reasonableness of a seizure, I must weigh the nature and extent of the government’s intrusion on private interests, government’s interest

\(^9\) The government continues to argue the BPI was not a seizure and that the Fourth Amendment is not implicated here. The government also continues to assert that even if the BPI is a seizure, either the special needs or exigent circumstances exception excuses the warrantless seizure. I decline to revisit my previous ruling rejecting these arguments.
in effecting the seizure, and the existence of checks on arbitrary executive discretion. The government argues that its interests here – national security and foreign policy – are “at their zenith.” This is so, the government contends, because BPIs carried out under E.O. 13224 “are by definition conducted to address ‘an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States[,]’ and are an exercise of the Executive’s authority to act in the foreign policy and national security realm.”

The government’s interest in cutting off funds and other support to terrorism is unquestionably compelling. The other factors, however, demonstrate OFAC’s BPI here was not reasonable.\(^1\)

The government continues to argue that it “has a strong interest in being able to act rapidly, sometimes instantaneously, in this area to protect the national security.” I do not doubt that these interests are strong. I have, however, already held that the government did not demonstrate a need to act rapidly in this case.

KindHearts’ interest here is also strong, despite the government’s contention that it is “limited.” As KindHearts points out, I previously held that it “had a strong interest in accessing its funds, remaining in operation and disbursing its funds, to the extent it was doing so, lawfully.” I remain convinced that KindHearts’ interest is substantial.

The government also argues that this was a “regulatory action,” not an action carried out “for regular law enforcement purposes.” My prior finding that “OFAC’s blocking power has more in common with ordinary law enforcement than with any of the activities considered in the special needs cases” refutes this argument, and I decline the invitation to revisit it.

Next, the government contends that the facts underlying the BPI require a finding of reasonableness. While these facts may speak to the level of governmental interest at stake – one which I agree is compelling – the seriousness of the actions OFAC attributes to KindHearts does not itself make a search reasonable.

OFAC froze all of KindHearts’ assets in February, 2006, and they have remained frozen ever since. A block affects “all property” in the control of a target entity, presently, and in the future. A block can thus last indefinitely. The intrusion here – seizing all of KindHearts assets for an indefinite period of time – is a far more substantial intrusion on private interests than those upheld as “reasonable” in [prior] cases.

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\(^{10}\) The government contends that I should draw on the recent decision of the District of Oregon (\textit{Al Haramain}) to conclude that the seizure here was reasonable under the circumstances. I disagree.

First, the court in \textit{Al Haramain} based its conclusion that no Fourth Amendment violation occurred on the special needs exception, not on a totality of the circumstances reasonableness analysis. I already concluded, and decline to revisit, my previous conclusion that the special needs exception is inapplicable here. Second, I find the Oregon court’s balancing between the individual and governmental interests unpersuasive as applied to the facts of this case.
OFAC need only claim that it is “investigating” a target entity to seize all of its assets. Neither IEEPA nor E.O. 13224 places any substantive limits on this power to seize. OFAC has broad power to block any and all assets of an entity subject to United States jurisdiction at any time, for any amount of time, and on virtually any level of suspicion.

Given the substantial intrusion on KindHearts’ interest, the seizure here was not reasonable under the Fourth Amendment based on the totality of the circumstances.

B. Remedy for Fourth Amendment Violation

Having concluded that the BPI was not otherwise reasonable and thus violated the Fourth Amendment, I am left with the difficult task of constructing an appropriate remedy for that violation. In so doing, I am cognizant that I stand at the intersection of Article II, with its absolute delegation of authority to the President to conduct our foreign affairs and keep us secure from foreign-based dangers, and the judicial authority and duty under Article III to enforce constitutional rights and protect those rights from infringement.

KindHearts argues that the only available remedy is invalidation of the BPI and return of its funds. KindHearts argues this is so because: 1) the APA requires it; and 2) I lack authority to construct any other remedy.

The government argues that, should I conclude – as I have – that the BPI was not otherwise reasonable, I should conduct a post-seizure probable cause review.

I note at the outset that I recognize the Fourth Amendment’s scope is more limited in the context of foreign relations and national security than in typical domestic criminal investigations and administrative actions. The Executive Branch has broad discretion in foreign affairs and national security. It is the role of the judiciary, however, to ensure the protection of individual rights. I “must be careful to balance” the Fourth Amendment “constitutional issues that could arise from deference to the agency’s interpretation against those constitutional issues which may arise if insufficient latitude is given to the executive in the conduct of foreign affairs.” Mindful of the need to attain such balance, I turn to the question of remedy.

Analogizing to exigent circumstances and forfeiture cases, the government argues that a post-hoc probable cause determination can cure the Fourth Amendment violation.

KindHearts argues such review is inappropriate because: 1) I do not have authority to issue a warrant; 2) a warrant cannot issue after a seizure; 3) post-seizure review in the Fourth Amendment context is limited to situations where an exception to the warrant requirement applies; and 4) neither I nor Congress have formulated an appropriate probable cause standard for BPIs.

I agree with the government that, under the unique circumstances of this case, I can and should implement post-hoc probable cause review.

As discussed below, in ordering a probable cause showing, I am not issuing a “retroactive warrant” as KindHearts contends. Rather, I am ordering a probable
cause showing as a remedy for the warrantless seizure and prolonged and continuing retention of KindHearts’ assets.

I find the analogy the government draws to forfeiture law instructive. Civil forfeiture implicates both the Fourth and Fifth Amendments. Courts have held that in forfeiture proceedings due process requires the government to provide notice and a hearing prior to seizing real property absent exigent circumstances.

If, however, the government fails to provide such pre-deprivation process, it is not required to release the forfeited property if, following the seizure, it can show probable cause that the seized assets are subject to forfeiture. U.S. v. Bowman, 341 F.3d 1228, 1235-36 (11th Cir. 2003) (“It would not be appropriate to return real property to the property owner if the Government can establish at the post-seizure adversarial hearing (as it has in this case) that there is probable cause to believe that the property is connected to criminal activity. The effect of returning the property to the property owner under these circumstances would be to allow the continuation of illegal activity, an outcome Congress surely did not intend.”)

While KindHearts is correct that these cases address remedies for Fifth Amendment – not Fourth Amendment – violations, and that these cases involve prior warrants, the parallels to the seizure here are apparent. As with civil forfeiture, the action challenged here is a seizure of KindHearts’ assets authorized by a particular statute. Both are civil in nature, but both serve law-enforcement-like purposes and implicate intertwined Fourth and Fifth Amendment concerns.

Although the forfeiture analogy is imperfect, it does demonstrate the potential inappropriateness of returning seized assets when the government can show post-seizure probable cause for the seizure. I thus find that ordering return of KindHearts’ assets would be similarly inappropriate if the government can show probable cause. This is especially true in this situation, where whatever I do intrudes – or risks intruding – into the zone of authority secured to the Executive under Article II.

**Probable Cause Standard**

In the administrative search context, the Supreme Court has explained that “where considerations of health and safety are involved, the facts that would justify an inference of ‘probable cause’ to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken.” Camara v. Municipal Court, 387 U.S. 523, 538, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

The court in Camara examined the level of probable cause necessary to issue a warrant for building inspections by municipal health and safety officials. It concluded that there is “probable cause” to issue a warrant “if reasonable legislative or administrative standards for conducting an area inspection are satisfied

Under the Foreign Intelligence Surveillance Act (FISA), a federal officer must have ‘probable cause to believe that . . . the target of the electronic surveillance
is a foreign power or agent of a foreign power,” and that “each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or agent of a foreign power.” Courts have upheld this modified probable cause standard under the Fourth Amendment. [see § 5.01 of the main volume]

I conclude that the government need not show probable cause to believe that evidence of a crime will be found. The government must instead show that, at the time of the original seizure, it had probable cause – that is, a reasonable ground – to believe that KindHearts, specifically, was subject to designation under E.O. 13224 § 1. I further find that if the government can show probable cause for the original seizure, even at this very late date, the post-hoc judicial finding of such cause remedies the Fourth Amendment violation.8

While it would have been easier for all involved if OFAC had obtained independent judicial review and a warrant prior to seizing KindHearts’ assets, or if it had provided KindHearts with a prompt and meaningful way to challenge the seizure, I find that this post-hoc probable cause determination, though not typical, provides a necessary check on otherwise unrestrained executive discretion. This is particularly so in these specific circumstances, where that discretion has been used in a way that violates the Constitution.

II. Fifth Amendment Violations

In my August 18 Order, I held that the government’s “blocking order failed to provide [KindHearts with] the two fundamental requirements of due process: meaningful notice and [an] opportunity to be heard.” I do not here revisit that determination, but I must decide what remedy flows from these violations of the Fifth Amendment’s Due Process Clause.

Here, KindHearts still does not know what facts to rebut, or what other grounds the government has for its action. As KindHearts points out, “OFAC has

8 The October, 2001, Patriot Act amended IEEPA. The amendment permitted the Treasury Secretary to impose on an entity all the blocking effects of a designation, including freezing an organization’s assets indefinitely, without designating the organization as an SDGT. 50 U.S.C. § 1702(a)(1)(B). The amendment also provided, inter alia:

  (c) Classified information. – In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court ex parte and in camera. This subsection does not confer or imply any right to judicial review.

  It is thus appropriate – should the government request my review of classified information in making its probable cause showing – for me to hold this probable cause hearing ex parte and in camera.

  For now I do not consider, much less try to spell out, what further remedy would be appropriate and necessary if the government fails to show probable cause as provided herein.
yet to afford KindHearts constitutionally adequate notice of the charges against it that would allow KindHearts to know what to look for” in its documents.16

I agree with the government that, notwithstanding the APA’s dictate that we set aside unconstitutional agency action, the proper remedy for a notice violation in the context of designation proceedings is to remand to OFAC, without vacatur of the BPI, with instructions as to what additional notice is required.

This leaves me with the difficult question of precisely what the government must disclose to KindHearts to provide KindHearts with adequate notice. On this issue, the government notes:

The Court has thus far expressed no opinion on what specific process must be provided beyond that which has to date been provided. OFAC has at this time given a complete statement of the unclassified, non-privileged reasons for the blocking and has provided KindHearts with all of the unclassified, non-privileged evidence being considered by the agency. There is possibly nothing else that can be done.

KindHearts responds: “If the only evidence that would provide KindHearts adequate notice is classified, OFAC is constitutionally obligated to devise a reasonable alternative that affords KindHearts a meaningful opportunity to respond.”

I appreciate the government’s interest in national security and foreign policy implicated here. Courts have found that their duty to protect individual rights extends to requiring disclosure of classified information to give a party an ability to respond to allegations made against it. See American-Arab Anti-Discrimination Comm. v. Reno (ADC), 70 F.3d 1045, 1070-71 (9th Cir. 1995). In ADC, the Ninth Circuit faced this issue in the context of immigration: aliens challenged the use of classified information in adjudicating their applications for legalization. The court held that the government’s use of classified information violated an individual’s right to due process. In so holding, the court noted that the government’s reliance on classified evidence undermined the adversarial system and created an enormous risk of error. The court further explained:

Only the most extraordinary circumstances could support one-sided process. We cannot in good conscience find that the President’s broad generalization regarding a distant foreign policy concern and a related national security

16 [My] conclusion that the notice provided KindHearts remains inadequate distinguishes this case from Al Haramain, to which the government points in arguing its due process violations were harmless. In Al Haramain, the district court found that “the redesignation notice” included “a lengthy explanation” of the grounds for the government’s designation decision, and that “[s]uch a comprehensive notice would have provided AHIF-Oregon [the plaintiff] with the facts and law and would have given it the opportunity to respond to OFAC’s concerns in a knowing and intelligent way.” The reason for the district court’s determination that the due process violation was harmless, therefore, rested upon the delay in providing constitutionally acceptable notice, not in the continued absence of such notice. By contrast, here I found OFAC’s notice to KindHearts failed constitutionally both in delay and in substance. The court in Al Haramain’s determination on this issue, therefore, is inapposite to the situation here.
threat suffices to support a process that is inherently unfair because of the enormous risk of error and the substantial personal interests involved.

Drawing on those cases, I propose, subject to giving the parties an opportunity to comment and be heard, that:

1. I convene, under 8 U.S.C. § 1189(b)(2), an ex parte, in camera meeting with the government to determine what classified evidence will give KindHearts adequate notice, and whether that evidence is capable of further declassification or adequate summarization;

2. If so, the government will expeditiously declassify and/or summarize whatever classified information I find will give KindHearts constitutionally adequate notice;

3. If declassification or summarization of classified information is insufficient or impossible, then KindHearts’ counsel will obtain an adequate security clearance to view the necessary documents, and will then view these documents in camera, under protective order, and without disclosing the contents to KindHearts; and

4. The government will then provide KindHearts’ counsel with an opportunity to respond to these documents (through a closed, classified hearing if KindHearts’ counsel views classified information).
[B] Access to Third-Party Records

add at page 247:

DOE v. MUKASEY
549 F.3d 861 (2d Cir. 2008)

[On this second appeal, the Second Circuit decided that it would best serve the public interest by construing the statutes to avoid the constitutional issues decided by the district court.]

We construe § 2709(c) to mean that the enumerated harms must be related to “an authorized investigation to protect against international terrorism or clandestine intelligence activities,” and construe § 3511 to place on the Government the burden to persuade a district court that there is a good reason to believe that disclosure may result in one of the enumerated harms, and to mean that a district court, in order to modify or set aside a nondisclosure order, must find that such a good reason exists.

The Government advances several arguments why the third *Freedman* safeguard should not apply to judicial review of the nondisclosure requirement. First, the Government contends that it would be unduly burdened if it had to initiate a lawsuit to enforce the nondisclosure requirement in the more than 40,000 NSL requests that were issued in 2005 alone, according to the 2007 report of the Inspector General of the Department of Justice (“OIG Report”). Instead of determining whether, as the Government contends, a burden of initiating litigation can prevent application of the third *Freedman* procedural safeguard, we consider an available means of minimizing that burden, use of which would substantially avoid the Government’s argument. The Government could inform each NSL recipient that it should give the Government prompt notice, perhaps within ten days, in the event that the recipient wishes to contest the nondisclosure requirement. Upon receipt of such notice, the Government could be accorded a limited time, perhaps 30 days, to initiate a judicial review proceeding to maintain the nondisclosure requirement, and the proceeding would have to be concluded within a prescribed time, perhaps 60 days. In accordance with the first and second *Freedman* safeguards, the NSL could inform the recipient that the nondisclosure requirement would remain in effect during the entire interval of the recipient’s decision whether to contest the nondisclosure requirement, the Government’s prompt application to a court, and the court’s prompt adjudication on the merits. The NSL could also inform the recipient that the nondisclosure requirement would remain in effect if the recipient declines to give the Government notice of an intent to challenge the requirement or, upon a challenge, if the Government prevails in court. If the Government is correct that very few NSL recipients have any interest in challenging the nondisclosure
requirement (perhaps no more than three have done so thus far), this “reciprocal notice procedure” would nearly eliminate the Government’s burden to initiate litigation (with a corresponding minimal burden on NSL recipients to defend numerous lawsuits). Thus, the Government’s litigating burden can be substantially minimized, and the resulting slight burden is not a reason for precluding application of the third Freedman safeguard.

Assessing the Government’s showing of a good reason to believe that an enumerated harm may result will present a district court with a delicate task. While the court will normally defer to the Government’s considered assessment of why disclosure in a particular case may result in an enumerated harm related to such grave matters as international terrorism or clandestine intelligence activities, it cannot, consistent with strict scrutiny standards, uphold a nondisclosure requirement on a conclusory assurance that such a likelihood exists. In this case, the director of the FBI certified that “the disclosure of the NSL itself or its contents may endanger the national security of the United States.” To accept that conclusion without requiring some elaboration would “cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer’s decision, but stripped of capacity to evaluate independently whether the executive’s decision is correct.”

In showing why disclosure would risk an enumerated harm, the Government must at least indicate the nature of the apprehended harm and provide a court with some basis to assure itself (based on in camera presentations where appropriate) that the link between disclosure and risk of harm is substantial.

We deem it beyond the authority of a court to “interpret” or “revise” the NSL statutes to create the constitutionally required obligation of the Government to initiate judicial review of a nondisclosure requirement. However, the Government might be able to assume such an obligation without additional legislation. If the Government uses the suggested reciprocal notice procedure as a means of initiating judicial review, there appears to be no impediment to the Government’s including notice of a recipient’s opportunity to contest the nondisclosure requirement in an NSL.

[C] The NSA Surveillance Program

add at page 268 in the Notes

3. In re NSA Telcomm. Records Litigation, 595 F. Supp. 2d 1077 (N.D. Cal. 2009). In proceedings on remand from the Ninth Circuit’s opinion in Al Haramain, the district court issued the following order.

[T]his court [earlier] issued a ruling that: (1) FISA preempts the state secrets privilege in connection with electronic surveillance for intelligence purposes and would appear to displace the state secrets privilege for purposes of plaintiffs’ claims; and (2) FISA did not appear to provide plaintiffs with a viable remedy unless they could show that they were “aggrieved persons” within the meaning of FISA. 564 F Supp 2d 1109 (N D Cal 2008). The court dismissed the complaint with leave to amend.
Plaintiffs timely filed an amended pleading and defendants, for the third time, moved to dismiss.

[The plaintiffs’ allegations regarding their aggrieved party status were]:

(i) the [TSP] targeted communications with individuals reasonably believed to be associated with al Qaeda; (ii) in February 2004, the Government blocked the assets of AHIF-Oregon based on its association with terrorist organizations; (iii) in March and April of 2004, plaintiffs Belew and Ghafoor talked on the phone with an officer of AHIF-Oregon in Saudi Arabia about, inter alia, persons linked to bin-Laden; (iv) in the September 2004 designation of AHIF-Oregon, [OFAC] cited the organization’s direct links to bin-Laden as a basis for the designation; (v) the OFAC designation was based in part on classified evidence; and (vi) the FBI stated it had used surveillance in an investigation of the Al-Haramain Islamic Foundation. Plaintiffs specifically allege that interception of their conversations in March and April 2004 formed the basis of the September 2004 designation, and that any such interception was electronic surveillance as defined by the FISA conducted without a warrant under the TSP.

Without a doubt, plaintiffs have alleged enough to plead “aggrieved person” status so as to proceed to the next step in proceedings under FISA.

The court has carefully considered the logistical problems and process concerns that attend considering classified evidence and issuing rulings based thereon. Measures necessary to limit the disclosure of classified or other secret evidence must in some manner restrict the participation of parties who do not control the secret evidence and of the press and the public at large. The court’s next steps will prioritize two interests: protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action. Unfortunately, the important interests of the press and the public in this case cannot be given equal priority without compromising the other interests.

To be more specific, the court will review the Sealed Document ex parte and in camera. The court will then issue an order regarding whether plaintiffs may proceed – that is, whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA. As the court understands its obligation with regard to classified materials, only by placing and maintaining some or all of its future orders in this case under seal may the court avoid indirectly disclosing some aspect of the Sealed Document’s contents. Unless counsel for plaintiffs are granted access to the court’s rulings and, possibly, to at least some of defendants’ classified filings, however, the entire remaining course of this litigation will be ex parte. This outcome would deprive plaintiffs of due process to an extent inconsistent with Congress’s purpose in enacting FISA’s sections 1806(f) and 1810. Accordingly, this order provides for members of plaintiffs’ litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court’s future orders.

Given the difficulties attendant to the use of classified material in litigation, it is timely at this juncture for defendants to review their classified
submissions to date in this litigation and to determine whether the Sealed Document and/or any of defendants’ classified submissions may now be declassified. Accordingly, the court now directs defendants to undertake such a review.

The next steps in this case will be as follows:

1. Within fourteen (14) days of the date of this order, defendants shall arrange for the court security officer/security specialist assigned to this case in the Litigation Security Section of the United States Department of Justice to make the Sealed Document available for the court’s in camera review. If the Sealed Document has been included in any previous classified filing in this matter, defendants shall so indicate in a letter to the court.

2. Defendants shall arrange for Jon B Eisenberg, lead attorney for plaintiffs herein and up to two additional members of plaintiffs’ litigation team to apply for TS/SCI clearance and shall expedite the processing of such clearances so as to complete them no later than Friday, February 13, 2009. Defendants shall authorize the court security officer/security specialist referred to in paragraph 1 to keep the court apprised of the status of these clearances. Failure to comply fully and in good faith with the requirements of this paragraph will result in an order to show cause re: sanctions.

3. Defendants shall review the Sealed Document and their classified submissions to date in this litigation and determine whether the Sealed Document and/or any of defendants’ classified submissions may be declassified, take all necessary steps to declassify those that they have determined may be declassified and, no later than forty-five (45) days from the date of this order, serve and file a report of the outcome of that review.


Plaintiffs seek an order finding defendants civilly liable to them under section 1810 of the Foreign Intelligence Surveillance Act (“FISA”) for eavesdropping on their telephone conversations without a FISA warrant. In the course of lengthy proceedings in this court and the court of appeals, this court determined that: FISA affords civil remedies to “aggrieved persons” who can show they were subjected to warrantless domestic national security surveillance; FISA takes precedence over the state secrets privilege in this case; and plaintiffs have met their burden of establishing their “aggrieved person” status using non-classified evidence. Because defendants denied plaintiffs’ counsel access to any classified filings in the litigation, even after top secret clearances were obtained for plaintiffs’ counsel and protective orders suitable for top secret documents proposed, the court directed the parties to conduct this phase of the litigation without classified evidence. Both plaintiffs’ motion for summary judgment of liability and defendants’ cross-motions for dismissal and for summary judgment were, therefore, based entirely on non-classified evidence.
The court now determines that plaintiffs have submitted, consistent with FRCP 56(d), sufficient non-classified evidence to establish standing on their FISA claim and to establish the absence of any genuine issue of material fact regarding their allegation of unlawful electronic surveillance; plaintiffs are therefore entitled to summary judgment in their favor on those matters. Defendants’ various legal arguments for dismissal and in opposition to plaintiffs’ summary judgment motion lack merit: defendants have failed to meet their burden to come forward, in response to plaintiffs’ prima facie case of electronic surveillance, with evidence that a FISA warrant was obtained, that plaintiffs were not surveilled or that the surveillance was otherwise lawful.

In the absence of a genuine issue of material fact whether plaintiffs were subjected to unlawful electronic surveillance within the purview of FISA and for the reasons fully set forth in the decision that follows, plaintiffs’ motion for summary judgment on the issue of defendants’ liability under FISA is GRANTED. Defendants’ motion to dismiss the amended complaint for lack of jurisdiction is DENIED and defendants’ cross-motion for summary judgment is DENIED.

Al-Haramain Islamic Found., Inc. v. Obama, 690 F.3d 1089 (9th Cir 8/7/12).

While 18 U.S.C. § 2712 created United States liability for certain FISA violations such as those of 50 U.S.C. § 1806, it did not include claims under § 1810. Unlike 50 U.S.C. §§ 1806, 1825, 1845, section 1810 had not been incorporated into the waiver of sovereign immunity in § 2712, or elsewhere. Nor did liability under § 1810 come with the procedures that accompany such actions against the United States. Section 1806 directly addressed the actions of "Federal officers or employees" without the intercession of 50 U.S.C. § 1801(m)'s definition of "person." Nonetheless, § 2712 was not content with providing only a cause of action under § 1806; rather, it also and explicitly waived sovereign immunity. That structure strongly pointed to the conclusion that the reference to "Federal officers or employees" in § 1806 — and certainly in § 1810 via § 1801(m) — did not, by itself, waive sovereign immunity. Congress deliberately did not waive immunity with respect to § 1810, and it was error to impute an implied waiver. The suit for damages against the United States could not proceed under § 1810.

The district court's conclusion that 50 U.S.C.S. § 1810 waived sovereign immunity was reversed. The judgment in favor of plaintiffs was vacated.

18 USC § 2712. Civil actions against the United States

(a) In general. Any person who is aggrieved by any willful violation of this chapter [electronic communications – general wiretap provisions] or of sections 106(a), 305(a), or 405(a) of the Foreign Intelligence Surveillance Act of 1978 [50 USC § 1806(a), 1825(a), or 1845(a)] (50 U.S.C. 1801 et seq.) may commence an action in United States District Court against the United States to recover
money damages. In any such action, if a person who is aggrieved successfully establishes such a violation of this chapter or of the above specific provisions of title 50, the Court may assess as damages--

(1) actual damages, but not less than $10,000, whichever amount is greater; and

(2) litigation costs, reasonably incurred.

50 USC § 1810. Civil liability
An aggrieved person, other than a foreign power or an agent of a foreign power, who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of 50 USC § 1809 shall have a cause of action against any person who committed such violation and shall be entitled to recover--

(a) actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of violation, whichever is greater;

(b) punitive damages; and

(c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

§ 5.03 CLASSIFIED INFORMATION PROCEDURES ACT
add at page 281, before Moussaoui:

UNITED STATES v. ABU ALI

Ahmed Omar Abu Ali was convicted by a jury of nine criminal counts arising from his affiliation with an al-Qaeda terrorist cell located in Medina, Saudi Arabia, and its plans to carry out a number of terrorist acts in this country.

 Unlike some others suspected of terrorist acts and designs upon the United States, Abu Ali was formally charged and tried according to the customary processes of the criminal justice system. Persons of good will may disagree over the precise extent to which the formal criminal justice process must be utilized when those suspected of participation in terrorist cells and networks are involved. There should be no disagreement, however, that the criminal justice system does retain an important place in the ongoing effort to deter and punish terrorist acts without the sacrifice of American constitutional norms and bedrock values. As will be apparent herein, the criminal justice system is not without those attributes of adaptation that will permit it to function in the post-9/11 world. These adaptations, however, need not and must not come at the expense of the requirement that an accused receive a fundamentally fair trial. In this case, we are satisfied that Abu Ali received a fair trial, though not a perfect one, and that the criminal justice system performed those functions which the
Constitution envisioned for it. The three of us unanimously express our conviction that this is so in this opinion, which we have jointly authored.

Abu Ali is an American citizen. He was born in Texas and raised in Falls Church, Virginia by his mother and father, the latter of whom was employed at the Royal Embassy of Saudi Arabia in Washington, D.C. After graduating from the Saudi Islamic Academy in Virginia, Abu Ali studied for one semester at the University of Maryland and then enrolled in the Institute in Virginia to study Islamic Sciences.

In September 2002, at the age of 21, Abu Ali left his home in Falls Church, Virginia and traveled to Saudi Arabia to study at the Islamic University in Medina. Within a few months of his arrival in Medina, Abu Ali [was introduced to a sequence of individuals leading to] Al-Faq’asi, the “brother in charge” of the al-Qaeda terrorist cell in Medina

Abu Ali went with al-Faq’asi to live in a villa in the al-Iskan neighborhood in Medina for training. Using the name “Ashraf,” Abu Ali was trained by a man called “Ahmad” on how to assemble and disassemble the Kalashnikov machine gun, five of which were located in the villa along with ammunition. Abu Ali informed Ahmad that he was tasked with killing the United States President. In addition to training, the al-Faq’asi Medina cell provided Abu Ali with finances and equipment. He was given money to buy a laptop computer, a cell phone, and books, as well as written materials on security and methods of concealment. He was also given a USB memory chip that included a clip taken during the bombing of Afghanistan which contained the voices of American pilots, and tasked with translating the recording into Arabic.

On May 6, 2003, Saudi authorities discovered a large stash of weapons and explosives in Riyadh, Saudi Arabia, which was suspected to be intended for use in terrorist activities within that country. The following day, the Saudi government published a list of the 19 most wanted individuals in connection with terrorist activity. The list included al-Faq’asi and Sultan Jubran. According to Abu Ali, after the list was published, al-Faq’asi told him that the villa location would be changed and Abu Ali was taken to a farm where he stayed for several days.

Six days later, on May 12, 2003, al-Qaeda carried out a number of suicide bombings in Riyadh, killing approximately 34 people including 9 Americans. That night, Abu Ali and the other cell members performed guard duty at the cell’s safehouses. After the bombings, Abu Ali and a number of the others moved to a second villa in an al-Iskan neighborhood where they stayed for three days, although Abu Ali did not spend the night in the villa with the others. According to Abu Ali, the villa contained “a dimly-lit room that contained wires and cell phones, . . . machine guns, ammunition, a pistol and a hand grenade.” Later, the group moved back to the farm, where Abu Ali continued his training in explosives and forgery.

On May 26 and 27, 2003, authorities with the Saudi Mabahith received orders to raid several suspected terrorist safe houses in Medina, including the safe house in the Al-Azhari villa where Abu Ali had received training.
Among the evidence retrieved during the search of one safe house was an English translation of an American pilot’s radio transmission and a paper with Abu Ali’s additional alias names of “Hani” and “Hanimohawk” written on it. The authorities also recovered a number of automatic rifles and guns, ammunition, fertilizer, hand grenades, cell phones which were being converted to explosives, as well as computers, cameras, walkie-talkies, and laminating equipment for identification cards. A number of members of the al-Faq’asi terrorist cell were arrested during the raids, including al-Ghamdi, who had trained Abu Ali, and Sheikh Nasser, who had given Abu Ali the blessing for the presidential assassination. Al-Faq’asi and Sultan Jubran, disguised in women’s clothing, escaped.

During subsequent questioning by the Saudi authorities, al-Ghamdi informed the Mabahith that one of their members was a student at the University of Medina of either American or European background who went by the alias “Reda” or “Ashraf.” Further investigative efforts resulted in the photo identification of Abu Ali as the American or European member of the cell.

On June 8, 2003, Abu Ali was arrested by the Mabahith at the Islamic University in Medina and his dormitory room was searched. Among the items found there were a GPS device, jihad literature, a walkie talkie, a United States passport, a Jordanian passport and identification card, a Nokia cellular telephone, a telephone notebook containing al-Qahtani’s name, and literature on jihad. Abu Ali was then flown from Medina to Riyadh, where he was interrogated by the Mabahith. Although he initially denied involvement with the al-Faq’asi cell, he confessed when the Mabahith officers addressed him with his alias names of “Reda” and “Ashraf.” Specifically, Abu Ali confessed to his affiliation with al-Qaeda and, in particular, the Medina cell headed by al-Faq’asi. According to Abu Ali, he joined the al-Qaeda cell “to prepare and train for an operation inside the [United States],” including an “intention to prepare and train to kill the [United States] President.” In addition to written confessions, the Mabahith obtained a videotaped confession in which Abu Ali admitted his affiliation with the Medina cell and its plans to conduct terrorist operations within the United States, including the plan to assassinate President Bush and to destroy airliners destined to this country.

Following Abu Ali’s arrest by the Saudi authorities, the FBI was notified of his suspected involvement in the al-Qaeda cell in Saudi Arabia and advised that the cell was planning on conducting terrorism operations in the United States. Although the FBI requested access to Abu Ali, the Mabahith denied the request. On June 15, 2003, the Mabahith allowed the FBI to supply proposed questions, but later rejected the list and the breadth of the inquiry sought. Ultimately, the Mabahith only agreed to ask Abu Ali six of those questions and to allow the FBI officers to observe his responses through a one-way mirror. Abu Ali was asked whether he was tasked to assassinate the President (as had been reported by the Mabahith to the FBI), when he arrived in Saudi Arabia, whether he knew of any planned terrorist attacks against American, Saudi, or Western interests, whether he was recruited by any terrorist organization, whether he had used false passports, and the nature of his father’s position in the Embassy. Other
than consular contact, the United States was denied all access to Abu Ali until September of 2003.

[After disposing of defense arguments related to *Miranda* and the Saudi interrogation, the court turned to CIPA issues related to some classified documents.]

After Abu Ali was indicted, Attorney Khurram Wahid and Attorney Ashraf Nubani appeared to represent him. However, because one failed to apply for security clearance and the other was not approved by the Department of Justice, neither attorney was authorized to view the classified documents. On September 8, 2005, the district court, informed that the case would involve national security interests and CIPA proceedings and anticipating Abu Ali’s need for an attorney with the proper security clearance, appointed Attorney Nina J. Ginsberg to act as CIPA-cleared counsel for Abu Ali.

On October 14, 2005, the government first produced unredacted copies of the classified documents to Ms. Ginsberg and informed her that it intended to introduce the documents as evidence at trial. However, the government advised Ms. Ginsberg that it would proceed under CIPA to seek “certain limitations on public disclosure that will be necessary to prevent the revelation of extremely sensitive national security information.”

Three days later, the government provided Abu Ali’s uncleared defense counsel with slightly redacted copies of the classified documents, which it described as “newly declassified communications between the defendant and Sultan Jubran Sultan al-Qahtani occurring on May 27, 2003, and June 6, 2003,” in their Arabic versions and with English translations, and advised counsel of the government’s “inten[t] to offer these communications into evidence at trial as proof that the defendant provided material support to al-Qaeda.”

A comparison of the classified and unclassified documents reveals that the declassified versions provided the dates, the opening salutations, the entire substance of the communications, and the closings, and had only been lightly redacted to omit certain identifying and forensic information.

On October 19, 2005, the government filed an in camera, ex parte motion pursuant to § 4 of CIPA, seeking a protective order prohibiting testimony and lines of questioning that would lead to the disclosure of the classified information during the trial. The government advised that the classified portions of the communications could not be provided to Abu Ali and his uncleared counsel because they contained highly sensitive information which, if confirmed in a public setting, would divulge information detrimental to national security interests. The district court granted the government’s motion by in camera, ex parte, sealed order. However, the district court ruled that the United States
could use the “silent witness rule” to disclose the classified information to the jury at trial.\textsuperscript{18}

Abu Ali immediately responded with a motion that the government declassify the documents in their entirety or be ordered to provide the dates on which the communications were obtained by the government and the manner in which they were obtained. [The documents were contents of phone conversations obtained from the service provider under FISA.] The stated purpose of the request, however, was not to contest that Abu Ali was a party to the communications, but to enable Abu Ali to ascertain whether the government had discovered the existence of the communications prior to Abu Ali’s arrest by the Saudi officials. If so, Abu Ali sought to rely upon this fact to demonstrate that each confession he made to the Saudi officials was the product of a joint venture with American law enforcement and, therefore, inadmissible.

The district court denied Abu Ali’s motion “because CIPA prohibits revealing such classified information to the public” and “uncleared defense counsel is barred under CIPA from receiving, or eliciting testimony that will likely reveal, classified information.” In doing so, the district court also noted that “the defense’s attempt to force the government to unnecessarily disclose the means and methods the government used to gather this classified information may amount to ‘greymail,’ which CIPA was intended to prevent.”

In support of this claim of alleged prejudice, uncleared counsel argued to the district court that “[i]t is very evident what the material is just by reading the evidence that has already been turned over to the defense,” ACA 140, and that it “takes really, quite frankly, someone who is of less than regular intelligence to not figure out what the document is,” ACA 141. In short, counsel was of the view that the classification designation was “a bit of a show that we’re putting on” that “den[ied] my client his Sixth Amendment right to confront the evidence, his choice of attorney and to have his attorney conduct a proceeding in a manner that that attorney sees fit.” ACA 140. In other words, uncleared counsel complained not that he and his client were in the dark about the redacted evidence, but rather that the government should declassify the documents because the redacted portions were not really a “secret” at all.

Noting that it was not at liberty under CIPA “to second guess the government’s judgment to classify the information,” the district court overruled the objection. The jury was instructed regarding the upcoming presentation of classified evidence, Ms. Ginsberg was introduced to the jury as “an attorney

\textsuperscript{18} The “silent witness” rule was described in \textit{United States v. Zettl}, 835 F.2d 1059, 1063 (4th Cir. 1987), as follows:

\begin{quote}
[T]he witness would not disclose the information from the classified document in open court. Instead, the witness would have a copy of the classified document before him. The court, counsel and the jury would also have copies of the classified document. The witness would refer to specific places in the document in response to questioning. The jury would then refer to the particular part of the document as the witness answered. By this method, the classified information would not be made public at trial but the defense would be able to present that classified information to the jury.
\end{quote}
hired by Mr. Abu Ali to handle this aspect of the case,” and the unredacted, classified versions of the documents were presented to the jury via the “silent witness” procedure.

We begin with the district court’s exclusion of Abu Ali and his uncleared counsel from the CIPA proceedings. The district court was presented with a § 4 motion by the government to protect the classified information and a § 5 motion, made at a later date, by Abu Ali that he be allowed to disclose that information. Initially, the district court found the redacted, unclassified version of the communications to be adequate to meet the defendant’s need for information. CIPA expressly provides for such redactions of classified information from documents sought or required to be produced to the defendant, and the determination may be based upon an ex parte showing that the disclosure would jeopardize national security interests. The district court appropriately balanced the interests and made a reasonable determination that disclosure of the redacted information was not necessary to a fair trial.

There was likewise no abuse of discretion in the district court’s decision to preclude Abu Ali’s uncleared counsel from cross-examining the government’s witnesses about the redacted information, which would have effectively disclosed the classified information that the court had already ruled need not be disclosed. A defendant and his counsel, if lacking in the requisite security clearance, must be excluded from hearings that determine what classified information is material and whether substitutions crafted by the government suffice to provide the defendant adequate means of presenting a defense and obtaining a fair trial. Thus, the mere exclusion of Abu Ali and his uncleared counsel from the CIPA hearings did not run afield of CIPA or Abu Ali’s Confrontation Clause rights.

We also conclude that the district court struck an appropriate balance between the government’s national security interests and the defendant’s right to explore the manner in which the communications were obtained and handled. Abu Ali and his uncleared counsel were provided with the substance of the communications, the dates, and the parties involved, and CIPA-cleared defense counsel was provided with the classified versions and afforded unfettered opportunity to cross-examine the government’s witnesses concerning these matters. At the conclusion of the examinations, defense counsel pointed to no specific problem with the issues explored. The district court also expressly considered Abu Ali’s rights under the Confrontation Clause and determined that public examination of these witnesses was not necessary to prevent infringement of them. Having fully considered the record and the classified information ourselves, we agree. Uncleared defense counsel were not entitled to disclose the classified information via their questioning of the witnesses about their roles in extracting, sharing, transferring, and handling the communications, and Abu Ali, who was ably represented by counsel at the hearing on this issue, was not deprived of his right to confrontation or to a fair trial merely because he and his uncleared counsel were not also allowed to attend.

The error in the case, which appears to have originated in the October 2005 CIPA proceeding, was that CIPA was taken one step too far. The district court did not abuse its discretion in protecting the classified information from
disclosure to Abu Ali and his uncleared counsel, in approving a suitable substitute, or in determining that Abu Ali would receive a fair trial in the absence of such disclosure. But, for reasons that remain somewhat unclear to us, the district court granted the government’s request that the complete, unredacted classified document could be presented to the jury via the “silent witness” procedure. The end result, therefore, was that the jury was privy to the information that was withheld from Abu Ali.

As noted above, CIPA contemplates and authorizes district courts to prevent the disclosure of classified information, as was done in this case, so long as it does not deprive the defendant of a fair trial. CIPA also authorizes restrictions upon the questioning of the witnesses to ensure that classified information remains classified. Indeed, even the “silent witness” procedure contemplates situations in which the jury is provided classified information that is withheld from the public, but not from the defendant. See United States v. Zettl, 835 F.2d 1059, 1063 (4th Cir. 1987). In addition, CIPA provides district courts wide discretion to evaluate and approve suitable substitutions to be presented to the jury. CIPA does not, however, authorize courts to provide classified documents to the jury when only such substitutions are provided to the defendant. Nor could it. There is a stark difference between ex parte submissions from prosecutors which protect the disclosure of irrelevant, nonexculpatory, or privileged information, and situations in which the government seeks to use ex parte information in court as evidence to obtain a conviction. And, the notion that such “safeguards against wide-ranging discovery... would be sufficient to justify a conviction on secret evidence is patently absurd.” See also United States v. Innamorati, 996 F.2d 456, 488 (1st Cir. 1993) (finding no error in prosecutor’s ex parte submission of information for consideration as to whether it must be disclosed to the defendant, but noting that “there [was] no question... of convictions based upon secret evidence furnished to the factfinder but withheld from the defendants”).

The same can be said for the evidence here. If classified information is to be relied upon as evidence of guilt, the district court may consider steps to protect some or all of the information from unnecessary public disclosure in the interest of national security and in accordance with CIPA, which specifically contemplates such methods as redactions and substitutions so long as these alternatives do not deprive the defendant of a fair trial. However, the government must at a minimum provide the same version of the evidence to the defendant that is submitted to the jury. We do not balance a criminal defendant’s right to see the evidence which will be used to convict him against the government’s interest in protecting that evidence from public disclosure. If the government does not want the defendant to be privy to information that is classified, it may either declassify the document, seek approval of an effective substitute, or forego its use altogether. What the government cannot do is hide the evidence from the defendant, but give it to the jury. Such plainly violates the Confrontation Clause.
Having determined that submission of the classified documents to the jury ran afoul of Abu Ali’s Confrontation Clause rights, we turn now to consider whether that error was harmless. We conclude that it was.

add new section at p. 296:

[B] The UK Special Advocate and Closed Materials Procedures

In Charkaoui v. Minister of Citizenship, p. 600 in the main volume, the Canadian Supreme Court discussed a procedure by which certain lawyers could be cleared to serve as surrogates for counsel in cases involving what the U.S. calls classified information. That system was created in response to a decision of the European Court of Human Rights holding that a predecessor system in the U.K. did not satisfy the ECHR. Chahal v. United Kingdom (1996), 23 E.H.R.R. 413. The current system allows for the appointment of a Special Advocate who sees the classified evidence (in the U.K. nomenclature: “closed material”) and then makes arguments on behalf of the other party without disclosing any information to that party.

[U.K. nomenclature includes “Public Interest Immunity” (PII) rather than “State Secrets Privilege” (SSP), “closed material” rather than “classified evidence,” and “Special Advocate” (SA). The concept of “gisting” corresponds to the summarizing of classified information contemplated in CIPA.]

The U.K. procedure is further described and refined in the following two cases. Compare these cases to the occasional call for a special court to handle terrorism or national security cases in the United States.

AL RAWI v. SECURITY SERVICE
[2010] EWCA Civ 482 (UK Ct. Appeals)

LORD NEUBERGER:
This is the judgment of the court, to which all members have contributed.

THE ISSUE TO BE RESOLVED

[1] The issue on this appeal is whether Silber J was right to conclude, as the Defendants contend, that it is open to a court in England and Wales, in the absence of statutory authority, to order a closed material procedure for part (or, conceivably, even the whole) of the trial of a civil claim for damages in tort and breach of statutory duty.

[2] A closed material procedure has been defined by agreement between the parties, at least for present purposes, as being:

“A procedure in which: (a) a party is permitted: (i) to comply with his obligations for disclosure of documents, and (ii) to rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to other parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as ‘closed material’); and (b) disclosure of such closed material
is made to special advocates and, where appropriate, the court; and (c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest. For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.”

[3] The “party” referred to in that definition will almost always be the Crown or some arm or emanation of the Government. A special advocate is a lawyer with rights of audience, who has been cleared by the Government to see closed material, and who is appointed by the Attorney General in a case where closed material is involved. The special advocate’s role was succinctly described by Sedley LJ in *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015, para 17, as being “to test by cross-examination, evidence and argument the strength of the case for non-disclosure”, and, if the case for non-disclosure is made out, “to do what he or she can to protect the interests of [the other party], a task which has to be carried out without taking any instructions [from the other party or his lawyers] on any aspect of the closed material”. Thus, although the special advocate is engaged to protect the interests of the other party in the litigation, he or she does not actually act for, and cannot normally take instructions from, that other party.

[4] The issue is raised as one of general principle. However, perhaps unsurprisingly, Ms Rose QC and Mr Fordham QC, for the Claimants, and Mr Crow QC for the Defendants, have relied in the course of their submissions on the facts of the instant case as an example of why the issue should be resolved in the way that they respectively contend. A very brief summary of the factual background to this appeal is therefore appropriate.

