

## **Due Process Rights and Terrorist Emergencies**

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### **I. Due process rights and their grounds**

#### **A. Due process rights defined**

DPRs are legal protections against a variety of familiar abuses occurring during the arrest, interrogation, trial, sentencing, and punishment of suspected criminals.<sup>1</sup> In this paragraph I describe a representative set of DPRs. At the time of arrest and interrogation DPRs require access to counsel and forbid police violence, summary punishments, and torture. During detention prior to trial DPRs insist upon an indictment hearing, consideration of release on bail, and the right to demand that one's detention be justified before an impartial judge (habeas corpus). Those accused of crimes have a right to a trial without excessive delay, and if the case goes to trial the proceedings must be fair and open, and the accused must enjoy the presumption of innocence, the right against self-incrimination, and a right to the assistance of counsel. The accused has a right to know the evidence against him or her, and there can be no conviction without a valid criminal statute that is not retroactive. At the sentencing stage DPRs dictate that sentences not be grossly disproportional to the severity of the crime. Finally, there is the right to appeal one's conviction to a higher court.

DPRs are responses to the fact that tyrants throughout history have used the institutions, personnel, and sanctions of the criminal law as means of imposing their arbitrary and unjust rule. They throw their enemies and political opponents into jail, have them executed, or take away their property. The authors of historic and contemporary bills of rights were well aware of these dangers and accordingly gave DPRs a prominent place. For example, the Magna Carta included provisions such as:

“38. No bailiff for the future shall, upon his own unsupported complaint, put anyone to his ‘law’, without credible witnesses brought for this purpose”.

“39. No freemen shall be taken or imprisoned or [...] exiled or in any way destroyed [...] except by the

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<sup>1</sup> On due process outside of criminal law *see* J.L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE*, 1985.

lawful judgment of his peers or by the law of the land”.<sup>3</sup>

The United States Bill of Rights devotes more space to DPRs than to any other family of rights. Of the original ten amendments to the Constitution, five of them (4-8) deal with due process. For example, the Sixth Amendment prescribes:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed [...] to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense”.<sup>4</sup>

DPRs also play a prominent role in contemporary human rights declarations and treaties. For example, the United Nations’ International Covenant on Civil and Political Rights (ICCPR) sets out DPRs in articles 6-15. Article 9.4 (habeas corpus) is representative:

“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that [the] court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.<sup>5</sup>

If a criminal case is prosecuted and no plea bargain is reached, subsequent review will occur in a trial. The criminal trial is an organized inquiry -one could also say “ritual”-which involves assembling needed participants, systematically collecting and presenting evidence, considering the arguments for and against the defendant's guilt, and judging appropriate penalties. The deliberate pace of a trial allows passions to cool and greater objectivity to emerge. The judge, who serves both as master of ceremonies and as interpreter of the law, is charged with impartial application of both law and evidence.<sup>6</sup> And lawyers are present to argue on behalf of their respective clients’ claims or defenses.

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<sup>3</sup> King John at Runnymede, *Magna Carta*, 1215, §§ 38 and 39, <http://www.britannia.com/history/magna2.html>

<sup>4</sup> U.S. CONST. Amendment VI, § 1.

<sup>5</sup> International Covenant on Civil and Political Rights, Art. 9 § 4, <http://www.ohchr.org/english/law/ccpr.htm>

<sup>6</sup> See A. DUFF, *TRIALS AND PUNISHMENTS*, 1986; D. WEISSBRODT and R. WOLFRUM, *THE RIGHT TO A FAIR TRIAL*, 1977.

## **B. The justification of due process rights**

DPRs protect both life and liberty against threats from government.<sup>7</sup> Suppose that we have been persuaded by the arguments in Thomas Hobbes's *Leviathan* (1660)<sup>8</sup> that without a strong government to protect us against the predations of our neighbors it will be impossible to have adequate levels of order and productivity and that consequently we will have a poor chance of avoiding a miserable life and early death. Greedy or hungry neighbors who will raid, kill, steal, dispossess, kidnap, and rape pose what I call the *First Problem of Insecurity*. To protect ourselves from them we create government and legal protections of personal security, liberty, and possessions. We enact criminal laws, create courts and jails, and proceed to convict and punish offenders. We thereby solve -or at least ameliorate- the First Problem. The system of law and government is dangerous, however, and we still have reason to be fearful, but now our fear is of the government's predations, corruption, and ineptitude. This is the *Second Problem of Insecurity*.

As suggested above, a common worry about governments is that they will throw us in jail or execute us because some official suspects us of committing a crime, wants to neutralize us as a political opponent, finds us troublesome, or wants our property. In response to this worry we come up with the idea of not permitting the government to impose serious punishments without justifying a person's punishment before an impartial and independent tribunal. Law is the remedy -or at least a key part of it- to both problems of insecurity. Just as we imposed law and its potential sanctions on ourselves and our neighbors to solve the First Problem, we now impose legal restrictions on our government to solve the Second Problem. Both projects are difficult and may never be fully successful. Still, DPRs give us important protections for our lives, liberty, and property.<sup>9</sup> Like the criminal law itself they protect our security. But instead of protecting us against private criminals they protect us against government.

DPRs protect us not only directly when we are personally accused of crimes, but also indirectly by serving as checks on governmental power. They make less available tempting

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<sup>7</sup> On the justification of rights by appeal to life and liberty and avoiding severe unfairness and cruelty, see **J. NICKEL**, *MAKING SENSE OF HUMAN RIGHTS*, 2nd ed., 2006, pp. 53-91.

<sup>8</sup> **T. HOBBS**, *LEVIATHAN*, Touchstone, 1997.

<sup>9</sup> See, e.g., *Hamdi v. Rumsfeld* 542 U.S. 507, 529, 2004. Justice O'Connor wrote that Hamdi's "private interest [...] affected by the official action [...] is the most elemental of liberty interests - the interest in being free from physical detention by one's own government".

but tyrannical (or just heavy-handed) ways of governing, and thereby promote good government. They make tyrannical ways of governing less available by making criminal procedure more transparent. Public trials give citizens a view of how the criminal justice system is working. Oppression, if it is occurring, is more likely to be open to public view. An attractive feature of trials by jury is that they bring randomly selected members of the public into the criminal justice system as participants, and test legal judgments against their consciences and common sense. Democratic practices, and the rights to campaign, protest, and vote that go with them, make transparency more valuable and DPRs more stable.

