The Bill of Rights after September 11th: Principles or Pragmatism?

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I. INTRODUCTION

The first ten amendments to the U.S. Constitution, known generally as the Bill of Rights, have iconic status as the laws that "protect the people from the government, which is why the framers tacked [them] on to the Constitution."\textsuperscript{1} Initially, the Bill of Rights was "adopted to protect the citizens of the states from the mischief and excesses of the new federal government."\textsuperscript{2} The Supreme Court's decisions incorporating most of the provisions of the Bill of Rights for application against state and local governments broadened these amendments' protective powers to safeguard individuals against all American governmental officials, agencies, and institutions.\textsuperscript{3} For American law and government, the first ten amendments have monumental importance because "the Bill of Rights codifies rights that are fundamental to a liberal-democratic polity and stipulates limits on governmental authority."\textsuperscript{4} In other words, contrary to the arguments of Alexander Hamilton and other early Federalists,\textsuperscript{5} the Bill of Rights has come to be viewed

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  \item 2. JOHN C. DOMINO, CIVIL RIGHTS \& LIBERTIES: TOWARD THE 21ST CENTURY 3 (1994).
  \item 3. See MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 2 (1986) ("[T]he Court has haltingly reached much the same result by gradual incorporation of most rights in the Bill of Rights as limits on the states under the due process clause, a development that reached fruition in the 1960s.").
  \item 4. DOMINO, supra note 2, at 3.
  \item 5. In THE FEDERALIST No. 84, Hamilton argued:

  I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no
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by Americans as an essential element for the protection of individuals' liberty. As characterized by Yale professor, Akhil Reed Amar, "The Bill of Rights stands as the high temple of our constitutional order—America's Parthenon..."  

The war on terrorism has challenged the traditional rhetoric and contemporary reality concerning the Bill of Rights. Societal rules, individual rights, and limits on governmental authority defined by the Bill of Rights changed in the aftermath of events that occurred on September 11, 2001—at least with respect to specific individuals. As a response to hijackers' deadly suicide attacks on the World Trade Center and the Pentagon, the Bush administration, often with congressional support, instituted a variety of measures that it asserted were necessary to combat the threat of terrorism. These measures ranged from military attacks in foreign countries to creative prosecutorial uses of existing statutes. In the course of undertaking these putative anti-terrorist actions, the Bush Administration has received heavy criticism for allegedly running roughshod over the principles of the Bill of Rights. The government's strategies appear to be premised on a view of constitutional rights, expressed by Justice Antonin Scalia in a public speech, that during wartime "the [legal] protections [for individuals] will be ratcheted right down to the constitutional minimum." In other words, the vital need to protect the country from its enemies during a time of war necessitates a reduction, and perhaps

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10. See Anthony D. Romero, How the War on Terrorism Affects You, CIVIL LIBERTIES (The American Civil Liberties Union National Newsletter) 1 (Fall 2002) (criticisms of the federal government's anti-terrorism tactics that have allegedly violated constitutional rights, generated excessive governmental secrecy, and encouraged racial and religious profiling).
even a severe reduction, in the recognition of constitutional rights provided by the Bill of Rights.

Under the traditional rhetoric about the Bill of Rights and its importance for the maintenance of individual liberty and a democratic society,¹² the document and its individual provisions are portrayed as embodying principles that must be respected and preserved in order to prevent the risk of excessive governmental power. By contrast, the assertion that rights can shrink and perhaps even disappear during a war or other emergency portrays a pragmatic view of rights that characterizes them, in some sense, as luxuries that must be set aside during certain historical eras. This article will examine these competing perspectives on the Bill of Rights to examine their implications for contemporary law and public policy.¹³

II. THE BILL OF RIGHTS: IDENTIFYING PRINCIPLES

The story of the Bill of Rights begins literally at the creation of the United States Constitution.¹⁴ Although there are older English roots for some of the rights described in the Bill of Rights, the actual definition and implementation of those rights developed over the course of American history. As described by Charles Rembar,

Due process of law, our courts have told us, is a legacy of Magna Carta, the fundamental common law, the Natural Law, the ancient rights of Englishmen, the timeless features of our legal system. We have seen that the rights we have been speaking of [in the Bill of Rights] are considerably less than timeless; that if they are fundamental, the courts have only recently made them so . . . .¹⁵

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¹². See Domino, supra note 2, at 3 ("Thus, the Bill of Rights codifies rights that are fundamental to a liberal-democratic polity and stipulates constitutional limits on government authority.").