**THE FACTUAL BACKGROUND**

[5] The six Claimants are individuals who were detained at various locations, including the United States detention facility in Guantanamo Bay. Although their claims are, of course, not identical, it is sufficient for present purposes to say that they each contend that, as a result of their respective detention and alleged mistreatment while detained, they have valid claims under at least some of the following heads, namely, false imprisonment, trespass to the person, conspiracy to injure, torture, breach of contract, negligence, misfeasance in public office, and breach of the Human Rights Act 1998. The Claimants brought their claims by issuing claim forms, together with fully pleaded Particulars of Claim, in the Queen’s Bench Division of the High Court. The Defendants to the claims are the Security Service, the Secret Intelligence Service, the Foreign and Commonwealth Office, the Home Office, and (in a representative capacity) the Attorney General (“the Defendants”). The claims are based on the contention that, to put it in broad terms, each of the Defendants caused or contributed towards the alleged detention, rendition and ill treatment of each of the Claimants.
The Defendants then filed an “Open Defence”, in which, while admitting that each of the Claimants was detained and transferred, the Defendants put in issue any mistreatment which the Claimants allege, and, in any event, denied any liability in respect of any of the Claimants’ detention or alleged mistreatment. Paragraph 1 of the Open Defence explains that “there is material not pleaded in this Open Defence which [the Defendants] wish to contend that the court should consider but which cannot be included without causing real harm to the public interest”. In para 3, it is stated that there is a “Defence”, which “pleads more fully to the Particulars of Claim and includes material the disclosure of which the Defendants consider would cause real harm to the public interest”. Paragraph 3 goes on to explain that “[w]here a paragraph of the Particulars of Claim is not pleaded to in this Open Defence, it will have been the subject of pleading in the Defence” and that “some of the pleadings in this Open Defence are more fully pleaded to [sic] or qualified by statements in the Defence”.

The Open Defence makes it clear that the Defendants wish the case to proceed throughout on the basis that it includes what may be characterised as a closed element. Thus, at least on the face of it, during the period prior to trial, there would be parallel open and closed pleadings, parallel open and closed disclosure and inspection, parallel open and closed witness statements, and parallel open and closed directions hearings. Similarly, at the trial, the hearing would be in part open and in part closed, no doubt with some documents and witnesses being seen and heard in the open hearing and others in the closed hearing (and some witnesses conceivably giving evidence at both hearings). After trial, there would be a closed judgment and an open judgment, which would be in substantially the same terms save that those passages in the closed judgment which referred to or relied on closed material would be excluded from the open judgment. In relation to the open elements of the proceedings, the Claimants would be represented by their solicitors and counsel in the normal way; however, in relation to the closed elements, their interests would, in effect, be protected by special advocates.

The Claimants object to the course proposed by the Defendants, contending for the normal approach in cases where the Crown or Government emanations are parties and consider that they have relevant documents in respect of which public interest immunity (“PII”) might be claimed, and where the Defendants could call relevant oral evidence which might not be able to be given on public interest grounds.

The Defendants accept that the PII procedure is well established, but they contend that the course which they favour is permissible in any civil case, at least before a judge sitting without a jury, and that it may well be appropriate in this case, where there is a very substantial amount of potentially relevant material which may be subject to PII. The evidence filed on behalf of the Defendants suggests that there may be as many as 250,000 potentially relevant documents, and that PII may have to be at least considered in respect of as many as 140,000 of them. It is also said by the Defendants that the PII exercise may take three years before the relevant Ministers can conscientiously decide in
respect of which documents PII can properly be claimed. The effort, cost, and
delay involved in such an exercise, argue the Defendants, may well justify a
different approach, such as that presaged by the Open Defence.

[10] The issue came before Silber J, and he decided that, as a matter of
principle, it was open to the court to order a closed material procedure in relation

SUMMARY OF CONCLUSION

[11] We have concluded that we should allow this appeal, and that we should
say firmly and unambiguously that it is not open to a court in England and
Wales, in the absence of statutory power to do so or (arguably) agreement
between the parties that the action should proceed on such a basis, to order a
closed material procedure in relation to the trial of an ordinary civil claim, such
as a claim for damages for tort or breach of statutory duty.

[12] The primary reason for our conclusion is that, by acceding to the
Defendants’ argument, the court, while purportedly developing the common law,
would in fact be undermining one of its most fundamental principles. In addition,
even if it would otherwise be a legitimate development of the common law, it
would be neither permissible in the light of the Civil Procedure Rules (“CPR”)
nor practical, in terms of effective case management or costs management, to
adopt the Defendants’ proposals.

[13] We propose to develop these points in turn, and then to deal with the
cases on which the Judge relied to justify the contrary conclusion. However,
before doing so, it is convenient to identify some relevant basic principles of
common law, to expand a little on the well established practice and procedure
involved when PII is claimed by the Crown, and to explain the basis for the more
recent closed material procedure.

PRINCIPLES WHICH ARE INVOLVED IN THIS CASE

[14] Under the common law, a trial is conducted on the basis that each party
and his lawyer, sees and hears all the evidence and all the argument seen and
heard by the court. This principle is an aspect of the cardinal requirement that
the trial process must be fair, and must be seen to be fair; it is inherent in one
of the two fundamental rules of natural justice, the right to be heard (or audi
alteram partem, the other rule being the rule against bias or nemo iudex in causa
sua). As the Privy Council said in the context of a hearing which resulted in the
dismissal of a police officer:

“[i]f the right to be heard is to be a real right which is worth anything,
it must carry with it a right in the accused man to know the case which
is made against him. He must know what evidence has been given and
what statements have been made affecting him: and then he must be
given a fair opportunity to correct or contradict them” - Kanda v

All ER 461, para 5, Lord Bingham of Cornhill traced the history of the common
law “right to be confronted by one’s accusers”. He explained how this right, having been abrogated during the 16th century by the court of the Star Chamber, had been effectively established during the 17th century. He relied in particular on a civil case, *Duke of Dorset v Girdler* (1720) 2 Eq Cas Abr 181, Prec Ch 531, 532. In the following paragraph, he identified a couple of common law exceptions to the right, namely “dying declarations and statements part of the *res gestae*”, and certain statutory exceptions. He then explained that the right was one which was enshrined in the Constitutions of various common law jurisdictions, including the United States and New Zealand. Turning to the specific issue before the House, Lord Bingham said that, although he appreciated the strong practical case for granting anonymity to prosecution witnesses in certain cases, he rejected the contention that the courts should sanction such a course, emphasising:

“That the right to be confronted by one’s accusers is a right recognised by the common law for centuries, and it is not enough if counsel sees the accusers if they are unknown to and unseen by the Defendant”

[16] Another fundamental principle of our law is that a party to litigation should know the reasons why he won or lost, so that a judge’s decision will be liable to be set aside if it contains no, or even insufficient, reasons. As Lord Phillips MR explained in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409, para 16, “justice will not be done if it is not apparent to the parties why one has won and the other has lost”.

[17] A further fundamental common law principle is that trials should be conducted in public, and that judgments should be given in public. The importance of the requirement for open justice was emphasised by the House of Lords in *Scott v Scott* [1913] AC 417, 82 LJJP 74, [1911-13] All ER Rep 1 and *A-G v Leveller Magazine* [1979] AC 440, 449H-450B, [1979] 1 All ER 745, 143 JP 260. It was recently discussed by Lord Judge CJ in *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, paras 38-39, where he made two points. First, “[t]he public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law”. Secondly, that:

“That in litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself.”

[18] Connected to these fundamental principles are two other rules developed by the common law. First, a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent’s case in advance, so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments for trial. Secondly, a party in civil litigation should be informed of the relevant documents in the control of his opponent, through the medium of what is now called disclosure; this helps ensure that neither party is unfairly taken
by surprise, and that the court reaches the right result, as neither party is able to rely on a selection of documents which presents the court with a misleading picture.

[21] At least in the case of some of these principles, the common law has long accepted that there can be exceptions. Thus, in Scott Viscount Haldane LC, while affirming, and applying, the open justice principle, made it clear that a court could sit in private where “justice could not be done at all if it had to be done in public”, immediately went on to say, the court considering the issue “must treat it as one of principle, and as turning, not on convenience, but on necessity”.

PUBLIC INTEREST IMMUNITY

[22] Similarly, in relation to disclosure, the courts have long recognised that some documents, while relevant, even crucial, to the issues between the parties, may be immune from disclosure on various public interest grounds. Thus, there is legal professional privilege (based on the public interest of people being able to seek legal advice) and “without prejudice” privilege (based on the public interest in parties settling their disputes), and, as already mentioned and particularly relevant for present purposes, there is PII.

[23] PII has become particularly significant since s 28 of the Crown Proceedings Act 1947 removed the Crown’s exemption from discovery in civil proceedings, while expressly recognising PII. The disclosure exercise where PII may be involved potentially involves three stages, before the court is involved.

[24] First, the relevant Minister (or his lawyers) must decide whether the documentary material in question is relevant to the proceedings in question – *i.e.* that the material should, in the absence of PII considerations, be disclosed in the normal way. Secondly, the Minister must consider whether there is a real risk that it would harm the national interest if the material was placed in the public domain. The third step is for the Minister to balance the public interests for and against disclosure. If the decision is, that the balance comes down against disclosure, then the Minister states, in a PII certificate, that it is in the public interest that the material be withheld.

[25] As decided in Conway [1968] AC 910 and explained in Wiley [1995] 1 AC 274, it is then for the court to weigh, as Lord Simon of Glaisdale put it, “the public interest which demands that the evidence be withheld . . . against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material”, and if “the former public interest is held to outweigh the latter, the evidence cannot in any circumstances be admitted”. On the other hand, if the court concludes that the latter public interest prevails, then the document must be disclosed, unless the Government concedes the issue to which it relates – see per Lord Hoffmann in Secretary of State for the Home Department v MB [2007] UKHL 46, [2008] 1 AC 440, para 51, [2008] 1 All ER 657. As Lord Woolf said in Wiley [1995], even where material cannot be disclosed, it may be possible, and therefore appropriate, to summarise the relevant effect of the material, to produce relevant extracts, or even to produce the material “on a restricted basis”.
[26] When conducting the balancing exercise between the two competing aspects of the public interest, the court may, in an appropriate case, inspect the material before reaching a conclusion on the issue. In such a case, it has become accepted practice, at least where it is appropriate and fair to do so, for special advocates to be appointed to assist the court on the issue of whether the Crown’s claim for PII should be upheld. As Lord Bingham of Cornhill explained in the criminal case of *R v H* [2004] UKHL 3, [2004] 1 All ER 1269, even though there is “little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate” in such a case:

“novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure the protection of a criminal Defendant’s right to a fair trial.”

**THE CLOSED MATERIAL PROCEDURE**

[27] In relation to certain classes of case, the legislature has made further encroachments into these principles. Private hearings and judgments are statutorily mandated in many family and Court of Protection proceedings, as recently discussed in *A v Independent News and Media Ltd* [2010] EWCA Civ 343. More relevantly for present purposes, statute has mandated what has come to be known as a closed material procedure in certain specified circumstances. Two well known examples are to be found in Sch 1 to the Terrorism Act 2005, which deals with control orders, and Sch 7 to the Counter-Terrorism Act 2008, which is concerned with financial restriction proceedings (the latter of which is considered in our judgments in *Bank Mellat v HM Treasury* [2010] EWCA Civ 483, which we are handing down today).

[28] Paragraph 4 of Sch 1 to the 2005 Act requires rules of court to be made to deal with control order proceedings. By virtue of para 4(2)(b) of Sch 1 to the 2005 Act, such rules may make provision for proceedings to be conducted “in the absence of any person, including a relevant party to the proceedings or his legal representative”. This has resulted in Civil Procedure Rule (CPR) Pt 76, which contains detailed provisions dealing, for instance, with “Hearings in private”, “Appointment of a special advocate”, “Modification of the general rules of evidence and disclosure”, “Closed material” and “Judgments”. CPR 76.2 provides that “the overriding objective [of the rules] must be read and modified and given effect in a way which is compatible with the duty” imposed on the court to “ensure that information is not disclosed contrary to the public interest”.

[29] Closed material procedures are also mandated in other tribunals by legislation. Thus, there is r 6 of the Parole Board Rules 2004, which specifically enables the Board to consider material which should be “withheld from the prisoner on the ground that its disclosure would adversely affect national security, the prevention of disorder or crime, or the health or welfare of the prisoner”, as discussed in *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, para 55, [2006] 1 All ER 39. Also, r 54(2) of the Employment Tribunals Regulations permits a tribunal, if it considers it to be expedient in the interests of national security, to order, inter alia, that the whole or part of any proceedings
before it are conducted in private, that the Claimant is excluded from the whole or part of the proceedings and that all or part of the tribunal’s reasoning is kept secret (and which we consider in our judgments handed down today in \textit{Tariq v The Home Office} [2010] EWCA Civ 462.

\textbf{THE OBJECTION TO THE CLOSED MATERIAL PROCEDURE IN PRINCIPLE}

[30] In our view, the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary civil claim, unless (perhaps) all parties to the claim agree otherwise. At least so far as the common law is concerned, we would accept the submission that this principle represents an irreducible minimum requirement of an ordinary civil trial. Unlike principles such as open justice, or the right to disclosure of relevant documents, a litigant’s right to know the case against him and to know the reasons why he has lost or won is fundamental to the notion of a fair trial.

[31] A private hearing in an individual case, with all litigants and their legal representatives present, cannot be said to involve a denial of justice in that case. It is contrary to the public interest that trials should be conducted in private, but, at least absent special circumstances, it could not normally be suggested that any litigant risks suffering an injustice in the conduct or outcome of a particular case simply because the trial takes place in private, although he may of course have cause for complaint if he cannot publicise the contents of the evidence, argument or judgment in the case.

[32] A litigant’s right to disclosure of documents is not a fundamental right in the same way as the right to know the evidence and argument presented to the judge and the reasons for the judge’s decision. Quite apart from this, if PII, legal professional privilege or “without prejudice” privilege is claimed in respect of a relevant document, the trial process itself is not impugned, as it is still fair: all parties are in the same position in that none of them can rely on the document. That cannot be said where the trial is conducted partly, let alone wholly, through a closed material procedure.

[33] Different considerations may apply where the proceedings do not only concern the interests of the parties to the litigation, but they also have a significant effect on a vulnerable third party, or where a wider public interest is engaged. Thus, where the case directly impinges on the interests of a child, it may be justifiable for the court to see a document which is not seen by the parties to the proceedings.

[37] We accept, of course, that the court has inherent jurisdiction to develop the common law so far as its procedures are concerned. However, in our opinion, the course proposed by the Defendants in this case would involve not merely altering the rules of evidence: it would involve altering what Lord Denning called “the ordinary law, of the land”, namely (for the reasons already explained) fundamental principles of the law of England and Wales.
[38] We would respectfully echo Lord Bingham’s approval of, and reliance on, two observations of Lord Shaw of Dunfermline in *Scott* [1913]. Lord Shaw said that “[t]here is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of the judges themselves”, and that “[t]he policy of widening the area of secrecy is always a serious one, but this is for Parliament, and those to whom the subject has been consigned by Parliament to consider”. Those observations were made by Lord Shaw in relation to hearings held in private, and cited by Lord Bingham in relation to concealing from a party (but not from his legal advisers) the identity of witnesses giving evidence in public. They surely apply with even greater force to the suggestion that the common law should permit ordinary civil claims not merely to be conducted in private, but in the absence of a party and his legal advisers. As Lord Brown of Eaton-under-Heywood ringingly observed in *Davis* [2008] 1 AC 1128, para 66, “It is the integrity of the judicial process which is at stake here. This must be safeguarded and vindicated whatever the cost.”

[39] Lord Bingham said in *Roberts* [2005] 2 AC 738, para 30, that if Parliament “intends that a tribunal shall have power to depart from, ordinary rules of procedural fairness, it legislates to confer such power in clear and express terms and it requires that subordinate legislation regulating such departures should be the subject of Parliamentary control. It follows this practice even where the security of the nation is potentially at stake”.

[40] The fact that a closed material procedure is adopted when the court is considering whether or not to give effect to a PII certificate, even where the issue arises in ordinary civil litigation (or in criminal proceedings), is nothing to the point. The issue at such a hearing is essentially *ex parte*: it is whether the material in question is immune from disclosure and inspection on the ground that the public interest would be harmed by its release into the public sphere. Further, the issue at such a hearing necessarily concerns material which at least arguably should not be shown to the other party, so that material is the very subject matter of the hearing: that is not true in a case where the material may be relevant, even very important, to the issue or subject matter of the hearing. Even more importantly for present purposes, the hearing is not the trial of the action (or the prosecution): it is merely concerned with an interlocutory matter ahead of the trial, and is bound to result in the material either being available for use in the litigation (or at the criminal trial) by both parties or by neither party.

**THE EFFECT OF THE CIVIL PROCEDURE RULES**

[41] Even if it was, as a matter of principle, open to the court to adopt a closed material procedure in an ordinary civil claim in the absence of all parties consenting, it seems to us that, in the light of the existence and terms of the CPR, there would be no jurisdiction to do so. This conclusion is reinforced when one turns to consider the existence and terms of the legislation which permits the court to adopt a closed material procedure.

[48] Again, there may be necessary exceptions where the very subject matter of the hearing is material which should, or arguably should, not be shown to the
other party, as in the PII procedure itself. In such a case, it is, as a matter of
inevitability, necessary to have a closed material procedure. It is not a question
of desirability or convenience: the hearing simply could not occur, as a matter of
inevitable logic, other than on a closed basis. In an ordinary civil claim, that is
not the position. In any event, and crucially, the closed procedure would not be
in connection with, let alone part of, the trial, but would be part of the disclosure
process.

PRACTICAL CONSIDERATIONS

[49] Although we are asked to determine the preliminary issue as a matter of
principle, rather than determining whether a closed material procedure could be
adopted in this case, it is helpful to consider what are said by the Defendants to
be the potential advantages of adopting a closed material procedure. Mr Crow
submits that there would be two potential advantages. The first is that, in an
appropriate case, such a procedure would be more likely to achieve a fair result,
because the court would be able to rely at trial on relevant material whose
disclosure would, if the PII procedure was adopted, be excluded from the trial
process altogether. The second advantage is said to be that, at least in cases such
as the present, the PII procedure would be unmanageable in practice, and
adopting a closed material procedure would be the only way of bringing the case
to trial economically and expeditiously.

[50] There is obvious attraction in the submission that the court should have
power to order a closed material procedure hearing in a case in which it is
satisfied that justice would be more likely to be served by adopting such a
procedure. However, even putting to one side the objections in principle to the
closed material procedure, the submission begs the important practical question
as to how the court would be able to satisfy itself that adopting such a procedure
would be more likely to achieve a fair result.

[The process of examining the material to determine whether it should be
disclosed is time-consuming regardless of who does it. If the Government wishes
to claim PII, then it does the review. Under the proffered “closed material”
procedure, it would try to shift some of that to the Special Advocate (SA).]

[56] While considering practical considerations, it is helpful to stand back and
consider not merely whether justice is being done, but whether justice is being
seen to be done. If the court was to conclude after a hearing, much of which had
been in closed session, attended by the Defendants, but not the Claimants or the
public, that for reasons, some of which were to be found in a closed judgment
that was available to the Defendants, but not the Claimants or the public, that
the claims should be dismissed, there is a substantial risk that the Defendants
would not be vindicated and that justice would not be seen to have been done.
The outcome would be likely to be a pyrrhic victory for the Defendants, whose
reputation would be damaged by such a process, but the damage to the
reputation of the court would in all probability be even greater.

[57] The contention that the Defendants’ proposed procedure should not be
adopted is reinforced by recent observations of the Joint Committee on Human
Rights on Counter-Terrorism Policy and Human Rights (Sixteenth Report):
Annual Renewal of Control Orders Legislation (HL Paper 64 HC 395). In para 15 of the report, the Committee referred to the fact they had previously “maintained an open mind” as to whether “the control orders regime can be made to operate in a way which is compatible with the requirements of basic fairness which are inherent in both the common law and art 6 ECHR”, and then said that its “assessment now, in the light of five years’ experience of the operation of the system, is that the current regime is not capable of ensuring the substantial measure of procedural justice that is required”. It is fair to add that the Committee went on to suggest that “fundamental reforms” were needed, which suggests that the closed material procedure might be made to work more fairly. It is also right to add that, subject to its inherent limitations, the special advocate system enjoys a high degree of confidence among the judiciary, as Maurice Kay LJ says in Tariq [2010] EWCA Civ 462, para 32. However, it seems to us that if a regime, which is statutorily authorised in certain classes of case, has been litigated and considered in many cases and is subject to detailed statutory rules, but cannot be guaranteed to ensure procedural justice, that is another reason why the common law should refuse to adopt such a regime.

CONCLUDING REMARKS

[68] We are conscious that in some cases, where evidence which is relevant, or even vital, to the interests of one of the parties (often the Crown, but sometimes not), limiting the procedure to the classic PII exercise can lead to unfairness, and can even result in what may appear to most people to be the wrong outcome, because the exercise will often result in important evidence being withheld. However, even where a PII claim is upheld in respect of material, the effect can often be mitigated by summarising its relevant effect, producing relevant extracts, or even producing it “on a restricted basis”. More generally, the evidential rules of exclusion, for instance in relation to material which attracts legal professional privilege or “without prejudice” privilege, will often be to increase the risk of a “wrong” outcome. But that is a risk inherent in any legal system with rules, and indeed it is inevitable in any system with human involvement.

[69] It is nonetheless tempting to accept that there may be the odd exceptional ordinary civil claim, where the closed material procedure would be appropriate. “Never say never” is often an appropriate catchphrase for a judge to have in mind, particularly in the context of common law, which is so open to practical considerations, and in relation to civil procedure, where experience suggests that unpredictability is one of the few dependable features. However, this is one of those cases where it is right for the court to take a clear stand, at least in relation to ordinary civil proceedings. Quite apart from the fact that the issue is one of principle, it is a melancholy truth that a procedure or approach which is sanctioned by a court expressly on the basis that it is applicable only in exceptional circumstances nonetheless often becomes common practice.

[70] The importance of civil trials being fair, the procedures of the court being simple, and the rules of court being clear are all of cardinal importance. It would, in our view, be wrong for judges to introduce into ordinary civil trials a procedure which:
(a) cuts across absolutely fundamental principles (the right to a fair trial and the right to know the reasons for the outcome), initially hard fought for and now well established for over three centuries,

(b) is hard, indeed impossible, to reconcile satisfactorily with the current procedural rules, the CPR,

(c) is for the legislature to consider and introduce, as it has done in certain specific classes of case, where it considers it appropriate to do so,

(d) complicates a well-established procedure for dealing with the problem in question, namely the PII procedure, and

(e) is likely to add to the uncertainty, cost, complication and delay in the initial and interlocutory stages of proceedings, the trial, the judgment, and any appeal.

[71] We leave open the question of whether a closed material procedure can properly be adopted, in the absence of statutory sanction, in an ordinary civil claim, such as the present, where all the parties agree, or in a civil claim involving a substantial public interest dimension (ie where the judge is not simply sitting as an arbiter as between the parties). Both principle and the authorities relied on below seem to us to suggest that a different conclusion may well be justified in such cases, albeit only in exceptional circumstances, but that is an issue which should be considered as and when it arises.

HOME OFFICE v. TARIQ

MAURICE KAY LJ:

[1] This is another case about closed material procedure and the use of special advocates (SAs). They first entered our lexicon of civil procedure, albeit without the present nomenclature, in the Special Immigration Appeals Act 1997, legislation which was prompted by Chahal v United Kingdom (1996) 23 EHRR 413, 1 BHRC 405. Since then they have been deployed in other proceedings, both civil and criminal, as exceptions to the fundamental principle of open justice. Today, this court, identically constituted, has handed down judgment in Al-Rawi and others v The Security Service and others [2010] EWCA Civ 482 in which we held that a court does not have the power to order a closed material procedure in relation to a civil claim for damages. The first issue in the present case is whether an Employment Tribunal (ET) has such a power. If it does, the second issue is whether Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28, [2009] 3 All ER 643, [2009] 3 WLR 74 applies in this context so as to require the Home Office to provide a gist of the closed material upon which it seeks to rely to the employee and his legal representatives in the ET proceedings.

[2] The factual background can be briefly stated. Mr Tariq commenced employment with the Home Office in April 2003 as an immigration officer. He received the necessary security clearance. However, in August 2006 he was suspended from duty due to national security concerns and on 20 December 2006
all levels of security clearance were withdrawn from him. He was told that this was based on his close association with individuals suspected of planning to mount terrorist attacks and that it was considered that association with such individuals might put him at risk of their attempting to exert influence on him to abuse his position as an immigration officer. An internal appeal against the withdrawal of his security clearance was dismissed. He remains suspended.

[3] The events which triggered the suspicion were the arrests on 10 August 2006 of Mr Tariq’s brother and cousin in the course of an investigation into a suspected plot to mount a terrorist attack on transatlantic flights. The brother was released without charge. The cousin, Tanveer Hussain, was charged, prosecuted and eventually convicted. He is now serving a sentence of life imprisonment for conspiracy to murder.

[4] Mr Tariq is a Muslim of Asian/Pakistani ethnic origin. He commenced proceedings in the ET in March 2007 claiming that his suspension and the withdrawal of his security clearance were acts of direct or indirect discrimination on the grounds of race and/or religion. There has yet to be a substantive hearing in the ET. The last three years have been taken up with a procedural dispute about whether a closed material procedure and a SA should be deployed (as the Home Office contends but Mr Tariq opposes) and, if so, whether AF(No 3) imposes a gisting duty (as Mr Tariq contends but the Home Office opposes).

[5] By a determination dated 5 March 2009, the ET held that it had power to adopt a closed material procedure and that it would hear the closed evidence before the open evidence. Mr Tariq appealed to the Employment Appeal Tribunal (EAT). Between the decision of the ET and the hearing of the EAT, AF(No 3) was decided in the House of Lords on 10 June 2009. AF(No 3) was conditioned by the Strasbourg case of A v United Kingdom (2009) 49 EHRR 29 in which judgment was delivered on 19 February 2009 - a month after the hearing in the ET in the present case and shortly before the ET promulgated its decision. The EAT upheld the decision of the ET that the closed material procedure is lawful and appropriate. However, it concluded that, in the light of AF(No 3), art 6 of the ECHR entitled Mr Tariq to be provided with the allegations being made against him in sufficient detail to enable him to give instructions to his legal representatives so that those allegations can be effectively challenged.

[6] Now, in this court, the Home Office appeals on the AF(No 3) point and Mr Tariq cross-appeals on the point of principle as to whether a closed material procedure is lawful in the ET. Logically, that is the first issue. In addition, there is a continuing issue as to whether (assuming that a closed material procedure is lawful) the ET was correct about the sequencing of the evidence.

**THE STATUTORY FRAMEWORK**

[7] Whereas Al-Rawi fell to be decided in a statutory vacuum, there is a statutory framework in relation to ET proceedings which provides for a closed material procedure and the appointment of a SA in a national security case. The case for Mr Tariq is that the statutory provisions offend both EU law and art 6 of the ECHR. At this point, it is appropriate simply to set out the statutory provisions.
The Employment Tribunals Rule 54(1) provides:

“A Minister of the Crown . . . may, if he considers it expedient in the interests of national security, direct a tribunal or Employment Judge by notice to the Secretary to - (a) conduct proceedings in private for all or part of particular Crown employment proceedings; (b) exclude the Claimant from all or part of particular Crown employment proceedings; (c) exclude the Claimant’s representatives from all or part of particular Crown employment proceedings; (d) take steps to conceal the identity of a particular witness in particular Crown employment proceedings.”

[Rule] 8 provides for the appointment of a SA by the Attorney General:

“to represent the interests of the Claimant in respect of those parts of the proceedings from which: (a) any representative of his is excluded; (b) both he and his representative are excluded; or (c) he is excluded, where he does not have a representative.”

Broadly speaking, a SA in an ET is in the same position as a SA in the Special Immigration Appeals Commission or in control order proceedings in the Administrative Court.

In the present case, on 15 February 2008 the Regional Employment Judge made an order under r 54(2) for the exclusion of Mr Tariq and his representatives from any part of the proceedings when closed evidence was being adduced, for the appointment of a SA and for the entirety of the proceedings to be held in private. Mr Tariq raises no issue on appeal about the ET hearing being private.

ISSUE 1: THE LAWFULNESS OF CLOSED MATERIAL PROCEDURE

ECHR Art 6

[Tariq argues] that the closed material procedure contained in the domestic Regulations fundamentally contravenes [ECHR] art 6. In my judgment, this submission, in its fullest form, is unsustainable. The closed material procedures prescribed by or under the Special Immigration Appeals Commission Act 1997 and the Prevention of Terrorism Act 2005, far from being inherently non-compliant with art 6, are sanctioned in principle by decisions of the Strasbourg Court. The 1997 Act was a domestic response to Chahal, in which the court put its imprimatur on the closed material procedure prescribed in Canada. It stated (at para 131):

“. . . in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.”

Indeed from Chahal to A v United Kingdom in 2009 the focus has been not on any inherent incompatibility of a closed material procedure with art 6 but on
the safeguards which art 6 requires a closed material procedure to include. I shall have to return to such safeguards when I address Issue 2.

[25] Any use of a closed material procedure is of course exceptional and requires justification. It is common ground that the procedure must be necessary, in the sense of directed to a proper social objective and no more restrictive than is required to meet that objective; and it must be sufficiently counterbalanced with appropriate protections. It is well established that the protection of national security and public safety can necessitate in that sense a closed material procedure (see A and its domestic progeny AF (No 3)) and that effective counterbalancing factors can be found in scrutiny by an independent court or tribunal and the use of SAs. Subject to a novel and more detailed critique of the domestic SA system advanced by Mr Allen, it seems to me that it is not inherently incompatible with art 6 for a domestic statute to prescribe or enable the use of a closed material procedure in the interests of national security.

[26] [Counsel for Tariq] is constrained to concede that deployment of SAs under the Special Immigration Appeals Commission Act and the Prevention of Terrorism Act has survived scrutiny in the domestic appellate courts and in Strasbourg, subject to the point I shall deal with as Issue 2. However, his submission is that there are aspects of the system that have not been considered in the existing jurisprudence and he invites reappraisal by reference to them. He points to the fact that SAs are appointed by the Attorney General who is also the Government’s principal legal adviser; that they are supported by a unit within the Treasury Solicitor’s Department, who acts for the Home Office in this and similar cases; that this gives rise to a conflict of interest which would not be permitted in private litigation and indeed is prohibited without exceptions by Rule 3.01(1) of the Solicitors’ Code of Conduct; and that there are no published rules governing the role and conduct of an SA in an Employment Tribunal.

[27] In R v H [2004] UKHL 03, [2004] 2 AC 134, [2004] 1 All ER 1269 the House of Lords considered doubts which had been expressed about the system whereby the Attorney General appoints SAs, albeit in the context of criminal proceedings. Giving the unanimous opinion of the Appellate Committee, Lord Bingham said:

“In my opinion such doubt is misplaced. It is very well-established that when exercising a range of functions the Attorney General acts not as a minister of the Crown (although he is of course such) and not as the public officer with overall responsibility for the conduct of prosecutions, but as an independent, unpartisan guardian of the public interest in the administration of justice . . . . It is in that capacity alone that he approves the list of counsel judged suitable to act as Special Advocates . . . . Counsel roundly acknowledged the complete integrity shown by successive holders of the office in exercising this role, and no plausible alternative procedure was suggested.”

I consider that that effectively disposes of [the] point about the role of the Attorney General.
[28] The submission about conflict of interest in the office of the Treasury Solicitor [relies on a case] which was concerned with the effectiveness of “Chinese walls” in a private professional practice. Lord Millett said:

“an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc and dependent on evidence sworn for the purpose by members of staff engaged on the relevant work.”

[29] At the hearing of the present appeal, much of the argument on this issue proceeded by way of assertion and counter-assertion. This led us to invite post-hearing written amplification which we now have. The work of the Special Advocates’ Support Office (SASO) is described as follows.

[30] SASO was set up in 2006 in response to the recommendation of the Constitutional Affairs Select Committee. The functions of SASO are described in Special Advocates - A Guide to the Role of Special Advocates and the Special Advocates’ Support Office, which is published on the Treasury Solicitor’s Department’s website. It is SASO that provides an SA with formal instructions. It also provides legal and administrative support to SAs and acts as the librarian of closed case law for them. Although formal instructions originate with SASO, it has no input into decisions such as whether to appeal a closed adverse judgment or to open part of a closed judgment. Such matters are for the independent judgment of the SA alone. Although SASO is physically located within the premises of the Treasury Solicitor at One Kemble Street, it has an established Chinese wall arrangement and is for all practical purposes a separate entity. It comprises five lawyers and three administrators. Four lawyers and two administrators form the SASO (closed) team, the remaining lawyer and administrator forming the SASO (open) team. The open team does not have security clearance. It alone communicates with the litigant’s open representatives. Although other relevant litigation teams within the office of the Treasury Solicitor are able to share their facilities, this is not so in relation to SASO’s resources and facilities. It has completely separate document-handling, communication, storage and technology facilities. The four lawyers who carry out casework on cases in which the SAs are instructed do not carry out any work for any other part of the Treasury Solicitor’s office. The fifth lawyer is at Grade 6 level. He does not have his own casework in relation to cases involving SAs. His role is more supervisory and he has a wider line management role which extends to the general private law litigation team. He may report to the Attorney General but only in relation to open issues in matters where SAs are instructed. In addition, in order to protect the independence of the SASO team, there are conflict checks to ensure that other members of the private law team do not act in cases which are in any way relevant to SASO.

[32] The procedure is anomalous but it seems to me that it is in substantial conformity with Lord Millett’s test. I identify no error of law in the EAT’s conclusion that the system permits SAs to do their work effectively and independently and subjects them to proper scrutiny. If I may be permitted a subjective observation: if such problems were evident they would be expected to provoke adverse judicial comment but, in my experience, the system, although
inherently imperfect, enjoys a high degree of confidence among the judges who deal with cases of this kind on a regular basis. I am satisfied that the functioning of SASO does not infringe Mr Tariq’s art 6 right to a fair trial.

Conclusion On Issue 1

[33] For all these reasons I am satisfied that the cross-appeal asserting breaches of both EU and ECHR rights fails.

ISSUE 2: DOES AF (NO 3) APPLY TO THE PROCEEDINGS IN THE ET?

[34] Having held that the procedure for national security cases is not in essence unlawful by reference to EU law or art 6 of the ECHR, the next question is whether art 6 impacts upon the content of the Rules. This requires consideration of whether AF(No 3) and A v United Kingdom which informed it give rise to a disclosure obligation upon the Home Office over and above disclosure to a SA. The case for the Home Office, which was rejected by the EAT, is that AF(No 3) and A do not apply to a case such as this. It was the appeal of the Home Office on this issue which first brought the present case into this court.

[35] As is well-known, the factual context of A was the system of detention without charge or trial created by the Anti-Terrorism, Crime and Security Act 2001 and that of AF(No 3) was its replacement - the non-derogating control order - introduced by the Prevention of Terrorism Act 2005. The factual context of the present case is rather different. Whereas in A and AF(No 3), the State was seeking to interfere with the personal liberty of the detainee or controlee, either by deprivation or restriction, in the present case Mr Tariq is seeking to enforce his private right not to be subjected to discrimination, albeit that the alleged discriminator is a public authority.

[37] Baroness Hale said in Secretary of State for the Home Department v MB [2007] UKHL 46, [2008] 1 AC 440, (at para 57), [2008] 1 All ER 657:

“Of the fundamental importance of the right to a fair trial there can be no doubt. But there is equally no doubt that the essential ingredients of a fair trial can vary according to the subject-matter and nature of the proceedings.”

[43] It is important to keep in mind what is in issue here. It is not the closed material procedure per se. I have addressed that earlier in this judgment. Nor is it disclosure of particular documents. It is the right of a litigant to know the essence of the case against him, if necessary by “gisting”. The starting point, whether at common law or by reference to art 6, is that described by the Master of the Rolls in Al-Rawi: “Unlike principles such as open justice or the right to disclosure of relevant documents a litigant’s right to know the case against him . . . is fundamental to the fairness of a trial.”

[44] Although Parliament may prescribe special procedures in the interests of national security or for other reasons, and although in so doing it may curtail to an extent some characteristic of a fair trial without breaching the requirements of art 6 (as the earlier part of this judgment illustrates), the right of a litigant to
know the case against him is of particular importance because it is a prerequisite to his being able not merely to deny, but actually to refute (in so far as that is possible) that case. Whilst, in totality, the requirements of fairness may not be immutable, some of them are of more fundamental importance than others.

[45] I do not read AF (No 3) as authority for the proposition that, in other contexts, the right of a litigant to know the essence of the case against him will be readily eroded.

[46] Lord Hoffmann said (at para 70) “... the Strasbourg court has imposed a rigid rule that the requirements of a fair hearing are never satisfied if the decision is ‘based solely or to a decisive degree’ on closed material.”

[47] The emphasis of never is Lord Hoffmann’s. Lord Hope said (at para 84) “If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him.”

[48] Lord Scott expressed himself in more general terms, basing his proposition on the common law (at para 96):

“An essential requirement of a fair hearing is that a party against whom relevant allegations are made is given the opportunity to rebut the allegations. That opportunity is absent if the party does not know what the allegations are. The degree of detail ... must ... be sufficient to enable the opportunity to be a real one.”

[49] Lord Brown added (at para 116):

“In short, Strasbourg has decided that the suspect must always be told sufficient of the case against him to enable him to give ‘effective instructions’ to the special advocate, notwithstanding that sometimes this will be impossible and national security will thereby be put at risk.”

The emphasis of always is Lord Brown’s.

[50] In my judgment, the present case is not put in a different category by the fact that the Secretary of State is not seeking to subject Mr Tariq to a control order but is simply defending a discrimination claim. Nor is it to the point that the ultimate issue is discrimination rather than the accuracy of the closed material. The fact is that the Home Office is seeking to rely on closed material in its defence. Whilst the Rules permit that, it seems to me that the principle illustrated by AF(No 3) must apply to ensure that fairness to which Mr Tariq is entitled by art 6 and at common law. For present purposes, I am satisfied that the judgment of the EAT was correct on this point and that the appeal of the Home Office should be dismissed.
Chapter 6

TOWARD AN INTERNATIONAL LAW OF TERRORISM

§ 6.02 DEVELOPING INTERNATIONAL CRIMINAL LAW

page 380, modify the section heading to read:

[C] International Criminal Court and Other Tribunals

The ICTY began winding down its activities and handing cases off to the domestic courts of Bosnia-Herzegovina, which have been supported by international judges and prosecutors for the past several years. http://www.sudbih.gov.ba/?jezik=e

In addition to the ICTY and ICTR, international and hybrid (combining international and domestic personnel) courts have been established for Sierra Leone and Cambodia.

Special Court for Sierra Leone: http://www.sc-sl.org/

Extraordinary Chambers in the Courts of Cambodia: http://www.eccc.gov.kh/english/

With regard to the substance of International Humanitarian Law, the special courts have actively pursued a number of topics. The most important development has been with regard to the concept of Joint Criminal Enterprise (JCE), analogous to Anglo-American law of conspiracy. JCE now has three distinct components: JCE I (acting with others pursuant to a common plan), JCE II (contribute to the maintenance or essential functions of a criminal institution or system, such as a concentration or detention camp), JCE III (liability for crimes that were the natural and foreseeable consequence of implementing the common design). JCE III is similar to our felony murder rule in that a person can be held responsible for the acts of others who were carrying out the common design or plan, such as violence against a particular ethnic or cultural group. As such, it is controversial and the ECCC recently declared that it was not part of international customary law at the time of the Cambodian atrocities of the 1970’s.
Chapter 7

ALIENS AND ETHNIC PROFILING

§ 7.01 ALIEN DETENTIONS AND SECRECY

page 406, add to “Note on Material Witness Warrants”

ASHCROFT v. AL-KIDD, 510 U.S. __ (2011). The Supreme Court held that former Attorney General Ashcroft enjoyed immunity from civil damage actions for alleged misuse of the material witness procedure. “It is alleged that federal officials had no intention of calling most of these individuals as witnesses, and that they were detained, at Ashcroft's direction, because federal officials suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime.”

A damage action against federal officials, however, requires a “showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” Because the detention of a suspected terrorist collaborator was obtained with the prior approval of a judge based on probable cause of the need to detain, whatever “bad faith” there might have been among the persons seeking the warrant were deemed irrelevant. Detention was the judge’s decision based on objectively verifiable information, so the motives of the federal agents in seeking the order were not the cause of any harm to the detainee.

Needless to say, warrantless, “suspicionless intrusions pursuant to a general scheme,” are far removed from the facts of this case. A warrant issued by a neutral Magistrate Judge authorized al-Kidd's arrest. The affidavit accompanying the warrant application (as al-Kidd concedes) gave individualized reasons to believe that he was a material witness and that he would soon disappear.”

Excerpts from opinions of Ninth Circuit Judges regarding rehearing en banc in the Al-Kidd case are reproduced here because they add additional color and flavor to the issues, even though the plaintiff was a U.S. citizen rather than an alien.

AL-KIDD v. ASHCROFT
580 F.3d 949 (9th Cir. 2009),
rehearing denied, 598 F.3d 1129 (9th Cir. 2010)

The petition for rehearing en banc is DENIED.

M. SMITH, Circuit Judge, concurring in the denial of rehearing en banc:

I concur in the court’s decision not to rehear this case en banc, and write to respond to the dissents from that decision.

In March 2005, al-Kidd brought suit in the District of Idaho against former United States Attorney General John Ashcroft, the United States, two FBI agents, and a number of other government agencies and officers in their official
capacities. The suit sought damages for violations of al-Kidd’s rights under the Fourth and Fifth Amendments to the Constitution, and for a direct violation of 18 U.S.C. § 3144. Each of the defendants moved to dismiss. The district court denied the 12(b)(6) motion, rejecting the defendants’ claims of absolute and qualified immunity.

The facts alleged in al-Kidd’s complaint are chilling, and serve as a cautionary tale to law-abiding citizens of the United States who fear the excesses of a powerful national government, as did many members of the Founding Generation. Al-Kidd, born Lavoni T. Kidd, is a United States citizen, born in Wichita, Kansas, and raised in Seattle, Washington. He graduated from the University of Idaho, where he was a highly regarded running back on the university’s football team. He was married and had two young children.

While at the university, al-Kidd converted to Islam and changed his name to Abdullah al-Kidd. In the spring and summer of 2002, al-Kidd became a target of FBI surveillance conducted as part of a broad anti-terrorism investigation, aimed at Arab and Muslim men. Al-Kidd cooperated with the FBI on several occasions when FBI agents asked to interview him.

Previous to this time, Ashcroft and others operating at his direction, or in concert with him, had decided to undertake a novel use of 18 U.S.C. § 3144, the material witness statute. Specifically,

1. At a press briefing, Ashcroft stated that the government was taking steps “to enhance [its] ability to protect the United States from the threat of terrorist aliens” and that “[a]gressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks.”

2. In DOJ memoranda, Ashcroft stressed the need “to use . . . aggressive arrest and detention tactics in the war on terror” and to use “every available law enforcement tool” to arrest persons who “participate in, or lend support to, terrorist activities.”

3. A DOJ document entitled “Maintaining Custody of Terrorism Suspects” stated that “[i]f a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant.”

4. Michael Chertoff, who was head of the DOJ’s Criminal Division in the years immediately following the 9/11 attacks, stated of the material witness statute, “[i]t’s an important investigative tool in the war on terrorism . . . . Bear in mind that you get not only testimony -- you get fingerprints, you get hair samples -- so there’s all kinds of evidence you can get from a witness.”

5. Then White House Counsel, Alberto Gonzales, stated that: “In any case where it appears that a U.S. citizen captured within the United States may be an al Qaeda operative and thus may qualify as an enemy combatant, information on the individual is developed and numerous options are considered by the various relative agencies (the Department of Defense, CIA
and DOJ), including the potential for a criminal prosecution, detention as a material witness, and detention as an enemy combatant.”

What apparently interested the FBI in al-Kidd was his friendship with one Sami Omar Al-Hussayen, a Saudi national and a computer science student at the university, who was the webmaster of an Islamic proselyting website dedicated to, among other things, “[s]pread[ing] the correct knowledge of Islam; [and] [w]iden[ing] the horizons and understanding . . . among Muslims concerning different Islamic contemporary issues.”