One way that DPRs protect people's liberty is by requiring legal justification for incarceration - a justification that shows that the accused person violated a law that was already in existence and knowable at the time the alleged criminal offense occurred. For example, when the police and many ordinary citizens dislike the recreational activities of certain teenagers, or the door-to-door witnessing of certain religious groups, the police may harass such people by arresting them for minor or imaginary offences and then beating them up during or after arrest. DPRs protect such people by making conviction of a criminal offense more difficult; they prescribe a fair trial in which it is shown that the person violated a valid law. Further, by opening arrest, interrogation, abuse, and detention to judicial and public scrutiny they help make it risky for police to use unauthorized violence.

Habeas corpus serves as a check on the executive by the judiciary, because it compels the executive branch to explain and defend its actions. As Justice Jackson of the United States Supreme Court once put it:

“[e]xecutive imprisonment has been considered oppressive and lawless [...] no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint”.<sup>12</sup>

Fairness considerations play a central role in justifying DPRs - and in supporting the idea that all citizens and residents should have such rights. These considerations require governments to avoid forms of unfairness so severe that they are matters of ruinous injustice

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<sup>12</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218–19, 1953, **J. JACKSON**, Dissenting Opinion; noting that “courts will not deny hearing an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates”.

to their victims. The severity of unfair treatment depends on the degree of unfairness, its duration and frequency, whether or not malicious intent is present, and the amount of harm or degradation that the unfairness causes. In the area of criminal justice fairness imposes three broad standards. First, there must be a system of fair and rational procedures for determining criminal guilt. Second, this system must produce in most cases results that are substantively fair. With the system in operation, people will rarely be punished when they in fact lack criminal guilt, and punishments will seldom be grossly disproportionate to the degree of wrongdoing. Finally, fairness requires that the protections of the system, such as lawyers and impartial trials, be available to all those within it who are in jeopardy of extended detention and criminal punishment - whether or not they are citizens. The claim against severely unfair treatment plays a large role in supporting the universality of DPRs.

Neither structural improvements in legal regimes, self-help, nor charitable assistance will eliminate the possibility of unjust trials in criminal proceedings. Individuals frequently lack the competence to secure just treatment within a complex legal system. High priority legal guarantees that can be invoked by the defendant are needed to protect people against the dangers imposed by the coercive powers of criminal justice systems.

The costs of implementing a general right to a fair trial are substantial. Providing those accused of crimes with impartial trials involves an expensive infrastructure of courts, judges, lawyers, record-keepers, and buildings. But most countries successfully bear these costs. And the burdens imposed on jurors and witnesses can be limited and distributed so as to avoid severe unfairness.

DPRs may seem to be negative rights, ones that merely call for their addressees to refrain from certain actions. But in fact they are more like positive rights, ones that require their addressees to provide a service to the rightholders. In my view they are best classified as conditionally positive. They say that if the government plans to punish someone then it must give that person various procedural protections and legal services along with the opportunity to have a trial. The if-clause of this conditional is sure to be continuously satisfied because governments need to threaten and carry out punishments in order to govern, and thus governments will have duties to provide due process services in many cases. From a practical point of view DPRs impose unavoidable duties to provide, just like positive rights. Ask government officials whether the system of courts and trials is a discretionary expenditure

and they will laugh at you. DPRs use governments to provide expensive legal services that require large, fragile, and expensive bureaucracies and infrastructures.

## **II. National emergencies**

National emergencies are times of extreme crisis in the life of a country. They typically result from wars, threats of attack, rebellions, terrorist attacks, famines, epidemics of disease, major industrial accidents, and natural disasters such as floods and earthquakes. During national emergencies exceptional measures are sometimes warranted in all or part of the country because the problems are immense, resources and personnel are severely strained, and it is imperative to take the most effective actions. Emergencies sometimes lead governments to declare a state of emergency or invoke martial law. When a state of emergency is in effect regionally or nationally, governments often claim and get legal authorization to restrict civil liberties, rule by decree, and conduct searches without judicial oversight. We think of emergencies as temporary, as bounded on both sides by times that are normal. But sometimes emergencies endure for a long time and the measures adopted during emergency rule become the standard political and legal practices of the country.

Emergencies differ in regard to the harshness of the measures their management is thought to demand. These might range from temporary curfews and restrictions on movement, to declaration of a state of siege and imposing martial law, to full-blown military occupation and pacification. During emergencies it is common for restrictions of rights to fall on freedom of movement and residence, freedom of assembly, freedom of expression and protest, democratic rights, and DPRs. The most severe emergencies are ones in which most parts of the country have high levels of physical devastation, loss of life, loss of home and livelihood, economic crisis, and institutional breakdown. Imminent invasion or attack may also create an emergency.

In a serious national emergency such as an armed foreign invasion or an extended series of terrorist attacks, governments have the responsibility of minimizing damage to people and property, stopping the invasion or attacks, restoring security and services, and repairing the damage. In order to do these things, certain emergency powers are sometimes justified. First, governments may need powers to control the location and movement of people, to move them from the most dangerous areas and into areas where security and

rudimentary services such as food, shelter, and medical care can be provided. Accordingly, rights to freedom of movement and to choice of residence are often restricted during serious emergencies. Second, governments need powers to reestablish rudimentary services. Doing this may involve commandeering public and private buildings and supplies to feed, house, or care for people, and conscription, particularly of those with special skills, to assist in the provision of these services. Thus rights to property and against forced labor may need to be restricted during emergencies. Third, governments need powers to reestablish security. In a natural disaster this may be mainly a matter of preventing looting. In a war, insurrection, or terrorist onslaught it may also involve preparing defenses against additional attacks. People who are believed to be dangerous may be detained in circumstances where it is impossible to file charges, collect evidence, or hold hearings quickly. Thus DPRs may be qualified or hearings and trials postponed.