¹³. When this article discusses the Bill of Rights, it also intends to include consideration of the Fourteenth Amendment which, although not actually part of the Bill of Rights, makes the rights in the first ten amendments applicable to the states through the Due Process Clause. See Thomas R. Hensley, Christopher E. Smith & Joyce A. Baugh, The Changing Supreme Court: Constitutional Rights and Liberties 92-125 (1997).

¹⁴. See, e.g., Rutland, supra note 5, 130-62 (description of how the Bill of Rights arose from debates about the drafting and ratification of the U.S. Constitution).

Indeed, Yale's Professor Amar notes that the Bill of Rights had relatively little specific meaning and impact in the minds and hands of its authors, so that the visionaries who authored the Fourteenth Amendment after the Civil War really deserve credit for effectuating the promise of rights for American citizens. In light of this recognition that the legal protections embodied in the words of the Bill of Rights do not really reflect centuries-old principles and practices, it would be deceptive to compare post-September 11th treatment of the Bill of Rights with illusory historical images. Instead, an accurate comparison must begin with the actual principles of the Bill of Rights as enunciated through the Supreme Court's decisions defining rights and proceed to compare those enunciated principles with the evident pragmatism of the contemporary war-on-terrorism diminution of legal protections for individuals.

A. Supreme Court Cases and the Meaning of the Bill of Rights

Individual provisions of the Bill of Rights lack inherent meaning and must be given definition through interpretations of the U.S. Supreme Court and other courts. The phrase "cruel and unusual punishments" in the Eighth Amendment, for example, does not give any indication by its words about which punishments fall within its ambit as improper to apply against criminal offenders. Professors Malcolm Feeley and Edward Rubin have said that the "broad language of the cruel and unusual punishments clause must be seen as a grant of jurisdiction . . . . [I]t could be understood only as a jurisdictional provision that invited the courts to

16. See AMAR, supra note 6, at 290-91, 293.
In the first century of our nation's existence, the Bill of Rights played a surprisingly trivial role: only once before 1866 was it used by the Supreme Court to invalidate federal action . . . . [T]he central role of the Bill of Rights today owes at least as much to the Reconstruction as to the Creation . . . . It was [John] Bingham's generation [in the Reconstruction Congress] that in effect added a closing parenthesis after the first eight (or nine, or ten) amendments, distinguishing these amendments from all others. As a result, Americans today can lay claim to a federal 'Bill of Rights' set apart from everything else, and symbolically first even if textually middling.

17. There is precedent for a diminution of rights during wartime by recalling, for example, the detention without due process applied to Japanese-Americans during World War II. PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 39-62 (1988). However, the contemporary "war" against terrorism presents an arguably distinguishable context because it involves governmental action against shadowy international organizations rather than sovereign states.


19. U.S. CONST. amend. VIII.
construct a set of rules, for it provided no meaningful guidance about the content of these rules." Other clauses also contain vague phrases, such as the Fourth Amendment's prohibition on "unreasonable searches and seizures" and the Sixth Amendment's entitlement to a "speedy trial." The words "unreasonable" and "speedy" do not have any specific meaning until that meaning is supplied by judges' interpretations of those words in the context of legal cases.

Because judicial interpretation shapes the meaning of the Bill of Rights, the nature of legal protections for individuals will change as judicial interpretations of various constitutional amendments change over time. As Professor Lee Epstein and Joseph Kobylka observed, "[One] basic truth about the nature of the American version of constitutional governance [is]: its rules are not static, insusceptible to change." There are abundant examples of such changes through constitutional interpretation, such as the Supreme Court's 1968 decision to require state courts to honor the Sixth Amendment right to trial by jury for cases involving serious criminal charges. In expanding the jury right in this manner, the Court had come a far distance from the observation in Justice Benjamin Cardozo's 1937 majority opinion that "[t]he right to trial by jury . . . ha[s] value and importance[, but] . . . [f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [it]." Thus, when we speak of the Bill of Rights, we must necessarily recognize that we are not discussing a set of fixed principles. Instead, we must acknowledge that the legal protections provided for individuals by the United States Constitution have changed throughout American history.