In the spring of 2003, al-Kidd planned to fly to Saudi Arabia to study Arabic and Islamic law on a scholarship at a Saudi university. Knowing of his travel plans from their interviews with al-Kidd, and apparently implementing Ashcroft’s plan to aggressively use the material witness statute to detain “material witnesses,” two FBI agents swore out an affidavit that contained multiple falsehoods to secure a material witness warrant against al-Kidd, allegedly so he would be available to testify against Al-Hussayen (who had been indicted one month previously for visa fraud and making false statements to U.S. officials).

On March 16, 2003, al-Kidd, bearing a round-trip ticket to Saudi Arabia, arrived at Dulles International Airport in Virginia. While al-Kidd was at the ticket counter, FBI agents handcuffed him, perp-walked him through the airport, and drove him to a police station, where he was placed in a holding cell. After being detained and questioned there for hours, al-Kidd was transferred to a detention center in Alexandria, Virginia.

For the next sixteen days, al-Kidd was detained in three different detention centers, one in Alexandria, one in Oklahoma, and one in Idaho. He was housed in high-security units within these facilities, which were the same units used to detain terrorists, and other persons charged with, or convicted of, other serious crimes. While at the Alexandria facility, al-Kidd was required to remain in a small cell where he ate his meals, except for one or two hours a day. He was strip-searched, denied visits by family, and denied requests to shower. Each time he was transferred to a new facility, he was shackled and accompanied by other prisoners who had been charged with, or convicted of, serious crimes. After sixteen days, “al-Kidd was ordered released, on the conditions that he live with his wife at his in-laws’ home in Nevada, limit his travel to Nevada and three other states, report regularly to a probation officer and consent to home visits throughout the period of supervision, and surrender his passport.”

Not too long after al-Kidd’s arrest and detention, in congressional testimony regarding the government’s efforts to fight terrorism, FBI Director Robert Mueller boasted that the government had charged over 200 “suspected terrorists” with crimes. Mueller then offered the names of five individuals as examples of the government’s recent successes. Four of those persons had been criminally charged with terrorism-related offenses; the other was al-Kidd.

“After almost a year under these conditions, the court permitted al-Kidd to secure his own residence in Las Vegas, as al-Kidd and his wife were separating. He lived under these conditions for three more months before being released at
the end of Al-Hussayen’s trial, more than fifteen months after being arrested. In July 2004, al-Kidd was fired from his job. He alleges he was terminated when he was denied a security clearance because of his arrest. He is now separated from his wife, and has been unable to find steady employment. He was also deprived of his chance to study in Saudi Arabia on scholarship.”

Al-Kidd was arrested more than a year before the Al-Hussayen trial began. In their interviews with al-Kidd, the FBI never suggested, let alone demanded, that al-Kidd appear as a witness in the Al-Hussayen trial. While in custody, al-Kidd was repeatedly questioned about matters unrelated to Al-Hussayen’s alleged visa violations or false statements, but was never given a Miranda warning. “Al-Kidd was never called as a witness in the Al-Hussayen trial or in any other criminal proceeding” despite his assurances that he would be willing to be a witness. Importantly, al-Kidd was never charged with the commission of any crime, even though Mueller had boasted to Congress that the government had at that point in time charged over 200 “suspected terrorists” with crimes, and named al-Kidd individually, as well as four other persons who had been criminally charged with terrorism-related offenses, as evidence of the government’s recent successes.

Accepting al-Kidd’s factual allegations as true and drawing all inferences in his favor, we held that al-Kidd alleged sufficient facts in his complaint to state a claim against Ashcroft for creating, authorizing, implementing, and supervising a policy that violated al-Kidd’s Fourth Amendment right against unreasonable searches and seizures. In doing so, we determined Ashcroft was not entitled to absolute or qualified immunity because he served an investigative function in connection with the challenged policy, which violated al-Kidd’s clearly established constitutional rights. We also held that al-Kidd alleged sufficient facts in his complaint to state a claim that Ashcroft directly violated the material witness statute by his own personal conduct. Accordingly, we affirmed the district court’s decision, allowing al-Kidd’s case to proceed against Ashcroft beyond the pleading stage.

Contrary to what our dissenting colleague suggests, we did not “effectively declar[e] the material witness statute unconstitutional.” Judge O’Scannlain accuses the majority of holding that the Constitution “invalidates arrests authorized by the statute,” and therefore, the statute is unconstitutional to the extent it authorizes arrests such as the one in this case. The material witness statute, however, does not authorize arrests like the one in this case.

Here, the statute was not used to secure the testimony of a material witness, but rather to detain and interrogate a criminal suspect. Indeed, al-Kidd contends that the federal government enforced a policy sanctioning the use of the constitutionally-sound material witness statute for an end entirely outside the scope of the statute — criminal investigation. Therefore, we did not address the validity of the material witness statute, and we unequivocally stated that the decision “does nothing to curb the use of the material witness statute for its stated purpose.” We treated “only the misuse of the statute,” and concluded that when the statute” is not being used for its stated purpose, but instead for the
purpose of criminal investigation,” the statute cannot be the basis for authorizing the government’s conduct.

The doctrine of qualified immunity seeks to ensure that governmental officials have “fair notice” that their specific actions violate a constitutional right. “It is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness [of the defendants’ actions] was apparent in light of preexisting law.” Accepting the factual allegations in al-Kidd’s complaint as true, and drawing all inferences in his favor, we determined that in light of the well-established Fourth Amendment principles in place at the time of al-Kidd’s arrest, Ashcroft had a fair warning that the policy he authorized and encouraged was unconstitutional. Under Beck v. Ohio, Ashcroft knew that an arrest of a criminal suspect is constitutional only if at the time of the arrest, there is probable cause that the arrestee has committed or is committing the offense justifying the arrest.

Only after we considered those well-established Fourth Amendment principles did we address a timely district court decision featuring a factual scenario closely analogous to that faced by al-Kidd. In United States v. Awadallah, Awadallah, like al-Kidd, was detained as a “material witness” for over two weeks in high-security prisons across the country, where he was kept in solitary confinement, shackled, strip-searched, and denied family contact. 202 F. Supp. 2d 55, 58 (S.D.N.Y. 2002). We recognized that the district court’s statements in Awadallah were merely dicta, and that ultimately Awadallah was charged with criminal offenses. Nevertheless, the facts at issue in Awadallah were so closely analogous to those in al-Kidd that we deemed them relevant to the discussion, especially in light of our court’s admonition to consider all relevant decisional law.

We did not stake the existence of the clearly established right in this case on the district court’s statements in Awadallah. Rather, the district court’s comments in Awadallah were unsurprising and entirely consistent with the long-established Fourth Amendment principles upon which we principally relied for our holding. Thus, we properly included a reference to Awadallah in considering whether al-Kidd had a clearly established right in March 2003.

Lastly, Judge O’Scanannlain misreads the majority’s decision as holding that a cabinet-level official may be personally liable for actions taken by his subordinate alone. To the contrary, the holding fully complies with the Court’s instruction in Ashcroft v. Iqbal, that “a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” Al-Kidd was not required to allege that Ashcroft actually authorized the specific warrant for al-Kidd, or any alleged misrepresentations or omissions contained therein. Under Iqbal, al-Kidd had to “plead sufficient factual matter to show that [Ashcroft] adopted and implemented the detention policies at issue” not for some neutral, lawful reason but for an unlawful purpose.
O’SCANNLAIN, Circuit Judge, joined by KOZINSKI, Chief Judge, and KLEINFELD, GOULD, TALLMAN, CALLAHAN, BEA and IKUTA, Circuit Judges, dissenting from the denial of rehearing en banc:

The majority holds that a former Attorney General of the United States may be personally liable for promulgating a policy under which his subordinates took actions expressly authorized by law. Judge Bea’s dissent from the panel decision clearly and ably describes the several legal errors the panel makes in reaching this startling conclusion. For my part, I write to express my concern at the scope of this decision. First, the majority holds that al-Kidd’s detention under a valid material witness warrant violated his clearly established constitutional rights – a conclusion that effectively declares the material witness statute unconstitutional as applied to al-Kidd. Second, the majority holds that a cabinet-level official may be personally liable for actions taken by his subordinates alone. Because of the gratuitous damage this decision inflicts upon orderly federal law enforcement, I must respectfully dissent from our refusal to rehear this case en banc.

§ 7.02 DETENTIONS AND ETHNIC PROFILING

add at page 416:

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). Plaintiff alleged violations of constitutional rights from having been singled out for questioning in the post-9/11 investigation based on his ethnicity, followed by mistreatment at the hands of jailers in the Manhattan Detention Center, and brought a Bivens claim for damages against various federal officials, including FBI Director Mueller and Attorney General Ashcroft. The Supreme Court held that a claim for damages needed to be plausible, that the complaint needed sufficient factual matter from which to infer that the specific defendants adopted and implemented the detention policies not for a neutral investigative reason, but for the purpose of discriminating on account of race, religion, or national origin. The facts in the complaint did not “nudge the claims of invidious discrimination across the line from conceivable to plausible.”
Chapter 8

THE MILITARY OPTION

Note on reorganizing Chapter 8:

§ 8.03 will deal with military detentions at both Guantanamo and other locales. § 8.04 will highlight only the law to be applied by military commissions. § 8.05 will deal with domestic executive detentions and the arguments for loosened standards in terrorism cases. Thus, the new Table of Contents will be as follows:

§ 8.01 DOMESTIC ROLE OF THE MILITARY (unchanged)
§ 8.02 MILITARY TRIBUNALS IN U.S. HISTORY (unchanged)
§ 8.03 MILITARY DETENTIONS (all new)
  [A] The 2004 Cases
  [B] Guantanamo Detention Revisited
  [C] Habeas Corpus in Iraq and Afghanistan
§ 8.04 GUANTANAMO: MILITARY TRIBUNALS AND CONGRESS (small addition)
§ 8.05 DOMESTIC EXECUTIVE DETENTIONS (small addition)

§ 8.03 MILITARY DETENTIONS

The clearest example of departure from peacetime norms in the “war on terrorism” is the military detention without trial of a U.S. citizen arrested by the FBI on U.S. soil and accused of planning to engage in a terrorist act on U.S. soil. His name is Jose Padilla, and he was held in the Navy brig at Charleston, South Carolina, while habeas corpus proceedings ground along for four years until he was finally tried and convicted in an ordinary civilian federal court trial (ordinary except for the skimpiness of the evidence against him). See Padilla v. Hanft, p. 152 infra.

Another U.S. citizen held under slightly different circumstances was Yaser Hamdi, who was picked up in Afghanistan in early 2002 at the same time and place as John Walker Lindh. Unlike Lindh, however, Hamdi was held in military custody in the U.S. Following the opinion of the U.S. Supreme Court below, he agreed to renounce U.S. citizenship and was expatriated to Saudi Arabia.

And then there were the roughly 700 persons of various nationalities held at Guantanamo Bay, most of whom were captured in Afghanistan but some of whom were captured in various other places under different circumstances. Many of those were captured in Bosnia-Herzegovina after engaging in mujahadin actions during the 1990's conflict there.
In all three instances, the Government claimed that it could detain these persons as “enemy combatants” pursuant to the war powers of the President. In June 2004, the Supreme Court decided all three cases, rejecting the Government’s underlying premise of near-unreviewable executive power.

The concepts involved in the “law of war” were introduced in Chapter 3. In short, the “law of war” applies at least during periods of “armed conflict” such that would trigger the Geneva Conventions. Under the law of war, a combatant in an international armed conflict possesses combat immunity for acts that do not violate the law of war, while a civilian would have no combat immunity unless he or she can fall within the definitions of eligibility for POW status under article 4 of Geneva III (GPW). And the law of war generally would not require recognition of combat immunity for violent acts during a period of insurrection or internal armed conflict. These concepts form part of the background for the question of how to deal with violent actors who are not connected with any entity claiming the status of a nation or state.

The administration argument for a hybrid status of “unlawful enemy combatant” has run into the counter argument that the law allows for two types of person, either of whom might be found to be guilty of war crimes or other illegal conduct. Members of armed forces or organized militias would be considered combatants while everyone else would be a civilian. It is important to realize in this construct that neither civilian nor combatant status protects anyone from allegations of illegal conduct – in fact, a civilian who takes up arms (“taking active part in hostilities”) would have no combat immunity for violent acts.

[A] The 2004 Cases


Hamdi was a U.S. citizen whose family moved to Saudi Arabia when he was a child. He was picked up by invading forces in Afghanistan, initially taken to Guantanamo, and then (when it was discovered that he was a U.S. citizen) transferred to the naval bring in Norfolk, Virginia. In response to a habeas corpus petition filed by his father in the U.S., the Government argued that

1. the President has inherent authority to imprison those he considers to be “enemy combatants,”

2. nevertheless, Congress has authorized executive detentions in the Authorization to Use Military Force (AUMF),

3. habeas corpus jurisdiction is not available for enemy combatants, and

4. even if a habeas court has jurisdiction, there has been no violation of rights because no due process was required.

When his habeas corpus petition reached the Supreme Court, the Court responded in somewhat fractured fashion. Four Justices (O’Connor joined by three others) believed that habeas corpus jurisdiction was appropriate, that the
AUMF authorized detentions, but that due process required at least an opportunity for the detainee to “rebut the Government’s factual assertions before a neutral decisionmaker.” Two Justices (Souter joined by Ginsburg) believed that the AUMF did not authorize detention, and two (Scalia joined by Stevens) believed that executive detention of citizens could not be constitutional. Justice Thomas thought detention was authorized and constitutionally valid.

As a result, the Court would have split 4-4 over whether detention could be authorized after a due process hearing, which would have left the Fourth Circuit’s opinion validating the detention in place. Therefore, Justices Souter and Ginsburg agreed to “join with the plurality in ordering remand on terms closest to those I would impose.”

Justice O’Connor (4 votes) first held that the AUMF authorized detentions by authorizing the President “to use ‘all necessary and appropriate force’ against ‘nations, organizations, or persons’ associated with the September 11, 2001 terrorist attacks.” This authorization was sufficient to override the Non-Detention Act, 18 U.S.C. § 4001(a), which was passed in the wake of the Japanese internment and states that “no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The plurality then held that due process required at least a minimal level of neutral review – although the Government’s interest in efficient demobilization of combatants was weighty, the personal interest in liberty triggered at least a right to be heard by a neutral decisionmaker. But the “Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.”

Justice Souter found that the AUMF was insufficiently precise to overcome the statutory prohibition of § 4001 but went along with the plurality to avoid a stalemate.

Justices Scalia and Stevens, in a duet not shared before or since, would have held that at least since the time of Blackstone executive detentions were not valid without some judicial process.

Notes and Questions following Hamdi

1. Hamdi was released from U.S. custody pursuant to an agreement with Saudi Arabian authorities to accept him into that country. Hamdi agreed to renounce U.S. citizenship, to reside in Saudi Arabia for at least 5 years, and to report any contacts from persons who he has reason to believe could be involved in hostile or terrorist actions.

2. The O’Connor plurality opinion is quite explicit that “individuals legitimately determined to be Taliban combatants” could be held without trial for the remainder of their lives if “active hostilities” continue so long. With four votes for that position coupled with Justice Thomas’ position, there seems to be a majority of the Court willing to countenance indefinite detention without trial under some circumstances. The plurality just requires a determination by a

3. Perhaps some slightly tongue-in-cheek examples would clarify the problem of judicial review over executive findings related to national security. If the government’s arguments for deference to the President were accepted, would there be anything to prevent the President from classifying a skinhead militant as an enemy combatant? If that worked, how about classifying a politically volatile dissident as an EC? If that worked, how about the President’s next election campaign opponent? Obviously, there must be a stopping point but it could be argued that the stopping point should be a matter for citizen or political action rather than judicial action. Which position carries the best message for the democratic process?

4. What is the definition of “enemy combatant” in the O’Connor scheme? If the example of citizen Haupt in the Quirin case means that a U.S. citizen arrested in the U.S. can be an enemy combatant, then can the executive declare any alleged terrorist to be an enemy combatant? What would be the standards for reviewing that determination? Justice O’Connor’s explanation of battlefield conditions says that the question is “the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States.” In what sense had Haupt “taken up arms” against the U.S.? Has any member of a terrorist organization “taken up arms” by engaging in a conspiracy to bomb either a military installation or a civilian target? Justice Scalia answers the Haupt example by pointing out that Haupt did not challenge his combatant status but that Hamdi did.

5. Perhaps the enemy combatant posture can be clarified by thinking of a range of persons and actions. At one extreme would be an Iraqi soldier in uniform wounded while firing a weapon at U.S. forces and then taken into custody. At the other extreme would be Jose Padilla, who was arrested by civilian authorities on U.S. soil while unarmed and having no more access to weapons than any other resident of the U.S. Where in this range of actions does a person become an enemy combatant?

a. uniformed soldier on field of battle

b. insurgent in civilian clothing firing weapon against uniformed invading force

c. insurgent attacking either military or civilian units allied with invading force

d. civilian attacking military installation on domestic soil of another country (the 9/11 plane flown into the Pentagon? does the target matter in this instance?)

e. civilian attacking civilian targets on soil of another country (the 9/11 planes flown into the WTC or almost any act of international terrorism)

f. civilian arrested on home soil allegedly intending to attack civilian targets (how distinguish Padilla from McVeigh?)

**RASUL v. BUSH, 542 U.S. 466 (2004).**

The many detainees at Guantanamo were addressed in a sampling of habeas petitions grouped together for purpose of certiorari. Justice Stevens wrote for a 6-3 majority holding that habeas corpus review would extend to provide some level of review. The federal courts have personal jurisdiction over the military authorities who are the custodians, and there is nothing in the history of the Writ to preclude “a right to judicial review of the legality of Executive detentions in a territory over which the United States exercises plenary and exclusive jurisdiction” even without “ultimate sovereignty.” The arguably contrary precedent of *Eisentrager v. Johnson* was distinguished this way:

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

All the Court held was that the petitioners had access to the federal courts. With regard to the merits of their claims, the Court addressed a mere footnote (note 15):

Petitioners’ allegations – that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing – unquestionably describe “custody in violation of the Constitution or laws of the United States.”

Justice Scalia dissented on the ground that there was no law that would protect these persons, making a distinction between citizens and noncitizens, much as he did in *Hamdi*. On remand in these cases, or in ruling on any future habeas corpus petitions, what law will apply to determine whether a detainee in U.S. military custody is being held “in violation of the Constitution or laws” of the U.S.? Consider these possibilities:

**a. constitutional rights** – It is not clear that an alien held in federal custody outside the U.S. would have constitutional rights other than perhaps some rights regarding conditions of confinement, or perhaps the due process right to a determination of status similar to that accorded to Hamdi. In one of the cases reviewed in *Rasul*, the D.C. Circuit stated: “We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not. This much is at the heart of *Eisentrager*.**
If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty.” Al Odah v. United States, 355 U.S. App. D.C. 189 (D.C. Cir. 2003).

b. statutory rights – An alien seeking admission to the U.S. may have claims to statutory rights under the immigration laws. Are there any statutes protecting the interests of the Guantanamo detainees?

c. treaty rights – Are the Geneva Conventions self-executing or do they create rights on behalf of individuals? The Government argued in the lower courts that the Conventions created diplomatic remedies and not individual remedies, an argument addressed in Hamdan v. Rumsfeld.

d. customary international law – Professor Paust argues that both treaties and custom international law entitle a person to freedom from “arbitrary” detention, which implies some level of judicial review over the propriety of detention. Jordan J. Paust, Judicial Power to Determine the Status and Rights of Persons Detained Without Trial, 44 HARV. INT'L L.J. 503 (2003).

After the Supreme Court’s decision, proceedings with respect to the Guantanamo detainees split into three tracks:

a. Petitions for habeas corpus filed in various courts were transferred to the District of Columbia. Most were consolidated for initial motions.

b. The military established “Combatant Status Review Tribunals” (CSRT) at Guantanamo to make determinations on the status of each detainee, and Congress enacted the Detainee Treatment Act of 2005 to validate the CSRT’s.

c. Some detainees were brought before military commissions to answer charges of violations of the law of war. See Hamdan v. Rumsfeld, p. 555.

[B] Guantanamo Detention Revisited

At its peak, Guantanamo housed about 750 prisoners. By the first of 2008, there were less than 300 remaining and about a third of those were awaiting movement to some country willing to accept them. The rest have been released pursuant to findings that they were No Longer Enemy Combatants (NLEC) or Non Enemy Combatants (NEC).

The treatment of detainees at Guantanamo was the subject of criticism from the beginning but became intense after the disclosures of Abu Ghraib. Allegedly, it was at Guantanamo that some of the harsh treatment methods later employed at Abu Ghraib were developed. A number of released prisoners have recounted tales of serious torture and mistreatment of detainees.

David Hicks, an Australian who eventually pleaded guilty to material support charges and was returned to Australia, was released after completing his sentence on December 29, 2007. According to his father, Hicks pleaded guilty only to get out of Guantanamo and was concerned that other detainees were still being mistreated.

Meanwhile, criticisms of Guantanamo around the world have continued to build. The British Government has called the situation “unacceptable.” “The historic tradition of the United States as a beacon of freedom, liberty and of justice deserves the removal of this symbol” UK Told US Won’t Shut Guantanamo, BBC News (May 11, 2006), http://news.bbc.co.uk/1/hi/uk_politics/4760365.stm. The UN Committee against Torture, after criticizing the U.S. for aggressive interrogation methods, secret detentions, and extraordinary renditions, had this to say about Guantanamo:

22. The Committee, noting that detaining persons indefinitely without charge, constitutes per se a violation of the Convention, is concerned that detainees are held for protracted periods at Guantanamo Bay, without sufficient legal safeguards and without judicial assessment of the justification for their detention. (articles 2, 3 and 16) The State party should cease to detain any person at Guantanamo Bay and close this detention facility, permit access by the detainees to judicial process or release them as soon as possible, ensuring that they are not returned to any State where they could face a real risk of being tortured, in order to comply with its obligations under the Convention.


Colin Powell joined the chorus against Guantanamo in June 2007: “Essentially, we have shaken the belief the world had in America’s justice system by keeping a place like Guantanamo open and creating things like the military commission. We don’t need it and it is causing us far more damage than any good we get from it.” Colin Powell Says Guantanamo Should Be Closed, Reuters (June 10, 2007), http://www.reuters.com/article/topNews/idUSN1043646920070610?feedType=RSS

It is a bit difficult to categorize the detainees at Guantanamo. Some of the detainees are there on what Senator Arlen Specter has called flimsy hearsay, while others are there as part of groups that were radicalized dissidents in places such as East Tajikistan. In September 2006, 14 “high value detainees” were transferred from CIA custody to Guantanamo.


One of the most interesting transcripts is that of Khalid Sheikh Mohammed (KSM), the alleged mastermind of 9/11 and the uncle of Ramzi Yousef. In his formal statement, KSM claimed responsibility for 31 separate plots and actions
(he orally corrected the statement to say that he “shared” responsibility for one of the 31). All 31 statements began with the phrase “I was responsible for” except this one: “I decapitated with my blessed right hand the head of the American Jew, Daniel Pearl.” After the formal recitation of his claims, he offered these comments orally:

What I wrote here, is not I’m making myself hero, when I said I was responsible for this or that. But your are military man. You know very well there are language for any war. So, there are, we are when I admitting these things I’m not saying I’m not did it. I did it but this the language of any war. If America they want to invade Iraq they will not send for Saddam roses or kisses they send for a bombardment. This is the best way if I want. If I’m fighting for anybody admit to them I’m American enemies. For sure, I’m American enemies. . . .

So when we made any war against America we are jackals fighting in the nights. I consider myself, for what you are doing, a religious thing as you consider us fundamentalist. So, we derive from religious leading that we consider we and George Washington doing same thing. As consider George Washington as hero. . . .

So when we say we are enemy combatant, that right. We are. But I’m asking you again to be fair with many Detainees which are not enemy combatant. Because many of them have been unjustly arrested. Many, not one or two or three. . . .

But if you and me, two nations, will be together in war the others are victims. This is the way of the language. You know 40 million people were killed in World War One. Ten million kill in World War. You know that two million four hundred thousand be killed in the Korean War. So this language of the war. Any people who, when Usama bin Laden say I’m waging war because such such reason, now he declared it. But when you said I’m terrorist, I think it is deceiving peoples. Terrorists, enemy combatant. All these definitions as CIA you can make whatever you want. . . .

If now we were living in the Revolutionary War and George Washington he being arrested through Britain. For sure he, they would consider him enemy combatant. But American they consider him as hero. This right the any Revolutionary War they will be as George Washington or Britain. . . .

This is why the language of any war in the world is killing. I mean the language of the war is victims. I don’t like to kill people. I feel very sorry they been killed kids in 9/11. What I will do? This is the language. Sometime I want to make great awakening between American to stop foreign policy in our land. . . .

Killing is prohibited in all what you call the people of the book, Jews, Judaism, Christianity, and Islam. You know the Ten Commandments very well. The Ten Commandments are shared between all of us. We all are
serving one God. Then now kill you know it very well. But war language also we have language for the war. You have to kill. . . .

The American have human right. So, enemy combatant itself, it flexible word. So I think God knows that many who been arrested, they been unjustly arrested. Otherwise, military throughout history know very well. They don’t want war will never stop. War start from Adam when Cain he killed Abel until now. It’s never gonna stop killing people. . . .

The Defense Department provided a list in May 2006 of all detainees who had been through Guantanamo as of that time:


Following Rasul, most of the habeas corpus petitions that were pending in the D.C. District Court were consolidated before Judge Green, who issued a decision upholding some of the petitioners’ claims in January 2005. In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005). Judge Leon retained his cases and issued a contrary decision 12 days before Judge Green released hers. Judge Leon concluded that due process did not apply to aliens detained outside the United States (relying on Eisentrager), that the Geneva Conventions were not self-executing, and that international law provided no cognizable rights to the detainees. Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005).

Judge Green, however, held

that the petitioners have stated valid claims under the Fifth Amendment and that the CSRT procedures are unconstitutional for foiling to comport with the requirements of due process. Additionally, the Court holds that Taliban fighters who have not been specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal have also stated valid claims under the Third Geneva Convention. Finally, the Court concludes that the remaining claims of the petitioners must be denied.

Judge Green began by noting the lack of connection between many of the detainees and anything resembling a battlefield:

In addition to belligerents captured during the heat of war in Afghanistan, the U.S. authorities are also detaining at Guantanamo Bay pursuant to the AUMF numerous individuals who were captured hundreds or thousands of miles from a battle zone in the traditional sense of that term. For example, detainees at Guantanamo Bay who are presently seeking habeas relief in the United States District Court for the District of Columbia include men who were taken into custody as far away from Afghanistan as Gambia, Zambia, Bosnia, and Thailand. Some have already been detained as long as three years while others have been captured as recently as September 2004. Although many of these individuals may never have been close to an actual battlefield and may never have raised conventional arms against the United States or its allies, the military nonetheless has deemed them detainable as “enemy combatants” based on conclusions that they have ties to al Qaeda or other terrorist organizations.
She also injected some levity into the difficulty that detainees would have in proving their innocence without knowing the evidence against them:

Tribunal President: Mustafa, does that conclude your statement?

Detainee: That is it, but I was hoping you had evidence that you can give me. If I was in your place – and I apologize in advance for these words – but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that.

[Everyone in the Tribunal room laughs.]

Tribunal President: We had to laugh, but it is okay.

Detainee: Why? Because these are accusations that I can’t even answer. I am not able to answer them. You tell me I am from Al Qaida, but I am not an Al Qaida. I don’t have any proof to give you except to ask you to catch Bin Laden and ask him if I am a part of Al Qaida. To tell me that I thought, I’ll just tell you that I did not. I don’t have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.

The laughter reflected in the transcript is understandable, and this exchange might have been truly humorous had the consequences of the detainee’s “enemy combatant” status not been so terribly serious and had the detainee’s criticism of the process not been so piercingly accurate.

The Khalid opinion dealt with the question of constitutional rights and habeas jurisdiction by separating the two, holding that Rasul did not impliedly overrule Eisentrager. By contrast, the In re Detainees opinion engages in an extensive review of cases before and after Eisentrager to determine that due process applies at least to aliens detained on soil under the exclusive control of the U.S.

For the Supreme Court to hold in Rasul that the courts have power to entertain the petition, did it necessarily hold that there must be some rights that pertain to the petitioners? How can there be jurisdiction in the absence of a claim of right? This is the conundrum presented by Justice Stevens’ footnote 15. If Khalid is correct, then what is the point of Rasul?

Judge Leon held that detention was authorized by Congress but then found that the petitioners could not identify any rights protecting them under federal law. With regard to treaty law, they “conceded at oral argument that [the Geneva] Convention does not apply because these petitioners were not captured in the ‘zone of hostilities . . . in and around Afghanistan.’” The combination of these two holdings seems to place the alleged terrorist within authorization to use executive force but outside the protection of any law other than international law. Of course, the Geneva Conventions are not the only source of international law but the petitioners seem to have made no arguments under international other than with respect to their conditions of confinement. Is the court correct
to view allegations regarding conditions of confinement as failing to state a claim regarding the basis of confinement?

What about Professor Paust’s argument that customary international law requires some level of judicial review to prevent “arbitrary” confinement? Do other countries have no interest in our imprisoning their citizens? Can the U.S. run around the world apprehending and detaining anyone we want with no controls? Khalid raises what may be the ultimate question to which this course is addressed: what law applies in dealing with terrorists around the world. Is it permissible for U.S. agents to apprehend suspects wherever they may be found? without probable cause? to imprison them without due process? to shoot them?

BOUMEDIENE v. BUSH
553 U.S. 723 (2008)

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit.

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), that provides certain procedures for review of the detainees’ status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore § 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C. § 2241(e) (Supp. 2007), operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.

I

Under the Authorization for Use of Military Force (AUMF), the President is authorized “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

In Hamdi v. Rumsfeld, 542 U.S. 507 (2004), five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan “for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President
After Hamdi, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were “enemy combatants,” as the Department defines that term. A later memorandum established procedures to implement the CSRTs. The Government maintains these procedures were designed to comply with the due process requirements identified by the plurality in Hamdi.

Interpreting the AUMF, the Department of Defense ordered the detention of these petitioners, and they were transferred to Guantanamo. Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda. Each petitioner appeared before a separate CSRT; was determined to be an enemy combatant; and has sought a writ of habeas corpus in the United States District Court for the District of Columbia.

The first actions commenced in February 2002. The District Court ordered the cases dismissed for lack of jurisdiction because the naval station is outside the sovereign territory of the United States. The Court of Appeals for the District of Columbia Circuit affirmed. We granted certiorari and reversed, holding that 28 U.S.C. § 2241 extended statutory habeas corpus jurisdiction to Guantanamo. [Rasul v. Bush, 542 U.S. 466 (2004).] The constitutional issue presented in the instant cases was not reached in Rasul.

After Rasul, petitioners’ cases were consolidated and entertained in two separate proceedings. In the first set of cases, Judge Richard J. Leon granted the Government’s motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas corpus action. In the second set of cases Judge Joyce Hens Green reached the opposite conclusion, holding the detainees had rights under the Due Process Clause of the Fifth Amendment. See Khalid v. Bush, 355 F. Supp. 2d 311, 314 (DC 2005); In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 464 (DC 2005).

While appeals were pending from the District Court decisions, Congress passed the DTA. Subsection (e) of § 1005 of the DTA amended 28 U.S.C. § 2241 to provide that “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.” Section 1005 further provides that the Court of Appeals for the District of Columbia Circuit shall have “exclusive” jurisdiction to review decisions of the CSRTs.

In Hamdan v. Rumsfeld, 548 U.S. 557, 576-577 (2006), the Court held this provision did not apply to cases (like petitioners’) pending when the DTA was enacted. Congress responded by passing the MCA, which again amended § 2241. The text of the statutory amendment is discussed below. (Four Members of the Hamdan majority noted that “[n]othing prevent[ed] the President from returning to Congress to seek the authority he believes necessary.” (BREYER, J.,
concurring). The authority to which the concurring opinion referred was the authority to “create military commissions of the kind at issue” in the case. Nothing in that opinion can be construed as an invitation for Congress to suspend the writ.

Petitioners’ cases were consolidated on appeal, and the parties filed supplemental briefs in light of our decision in *Hamdan*. The Court of Appeals’ ruling, 375 U.S. App. D.C. 48, 476 F.3d 981 (D.C. Cir. 2007), is the subject of our present review and today’s decision.

The Court of Appeals concluded that MCA § 7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners’ habeas corpus applications; that petitioners are not entitled to the privilege of the writ or the protections of the Suspension Clause; and, as a result, that it was unnecessary to consider whether Congress provided an adequate and effective substitute for habeas corpus in the DTA.

II

As a threshold matter, we must decide whether MCA § 7 denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment. We hold the statute does deny that jurisdiction, so that, if the statute is valid, petitioners’ cases must be dismissed.

There is little doubt that the effective date provision applies to habeas corpus actions.

We acknowledge, moreover, the litigation history that prompted Congress to enact the MCA. In *Hamdan* the Court found it unnecessary to address the petitioner’s Suspension Clause arguments but noted the relevance of the clear statement rule in deciding whether Congress intended to reach pending habeas corpus cases. This interpretive rule facilitates a dialogue between Congress and the Court. If the Court invokes a clear statement rule to advise that certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text. If Congress amends, its intent must be respected even if a difficult constitutional question is presented.

If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan*’s holding that the DTA’s jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute; and we agree with its conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.

III

In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, *i.e.*, petitioners’ designation by the Executive Branch as enemy combatants, or their physical
location, i.e., their presence at Guantanamo Bay. The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation’s borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.

We begin with a brief account of the history and origins of the writ. Our account proceeds from two propositions. First, protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause. Second, to the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases.

A

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchical power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.

Magna Carta decreed that no man would be imprisoned contrary to the law of the land. Art. 39. Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. Holdsworth tells us, however, that gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled. 9 W. Holdsworth, A History of English Law 112 (1926) (hereinafter Holdsworth).

The development was painstaking, even by the centuries-long measures of English constitutional history. The early courts were considered agents of the Crown, designed to assist the King in the exercise of his power. Over time it became clear that by issuing the writ of habeas corpus common-law courts sought to enforce the King’s prerogative to inquire into the authority of a jailer to hold a prisoner.

Even so, from an early date it was understood that the King, too, was subject to the law. As the writers said of Magna Carta, “it means this, that the king is and shall be below the law.” 1 F. Pollock & F. Maitland, History of English Law 173 (2d ed. 1909); see also 2 Bracton on the Laws and Customs of England 33 (S. Thorne transl. 1968) (“The king must not be under man but under God and under the law, because law makes the king”). And, by the 1600’s, the writ was deemed less an instrument of the King’s power and more a restraint upon it.

Still, the writ proved to be an imperfect check. Even when the importance of the writ was well understood in England, habeas relief often was denied by the
courts or suspended by Parliament. Denial or suspension occurred in times of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them. [T]he Habeas Corpus Act of 1679, which later would be described by Blackstone as the “stable bulwark of our liberties,” 1 W. BLACKSTONE, COMMENTARIES *137 (hereinafter Blackstone), established procedures for issuing the writ; and it was the model upon which the habeas statutes of the 13 American Colonies were based.

This history was known to the Framers. It no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power. The Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty. Because the Constitution’s separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles.

That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Art. I, § 9, cl. 2.

B

The broad historical narrative of the writ and its function is central to our analysis, but we seek guidance as well from founding-era authorities addressing the specific question before us: whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation’s security, may assert the privilege of the writ and seek its protection.

To support their arguments, the parties in these cases have examined historical sources to construct a view of the common-law writ as it existed in 1789 – as have amici whose expertise in legal history the Court has relied upon in the past. The Government argues the common-law writ ran only to those territories over which the Crown was sovereign. Petitioners argue that jurisdiction followed the King’s officers. Diligent search by all parties reveals no certain conclusions. In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.

We know that at common law a petitioner’s status as an alien was not a categorical bar to habeas corpus relief. See, e.g., Sommersett’s Case, 20 How. St. Tr. 1, 80-82 (1772) (ordering an African slave freed upon finding the custodian’s return insufficient). We know as well that common-law courts entertained habeas petitions brought by enemy aliens detained in England – “entertained”
at least in the sense that the courts held hearings to determine the threshold question of entitlement to the writ.

As the Court noted in Rasul, common-law courts granted habeas corpus relief to prisoners detained in the exempt jurisdictions. But these areas, while not in theory part of the realm of England, were nonetheless under the Crown’s control. Petitioners and their amici further rely on cases in which British courts in India granted writs of habeas corpus to noncitizens detained in territory over which the Moghul Emperor retained formal sovereignty and control. The analogy to the present cases breaks down, however, because of the geographic location of the courts in the Indian example. The Supreme Court of Judicature (the British Court) sat in Calcutta; but no federal court sits at Guantanamo. The Supreme Court of Judicature was, moreover, a special court set up by Parliament to monitor certain conduct during the British Raj. That it had the power to issue the writ in nonsovereign territory does not prove that common-law courts sitting in England had the same power. If petitioners were to have the better of the argument on this point, we would need some demonstration of a consistent practice of common-law courts sitting in England and entertaining petitions brought by alien prisoners detained abroad. We find little support for this conclusion.

The Government argues, in turn, that Guantanamo is more closely analogous to Scotland and Hanover, territories that were not part of England but nonetheless controlled by the English monarch (in his separate capacities as King of Scotland and Elector of Hanover). Lord Mansfield can be cited for the proposition that, at the time of the founding, English courts lacked the “power” to issue the writ to Scotland and Hanover, territories Lord Mansfield referred to as “foreign.” But what matters for our purposes is why common-law courts lacked this power. Given the English Crown’s delicate and complicated relationships with Scotland and Hanover in the 1700’s, we cannot disregard the possibility that the common-law courts’ refusal to issue the writ to these places was motivated not by formal legal constructs but by what we would think of as prudential concerns. Even after the Act of Union, Scotland (like Hanover) continued to maintain its own laws and court system. Under these circumstances prudential considerations would have weighed heavily when courts sitting in England received habeas petitions from Scotland or the Electorate. Common-law decisions withholding the writ from prisoners detained in these places easily could be explained as efforts to avoid either or both of two embarrassments: conflict with the judgments of another court of competent jurisdiction; or the practical inability, by reason of distance, of the English courts to enforce their judgments outside their territorial jurisdiction.

In the end a categorical or formal conception of sovereignty does not provide a comprehensive or altogether satisfactory explanation for the general understanding that prevailed when Lord Mansfield considered issuance of the writ outside England. Blackstone put it as follows: “[A]s Scotland and England are now one and the same kingdom, and yet differ in their municipal laws; so England and Ireland are, on the other hand, distinct kingdoms, and yet in general agree in their laws.” This distinction, and not formal notions of
sovereignty, may well explain why the writ did not run to Scotland (and Hanover) but would run to Ireland.

Each side in the present matter argues that the very lack of a precedent on point supports its position. The Government points out there is no evidence that a court sitting in England granted habeas relief to an enemy alien detained abroad; petitioners respond there is no evidence that a court refused to do so for lack of jurisdiction.

Given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point.

IV

Drawing from its position that at common law the writ ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.

Guantanamo Bay is not formally part of the United States. And under the terms of the lease between the United States and Cuba, Cuba retains “ultimate sovereignty” over the territory while the United States exercises “complete jurisdiction and control.” Under the terms of the 1934 Treaty, however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base.

The United States contends, nevertheless, that Guantanamo is not within its sovereign control. This was the Government’s position well before the events of September 11, 2001. And in other contexts the Court has held that questions of sovereignty are for the political branches to decide.

Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government’s premise that de jure sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded. For the reasons indicated above, the history of common-law habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be inconsistent with our precedents and contrary to fundamental separation-of-powers principles.

A

The Court has discussed the issue of the Constitution’s extraterritorial application on many occasions. These decisions undermine the Government’s argument that, at least as applied to noncitizens, the Constitution necessarily stops where de jure sovereignty ends.

Fundamental questions regarding the Constitution’s geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories: Puerto Rico, Guam, and the Philippines – ceded to the United States by Spain at the conclusion of the Spanish-American War – and Hawaii – annexed by the United States in 1898. At this point Congress chose to
discontinue its previous practice of extending constitutional rights to the territories by statute.

In a series of opinions later known as the Insular Cases, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State. See De Lima v. Bidwell, 182 U.S. 1 (1901); . . . Dorr v. United States, 195 U.S. 138 (1904). The Court held that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace. Yet it took note of the difficulties inherent in that position.

Prior to their cession to the United States, the former Spanish colonies operated under a civil-law system, without experience in the various aspects of the Anglo-American legal tradition, for instance the use of grand and petit juries. At least with regard to the Philippines, a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory. The Court thus was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories.

Practical considerations likewise influenced the Court’s analysis a half-century later in Reid [v. Covert], 354 U.S. 1 (1957). The petitioners there, spouses of American servicemen, lived on American military bases in England and Japan. They were charged with crimes committed in those countries and tried before military courts, consistent with executive agreements the United States had entered into with the British and Japanese governments. Because the petitioners were not themselves military personnel, they argued they were entitled to trial by jury. [The Court in Reid agreed.]

Justice Black, writing for the plurality, contrasted the cases before him with the Insular Cases, which involved territories “with wholly dissimilar traditions and institutions” that Congress intended to govern only “temporarily.” Justice Frankfurter argued that the “specific circumstances of each particular case” are relevant in determining the geographic scope of the Constitution. And Justice Harlan, who had joined an opinion reaching the opposite result in the case in the previous Term, was most explicit in rejecting a “rigid and abstract rule” for determining where constitutional guarantees extend.

That the petitioners in Reid were American citizens was a key factor in the case and was central to the plurality’s conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States. But practical considerations, related not to the petitioners’ citizenship but to the place of their confinement and trial, were relevant to each Member of the Reid majority. And to Justices Harlan and Frankfurter (whose votes were necessary to the Court’s disposition) these considerations were the decisive factors in the case.

Practical considerations weighed heavily as well in Johnson v. Eisentrager, 339 U.S. 763 (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war. The prisoners were detained at Landsberg Prison in Germany
during the Allied Powers’ postwar occupation. The Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. It “would require allocation of shipping space, guarding personnel, billeting and rations” and would damage the prestige of military commanders at a sensitive time. In considering these factors the Court sought to balance the constraints of military occupation with constitutional necessities.

True, the Court in *Eisentrager* denied access to the writ, and it noted the prisoners “at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.” The Government seizes upon this language as proof positive that the *Eisentrager* Court adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause. We reject this reading for three reasons.

First, we do not accept the idea that the above-quoted passage from *Eisentrager* is the only authoritative language in the opinion and that all the rest is dicta.

Second, because the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. That the Court devoted a significant portion of [its opinion] to a discussion of practical barriers to the running of the writ suggests that the Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it.

Third, if the Government’s reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the *Insular Cases*’ (and later *Reid’s*) functional approach to questions of extraterritoriality. We cannot accept the Government’s view. Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus. Were that the case, there would be considerable tension between *Eisentrager*, on the one hand, and the *Insular Cases* and *Reid*, on the other. Our cases need not be read to conflict in this manner. A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the *Insular Cases, Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.

B

The Government’s formal sovereignty-based test raises troubling separation-of-powers concerns as well. The political history of Guantanamo illustrates the deficiencies of this approach. The United States has maintained complete and uninterrupted control of the bay for over 100 years. At the close of the Spanish-American War, Spain ceded control over the entire island of Cuba to the United States and specifically “relinquishe[d] all claim[s] of sovereignty . . . and title.” From the date the treaty with Spain was signed until the Cuban Republic was
established on May 20, 1902, the United States governed the territory “in trust” for the benefit of the Cuban people. And although it recognized, by entering into the 1903 Lease Agreement, that Cuba retained “ultimate sovereignty” over Guantanamo, the United States continued to maintain the same plenary control it had enjoyed since 1898. Yet the Government’s view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not “absolute and unlimited” but are subject “to such restrictions as are expressed in the Constitution.” Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court’s recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say “what the law is.”