Because of the dangers that national emergencies pose to fundamental rights and freedoms it is important that national constitutions and international human rights treaties provide guidance as to what governments may and may not do during such periods. Fortunately, three major international treaties -the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the ICCPR- undertook this difficult task. They permit the suspension of most rights during severe national emergencies if the suspension is genuinely necessary, but hold that a few extremely important rights are immune to suspension. Article 15 of the ECHR gives a representative formulation:

“In time of war or other public emergency threatening the life of the nation any [country that has ratified the Convention] may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation [...]. No derogation from Article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [right against torture and degrading treatment], 4 (paragraph 1) [right against slavery and servitude] and 7 [right against ex post facto laws] shall be made under this provision”.<sup>13</sup>

This clause makes several especially important rights immune to suspension while permitting the remaining rights to be set aside only as far and for as long as is indispensable, or at least highly useful, to managing the emergency. Further, other countries that are parties to the treaty must be informed of any suspensions. According to the three treaties, most

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<sup>13</sup> **European Convention on Human Rights**, Art. 15, <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

human rights -including DPRs, personal liberties, and democratic rights- may be suspended in national emergencies when the country's security and survival commands it.<sup>14</sup> If there are compelling goals of security and survival that a country cannot reasonably hope to reach without suspending some right, then its suspension is permissible as long as it is not on the short list of rights whose suspension is forbidden in all circumstances. Still, the requirement that derogation be “strictly required by the exigencies of the situation” recognizes the normative strength of human rights by requiring that what is on the other side of the scale is the security and survival of the country during a period of great danger. Article 27 of the ACHR requires a “war, public danger, or other emergency” that is sufficiently large to threaten a country’s “independence or security”.<sup>15</sup> The ECHR requires a time of war or other public emergency threatening the life of the nation.

Many scholars and human rights bodies have advocated adding DPRs to the list of rights that are immune to suspension during emergencies.<sup>16</sup> Both the Inter-American Court of Human Rights and the United Nations Human Rights Committee (established under the ICCPR) have made substantial efforts in their interpretations and rulings to give DPRs more protected status during emergencies.

The approach to emergencies found in the three treaties uses a simple emergency versus non-emergency approach. I think that this simple dichotomy is dangerous and believe that we will be better able to think clearly about human rights during emergencies if we work with four categories instead of just two. I distinguish *normal times*, *troubled times*, *severe emergencies*, and *supreme emergencies*. I present these four categories as ideal types, recognizing that reality is often messier than neat categories suggest. It would be worthwhile -though difficult- to work up and defend a detailed normative view of what measures are permissible during the three types of non-normal times, but here those measures are only sketched. The norm that there should be no suspensions of rights except those “strictly required by the exigencies of the situation” applies to all four categories.

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<sup>14</sup> The statement that the three treaties make DPRs subject to suspension should be qualified by noting that the right to life in these treaties is formulated so as to require that capital punishment be imposed “pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime”. The effect of this clause is to forbid summary executions. It also suggests an attractive principle, namely that DPRs are most imperative when the most fundamental interests and rights are at stake.

<sup>15</sup> **Inter-American Convention on Human Rights**, Art. 27,

<http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>

<sup>16</sup> See **J. ORAA**, *HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW*, Oxford, 1992.

*Normal times* are periods when a country is not facing severe and exceptional problems. The problems that do exist are perennial problems such as crime, unemployment, inflation, inequality, prejudice, and political discontent, and these problems are not at crisis levels. Further, no major emergencies are occurring in the home territory, although there may be floods, hurricanes, recessions, and crime waves. The country may be involved in small-scale wars and peacekeeping operations in other countries, but it is not experiencing major war or insurrection at home. The United States, for example, was in normal times during the year 1999. The war in Yugoslavia and the NATO action in Kosovo were having little domestic effect, and the U.S. had not yet experienced the 2000 attack on the USS Cole or the September 2001 attacks on New York and Washington DC. During normal times human rights fully apply. The situation has no special exigencies that make imperative the restriction of basic rights.

Second, there are *troubled times*. In such a period the country is experiencing the problems of normal times plus engaging in a war outside of the homeland, experiencing occasional terrorist attacks (victims in the dozens or hundreds), suffering domestic unrest, or trying to recover from a major natural disaster or industrial accident. Large natural disasters such as Hurricane Katrina may create troubled times through their political and economic impacts. Wholesale suspensions of rights are not appropriate during troubled times, but temporary curfews and restrictions of movement may be necessary for short periods in disaster areas. Security may need to be increased in a wide range of areas.

Third, there are *severe emergencies*. These involve a major war in the national territory, armed rebellion, or regular and severe terrorist attacks. ECHR Article 15 speaks of a “war or other public emergency threatening the life of the nation”. This language is not very helpful, although the references to war and to a threat to the country’s life suggest that the situation should be one that is very serious; that the level of danger and damage is on a par with the level that occurs during a serious war. There are several conditions that create an emergency or make an emergency severe. These include: (1) The threat or damage is enormous: actual or potential damage to the country’s residents and institutions is very severe, including large-scale loss of life; (2) the danger or damage is not confined to a few small areas but rather is widespread (if not literally everywhere) within the country; (3) the threat or damage to the country’s economic life and the provision of essential services is

large; and (4) the ordinary operation of law enforcement and border protection agencies is not sufficient to stop the danger and damage.<sup>17</sup> To these conditions we should add the principle that if an emergency is caused by a threat rather than an actual occurrence, the threat must, on a careful and reasonable judgment, be deemed to be highly likely rather than merely possible. The boundary between troubled times and severe emergencies is extremely important legally and politically, and these conditions attempt to sketch that boundary. In severe emergencies derogable rights may be restricted or even suspended wholesale if this is strictly necessary, but non-derogable rights may not.