21. U.S. CONST. amend. IV.
22. U.S. CONST. amend. VI.
24. See CHRISTOPHER E. SMITH, POLITICS IN CONSTITUTIONAL LAW 80 (1992) ("The meaning of the Constitution changes as justices interpret its words in conjunction with historical, social, and political developments in American society.").
25. EPSTEIN & KOBYLKA, supra note 23, at 300.
B. The Principles of the Contemporary Bill of Rights

Although some scholars applaud the process for changing constitutional meanings through judicial interpretation as a means for keeping the Constitution relevant to the needs of an evolving society, the existence of change makes it more difficult to argue for the existence of enduring constitutional principles. Despite the practical need to acknowledge that the Bill of Rights does not reflect a set of permanent rules for American society, it is still possible to discern principles flowing from the Supreme Court's interpretation of the contemporary Bill of Rights. By this I mean that there are legal principles that are so firmly established and well-supported by consensus, or near-consensus, on the Supreme Court that they reflect a contemporary settled doctrine that is thoroughly accepted by courts, and, moreover, the basis for an expectation of entitlement by individuals drawn into the justice system. These expectations about principles concerning rights, created in large part by the Supreme Court's decisions, are evident in public opinion polls. Any significant change that might affect these accepted principles about rights through decisions by a future Supreme Court would require overt repudiation of a long-standing promise of protection or entitlement granted to individuals under well-established interpretations of the Constitution. For example, when a decision by the U.S. Court of Appeals for the 4th Circuit challenged the constitutional basis for and necessity of *Miranda*

28. See Lawrence H. Tribe & Michael C. Dorf, On Reading the Constitution 31 (1991) (“We do not attempt to offer the last word on the Constitution's meaning; when a last word is possible, the Constitution will have lost its relevance to an ever-changing society.”).

29. Advocates of judicial interpretation by original intent argue that judicial interpretations that produce flexible, evolving changes in constitutional meanings are contrary to the only true set of constitutional principles: fixed meanings determined by the original intentions of the Constitution's authors. Christopher E. Smith & Joyce A. Baugh, The Real Clarence Thomas: Confirmation Veracity Meets Performance Reality 50-59 (2000). However, the originalists' claim of principled decision making has been thoroughly criticized by various scholars and judges. See, e.g., Stephen Macedo, The New Right v. The Constitution 7-23 (1987).

30. Public opinion polls show strong majority support for the following principles concerning rights: "Right to the government providing a defense lawyer for someone who cannot afford one," 74%; "Right to remain silent when being questioned by the police," 63%; "Right to have a lawyer present during police questioning," 71%. George F. Cole & Christopher E. Smith, The American System of Criminal Justice 121 (10th ed. 2004). It is reasonable to infer that the Supreme Court's famous decisions contributed to these expectations, both because they relate to two of the Court's most well-known decisions, Gideon v. Wainwright, 372 U.S. 335 (1963), and Miranda v. Arizona, 384 U.S. 436 (1966), and because the Court's decisions in the 1960s created these rights and brought them into public consciousness.
warnings, the U.S. Supreme Court emphatically rejected that view and, in an opinion by Chief Justice William Rehnquist, reiterated the strong support for the precedent in *Miranda v. Arizona.* Although Rehnquist acknowledged that "no constitutional rule is immutable," he said that *Miranda* is "a constitutional rule" that "has become embedded in routine police practice to the point where the warnings have become part of our national culture." Such reasoning provides an endorsement that recognizes the existence of near-consensus support on the Court and well-established expectations among members of the public.

If we conceive of the contemporary principles of the Bill of Rights as flowing from those Supreme Court interpretations of the Constitution that draw consensus, or near-consensus support, and receive consistent reinforcement in Supreme Court opinions, which rights affecting criminal justice can be said to be based on such principles? The following list is not meant to be exhaustive, but is intended to provide reference points for the subsequent discussion of post-September 11th developments.

1. The Right to Counsel for Criminal Defendants, Including Appointed Counsel for Indigent Defendants

In 1963, the U.S. Supreme Court incorporated the Sixth Amendment right to counsel for application in serious criminal

33. *Dickerson*, 530 U.S. at 441.
34. *Id.* at 444.
35. *Id.* at 443.
36. There are additional rights that may be regarded as principles that are consistently reinforced by Supreme Court decisions, but some of these rights can be more illusory than concrete because their implementation depends on discretionary decisions by police officers, e.g., the requirement of "reasonable suspicion" for a Fourth Amendment stop (People v. Oliver, 627 N.W.2d 297 (Mich. 2001); Illinois v. Wardlow, 528 U.S. 119 (2000)), or the Supreme Court has created exceptions that can apply to multiple situations, e.g., the exclusionary rule (New York v. Quarles, 467 U.S. 649 (1984); Nix v. Williams, 467 U.S. 431 (1984)).
37. It would be possible to discuss other principles from the Bill of Rights that have become subject to debate as a result of the USA Patriot Act and other measures that increase governmental powers of surveillance over the entire population of the United States and threats to First Amendment rights, such as freedom of association. See NANCY CHANG, SILENCING POLITICAL DISSERT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES 43-66, 92-137 (2002); DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION 147-75 (2002). However, this article will illustrate its theme about the image and impact of the Bill of Rights by looking at the treatment of detainees.
cases in state courts in the famous case of *Gideon v. Wainwright*. A strong near-consensus existed throughout the United States in support of this principle at the time of the Court's decision. By 1963, nearly all states had already implemented the right to counsel in their own courts through legislation, judicial decisions, or informal courthouse practices. Thus, in the *Gideon* decision, "the Court merely used its powers to make the rest of the states catch up" with a principle already adopted throughout the rest of the nation.