These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

As we recognized in Rasul, the outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in Eisentrager. In addition to the practical concerns discussed above, the Eisentrager Court found relevant that each petitioner:

(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Based on this language from Eisentrager, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and
then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court’s assertion that they were “enemy alien[s].” In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager*, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution’s witnesses.

In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a “Personal Representative” to assist him during CSRT proceedings, the Secretary of the Navy’s memorandum makes clear that person is not the detainee’s lawyer or even his “advocate.” The Government’s evidence is accorded a presumption of validity. The detainee is allowed to present “reasonably available” evidence, but his ability to rebut the Government’s evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage. And although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings.

As to the second factor relevant to this analysis, the detainees here are similarly situated to the *Eisentrager* petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause. But there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008. Unlike its present control over the naval station, the United States’ control over the prison in Germany was neither absolute nor indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces. The Court’s holding in *Eisentrager* was thus consistent with the Insular Cases, where it had held there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely. Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.

As to the third factor, we recognize, as the Court did in *Eisentrager*, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas corpus proceedings may require expenditure of funds
by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned along side each other at various points in our history. See, e.g., Duncan v. Kahanamoku, 327 U.S. 304 (1946); Ex parte Milligan, 71 U.S. 2 (1866). The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims. And in light of the plenary control the United States asserts over the base, none are apparent to us.

It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. This Court may not impose a de facto suspension by abstaining from these controversies. The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.

V

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus. The Government submits there has been compliance with the Suspension Clause because the DTA review process in the Court of Appeals, provides an adequate substitute. Congress has granted that court jurisdiction to consider

(i) whether the status determination of the [CSRT] . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and
(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional. The parties before us have addressed the adequacy issue. While we would have found it informative to consider the reasoning of the Court of Appeals on this point, we must weigh that
against the harms petitioners may endure from additional delay. And, given there are few precedents addressing what features an adequate substitute for habeas corpus must contain, in all likelihood a remand simply would delay ultimate resolution of the issue by this Court.

We do have the benefit of the Court of Appeals’ construction of key provisions of the DTA. When we granted certiorari in these cases, we noted “it would be of material assistance to consult any decision” in the parallel DTA review proceedings pending in the Court of Appeals, specifically any rulings in the matter of Bismullah v. Gates. Although the Court of Appeals has yet to complete a DTA review proceeding, the three-judge panel in Bismullah has issued an interim order giving guidance as to what evidence can be made part of the record on review and what access the detainees can have to counsel and to classified information. See 378 U.S. App. D.C. 179, 501 F.3d 178 (CADC) (Bismullah I), reh’g denied, 378 U.S. App. D.C. 238, 503 F.3d 137 (CADC 2007) (Bismullah II). In that matter the full court denied the Government’s motion for rehearing en banc, see Bismullah v. Gates, 514 F.3d 1291 (CADC 2008) (Bismullah III). The order denying rehearing was accompanied by five separate statements from members of the court, which offer differing views as to scope of the judicial review Congress intended these detainees to have.

Under the circumstances we believe the costs of further delay substantially outweigh any benefits of remanding to the Court of Appeals to consider the issue it did not address in these cases.

A

Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred. This simply confirms the care Congress has taken throughout our Nation’s history to preserve the writ and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ’s protection but to expand it or to hasten resolution of prisoners’ claims.

In § 2241 Congress confirmed the authority of “any justice” or “circuit judge” to issue the writ. That statute accommodates the necessity for factfinding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for factfinding is superior to his or her own. By granting the Court of Appeals “exclusive” jurisdiction over petitioners’ cases, Congress has foreclosed that option. This choice indicates Congress intended the Court of Appeals to have a more limited role in enemy combatant status determinations than a district court has in habeas corpus proceedings. The DTA should be interpreted to accord some latitude to the Court of Appeals to fashion procedures necessary to make its review function a meaningful one, but, if congressional intent is to be respected, the procedures adopted cannot be as extensive or as protective of the rights of the detainees as they would be in a § 2241 proceeding. Otherwise there would have been no, or very little, purpose for enacting the DTA.

To the extent any doubt remains about Congress’ intent, the legislative history confirms what the plain text strongly suggests: In passing the DTA Congress did
not intend to create a process that differs from traditional habeas corpus process in name only. It intended to create a more limited procedure.

It is against this background that we must interpret the DTA and assess its adequacy as a substitute for habeas corpus.

B

We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to “the erroneous application or interpretation” of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained — though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. These are the easily identified attributes of any constitutionally adequate habeas corpus proceeding. But, depending on the circumstances, more may be required.

The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context. See *Mathews v. Eldridge*, 424 U.S. 319 (1976). Where relief is sought from a sentence that resulted from the judgment of a court of record, considerable deference is owed to the court that ordered confinement. Likewise in those cases the prisoner should exhaust adequate alternative remedies before filing for the writ in federal court. Both aspects of federal habeas corpus review are justified because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding. In cases involving state convictions this framework also respects federalism; and in federal cases it has added justification because the prisoner already has had a chance to seek review of his conviction in a federal forum through a direct appeal. The present cases fall outside these categories, however; for here the detention is by executive order.

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive’s power to detain.

To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which petitioners’ designation as enemy combatants became final. Whether one characterizes the CSRT process as direct review of the Executive’s battlefield determination that the detainee is
an enemy combatant – as the parties have and as we do – or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.

Petitioners identify what they see as myriad deficiencies in the CSRTs. The most relevant for our purposes are the constraints upon the detainee’s ability to rebut the factual basis for the Government’s assertion that he is an enemy combatant. As already noted, at the CSRT stage the detainee has limited means to find or present evidence to challenge the Government’s case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention. The detainee can confront witnesses that testify during the CSRT proceedings. But given that there are in effect no limits on the admission of hearsay evidence – the only requirement is that the tribunal deem the evidence “relevant and helpful” – the detainee’s opportunity to question witnesses is likely to be more theoretical than real.

The Government defends the CSRT process, arguing that it was designed to conform to the procedures suggested by the plurality in *Hamdi*. Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand. None of the parties in *Hamdi* argued there had been a suspension of the writ. Nor could they. The § 2241 habeas corpus process remained in place. Accordingly, the plurality concentrated on whether the Executive had the authority to detain and, if so, what rights the detainee had under the Due Process Clause. True, there are places in the *Hamdi* plurality opinion where it is difficult to tell where its extrapolation of § 2241 ends and its analysis of the petitioner’s Due Process rights begins. But the Court had no occasion to define the necessary scope of habeas review, for Suspension Clause purposes, in the context of enemy combatant detentions. The closest the plurality came to doing so was in discussing whether, in light of separation-of-powers concerns, § 2241 should be construed to forbid the District Court from inquiring beyond the affidavit Hamdi’s custodian provided in answer to the detainee’s habeas petition. The plurality answered this question with an emphatic “no.”

Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes’ words, to “cut through all forms and go to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.” Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant. This is so, as *Hayman* and *Swain* make clear, even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights. Were this not the case, there would have been no reason for the Court to inquire into the adequacy of substitute habeas procedures in *Hayman* and *Swain*. That the prisoners were
detained pursuant to the most rigorous proceedings imaginable, a full criminal trial, would have been enough to render any habeas substitute acceptable per se.

Although we make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal’s findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is “closed and accusatorial.” See Bismullah III, 514 F.3d at 1296 (Ginsburg, C. J., concurring in denial of rehearing en banc). And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government’s evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting. Here that opportunity is constitutionally required.

Consistent with the historic function and province of the writ, habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here. In two habeas cases involving enemy aliens tried for war crimes, In re Yamashita, 327 U.S. 1 (1946), and Ex parte Quirin, 317 U.S. 1 (1942), for example, this Court limited its review to determining whether the Executive had legal authority to try the petitioners by military commission. Military courts are not courts of record. And the procedures used to try General Yamashita have been sharply criticized by Members of this Court. We need not revisit these cases, however. For on their own terms, the proceedings in Yamashita and Quirin, like those in Eisentrager, had an adversarial structure that is lacking here.

The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage. We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.

C

We now consider whether the DTA allows the Court of Appeals to conduct a proceeding meeting these standards.

The DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify detention. This is troubling. Yet, for present purposes, we can assume
congressional silence permits a constitutionally required remedy. In that case it
would be possible to hold that a remedy of release is impliedly provided for. The
DTA might be read, furthermore, to allow the petitioners to assert most, if not
all, of the legal claims they seek to advance, including their most basic claim:
that the President has no authority under the AUMF to detain them indefinitely.
(Whether the President has such authority turns on whether the AUMF
authorizes – and the Constitution permits – the indefinite detention of “enemy
combatants” as the Department of Defense defines that term. Thus a challenge
to the President’s authority to detain is, in essence, a challenge to the
Department’s definition of enemy combatant, a “standard” used by the CSRTs
in petitioners’ cases.) At oral argument, the Solicitor General urged us to adopt
both these constructions, if doing so would allow MCA § 7 to remain intact.

The absence of a release remedy and specific language allowing AUMF
challenges are not the only constitutional infirmities from which the statute
potentially suffers, however. The more difficult question is whether the DTA
permits the Court of Appeals to make requisite findings of fact. The DTA enables
petitioners to request “review” of their CSRT determination in the Court of
Appeals; but the “Scope of Review” provision confines the Court of Appeals’ role
to reviewing whether the CSRT followed the “standards and procedures” issued
by the Department of Defense and assessing whether those “standards and
procedures” are lawful. Among these standards is “the requirement that the
conclusion of the Tribunal be supported by a preponderance of the evidence . . .
allowing a rebuttable presumption in favor of the Government’s evidence.”

Assuming the DTA can be construed to allow the Court of Appeals to review
or correct the CSRT’s factual determinations, as opposed to merely certifying
that the tribunal applied the correct standard of proof, we see no way to construe
the statute to allow what is also constitutionally required in this context: an
opportunity for the detainee to present relevant exculpatory evidence that was
not made part of the record in the earlier proceedings.

On its face the statute allows the Court of Appeals to consider no evidence
outside the CSRT record. In the parallel litigation, however, the Court of Appeals
determined that the DTA allows it to order the production of all “reasonably
available information in the possession of the U.S. Government bearing on the
issue of whether the detainee meets the criteria to be designated as an enemy
combatant,” regardless of whether this evidence was put before the CSRT. For
present purposes, we can assume that the Court of Appeals was correct that the
DTA allows introduction and consideration of relevant exculpatory evidence that
was “reasonably available” to the Government at the time of the CSRT but not
made part of the record. Even so, the DTA review proceeding falls short of being
a constitutionally adequate substitute, for the detainee still would have no
opportunity to present evidence discovered after the CSRT proceedings
concluded.

Under the DTA the Court of Appeals has the power to review CSRT
determinations by assessing the legality of standards and procedures. This
implies the power to inquire into what happened at the CSRT hearing and,
perhaps, to remedy certain deficiencies in that proceeding. But should the Court
of Appeals determine that the CSRT followed appropriate and lawful standards and procedures, it will have reached the limits of its jurisdiction. There is no language in the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings. This evidence, however, may be critical to the detainee’s argument that he is not an enemy combatant and there is no cause to detain him.

This is not a remote hypothetical. One of the petitioners, Mohamed Nechla, requested at his CSRT hearing that the Government contact his employer. The petitioner claimed the employer would corroborate Nechla’s contention he had no affiliation with al Qaeda. Although the CSRT determined this testimony would be relevant, it also found the witness was not reasonably available to testify at the time of the hearing. Petitioner’s counsel, however, now represents the witness is available to be heard. If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court. Even under the Court of Appeals’ generous construction of the DTA, however, the evidence identified by Nechla would be inadmissible in a DTA review proceeding. The role of an Article III court in the exercise of its habeas corpus function cannot be circumscribed in this manner.

By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete. In other contexts, e.g., in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims, similar limitations on the scope of habeas review may be appropriate. In this context, however, where the underlying detention proceedings lack the necessary adversarial character, the detainee cannot be held responsible for all deficiencies in the record.

We do not imply DTA review would be a constitutionally sufficient replacement for habeas corpus but for these limitations on the detainee’s ability to present exculpatory evidence. For even if it were possible, as a textual matter, to read into the statute each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so. To hold that the detainees at Guantanamo may, under the DTA, challenge the President’s legal authority to detain them, contest the CSRT’s findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress’ reasons for enacting it, cannot bear this interpretation. Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas corpus.

Although we do not hold that an adequate substitute must duplicate § 2241 in all respects, it suffices that the Government has not established that the detainees’ access to the statutory review provisions at issue is an adequate
substitute for the writ of habeas corpus. MCA § 7 thus effects an unconstitutional suspension of the writ. In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.

VI

A

In light of our conclusion that there is no jurisdictional bar to the District Court’s entertaining petitioners’ claims the question remains whether there are prudential barriers to habeas corpus review under these circumstances.

The Government argues petitioners must seek review of their CSRT determinations in the Court of Appeals before they can proceed with their habeas corpus actions in the District Court. As noted earlier, in other contexts and for prudential reasons this Court has required exhaustion of alternative remedies before a prisoner can seek federal habeas relief. Most of these cases were brought by prisoners in state custody and thus involved federalism concerns that are not relevant here. But we have extended this rule to require defendants in courts-martial to exhaust their military appeals before proceeding with a federal habeas corpus action.

The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law’s writs, including habeas corpus. The cases and our tradition reflect this precept.

In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way. Cf. Ex parte Milligan, 4 Wall., at 127 (“If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course”). Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts’ role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power.
The cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. These qualifications no longer pertain here. In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. The first DTA review applications were filed over a year ago, but no decisions on the merits have been issued. While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.

Our decision today holds only that the petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA § 7. Accordingly, both the DTA and the CSRT process remain intact. Our holding with regard to exhaustion should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. The Executive is entitled to a reasonable period of time to determine a detainee’s status before a court entertains that detainee’s habeas corpus petition. The CSRT process is the mechanism Congress and the President set up to deal with these issues. Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant’s habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status.

Although we hold that the DTA is not an adequate and effective substitute for habeas corpus, it does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent. Felker, Swain, and Hayman stand for the proposition that the Suspension Clause does not resist innovation in the field of habeas corpus. Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.

In the DTA Congress sought to consolidate review of petitioners’ claims in the Court of Appeals. Channeling future cases to one district court would no doubt reduce administrative burdens on the Government. This is a legitimate objective that might be advanced even without an amendment to § 2241. If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, the Government can move for change of venue to the court that will hear these petitioners’ cases, the United States District Court for the District of Columbia.
Another of Congress’ reasons for vesting exclusive jurisdiction in the Court of Appeals, perhaps, was to avoid the widespread dissemination of classified information. The Government has raised similar concerns here and elsewhere. We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees’ habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible.

These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.

***

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation’s present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

Our opinion does not undermine the Executive’s powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to
preserve constitutional values while protecting the Nation from terrorism. Cf. 
*Hamdan*, 548 U.S., at 636 (BREYER, J., concurring) (“[J]udicial insistence upon 
that consultation does not weaken our Nation’s ability to deal with danger. To 
the contrary, that insistence strengthens the Nation’s ability to determine – 
through democratic means – how best to do so”).

It bears repeating that our opinion does not address the content of the law 
that governs petitioners’ detention. That is a matter yet to be determined. We 
hold that petitioners may invoke the fundamental procedural protections of 
habeas corpus. The laws and Constitution are designed to survive, and remain 
in force, in extraordinary times. Liberty and security can be reconciled; and in 
our system they are reconciled within the framework of the law. The Framers 
decided that habeas corpus, a right of first importance, must be a part of that 
framework, a part of that law.

The determination by the Court of Appeals that the Suspension Clause and 
its protections are inapplicable to petitioners was in error. The judgment of the 
Court of Appeals is reversed. The cases are remanded to the Court of Appeals 
with instructions that it remand the cases to the District Court for proceedings 
consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER 
join, concurring.

I join the Court’s opinion in its entirety and add this afterword only to 
emphasize two things one might overlook after reading the dissents.

Four years ago, this Court in *Rasul v. Bush* held that statutory habeas 
jurisdiction extended to claims of foreign nationals imprisoned by the United 
States at Guantanamo Bay, “to determine the legality of the Executive’s 
potentially indefinite detention” of them. Subsequent legislation eliminated the 
statutory habeas jurisdiction over these claims, so that now there must be 
constitutionally based jurisdiction or none at all. Justice Scalia is thus correct 
that here, for the first time, this Court holds there is (he says “confers”) 
constitutional habeas jurisdiction over aliens imprisoned by the military outside 
an area of *de jure* national sovereignty. But no one who reads the Court’s opinion 
in *Rasul* could seriously doubt that the jurisdictional question must be answered 
the same way in purely constitutional cases, given the Court’s reliance on the 
historical background of habeas generally in answering the statutory question. 
Indeed, the Court in *Rasul* directly answered the very historical question that 
Justice Scalia says is dispositive; it wrote that “[a]pplication of the habeas 
statute to persons detained at [Guantanamo] is consistent with the historical 
reach of the writ of habeas corpus.” Justice Scalia dismisses the statement as 
dictum, but if dictum it was, it was dictum well considered, and it stated the 
view of five Members of this Court on the historical scope of the writ. But 
whether one agrees or disagrees with today’s decision, it is no bolt out of the 
blue.
A second fact insufficiently appreciated by the dissents is the length of the disputed imprisonments, some of the prisoners represented here today having been locked up for six years. Hence the hollow ring when the dissenters suggest that the Court is somehow precipitating the judiciary into reviewing claims that the military (subject to appeal to the Court of Appeals for the District of Columbia Circuit) could handle within some reasonable period of time. These suggestions of judicial haste are all the more out of place given the Court’s realistic acknowledgment that in periods of exigency the tempo of any habeas review must reflect the immediate peril facing the country.

It is in fact the very lapse of four years from the time Rasul put everyone on notice that habeas process was available to Guantanamo prisoners, and the lapse of six years since some of these prisoners were captured and incarcerated, that stand at odds with the repeated suggestions of the dissenters that these cases should be seen as a judicial victory in a contest for power between the Court and the political branches. The several answers to the charge of triumphalism might start with a basic fact of Anglo-American constitutional history: that the power, first of the Crown and now of the Executive Branch of the United States, is necessarily limited by habeas corpus jurisdiction to enquire into the legality of executive detention. And one could explain that in this Court’s exercise of responsibility to preserve habeas corpus something much more significant is involved than pulling and hauling between the judicial and political branches. Instead, though, it is enough to repeat that some of these petitioners have spent six years behind bars. After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today’s decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law’s operation. And to what effect? The majority merely replaces a review system designed by the people’s representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority’s ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.

The majority is adamant that the Guantanamo detainees are entitled to the protections of habeas corpus – its opinion begins by deciding that question. I
regard the issue as a difficult one, primarily because of the unique and unusual jurisdictional status of Guantanamo Bay. I nonetheless agree with Justice Scalia’s analysis of our precedents and the pertinent history of the writ, and accordingly join his dissent. The important point for me, however, is that the Court should have resolved these cases on other grounds. Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention. The critical threshold question in these cases, prior to any inquiry about the writ’s scope, is whether the system the political branches designed protects whatever rights the detainees may possess. If so, there is no need for any additional process, whether called “habeas” or something else.

Congress entrusted that threshold question in the first instance to the Court of Appeals for the District of Columbia Circuit, as the Constitution surely allows Congress to do. But before the D. C. Circuit has addressed the issue, the Court cashiers the statute, and without answering this critical threshold question itself. The Court does eventually get around to asking whether review under the DTA is, as the Court frames it, an “adequate substitute” for habeas, but even then its opinion fails to determine what rights the detainees possess and whether the DTA system satisfies them. The majority instead compares the undefined DTA process to an equally undefined habeas right – one that is to be given shape only in the future by district courts on a case-by-case basis. This whole approach is misguided.

It is also fruitless. How the detainees’ claims will be decided now that the DTA is gone is anybody’s guess. But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners’ detention with the undoubted need to protect the American people from the terrorist threat – precisely the challenge Congress undertook in drafting the DTA. All that today’s opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.

I believe the system the political branches constructed adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy. I therefore would dismiss these cases on that ground. With all respect for the contrary views of the majority, I must dissent.

The Court’s opinion makes plain that certiorari to review these cases should never have been granted. As two Members of today’s majority once recognized, “traditional rules governing our decision of constitutional questions and our practice of requiring the exhaustion of available remedies . . . make it appropriate to deny these petitions.” Just so. Given the posture in which these cases came to us, the Court should have declined to intervene until the D. C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee’s case.

It is grossly premature to pronounce on the detainees’ right to habeas without first assessing whether the remedies the DTA system provides vindicate whatever rights petitioners may claim. The plurality in Hamdi explained that
the Constitution guaranteed an American *citizen* challenging his detention as an enemy combatant the right to “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” The plurality specifically stated that constitutionally adequate collateral process could be provided “by an appropriately authorized and properly constituted military tribunal,” given the “uncommon potential to burden the Executive at a time of ongoing military conflict.” This point is directly pertinent here, for surely the *Due Process Clause* does not afford *non-*citizens in such circumstances greater protection than citizens are due.

If the CSRT procedures meet the minimal due process requirements outlined in *Hamdi*, and if an Article III court is available to ensure that these procedures are followed in future cases, there is no need to reach the Suspension Clause question. Detainees will have received all the process the Constitution could possibly require, whether that process is called “habeas” or something else. The question of the writ’s reach need not be addressed.

II

The majority’s overreaching is particularly egregious given the weakness of its objections to the DTA. Simply put, the Court’s opinion fails on its own terms. The majority strikes down the statute because it is not an “adequate substitute” for habeas review, but fails to show what rights the detainees have that cannot be vindicated by the DTA system.

Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the prisoner’s claims and, when necessary, order release. See *Brown v. Allen*, 344 U.S. 443, 533, 73 S. Ct. 397, 97 L. Ed. 469 (1953) (Jackson, J., concurring in result). Beyond that, the process a given prisoner is entitled to receive depends on the circumstances and the rights of the prisoner. See *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). After much hemming and hawing, the majority appears to concede that the DTA provides an Article III court competent to order release. See *ante*, at 61. The only issue in dispute is the process the Guantanamo prisoners are entitled to use to test the legality of their detention. *Hamdi* concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have.

A

The Court reaches the opposite conclusion partly because it misreads the statute. The majority appears not to understand how the review system it invalidates actually works – specifically, how CSRT review and review by the D. C. Circuit fit together.

First of all, the majority is quite wrong to dismiss the Executive’s determination of detainee status as no more than a “battlefield” judgment, as if it were somehow provisional and made in great haste. In fact, detainees are
designated “enemy combatants” only after “multiple levels of review by military officers and officials of the Department of Defense.”

The majority is equally wrong to characterize the CSRTs as part of that initial determination process. They are instead a means for detainees to challenge the Government’s determination. The Executive designed the CSRTs to mirror Army Regulation 190-8, the very procedural model the plurality in Hamdi said provided the type of process an enemy combatant could expect from a habeas. The CSRTs operate much as habeas courts would if hearing the detainee’s collateral challenge for the first time: They gather evidence, call witnesses, take testimony, and render a decision on the legality of the Government’s detention. If the CSRT finds a particular detainee has been improperly held, it can order release.

The majority insists that even if “the CSRTs satisf[ied] due process standards,” full habeas review would still be necessary, because habeas is a collateral remedy available even to prisoners “detained pursuant to the most rigorous proceedings imaginable.” This comment makes sense only if the CSRTs are incorrectly viewed as a method used by the Executive for determining the prisoners’ status, and not as themselves part of the collateral review to test the validity of that determination.

Hamdi merits scant attention from the Court – a remarkable omission, as Hamdi bears directly on the issues before us. In light of the Government’s national security responsibilities, the plurality found the process could be “tailored to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict.” For example, the Government could rely on hearsay and could claim a presumption in favor of its own evidence.

Hamdi further suggested that this “basic process” on collateral review could be provided by a military tribunal. It pointed to prisoner-of-war tribunals as a model that would satisfy the Constitution’s requirements.

Contrary to the majority, Hamdi is of pressing relevance because it establishes the procedures American citizens detained as enemy combatants can expect from a habeas court proceeding under § 2241. The DTA system of military tribunal hearings followed by Article III review looks a lot like the procedure Hamdi blessed. If nothing else, it is plain from the design of the DTA that Congress, the President, and this Nation’s military leaders have made a good-faith effort to follow our precedent.

Congress and the Executive did not envision “DTA review” – by which I assume the Court means D. C. Circuit review – as the detainees’ only opportunity to challenge their detentions. Instead, the political branches crafted CSRT and D. C. Circuit review to operate together, with the goal of providing noncitizen detainees the level of collateral process Hamdi said would satisfy the due process rights of American citizens.

B

By virtue of its refusal to allow the D. C. Circuit to assess petitioners’ statutory remedies, and by virtue of its own refusal to consider, at the outset, the
fit between those remedies and due process, the majority now finds itself in the position of evaluating whether the DTA system is an adequate substitute for habeas review without knowing what rights either habeas or the DTA is supposed to protect.

To what basic process are these detainees due as habeas petitioners? The majority admits that a number of historical authorities suggest that at the time of the Constitution’s ratification, “common-law courts abstained altogether from matters involving prisoners of war.” If this is accurate, the process provided prisoners under the DTA is plainly more than sufficient – it allows alleged combatants to challenge both the factual and legal bases of their detentions.

Assuming the constitutional baseline is more robust, the DTA still provides adequate process, and by the majority’s own standards. Today’s Court opines that the Suspension Clause guarantees prisoners such as the detainees “a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law.” Further, the Court holds that to be an adequate substitute, any tribunal reviewing the detainees’ cases “must have the power to order the conditional release of an individual unlawfully detained.” The DTA system – CSRT review of the Executive’s determination followed by D. C. Circuit review for sufficiency of the evidence and the constitutionality of the CSRT process – meets these criteria.

C

At the CSRT stage, every petitioner has the right to present evidence that he has been wrongfully detained. This includes the right to call witnesses who are reasonably available, question witnesses called by the tribunal, introduce documentary evidence, and testify before the tribunal.

As to classified information, while detainees are not permitted access to it themselves, the Implementation Memo provides each detainee with a “Personal Representative” who may review classified documents at the CSRT stage and summarize them for the detainee. The prisoner’s counsel enjoys the same privilege on appeal before the D. C. Circuit. Indeed, prisoners of war who challenge their status determinations under the Geneva Convention are afforded no such access, and the prisoner-of-war model is the one Hamdi cited as consistent with the demands of due process for citizens.

What alternative does the Court propose? Allow free access to classified information and ignore the risk the prisoner may eventually convey what he learns to parties hostile to this country, with deadly consequences for those who helped apprehend the detainee? If the Court can design a better system for communicating to detainees the substance of any classified information relevant to their cases, without fatally compromising national security interests and sources, the majority should come forward with it. Instead, the majority fobs that vexing question off on district courts to answer down the road.

Keep in mind that all this is just at the CSRT stage. Detainees receive additional process before the D. C. Circuit, including full access to appellate counsel and the right to challenge the factual and legal bases of their detentions.
All told, the DTA provides the prisoners held at Guantanamo Bay adequate opportunity to contest the bases of their detentions, which is all habeas corpus need allow. The DTA provides more opportunity and more process, in fact, than that afforded prisoners of war or any other alleged enemy combatants in history.

D

Despite these guarantees, the Court finds the DTA system an inadequate habeas substitute, for one central reason: Detainees are unable to introduce at the appeal stage exculpatory evidence discovered after the conclusion of their CSRT proceedings. The Court hints darkly that the DTA may suffer from other infirmities, but it does not bother to name them, making a response a bit difficult. As it stands, I can only assume the Court regards the supposed defect it did identify as the gravest of the lot.

If this is the most the Court can muster, the ice beneath its feet is thin indeed. As noted, the CSRT procedures provide ample opportunity for detainees to introduce exculpatory evidence – whether documentary in nature or from live witnesses – before the military tribunals. And if their ability to introduce such evidence is denied contrary to the Constitution or laws of the United States, the D. C. Circuit has the authority to say so on review.

E

The Court’s second criterion for an adequate substitute is the “power to order the conditional release of an individual unlawfully detained.” As the Court basically admits, the DTA can be read to permit the D. C. Circuit to order release in light of our traditional principles of construing statutes to avoid difficult constitutional issues, when reasonably possible.

The Solicitor General concedes that remedial authority of some sort must be implied in the statute, given that the DTA – like the general habeas law itself – provides no express remedy of any kind.

The D. C. Circuit can thus order release, the CSRTs can order release, and the head of the Administrative Review Boards can, at the recommendation of those panels, order release. These multiple release provisions within the DTA system more than satisfy the majority’s requirement that any tribunal substituting for a habeas court have the authority to release the prisoner.

The basis for the Court’s contrary conclusion is summed up in the following sentence near the end of its opinion: “To hold that the detainees at Guantanamo may, under the DTA, challenge the President’s legal authority to detain them, contest the CSRT’s findings of fact, supplement the record on review with newly discovered or previously unavailable evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them.” In other words, any interpretation of the statute that would make it an adequate substitute for habeas must be rejected, because Congress could not possibly have intended to enact an adequate substitute for habeas. The Court could have saved itself a lot of trouble if it had simply announced this Catch-22 approach at the beginning rather than the end of its opinion.
For all its eloquence about the detainees’ right to the writ, the Court makes no effort to elaborate how exactly the remedy it prescribes will differ from the procedural protections detainees enjoy under the DTA. What it does say leaves open the distinct possibility that its “habeas” remedy will, when all is said and done, end up looking a great deal like the DTA review it rejects.

The majority rests its decision on abstract and hypothetical concerns. Step back and consider what, in the real world, Congress and the Executive have actually granted aliens captured by our Armed Forces overseas and found to be enemy combatants:

. The right to hear the bases of the charges against them, including a summary of any classified evidence.

. The ability to challenge the bases of their detention before military tribunals modeled after Geneva Convention procedures. Some 38 detainees have been released as a result of this process. Brief for Federal Respondents 57, 60.

. The right, before the CSRT, to testify, introduce evidence, call witnesses, question those the Government calls, and secure release, if and when appropriate.

. The right to the aid of a personal representative in arranging and presenting their cases before a CSRT.

. Before the D. C. Circuit, the right to employ counsel, challenge the factual record, contest the lower tribunal’s legal determinations, ensure compliance with the Constitution and laws, and secure release, if any errors below establish their entitlement to such relief.

In sum, the DTA satisfies the majority’s own criteria for assessing adequacy. This statutory scheme provides the combatants held at Guantanamo greater procedural protections than have ever been afforded alleged enemy detainees – whether citizens or aliens – in our national history.

* * *

So who has won? Not the detainees. The Court’s analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D. C. Circuit – where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to “determine – through democratic means – how best” to balance the security of the American people with the detainees’ liberty interests, has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges.
I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today, for the first time in our Nation’s history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing War. The Chief Justice’s dissent, which I join, shows that the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows. My problem with today’s opinion is more fundamental still: The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court’s intervention in this military matter is entirely ultra vires.

I shall devote most of what will be a lengthy opinion to the legal errors contained in the opinion of the Court. Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today.

I

America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dhahran, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen. On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D.C., and 40 in Pennsylvania. It has threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one. Our Armed Forces are now in the field against the enemy, in Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.

The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court’s blatant abandonment of such a principle that produces the decision today. The President relied on our settled precedent in Johnson v. Eisentrager when he established the prison at Guantanamo Bay for enemy aliens. Citing that case, the President’s Office of Legal Counsel advised him “that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay].” Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Dept. of Defense (Dec. 28, 2001). Had the law been otherwise, the military surely would not have transported prisoners there, but
would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves.

In the long term, then, the Court’s decision today accomplishes little, except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect. In the short term, however, the decision is devastating. At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield. Some have been captured or killed. But others have succeeded in carrying on their atrocities against innocent civilians. In one case, a detainee released from Guantanamo Bay masterminded the kidnapping [sic] of two Chinese dam workers, one of whom was later shot to death when used as a human shield against Pakistani commandoes. Another former detainee promptly resumed his post as a senior Taliban commander and murdered a United Nations engineer and three Afghan soldiers. Still another murdered an Afghan judge. It was reported only last month that a released detainee carried out a suicide bombing against Iraqi soldiers in Mosul, Iraq.

These, mind you, were detainees whom the military had concluded were not enemy combatants. Their return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection. Astoundingly, the Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified. As the Chief Justice’s dissent makes clear, we have no idea what those procedural and evidentiary rules are, but they will be determined by civil courts and (in the Court’s contemplation at least) will be more detainee-friendly than those now applied, since otherwise there would no reason to hold the congressionally prescribed procedures unconstitutional. If they impose a higher standard of proof (from foreign battlefields) than the current procedures require, the number of the enemy returned to combat will obviously increase.

But even when the military has evidence that it can bring forward, it is often foolhardy to release that evidence to the attorneys representing our enemies. And one escalation of procedures that the Court is clear about is affording the detainees increased access to witnesses (perhaps troops serving in Afghanistan?) and to classified information. During the 1995 prosecution of Omar Abdel Rahman, federal prosecutors gave the names of 200 unindicted co-conspirators to the “Blind Sheik’s” defense lawyers; that information was in the hands of Osama Bin Laden within two weeks. In another case, trial testimony revealed to the enemy that the United States had been monitoring their cellular network, whereupon they promptly stopped using it, enabling more of them to evade capture and continue their atrocities.

The Court today decrees that no good reason to accept the judgment of the other two branches is “apparent.” “The Government,” it declares, “presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.” What competence does the Court have to second-guess the judgment of
Congress and the President on such a point? None whatever. But the Court
blunders in nonetheless. Henceforth, as today’s opinion makes unnervingly clear,
how to handle enemy prisoners in this war will ultimately lie with the branch
that knows least about the national security concerns that the subject entails.

II

The Suspension Clause of the Constitution provides: “The Privilege of the Writ
of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or
Invasion the public Safety may require it.” Art. I, § 9, cl. 2. As a court of law
operating under a written Constitution, our role is to determine whether there
is a conflict between that Clause and the Military Commissions Act. A conflict
arises only if the Suspension Clause preserves the privilege of the writ for aliens
held by the United States military as enemy combatants at the base in
Guantanamo Bay, located within the sovereign territory of Cuba.

The Court purports to derive from our precedents a “functional” test for the
extraterritorial reach of the writ, which shows that the Military Commissions
Act unconstitutionally restricts the scope of habeas. That is remarkable because
the most pertinent of those precedents, Johnson v. Eisentrager, conclusively
establishes the opposite. There we were confronted with the claims of 21
Germans held at Landsberg Prison, an American military facility located in the
American Zone of occupation in postwar Germany. They had been captured in
China, and an American military commission sitting there had convicted them
of war crimes – collaborating with the Japanese after Germany’s surrender. Like
the petitioners here, the Germans claimed that their detentions violated the
Constitution and international law, and sought a writ of habeas corpus. Writing
for the Court, Justice Jackson held that American courts lacked habeas
jurisdiction:

We are cited to [sic] no instance where a court, in this or any other country
where the writ is known, has issued it on behalf of an alien enemy who, at
no relevant time and in no stage of his captivity, has been within its
territorial jurisdiction. Nothing in the text of the Constitution extends such
a right, nor does anything in our statutes.

Lest there be any doubt about the primacy of territorial sovereignty in
determining the jurisdiction of a habeas court over an alien, Justice Jackson
distinguished two cases in which aliens had been permitted to seek habeas relief,
on the ground that the prisoners in those cases were in custody within the
sovereign territory of the United States.

Eisentrager thus held – held beyond any doubt – that the Constitution does
not ensure habeas for aliens held by the United States in areas over which our
Government is not sovereign.

The category of prisoner comparable to these detainees are not the Eisentrager
criminal defendants, but the more than 400,000 prisoners of war detained in the
United States alone during World War II. Not a single one was accorded the
right to have his detention validated by a habeas corpus action in federal court
– and that despite the fact that they were present on U.S. soil. The Court’s
analysis produces a crazy result: Whereas those convicted and sentenced to
death for war crimes are without judicial remedy, all enemy combatants
detained during a war, at least insofar as they are confined in an area away from
the battlefield over which the United States exercises “absolute and indefinite”
control, may seek a writ of habeas corpus in federal court. And, as an even more
bizarre implication from the Court’s reasoning, those prisoners whom the
military plans to try by full-dress Commission at a future date may file habeas
petitions and secure release before their trials take place.

What drives today’s decision is neither the meaning of the Suspension Clause,
nor the principles of our precedents, but rather an inflated notion of judicial
supremacy. The Court says that if the extraterritorial applicability of the
Suspension Clause turned on formal notions of sovereignty, “it would be possible
for the political branches to govern without legal constraint” in areas beyond the
sovereign territory of the United States. That cannot be, the Court says, because
it is the duty of this Court to say what the law is. Our power “to say what the law
is” is circumscribed by the limits of our statutorily and constitutionally conferred
jurisdiction. And that is precisely the question in these cases: whether the
Constitution confers habeas jurisdiction on federal courts to decide petitioners’
claims. It is both irrational and arrogant to say that the answer must be yes,
because otherwise we would not be supreme.

But so long as there are some places to which habeas does not run – so long as
the Court’s new “functional” test will not be satisfied in every case – then there
will be circumstances in which “it would be possible for the political branches to
govern without legal constraint.” Or, to put it more impartially, areas in which
the legal determinations of the other branches will be (shudder!) supreme. In
other words, judicial supremacy is not really assured by the constitutional rule
that the Court creates. The gap between rationale and rule leads me to conclude
that the Court’s ultimate, unexpressed goal is to preserve the power to review
the confinement of enemy prisoners held by the Executive anywhere in the
world. The “functional” test usefully evades the precedential landmine of
Eisentrager but is so inherently subjective that it clears a wide path for the
Court to traverse in the years to come.

III

Putting aside the conclusive precedent of Eisentrager, it is clear that the
original understanding of the Suspension Clause was that habeas corpus was not
available to aliens abroad.

It is entirely clear that, at English common law, the writ of habeas corpus did
not extend beyond the sovereign territory of the Crown. To be sure, the writ had
an “extraordinary territorial ambit,” because it was a so-called “prerogative
writ,” which, unlike other writs, could extend beyond the realm of England to
other places where the Crown was sovereign. But prerogative writs could not
issue to foreign countries, even for British subjects; they were confined to the
King’s dominions – those areas over which the Crown was sovereign.

Despite three opening briefs, three reply briefs, and support from a legion of
amici, petitioners have failed to identify a single case in the history of Anglo-
American law that supports their claim to jurisdiction. The Court finds it significant that there is no recorded case denying jurisdiction to such prisoners either. But a case standing for the remarkable proposition that the writ could issue to a foreign land would surely have been reported, whereas a case denying such a writ for lack of jurisdiction would likely not. At a minimum, the absence of a reported case either way leaves unrefuted the voluminous commentary stating that habeas was confined to the dominions of the Crown.

In sum, because I conclude that the text and history of the Suspension Clause provide no basis for our jurisdiction, I would affirm the Court of Appeals even if *Eisentrager* did not govern these cases.

* * *

Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to establish a manipulable "functional" test for the extraterritorial reach of habeas corpus (and, no doubt, for the extraterritorial reach of other constitutional protections as well). It blatantly misdescribes important precedents, most conspicuously Justice Jackson's opinion for the Court in *Johnson v. Eisentrager*. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

The Nation will live to regret what the Court has done today. I dissent.

**PARHAT v. GATES**


Parhat is an ethnic Uighur, who fled his home in the People's Republic of China in opposition to the policies of the Chinese government. It is undisputed that he is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies. The Tribunal's determination that Parhat is an enemy combatant is based on its finding that he is "affiliated" with a Uighur independence group, and the further finding that the group was "associated" with al Qaida and the Taliban. The Tribunal's findings regarding the Uighur group rest, in key respects, on statements in classified State and Defense Department documents that provide no information regarding the sources of the reporting upon which the statements are based, and otherwise lack sufficient indicia of the statements' reliability. Parhat contends, with support of his own, that the Chinese government is the source of several of the key statements.

Parhat’s principal argument on this appeal is that the record before his Combatant Status Review Tribunal’s is insufficient to support the conclusion that he is an enemy combatant, even under the Defense Department’s own definition of that term. We agree.
First, the government suggests that several of the assertions in the intelligence documents are reliable because they are made in at least three different documents. We are not persuaded. Lewis Carroll notwithstanding, the fact that the government has “said it thrice” does not make an allegation true. See LEWIS CARROLL, THE HUNTING OF THE SNARK 3 (1876) (“I have said it thrice: What I tell you three times is true.”). In fact, we have no basis for concluding that there are independent sources for the documents’ thrice-made assertions. To the contrary, many of those assertions are made in identical language, suggesting that later documents may merely be citing earlier ones, and hence that all may ultimately derive from a single source. And as we have also noted, Parhat has made a credible argument that – at least for some of the assertions – the common source is the Chinese government, which may be less than objective with respect to the Uighurs.

Second, the government insists that the statements made in the documents are reliable because the State and Defense Departments would not have put them in intelligence documents were that not the case. This comes perilously close to suggesting that whatever the government says must be treated as true, thus rendering superfluous both the role of the Tribunal and the role that Congress assigned to this court. We do not in fact know that the departments regard the statements in those documents as reliable; the repeated insertion of qualifiers indicating that events are “reported” or “said” or “suspected” to have occurred suggests at least some skepticism.

In this opinion, we neither prescribe nor proscribe possible ways in which the government may demonstrate the reliability of its evidence. We merely reject the government’s contention that it can prevail by submitting documents that read as if they were indictments or civil complaints, and that simply assert as facts the elements required to prove that a detainee falls within the definition of enemy combatant. To do otherwise would require the courts to rubber-stamp the government’s charges, in contravention of our understanding that Congress intended the court “to engage in meaningful review of the record.”

Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir 2009). After the opinion in Parhat, the government concluded that the Uighur detainees could not be repatriated to China for fear of how they would be treated there. When no other country stepped forward to take them, the petitioners demanded to be released into the United States. The D.C. Circuit rejected that argument.

Kiyemba v. Obama, 130 S. Ct. 1235 (2010). The Supreme Court granted certiorari on the Uighurs’ case but before the case was decided, the U.S. was able to relocate them to Bermuda, reportedly to the chagrin of the U.K. Government, where they now work as greenskeepers on a golf course.

President Obama and Guantanamo

In his second full day in office, President Obama signed three Executive Orders. The first, EO 13491, dealt with interrogation. EO 13493 established an
Interagency Task Force chaired by the Attorney General and Secretary of Defense to develop policy for dealing with future detainees – specifically “to develop policies for the detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations that are consistent with the national security and foreign policy interests of the United States and the interests of justice.”

EO 13492 dealt with Guantanamo and the existing detainees. It had three critical elements:

1. Closing Guantanamo: “The detention facilities at Guantanamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantanamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.”

2. Review of each detainee: The Attorney General was tasked to head up a review of each of the remaining 240 detainees to decide whether to release, transfer to another country, prosecute, or otherwise deal with each person. If neither release, transfer, nor prosecution “is achieved,” then the task force is to find “lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals.”

3. Military Commissions: The proceedings before military commissions were suspended pending the review.

Former Vice-President Cheney went so far as to imply that President Obama would be responsible for the deaths of Americans at the hands of terrorists:

“If you release the hard-core al-Qaeda terrorists that are held at Guantanamo, I think they go back into the business of trying to kill more Americans and mount further mass-casualty attacks,” he said. “If you turn ‘em loose and they go kill more Americans, who’s responsible for that?”


On May 20, 2009, Congress voted 90-6 to deny funding for the closure of Guantanamo. This action was viewed widely as a rejection of Obama’s policies but some observers noted that it was merely a delay of action pending the review started in January. The next day, the President made a major policy address from in front of the Constitution at the National Archives:

[W]e will be ill-served by some of the fear-mongering that emerges whenever we discuss this issue.

Now, let me begin by disposing of one argument as plainly as I can: We are not going to release anyone if it would endanger our national security, nor will we release detainees within the United States who endanger the American people.
Going forward, these cases will fall into five distinct categories.

First, whenever feasible, we will try those who have violated American criminal laws in federal court.

The second category of cases involves detainees who violate the laws of war and are therefore best tried through military commissions.

The third category of detainees includes those who have been ordered released by the courts.

The fourth category of cases involves detainees who we have determined can be transferred safely to another country.