Fourth and finally, there are *supreme emergencies* (or “extremely severe emergencies”) which literally threaten the survival of the country as independent and whole.<sup>18</sup> A major war or insurrection is occurring in the homeland, causing widespread death and devastation. In many areas political and economic institutions are not functioning, or are functioning at low levels. The economic and institutional strain is enormous, and there is a serious risk that the war or insurrection will end in disastrous defeat. Britain, for example, was in a supreme emergency during the worst years of World War II. Since supreme emergencies raise the prospect of severe restrictions of many important human rights, as well as deliberate violations of the law of war, it is imperative to attempt to define carefully what supreme emergencies are and to specify what they permit. A lively debate on this subject is currently underway among philosophers and political theorists.<sup>19</sup>

If we use the four categories suggested above to classify countries such as France, Spain, the United Kingdom, and the United States which experienced terrorist attacks between 2001 and 2006, the most plausible view is that although actual and threatened terrorist attacks put these countries into severe emergencies for brief periods they subsequently experienced troubled times rather than severe and extended national emergencies.<sup>20</sup> I recognize, of course, that in late 2001 it was not foreseeable that terrorist attacks

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<sup>17</sup> See **E.C.H.R.**, *Greek Case*, 18 Nov. 1969; *Lawless v. Ireland*, 1961. See also **O. GROSS and F. NI AOLAIN**, “From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights”, *HUMAN RIGHTS QUARTERLY*, 2001, pp. 625-649.

<sup>18</sup> On the idea of a supreme emergency, see **M. Walzer**, *JUST AND UNJUST WARS*, Basic Books, 1977; **J. RAWLS**, *THE LAW OF PEOPLES*, Harvard, 1999.

<sup>19</sup> See **D. STATMAN**, “Supreme Emergencies Revisited”, and bibliography, *ETHICS*, 2006.

<sup>20</sup> See, e.g., **B. ACKERMAN**, “The Emergency Constitution”, *YALE L.J.*, 2004. Ackerman states “[u]ndoubtedly, there are times when a political society is struggling for its very survival. But my central thesis is that we are not living in one of these times. Terrorism -as exemplified by the attack on the Twin Towers- does not raise an existential threat, at least in the consolidated democracies of the West”.

would not continue to occur regularly in the United States, and we do not know what the future holds. Still, when no severe emergency exists these countries are not permitted under the three treaties to suspend DPRs. Human rights standards apply without restrictions during normal and troubled times. Recognizing the category of troubled times aids the maintenance of critical attitudes about how long severe emergencies endure.

### **III. Detention without trial in the war on terror**

This section addresses the justifiability of setting aside DPRs as part of a government's struggle against terrorism. The following section discusses detention without trial in the United States.

A perplexing dimension of terrorist and wartime emergencies is that they generate detainees such as suspected terrorists who are captured by military forces or special operations units rather than by ordinary domestic law enforcement agencies. Such detainees do not necessarily fall into the systems ordinarily used for suspected criminals, and it may be difficult as well to classify them as prisoners of war since terrorists are not considered to be engaged in lawful warfare. Captured enemy soldiers who were engaged in lawful warfare are not ordinarily considered to be criminals. But terrorists do not wear uniforms or bear their arms openly, and for this reason are sometimes described as "unlawful combatants."

Under international law it is permissible to detain captured enemy soldiers without trial. For instance, the Geneva Conventions permit prisoners of war to be held without trial until the end of hostilities in order to incapacitate them and prevent their return to the war effort. Still, these prisoners are entitled to some sort of administrative review of the grounds for their imprisonment. The grounds for permitting the detention without trial of enemy soldiers during wartime include the costs and difficulties of conducting trials for thousands of prisoners, the fact that captives are not generally accused of crimes, and the temporary nature of the detention. If detained combatants are charged with crimes rather than simply being held until the end of hostilities, they must in most circumstances be given a trial or court martial with full due process protections. The Geneva Convention allows a "great degree of flexibility in trying individuals captured during armed conflicts; its requirements are general ones, crafted to accommodate a wide variety of legal systems; but *requirements* they are

nonetheless”.<sup>21</sup> Those suspected of being unlawful combatants are required by the Geneva Conventions to be treated as prisoners of war until their status has been decided by a “competent tribunal”.<sup>22</sup>

The issue to be discussed here is not about combatants captured in a war zone outside of the national territory. Such persons normally fall under the provisions of the Geneva Conventions. The issue is rather whether human rights permit the holding without trial of persons suspected of terrorism but captured nowhere near a war zone. After the 9/11 attacks, the United States held without trial a number of suspected terrorists who had been apprehended domestically. An example is Jose Padilla, who was born in Brooklyn to a Puerto Rican family. Padilla is a convert to Islam who traveled to Egypt, Saudi Arabia, Afghanistan, Pakistan, and Iraq. Upon return to the U.S. in 2002, Padilla was arrested at the Chicago airport and initially held as a material witness. Suspected of planning to detonate a "dirty bomb" in the U.S., he was subsequently designated an enemy combatant and imprisoned without indictment or trial in a military brig in South Carolina. Padilla's case is discussed in greater detail in Section IV.

Detention without trial of fighters apprehended in a war zone raises in many cases serious questions of fairness, but it does not pose much threat of undermining the domestic system of DPRs.<sup>23</sup> A case like Padilla's, however, posed such a threat since he is a citizen arrested within the national territory. The danger in democratic countries is not that the whole system of trials and DPRs will be abandoned. It is rather the opening of a second track with few or no procedural guarantees that is dedicated to people thought to pose threats to national security. Perhaps the worst possible outcome is that government agents will conduct a “dirty war” on targeted groups of citizens and residents.

A special national security track may start with an irregular arrest, operate largely out of the public view, and involve disappearances and secret prisons. In this track the forms of interrogation used may often be severe enough to border on or be torture, and individuals

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<sup>21</sup> *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2006.

<sup>22</sup> See **1949 Geneva Conventions III-IV**, <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>

<sup>23</sup> Full criminal DPRs may not extend to all detainees. When a person is in custody as an “enemy combatant” the government may argue that the prisoner has not been detained for a “criminal proceeding” as defined under the Fifth and Sixth Amendments. Therefore, these prisoners are not afforded the same DPRs as a prisoner in custody for criminal prosecution. But the Supreme Court has said that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker”. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 2004.

may be held incommunicado without habeas corpus, other forms of judicial scrutiny, and a guarantee of a speedy trial. It is the emergence and institutionalization of this sort of system that undermines the rule of law and poses a major threat to the security of citizens and residents.