After *Gideon*, the Supreme Court expanded the entitlement to counsel to additional contexts. The right to counsel applies for anyone facing the possibility of incarceration, not merely those facing serious charges that could lead to six months or more of imprisonment, as in Clarence Gideon's case. The right also applies to first appeals of right, usually to state intermediate appellate courts. In addition, suspects are entitled to representation by counsel during custodial questioning and at "critical stages" in the justice process, such as at identification line-ups conducted after formal charges have been filed. Although the Supreme Court has declined to expand the right to counsel to several additional contexts, the entitlement to representation remains a consistently supported principle under the Sixth Amendment of the Bill of Rights. It is also supported by public opinion as 74% of respondents to a national survey labeled as "essential" the right to have the government provide a defense attorney for someone who cannot afford one.

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38. 372 U.S. at 335.
2. Right to Be Free From Physical Coercion as Means of Governmental Extraction of Incriminating Information During Questioning, Based on the Right to Due Process and the Fifth Amendment Privilege Against Compelled Self-Incrimination

There is a long history of police officers using violence to obtain information from suspects in the United States. As described by legal historian Professor Lawrence Friedman concerning police practices in the early twentieth century:

Police brutality has a long, dishonorable history, not only on the street, but also in the station house. Here was the domain of the "third degree"—various ways of getting information out of suspects by inflicting "suffering, physical and mental." This rather bland phrase conceals a whole world of torture and abuse—beatings with nightsticks and rubber hoses, and sometimes worse . . . . [including using a dentist for] drilling into the pulp chamber of a lower rear molar in the region of a nerve [to make a suspect talk].

Public investigations of the police revealed the use of brutal methods as far back as the Lexow Commission in New York City in 1894. Yet little was done to prevent the abuses that often took place behind closed doors and were primarily inflicted on people who lacked the power to complain successfully—the poor, the young, and members of racial minority groups.

The risks from coercive violence are not merely inhumane treatment and torture. The use of such methods also increases the likelihood that innocent people will confess to wrongdoing simply to end the infliction of pain. Thus, the use of such techniques can produce unjust outcomes when people are erroneously

47. LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 361 (1993).
48. Id. at 154.
49. Id. at 153-54, 362-63.
50. See SMITH, CONSTITUTIONAL RIGHTS, supra note 18, at 121.

The problem of abusive police practices remains real in some American cities. In Prince Georges County, Maryland, police officers questioned a man for twenty-eight hours without an attorney present before the exhausted man finally confessed to a murder that he did not commit. DNA evidence later proved that he was innocent of the crime, and the real killer sexually assaulted seven more victims while the police kept the wrong man in jail.

Id.
regarded as culpable for deeds that they admitted merely to stop torturous questioning techniques.\textsuperscript{51}

The U.S. Supreme Court began to assert its authority against such practices as early as the 1930s, even before it had begun incorporating criminal justice-related rights to apply against the states.\textsuperscript{52} The Court’s 1936 decision in \textit{Brown v. Mississippi} concerned police officers’ practice of “solving” crimes by torturing African-Americans into confessing.\textsuperscript{53} In the \textit{Brown} case:

Upon his denial [of guilt] they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony . . . . A day or two thereafter . . . . the deputy stopped and severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate . . . . The other two defendants . . . were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it . . . . \textsuperscript{54}

The Supreme Court overturned the defendants’ convictions by saying, “It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.”\textsuperscript{55} The Court’s statement does not merely mean that the use of that type of evidence is a violation of constitutional rights; under contemporary legal standards, the police officers’ actions

\textsuperscript{51} See SMITH, CRIMINAL PROCEDURE, supra note 40, at 211;
\textsuperscript{52} The incorporation of most rights relating to criminal justice occurred during the Warren Court era, 1953-1969. \textit{Id.} at 25.
\textsuperscript{53} 297 U.S. 278 (1936).
\textsuperscript{54} \textit{Id.} at 281-82.
\textsuperscript{55} \textit{Id.} at 286.
themselves are clearly in violation of the Constitution and would make the officers susceptible to civil rights lawsuits for substantial damages.\(^5\)\(^6\) In addition, the principle that officials should not use physical coercion to extract confessions appears to be strongly supported by the American public. In one poll, 93% of respondents answered "No" to the question, "Would you approve of a policeman striking a citizen who was being questioned in a murder case?"\(^7\) Thus, there appears to be a strong consensus against the use of coercive violence to induce self-incrimination.