Now, finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people.

We must have clear, defensible, and lawful standards for those who fall into this category. I want to be very clear that our goal is to construct a legitimate legal framework for the remaining Guantanamo detainees that cannot be transferred.

Critics were quick to point out that this approach leaves two categories of detainees in highly contentious situations, some to be tried by military commissions and some to be detained apparently without trial. It is not clear how to construct a system of executive detention that is “consistent with our values and our Constitution.” Nor does the speech rule out the use of classified information before military commissions.

Predictably, however, the more vociferous criticism was not from the standpoint of civil liberties but from the right. Dick Cheney again went on the offensive in a speech the same day to the American Enterprise Institute,

We promised an all-out effort to protect this country. To the very end of our administration, we kept al-Qaida terrorists busy with other problems. We focused on getting their secrets, instead of sharing ours with them. And on our watch, they never hit this country again. After the most lethal and devastating terrorist attack ever, seven-and-a-half years without a repeat is not a record to be rebuked and scorned, much less criminalized. It is a record to be continued until the danger has passed.

Defense Secretary Gates, a holdover from the previous administration, appeared on the Today show and decried the “fear-mongering on this,” saying that Guantanamo had to be closed if for no other reason than that it was a “taint” on America and the “name itself is a condemnation.”

The Task Force reported on January 22, 2010, and recommended that 126 prisoners be transferred to other countries, 44 were referred for prosecution either in federal court or before military commissions, and 48 were determined to be too dangerous to transfer but not feasible for prosecution. Those 48 would be held indefinitely without trial subject to habeas corpus proceedings following Boumediene.
An unusually articulate defense of keeping Guantanamo open was this exchange on NPR between host Steve Inskeep and Bradford Berenson, an attorney who “previously served in the Office of White House Counsel where he worked on detainee policy.”

INSKEEP: We've heard plenty of arguments for closing the Guantanamo detention center. What is the argument for keeping it open?

Mr. BERENSON: Guantanamo has become a symbol for a set of practices in the war on terror that people object to. But it’s really not Guantanamo that people have a problem with. It’s the practices involving detainees at Guantanamo that are the fodder for the critics. So closing Guantanamo really will have only symbolic value. The things that we are doing at Guantanamo Bay will still have to take place somewhere and Guantanamo is in many ways the ideal location to have prison camps of this kind. It is completely secure, so there are no risks to American civilian populations, no risks of escape, yet it is close to the United States so that policy-makers, lawyers, journalists, can have ready access, but it is not within the United States. In that sense, Guantanamo's somewhat unique.

INSKEEP: Forgive me, are you saying that the practices that have been widely criticized in the way that US has treated detainees are going to continue no matter what?

Mr. BERENSON: No, I don't mean that the abuses or the violations of US policy that have occurred from time to time are going to take place elsewhere or anyway. But those things are not really what are stimulating the criticism. The critics of Guantanamo Bay and the critics of the administration's detainee policy don't like the fact that we are holding people as enemy combatants in a war on terror and that we are keeping them outside of the criminal justice system. That won't change.

Meanwhile, the federal courts in D.C. continued to process cases coming out of Guantanamo. Although the D.C. Circuit had earlier ordered the release of several Uighar detainees in Parkhat, the administration was unable to find a country willing to take them until June 11, when they were transferred to Bermuda – to the apparent distress of the British government. The D.C. courts, however, quit reviewing CSRT determinations after the holding in Bismullah below, which decided that review would have to be by habeas corpus rather than by CSRT reviews.

So where do Guantanamo prisoners go if we decide to keep them? In an ironic and almost amusing byplay of the Guantanamo controversy, there are two western U.S. communities squabbling over the “hosting” of detainees. Although most residents of Canon City, Colorado, were unconcerned about having more terrorists housed at the nearby Florence supermax prison, a few worried that the move could make the town a target for attack while others worried that “large numbers of Muslims – the family members and friends of inmates – would move
into town if the transfer occurred. Property values would fall, [one] said, and some family members of terrorists might be terrorists, too.” In Area Packed With Prisons, a Split on Jihadists, N.Y. TIMES (May 23, 2009).

Meanwhile, up the road a ways, the town of Hardin, Montana, is lobbying to get more prisoners.

Hardin, a dusty town of 3,400 people so desperate that it built a $27 million jail a couple of years ago in the vain hope it would be a moneymaker, is offering to house hundreds of Gitmo detainees at the empty, never-used institution. The medium-security jail was conceived as a holding facility for drunks and other scofflaws, but town leaders said it could be fortified with a couple of guard towers and some more concertina wire. Apart from that, it is a turnkey operation, fully outfitted with everything from cafeteria trays and sweatsocks to 88 surveillance cameras. “I'm a lot more worried about some sex offender walking my streets than a guy that's a world-class terrorist. He's not going to escape, pop into the IGA (supermarket), grab a six-pack and go sit in the park.”

Montana Town Offers to Take Guantanamo Prisoners, ASSOCIATED PRESS (May 29, 2009).

**Israeli Practice**. An amicus brief filed with the Supreme Court in the Boumediene case on behalf of “Specialists in Israeli Military Law and Constitutional Law” makes the following points:

Despite great danger and pressing needs for intelligence, Israel affords all detainees prompt, independent judicial review of their detention, protected by procedural safeguards and aided by access to counsel.

1. Unlike the United States, Israel provides suspected unlawful combatants the right to judicial review of the basis for their detention within no more than 14 days of their seizure.

2. Unlike the United States, Israel provides suspected unlawful combatants the right to judicial review in a tribunal independent from the executive.

3. Unlike the United States, Israel limits detention to only those circumstances in which the suspected unlawful combatant poses a threat to State security and when no other means are available to neutralize the threat.

4. Unlike the United States, Israel subjects the evidence and judgments supporting the detention of suspected unlawful combatants to searching judicial review.

5. Unlike the United States, Israel prohibits all inhumane methods of interrogation and limits the use of coerced testimony against suspected unlawful combatants when assessing the basis for their detention.
6. Unlike the United States, Israel requires judicial approval before limiting a suspected unlawful combatant’s access to classified information offered in support of detention.

7. Unlike the United States, Israel provides access to counsel within no more than 34 days.

8. Unlike the United States, Israel provides for periodic review of detention at least once every 6 months, permitting the continuation of detention only upon a fresh judicial finding of dangerousness following a fully adversarial hearing.

Notice particularly point #3 in the Israeli amicus brief, in which a standard for detention is set out. Compare the definition of “unlawful enemy combatant” in the MCA: “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant.”

Could you be an unlawful enemy combatant if you sent money to a Pakistani opposition group without knowing whether they might engage in violence against a government friendly to the U.S.? Perhaps you should be prevented from doing so, but should you not be entitled to a hearing to determine if indeed you had done so?

**AL-BIHANI v. OBAMA**

590 F.3d 866 (D.C. Cir. 2010)

BROWN, Circuit Judge:

Ghaleb Nassar Al-Bihani appeals the denial of his petition for a writ of habeas corpus and seeks reversal or remand. He claims his detention is unauthorized by statute and the procedures of his habeas proceeding were constitutionally infirm. We reject these claims and affirm the denial of his petition.

Al-Bihani, a Yemeni citizen, has been held at the U.S. naval base detention facility in Guantanamo Bay, Cuba since 2002. He came to Guantanamo by a circuitous route. It began in Saudi Arabia in the first half of 2001 when a local sheikh issued a religious challenge to Al-Bihani. In response, Al-Bihani traveled through Pakistan to Afghanistan eager to defend the Taliban’s Islamic state against the Northern Alliance. Along the way, he stayed at what the government alleges were Al Qaeda-affiliated guesthouses; Al-Bihani only concedes they were affiliated with the Taliban. During this transit period, he may also have received instruction at two Al Qaeda terrorist training camps, though Al-Bihani disputes this. What he does not dispute is that he eventually accompanied and served a paramilitary group allied with the Taliban, known as the 55th Arab Brigade, which included Al Qaeda members within its command structure and which fought on the front lines against the Northern Alliance. He worked as the brigade’s cook and carried a brigade-issued weapon, but never fired it in combat. Combat, however—in the form of bombing by the U.S.-led Coalition that invaded Afghanistan in response to the attacks of September 11, 2001—forced the 55th
to retreat from the front lines in October 2001. At the end of this protracted retreat, Al-Bihani and the rest of the brigade surrendered, under orders, to Northern Alliance forces, and they kept him in custody until his handover to U.S. Coalition forces in early 2002. The U.S. military sent Al-Bihani to Guantanamo for detention and interrogation.

Soon after the Boumediene decision, the district court, acting with admirable dispatch, revived Al-Bihani’s petition and convened counsel to discuss the process to be used. The district court finalized the procedure in a published case management order. See Al-Bihani v. Bush (CMO), 588 F. Supp. 2d 19 (D.D.C. 2008) (case management order). The order established that the government had the burden of proving the legality of Al-Bihani’s detention by a preponderance of the evidence; it obligated the government to explain the legal basis for Al-Bihani’s detention, to share all documents used in its factual return, and to turn over any exculpatory evidence found in preparation of its case.

Adopting a definition that allowed the government to detain anyone “who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,” the district court found Al-Bihani’s actions met the standard. It cited as sufficiently credible the evidence – primarily drawn from Al-Bihani’s own admissions during interrogation – that Al-Bihani stayed at Al Qaeda-affiliated guesthouses and that he served in and retreated with the 55th Arab Brigade.

Al-Bihani’s many arguments present this court with two overarching questions regarding the detainees at the Guantanamo Bay naval base. The first concerns whom the President can lawfully detain pursuant to statutes passed by Congress. The second asks what procedure is due to detainees challenging their detention in habeas corpus proceedings. The Supreme Court has provided scant guidance on these questions, consciously leaving the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion. In this decision, we aim to narrow the legal uncertainty that clouds military detention.

Al-Bihani challenges the statutory legitimacy of his detention by advancing a number of arguments based upon the international laws of war. He first argues that relying on “support,” or even “substantial support” of Al Qaeda or the Taliban as an independent basis for detention violates international law. As a result, such a standard should not be read into the ambiguous provisions of the AUMF.

Before considering these arguments in detail, we note that all of them rely heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war. This premise is mistaken. There is no indication that Congress intended the international laws of war to

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19 This was the initial definition offered by the government as the controlling standard. In its filings before this court, the government modified the definition in its initial habeas return to replace the term “support” with “substantially supported.” The district court adopted the initial definition.
act as extra-textual limiting principles for the President’s war powers under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.

Al-Bihani is lawfully detained whether the definition of a detainable person is, as the district court articulated it, “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,” or the modified definition offered by the government that requires that an individual “substantially support” enemy forces.

While we think the facts of this case show Al-Bihani was both part of and substantially supported enemy forces, we realize the picture may be less clear in other cases where facts may indicate only support, only membership, or neither. We have no occasion here to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard. We merely recognize that both prongs are valid criteria that are independently sufficient to satisfy the standard.

With the government’s detention authority established as an initial matter, we turn to the argument that Al-Bihani must now be released according to longstanding law of war principles because the conflict with the Taliban has allegedly ended. The principle Al-Bihani espouses – were it accurate – would make each successful campaign of a long war but a Pyrrhic prelude to defeat. The initial success of the United States and its Coalition partners in ousting the Taliban from the seat of government and establishing a young democracy would trigger an obligation to release Taliban fighters captured in earlier clashes. Thus, the victors would be commanded to constantly refresh the ranks of the fledgling democracy’s most likely saboteurs.

Unlike either Hamdi or Al-Marri, Al-Bihani is a non-citizen who was seized in a foreign country. Requiring highly protective procedures at the tail end of the detention process for detainees like Al-Bihani would have systemic effects on the military’s entire approach to war. From the moment a shot is fired, to battlefield capture, up to a detainee’s day in court, military operations would be compromised as the government strove to satisfy evidentiary standards in anticipation of habeas litigation.

In addition to the Hamdi plurality’s approving treatment of military tribunal procedure, it also described as constitutionally adequate – even for the detention of U.S. citizens – a “burden-shifting scheme” in which the government need only present “credible evidence that the habeas petitioner meets the enemy-combatant criteria” before “the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.” That description mirrors a preponderance standard.

We find Al-Bihani’s hearsay challenges to be similarly unavailing. Al-Bihani claims that government reports of his interrogation answers – which made up the majority, if not all, of the evidence on which the district court relied – and
other informational documents were hearsay improperly admitted absent an examination of reliability and necessity.

But that such evidence was hearsay does not automatically invalidate its admission – it only begins our inquiry. We observe Al-Bihani cannot make the traditional objection based on the Confrontation Clause of the Sixth Amendment. This is so because the Confrontation Clause applies only in criminal prosecutions, and is not directly relevant to the habeas setting.

Therefore, the question a habeas court must ask when presented with hearsay is not whether it is admissible – it is always admissible – but what probative weight to ascribe to whatever indicia of reliability it exhibits.

In Al-Bihani’s case, the district court had ample contextual information about evidence in the government’s factual return to determine what weight to give various pieces of evidence. [T]he district court afforded Al-Bihani the opportunity in a traverse to rebut the evidence and to attack its credibility. Further, Al-Bihani did not contest the truth of the majority of his admissions upon which the district court relied, enhancing the reliability of those reports. We therefore find that the district court did not improperly admit hearsay evidence.

For these reasons, the order of the district court denying Al-Bihani’s petition for a writ of habeas corpus is

Affirmed.

BROWN, Circuit Judge, concurring:

The Supreme Court in Boumediene and Hamdi charged this court and others with the unprecedented task of developing rules to review the propriety of military actions during a time of war, relying on common law tools. We are fortunate this case does not require us to demarcate the law’s full substantive and procedural dimensions. But as other more difficult cases arise, it is important to ask whether a court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation. The common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple. None of those factors exist in the Guantanamo context.

These cases present hard questions and hard choices, ones best faced directly. Judicial review, however, is just that: re-view, an indirect and necessarily backward looking process. And looking backward may not be enough in this new war. The saying that generals always fight the last war is familiar, but familiarity does not dull the maxim’s sober warning.

The legal issues presented by our nation’s fight with this enemy have been numerous, difficult, and to a large extent novel. What drives these issues is the unconventional nature of our enemy: they are neither soldiers nor mere criminals, claim no national affiliation, and adopt long-term strategies and
asymmetric tactics that exploit the rules of open societies without respect or reciprocity.

War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.

Uthman v. Obama, 637 F.3d 400 (D.C. Cir. 2011). Uthman was alleged to have been a bodyguard for Osama bin Laden. District Judge Kennedy described the evidence against him as consisting mostly of highly questionable photo identifications of him by other detainees under “harsh interrogation.”

In sum, the Court gives credence to evidence that Uthman (1) studied at a school at which other men were recruited to fight for Al Qaeda; (2) received money for his trip to Afghanistan from an individual who supported jihad; (3) traveled to Afghanistan along a route also taken by Al Qaeda recruits; (4) was seen at two Al Qaeda guesthouses in Afghanistan; and (5) was with Al Qaeda members in the vicinity of Tora Bora after the battle that occurred there.

Even taken together, these facts do not convince the Court by a preponderance of the evidence that Uthman received and executed orders from Al Qaeda. Certainly none of the facts respondents have demonstrated are true are direct evidence of fighting or otherwise “receiving and executing orders,” and they also do not, even together, paint an incriminating enough picture to demonstrate that the inferences respondents ask the Court to make are more likely accurate than not. Associations with Al Qaeda members, or institutions to which Al Qaeda members have connections, are not alone enough to demonstrate that, more likely than not, Uthman was part of Al Qaeda.

On appeal, the D.C. Circuit held that the district court had applied an improper standard to the facts and remanded with instructions that the habeas petition be denied.

The District Court stated that "the key question" in determining someone's membership in Al Qaeda "is whether an individual receives and executes orders from the enemy force's combat apparatus." The District Court derived that test from two previous district court opinions applying this "command structure test."

Several of this Court's cases – all decided after the District Court granted Uthman's petition – have held that the "command structure test" does not reflect the full scope of the Executive's detention authority under the AUMF. "These decisions make clear that the determination of whether an
individual is 'part of' al-Qaida 'must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.'" Salahi v. Obama, 625 F.3d 745, 751-52 (D.C. Cir. 2010) (quoting Bensayah, 610 F.3d at 725). To be sure, demonstrating that someone is part of al Qaeda's command structure is sufficient to show that person is part of al Qaeda. But it is not necessary. Indicia other than the receipt and execution of al Qaeda's orders may prove "that a particular individual is sufficiently involved with the organization to be deemed part of it."

Salahi v. Obama, 625 F.3d 745 (D.C. Cir. 2010). Salahi was taken into custody by the U.S. in November 2001 from Mauritania on suspicion that he was connected to the failed "Millennium Plot" for which Ahmed Ressam was convicted of attempting to bomb Los Angeles International Airport. Ressam was part of a group in Montreal, Canada, with whom Salahi had maintained contact over the years. Salahi admitted to going to Afghanistan in early 1990 to join al Qaeda but claimed that "his association with al-Qaida ended after 1992, and that, even though he remained in contact thereafter with people he knew to be al-Qaida members, he did nothing for al-Qaida after that time." The district court found that most of the government’s evidence against Salahi consisted of his own statements, which were not particularly credible because they had been acquired during or after “extensive and severe mistreatment” at Guantanamo. The court concluded:

The government had to adduce evidence – which is different from intelligence – showing that it was more likely than not that Salahi was “part of” al-Qaida. To do so, it had to show that the support Salahi undoubtedly did provide from time to time was provided within al-Qaida’s command structure. The government has not done so. The government has shown that Salahi was an al-Qaida sympathizer – perhaps a “fellow traveler”; that he was in touch with al-Qaida members; and that from time to time, before his capture, he provided sporadic support to members of al-Qaida.

The government’s problem is that its proof that Salahi gave material support to terrorists is so attenuated, or so tainted by coercion and mistreatment, or so classified, that it cannot support a successful criminal prosecution. Nevertheless, the government wants to hold Salahi indefinitely, because of its concern that he might renew his oath to al-Qaida and become a terrorist upon his release. That concern may indeed be well-founded. Salahi fought with al-Qaida in Afghanistan (twenty years ago), associated with at least a half-dozen known al-Qaida members and terrorists, and somehow found and lived among or with al-Qaida cell members in Montreal. But a habeas court may not permit a man to be held indefinitely upon suspicion, or because of the government’s prediction that he may do unlawful acts in the future – any more than a habeas court may
rely upon its prediction that a man will not be dangerous in the future and order his release if he was lawfully detained in the first place. The question, upon which the government had the burden of proof, was whether, at the time of his capture, Salahi was a "part of al-Qaida. On the record before me, I cannot find that he was.

On appeal, the D.C. Circuit noted that the district court had applied the now-repudiated "command structure" test but it also could not accept the government's position that the burden of proof was on Salahi merely because he had once been engaged with al Qaeda.

[T]he government contends that Salahi should bear the burden of proving that he disassociated from al-Qaida after swearing bayat to the organization in 1991. [But] the relevant inquiry is whether Salahi was "part of" al-Qaida when captured. Therefore, in order to shift the burden of proof to Salahi, we would have to presume that having once sworn bayat to al-Qaida, Salahi remained a member of the organization until seized in November 2001. Although such a presumption may be warranted in some cases, such as where an individual swore allegiance to al-Qaida on September 12, 2001, and was captured soon thereafter, the unique circumstances of Salahi's case make the government's proposed presumption inappropriate here.

When Salahi took his oath of allegiance in March 1991, al-Qaida and the United States shared a common objective: they both sought to topple Afghanistan's Communist government. Not until later did al-Qaida begin publicly calling for attacks against the United States. Salahi's March 1991 oath of bayat is insufficiently probative of his relationship with al-Qaida at the time of his capture in November 2001 to justify shifting the burden to him to prove that he disassociated from the organization.

Salahi is not accused of participating in military action against the United States. Instead, the government claims that Salahi was "part of" al-Qaida because he swore bayat and thereafter provided various services to the organization, including recruiting, hosting leaders, transferring money, etc. Under these circumstances, whether Salahi performed such services pursuant to al-Qaida orders may well be relevant to determining if he was "part of" al-Qaida or was instead engaged in the "purely independent conduct of a freelancer." Bensayah, 610 F.3d at 725. The problem with the district court's decision is that it treats the absence of evidence that Salahi received and executed orders as dispositive.

The government urges us to reverse and direct the district court to deny Salahi's habeas petition. Although we agree that Awad and Bensayah require that we vacate the district court's judgment, we think the better course is to remand for further proceedings consistent with those opinions. For example, does the government's evidence support the inference that even if Salahi was not acting under express orders, he nonetheless had a tacit understanding with al-Qaida operatives that he would refer prospective jihadists to the organization? Did al-Qaida operatives ask Salahi to assist the organization with telecommunications projects in Sudan, Afghanistan, or Pakistan? Did Salahi
provide any assistance to al-Qaida in planning denial-of-service computer attacks, even if those attacks never came to fruition? May the court infer from Salahi's numerous ties to known al-Qaida operatives that he remained a trusted member of the organization? With answers to questions like these, which may require additional testimony, the district court will be able to determine in the first instance whether Salahi was or was not "sufficiently involved with [al-Qaida] to be deemed part of it." Bensayah, 610 F.3d at 725.

ABDAH [ODAINI] v. OBAMA

KENNEDY, District Judge:

Mohamed Mohamed Hassan Odaini, a Yemeni citizen, was seized by Pakistani authorities on March 28, 2002 and has been held by the United States at the naval base detention facility in Guantanamo Bay, Cuba since June 2002. The Court concludes that respondents have failed to demonstrate that the detention of Odaini is lawful. Therefore, Odaini's petition shall be granted.

I. LEGAL STANDARDS

A. Scope of the Government's Detention Authority

The U.S. Supreme Court has held that the District Court for the District of Columbia has jurisdiction over petitions for writs of habeas corpus brought by detainees held at Guantanamo Bay pursuant to the AUMF. See Boumediene v. Bush; Rasul v. Bush. The Supreme Court has provided "scant guidance," however, as to whom respondents may lawfully detain under the statute. Al-Bihani v. Obama.

In the absence of controlling law governing the question of by what standard to evaluate the lawfulness of the detention of the individuals held at Guantanamo Bay, the Court shall rely on the reasoning of other Judges of this Court who have thoroughly and thoughtfully addressed this issue. Accordingly, consistent with Judge Bates's ruling in Hamilby v. Obama, the government may detain "those who are part of the Taliban or al Qaida forces." As Judge Walton ruled in Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. 2009), such membership requires that the person in question "have some sort of 'structured' role in the 'hierarchy' of the enemy force."

B. Burden of Proof

As stated in the Amended Case Management Order that governs this case, "[t]he government bears the burden of proving by a preponderance of the evidence that the petitioner's detention is lawful." In re Guantanamo Bay Litig. Accordingly, Odaini need not prove that he is unlawfully detained; rather, respondents must produce "evidence which as a whole shows that the fact sought to be proved," that Odaini was part of Al Qaeda, "is more probable than not."

C. Evidentiary Issues
The Court notes at the outset two issues regarding the evidence in this case. First, the Court has permitted the admission of hearsay evidence but considers at this merits stage the accuracy, reliability, and credibility of all of the evidence presented to support the parties' arguments. This approach is consistent with a directive from the D.C. Circuit. See Al Bihani (“[T]he question a habeas court must ask when presented with hearsay is not whether it is admissible – it is always admissible – but what probative weight to ascribe to whatever indicia of reliability it exhibits.”). The Court's assessment of the weight properly accorded to particular pieces of evidence appears throughout this memorandum opinion.

II. ANALYSIS

A. The Evidence Before the Court Overwhelmingly Supports Odaini's Contention that He is Unlawfully Detained.

The Court begins by summarizing the evidence in the record directly related to Odaini's case. This evidence consists of statements Odaini has made while in detention about his time in Pakistan, statements other Guantanamo Bay detainees seized at the same time and location as Odaini have made while in U.S. custody, and respondents' records regarding Odaini's detention.

From the first time he was interrogated in American captivity to the declaration he created for use in this litigation, Odaini has told the same story. He was born in Taiz, Yemen on September 20, 1983. He is Muslim. His father, who works for the Yemeni Security Service, has two wives and sixteen children. Odaini went to high school in his hometown. Odaini's father wanted Odaini to pursue religious studies in Pakistan after his graduation from high school in 2001. Odaini's father provided his son with a passport, a visa for travel to Pakistan, a plane ticket to Lahore, Pakistan via Karachi, Pakistan, and money to take with him on his journey.

Odaini enrolled in Salafia University, where he was one of approximately two hundred students. He lived in a university dormitory. Another student, whose name was Emad, told Odaini he was welcome to visit Emad's off-campus home, which was a guesthouse. Odaini accepted this invitation on the evening of March 27, 2002, when he went to Issa House for dinner; after spending the evening talking to other Yemeni, Salafia University students who lived there about religion as well as “their past and where they lived in Yemen,” he decided to spend the night. There were other people in the house, but Odaini did not know them.

At around 2:00 a.m., Pakistani police raided the house and seized all of its occupants. After his initial seizure, Odaini was held in Lahore and then taken to Islamabad, Pakistan. He was transported to Bagram, Afghanistan, then Kandahar, Afghanistan, and ultimately to Guantanamo Bay, Cuba. He was told shortly after being taken into custody and upon arrival at Guantanamo Bay that he would be released within two weeks. Odaini has been repeatedly interrogated while in U.S. custody, and has consistently told the story described in this memorandum opinion. He has also consistently, explicitly denied membership in Al Qaeda.
[Many statements from other unidentified detainees corroborated Odaini’s account.]

B. Respondents Have Failed to Show that Odaini is Lawfully Detained.

[Much of the counter evidence was classified and redacted from the court’s opinion. The court noted that it consisted mostly of information about the nature of Issa House and connections to Abu Zubaydah, but nothing in those accounts credibly connected Odaini himself to Al Qaeda activities.]

Respondents also argue that Odaini’s assertion that he was a student is a cover story the occupants of Issa House had agreed to use. Only by refusing to deviate from a predetermined conclusion could this explanation of consistent statements from so many men over so many years seem at all reasonable. This theory ignores the fact that several occupants of the house did not claim to be students but nevertheless said that Odaini was a student.

Furthermore, to find that Odaini’s version of events is a cover story in the complete absence of information suggesting that he was anything other than a student would render meaningless the principle of law that places the burden of proof on respondents rather than Odaini.

C. Conclusion

Respondents have kept a young man from Yemen in detention in Cuba from age eighteen to age twenty-six. They have prevented him from seeing his family and denied him the opportunity to complete his studies and embark on a career. The evidence before the Court shows that holding Odaini in custody at such great cost to him has done nothing to make the United States more secure. There is no evidence that Odaini has any connection to Al Qaeda. Consequently, his detention is not authorized by the AUMF. The Court therefore emphatically concludes that Odaini’s motion must be granted.

III. CONCLUSION

For the foregoing reasons, Odaini’s petition for a writ of habeas corpus shall be granted.

Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010). Bensayah, an Algerian citizen, was arrested by the Bosnian police on immigration charges in late 2001. He and five other Algerian men arrested in Bosnia were suspected of plotting to attack the United States Embassy in Sarajevo but eventually were released for insufficient evidence. The six were turned over to the U.S. and transported to Guantanamo in early 2002.

The district court granted habeas relief to the other five on the ground that there was no reliable evidence that they had intended to travel to Afghanistan to fight against the U.S. The district court, however, denied Bensayah’s petition for habeas corpus, holding that the Government had adduced sufficient evidence to show it was more likely than not that he had “supported” al Qaeda. The evidence for this conclusion consisted primarily of a classified document plus
corroboration from a classified source. On appeal, the Government disclaimed reliance on the source and abandoned the argument that he had provided “support” for al Qaeda. Instead, it argued that he was “part of” al Qaeda. The court of appeals panel started with this observation:

Although it is clear al Qaeda has, or at least at one time had, a particular organizational structure, the details of its structure are generally unknown, but it is thought to be somewhat amorphous. As a result, it is impossible to provide an exhaustive list of criteria for determining whether an individual is “part of” al Qaeda. That determination must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization. That an individual operates within al Qaeda’s formal command structure is surely sufficient but is not necessary to show he is “part of” the organization; there may be other indicia that a particular individual is sufficiently involved with the organization to be deemed part of it, but the purely independent conduct of a freelancer is not enough.

Without the asserted corroboration for the classified document, the court of appeal found there was insufficient evidence to show that he was “part of” an organization and remanded for the district court to receive any further evidence that the Government might choose to bring forward.

ProPublica is an “investigative journalism” group with sufficient credibility to be linked on an American Bar Association website. According to their counts, as of August, 2010, 53 Guantanamo detainee habeas corpus petitions had been decided by federal courts, while approximately 100 similar lawsuits are pending. Of the 53 decided cases, 37 have been declared eligible for release (that includes the 17 Uighur detainees considered in Parhat) while 16 lost their habeas claims. http://projects.propublica.org/tables/gitmo-detainee-lawsuits Thus, taking the Uighurs out of the mix, the count would be 20-16 at that time. The results in cases since then have been similarly mixed.

NOTES AND QUESTIONS

What do you think of each of the following reasons for military detention?

a. Indeterminate Duration of Hostilities. If this were a war, when would prisoners be repatriated and to what country? If either Hamdi or Padilla were prosecuted for a criminal violation and sentenced to a few years in prison, how safe would you feel with them on the streets at the end of their sentence? Should this be a reason for avoiding the civilian justice system?

b. Detention as Incentive To Talk. The information presented by the Government in all three cases emphasized that government agents wanted to pump the detainees for further information about al Qaeda and other operatives who may still be at large. If they were treated as recalcitrant witnesses before a grand jury, for example, they could be imprisoned until
they agreed to disclose. But the government argues that the mere fact of isolation creates a sense of dependency on the interrogator which is conducive to disclosure. Is this a reasonable constitutional argument? To what extent might the Supreme Court have been influenced by the disclosures of prisoner abuse made public while these cases were pending?

c. Detention to Prevent Violent Acts. Administrative detention to prevent violence has been discussed loosely in the past, particularly with respect to child molesters and the criminally insane. The Supreme Court has flatly rejected detention without at least a judicial finding of propensity to harm.

d. Problems With the Civilian Criminal System. The principal rights that Hamdi and Padilla would be able to claim if charged in the civilian criminal system are notice of charges, right to counsel, confrontation of witnesses, public trial by jury. How would these same rights fare in the military justice system if charges were brought? See United States v. Grunden, supra.

e. The Mosaic Concern. If Padilla were brought to trial, then the methods by which federal agents discovered his alleged plot would be much more likely to come out into public scrutiny.

[C] Habeas Corpus in Iraq and Afghanistan

MUNAF v. GEREN
553 U.S. 674 (2008)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Multinational Force-Iraq (MNF-I) is an international coalition force operating in Iraq composed of 26 different nations, including the United States. The force operates under the unified command of United States military officers, at the request of the Iraqi Government, and in accordance with United Nations Security Council Resolutions. Pursuant to the U. N. mandate, MNF-I forces detain individuals alleged to have committed hostile or warlike acts in Iraq, pending investigation and prosecution in Iraqi courts under Iraqi law.

These consolidated cases concern the availability of habeas corpus relief arising from the MNF-I’s detention of American citizens who voluntarily traveled to Iraq and are alleged to have committed crimes there. We are confronted with two questions. First, do United States courts have jurisdiction over habeas corpus petitions filed on behalf of American citizens challenging their detention in Iraq by the MNF-I? Second, if such jurisdiction exists, may district courts exercise that jurisdiction to enjoin the MNF-I from transferring such individuals to Iraqi custody or allowing them to be tried before Iraqi courts?

We conclude that the habeas statute extends to American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition. Under circumstances such as those presented here, however, habeas corpus provides petitioners with no relief.
Pursuant to its U. N. mandate, the MNF-I has “the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq.” The multinational force, for example, conducts combat operations against insurgent factions, trains and equips Iraqi security forces, and aids in relief and reconstruction efforts.

MNF-I forces also detain individuals who pose a threat to the security of Iraq. The Government of Iraq retains ultimate responsibility for the arrest and imprisonment of individuals who violate its laws, but because many of Iraq’s prison facilities have been destroyed, the MNF-I agreed to maintain physical custody of many such individuals during Iraqi criminal proceedings. MNF-I forces are currently holding approximately 24,000 detainees. An American military unit, Task Force 134, oversees detention operations and facilities in Iraq, including those located at Camp Cropper, the detention facility currently housing Shawqi Omar and Mohammad Munaf (hereinafter petitioners). The unit is under the command of United States military officers who report to General David Petraeus.

Petitioner Shawqi Omar, an American-Jordanian citizen, voluntarily traveled to Iraq in 2002. In October 2004, Omar was captured and detained in Iraq by U.S. military forces operating as part of the MNF-I during a raid of his Baghdad home. Omar is believed to have provided aid to Abu Musab al-Zarqawi – the late leader of al Qaeda in Iraq – by facilitating his group’s connection with other terrorist groups, bringing foreign fighters into Iraq, and planning and executing kidnappings in Iraq.

Following Omar’s arrest, a three-member MNF-I Tribunal composed of American military officers concluded that Omar posed a threat to the security of Iraq and designated him a “security internee.” The tribunal also found that Omar had committed hostile and warlike acts, and that he was an enemy combatant in the war on terrorism. In accordance with Article 5 of the Geneva Convention, Omar was permitted to hear the basis for his detention, make a statement, and call immediately available witnesses.

In addition to the review of his detention by the MNF-I Tribunal, Omar received a hearing before the Combined Review and Release Board (CRRB) – a nine-member board composed of six representatives of the Iraqi Government and three MNF-I officers. The CRRB, like the MNF-I Tribunal, concluded that Omar’s continued detention was necessary because he posed a threat to Iraqi security. At all times since his capture, Omar has remained in the custody of the United States military operating as part of the MNF-I.

Omar’s wife and son filed a next-friend petition for a writ of habeas corpus on Omar’s behalf in the District Court for the District of Columbia. After the Department of Justice informed Omar that the MNF-I had decided to refer him to the Central Criminal Court of Iraq (CCCI) for criminal proceedings, his
attorney sought and obtained a preliminary injunction barring Omar’s “remov[al] . . . from United States or MNF-I custody.”

B

Petitioner Munaf, a citizen of both Iraq and the United States, voluntarily traveled to Iraq with several Romanian journalists. He was to serve as the journalists’ translator and guide. Shortly after arriving in Iraq, the group was kidnapped and held captive for two months. After the journalists were freed, MNF-I forces detained Munaf based on their belief that he had orchestrated the kidnappings.

A three-judge MNF-I Tribunal conducted a hearing to determine whether Munaf’s detention was warranted. The MNF-I Tribunal reviewed the facts surrounding Munaf’s capture, interviewed witnesses, and considered the available intelligence information. Munaf was present at the hearing and had an opportunity to hear the grounds for his detention, make a statement, and call immediately available witnesses. At the end of the hearing, the tribunal found that Munaf posed a serious threat to Iraqi security, designated him a “security internee,” and referred his case to the Central Criminal Court of Iraq (CCCI) for criminal investigation and prosecution.

During his CCCI trial, Munaf admitted on camera and in writing that he had facilitated the kidnapping of the Romanian journalists. He also appeared as a witness against his alleged co-conspirators. Later in the proceedings, Munaf recanted his confession, but the CCCI nonetheless found him guilty of kidnapping. On appeal, the Iraqi Court of Cassation vacated Munaf’s conviction and remanded his case to the CCCI for further investigation. The Court of Cassation directed that Munaf was to “remain in custody pending the outcome” of further criminal proceedings.

Meanwhile, Munaf’s sister filed a next-friend petition for a writ of habeas corpus in the District Court for the District of Columbia.

II

The Solicitor General argues that the federal courts lack jurisdiction over the detainees’ habeas petitions because the American forces holding Omar and Munaf operate as part of a multinational force. The United States acknowledges that Omar and Munaf are American citizens held overseas in the immediate “physical custody” of American soldiers who answer only to an American chain of command. We think these concessions the end of the jurisdictional inquiry.

The Government’s primary contention is that the District Courts lack jurisdiction in these cases because of this Court’s decision in Hirota v. MacArthur, 338 U.S. 197 (1948) (per curiam). That slip of a case cannot bear the weight the Government would place on it. In Hirota, Japanese citizens sought permission to file habeas corpus applications directly in this Court. The petitioners were noncitizens detained in Japan. They had been convicted and sentenced by the International Military Tribunal for the Far East – an international tribunal established by General Douglas MacArthur acting, as the Court put it, in his capacity as “the agent of the Allied Powers.” Although those
familiar with the history of the period would appreciate the possibility of confusion over who General MacArthur took orders from, the Court concluded that the sentencing tribunal was “not a tribunal of the United States.” The Court then held that, “[u]nder the foregoing circumstances,” United States courts had “no power or authority to review, to affirm, set aside or annul the judgments and sentences” imposed by that tribunal. Accordingly, the Court denied petitioners leave to file their habeas corpus applications, without further legal analysis.

Even if the Government is correct that the international authority at issue in Hirota is no different from the international authority at issue here, the present “circumstances” differ in another respect. These cases concern American citizens while Hirota did not, and the Court has indicated that habeas jurisdiction can depend on citizenship.

III

We now turn to the question whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign’s territory to that sovereign’s government for criminal prosecution.

[A] party seeking a preliminary injunction must demonstrate, among other things, “a likelihood of success on the merits.” But one searches the opinions below in vain for any mention of a likelihood of success as to the merits of Omar’s habeas petition. Instead, the District Court concluded that the “jurisdictional issues” presented questions “so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation.”

A difficult question as to jurisdiction is, of course, no reason to grant a preliminary injunction. It says nothing about the “likelihood of success on the merits,” other than making such success more unlikely due to potential impediments to even reaching the merits. Indeed, if all a “likelihood of success on the merits” meant was that the district court likely had jurisdiction, then preliminary injunctions would be the rule, not the exception. In light of these basic principles, we hold that it was an abuse of discretion for the District Court to grant a preliminary injunction on the view that the “jurisdictional issues” in Omar’s case were tough, without even considering the merits of the underlying habeas petition.

What we have said thus far would require reversal and remand in each of these cases: The lower courts in Munaf erred in dismissing for want of jurisdiction, and the lower courts in Omar erred in issuing and upholding the preliminary injunction. There are occasions, however, when it is appropriate to proceed further and address the merits. This is one of them.

Given that the present cases involve habeas petitions that implicate sensitive foreign policy issues in the context of ongoing military operations, reaching the merits is the wisest course. Because the Government is entitled to judgment as a matter of law, it is appropriate for us to terminate the litigation now.

IV
The habeas petitioners argue that the writ should be granted in their cases because they have “a legally enforceable right” not to be transferred to Iraqi authority for criminal proceedings under both the Due Process Clause and the Foreign Affairs Reform and Restructuring Act of 1998 (FARR Act), and because they are innocent civilians who have been unlawfully detained by the United States in violation of the Due Process Clause. With respect to the transfer claim, petitioners request an injunction prohibiting the United States from transferring them to Iraqi custody. With respect to the unlawful detention claim, petitioners seek “release” – but only to the extent that release would not result in “unlawful” transfer to Iraqi custody. Both of these requests would interfere with Iraq’s sovereign right to “punish offenses against its laws committed within its borders.” We accordingly hold that the detainees’ claims do not state grounds upon which habeas relief may be granted, that the habeas petitions should have been promptly dismissed, and that no injunction should have been entered.

The habeas petitioners do not dispute that they voluntarily traveled to Iraq, that they remain detained within the sovereign territory of Iraq today, or that they are alleged to have committed serious crimes in Iraq. Indeed, Omar and Munaf both concede that, if they were not in MNF-I custody, Iraq would be free to arrest and prosecute them under Iraqi law. Given these facts, our cases make clear that Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil.

To allow United States courts to intervene in an ongoing foreign criminal proceeding and pass judgment on its legitimacy seems at least as great an intrusion as the plainly barred collateral review of foreign convictions.

Petitioners contend that these general principles are trumped in their cases because their transfer to Iraqi custody is likely to result in torture. This allegation was raised in Munaf’s petition for habeas, but not in Omar’s. Such allegations are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the judiciary. See M. Bassiouni, International Extradition: United States Law and Practice 921 (2007) (“Habeas corpus has been held not to be a valid means of inquiry into the treatment the relator is anticipated to receive in the requesting state”).

The Executive Branch may, of course, decline to surrender a detainee for many reasons, including humanitarian ones. Petitioners here allege only the possibility of mistreatment in a prison facility; this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway. Indeed, the Solicitor General states that it is the policy of the United States not to transfer an individual in circumstances where torture is likely to result.

* * *

Munaf and Omar are alleged to have committed hostile and warlike acts within the sovereign territory of Iraq during ongoing hostilities there. Pending their criminal prosecution for those offenses, Munaf and Omar are being held in Iraq by American forces operating pursuant to a U. N. Mandate and at the request of the Iraqi Government. Petitioners concede that Iraq has a sovereign
right to prosecute them for alleged violations of its law. Yet they went to federal court seeking an order that would allow them to defeat precisely that sovereign authority. Habeas corpus does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

The Court reserves judgment on an “extreme case in which the Executive has determined that a detainee [in United States custody] is likely to be tortured but decides to transfer him anyway.” I would add that nothing in today’s opinion should be read as foreclosing relief for a citizen of the United States who resists transfer, say, from the American military to a foreign government for prosecution in a case of that sort, and I would extend the caveat to a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it.

MAQALEH v. GATES
605 F.3d 84 (DC Cir. 2010)

SENTELLE, Chief Judge:

Three detainees at Bagram Air Force Base in Afghanistan petitioned the district court for habeas corpus relief from their confinement by the United States military.

All three petitioners are being held as unlawful enemy combatants at the Bagram Theater Internment Facility on the Bagram Airfield Military Base in Afghanistan. Petitioner Fadi Al-Maqaleh is a Yemeni citizen who alleges he was taken into custody in 2003. While Al-Maqaleh’s petition asserts “on information and belief” that he was captured beyond Afghan borders, a sworn declaration from Colonel James W. Gray, Commander of Detention Operations, states that Al-Maqaleh was captured in Zabul, Afghanistan. Redha Al-Najar is a Tunisian citizen who alleges he was captured in Pakistan in 2002. Amin Al-Bakri is a Yemeni citizen who alleges he was captured in Thailand in 2002. Both Al-Najar and Al-Bakri allege they were first held in some other unknown location before being moved to Bagram.

Bagram Airfield Military Base is the largest military facility in Afghanistan occupied by United States and coalition forces. The United States entered into an “Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield” with the Islamic Republic of Afghanistan in 2006, which “consigns all facilities and land located at Bagram Airfield . . . owned by [Afghanistan] or Parwan Province, or private individuals, or others, for use by the United States and coalition forces for military purposes.” (Accommodation and Consignment Agreement for Lands and Facilities at Bagram Airfield Between the Islamic Republic of Afghanistan and the United States of America) (internal
capitalization altered). The Agreement refers to Afghanistan as the “host nation” and the United States “as the lessee.” The leasehold created by the agreement is to continue “until the United States or its successors determine that the premises are no longer required for its use.”

Afghanistan remains a theater of active military combat. The United States and coalition forces conduct “an ongoing military campaign against al Qaeda, the Taliban regime, and their affiliates and supporters in Afghanistan.” These operations are conducted in part from Bagram Airfield. Bagram has been subject to repeated attacks from the Taliban and al Qaeda, including a March 2009 suicide bombing striking the gates of the facility, and Taliban rocket attacks in June of 2009 resulting in death and injury to United States service members and other personnel.

In a thorough and detailed opinion, the [Boumediene] Court undertook its inquiry into the constitutional questions on two levels. First, it explored the breadth of the Court’s holding in Eisentrager (still not overruled) in response to the argument by the United States that constitutional rights protected by the writ of habeas corpus under the Suspension Clause extended only to territories over which the United States held de jure sovereignty. Second, it explored the more general question of extension of constitutional rights and the concomitant constitutional restrictions on governmental power exercised extraterritorially and with respect to noncitizens.

The Court concluded that “at least three factors are relevant in determining the reach of the Suspension Clause.” Those three factors, which we must apply today in answering the same question as to detainees at Bagram, are:

1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.