In situations where government officials believe that a detained person is seriously dangerous but doubt that they have the evidence needed for a conviction they may find very attractive the possibility of holding the person for an extended period without trial. Detention without trial permits incapacitating a person without having to bring him or her to trial and thereby risking acquittal and release.

Detention without trial is often justified as a kind of quarantine, a way of keeping dangerous people from doing harm. It might be argued that when we impose what amounts to house arrest on a person who has been discovered to have a contagious and dangerous disease we do not think a trial is necessary. If a statute prescribes quarantine for infectious bearers of certain diseases, and if a physician has determined that a person has one of the diseases and is infectious, then the health department can order and supervise the person's quarantine. No procedural guarantees are provided.

More analogous to detention without trial of a suspected terrorist for a long time would be the practice of sending lepers to remote and isolated leper colonies. (This practice is now largely abandoned because leprosy -Hansen's disease- is less contagious than once thought and can be treated with antibiotics.) Quarantine in a leper colony is such a long and large deprivation of liberty that if there were a significant possibility of mistakes in the diagnosis of leprosy, some form of review of decisions to send people to leper colonies would be appropriate. If a person is being subjected to long-term detention or quarantine, and if there is a significant level of false positives in selection for the kind of detention or quarantine in question, then some sort of process involving second-party review of the case for detention or quarantine must be available.

### **A. The three options argument**

When suspected terrorists are arrested they are sometimes held without being charged because the detaining authorities do not yet have good enough evidence to justify their

detention before a judge. The government does not want the suspected terrorists to be released for fear they will then have the chance to carry out their plots. Since most human rights are not absolute, and since personal security is itself an important ground for some human rights, we cannot simply dismiss the possibility of using detention without trial. An argument for detention without trial, which I call the “Three Options Argument”, relies on four premises.

Premise one asserts that following his arrest, a suspected terrorist can be treated in only three ways: (1) released; (2) brought to trial; or (3) detained without trial for an extended period.

Premise two asserts that the first option (releasing the suspect) is unacceptably risky. If the government is right in believing that the suspect is involved in terrorist activities, releasing him risks severe harm to public safety as the person returns to terrorism.

Premise three is that the second option (bringing the suspect to trial) is also unacceptably risky. The cases in question are ones where the government believes its evidence may well be insufficient to convict at trial. Thus, a criminal prosecution may well result in the suspect’s release, risking severe harm to the country as the person returns to terrorist activities. And even if the person is convicted of something, it will often be on minor charges, such as immigration violations, and thus impose only a short period of detention. Bringing the suspect to trial may also risk revealing the government's undercover agents and other sources of intelligence. Further, if torture or near-torture was used in interrogating the suspect or witnesses, allowing them to participate in a trial risks embarrassing the government by exposing that fact.

Premise four is that the third option carries no comparable risks. Detaining the person without trial for an extended period eliminates any risk that he will return to terrorist activities.

If there are only three options, and if the first two are unacceptably risky while the third is not, then the third is the best option. The argument concludes that long-term detention without trial is the best option for protecting society against suspected terrorists when it is doubtful whether the evidence available will support conviction of serious charges at trial.

An objection to this argument is that the first premise is false because there are more than three options. One additional option is reducing or eliminating the need for detention without trial by making it easier for the government to convict those suspected of terrorism when it brings them to trial. This could be accomplished by making it easier for law enforcement officers to engage in effective surveillance. Another way of doing this is passing special terrorism laws which make it easier to convict people of engaging in a terrorist conspiracy or belonging to a terrorist organization. There could also be special tribunals for those accused of terrorism in which some due process protections are not available. The United States Supreme Court allowed that “enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict; hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding”. It also allowed that “once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus should shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria”.<sup>24</sup> A different approach attempts to make detention without trial less objectionable by using milder methods of control such as house arrest and electronic bracelets. These measures may be useful in some cases, but none of them makes the problem go away entirely.

An objection to premise two is that the dangers in releasing suspected terrorists are the same ones we face when we release criminals suspected of being dangerous because we have failed to convict them at trial. If the three options argument were sound, it would undermine due process protections for all people who are thought likely to commit major crimes if they are released. For this worry to have special force in the case of suspected terrorists we have to be persuaded that the damage they are likely to do if released is far greater than that done by ordinary criminals whom we fail to convict at trial. This seems far from obvious. First, upon release they will surely be subjected to heavy police surveillance both in order to protect society and in hopes that they will lead police to other members of terrorist networks. The likelihood of surveillance will also lead other terrorists to stay away from them. Second, after release they will not be trusted by other terrorists because of the worry that in order to gain their freedom they have switched sides and become informers.

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<sup>24</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34, 2004.

Another objection to this argument rebuts premise four by holding that detention without trial also has great risks to the public's safety. It poses the danger of undermining the protections against government abuses that DPRs provide. Abandoning due process protections puts at risk protections that are valuable to us all. Grave risks to people's security are generated when we create, for those accused of being dangerous to national security, a special track in which most due process protections are unavailable. If this objection is correct then none of the three options is good for the public's safety.

A final objection is that what we do cannot be decided entirely on the basis of public safety. The severity of unfairness also has to be considered. Long-term detention without trial has the features of summary punishment. It greatly increases the risk of incarcerating people who are neither dangerous nor guilty of crimes. Estimating how dangerous a person is turns out to be extremely difficult.

### **B. The priority shift argument**

Another argument for detention without trial is the "Priority Shift Argument". Its key idea is that in severe emergencies people downgrade the importance of liberty and fairness. Emergency conditions can be bad enough that reasonable people, at least temporarily, shift their priorities in the direction of greater concern for security - a concern for saving one's life and health. If this shift occurs in the priorities of rational people, then an impartial legislator could reasonably be guided by it in deciding which rights are immune to suspension.

Does the Priority Shift Argument help justify long-term detention without trial of suspected terrorists in severe emergencies? One reason for doubting that it does is that the shift does not occur, I believe, in regard to fairness in the distribution of the most important goods. The downgrading of fairness-based rights is not rational when a person's most important interests are at stake. This is why the three treaties forbid capital punishment without full due process.<sup>25</sup> For another example, in a severe natural disaster citizens will be

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<sup>25</sup> See, e.g., **International Covenant on Civil and Political Rights**, Art. 6, <http://www.ohchr.org/english/law/ccpr.htm> Article 6.2 states "[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out

very concerned that greatly needed government assistance is provided to people and neighborhoods in ways that are fair. Thus concern for fair distribution of the measures that protect people against severe government abuses of the criminal justice system may survive the Priority Shift.