At the outset, we note that each of the parties has asserted both an extreme understanding of the law after Boumediene and a more nuanced set of arguments upon which each relies in anticipation of the possible rejection of the bright-line arguments. The United States would like us to hold that the Boumediene analysis has no application beyond territories that are, like Guantanamo, outside the de jure sovereignty of the United States but are subject to its de facto sovereignty. We note that the very fact that the Boumediene Court set forth the three-factor test outlined above parallels the Eisentrager Court’s further reasoning addressed by the Boumediene Court in its rejection of the bright-line de jure sovereignty argument before it. That is, had the Boumediene Court intended to limit its understanding of the reach of the Suspension Clause to territories over which the United States exercised de facto sovereignty, it would have had no need to outline the factors to be considered either generally or in the detail which it in fact adopted. We therefore reject the proposition that Boumediene adopted a bright-line test with the effect of substituting de facto for de jure in the otherwise rejected interpretation of Eisentrager.
For similar reasons, we reject the most extreme position offered by the petitioners. At various points, the petitioners seem to be arguing that the fact of United States control of Bagram under the lease of the military base is sufficient to trigger the extraterritorial application of the Suspension Clause, or at least satisfy the second factor of the three set forth in Boumediene. Again, we reject this extreme understanding. Such an interpretation would seem to create the potential for the extraterritorial extension of the Suspension Clause to noncitizens held in any United States military facility in the world, and perhaps to an undeterminable number of other United States-leased facilities as well. Again, such an extended application is not a tenable interpretation of Boumediene.

Having rejected the bright-line arguments of both parties, we must proceed to their more nuanced arguments, and reach a conclusion based on the application of the Supreme Court’s enumerated factors to the case before us.

The first of the enumerated factors is “the citizenship and status of the detainee and the adequacy of the process through which that status determination was made.” Citizenship is, of course, an important factor in determining the constitutional rights of persons before the court. It is well established that there are “constitutional decisions of [the Supreme] Court expressly according differing protection to aliens than to citizens.” However, clearly the alien citizenship of the petitioners in this case does not weigh against their claim to protection of the right of habeas corpus under the Suspension Clause. So far as citizenship is concerned, they differ in no material respect from the petitioners at Guantanamo who prevailed in Boumediene. As to status, the petitioners before us are held as enemy aliens. While the Eisentrager petitioners were in a weaker position by having the status of war criminals, that is immaterial to the question before us. This question is governed by Boumediene and the status of the petitioners before us again is the same as the Guantanamo detainees, so this factor supports their argument for the extension of the availability of the writ.

So far as the adequacy of the process through which that status determination was made, the petitioners are in a stronger position for the availability of the writ than were either the Eisentrager or Boumediene petitioners. As the Supreme Court noted, the Boumediene petitioners were in a very different posture than those in Eisentrager in that “there ha[d] been no trial by military commission for violations of the laws of war.” The Eisentrager detainees were “entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution’s witnesses” in an adversarial proceeding.

The status of the Bagram detainees is determined not by a Combatant Status Review Tribunal but by an “Unlawful Enemy Combatant Review Board” (UECRB). As the district court correctly noted, proceedings before the UECRB afford even less protection to the rights of detainees in the determination of status than was the case with the CSRT. Therefore, as the district court noted, “while the important adequacy of process factor strongly supported the extension
of the Suspension Clause and habeas rights in Boumediene, it even more strongly favors petitioners here.”

The second factor, “the nature of the sites where apprehension and then detention took place,” weighs heavily in favor of the United States. Like all petitioners in both Eisentrager and Boumediene, the petitioners here were apprehended abroad. While this in itself would appear to weigh against the extension of the writ, it obviously would not be sufficient, otherwise Boumediene would not have been decided as it was. However, the nature of the place where the detention takes place weighs more strongly in favor of the position argued by the United States and against the extension of habeas jurisdiction than was the case in either Boumediene or Eisentrager. In the first place, while de facto sovereignty is not determinative, for the reasons discussed above, the very fact that it was the subject of much discussion in Boumediene makes it obvious that it is not without relevance. As the Supreme Court set forth, Guantanamo Bay is “a territory that, while technically not part of the United States, is under the complete and total control of our Government.” While it is true that the United States holds a leasehold interest in Bagram, and held a leasehold interest in Guantanamo, the surrounding circumstances are hardly the same. The United States has maintained its total control of Guantanamo Bay for over a century, even in the face of a hostile government maintaining de jure sovereignty over the property. In Bagram, while the United States has options as to duration of the lease agreement, there is no indication of any intent to occupy the base with permanence, nor is there hostility on the part of the “host” country. Therefore, the notion that de facto sovereignty extends to Bagram is no more real than would have been the same claim with respect to Landsberg in the Eisentrager case. While it is certainly realistic to assert that the United States has de facto sovereignty over Guantanamo, the same simply is not true with respect to Bagram. Though the site of detention analysis weighs in favor of the United States and against the petitioners, it is not determinative.

But we hold that the third factor, that is “the practical obstacles inherent in resolving the prisoner’s entitlement to the writ,” particularly when considered along with the second factor, weighs overwhelmingly in favor of the position of the United States. It is undisputed that Bagram, indeed the entire nation of Afghanistan, remains a theater of war. Not only does this suggest that the detention at Bagram is more like the detention at Landsberg than Guantanamo, the position of the United States is even stronger in this case than it was in Eisentrager. As the Supreme Court recognized in Boumediene, even though the active hostilities in the European theater had “c[o]me to an end,” at the time of the Eisentrager decision, many of the problems of a theater of war remained:

In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. In retrospect the post-War occupation may seem uneventful. But at the time Eisentrager was decided, the Court was right to be concerned about judicial interference with the military’s efforts to contain “enemy elements, guerilla fighters, and ‘were-wolves.’”
We do not ignore the arguments of the detainees that the United States chose the place of detention and might be able “to evade judicial review of Executive detention decisions by transferring detainees into active conflict zones, thereby granting the Executive the power to switch the Constitution on or off at will.” However, that is not what happened here. Indeed, without dismissing the legitimacy or sincerity of appellees’ concerns, we doubt that this fact goes to either the second or third of the Supreme Court’s enumerated factors. We need make no determination on the importance of this possibility, given that it remains only a possibility; its resolution can await a case in which the claim is a reality rather than a speculation. In so stating, we note that the Supreme Court did not dictate that the three enumerated factors are exhaustive. It only told us that “at least three factors” are relevant. Perhaps such manipulation by the Executive might constitute an additional factor in some case in which it is in fact present. However, the notion that the United States deliberately confined the detainees in the theater of war rather than at, for example, Guantanamo, is not only unsupported by the evidence, it is not supported by reason. To have made such a deliberate decision to “turn off the Constitution” would have required the military commanders or other Executive officials making the situs determination to anticipate the complex litigation history set forth above and predict the *Boumediene* decision long before it came down.

For the reasons set forth above, we hold that the jurisdiction of the courts to afford the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in Executive detention in the Bagram detention facility in the Afghan theater of war. We therefore reverse the order of the district court denying the motion for dismissal of the United States and order that the petitions be dismissed for lack of jurisdiction.

§ 8.04 GUANTANAMO: MILITARY TRIBUNALS AND CONGRESS

**HAMDAN v. UNITED STATES**

2012 U.S. App. LEXIS 21385 (D.C. Cir. 10/16/12)

KAVANAUGH, Circuit Judge:

The United States is at war against al Qaeda, an international terrorist organization. Al Qaeda’s stated goals are, among other things, to drive the United States from posts in the Middle East, to devastate the State of Israel, and to help establish radical Islamic control over the Greater Middle East. Al Qaeda uses terror to advance its broad objectives. Al Qaeda terrorists do not wear uniforms, and they target American civilians and members of the U.S. Military, as well as U.S. allies. After al Qaeda’s attacks on the United States on September 11, 2001, Congress authorized the President to wage war against al Qaeda. That war continues.

In war, when the United States captures or takes custody of alien enemy combatants or their substantial supporters, it may detain them for the duration of hostilities. Moreover, the United States may try *unlawful* alien enemy

This case raises questions about the scope of the Executive's authority to prosecute war crimes under current federal statutes.

This particular dispute involves the military commission conviction of Salim Hamdan, an al Qaeda member who worked for Osama bin Laden. In 2001, Hamdan was captured in Afghanistan. He was later transferred to the U.S. Naval Base at Guantanamo Bay, Cuba.

Hamdan was not just detained at Guantanamo as an enemy combatant. He was also accused of being an unlawful enemy combatant and was tried and convicted by a military commission for "material support for terrorism," a war crime specified by the Military Commissions Act of 2006. Hamdan's conviction was based on actions he took from 1996 to 2001 – before enactment of the Military Commissions Act. At the time of Hamdan's conduct, the extant federal statute authorized and limited military commissions to try violations of the "law of war." 10 U.S.C. § 821.

As punishment for his war crime, Hamdan was sentenced by the military commission to 66 months' imprisonment, with credit for some time already served. Hamdan's sentence expired in 2008. Although the United States may have continued to detain Hamdan until the end of hostilities pursuant to its wartime detention authority, Hamdan was transferred in late 2008 to Yemen and then released there. Even after his release, Hamdan has continued to appeal his U.S. war crimes conviction.

This appeal presents several issues. First, is the dispute moot because Hamdan has already served his sentence and been released from U.S. custody? Second, does the Executive have authority to prosecute Hamdan for material support for terrorism on the sole basis of the 2006 Military Commissions Act – which specifically lists material support for terrorism as a war crime triable by military commission – even though Hamdan's conduct occurred from 1996 to 2001, before enactment of that Act? Third, if not, did the pre-existing statute that authorized war-crimes military commissions at the time of Hamdan's conduct – a statute providing that military commissions may try violations of the "law of war," – proscribe material support for terrorism as a war crime?

We conclude as follows:

First, despite Hamdan's release from custody, this case is not moot. This is a direct appeal of a conviction. The Supreme Court has long held that a defendant's direct appeal of a conviction is not mooted by the defendant's release from custody.

Second, consistent with Congress's stated intent and so as to avoid a serious Ex Post Facto Clause issue, we interpret the Military Commissions Act of 2006 not to authorize retroactive prosecution of crimes that were not prohibited as war crimes triable by military commission under U.S. law at the time the conduct occurred. Therefore, Hamdan's conviction may be affirmed only if the relevant
statute that was on the books at the time of his conduct – 10 U.S.C. § 821 – encompassed material support for terrorism.

Third, when Hamdan committed the relevant conduct from 1996 to 2001, Section 821 of Title 10 provided that military commissions may try violations of the "law of war." The "law of war" cross-referenced in that statute is the international law of war. See Quirin, 317 U.S. at 27-30, 35-36. When Hamdan committed the conduct in question, the international law of war proscribed a variety of war crimes, including forms of terrorism. At that time, however, the international law of war did not proscribe material support for terrorism as a war crime. Indeed, the Executive Branch acknowledges that the international law of war did not – and still does not – identify material support for terrorism as a war crime. Therefore, the relevant statute at the time of Hamdan's conduct did not proscribe material support for terrorism as a war crime.

Because we read the Military Commissions Act not to retroactively punish new crimes, and because material support for terrorism was not a pre-existing war crime under 10 U.S.C. § 821, Hamdan’s conviction for material support for terrorism cannot stand. We reverse the judgment of the Court of Military Commission Review and direct that Hamdan’s conviction for material support for terrorism be vacated.

In November 2001, Hamdan was captured in Afghanistan while driving toward Kandahar. The car he was driving contained two anti-aircraft missiles. Also in the car was an al Qaeda-issued document that authorized the bearer to carry a weapon in Afghanistan. Hamdan's captors turned him over to U.S. authorities. He was later transferred to Guantanamo Bay, Cuba, and the U.S. Military detained him there as an enemy combatant.

At Guantanamo, Hamdan not only was detained as an enemy combatant but also was eventually charged with one count of conspiracy and was to be tried before a military commission as an unlawful enemy combatant who had committed war crimes. Hamdan raised various legal objections to the prosecution, and the case ultimately wound its way to the Supreme Court. The Supreme Court held that the military commission rules then in place contravened statutory limits because the rules did not comply in certain respects with statutory restrictions contained in 10 U.S.C. § 836. The Court split 4-3 on and thus did not decide a separate issue: whether conspiracy was a cognizable charge in a military commission under the "law of war" for purposes of 10 U.S.C. § 821. Compare Hamdan, 548 U.S. at 595-612 (Stevens, J., plurality opinion)

Our judgment would not preclude detention of Hamdan until the end of U.S. hostilities against al Qaeda. Nor does our judgment preclude any future military commission charges against Hamdan – either for conduct prohibited by the "law of war" under 10 U.S.C. § 821 or for any conduct since 2006 that has violated the Military Commissions Act. Nor does our judgment preclude appropriate criminal charges in civilian court. Moreover, our decision concerns only the commission's legal authority. We do not have occasion to question that, as a matter of fact, Hamdan engaged in the conduct for which he was convicted.
(conspiracy is not a law of war crime), with id. at 697-706 (Thomas, J., dissenting) (conspiracy is a law of war crime). (Justice Kennedy did not address that issue; Chief Justice Roberts did not participate in the case.)

After passage of the 2006 Military Commissions Act, Hamdan was charged anew before a U.S. military commission on one charge of conspiracy and one charge, containing eight specifications, of material support for terrorism.

At his military commission trial, Hamdan was acquitted of conspiracy but convicted of five specifications of material support for terrorism. In August 2008, he was sentenced to 66 months’ confinement and credited for having already served most of that time.

When his sentence ended later in 2008, the war against al Qaeda had not ended. Therefore, the United States may have continued to detain Hamdan as an enemy combatant. But in November 2008, Hamdan was transferred by the U.S. Military to Yemen, and he was then released on or about January 8, 2009, in Yemen.

Note on the Lawyers of Guantanamo

Much has been written about the question of whether key lawyers in the crafting of interrogation and detention policies violated ethical norms by advising policymakers that it would be legally acceptable to ignore certain statutory and treaty obligations in pursuit of the President’s executive powers. See, e.g., Milan Markovic, Can Lawyers Be War Criminals? 20 GEO. J. LEGAL ETHICS 347 (2007). Jack Goldsmith, The Terror Presidency (2007) created further controversy first by disclosing his role in repudiating the “torture memo” and also by appearing to disclose conversations that could be argued to have been protected by attorney-client privilege.

In contrast, a number of military lawyers have come forward with criticisms of the processes of the military commissions and CSRTs.

Colonel Charles Swift, who was assigned to represent Salim Hamdan, pursued Hamdan’s case to the rather clear detriment of his career. Swift took Hamdan’s constitutional claims to the Supreme Court, gave an interview to Vanity Fair, was passed over for promotion, served temporarily as Visiting Associate Professor and Acting Director of the International Humanitarian Law Clinic at Emory Law School, and eventually entered private law practice.

Maj. Thomas Roughneen, Swift’s replacement as Hamdan’s lawyer, reportedly told the Miami Herald, “It’s like the Titanic. You know someday the ship is going to sink. God almighty, let’s get there already.” http://www.andreworthington.co.uk/?p=97

Lt. Col. Stephen Abraham is a lawyer and intelligence officer who was assigned to review files going before the CSRTs and to provide an assurance that other intelligence agencies did not possess exculpatory information for the
detainee’s benefit. He provided an affidavit that was attached to the petition for rehearing from denial of certiorari in *al-Odah*. In that affidavit, he described some problems with the chain of command and training of CSRT members. Specifically, he addressed the availability of information from intelligence agencies this way:

I was specifically told on a number of occasions that the information provided to me was all that I would be shown, but I was never told that the information that was provided constituted all available information. On those occasions when I asked that a representative of the organization provide a written statement that there was no exculpatory evidence, the requests were summarily denied. At one point, following a review of information, I asked the Office of General Counsel of the intelligence organization that I was visiting for a statement that no exculpatory information had been withheld. I explained that I was tasked to review all available materials and to reach a conclusion regarding the non-existence of exculpatory information, and that I could not do so without knowing that I had seen all information. The request was denied, coupled with a refusal even to acknowledge whether there existed additional information that I was not permitted to review.


Colonel Morris Davis had this to say about his experience:

I was the chief prosecutor for the military commissions at Guantanamo Bay, Cuba, until Oct. 4 [2007], the day I concluded that full, fair and open trials were not possible under the current system. I resigned on that day because I felt that the system had become deeply politicized and that I could no longer do my job effectively or responsibly.


An unidentified legal officer filed an affidavit in the habeas corpus case of Adel Hamad. In his affidavit, this officer observed that many CSRT determinations were supported by mere conclusory statements from intelligence files, and that when CSRT panels found that a detainee was not an enemy combatant, the file would be sent back with instructions to make different findings but without any additional evidence.

http://jurist.law.pitt.edu/pdf/TeesdaleCSRTofficerRedacted.pdf

§ 8.05 DOMESTIC EXECUTIVE DETENTIONS
add at page 530:

After *Hamdi*, Jose Padilla would seem to have a slam-dunk. But the Court held that his habeas petition had been filed in the wrong court. He was initially held in New York on a material witness warrant. When counsel appeared and moved to quash the warrant, he was transferred to the naval brig in Charleston, South Carolina, as an “enemy combatant.” Two days later, counsel filed for habeas corpus in New York. The Court held that the petition should have been filed in South Carolina where he was imprisoned. The Guantanamo detainees were different because they were not located within any judicial district so all the courts need would be personal jurisdiction over the military custodians.

**Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).** Following the Supreme Court opinion, Padilla’s attorneys filed a habeas corpus petition in South Carolina. The District Court, Judge Floyd, held that the AUMF did not authorize detention of Padilla, who was not captured on the battlefield (unlike Hamdi) and who was not charged with any violation of the law of war or any other crime but was merely held in preventive detention. Calling the situation a “law enforcement matter, not a military matter,” the court ordered that Padilla be released in 45 days unless the Government decided to charge him with a crime. Government lawyers had already indicated in several settings that it would be impossible to assemble admissible evidence for a civilian prosecution.

The Fourth Circuit, Judge Luttig, disagreed. “Like Haupt [the U.S. citizen involved in *Quirin*], Padilla associated with the military arm of the enemy, and with its aid, guidance, and direction entered this country bent on committing hostile acts on American soil. Padilla thus falls within *Quirin*’s definition of enemy belligerent, as well as within the definition of the equivalent term accepted by the plurality in *Hamdi*.”

Padilla then petitioned for certiorari, at which point the Government decided to transfer him to civilian custody to face charges in federal court. Supreme Court Rules required a court order to allow transfer of custody, which the Fourth Circuit refused but the Supreme Court then granted. Ultimately, the Court denied certiorari, 126 S. Ct. 1649 (April 3, 2006).

Justice Kennedy, for himself and two others, concurred in the denial of certiorari with these comments:

In light of the previous changes in his custody status and the fact that nearly four years have passed since he first was detained, Padilla, it must be acknowledged, has a continuing concern that his status might be altered again. That concern, however, can be addressed if the necessity arises. Padilla is now being held pursuant to the control and supervision of the United States District Court for the Southern District of Florida, pending trial of the criminal case. In the course of its supervision over Padilla’s custody and trial the District Court will be obliged to afford him the protection, including the right to a speedy trial, guaranteed to all federal criminal defendants. Were the Government to seek to change the status or conditions of Padilla’s custody, that court would be in a position to rule quickly on any responsive filings submitted by Padilla. In such an event, the District
Court, as well as other courts of competent jurisdiction, should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised. Padilla, moreover, retains the option of seeking a writ of habeas corpus in this Court.

Justice Ginsburg dissented from the denial of certiorari on the ground that the case was one “capable of repetition yet evading review.”

Subsequently, Padilla was tried in Florida and convicted of conspiracy to murder and material support for seeking to attend a training camp. The principal evidence against him was a form for training bearing his fingerprints. There was no evidence of any particular plans on his part to do anything. See Jenny S. Martinez, The Real Verdict on Jose Padilla, WASHINGTON POST A23 (Aug 17, 2007). David Cole provided this assessment:

In the end, the prosecution succeeded, as the jury found Padilla guilty of attending the training camp and of one count of conspiracy to maim, murder or kidnap overseas. But given how weak the evidence was, the case could easily have come out the other way – and may not withstand appeal. If what the Administration says about Padilla is true, this should not have been a close case. But because the Administration obtained its evidence against him through unconstitutional means, it was never able to tell the jury what it really thinks Padilla was up to.


PADILLA v. YOO
678 F.3d 748 (9th Cir. 2012)

FISHER, Circuit Judge:

After the September 11, 2011 attacks on the United States, the government detained Jose Padilla, an American citizen, as an enemy combatant. Padilla alleges that he was held incommunicado in military detention, subjected to coercive interrogation techniques and detained under harsh conditions of confinement, all in violation of his constitutional and statutory rights. In this lawsuit, plaintiffs Padilla and his mother, Estela Lebron, seek to hold defendant John Yoo, who was the Deputy Assistant Attorney General in the U.S. Department of Justice's Office of Legal Counsel (OLC) from 2001 to 2003, liable for damages they allege they suffered from these unlawful actions. Under recent Supreme Court law, however, we are compelled to conclude that, regardless of the legality of Padilla's detention and the wisdom of Yoo’s judgments, at the time he acted the law was not "sufficiently clear that every reasonable official would have understood that what he [wa]s doing violate[d]" the plaintiffs' rights. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011) (internal quotation marks omitted). We therefore hold that Yoo must be granted qualified immunity, and accordingly reverse the decision of the district court.
As we explain below, we reach this conclusion for two reasons. First, although during Yoo's tenure at OLC the constitutional rights of convicted prisoners and persons subject to ordinary criminal process were, in many respects, clearly established, it was not "beyond debate" at that time that Padilla – who was not a convicted prisoner or criminal defendant, but a suspected terrorist designated an enemy combatant and confined to military detention by order of the President – was entitled to the same constitutional protections as an ordinary convicted prisoner or accused criminal. Second, although it has been clearly established for decades that torture of an American citizen violates the Constitution, and we assume without deciding that Padilla's alleged treatment rose to the level of torture, that such treatment was torture was not clearly established in 2001-03.

I. BACKGROUND

A. [Facts as stated in plaintiffs’ complaint]

In early May 2002, Padilla was arrested at Chicago O'Hare International Airport pursuant to a material witness warrant issued by the United States District Court for the Southern District of New York. He was transported to New York, where he was held in custody in a federal detention facility.

On June 9, 2002, President George W. Bush issued an order declaring Padilla an "enemy combatant" and directing the Secretary of Defense to take Padilla into military custody. The presidential order asserted that Padilla was "closely associated with al Qaeda"; that he had "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States"; that he "possesse[d] intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States"; that he "represent[ed] a continuing, present and grave danger to the national security of the United States"; and that his detention was "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens."

In accordance with the President's order, Padilla was transferred from the federal detention facility in New York to a military brig in Charleston, South Carolina, where he was held in military custody for more than three and a half years, from June 2002 until January 2006. For a substantial portion of this period, from June 2002 until March 2004, government officials denied Padilla all contact with persons outside the brig, including his family and legal counsel.

On January 5, 2006, Padilla was transferred from the military brig to a federal detention center in Miami, Florida, where he stood trial in federal district court on criminal charges unrelated to the allegations that had been used to justify his military detention. In August 2007, the jury returned a verdict of guilty. In September 2011, a divided Eleventh Circuit panel affirmed Padilla's conviction, vacated his sentence as unreasonably low and remanded for resentencing. See United States v. Jayyousi, 657 F.3d 1085, 1117-19 (11th Cir. 2011).
Padilla and his mother, Estela Lebron, filed this civil action against John Yoo, in his individual capacity, on January 4, 2008, two years after Padilla's military detention ended. In their first amended complaint, Padilla and Lebron alleged that Padilla was imprisoned in the military brig without charge and without the ability to defend himself or to challenge his conditions of confinement. They alleged that during Padilla's detention, he suffered gross physical and psychological abuse upon the orders of high-ranking government officials as part of a systematic program of abusive interrogation mirroring the alleged abuses committed at Guantanamo Bay, including extreme isolation; interrogation under threat of torture, deportation and even death; prolonged sleep adjustment and sensory deprivation; exposure to extreme temperatures and noxious odors; denial of access to necessary medical and psychiatric care; substantial interference with his ability to practice his religion; and incommunicado detention for almost two years, without access to family, counsel or the courts. They also alleged that Lebron was deprived of virtually all contact with Padilla during his prolonged and allegedly unlawful military detention, in violation of her constitutional rights to familial association and communication.

The complaint alleged that Yoo is one of several current and former government officials who abused their high positions to cause Padilla's allegedly unlawful military detention and interrogation. From 2001 to 2003, Yoo was Deputy Assistant Attorney General at OLC. Padilla and Lebron alleged that Yoo set in motion Padilla's allegedly illegal interrogation and detention, both by formulating unlawful policies for the designation, detention and interrogation of suspected "enemy combatants" and by issuing legal memoranda designed to evade legal restraints on those policies and to immunize those who implemented them. They alleged that, in doing so, Yoo abdicated his ethical duties as a government attorney and abandoned his office's tradition of providing objective legal advice to the President.

The complaint alleged that Yoo publicly acknowledged in his book, War By Other Means, that he stepped beyond his role as a lawyer to participate directly in developing policy in the war on terrorism. It alleged that Yoo shaped government policy in his role as a key member of a small, secretive and highly influential group of senior administration officials known as the "War Council," which met regularly "to develop policy in the war on terrorism." It alleged that Yoo acted outside the scope of his employment at OLC by taking instructions directly from White House Counsel Alberto Gonzales and providing Gonzales with verbal and written advice without first consulting Attorney General John Ashcroft. The complaint alleged that, in his role as the de facto head of war-on-terrorism legal issues, Yoo wrote and promulgated a series of memoranda that ultimately led to Padilla's allegedly unlawful treatment.

The complaint alleged that these memoranda advised that there were no legal constraints on the Executive's policies with respect to the detention and interrogation of suspected terrorists. It alleged that the memoranda "did not provide the fair and impartial evaluation of the law required by OLC tradition and the ethical obligations of an attorney to provide the client with an exposition of the law adequate to make an informed decision." Rather, it alleged that Yoo
"intentionally used the Memos to evade well-established legal constraints and to justify illegal policy choices that he knew had already been made — sometimes by virtue of his own participation in the War Council."

The complaint also alleged that Yoo personally participated in Padilla's unlawful military detention. Quoting from Yoo's book, it alleged that Yoo "personally 'reviewed the material on Padilla to determine whether he could qualify, legally, as an enemy combatant, and issued an opinion to that effect.'" It alleged that Ashcroft relied on Yoo's opinion in recommending to the President that Padilla be taken into military custody.

The complaint alleged that Padilla's designation as an enemy combatant, military detention, conditions of confinement and program of interrogation violated his rights to procedural and substantive due process, not to be subjected to cruel or unusual punishment or treatment that shocks the conscience, to freely exercise his religion, of access to information, to association with family members and friends, of access to legal counsel, of access to the courts, against compelled self-incrimination and against arbitrary and unconstitutional seizure and military detention. It alleged violations of the First, Fourth, Fifth, Sixth and Eighth Amendments to the United States Constitution, Article III of the Constitution, the Habeas Suspension and Treason Clauses of the Constitution and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb.

The complaint sought two remedies: a declaration that Padilla's treatment violated the Constitution and RFRA, and nominal money damages of one dollar. The plaintiffs subsequently agreed to dismiss their claims for declaratory relief, leaving only a claim for nominal damages.

B.

Yoo moved to dismiss the action for failure to state a claim upon which relief could be granted. He argued that the complaint failed to state a claim for money damages on three grounds. First, he argued that the plaintiffs could not state an action for damages because Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which recognized an implied cause of action for damages against federal officials under some circumstances, did not apply. Second, Yoo argued that he was entitled to qualified immunity because the complaint failed to allege facts sufficient to establish his personal responsibility for the constitutional and statutory violations alleged in the complaint. Third, Yoo argued that he was entitled to qualified immunity because the complaint failed to allege a violation of clearly established constitutional or statutory rights.

The district court denied Yoo's motion. See Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009). The court concluded that the plaintiffs could pursue a Bivens action, that the complaint adequately alleged Yoo's personal responsibility for Padilla's treatment and, as relevant here, that the complaint alleged violations of clearly established constitutional and statutory rights.

With respect to this last issue, the district court acknowledged Yoo's argument that, at the time of Yoo's tenure at OLC, "no federal court ha[d] afforded an enemy combatant the kind
of constitutional protections Padilla seeks in this case," and that "courts ha[d] never attributed the level of constitutional rights sought in this action" to enemy combatants – a "unique type of detainee." But the court concluded that the complaint nonetheless alleged violations of clearly established law because "the basic facts alleged in the complaint clearly violate the rights afforded to citizens held in the prison context," and because all detainees, including enemy combatants, must be afforded at least the rights to which convicted prisoners are entitled. The court explained:

[Although the legal framework relating to the designation of a citizen as an enemy combatant was developing at the time of the conduct alleged in the complaint, federal officials were cognizant of the basic fundamental civil rights afforded to detainees under the United States Constitution. The Court finds that the complaint alleges conduct that would be unconstitutional if directed at any detainee, and therefore finds that the rights allegedly violated were clearly established at the time of the alleged conduct.

The court accordingly concluded that Yoo was not entitled to qualified immunity and denied Yoo's motion to dismiss. The crux of the district court's decision for purposes of this appeal is its assumption that any reasonable official would have understood in 2001-03 that United States citizen enemy combatants in military detention must be afforded at least the constitutional and statutory rights afforded to ordinary prison inmates.

C.

Of relevance, a different federal district court reached a contrary result in a related case. In February 2007, Padilla and Lebron filed an action similar to this one in the United States District Court for the District of South Carolina against former Secretary of Defense Rumsfeld, former Attorney General Ashcroft, 11 other current or former government officials and unnamed Doe defendants, including the individuals allegedly responsible for Padilla’s interrogation at the military brig. In February 2011, the district court dismissed the South Carolina case for failure to state a claim, in part concluding that the defendants were entitled to qualified immunity because the complaint failed to allege that Padilla's treatment violated clearly established law. See Lebron v. Rumsfeld, 764 F. Supp. 2d 787 (D.S.C. 2011).

In January 2012, the Fourth Circuit affirmed dismissal of the South Carolina action. See Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012). The court affirmed dismissal of the plaintiffs’ constitutional claims for lack of a Bivens remedy. As relevant here, the court also affirmed dismissal of the plaintiffs’ RFRA claims on the basis of qualified immunity, holding that RFRA’s application "to the military detention setting" was not clearly established at the time of the alleged violations. The court "emphasized the substantial differences between individuals in civilian custody and individuals in military custody."

[The Fourth Circuit decision was not preclusive because different parties were involved.] Whereas the Fourth Circuit resolved the plaintiffs’ constitutional claims under Bivens and relied on qualified immunity to resolve only the plaintiffs’ RFRA claim, we resolve all claims under qualified immunity.

II. DISCUSSION

A.

The outcome of this appeal is governed by the Supreme Court's decision in Ashcroft v. al-Kidd, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011), decided subsequent to the district court's ruling against Yoo. In al-Kidd, the plaintiff filed a Bivens action against then-Attorney
General Ashcroft, alleging that Ashcroft violated al-Kidd's Fourth Amendment rights by authorizing federal prosecutors to obtain valid material witness warrants for detention of terrorism suspects whom they would otherwise lack probable cause to arrest. The complaint alleged that, "in the aftermath of the September 11th terrorist attacks, . . . Ashcroft authorized federal prosecutors and law enforcement officials to use the material-witness statute to detain individuals with suspected ties to terrorist organizations." It alleged "that federal officials had no intention of calling most of these individuals as witnesses, and that they were detained, at Ashcroft's direction, because federal officials suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime." Id. The complaint alleged that "this pretextual detention policy led to the material-witness arrest of [Abdullah] al-Kidd, a native-born United States citizen," leading al-Kidd to file a Bivens action challenging the constitutionality of Ashcroft's alleged policy as a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. Al-Kidd conceded that individualized suspicion supported issuance of the material witness arrest warrant, but argued that the arrest was unconstitutional because of Ashcroft's alleged subjective intent to use the material witness statute as a pretext to detain terrorism suspects who officials never intended to have testify. Ashcroft moved to dismiss based on absolute and qualified immunity. The district court denied the motion and this court affirmed. The Supreme Court reversed.

The Court began by reaffirming the general principle that "[q]ualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." Significant here, under the second prong, a "Government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." The Court emphasized that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions," and admonished us "not to define clearly established law at a high level of generality."

Here, the complaint alleged that Yoo, as a Justice Department attorney, participated in policy decisions and rendered legal opinions that ultimately authorized federal officials to designate Padilla as an enemy combatant, take him into military custody, hold him incommunicado without access to the courts or counsel and subject him to both coercive interrogation techniques and harsh conditions of confinement, in violation of his constitutional and statutory rights.

Granted, it may sometimes be permissible to rely on cases involving one type of detainee to establish clearly established constitutional rights of another type of detainee. See City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244-46, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983) (holding that pretrial detainees possess a constitutional right against deliberate indifference to their serious medical needs because the due process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner"); Youngberg v. Romeo, 457 U.S. 307, 315-16, 321-22, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) (holding that mentally retarded individuals who are involuntarily committed to a state institution have a constitutional right to reasonably safe conditions of confinement under the due process clause of the Fourteenth Amendment because "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish");
Hydrick v. Hunter, 500 F.3d 978, 989 (9th Cir. 2007) (holding that "the rights afforded prisoners set a floor for those that must be afforded" sexually violent predators subject to civil detention), vacated and remanded on other grounds, 556 U.S. 1256, 129 S. Ct. 2431, 174 L. Ed. 2d 226 (2009); Or. Advocacy Ctr. v. Mink, 322 F.3d 1101, 1120 (9th Cir. 2003) (holding, in light of the Supreme Court's "observation that the due process rights of pretrial detainees are 'at least as great as the Eighth Amendment protections available to a convicted prisoner,'" that the Eighth Amendment provides "a minimum standard of care" for determining the rights of pretrial detainees). In Hydrick, for example, we held that court decisions defining the constitutional rights of prisoners could be relied upon to establish a floor for the clearly established constitutional rights of persons who are civilly detained as sexually violent predators, for whom the law was at that time "still evolving." Central to our holding, however, was the Supreme Court's earlier statement that "civilly detained persons must be afforded 'more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.'"

Here, of course, the Supreme Court had not, at the time of Yoo's tenure at OLC, declared that American citizens detained as enemy combatants had to be treated at least as well, or afforded at least the same constitutional and statutory protections, as convicted prisoners. On the contrary, the Supreme Court had suggested in Ex parte Quirin, 317 U.S. 1 (1942), the most germane precedent in existence at the time of Yoo's tenure at OLC, that a citizen detained as an unlawful combatant could be afforded lesser rights than ordinary prisoners or individuals in ordinary criminal proceedings.

Hamdi was not decided until 2004, so it could not have placed Yoo on clear notice of Padilla's constitutional rights in 2001-03 when Yoo was at the Department of Justice. Even after Hamdi, moreover, it remains murky whether an enemy combatant detainee may be subjected to conditions of confinement and methods of interrogation that would be unconstitutional if applied in the ordinary prison and criminal settings. Although Hamdi recognized that citizens detained as enemy combatants retain constitutional rights to due process, the Court suggested that those rights may not be coextensive with those enjoyed by other kinds of detainees. On the contrary, the Court held that the rights afforded to an enemy combatant detainee "may be tailored" to the circumstances, because "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting."

In sum, the plaintiffs did not, through their reliance on either Hamdi or cases involving ordinary prison and criminal settings, allege violations of constitutional and statutory rights that were clearly established in 2001-03. During that relevant time frame, the constitutional rights of convicted prisoners and persons subject to ordinary criminal process were, in many respects, clearly established. But Padilla was not a convicted prisoner or criminal defendant; he was a suspected terrorist designated an enemy combatant and confined to military detention by order of the President. He was detained as such because, in the opinion of the President -- albeit allegedly informed by his subordinates, including Yoo -- Padilla presented a grave danger to national security and possessed valuable intelligence information that, if communicated to the United States, could have been helpful to the United States in staving off further terrorist attacks. We express no opinion as to whether those allegations were true, or whether, even if true, they justified the extreme conditions of confinement to which Padilla says he was subjected. Given the unique circumstances and purposes of Padilla's detention, and in light of Quirin, an official could have had some reason to believe that Padilla's harsh treatment fell within constitutional bounds. Even after Hamdi, the degree to which citizens detained as enemy combatants must be afforded the constitutional protections
granted other detainees remains unsettled, because "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting." The same is true of Padilla's RFRA claim. As the Fourth Circuit held, the application of RFRA to enemy combatants in military detention was not clearly established in 2001-03.

B.

The absence of a decision defining the constitutional and statutory rights of citizens detained as enemy combatants need not be fatal to the plaintiffs' claims. The Supreme Court has long held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."

The plaintiffs invoke this principle here. They argue that, even if there is no specific judicial decision holding that the Fifth Amendment's prohibition on government conduct that "shocks the conscience" is violated when the government tortures a United States citizen designated as an enemy combatant, torture of a United States citizen is the kind of egregious constitutional violation for which a decision "directly on point" is not required. We agree with the plaintiffs that the unconstitutionality of torturing a United States citizen was "beyond debate" by 2001. Yoo is entitled to qualified immunity, however, because it was not clearly established in 2001-03 that the treatment to which Padilla says he was subjected amounted to torture.

We assume without deciding that Padilla's alleged treatment rose to the level of torture. That it was torture was not, however, "beyond debate" in 2001-03. There was at that time considerable debate, both in and out of government, over the definition of torture as applied to specific interrogation techniques. In light of that debate, as well as the judicial decisions discussed above, we cannot say that any reasonable official in 2001-03 would have known that the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture. Thus, although we hold that the unconstitutionality of torturing an American citizen was beyond debate in 2001-03, it was not clearly established at that time that the treatment Padilla alleges he was subjected to amounted to torture.

C.

For these reasons, we hold that Yoo is entitled to qualified immunity on the plaintiffs' claims. Because we reverse on that basis, we do not address Yoo's alternative arguments that the complaint does not adequately allege his personal responsibility for Padilla's treatment and that a Bivens remedy is unavailable.

Our conclusion that Yoo is entitled to qualified immunity does not address the propriety of Yoo's performance of his duties at OLC otherwise. As amici point out, the complaint alleges that Yoo "intentionally violated professional standards reflected in OLC practice and willfully disregarded the obligations attendant on his office." Amici argue that "[s]uch conduct, if proven, would strike at the very heart of OLC's mission and seriously compromise the ability of the executive to make informed, even lawful, decisions." These allegations have been the subject of an internal Department of Justice investigation of Yoo's compliance with professional standards and are not at issue

III. CONCLUSION

Yoo is entitled to qualified immunity. The order of the district court denying Yoo's motion to dismiss is therefore reversed in pertinent part.
Chapter 9

INTERROGATION & EMERGENCY POWERS

add at page 549

Mary Ellen O’Connell, Combatants and the Combat Zone, 43 U. RICH. L. REV. 845 (2009):

In an armed conflict, in the zone of hostilities, combatants may be targeted without warning or detained without trial. Such treatment is unlawful against persons engaging in violence in the absence of armed conflict. Armed conflict occurs when organized armed groups exchange protracted, intense, armed hostilities. The groups must be associated with territory. In addition to the concept of armed conflict, the concept of conflict zone is important. Killing combatants or detaining them without trial until the end of hostilities is consistent with the principles of necessity and proportionality, as well as general human rights, when related to a zone of actual armed hostilities. Outside such a zone, however, authorities must attempt to arrest a suspect and only target to kill those who pose an immediate lethal threat and refuse to surrender. Those arrested outside a conflict zone should receive a speedy trial on the basis of the evidence that has led to the arrest.

UNITED STATES v. BELFAST
611 F.3d 783 (11th Cir. 2010).

Roy M. Belfast, Jr., a/k/a Charles McArthur Emmanuel, a/k/a Charles Taylor, Jr., a/k/a Chuckie Taylor, II (“Emmanuel”), appeals his convictions and 97-year sentence for committing numerous acts of torture and other atrocities in Liberia between 1999 and 2003, during the presidency of his father, Charles Taylor. Emmanuel, who is the first individual to be prosecuted under the Torture Act, 18 U.S.C. § 2340-2340A, seeks reversal of his convictions on the ground that the Torture Act is unconstitutional. Primarily, Emmanuel contends that congressional authority to pass the Torture Act derives solely from the United States's obligations as a signatory to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; he says the Torture Act impermissibly exceeds the bounds of that authority, both in its definition of torture and its proscription against conspiracies to commit torture.

The facts of this case are riddled with extraordinary cruelty and evil. The defendant, Charles McArthur Emmanuel, was born in Massachusetts in 1977, the son of Bernice Yolanda Emmanuel and Charles Taylor. Taylor returned to his native Liberia sometime thereafter. Emmanuel's mother married Roy Belfast in 1983. Apparently out of fear that Taylor would try to take her son, Bernice Emmanuel moved with him and Belfast to Orlando, FL. There, the couple also changed Emmanuel's name to Roy Belfast, Jr.

In 1992, Emmanuel visited Liberia, where a bloody civil war had been raging for three years. At the time of Emmanuel's visit, his father, Taylor, led the
National Patriotic Front of Liberia, an armed insurgent group. The NPFL was one faction in the struggle for national power following the assassination of Liberian President Samuel Doe in 1990. After some months, Emmanuel returned to the United States. Two years later, however, Emmanuel again visited Liberia; this time, he did not return. In 1997, Taylor was elected to the presidency. President Taylor soon charged the twenty-year-old Emmanuel with overseeing the state’s creation of an Anti-Terrorism Unit ("ATU") – also known in Liberia as the "Demon Forces" – which was responsible for protecting Taylor and his family.

The ATU was Emmanuel’s self-described "pet project." ATU affiliates referred to Emmanuel as "Chief," and his license plate read "Demon." Between 1999 and 2002, the defendant wielded his power in a terrifying and violent manner, torturing numerous individuals in his custody who were never charged with any crime or given any legal process. [The court provided extensive details of incidents.]

President Reagan signed the Convention Against Torture on April 18, 1988, and approximately one month later, the CAT was transmitted to the Senate for its advice and consent, along with seventeen reservations, understandings, and declarations. In January 1990, President George H.W. Bush submitted a revised list of such conditions. Of particular relevance here, the United States expressed its understanding that "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering." The Senate adopted a resolution of advice and consent to ratification of the CAT on October 27, 1990, subject to several conditions, including the one just mentioned. President Clinton deposited the instrument of ratification, which included the Senate reservations, understandings, and declarations, with the United Nations on October 21, 1994. The CAT became the law of the land on November 20, 1994, thirty days after it was deposited for ratification with the United Nations. At present, 146 nations are signatories to the CAT.

The heart of Emmanuel’s argument is that the Torture Act is invalid because its definition of torture sweeps more broadly than that provided by the CAT. According to Emmanuel, there are three crucial differences between the definition of torture in the CAT and the Torture Act: first, the CAT requires that "torture" be committed for some proscribed purpose – specifically, "for such purposes as" obtaining information, punishing, intimidating, or coercing a person, or for "any reason based on discrimination of any kind," – whereas the Torture Act does not require the government to prove the defendant’s motive; second, the CAT requires that the torturer’s actions actually result in "severe pain and suffering," whereas the Torture Act requires only an act committed with the "specific inten[tion] to inflict severe physical or mental pain or suffering"; and third, the CAT limits the scope of "torture" to conduct committed by "a public official or other person acting in an official capacity," whereas the Torture Act requires that the torturous conduct be "committed by a person acting under the color of law."

In determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether
the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." Congressional power to pass those laws that are necessary and proper to effectuate the enumerated powers of the Constitution is nowhere broader and more important than in the realm of foreign relations.

Notably, the existence of slight variances between a treaty and its congressional implementing legislation do not make the enactment unconstitutional; identicality is not required. Rather, legislation implementing a treaty bears a "rational relationship" to that treaty where the legislation "tracks the language of the [treaty] in all material respects."