A related reason to believe that DPRs will survive the Priority Shift is that they are themselves protections of security. Recall that one major justification for DPRs given above was in terms of security of life, liberty, and property against abuses by government. Thus the trade-off is security versus security, not just security versus fairness. Recall also that one of the objections to the Three Options Argument above was that the third option, long-term detention without trial, threatened public security by undermining historically hard-won due process protections.

Still, ordinary citizens may not much fear being suspected of terrorism. Some of them say that they will not be troubled if the government decides to restrict or suspend the DPRs of suspected terrorists. Law-abiding citizens find it hard to believe that they could be mistaken for criminals, much less for terrorists. Thus they cannot see that protecting the due process and other rights of accused terrorists does much to protect the security of ordinary people. The security argument for DPRs leaves them cold. This coldness applies particularly to non-citizen detainees, but it applies as well to citizen detainees who seem to have been involved in terrorism. This outlook is a great practical barrier to the maintenance of DPRs during emergencies and troubled times. Its roots are not necessarily egoism, a concern only for oneself. More commonly they are a matter of limited sympathies, a willingness to dismiss the claims of people who seem threatening or alien. One response to this worry is to try to persuade ordinary citizens that the risks of mistakes in the detention and prosecution of terrorists are real, that those mistakes have severely bad consequences, and that some ordinary law-abiding citizens are vulnerable to those risks. The best means of persuasion here may take the form of plausible stories that illustrate how various sorts of people would be at risk if governments could detain and punish without providing trials and procedural protections. But such attempts at persuasion also need to invoke fairness, to remind people

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pursuant to a final judgment rendered by a competent court". See also, **Inter-American Convention of Human Rights**, Art. 4, <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>, in which Article 4, sections 2–6 provide "[i]n countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court [...]. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence".

that one of the most important reasons for having DPRs is to avoid severe unfairness.<sup>26</sup>

#### **IV. Due process and the war on terror in the USA**

This section addresses issues discussed abstractly in the previous sections by discussing detention without trial in the United States during the “War on Terror.”

##### **A. Conceptualizing the problem of terrorism**

After suffering a surprise attack, such as the one that occurred in the United States on 11 September 2001, a government must appraise the situation, analyze the nature and actions of its enemies, and diagnose the problems leading to and resulting from the attack. When many problems are identified, each will provide a partial view of the situation and how to respond to it. After the 9/11 attacks the U.S. government identified many specific problems including the real possibility of further terrorist attacks, poor control of its borders and immigration, flawed airport security, insufficient intelligence about its enemies and their capacities, and possible terrorist cells among students and immigrants from Muslim countries.<sup>27</sup>

These specific diagnoses did not preclude, however, an overall view of the situation. The Bush Administration’s overall view was that the U.S. was in (1) a severe emergency situation involving (2) a substantial and extended war. Severe emergency is the generic category and war is the specific type of emergency. Immediately after the attacks, President Bush met with the National Security Council stressing that the U.S. “was at war with a new and different kind of enemy,” and that terrorism needed to be eliminated because it was a

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<sup>26</sup> See **R. DWORKIN**, “Terror and the Attack on Civil Liberties”, *NEW YORK REVIEW OF BOOKS*, Vol. 50, 2003, [http://www.nybooks.com/articles/article-preview?article\\_id=16738](http://www.nybooks.com/articles/article-preview?article_id=16738); **J. WALDRON**, “Security and Liberty: The Image of Balance”, *JOURNAL OF POLITICAL PHILOSOPHY*, 2003, pp. 191-210; **D. LUBAN**, “Eight Fallacies about Liberty and Security”, in **R. WILSON**, *HUMAN RIGHTS IN THE WAR ON TERRORISM*, Cambridge, 2005, pp. 243-245.

<sup>27</sup> The 9/11 Commission Report found that before 9/11 the Department of Defense was never fully engaged in countering Al-Qaeda. The Immigration and Naturalization Service (INS) never entirely focused on terrorism, and instead was dealing more with criminal aliens and backlogged naturalization applications. The Federal Aviation Administration (FAA) was unprepared for the 9/11 attacks because there had been no domestic hijacking in the past decade, and explosives rather than other weapons were seen as deadlier and more probable. See **NATIONAL COMMISSION ON TERRORIST ATTACK UPON THE UNITED STATES**, *THE 9/11 COMMISSION REPORT*, W.W. Norton & Co., 2004.

threat to “our way of life”.<sup>28</sup> The 9/11 attacks might have been viewed as crimes, or as a one-shot act of retaliation by Islamic radicals, but the U.S. government ultimately came to perceive the situation as a war of extended duration rather than a short-term national emergency.<sup>29</sup> When the U.S. went to war in Afghanistan in late 2001 the idea of a war on terror ceased to be a mere metaphor since real war was being waged against the Taliban and the Al-Qaeda operatives the Taliban hosted. After the U.S. invaded Iraq in 2003 no one could deny that the country was in a serious war. For a long time, however, Osama bin Laden and Al-Qaeda were the main targets. The war on Al-Qaeda was an unusual kind of war - the enemy was a religious and political movement rather than another state. The length of the war and the possibility of attacks on the U.S. it might involve were completely unforeseeable. The wars in Afghanistan and Iraq were occurring thousands of miles from U.S. territory, however, and by 2003 life in the U.S. began to normalize.

Especially in their early stages, emergencies transfer power to the executive branch. The President is capable of acting quickly to improve security, block further attacks, and improve intelligence. After the 9/11 attacks, Congress, the courts, and the public gave President George W. Bush and his administration a lot of latitude for a long time as they took aggressive steps to combat terrorism at home and abroad. Although terrorist attacks did not recur in the U.S. homeland during the period 2002-2006, the wars in Afghanistan and Iraq, along with terrorist attacks in Europe and Asia, contributed to the plausibility of the claim that the U.S. was in a severe terrorist emergency and gave the CIA and special operations forces an ongoing mandate for action.