Emmanuel also fails to persuade us that he cannot be prosecuted for torture committed before Liberia became a signatory to the Convention Against Torture in 2004. Nothing in the CAT limits its application to torture committed within the territorial borders of its signatories. Indeed, such a limitation would be at odds with the treaty's core purpose of "mak[ing] more effective the struggle against torture . . . throughout the world," inasmuch as any nation that wished to practice torture, even on a huge scale, could avoid all responsibility by not signing the CAT in the first place, or by withdrawing from the CAT before engaging in torture. To avoid precisely those possibilities, the CAT requires each state party to "ensure that all acts of torture are offences under its criminal law." Congress faithfully implemented the CAT's directive to prosecute torture wherever it may occur, applying the proscriptions of the Torture Act to "[w]hoever outside the United States commits . . . torture."

Emmanuel, for his part, is bound by the Torture Act, a valid congressional enactment. The Supreme Court made clear long ago that an absent United States citizen is nonetheless "personally bound to take notice of the laws [of the United States] that are applicable to him and to obey them." Emmanuel was a United States citizen at all relevant times – when the Torture Act was passed and when he committed all of the acts for which he was convicted. As such, he is bound by United States law "made applicable to him in a foreign country." Thus, there was nothing improper about application of the Torture Act to Emmanuel's conduct in Liberia before that country signed the CAT.

Next, Emmanuel argues that his convictions are invalid because the Torture Act allows federal courts to take jurisdiction over an act of torture based solely on the presence of the alleged torturer in the United States, something he claims is not authorized by the CAT or any other provision of law. Notably, there was no need to invoke this so-called "present-in" jurisdiction in this case because Emmanuel is a United States citizen. Thus, we address Emmanuel's objection to "present-in" jurisdiction only in the context of his facial challenge to the Torture Act. Article 5(2) of the CAT obligates a signatory nation to assert jurisdiction over an "alleged offender" who is "present in any territory under its jurisdiction" and whom it does not extradite. It is difficult to see what clearer authorization of "present-in" jurisdiction the CAT might have contained. Consistent with the plain language of the CAT, Congress placed the following jurisdictional provision in the Torture Act:
(b) Jurisdiction -- There is jurisdiction over the activity prohibited in subsection (a) if --

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

§ 9.01 INTERROGATION & TORTURE

The most consistent coverage of the torture issue has been provided by journalism professor Mark Danner: http://www.markdanner.com

The International Committee of the Red Cross is recognized as the official agency for monitoring nations’ compliance with the Geneva Conventions. It investigates detention facilities and addresses its reports in confidence to the responsible government officials. Its report on CIA interrogation techniques in February 2007, however, became publicly available. ICRC, Report on the Treatment of Fourteen “High-Level Detainees” in CIA Custody. It concluded that their detention “outside protection of the law” constituted “arbitrary deprivation of liberty and forced disappearance, in violation of international law.” The report also described interrogation and confinement to which the detainees were subjected and concluded that these conditions constituted in some instances torture and in others cruel inhuman or degrading treatment.

One of the three Executive Orders signed by President Obama on January 22, 2009, was directed to interrogation and to the CIA detention facilities. EO 13491 set Common Article 3 as the “baseline” for treatment of prisoners, directed that all interrogations would be conducted under the Army Field Manual, and ordered that the CIA detention facilities be closed “as expeditiously as possible.”

On April 16, 2009, President Obama released four more memos dealing with “interrogation” techniques used by the CIA. While releasing these memos, the President ruled out prosecutions, stating that it is a “time for reflection, not retribution.”

DOJ Memo Re Interrogation of Abu Zubaydah (August 1, 2002):

Zubaydah is currently being held by the United States. The interrogation team is certain that he has additional information that he refuses to divulge. Specifically, he is withholding information regarding terrorist networks in the United States or in Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas. Zubaydah has become accustomed to a certain level of treatment and displays no signs of willingness to disclose further information. Moreover, your intelligence indicates that there is currently a level of “chatter” equal to that which preceded the September 11 attacks. In light of the information you believe Zubaydah has and the high level of threat you believe now exists, you wish to move the interrogations into what you have described, as an “increased pressure phase.”
[The memo then describes 10 techniques including stress positions, waterboarding, and poisonous insects – it relates that these are used in SERE training but admits that trainees know the limited duration and that they will not be harmed.]

To violate the statute, an individual must have the specific intent to inflict severe pain or suffering. Because specific intent is an element of the offense, the absence of specific intent negates the charge of torture. [The presence of medical personnel and the prior experience with SERE training negate the presence of specific intent.]

**DOJ Memo Re Use of Techniques in Combination (May 10, 2005):**

[O]ur advice does not extend to the use of techniques on detainees unlike those we have previously considered; and whether other detainees would, in the relevant ways, be like the ones at issue in our previous advice would be a factual question we cannot now decide. Finally, we emphasize that these are issues about which reasonable persons may disagree. Our task has been made more difficult by the imprecision of the statute and the relative absence of judicial guidance, but we have applied our best reading of the law to the specific facts that you have provided.

**DOJ Memo Re Legal Standards (May 10, 2005):**

A paramount recognition emphasized in our 2004 Legal Standards Opinion merits re-emphasis at the outset and guides our analysis: Torture is abhorrent both to American law and values and to international norms. The universal repudiation of torture is reflected not only in our criminal law, but also in international agreements, in centuries of Anglo-American law, and in the longstanding policy of the United States, repeatedly and recently reaffirmed by the President. Consistent with these norms, the President has directed unequivocally that the United States is not to engage in torture.

In sum, based on the information you have provided and the limitations, procedures, and safeguards that would be in place, we conclude that - although extended sleep deprivation and use of the waterboard present more substantial questions in certain respects under the statute and the use of the waterboard raises the most substantial issue – none of these specific techniques, considered individually, would violate the prohibition.

**DOJ Memo Re Application of CAT to Interrogation of Detainees (May 30, 2005):**

You have asked us to address whether certain “enhanced interrogation techniques” employed by the Central Intelligence Agency (“CIA”) in the interrogation of high value at Qaeda detainees are consistent with United States obligations under Article 16 of the United Nations Convention
Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ("CAT"), We conclude that use of these techniques, subject to the CIA's careful screening criteria and limitations and its medical safeguards, is consistent with United States obligations under Article 16.

By its terms, Article 16 is limited to conduct within “territory under [United States] jurisdiction.” We conclude that territory under United States jurisdiction includes, at most, areas over which the United States exercises at least de facto authority as the government. Based on CIA assurances, we understand that the interrogations do not take place in any such areas. We therefore conclude that Article 16 is inapplicable to the CIA’s interrogation practices and that those practices thus cannot violate Article 16.

Given the paucity of relevant precedent and the subjective nature of the inquiry, however, we cannot predict with confidence whether a court would agree with this conclusion, though, for the reasons explained, the question is unlikely to be subject to judicial inquiry.

add at page 555:

The Inspector General of the Justice Department published “A Review of the FBI’s Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq” in October 2009. The report concluded:

Our review determined that the vast majority of FBI complied with FBI interview policies and separated themselves from interrogators who used non-FBI techniques. In a few instances, FBI agents used or participated in interrogations during which techniques were used that would not normally be permitted in the United States. . . . We also concluded that the FBI had not provided sufficient guidance for how agents should respond when confronted with military interrogators who used interrogation techniques that were not permitted by FBI policies.

add at page 558:

Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc) affirmed the district court holdings over four dissents. The dissenters would have allowed the Bivens claim to proceed on the basis that Arar’s treatment in Syria stemmed directly from actions of U.S. agents in the U.S.

See also Al Kidd v. Ashcroft, p. 112 supra, in which the district court would have allowed a Bivens action to proceed but the Supreme Court reversed on grounds on qualified immunity.

Meanwhile, an Italian judge convicted 23 Americans (21 CIA agents and two others) and two Italian intelligence agents on kidnaping charges in connection with the capture and rendition of Abu Omar from Italy to Egypt. The Americans were convicted in absentia and are not likely to be extradited to Italy.
§ 9.02 EMERGENCY POWERS & CIVIL LIBERTIES

A v. United Kingdom, ECHR 3455/05 (Feb 19, 2009). The European Court of Human Rights agreed with the House of Lords that executive detention of aliens suspected of terrorist connections was a violation of the European Covenant on Human Rights. The ECHR, however, found that the deprivation was rather minimal and assessed rather nominal damages against the UK.

Gillan & Quinton v. United Kingdom, ECHR 4158/05 (2010). Plaintiffs were British nationals who were stopped and searched by police while on their way to a demonstration close to an arms fair held in the Docklands area of East London. The United Kingdom Terrorism Act of 2000 created a system in which police officials could authorize, if “expedient for the prevention of acts of terrorism,” police officers within a defined geographical area to stop any person and search the person and anything carried by him or her. The search can be carried out by an officer in an authorised area whether or not he has grounds for suspicion “for articles of a kind which could be used in connection with terrorism.” The 2000 Act went into effect on 19 February 2001 and successive authorizations, each covering the whole of the Metropolitan Police district and each for the maximum permissible period (28 days), have been made and confirmed ever since that time. Between 2004 and 2008 the total of searches recorded by the Ministry of Justice went from 33,177 to 117,278.

The European Court held that the searches constituted an invasion of the right of privacy under article 8 of the ECHR. Article 8 permits invasion of privacy only “in accordance with the law.” The unfettered discretion conferred by the 2000 Act first on the authorizing official and then on the individual officer meant there was no effective control. Without “adequate legal safeguards” the individual was subject to arbitrary interference with the right of privacy, and thus the searches were not “in accordance with law.”

The Government unsuccessfully tried to compare these searches with searches of travelers at airports. Air travelers essentially consent to searches because they know that a search will be conducted and the traveler can choose whether to travel under those terms. The individual walking on the street has no similar choice available.

add new section at page 612

§ 9.03 SUING GOVERNMENT OFFICIALS

The many civil lawsuits against government officials involved in the “war on terror” include those involving asset forfeiture (§4.02 supra), unlawful surveillance (Al-Haramain, p. 84 supra), unlawful detentions (Al-Kidd, p. 112 supra; Iqbal, p. 117 supra), detention and torture (Arar, p. 206 supra, Padilla, p. 193, supra). The following two cases exemplify and explain some of the reasons why the plaintiffs have failed to recover – one on torture and one on targeted killing.
This case requires us to address the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security. Although as judges we strive to honor all of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them. On those rare occasions, we are bound to follow the Supreme Court's admonition that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake." United States v. Reynolds, 345 U.S. 1 (1953). After much deliberation, we reluctantly conclude this is such a case, and the plaintiffs' action must be dismissed. Accordingly, we affirm the judgment of the district court.

I. BACKGROUND

We emphasize that this factual background is based only on the allegations of plaintiffs' complaint, which at this stage in the litigation we construe "in the light most favorable to the plaintiff[s], taking all [their] allegations as true and drawing all reasonable inferences from the complaint in [their] favor." Whether plaintiffs' allegations are in fact true has not been decided in this litigation, and, given the sensitive nature of the allegations, nothing we say in this opinion should be understood otherwise.

A. Factual Background

1. The Extraordinary Rendition Program

Plaintiffs allege that the Central Intelligence Agency ("CIA"), working in concert with other government agencies and officials of foreign governments, operated an extraordinary rendition program to gather intelligence by apprehending foreign nationals suspected of involvement in terrorist activities and transferring them in secret to foreign countries for detention and interrogation by United States or foreign officials. According to plaintiffs, this program has allowed agents of the U.S. government "to employ interrogation methods that would [otherwise have been] prohibited under federal or international law." Relying on documents in the public domain, plaintiffs, all foreign nationals, claim they were each processed through the extraordinary rendition program. They also make the following individual allegations.

Plaintiff Ahmed Agiza, an Egyptian national who had been seeking asylum in Sweden, was captured by Swedish authorities, allegedly transferred to American custody and flown to Egypt. In Egypt, he claims he was held for five weeks "in a squalid, windowless, and frigid cell," where he was "severely and repeatedly beaten" and subjected to electric shock through electrodes attached to his ear lobes, nipples and genitals. Agiza was held in detention for two and a half years, after which he was given a six-hour trial before a military court, convicted and sentenced to 15 years in Egyptian prison. According to plaintiffs, "[v]irtually every aspect of Agiza's rendition, including his torture in Egypt, has been publicly acknowledged by the Swedish government."

Plaintiff Abou Elkassim Britel, a 40-year-old Italian citizen of Moroccan origin, was arrested and detained in Pakistan on immigration charges. After
several months in Pakistani detention, Britel was allegedly transferred to the custody of American officials. These officials dressed Britel in a diaper and a torn t-shirt and shackled and blindfolded him for a flight to Morocco. Once in Morocco, he says he was detained incommunicado by Moroccan security services at the Temara prison, where he was beaten, deprived of sleep and food and threatened with sexual torture, including sodomy with a bottle and castration. After being released and re-detained, Britel says he was coerced into signing a false confession, convicted of terrorism-related charges and sentenced to 15 years in a Moroccan prison.

Plaintiff Binyam Mohamed, a 28-year-old Ethiopian citizen and legal resident of the United Kingdom, was arrested in Pakistan on immigration charges. Mohamed was allegedly flown to Morocco under conditions similar to those described above, where he claims he was transferred to the custody of Moroccan security agents. These Moroccan authorities allegedly subjected Mohamed to "severe physical and psychological torture," including routinely beating him and breaking his bones. He says they cut him with a scalpel all over his body, including on his penis, and poured "hot stinging liquid" into the open wounds. He was blindfolded and handcuffed while being made "to listen to extremely loud music day and night." After 18 months in Moroccan custody, Mohamed was allegedly transferred back to American custody and flown to Afghanistan. He claims he was detained there in a CIA "dark prison" where he was kept in "near permanent darkness" and subjected to loud noise, such as the recorded screams of women and children, 24 hours a day. Mohamed was fed sparingly and irregularly and in four months he lost between 40 and 60 pounds. Eventually, Mohamed was transferred to the U.S. military prison at Guantanamo Bay, Cuba, where he remained for nearly five years. He was released and returned to the United Kingdom during the pendency of this appeal.21

Plaintiff Bisher al-Rawi, a 39-year-old Iraqi citizen and legal resident of the United Kingdom, was arrested in Gambia while traveling on legitimate business. Like the other plaintiffs, al-Rawi claims he was put in a diaper and shackles and placed on an airplane, where he was flown to Afghanistan. He says he was detained in the same "dark prison" as Mohamed and loud noises were played 24 hours per day to deprive him of sleep. Al-Rawi alleges he was eventually transferred to Bagram Air Base, where he was "subjected to humiliation, degradation, and physical and psychological torture by U.S. officials," including being beaten, deprived of sleep and threatened with death. Al-Rawi was eventually transferred to Guantanamo; in preparation for the flight, he says he was "shackled and handcuffed in excruciating pain" as a result of his beatings. Al-Rawi was eventually released from Guantanamo and returned to the United Kingdom.

Plaintiff Farag Ahmad Bashmilah, a 38-year-old Yemeni citizen, says he was apprehended by agents of the Jordanian government while he was visiting

21 [Ed. Note: Mohammed was awarded £1 million compensation by the British Government after their involvement in his treatment was disclosed.]
Jordan to assist his ailing mother. After a brief detention during which he was "subject[ed] to severe physical and psychological abuse," Bashmilah claims he was given over to agents of the U.S. government, who flew him to Afghanistan in similar fashion as the other plaintiffs. Once in Afghanistan, Bashmilah says he was placed in solitary confinement, in 24-hour darkness, where he was deprived of sleep and shackled in painful positions. He was subsequently moved to another cell where he was subjected to 24-hour light and loud noise. Depressed by his conditions, Bashmilah attempted suicide three times. Later, Bashmilah claims he was transferred by airplane to an unknown CIA "black site" prison, where he "suffered sensory manipulation through constant exposure to white noise, alternating with deafeningly loud music" and 24-hour light. Bashmilah alleges he was transferred once more to Yemen, where he was tried and convicted of a trivial crime, sentenced to time served abroad and released.

2. Jeppesen’s Alleged Involvement in the Rendition Program

Plaintiffs contend that publicly available information establishes that defendant Jeppesen Dataplan, Inc., a U.S. corporation, provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture. The complaint asserts "Jeppesen played an integral role in the forced" abductions and detentions and "provided direct and substantial services to the United States for its so-called 'extraordinary rendition' program," thereby "enabling the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities." It also alleges that Jeppesen provided this assistance with actual or constructive "knowledge of the objectives of the rendition program," including knowledge that the plaintiffs "would be subjected to forced disappearance, detention, and torture" by U.S. and foreign government officials.

B. Summary of the Claims

Regarding Jeppesen's alleged actual or constructive knowledge that its services were being used to facilitate "forced disappearance," plaintiffs allege that Jeppesen "knew or reasonably should have known that the flights involved the transportation of terror suspects pursuant to the extraordinary rendition program," that their "knowledge of the objectives of the rendition program" may be inferred from the fact that they allegedly "falsified flight plans submitted to European air traffic control authorities to avoid public scrutiny of CIA flights" and that a Jeppesen employee admitted actual knowledge that the company was performing extraordinary rendition flights for the U.S. government.

C. Procedural History

Before Jeppesen answered the complaint, the United States moved to intervene and to dismiss plaintiffs' complaint under the state secrets doctrine. The then-Director of the CIA, General Michael Hayden, filed two declarations in support of the motion to dismiss, one classified, the other redacted and unclassified. The public declaration states that "[d]isclosure of the information covered by this privilege assertion reasonably could be expected to cause serious -- and in some instances, exceptionally grave -- damage to the national security of the United States and, therefore, the information should be excluded from any
use in this case." It further asserts that "because highly classified information is central to the allegations and issues in this case, the risk is great that further litigation will lead to disclosures harmful to U.S. national security and, accordingly, this case should be dismissed."

The district court granted the motions to intervene and dismiss and entered judgment in favor of Jeppesen, stating that "at the core of Plaintiffs' case against Defendant Jeppesen are 'allegations' of covert U.S. military or CIA operations in foreign countries against foreign nationals – clearly a subject matter which is a state secret."

The government maintains its assertion of privilege on appeal, continuing to rely on General Hayden's two declarations. While the appeal was pending Barack Obama succeeded George W. Bush as President of the United States. On September 23, 2009, the Obama administration announced new policies for invoking the state secrets privilege, effective October 1, 2009, in a memorandum from the Attorney General. See Memorandum from the Attorney Gen. to the Heads of Executive Dep'ts and Agencies on Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009) ("Holder Memo"), http://www.justice.gov/opa/documents/state-secret-privileges.pdf. The government certified both in its briefs and at oral argument before the en banc court that officials at the "highest levels of the Department of Justice" of the new administration had reviewed the assertion of privilege in this case and determined that it was appropriate under the newly announced policies.

II. STANDARD OF REVIEW

We review de novo the interpretation and application of the state secrets doctrine and review for clear error the district court's underlying factual findings. Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1196 (9th Cir. 2007).

III. THE STATE SECRETS DOCTRINE

The Supreme Court has long recognized that in exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely. See Totten v. United States, 92 U.S. 105 (1876). The contemporary state secrets doctrine encompasses two applications of this principle. One completely bars adjudication of claims premised on state secrets (the "Totten bar"); the other is an evidentiary privilege ("the Reynolds privilege") that excludes privileged evidence from the case and may result in dismissal of the claims. See United States v. Reynolds, 345 U.S. 1 (1953). We first address the nature of these applications and then apply them to the facts of this case.

A. The Totten Bar

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22 Were this a criminal case, the state secrets doctrine would apply more narrowly. See El-Masri v. United States, 479 F.3d 296, 313 n.7 (4th Cir. 2007) ("[T]he Executive's authority to protect [state secrets] is much broader in civil matters than in criminal prosecutions.")
In 1876 the Supreme Court stated "as a general principle[] that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."

The Court first applied this bar in *Totten* itself, where the estate of a Civil War spy sued the United States for breaching an alleged agreement to compensate the spy for his wartime espionage services. Setting forth the "general principle" quoted above, the Court held that the action was barred because it was premised on the existence of a "contract for secret services with the government," which was "a fact not to be disclosed."

A century later, the Court applied the *Totten* bar in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981). There, the plaintiffs sued under the National Environmental Policy Act of 1969 to compel the Navy to prepare an environmental impact statement regarding a military facility where the Navy allegedly proposed to store nuclear weapons. The Court held that the allegations were "beyond judicial scrutiny" because, "due to national security reasons, . . . the Navy can neither admit nor deny that it proposes to store nuclear weapons at [the facility]."

Plaintiffs contend that the *Totten* bar applies only to a narrow category of cases they say are not implicated here, namely claims premised on a plaintiff's espionage relationship with the government. We disagree. We read the Court's discussion of *Totten* in *Reynolds* to mean that the *Totten* bar applies to cases in which "the very subject matter of the action" is "a matter of state secret." "[A] contract to perform espionage" is only an example. This conclusion is confirmed by *Weinberger*, which relied on the *Totten* bar to hold that a case involving nuclear weapons secrets, and having nothing to do with espionage contracts, was "beyond judicial scrutiny."

We also disagree with plaintiffs' related contention that the *Totten* bar cannot apply unless the plaintiff is a party to a secret agreement with the government. The environmental groups and individuals who were the plaintiffs in *Weinberger* were not parties to agreements with the United States, secret or otherwise. The purpose of the bar, moreover, is to prevent the revelation of state secrets harmful to national security, a concern no less pressing when the plaintiffs are strangers to the espionage agreement that their litigation threatens to reveal.

**B. The Reynolds Privilege**

In addition to the *Totten* bar, the state secrets doctrine encompasses a "privilege against revealing military [or state] secrets, a privilege which is well established in the law of evidence." A successful assertion of privilege under *Reynolds* will remove the privileged evidence from the litigation. Unlike the *Totten* bar, a valid claim of privilege under *Reynolds* does not automatically require dismissal of the case. In some instances, however, the assertion of privilege will require dismissal because it will become apparent during the *Reynolds* analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.
Reynolds involved a military aircraft carrying secret electronic equipment. After the plane crashed, the estates of three civilian observers killed in the accident brought tort claims against the government. In discovery, plaintiffs sought production of the Air Force’s official accident investigation report and the statements of three surviving crew members. The Air Force refused to produce the materials, citing the need to protect national security and military secrets. The district court ordered the government to produce the documents in camera so the court could determine whether they contained privileged material. When the government refused, the court sanctioned the government by establishing the facts on the issue of negligence in plaintiffs’ favor.

The Supreme Court reversed and sustained the government’s claim of privilege because “there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.” The Court also provided guidance on how claims of privilege should be analyzed and held that, under the circumstances, the district court should have sustained the privilege without even requiring the government to produce the report for in camera review. The Court did not, however, dismiss the case outright. Rather, given that the secret electronic equipment was unrelated to the cause of the accident, it remanded to the district court, affording plaintiffs the opportunity to try to establish their claims without the privileged accident report and witness statements.

Analyzing claims under the Reynolds privilege involves three steps:

First, we must "ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied." Second, we must make an independent determination whether the information is privileged. . . . Finally, "the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim."

Al-Haramain, 507 F.3d at 1202 (quoting El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007)). We discuss these steps in turn.

1. Procedural Requirements

a. Assertion of the privilege. “The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party.” The privilege "is not to be lightly invoked." This is especially true when, as in this case, the government seeks not merely to preclude the production of particular items of evidence (as in Reynolds) but to obtain dismissal of the entire action.

To ensure that the privilege is invoked no more often or extensively than necessary, Reynolds held that "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."

The claim also must be presented in sufficient detail for the court to make an independent determination of the validity of the claim of privilege and the scope of the evidence subject to the privilege.

In the present case, General Michael Hayden, then-Director of the CIA, asserted the initial, formal claim of privilege and submitted detailed public and
classified declarations. We were informed at oral argument that the current Attorney General, Eric Holder, has also reviewed and approved the ongoing claim of privilege. Although Reynolds does not require review and approval by the Attorney General when a different agency head has control of the matter, such additional review by the executive branch’s chief lawyer is appropriate and to be encouraged.

b. Timing. Plaintiffs contend that the government’s assertion of privilege was premature, urging that the Reynolds privilege cannot be raised before an obligation to produce specific evidence subject to a claim of privilege has actually arisen. We disagree. The privilege may be asserted at any time, even at the pleading stage.

The privilege indisputably may be raised with respect to discovery requests seeking information the government contends is privileged. Courts have repeatedly sustained claims of privilege under those circumstances.

We also conclude that the government may assert a Reynolds privilege claim prospectively, even at the pleading stage, rather than waiting for an evidentiary dispute to arise during discovery or trial. See, e.g., El-Masri, 479 F.3d at 308 (“[D]ismissal at the pleading stage is appropriate if state secrets are so central to a proceeding that it cannot be litigated without threatening their disclosure.”)

2. The Court’s Independent Evaluation of the Claim of Privilege

When the privilege has been properly invoked, “we must make an independent determination whether the information is privileged.” The court must sustain a claim of privilege when it is satisfied, “from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged.”

This step in the Reynolds analysis “places on the court a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system.” Al-Haramain, 507 F.3d at 1203. In evaluating the need for secrecy, “we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.” But “the state secrets doctrine does not represent a surrender of judicial control over access to the courts.”

We do not offer a detailed definition of what constitutes a state secret. The Supreme Court in Reynolds found it sufficient to say that the privilege covers “matters which, in the interest of national security, should not be divulged.” We do note, however, that an executive decision to classify information is insufficient to establish that the information is privileged. (“[T]he privilege may not be used to shield any material not strictly necessary to prevent injury to national security.”). Although classification may be an indication of the need for secrecy, treating it as conclusive would trivialize the court’s role, which the Supreme Court has clearly admonished “cannot be abdicated to the caprice of executive officers.”

3. How Should the Matter Proceed
When a court sustains a claim of privilege, it must then resolve "how the matter should proceed in light of the successful privilege claim." The court must assess whether it is feasible for the litigation to proceed without the protected evidence and, if so, how.

When the government successfully invokes the state secrets privilege, "the evidence is completely removed from the case." "[W]henever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter." However, there will be occasions when, as a practical matter, secret and nonsecret information cannot be separated.

Ordinarily, simply excluding or otherwise walling off the privileged information may suffice to protect the state secrets and "the case will proceed accordingly, with no consequences save those resulting from the loss of evidence."

In some instances, however, application of the privilege may require dismissal of the action. When this point is reached, the Reynolds privilege converges with the Totten bar, because both require dismissal. There are three circumstances when the Reynolds privilege would justify terminating a case.

First, if "the plaintiff cannot prove the prima facie elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case." Second, if "the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant."

Third, and relevant here, even if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because – privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses – litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets. As we shall explain, this circumstance exists here and requires dismissal.

IV. APPLICATION

We therefore turn to the application of the state secrets doctrine in this case. The government contends that plaintiffs' lawsuit should be dismissed, whether under the Totten bar or the Reynolds privilege, because "state secrets are so central to this case that permitting further proceeding[s] would create an intolerable risk of disclosure that would jeopardize national security." Plaintiffs argue that the Totten bar does not apply and that, even if the government is entitled to some protection under the Reynolds privilege, at least some claims survive. The district court appears to have dismissed the action under the Totten bar, making a "threshold determination" that "the very subject matter of the case is a state secret." Having dismissed on that basis, the district court did not address whether application of the Reynolds privilege would require dismissal.

We do not find it quite so clear that the very subject matter of this case is a state secret. Nonetheless, having conducted our own detailed analysis, we conclude that the district court reached the correct result because dismissal is warranted even under Reynolds. Recognizing the serious consequences to
plaintiffs of dismissal, we explain our ruling so far as possible within the considerable constraints imposed on us by the state secrets doctrine itself.

A. The Totten Bar

Here, some of plaintiffs' claims might well fall within the Totten bar. In particular, their allegations that Jeppesen conspired with agents of the United States in plaintiffs' forced disappearance, torture and degrading treatment are premised on the existence of an alleged covert relationship between Jeppesen and the government—a matter that the Fourth Circuit has concluded is "practically indistinguishable from that categorically barred by Totten and Tenet." El-Masri, 479 F.3d at 309. On the other hand, allegations based on plaintiffs' theory that Jeppesen should be liable simply for what it "should have known" about the alleged unlawful extraordinary rendition program while participating in it are not so obviously tied to proof of a secret agreement between Jeppesen and the government.

We do not resolve the difficult question of precisely which claims may be barred under Totten because application of the Reynolds privilege leads us to conclude that this litigation cannot proceed further. We rely on the Reynolds privilege rather than the Totten bar for several reasons. First, the government has asserted the Reynolds privilege along with the Totten bar, inviting the further inquiry Reynolds requires and presenting a record that compels dismissal even on this alternate ground. Second, we have discretion to affirm on any basis supported by the record. Third, resolving this case under Reynolds avoids difficult questions about the precise scope of the Totten bar and permits us to conduct a searching judicial review, fulfilling our obligation under Reynolds "to review the [government's claim] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege."

B. The Reynolds Privilege

There is no dispute that the government has complied with Reynolds' procedural requirements for invoking the state secrets privilege by filing General Hayden's formal claim of privilege in his public declaration. We therefore focus on the second and third steps in the Reynolds analysis: First, whether and to what extent the matters the government contends must be kept secret are in fact matters of state secret; and second, if they are, whether the action can be litigated without relying on evidence that would necessarily reveal those secrets or press so closely upon them as to create an unjustifiable risk that they would be revealed. In doing so, we explain our decision as much as we can without compromising the secrets we are required to protect.

1. Whether and to What Extent the Evidence Is Privileged

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8 This skepticism is all the more justified in cases that allege serious government wrongdoing. Such allegations heighten the risk that government officials may be motivated to invoke the state secrets doctrine not only by their obligation to protect national security but also by a desire to protect themselves or their associates from scrutiny.
The government asserts the state secrets privilege over four categories of evidence. In particular, the government contends that neither it nor Jeppesen should be compelled, through a responsive pleading, discovery responses or otherwise, to disclose: 

1. information that would tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with clandestine intelligence activities; 
2. information about whether any foreign government cooperated with the CIA in clandestine intelligence activities; 
3. information about the scope or operation of the CIA terrorist detention and interrogation program; 
4. any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods.

These indisputably are matters that the state secrets privilege may cover. See, e.g., CIA v. Sims, 471 U.S. 159, 175 (1985) ("Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'"); In re Sealed Case, 494 F.3d at 152 (prohibiting "all discussion of intelligence sources, capabilities, and the like"); Al-Haramain, 507 F.3d at 1204 (applying the privilege to "the means, sources and methods of intelligence gathering"); Ellsberg, 709 F.2d at 57 (applying the privilege to the "disclosure of intelligence-gathering methods or capabilities").

We have thoroughly and critically reviewed the government's public and classified declarations and are convinced that at least some of the matters it seeks to protect from disclosure in this litigation are valid state secrets, "which, in the interest of national security, should not be divulged." The government's classified disclosures to the court are persuasive that compelled or inadvertent disclosure of such information in the course of litigation would seriously harm legitimate national security interests. In fact, every judge who has reviewed the government's formal, classified claim of privilege in this case agrees that in this sense the claim of privilege is proper, although we have different views as to the scope of the privilege and its impact on plaintiffs' case. The plaintiffs themselves "do not dispute that, during the course of litigation, there may well be relevant evidence that may be properly withheld pursuant to the privilege."

We are precluded from explaining precisely which matters the privilege covers lest we jeopardize the secrets we are bound to protect. We can say, however, that the secrets fall within one or more of the four categories identified by the government and that we have independently and critically confirmed that their disclosure could be expected to cause significant harm to national security.

2. Effect on the Proceedings

Given plaintiffs' extensive submission of public documents and the stage of the litigation, we do not rely on the first two circumstances in which the Reynolds privilege requires dismissal – that is, whether plaintiffs could prove a prima facie case without privileged evidence, or whether the privilege deprives Jeppesen of evidence that would otherwise give it a valid defense to plaintiffs' claims. Instead, we assume without deciding that plaintiffs' prima facie case and Jeppesen's defenses may not inevitably depend on privileged evidence. Proceeding on that assumption, we hold that dismissal is nonetheless required.
under *Reynolds* because there is no feasible way to litigate Jeppesen's alleged liability *without creating an unjustifiable risk of divulging state secrets.*

We reach this conclusion because all seven of plaintiffs' claims, even if taken as true, describe Jeppesen as providing logistical support in a broad, complex process, certain aspects of which, the government has persuaded us, are absolutely protected by the state secrets privilege. Notwithstanding that some information about that process has become public, Jeppesen's alleged role and its attendant liability cannot be isolated from aspects that are secret and protected. Because the facts underlying plaintiffs' claims are so infused with these secrets, *any* plausible effort by Jeppesen to defend against them would create an unjustifiable risk of revealing state secrets, even if plaintiffs could make a prima facie case on one or more claims with nonprivileged evidence. See *Bareford*, 973 F.2d at 1144 ("[T]he danger that witnesses might divulge some privileged material during cross-examination is great because the privileged and nonprivileged material are inextricably linked. We are compelled to conclude that the trial of this case would inevitably lead to a significant risk that highly sensitive information concerning this defense system would be disclosed."); *Fitzgerald*, 776 F.2d at 1243 ("In examining witnesses with personal knowledge of relevant military secrets, the parties would have every incentive to probe dangerously close to the state secrets themselves. In these circumstances, state secrets could be compromised even without direct disclosure by a witness."); *Farnsworth Cannon*, 635 F.2d at 281 ("[T]he plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing. It is evident that any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation.").

Here, further litigation presents an unacceptable risk of disclosure of state secrets no matter what legal or factual theories Jeppesen would choose to advance during a defense. Whether or not Jeppesen provided logistical support in connection with the extraordinary rendition and interrogation programs, there is precious little Jeppesen could say about its relevant conduct and knowledge without revealing information about how the United States government does or does not conduct covert operations.

** * * *

Although we are necessarily precluded from explaining precisely why this case cannot be litigated without risking disclosure of state secrets, or the nature of the harm to national security that we are convinced would result from further litigation, we are able to offer a few observations.

*First,* we recognize that plaintiffs have proffered hundreds of pages of publicly available documents, many catalogued in the dissent's Appendix, that they say corroborate some of their allegations concerning Jeppesen's alleged participation in aspects of the extraordinary rendition program. As the government has acknowledged, its claim of privilege does not extend to public documents. Accordingly, we do not hold that any of the documents plaintiffs have
submitted are subject to the privilege; rather, we conclude that even assuming
plaintiffs could establish their entire case solely through nonprivileged evidence
– unlikely as that may be – any effort by Jeppesen to defend would unjustifiably
risk disclosure of state secrets.

Second, we do not hold that the existence of the extraordinary rendition
program is itself a state secret. The program has been publicly acknowledged by
numerous government officials including the President of the United States.
Even if its mere existence may once have been a "matter[ ] which, in the interest
of national security, should not be divulged," it is not a state secret now.
Nonetheless, partial disclosure of the existence and even some aspects of the
extraordinary rendition program does not preclude other details from remaining
state secrets if their disclosure would risk grave harm to national security.

Third, we acknowledge the government's certification at oral argument that
its assertion of the state secrets privilege comports with the revised standards
set forth in the current administration's September 23, 2009 memorandum,
adopted several years after the government first invoked the privilege in this
case. Those standards require the responsible agency to show that "assertion of
the privilege is necessary to protect information the unauthorized disclosure of
which reasonably could be expected to cause significant harm to the national
defense or foreign relations." They also mandate that the Department of Justice
"will not defend an invocation of the privilege in order to: (i) conceal violations
of the law, inefficiency, or administrative error; (ii) prevent embarrassment to
a person, organization, or agency of the United States government; (iii) restrain
competition; or (iv) prevent or delay the release of information the release of
which would not reasonably be expected to cause significant harm to national
security." That certification here is consistent with our independent conclusion,
having reviewed the government's public and classified declarations, that the
government is not invoking the privilege to avoid embarrassment or to escape
scrutiny of its recent controversial transfer and interrogation policies, rather
than to protect legitimate national security concerns.

V. OTHER REMEDIES

Our holding today is not intended to foreclose – or to prejudge – possible
nonjudicial relief, should it be warranted for any of the plaintiffs. Denial of a
judicial forum based on the state secrets doctrine poses concerns at both
individual and structural levels. For the individual plaintiffs in this action, our
decision forecloses at least one set of judicial remedies, and deprives them of the
opportunity to prove their alleged mistreatment and obtain damages. At a
structural level, terminating the case eliminates further judicial review in this
civil litigation, one important check on alleged abuse by government officials and
putative contractors. Other remedies may partially mitigate these concerns,
however, although we recognize each of these options brings with it its own set
of concerns and uncertainties.

First, that the judicial branch may have deferred to the executive branch's
claim of privilege in the interest of national security does not preclude the
government from honoring the fundamental principles of justice. The
government, having access to the secret information, can determine whether
plaintiffs' claims have merit and whether misjudgments or mistakes were made that violated plaintiffs' human rights. Should that be the case, the government may be able to find ways to remedy such alleged harms while still maintaining the secrecy national security demands. For instance, the government made reparations to Japanese Latin Americans abducted from Latin America for internment in the United States during World War II.

Second, Congress has the authority to investigate alleged wrongdoing and restrain excesses by the executive branch. "The power of the Congress to conduct investigations is inherent in the legislative process."

Third, Congress also has the power to enact private bills. Congress can refer the case to the Court of Federal Claims to make a recommendation before deciding whether to enact a private bill, although Congress alone will make the ultimate decision. When national security interests deny alleged victims of wrongful governmental action meaningful access to a judicial forum, private bills may be an appropriate alternative remedy.\(^{14}\)

Fourth, Congress has the authority to enact remedial legislation authorizing appropriate causes of action and procedures to address claims like those presented here. When the state secrets doctrine "compels the subordination of appellants' interest in the pursuit of their claims to the executive's duty to preserve our national security, this means that remedies for . . . violations that cannot be proven under existing legal standards, if there are to be such remedies, must be provided by Congress. That is where the government's power to remedy wrongs is ultimately reposed."

VI. CONCLUSION

For all the reasons the dissent articulates – including the impact on human rights, the importance of constitutional protections and the constraints of a judge-made doctrine – we do not reach our decision lightly or without close and skeptical scrutiny of the record and the government's case for secrecy and dismissal. We also acknowledge that this case presents a painful conflict between human rights and national security. As judges, we have tried our best to evaluate the competing claims of plaintiffs and the government and resolve that conflict according to the principles governing the state secrets doctrine set forth by the United States Supreme Court.

For the reasons stated, we hold that the government's valid assertion of the state secrets privilege warrants dismissal of the litigation, and affirm the judgment of the district court.

\(^{14}\) Proceedings in the Court of Federal Claims following congressional referral may pose some of the same problems that require dismissal here – the Court of Federal Claims must avoid disclosure of state secrets too. The referral proceedings might be less problematic than this lawsuit, however, because, for example, the question of third-party liability would not be the focus: a private bill addresses compensation by the government, not by third parties. In addition, Congress might tailor its referral to protect state secrets, by, for example, requiring the Court of Federal Claims to make its recommendation based solely on the plaintiffs' own testimony and nonprivileged documents in the public domain. Moreover, Congress presumably possesses the power to restrict application of the state secrets privilege in the referral proceedings.
HAWKINS, Circuit Judge, with whom Judges SCHROEDER, CANBY, THOMAS, and PAEZ, Circuit Judges, join, dissenting:

I agree with my colleagues in the majority that United States v. Reynolds is a rule of evidence, requiring courts to undertake a careful review of evidence that might support a claim or defense to determine whether either could be made without resort to legitimate state secrets. I part company concerning when and where that review should take place.

The majority dismisses the case in its entirety before Jeppesen has even filed an answer to Plaintiffs' complaint. Outside of the narrow Totten context, the state secrets privilege has never applied to prevent parties from litigating the truth or falsity of allegations, or facts, or information simply because the government regards the truth or falsity of the allegations to be secret. Within the Reynolds framework, dismissal is justified if and only if specific privileged evidence is itself indispensable to establishing either the truth of the plaintiffs' allegations or a valid defense that would otherwise be available to the defendant.

This is important, because an approach that focuses on specific evidence after issues are joined has the benefit of confining the operation of the state secrets doctrine so that it will sweep no more broadly than clearly necessary. The state secrets doctrine is a judicial construct without foundation in the Constitution, yet its application often trumps what we ordinarily consider to be due process of law. This case now presents a classic illustration. Plaintiffs have alleged facts, which must be taken as true for purposes of a motion to dismiss, that any reasonable person would agree to be gross violations of the norms of international law, remediable under the Alien Tort Statute. They have alleged in detail Jeppesen's complicity or recklessness in participating in these violations. The government intervened, and asserted that the suit would endanger state secrets. The majority opinion here accepts that threshold objection by the government, so Plaintiffs' attempt to prove their case in court is simply cut off. They are not even allowed to attempt to prove their case by the use of nonsecret evidence in their own hands or in the hands of third parties.

It is true that, judicial construct though it is, the state secrets doctrine has become embedded in our controlling decisional law. Government claims of state secrets therefore must be entertained by the judiciary. But the doctrine is so dangerous as a means of hiding governmental misbehavior under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government's essential secrets.\(^1\) When, as here, the doctrine is successfully

\(^1\) Abuse of the Nation's information classification system is not unheard of. Former U.S. Solicitor General Erwin Griswold, who argued the government's case in the Pentagon Papers matter, later explained in a Washington Post editorial that "It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification, and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another." Erwin N. Griswold, Secrets Not Worth Keeping: the Courts and Classified Information, Wash. Post, Feb. 15, 1989, at A25.

Former Attorney General Herbert Brownell similarly complained in a 1953 letter to President
invoked at the threshold of litigation, the claims of secret are necessarily broad and hypothetical. The result is a maximum interference with the due processes of the courts, on the most general claims of state secret privilege. It is far better to require the government to make its claims of state secrets with regard to specific items of evidence or groups of such items as their use is sought in the lawsuit. An official certification that evidence is truly a state secret will be more focused if the head of a department must certify that specific evidence sought in the course of litigation is truly a secret and cannot be revealed without danger to overriding, essential government interests. And when responsive pleading is complete and discovery under way, judgments as to whether secret material is essential to Plaintiffs' case or Jeppesen's defense can be made more accurately.

By failing to examine the voluminous public record materials submitted by Plaintiffs in support of their claims, and by failing to undertake an analysis of Jeppesen's ability to defend against those claims, the district court forced every judge of the court of appeals to undertake that effort. This was no small undertaking. Materials the government considers top secret had to be moved securely back and forth across the country and made available in a "cone of silence" environment to first the three-judge panel assigned the case and then the twenty-seven active judges of this court to evaluate whether the case merited en banc consideration. This quite literally put the cart before the horse, depriving a reviewing court of a record upon which its traditional review function could be carried out.

This is an appeal from a Rule 12 dismissal, which means that the district court was required to assume that the well-pleaded allegations of the complaint are true, and that we "construe the complaint in the light most favorable to the plaintiff[s]." The majority minimizes the importance of these requirements by gratuitously attaching "allegedly" to nearly each sentence describing what Plaintiffs say happened to them, and by quickly dismissing the voluminous publicly available evidence supporting those allegations, including that Jeppesen knew what was going on when it arranged flights described by one of its own officials as "torture flights." Instead, the majority assumes that even if Plaintiffs' prima facie case and Jeppesen's defense did not depend on privileged evidence,

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Eisenhower that classification procedures were then "so broadly drawn and loosely administered as to make it possible for government officials to cover up their own mistakes and even their wrongdoing under the guise of protecting national security." Letter from Attorney General Herbert Brownell to President Dwight Eisenhower (June 15, 1953) (quoted in Kenneth R. Mayer, With the Stroke of a Pen: Executive Orders and Presidential Power 145 (2001)).

Even in Reynolds, avoidance of embarrassment — not preservation of state secrets — appears to have motivated the Executive's invocation of the privilege. There the Court credited the government's assertion that "this accident occurred to a military plane which had gone aloft to test secret electronic equipment," and that "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." In 1996, however, the "secret" accident report involved in that case was declassified. A review of the report revealed, not "details of any secret project the plane was involved in," but "[j]instead, . . . a horror story of incompetence, bungling, and tragic error." Garry Wills, Why the Government Can Legally Lie, 56 N.Y. Rev. of Books 32, 33 (2009). Courts should be concerned to prevent a concentration of unchecked power that would permit such abuses.
dismissal is required "because there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets." But Jeppesen has yet to answer or even to otherwise plead, so we have no idea what those defenses or assertions might be. Making assumptions about the contours of future litigation involves mere speculation.