### **B. U.S. detainees in the war on terror**

The War on Terror raises many legal issues including border security and immigration policy; warrantless electronic surveillance, interrogation techniques and the use of torture; racial profiling; and the role of the Geneva Conventions in dealing with terrorists. My concern here continues to be restricted to issues of detention without trial. One of the Bush administration’s responses to the 2001 terrorist attacks on New York and Washington was to adopt a policy of detaining suspected terrorists for extended periods without trial and other

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<sup>28</sup> G.W. BUSH, “Remarks by the President in Photo Opportunity with the National Security Team”, 12 Sept. 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html>

<sup>29</sup> See K. LANE SCHEPPELE, “Law in a Time of Emergency: States of Exception and the Temptations of 9/11”, *U.P.A.J. CONST.L.*, 2004.

due process protections when doing so was thought necessary to gaining useful information or incapacitating suspected terrorists (recall the Three Options Argument). Many detainees were denied access to counsel, habeas corpus, and the right to a fair trial. The Bush administration did not at any point seek Congressional suspension of habeas corpus as permitted by Article 2 of the Constitution. This suspension clause says that “[t]he 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”.<sup>30</sup> Further, the administration did not declare an emergency under Article 4 of the ICCPR (to which it is a party).

Shortly after the 9/11 attacks the Justice Department undertook the investigation and prevention of domestic terrorism by arresting, interrogating, and in many cases deporting people -most of them Muslim men- thought to have ties to or information about terrorism. Approximately 1,200 people were ultimately detained by this program. Since extended detentions for investigative purposes are not permitted under U.S. law, most detentions were imposed either by the Immigration and Naturalization Service or under laws permitting the detention of material witnesses. The vast majority of those detained were arrested by the Immigration and Naturalization Service on immigration law warrants. Many of these people were denied bail and were deported after interrogation. Other detainees were held as material witnesses, since that allowed the government to hold them for an extended period without filing charges. While few if any of the people detained under this Justice Department program were later indicted for terrorist crimes, many were deported for minor immigration violations. Both Human Rights Watch and the Justice Department Inspector General later issued reports detailing the abuses detainees were subjected to, such as “prolonged detention without charge, denial of access to release on bond, interference with the right to counsel, and unduly harsh conditions of confinement”.<sup>31</sup>

The Supreme Court decided one of the first cases after 9/11 involving alien detainees in *Rasul v. Bush*.<sup>32</sup> Individuals being held for over two years at the Guantanamo Bay Naval

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<sup>30</sup> U.S. CONST., Art. I, § 9.2.

<sup>31</sup> U.S. Department of Justice, Office of the Inspector General, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks”, <http://www.usdoj.gov/oig/special/0306/index.htm>. See also, Human Rights Watch, “U.S. Supreme Court Should Review and Reject Secret Detentions”, 30 Sept. 2003,

<http://hrw.org/english/docs/2003/09/30/usdom6409.htm>; American Civil Liberties Union, “Internal Justice Department Report Details 9/11 Detainees’ Plight; Arab, Muslim, South Asian Immigrants Languished in Detention for Months”, 2 June 2003, <http://www.aclu.org/safefree/general/17241prs20030602.html>

<sup>32</sup> *Rasul v. Bush*, 542 U.S. 466, 2004.

Base in Cuba, without ever being charged or given access a trial, petitioned for habeas in 2004. The prisoners who brought the case were all captured abroad. Because the U.S. “exercises plenary and exclusive jurisdiction” over Guantanamo, the Court held “[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority” under the habeas statute.<sup>33</sup> Additionally, since they were being held in “federal custody” for an extended period of time without being afforded any formal DPRs, they had the right to challenge the legality of their detention.<sup>34</sup> Detentions of citizens also occurred. Jose Padilla was arrested in the U.S. after returning from a trip to the Middle East. As noted earlier, Padilla is a U.S. citizen who converted to Islam. He was suspected of planning to detonate a ‘dirty bomb’ in the U.S., and after being arrested in May 2002 at Chicago’s O’Hare International Airport, he was held without trial as an enemy combatant in a military jail in South Carolina. In 2005 Padilla was finally indicted on charges of conspiring to wage and support international terrorism.<sup>35</sup> On August 21, 2006, U.S. District Judge Marcia Cooke dismissed the terror count, holding that the indictment “is multiplicitous when it charges a single offense multiple times, in separate counts”. Padilla’s trial in civilian criminal proceedings is currently underway.<sup>36</sup> In Padilla’s case the justice system seems to have worked -slowly, and after much litigation- to get Padilla a civilian trial.

In April 2006 the Supreme Court, in a 6-3 vote, declined to reconsider Padilla’s case given that he had been transferred out of the military system shortly before his case was to be considered by the Supreme Court. Justice Ruth Ginsburg dissented from the refusal to reconsider:

“This case, here for the second time, raises a question ‘of profound importance to the Nation’ [...]. Does the President have authority to imprison indefinitely a United States citizen arrested on United States soil distant from a zone of combat, based on an Executive declaration that the citizen was, at the time of his arrest, an ‘enemy combatant’? It is a question the Court heard, and should have decided, two years ago [...]. Nothing the Government has yet done purports to retract the assertion of Executive power Padilla protests. Although the Government has recently lodged charges against Padilla in a civilian court, nothing prevents the Executive from returning to the road it earlier constructed and

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<sup>33</sup> *Id.*, 561.

<sup>34</sup> *Rasul*, 542 U.S., 483–484.