Because the Reynolds privilege, like any other evidentiary privilege, "extends only to [evidence] and not to facts," it cannot be invoked to prevent a litigant from persuading a jury of the truth or falsity of an allegation by reference to non-privileged evidence, regardless whether privileged evidence might also be probative of the truth or falsity of the allegation.

The majority's analysis here is premature. This court should not determine that there is no feasible way to litigate Jeppesen's liability without disclosing state secrets; such a determination is the district court's to make once a responsive pleading has been filed, or discovery requests made. We should remand for the government to assert the privilege with respect to secret evidence, and for the district court to determine what evidence is privileged and whether any such evidence is indispensable either to Plaintiffs' prima facie case or to a valid defense otherwise available to Jeppesen. Only if privileged evidence is indispensable to either party should it dismiss the complaint.

Conclusion

The majority concludes its opinion with a recommendation of alternative remedies. Not only are these remedies insufficient, but their suggestion understates the severity of the consequences to Plaintiffs from the denial of judicial relief. Suggesting, for example, that the Executive could "honor[ ] the fundamental principles of justice" by determining "whether plaintiffs' claims have merit," disregards the concept of checks and balances. Permitting the executive to police its own errors and determine the remedy dispensed would not only deprive the judiciary of its role, but also deprive Plaintiffs of a fair assessment of their claims by a neutral arbiter. The majority's suggestion of payment of reparations to the victims of extraordinary rendition, such as those paid to Japanese Latin Americans for the injustices suffered under Internment during World War II, over fifty years after those injustices were suffered, elevates the impractical to the point of absurdity. Similarly, a congressional investigation, private bill, or enacting of "remedial legislation," leaves to the legislative branch claims which the federal courts are better equipped to handle.

Arbitrary imprisonment and torture under any circumstance is a "'gross and notorious . . . act of despotism.'" Hamdi v. Rumsfeld, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting) (quoting 1 Blackstone 131-33 (1765)). But "'confinement [and abuse] of the person, by secretly hurrying him to [prison], where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.'" Id. (Scalia, J., dissenting) (quoting 1 Blackstone 131-33 (1765)) (emphasis added).

I would remand to the district court to determine whether Plaintiffs can establish the prima facie elements of their claims or whether Jeppesen could defend against those claims without resort to state secrets evidence.
[The dissent attached many pages of public nonsecret information demonstrating Jeppesen’s involvement in the publicly acknowledged aspects of the rendition and torture regime of the CIA “black sites.”]

**AL-AULAQI v. OBAMA**


BATES, District Judge.

**BACKGROUND**

This case arises from the United States's alleged policy of “authorizing, planning, and carrying out targeted killings, including of U.S. citizens, outside the context of armed conflict.” Specifically, plaintiff, a Yemeni citizen, claims that the United States has authorized the targeted killing of plaintiff's son, Anwar Al-Aulaqi, in violation of the Constitution and international law.

Anwar Al-Aulaqi is a Muslim cleric with dual U.S.-Yemeni citizenship, who is currently believed to be in hiding in Yemen. Anwar Al-Aulaqi was born in New Mexico in 1971, and spent much of his early life in the United States, attending college at Colorado State University and receiving his master's degree from San Diego State University before moving to Yemen in 2004. On July 16, 2010, the U.S. Treasury Department's Office of Foreign Assets Control (“OFAC”) designated Anwar Al-Aulaqi as a Specially Designated Global Terrorist (“SDGT”) in light of evidence that he was “acting for or on behalf of al-Qa’ida in the Arabian Peninsula (AQAP)” and “providing financial, material or technological support for, or other services to or in support of, acts of terrorism[.]” In its designation, OFAC explained that Anwar Al-Aulaqi had “taken on an increasingly operational role” in AQAP since late 2009, as he “facilitated training camps in Yemen in support of acts of terrorism” and provided “instructions” to Umar Farouk Abdulmutallab, the man accused of attempting to detonate a bomb aboard a Detroit-bound Northwest Airlines flight on Christmas Day 2009. Media sources have also reported ties between Anwar Al-Aulaqi and Nidal Malik Hasan, the U.S. Army Major suspected of killing 13 people in a November 2009 shooting at Fort Hood, Texas. According to a January 2010 Los Angeles Times article, unnamed “U.S. officials” have discovered that Anwar Al-Aulaqi and Hasan exchanged as many as eighteen e-mails prior to the Fort Hood shootings.

Recently, Anwar Al-Aulaqi has made numerous public statements calling for “jihad against the West,” praising the actions of “his students” Abdulmutallab and Hasan, and asking others to “follow suit.” Michael Leiter, Director of the National Counterterrorism Center, has explained that Anwar Al-Aulaqi’s “familiarity with the West” is a “key concern[]” for the United States, and media sources have similarly cited Anwar Al-Aulaqi’s ability to communicate with an English-speaking audience as a source of “particular concern” to U.S. officials. But despite the United States's expressed “concern” regarding Anwar Al-Aulaqi's “familiarity with the West” and his “role in AQAP,” the United States has not yet publicly charged Anwar Al-Aulaqi with any crime. For his part, Anwar Al-Aulaqi has made clear that he has no intention of making himself available for criminal
prosecution in U.S. courts, remarking in a May 2010 AQAP video interview that he “will never surrender” to the United States, and that “[i]f the Americans want me, [they can] come look for me.”

Plaintiff does not deny his son’s affiliation with AQAP or his designation as a SDGT. Rather, plaintiff challenges his son’s alleged unlawful inclusion on so-called “kill lists” that he contends are maintained by the CIA and the Joint Special Operations Command (“JSOC”). In support of his claim that the United States has placed Anwar Al-Aulaqi on “kill lists,” plaintiff cites a number of media reports, which attribute their information to anonymous U.S. military and intelligence sources. For example, in January 2010, The Washington Post reported that, according to unnamed military officials, Anwar Al-Aulaqi was on “a shortlist of U.S. citizens” that JSOC was authorized to kill or capture. A few months later, The Washington Post cited an anonymous U.S. official as stating that Anwar Al-Aulaqi had become “the first U.S. citizen added to a list of suspected terrorists the CIA is authorized to kill.” And in July 2010, National Public Radio announced – on the basis of unidentified “[i]ntelligence sources” – that the United States had already ordered “almost a dozen” unsuccessful drone and air-strikes targeting Anwar Al-Aulaqi in Yemen.

Based on these news reports, plaintiff claims that the United States has placed Anwar Al-Aulaqi on the CIA and JSOC “kill lists” without “charge, trial, or conviction.” Plaintiff alleges that individuals like his son are placed on “kill lists” after a “closed executive process” in which defendants and other executive officials determine that “secret criteria” have been satisfied. Plaintiff further avers “[u]pon information and belief” that once an individual is placed on a “kill list,” he remains there for “months at a time.” Consequently, plaintiff argues, Anwar Al-Aulaqi is “now subject to a standing order that permits the CIA and JSOC to kill him ... without regard to whether, at the time lethal force will be used, he presents a concrete, specific, and imminent threat to life, or whether there are reasonable means short of lethal force that could be used to address any such threat.”

The United States has neither confirmed nor denied the allegation that it has issued a “standing order” authorizing the CIA and JSOC to kill plaintiff’s son. Additionally, the United States has neither confirmed nor denied whether – if it has, in fact, authorized the use of lethal force against plaintiff’s son – the authorization was made with regard to whether Anwar Al-Aulaqi presents a concrete, specific, and imminent threat to life, or whether there were reasonable means short of lethal force that could be used to address any such threat. The United States has, however, repeatedly stated that if Anwar Al-Aulaqi “were to surrender or otherwise present himself to the proper authorities in a peaceful and appropriate manner, legal principles with which the United States has traditionally and uniformly complied would prohibit using lethal force or other violence against him in such circumstances.”

Nevertheless, plaintiff alleges that due to his son’s inclusion on the CIA and JSOC “kill lists,” Anwar Al-Aulaqi is in “hiding under threat of death and cannot access counsel or the courts to assert his constitutional rights without disclosing his whereabouts and exposing himself to possible attack by Defendants.”
Plaintiff therefore brings four claims – three constitutional, and one statutory – on his son's behalf. He asserts that the United States's alleged policy of authorizing the targeted killing of U.S. citizens, including plaintiff's son, outside of armed conflict, “in circumstances in which they do not present concrete, specific, and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be employed to neutralize any such threat,” violates (1) Anwar Al-Aulaqi’s Fourth Amendment right to be free from unreasonable seizures and (2) his Fifth Amendment right not to be deprived of life without due process of law. Plaintiff further claims that (3) the United States's refusal to disclose the criteria by which it selects U.S. citizens like plaintiff's son for targeted killing independently violates the notice requirement of the Fifth Amendment Due Process Clause. Finally, plaintiff brings (4) a statutory claim under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, alleging that the United States's “policy of targeted killings violates treaty and customary international law.” Plaintiff seeks both declaratory and injunctive relief.

This is a unique and extraordinary case. Stark, and perplexing, questions readily come to mind, including the following: How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death? Can a U.S. citizen-himself or through another-use the U.S. judicial system to vindicate his constitutional rights while simultaneously evading U.S. law enforcement authorities, calling for “jihad against the West,” and engaging in operational planning for an organization that has already carried out numerous terrorist attacks against the United States? Can the Executive order the assassination of a U.S. citizen without first affording him any form of judicial process whatsoever, based on the mere assertion that he is a dangerous member of a terrorist organization? How can the courts, as plaintiff proposes, make real-time assessments of the nature and severity of alleged threats to national security, determine the imminence of those threats, weigh the benefits and costs of possible diplomatic and military responses, and ultimately decide whether, and under what circumstances, the use of military force against such threats is justified? When would it ever make sense for the United States to disclose in advance to the “target” of contemplated military action the precise standards under which it will take that military action? And how does the evolving AQAP relate to core al Qaeda for purposes of assessing the legality of targeting AQAP (or its principals) under the September 18, 2001 Authorization for the Use of Military Force?

These and other legal and policy questions posed by this case are controversial and of great public interest. Unfortunately, however, no matter how interesting and no matter how important this case may be, we cannot address it unless we have jurisdiction. Before reaching the merits of plaintiff's claims, then, this Court must decide whether plaintiff is the proper person to bring the constitutional and statutory challenges he asserts, and whether plaintiff's challenges, as framed, state claims within the ambit of the Judiciary to resolve. These jurisdictional issues pose “distinct and separate limitation[s],
so that either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party.” Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974)

**DISCUSSION**

I. **Standing**

Plaintiff has failed to provide an adequate explanation for his son's inability to appear on his own behalf, which is fatal to plaintiff's attempt to establish "next friend" standing. In his complaint, plaintiff maintains that his son cannot bring suit on his own behalf because he is “in hiding under threat of death” and any attempt to access counsel or the courts would “expos[e] him[ ] to possible attack by Defendants.” But while Anwar Al-Aulaqi may have chosen to “hide” from U.S. law enforcement authorities, there is nothing preventing him from peacefully presenting himself at the U.S. Embassy in Yemen and expressing a desire to vindicate his constitutional rights in U.S. courts. Defendants have made clear – and indeed, both international and domestic law would require – that if Anwar Al-Aulaqi were to present himself in that manner, the United States would be “prohibit[ed] [from] using lethal force or other violence against him in such circumstances.”

The Court's conclusion that Anwar Al-Aulaqi can access the U.S. judicial system by presenting himself in a peaceful manner implies no judgment as to Anwar Al-Aulaqi’s status as a potential terrorist. All U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully, and no U.S. citizen may simultaneously avail himself of the U.S. judicial system and evade U.S. law enforcement authorities. Anwar Al-Aulaqi is thus faced with the same choice presented to all U.S. citizens. It is certainly possible that Anwar Al-Aulaqi could be arrested – and imprisoned – if he were to come out of hiding to seek judicial relief in U.S. courts. Without expressing an opinion as to the likelihood of Anwar Al-Aulaqi’s future arrest or imprisonment, it is significant to note that an individual's incarceration does not render him unable to access the courts.

Plaintiff argues, however, that if his son were to seek judicial relief, he would not be detained as an ordinary federal prisoner, but instead would be subject to “indefinite detention without charge.” But unlike the detainees in Padilla and Hamdi, Anwar Al-Aulaqi is not in U.S. custody, nor is he being held incommunicado against his will. To the extent that Anwar Al-Aulaqi is currently incommunicado, that is the result of his own choice. Moreover, there is reason to doubt whether Anwar Al-Aulaqi is, in fact, incommunicado. Since his alleged

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2 In fact, it is possible that Anwar Al-Aulaqi would not even need to emerge from “hiding” in order to seek judicial relief. The use of videoconferencing and other technology has made civil judicial proceedings possible even where the plaintiff himself cannot physically access the courtroom. For example, courts frequently entertain habeas corpus petitions from detainees at Guantanamo Bay despite the fact that those detainees are not present in the courtroom. There is no reason why – if Anwar Al-Aulaqi wanted to seek judicial relief but feared the consequences of emerging from hiding – he could not communicate with attorneys via the Internet from his current place of hiding.
period of hiding began in January 2010, Anwar Al-Aulaqi has communicated with the outside world on numerous occasions, participating in AQAP video interviews and publishing online articles in the AQAP magazine *Inspire*. Anwar Al-Aulaqi has continued to use his personal website to convey messages to readers worldwide, and a July 2010 online article written by Anwar Al-Aulaqi advises readers that they “may contact Shayk [Anwar] Al-Aulaqi through any of the emails listed on the contact page.” Needless to say, Anwar Al-Aulaqi’s access to e-mail renders the circumstances of his existing, self-made “confinement” far different than the confinement of the detainees in *Padilla* and *Hamdi*.

Not only has plaintiff failed to prove that Anwar Al-Aulaqi lacks access to the courts, but he has also failed to show that he is “truly dedicated” to Anwar Al-Aulaqi’s “best interests.” Indeed, to the extent that Anwar Al-Aulaqi has made his personal preferences known, he has indicated precisely the opposite – i.e., that he believes it is not in his best interests to prosecute this case. [At no point has Anwar Al-Aulaqi sought to challenge his alleged inclusion on the CIA or JSOC “kill lists,” nor has he communicated any desire to do so. Several times during the past ten months, Anwar Al-Aulaqi has publicly expressed his desire for “jihad against the West,” and he has called upon Muslims to meet “American aggression” not with “pigeons and olive branches” but “with bullets and bombs.” Given that Anwar Al-Aulaqi has been able to make such controversial statements with impunity, there is no reason to believe that he could not convey a desire to sue without somehow placing his life in danger. Under these circumstances, the fact that Anwar Al-Aulaqi has chosen not to communicate any such desire strongly supports the inference that he does not want to litigate in the U.S. courts.

This inference is further corroborated by the content of Anwar Al-Aulaqi’s public statements, in which he has decried the U.S. legal system and suggested that Muslims are not bound by Western law. As recently as April 2010, Anwar Al-Aulaqi wrote an article for the AQAP publication *Inspire*, in which he asserted that Muslims “should not be forced to accept rulings of courts of law that are contrary to the law of Allah.” According to Anwar Al-Aulaqi, Muslims need not adhere to the laws of the “civil state,” since “the modern civil state of the West does not guarantee Islamic rights.” In a July 2010 *Inspire* article, Anwar Al-Aulaqi again expressed his belief that because Western “government, political parties, the police, [and] the intelligence services … are part of a system within which the defamation of Islam is … promoted … the attacking of any Western target [is] legal from an Islamic viewpoint.” He went on to argue that a U.S. civilian who drew a cartoon depiction of Mohammed should be “a prime target of assassination” and that “[a]ssassinations, bombings, and acts of arson” constitute “legitimate forms of revenge against a system that relishes the sacrilege of Islam in the name of freedom.”

Such statements – which reveal a complete lack of respect for U.S. law and governmental structures as well as a belief that it is “legal” and “legitimate” to violate U.S. law – do not reflect the views of an individual who would likely want to sue to vindicate his U.S. constitutional rights in U.S. courts. After all, the
substantive rights that are being asserted in this case are only provided to Anwar Al-Aulaqi by the *U.S. Constitution* and *international law*. Yet he has made clear his belief that “international treaties” do not govern Muslims, and that Muslims are not bound by *any* law – U.S., international, or otherwise – that conflicts with the “law of Allah.” There is, then, reason to doubt that Anwar Al-Aulaqi would even regard a ruling from this Court as binding – much less that he would want to litigate in order to obtain such a ruling. Anwar Al-Aulaqi’s public statement that “[i]f the Americans want me, [they can] come look for me” provides further evidence that he has no intention of making himself the subject of litigation in U.S. courts. In light of such remarks, this Court cannot conclude that Anwar Al-Aulaqi believes “taking legal action to stop the United States from killing” him would be in his “best interests.” While he may very well wish to avoid targeted killing by the United States, all available evidence indicates that he does not wish to file suit as a vehicle for accomplishing this purpose.

Ultimately, plaintiff’s belated argument in support of third party standing fares no better than his attempt to sue as his son’s “next friend.” Plaintiff cannot show that a parent suffers an injury in fact if his adult child is threatened with a future extrajudicial killing. Moreover, even if plaintiff could make such a showing, [prudential] factors militate against according plaintiff third party standing to assert violations of his son’s constitutional rights. As the Supreme Court has observed, where “the interests of [a] parent and [a] child are not in parallel, and indeed, are potentially in conflict,” a parent may not evade the requirements of “next friend” standing by instead bringing suit under the related doctrine of third party standing. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004).

Plaintiff, however, does not merely allege that his son will be injured by defendants’ use of “excessive force”; rather, plaintiff maintains that he, too, will be injured by defendants’ use of lethal force, since defendants’ extrajudicial killing of Anwar Al-Aulaqi would permanently sever plaintiff’s relationship with his adult child. Although this Court does not question the severity of the emotional harm that plaintiff may suffer if his son were to be killed by the United States, emotional harm – in and of itself – is not sufficient to satisfy Article III’s injury in fact requirement. Instead, a plaintiff can only establish an Article III injury in fact based on emotional harm if that alleged harm stems from the infringement of some “legally protected” or “judicially cognizable” interest that is either recognized at common law or specifically recognized as such by the Congress. Here, this Court has been unable to find any legal basis for such an interest, either statutory or otherwise. Plaintiff also has no constitutionally protected interest in maintaining a relationship with his adult child. To date, no court has held that a parent possesses a constitutionally protected liberty interest in maintaining a relationship with his adult child free from indirect government interference. [Likewise,] plaintiff has failed to cite a single case to support the argument that a parent enjoys a common law interest in maintaining a relationship with his adult child. [Again], this Court does not minimize the devastating loss that a parent can experience from the death of an adult child. But not all devastating losses constitute invasions of judicially cognizable interests. And absent an invasion of such an interest, plaintiff cannot
show that he has suffered the requisite Article III injury in fact needed to establish third party standing.\textsuperscript{9}

II. The Alien Tort Statute

Plaintiff brings his fourth and final claim under the Alien Tort Statute ("ATS"), alleging that the United States’s “policy of targeted killings violates treaty and customary international law.” The ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. Plaintiff is an alien, but in order for his ATS claim to survive a motion to dismiss, he must also show that (1) an alien suffers a legally cognizable tort—which rises to the level of a “customary international law norm”—when his U.S. citizen son is threatened with a future extrajudicial killing and (2) the United States has waived sovereign immunity for that type of claim. Because plaintiff has failed to make either showing, his ATS claim must be dismissed.

A. Plaintiff’s Alleged ATS Cause of Action

In Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), the Supreme Court held that ATS claims must allege violations of “the present-day law of nations” that “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” The Court further explained that all judicial determinations as to whether an alleged international law norm “is sufficiently definite to support a cause of action [under the present-day law of nations] should (and indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts.” Since Sosa, it has become clear that while the ATS may provide subject-matter jurisdiction for modern causes of action not recognized at the time of its initial passage in 1789, there is a “high bar to new private causes of action for violating international law.”

Plaintiff maintains that his alleged tort-extrajudicial killing-meets the high bar of Sosa, since there is a customary international law norm against state-sponsored extrajudicial killings, which has been “consistently recognized by U.S. courts” and “indeed codified in domestic law under the Torture Victim Protection Act.”\textsuperscript{10} Plaintiff is correct insofar as many U.S. courts have recognized

\textsuperscript{9} Defendants make much of the fact that plaintiff’s alleged injury is “speculative,” since plaintiff has not shown whether the United States is acting “in compliance with the standard plaintiff argues should be applied here.” Because plaintiff has failed to allege an invasion of any legally protected interest, this Court need not address defendants’ argument that the threatened extrajudicial killing of plaintiff’s adult child is also too “speculative” to satisfy Article III. The Court notes, however, that a threatened injury – like that asserted by plaintiff here – may form the basis of an Article III injury in fact so long as it is certainly impending.

\textsuperscript{10} The Torture Victim Protection Act of 1991 (“TVPA”) provides in relevant part that “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation ... subjects an individual to an extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful
a customary international law norm against past state-sponsored extrajudicial killings as the basis for an ATS claim. Significantly, however, plaintiff cites no case in which a court has ever recognized a “customary international law norm” against a threatened future extrajudicial killing, nor does he cite a single case in which an alien has ever been permitted to recover under the ATS for the extrajudicial killing of his U.S. citizen child. These two features of plaintiff’s ATS claim – that it is based on a threat of a future extrajudicial killing, not an actual extrajudicial killing, that is directed not to plaintiff or to his alien relative, but to his U.S. citizen son – render plaintiff’s ATS claim fundamentally distinct from all extrajudicial killing claims that courts have previously held cognizable under the ATS.

Even assuming that the threat at issue were directed to plaintiff (rather than to plaintiff’s U.S. citizen son), there is no basis for the assertion that the threat of a future state-sponsored extrajudicial killing – as opposed to the commission of a past state-sponsored extrajudicial killing – constitutes a tort in violation of the “law of nations.” A threatened extrajudicial killing could possibly – depending on the precise nature of the threat – form the basis of a state tort law claim for assault or for intentional infliction of emotional distress. But common law tort claims for assault and intentional infliction of emotional distress do not rise to the level of international torts that are sufficiently definite and accepted “among civilized nations” to qualify for the ATS jurisdictional grant. Plaintiff cites no treaty or international document that recognizes assault or intentional infliction of emotional distress as a violation of the “present-day law of nations,” nor does he cite any case in which a court has ever found such common law torts cognizable under the ATS. [A holding to the contrary] would make broad swaths of conduct actionable by aliens under the ATS, which is precisely what the Supreme Court in Sosa warned against.

Moreover, even if the mere threat of a future state-sponsored extrajudicial killing did constitute a violation of the present-day law of nations, plaintiff could not bring an ATS claim based on the alleged threat of an extrajudicial killing of his U.S. citizen son. Plaintiff cannot have it both ways. He either is bringing an ATS claim on behalf of his U.S. citizen son, alleging violations of Anwar Al-Aulaqi’s right to be free from an extrajudicial killing, or he is bringing an ATS claim based on violations of his own right to be free from the emotional harm that he would suffer if his son were to be unlawfully killed. But the former fails as a result of Anwar Al-Aulaqi’s U.S. citizenship, and the latter fails because there is not even domestic consensus as to whether a parent can recover for emotional injuries stemming from the death of his adult child, much less universal agreement that such a tort is actionable.

**B. Sovereign Immunity Under the ATS**

Because plaintiff brings his ATS claim against the President, the Secretary of Defense, and the Director of the CIA in their official capacities, his suit is tantamount to a suit against the United States itself. “It is axiomatic that the death.” 28 U.S.C. § 1350 note § 2(a)(2).
United States may not be sued without its consent and that the existence of such consent is a prerequisite for jurisdiction.” United States v. Mitchell, 463 U.S. 206, 212 (1983). [P]laintiff argues that his ATS claim may proceed against the United States [because] it is within the Administrative Procedure Act’s waiver of sovereign immunity for claims seeking non-monetary relief. [However], defendants’ alleged action here might be considered agency action “committed to agency discretion by law,” in which case the APA’s waiver of sovereign immunity would not apply. See 5 U.S.C. § 701(a)(2).

Ultimately, however, this Court need not decide that issue. Even if the action involved in this case does not fall within the APA’s exception for agency action committed to agency discretion by law, this Court nonetheless would [exercise] its equitable discretion not to grant the relief sought. [Plaintiff] asks this Court to interject itself into a sensitive foreign affairs matter, by issuing discretionary relief that would prohibit military and intelligence activities against an alleged enemy abroad. [T]he military and intelligence activities at issue in this case allegedly received the attention and approval of the President, the Secretary of Defense, and the Director of the CIA. The Supreme Court has repeatedly acknowledged the separation-of-powers concerns posed by any judicial attempt to “enjoin the President in performance of his official duties.” Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992). Just as the issuance of injunctive relief against the President personally is an extraordinary measure not lightly to be undertaken, so, too, would it be extraordinary for this Court to order declaratory and injunctive relief against the President’s top military and intelligence advisors, with respect to military action abroad that the President himself is alleged to have authorized. Given that there is no clear waiver of sovereign immunity permitting such “extraordinary relief,” and that “[t]he Alien Tort Statute has never been held to cover suits against the United States or United States Government officials,” El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 858 (D.C.Cir. 2010) (en banc) (Kavanaugh, J., concurring), this Court declines to exercise its equitable discretion to grant such relief here.

III. The Political Question Doctrine

Defendants argue that even if plaintiff has standing to bring his constitutional claims or states a cognizable claim under the ATS, his claims should still be dismissed because they raise non-justiciable political questions. The political question doctrine is “essentially a function of the separation of powers,” Baker v. Carr, 369 U.S. 186, 217 (1962), and “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” Japan Whaling Ass’n v. Am. Cetacean Soc’y, 478 U.S. 221, 230 (1986). An examination of the specific areas in which courts have invoked the political question doctrine reveals that national security, military matters and foreign relations are “quintessential sources of political questions.” El-Shifa, 607 F.3d at 841.

Judicial resolution of the particular questions posed by plaintiff in this case would require this Court to decide: (1) the precise nature and extent of Anwar Al-Aulaqi’s affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely
linked that the defendants' targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether (assuming plaintiff's proffered legal standard applies) Anwar Al-Aulaqi's alleged terrorist activity renders him a “concrete, specific, and imminent threat to life or physical safety”; and (4) whether there are “means short of lethal force” that the United States could “reasonably” employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests. Such determinations, in turn, would require this Court, in defendants' view, to understand and assess “the capabilities of the [alleged] terrorist operative to carry out a threatened attack, what response would be sufficient to address that threat, possible diplomatic considerations that may bear on such responses, the vulnerability of potential targets that the [alleged] terrorist [ ] may strike, the availability of military and nonmilitary options, and the risks to military and nonmilitary personnel in attempting application of non-lethal force.” Viewed through these prisms, it becomes clear that plaintiff's claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.

Most recently, in El-Shifa, the D.C. Circuit examined whether the political question doctrine barred judicial resolution of claims by owners of a Sudanese pharmaceutical plant who brought suit seeking to recover damages after their plant was destroyed by an American cruise missile. President Clinton had ordered the missile strike in light of intelligence indicating that the plant was “associated with the [Osama] bin Ladin network and involved in the production of materials for chemical weapons.” The plaintiffs maintained that the U.S. government had been negligent in determining that the plant was tied “to chemical weapons and Osama bin Laden,” and therefore sought “a declaration that the government's failure to compensate them for the destruction of the plant violated customary international law, a declaration that statements government officials made about them were defamatory, and an injunction requiring the government to retract those statements.” Dismissing the plaintiffs' claims as non-justiciable under the political question doctrine, the D.C. Circuit explained that “[i]n military matters ... the courts lack the competence to assess the strategic decision to employ force or to create standards to determine whether the use of force was justified or well-founded.” Rather than endeavor to resolve questions beyond the Judiciary's institutional competence, the court held that “[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target.”

Here, plaintiff asks this Court to do exactly what the D.C. Circuit forbid in El-Shifa—assess the merits of the President's (alleged) decision to launch an attack on a foreign target. Although the “foreign target” happens to be a U.S. citizen, the same reasons that counseled against judicial resolution of the plaintiffs' claims in El-Shifa apply with equal force here. Just as in El-Shifa, any judicial determination as to the propriety of a military attack on Anwar Al-Aulaqi would “require this court to elucidate the ... standards that are to guide a President when he evaluates the veracity of military intelligence.” Indeed, that is just what plaintiff has asked this Court to do ([to] order the
defendants to “disclose the criteria used in determining whether the government will carry out the targeted killing of a U.S. citizen”). But there are no judicially manageable standards by which courts can endeavor to assess the President’s interpretation of military intelligence and his resulting decision-based on that intelligence—whether to use military force against a terrorist target overseas. Nor are there judicially manageable standards by which courts may determine the nature and magnitude of the national security threat posed by a particular individual. Given that courts may not undertake to assess whether a particular organization’s alleged terrorist activities threaten national security, it would seem axiomatic that courts must also decline to assess whether a particular individual’s alleged terrorist activities threaten national security. But absent such a judicial determination as to the nature and extent of the alleged national security threat that Anwar Al-Aulaqi poses to the United States, this Court cannot possibly determine whether the government’s alleged use of lethal force against Anwar Al-Aulaqi would be “justified or well-founded.”

The type of relief that plaintiff seeks only underscores the impropriety of judicial review here. Plaintiff requests both a declaration setting forth the standard under which the United States can select individuals for targeted killing as well as an injunction prohibiting defendants from intentionally killing Anwar Al-Aulaqi unless he meets that standard—i.e., unless he “presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat.” Yet plaintiff concedes that the “‘imminence’ requirement” of his proffered legal standard would render any “real-time judicial review” of targeting decisions “infeasible,” and he therefore urges this Court to issue his requested preliminary injunction and then, enforce the injunction “through an after-the-fact contempt motion or an after-the-fact damages action.” But as the D.C. Circuit has explained, “[i]t is not the role of judges to second-guess, with the benefit of hindsight, another branch’s determination that the interests of the United States call for military action.” El-Shifa, 607 F.3d at 844. Such military determinations are textually committed to the political branches. Moreover, any post hoc judicial assessment as to the propriety of the Executive’s decision to employ military force abroad “would be anathema to . . . separation of powers” principles.

The mere fact that the “foreign target” of military action in this case is an individual—rather than alleged enemy property—does not distinguish plaintiff’s claims from those raised in El-Shifa for purposes of the political question doctrine. The significance of Anwar Al-Aulaqi’s U.S. citizenship is not lost on this Court. Indeed, it does not appear that any court has ever-on political question doctrine grounds—refused to hear a U.S. citizen’s claim that his personal constitutional rights have been violated as a result of U.S. government action taken abroad. Nevertheless, there is inadequate reason to conclude that Anwar Al-Aulaqi’s U.S. citizenship—standing alone—renders the political question doctrine inapplicable to plaintiff’s claims. [Courts are] not accustomed to assessing claims like those raised by plaintiff here, which seek to prevent future U.S. military action in the name of national security against specifically contemplated targets by the imposition of judicially-prescribed legal standards enforced through “after-the-fact contempt motion[s]” or “after-the-fact damages
action[s].” To be sure, this Court recognizes the somewhat unsettling nature of its conclusion – that there are circumstances in which the Executive's unilateral decision to kill a U.S. citizen overseas is “constitutionally committed to the political branches” and judicially unreviewable. But this case squarely presents such a circumstance. The political question doctrine requires courts to engage in a fact-specific analysis of the particular question posed by a specific case, and the doctrine does not contain any “carve-out” for cases involving the constitutional rights of U.S. citizens.

Contrary to plaintiff's assertion, in holding that the political question doctrine bars plaintiff's claims, this Court does not hold that the Executive possesses “unreviewable authority to order the assassination of any American whom he labels an enemy of the state.” Rather, the Court only concludes that it lacks the capacity to determine whether a specific individual in hiding overseas, whom the Director of National Intelligence has stated is an “operational” member of AQAP, presents such a threat to national security that the United States may authorize the use of lethal force against him. This Court readily acknowledges that it is a “drastic measure” for the United States to employ lethal force against one of its own citizens abroad, even if that citizen is currently playing an operational role in a “terrorist group that has claimed responsibility for numerous attacks against Saudi, Korean, Yemeni, and U.S. targets since January 2009.” But a determination as to whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking. Because decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims, the Court finds that the political question doctrine bars judicial resolution of this case.

CONCLUSION

For the foregoing reasons, the Court will grant defendants' motion to dismiss.

NOTES AND QUESTIONS

1. Al-Aulaqi and Son’s Deaths. Aulaqi was killed by an American drone attack in Yemen on September 30, 2011. Two weeks later, his 16-year-old son, Abdulrahman al-Aulaqi, a U.S. citizen, was also killed by a CIA-led drone strike in Yemen.

2. Duped into Killing? Targeted killings have always carried the danger of mistaken intelligence and collateral damage resulting in the death of innocents. In December 2011, however, it was reported that the Yemeni government had duped the U.S. into killing a local leader whose relationship had soured with the family of Yemini president Ali Abdullah Saleh.

On May 25, 2010, a U.S. missile attack killed at least six people including Jabir Shabwani, the 31-year-old deputy governor of Yemen's
central Mareb province. The Yemeni government provided intelligence used in the strike but didn't say Mr. Shabwani would be among those there, say several current and former U.S. military officials. These people say they believe the information from the Yemenis may have been intended to result in Mr. Shabwani's death. "We think we got played," said one participant in high-level administration discussions.

Adam Entous, U.S. Doubts Intelligence That Led to Yemen Strike, WALL ST. J., Dec. 29, 2011, at A1. Unsurprisingly, the Yemeni government denied that it provided misleading information. Moreover, some U.S. officials noted that the events remain unclear, Shabwani's actions were suspect, and he had loose connections with known terrorists. Still, the episode raised questions about the intelligence relied upon in targeting decisions. According to one former official, the incident demonstrated that the U.S. had been "too susceptible to the Yemenis saying, 'Oh, that's a bad guy, you go get him.' And it's a political bad guy – it's not a real bad, bad guy."

3. Another U.S. citizen and the editor of AQAP's English-language magazine, Samir Khan, was also killed during the attack. Also Abdulrahman al-Awlaki:

4. Anna Lindh, then Swedish Foreign Minister, commented about the first U.S. drone attack in Yemen in November 2002, which killed four people including one U.S. citizen: "If the USA is behind this with Yemen's consent, it is nevertheless a summary execution that violates human rights. If the USA has conducted the attack without Yemen's permission it is even worse. Then it is a question of unauthorised use of force.”

5. Would killing al-Aulaqi fit within the Israeli Supreme Court. parameters? What would be the consequence of defining a conflict as NOT international? This issue arises in the Hamdan detention case in Chapter 7.

6. Collective targeting. What constitutes a proportional response to terrorism? And, for that matter, is proportional reprisal a wise response, even if its legality could be established? Israel has been roundly criticized for striking at Palestinian camps in reprisal for terrorist raids and has on occasion destroyed homes of persons associated with suicide bombers. Alan Dershowitz argues that an even more effective approach would be to pick out Palestinian homes in advance and state that those will be destroyed after the next suicide bombing regardless of complicity. ALAN DERSHOWITZ, WHY TERRORISM WORKS 177 (2002). Dershowitz argues that it is not unusual to penalize someone who fails to prevent a violent act and that even collective penalties are used in such cases as economic sanctions. “Although collective punishment is prohibited by international law, it is widely practiced throughout the world, including by the
most democratic and liberty-minded countries.” *Id.* at 172. Even under the current policy of striking the family home, there are both pragmatic and legal difficulties. The pragmatic argument is that striking the innocent creates more terrorists, and it is a sound argument. On a legal plane, it is clearly invalid to strike at civilian targets even in reprisal for attacks on your own civilians.

The Dershowitz proposal of penalizing presumably innocent bystanders is unthinkable to a western notion of due process, but he claims that our ideas of deterrence must override notions of individual responsibility. “The international community must come to accept the justice of directing proportionate, nonlethal deterrents against those who support and benefit from terrorism, rather than threatening meaningless sanctions against the suicide terrorists themselves.” *Id.* at 179. Thus far, international law limiting responses to military proportionality operates even when the terrorist has not played by the rules. The difficulty is that if future threats are represented by unknown civilians who are eager to die for their cause, then there is simply no punitive measure that will deter that behavior. This makes it appear that the choice is between two unacceptable extremes, doing nothing while the suicide bomber prepares to strike or retaliating against bystanders. In reality, there is a middle ground, difficult as it may be to employ, that is to track down and immobilize the leaders who select and instruct the suicide bombers. The word “immobilize” begs the question of the degree of force that can be used against the leader without capture and trial. It may be possible to agree with Dershowitz that the leadership can be hunted down and killed but conclude that it would be preferable not to legitimize this behavior. Instead, it is better left to the clandestine underworld in which it now resides.

7. **LOAC, IHL, Domestic Law.** In the Israeli *Targeted Killings Case*, Justice Rivlin says that President Barak starts from the perspective of a “civilian group” to create a third category of “unlawful combatants.” But Barak’s opinion explicitly says that “our starting point is . . . the international law dealing with armed conflicts.” Under LOAC, he points out that a civilian can be a legitimate target while “actively engaged in hostilities” and that it would not make sense to immunize a person just because he does not wear a uniform and goes home between attacks.

Does it matter what source of law is used for this purpose? If one starts from the premise of domestic criminal law enforcement, what are the appropriate circumstances for use of lethal force? Ordinarily, lethal force is limited to “necessary to prevent imminent threat of great bodily harm.” But in the context of a person who cannot be arrested and who threatens great bodily harm whenever he can accomplish it, is that test satisfied?

Put the other way around, is the terrorist resting at home taking an “active part in the hostilities?” President Barak’s test for use of lethal force under LOAC contemplates that the suspect must be arrested if possible – “trial is preferable to use of force.” So what is the difference between LOAC and domestic law?

8. **Types of Active Part in Hostilities.** Following the Targeted Killings opinion, Israeli Defense Forces have been dealing with issues of the different levels of participation in violence. The planner, financier, recruiter, and
propagandist all play roles in the drama. If one were bringing criminal proceedings against them, all of those roles would be part of a conspiracy. But conspiracy is not recognized in the international law relating to war crimes. Is a conspirator a sufficiently involved person to be subject to LOAC?

9. Hague Conventions. Chief Justice Barak’s opinion notes that ban on "treacherous killing." This is codified in a provision of the Hague Conventions, which provides that it is “especially forbidden” “to kill or wound treacherously individuals belonging to the hostile nation or army.” Convention Respecting the Laws and Customs of War on Land (Hague Convention IV), art. 23(b), Oct. 18, 1907. The Army Field Manual interprets the provision as follows:

This article is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy “dead or alive.” It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.

U.S. Dep’t of the Army, Field Manual No. 27-10: The Law of Land Warfare ¶ 31 (1956). In addition, an executive order prohibits the targeting of heads of state. See Executive Order 12333 (1981). First promulgated by President Ford, the order came in the wake of the Church Committee’s findings that the U.S. had been involved in a series of assassination attempts on foreign leaders. To be clear, however, the law of war does not generally prohibit the killing of enemy commanders (including heads of state) during time of war, so long as it is not accomplished by “perfidy” or by placing a price on one’s head. Nathan Canestaro, American Law and Policy on Assassinations of Foreign Leaders, 26 B.C. INT’L & COMP. L. REV. 1 (2003).

10. Remedies and Justiciability. The Israeli court takes on a set of questions in response to general complaints filed by activist organizations. The U.S. court in Aulaqi “refuses to decide” a very concrete dispute involving a death order against a specific citizen – or does it? The court essentially says to a parent, “We will decide whether it’s ok to kill your son after he’s dead.” What the court purports to do is to deny that there is a claim under international law for assault, as opposed to murder. But that decision on the merits of the controversy is based on the premise that the court should not make a ruling on the specifics of whether this particular person presents a sufficiently imminent threat.

Perhaps the question that should have been presented was not a request for an injunction against killing this particular person at this particular time but a request for a declaratory judgment regarding the criteria for extrajudicial killing. In that regard, the specific case would present an opportunity to decide whether, for example, “incitement of others” would place the target at risk so that he would have the clear option of abandoning that course of conduct or choosing to continue standing in harm’s way.
Appendix

DOCUMENTS

Statutes on Domestic Use of Military

18 USC § 1385. Use of Army and Air Force as posse comitatus
Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

10 USC § 331. Federal aid for State governments
Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

10 USC § 332. Use of militia and armed forces to enforce Federal authority
Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

10 USC § 372. Use of military equipment and facilities
(a) In general. The Secretary of Defense may, in accordance with other applicable law, make available any equipment (including associated supplies or spare parts), base facility, or research facility of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes.
Military Commission Act of 2006

10 USC § 950g. Review by the United States Court of Appeals for the
District of Columbia Circuit and the Supreme Court

(a) Exclusive appellate jurisdiction.

(1) (A) Except as provided in subparagraph (B), the United States Court of
Appeals for the District of Columbia Circuit shall have exclusive jurisdiction
to determine the validity of a final judgment rendered by a military
commission (as approved by the convening authority) under this chapter.

(B) The Court of Appeals may not review the final judgment until all other
appeals under this chapter have been waived or exhausted.

(2) A petition for review must be filed by the accused in the Court of Appeals
not later than 20 days after the date on which—

(A) written notice of the final decision of the Court of Military Commission
Review is served on the accused or on defense counsel; or

(B) the accused submits, in the form prescribed by section 950c, a written
notice waiving the right of the accused to review by the Court of Military
Commission Review under section 950f of this title.

(b) Standard for review. In a case reviewed by it under this section, the Court
of Appeals may act only with respect to matters of law.

(c) Scope of review. The jurisdiction of the Court of Appeals on an appeal
under subsection (a) shall be limited to the consideration of:

(1) whether the final decision was consistent with the standards and
procedures specified in this chapter and

(2) to the extent applicable, the Constitution and the laws of the United
States.

(d) Supreme Court. The Supreme Court may review by writ of certiorari the
final judgment of the Court of Appeals pursuant to 28 USCS § 1257.

10 USC § 950j. Finality of proceedings, findings, and sentences

(a) Finality. The appellate review of records of trial provided by this chapter,
and the proceedings, findings, and sentences of military commissions as
approved, reviewed, or affirmed as required by this chapter, are final and
conclusive.

(b) Provisions of chapter sole basis for review of military commission
procedures and actions. Except as otherwise provided in this chapter and
notwithstanding any other provision of law (including 28 USC § 2241 or any
other habeas corpus provision), no court, justice, or judge shall have jurisdiction
to hear or consider any claim or cause of action whatsoever, including any action
pending on or filed after the date of the enactment of the Military Commissions
Act of 2006 [enacted Oct. 17, 2006], relating to the prosecution, trial, or judgment
of a military commission under this chapter, including challenges to the
lawfulness of procedures of military commissions.
Executive Order 13491 (Jan 22, 2009)

Section 1. Revocation. Executive Order 13440 of July 20, 2007, is revoked. All executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order.

Sec. 3. Standards and Practices for Interrogation of Individuals in the Custody or Control of the United States in Armed Conflicts.

(a) Common Article 3 Standards as a Minimum Baseline. Consistent with the requirements of the Federal torture statute, the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.

(b) Interrogation Techniques and Interrogation-Related Treatment. Effective immediately, an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3

Sec. 4. Prohibition of Certain Detention Facilities, and Red Cross Access to Detained Individuals.

(a) CIA Detention. The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.
UNITED KINGDOM
Terrorism Act 2006, Ch. 11, s. 1

Encouragement of terrorism

(1) This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.

(2) A person commits an offence if—

(a) he publishes a statement to which this section applies or causes another to publish such a statement; and

(b) at the time he publishes it or causes it to be published, he—

(i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or

(ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.

(3) For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

(b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

(4) For the purposes of this section the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both—

(a) to the contents of the statement as a whole; and

(b) to the circumstances and manner of its publication.

(5) It is irrelevant for the purposes of subsections (1) to (3) . . . (b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.