<sup>35</sup> See **K. ARENA, T. FRIEDEN and P. HIRSCHKORN**, “Terror Suspect Padilla Charged”, *CNN.COM*, 22 Nov. 2005, <http://www.cnn.com/2005/LAW/11/22/padilla.case/index.html>

<sup>36</sup> “Judge Drops Padilla Terror Charge”, *CNN.COM*, 21 Aug. 2006, <http://www.cnn.com/2006/LAW/08/21/padilla.charge/index.html>

defended”.<sup>37</sup>

Justice Anthony Kennedy’s opinion, disagreeing with Justice Ginsburg and concurring with the majority, noted that consideration of what rights Padilla “might be able to assert if he were returned to military custody would be hypothetical, and to no effect, at this stage of the proceedings”. Justice Kennedy’s opinion went on to suggest that the Court was standing by watchfully to take up those issues “if the necessity arises”. This may have been intended as a warning to the Bush administration that it would not tolerate evasive tactics.<sup>38</sup> Justice Kennedy also acknowledged that “Padilla’s claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts”.<sup>39</sup>

Another citizen detainee is Yaser Hamdi. Unlike Padilla, Hamdi was captured on the battlefield. He was initially captured in Afghanistan by Northern Alliance forces and then turned over to the U.S. military. Hamdi was first held at Guantanamo,<sup>40</sup> but in April 2002 was transferred to a Navy brig in the U.S. when his U.S. citizenship was discovered. Although Hamdi had been raised in Saudi Arabia, he was born in Louisiana and hence is a U.S. citizen. The government contended that Hamdi was an enemy combatant and that as such he could be held indefinitely without being informed of the charges against him, access to counsel, or access to an impartial tribunal. In *Hamdi v. Rumsfeld*, the Supreme Court ruled in 2004 that “citizen-detainees” like Hamdi were entitled to due process and should be given a meaningful opportunity before a neutral decisionmaker to contest their classification as enemy combatants.<sup>41</sup>

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<sup>37</sup> *Padilla v. Hanft*, 126 S.Ct. 1649, 2006, **J. GINSBURG**, Dissenting Opinion. Padilla’s first case before the Supreme Court was *Rumsfeld v. Padilla*, 542 U.S. 426, 2004.

<sup>38</sup> See **J.M. FREIMAN**, “Padilla’s Real Message: The Grace Period is Over”, *JURIST*, 4 Apr. 2006, <http://jurist.law.pitt.edu/forumy/2006/04/padillas-real-message-grace-period-is.php>

<sup>39</sup> *Padilla*, 126 S.Ct., 1649, **J. KENNEDY**, Concurring Opinion.

<sup>40</sup> Many people suspected of terrorism, or believed to have information about terrorists, were captured by American forces in Afghanistan and Iraq and by special operations forces. The Bush administration generally treated these detainees as enemy combatants and hence as falling under extrajudicial procedures for handling prisoners during war, but not generally as falling under the Geneva Convention and the protections it provides to prisoners of war. Because the administration viewed the entire world as a terrorist battlefield, it tended not to discriminate between suspected terrorists captured in Afghanistan or Iraq and those captured outside of any active war zone. As a way of holding and interrogating such detainees with lessened public scrutiny and with less danger of effective legal challenges the Bush administration established in 2002 the Guantanamo Bay detention camp at its Navy base in Cuba. As of 2007, several hundred detainees are still held in Guantanamo. Some of these people will be brought to trial, but others are likely to continue to be held without trial. In September 2006 the Bush Administration revealed that it had operated a program of secret prisons overseas, and that it was transferring people from those prisons to Guantanamo. See *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2004; **Military Commissions Act**, 2006, Pub.L. No 109-366, 120 Stat. 2600, 17 Oct. 2006.

<sup>41</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 2004.

In the five years following the 9/11 attacks the Bush Administration often acted in ways that violated DPRs and the important values that support them. Soon after 9/11, when the country invaded Afghanistan in October of 2001 and went to war with Iraq in March of 2003, it may have been plausible to think that extended detentions without trial were sometimes necessary in order to gain information about terrorist activities and to incapacitate suspected terrorists when the government was not confident it could convict them at trial. But even during that period the Bush Administration did not seek specific legislation authorizing and providing regular judicial scrutiny of extended detentions of citizens and residents suspected of engaging in or supporting terrorism. It took advantage of the immigration system and material witness laws to hold people for extended interrogation. It used an offshore facility (Guantanamo) and secret prisons to prevent public and judicial scrutiny of its detentions and interrogations of suspected terrorists arrested in other countries. And it failed to offer apologies and compensation to people who were mistakenly held for extended periods and subjected to very harsh interrogation and treatment. In 2003–2006, when the U.S. was in troubled times rather than a severe emergency, the Bush administration continued to insist on using measures domestically that went far beyond those “strictly required by the exigencies of the situation”.

In the latter half of 2006, the Bush administration introduced the Military Commission Act of 2006 (MCA) regarding the suspension of habeas corpus and other DPRs. This legislation was enacted on October 17, 2006, and contains worrisome provisions. It permits use of evidence obtained through cruel, inhuman, or degrading treatment, but bans evidence acquired through torture; it shifts the burden of disproving hearsay evidence onto defendants with limited discovery rights; it denies defendants access to classified evidence; it permits the death penalty for crimes that resulted in the death of another; and it expands the definition of “unlawful enemy combatant” to include anyone “who has purposefully and materially supported hostilities against the United States or its co-belligerents”.<sup>42</sup>

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<sup>42</sup> See **Military Commissions Act**, 2006, Pub.L. No 109-366, 120 Stat. 2600, 17 Oct. 2006. See also, **Human Rights Watch**, “Q & A: Military Commissions Act of 2006”, Oct. 2006, <http://hrw.org/backgrounders/usa/qna1006/usqna1006web.pdf>; describing the issues and changes associated with the Act and the pertinent problems that arise. The legislation also amended habeas so that “[n]o 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 United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination”; 120 Stat., 2636.

The constitutionality of the habeas provision of the MCA was upheld by the U.S. Court of Appeals for the District of Columbia on February 20, 2007 in *Boumediene v. Bush* (consolidated detainee cases).<sup>43</sup> The Court concluded that the MCA strips the federal courts of jurisdiction over habeas petitions brought by alien enemy combatants and dismissed the case. It remains to be seen if the constitutionality of the MCA will be taken up by the Supreme Court.

## **V. Conclusion**

There are very strong reasons for upholding DPRs during times of trouble and emergency. Underlying values of security and fairness remain relevant and important during such times. Creating a special arrest and detention track without most DPRs for suspected terrorists is extremely dangerous to people's security and to the universality of protections for due process.

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<sup>43</sup> No. 05-5062, 2007 U.S. App. LEXIS 3682 at \*1, 20 Feb. 2007.