3. **Right to Probable Cause Determination by a Judicial Officer to Determine Validity of Arrest and Detention**

According to the Fourth Amendment, when police officers seek an arrest warrant, they must present evidence constituting probable cause to show the likelihood of a suspect's involvement in a crime in order for a judicial officer to issue a warrant.\(^8\) This requirement ensures that a neutral judicial officer examines the evidence purporting to justify the arrest before an individual is deprived of his or her liberty in circumstances in which police officers know in advance that they intend to make an arrest.\(^9\)

When police officers make arrests without a warrant, such as in situations in which they observe criminal behavior or a witness reports the occurrence of a crime, the arrestee is entitled to have the basis for the arrest examined by a judicial officer in a hearing.\(^10\) The hearing to determine probable cause is not a full-blown adversarial proceeding; instead, "such a hearing may and often does consist merely of a brief appearance in front of a magistrate after arrest."\(^11\) The hearing must be held within a "reasonable" time period after arrest, normally within 48 hours.\(^12\) Clearly, the

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\(^5\) VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 59-73 (2nd ed. 1997).

\(^6\) COLE & SMITH, supra note 30, at 251.

\(^7\) See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 89 (4th ed. 2000) ("The Fourth Amendment states that arrest warrants may only issue upon a showing of probable cause and must identify with particularity the person to be seized.").

\(^8\) See SMITH, CRIMINAL PROCEDURE, supra note 40, at 79 ("Probable cause determinations are supposed to be made and warrants issued by neutral officials who will not—in theory—automatically support law enforcement officials' desire to obtain the warrant. These officials are charged with protecting people's Fourth Amendment rights against improper intrusions by investigatory officers.").


\(^10\) WHITEBREAD & SLOBOGIN, supra note 58, at 526.

entitlement to a probable cause determination is intended to prevent officials from arresting and detaining individuals indefinitely without a judicial officer considering whether sufficient evidence exists to support both the arrest and the continuation of detention after arrest.\textsuperscript{63} If it were otherwise, police officers and other government officials could deprive people of their liberty without justification. Such practices, albeit common in many countries, clash with the ideas underlying a number of rights in the Bill of Rights, including the right to due process in the Fifth and Fourteenth Amendments,\textsuperscript{64} the Fourth Amendment protection against unreasonable seizures,\textsuperscript{65} and the Eighth Amendment prohibition on excessive bail.\textsuperscript{66} All of those provisions embody the constitutional objective of preventing arbitrary and discretionary deprivations of liberty.

The right to a determination of probable cause by a judicial officer enjoys consensus support among the Supreme Court's justices, who disagree only about whether such post-arrest hearings must take place within 24 hours after arrest or whether a slightly longer period of time is permissible.\textsuperscript{67}

\textbf{4. The "Due Process" Right of Access to the Courts for Individuals Held in Prisons and Jails}

Through decisions spanning more than a half-century, the Supreme Court has recognized and enforced what it calls "the fundamental constitutional right of access to the courts" for people held in custody in prisons and jails.\textsuperscript{68} In \textit{Ex Parte Hull}, decided in 1941, the Court examined a state prison regulation that required all "documents, briefs, petitions, motions, habeas corpus proceedings and appeals . . . to be submitted to the institutional welfare office and . . . the legal investigator to the Parole Board."\textsuperscript{69} The regulation, in effect, permitted corrections officials to review and block petitions that prisoners sought to file in federal court. The

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\item \textsuperscript{63} WHITEBREAD & SLOBOGIN, supra note 58, at 524 ("[B]efore a suspect may be detained, some official entity other than a law enforcement officer must make a determination of probable cause.").
\item \textsuperscript{64} Both amendments bar deprivations of "life, liberty, or property, without due process of law." U.S. CONST. amend. V; U.S. CONST. amend. XIV.
\item \textsuperscript{65} U.S. CONST. amend. IV.
\item \textsuperscript{66} U.S. CONST. amend. VIII.
\item \textsuperscript{67} \textit{McLaughlin}, 500 U.S. at 44.
\item \textsuperscript{68} Bounds v. Smith, 430 U.S. 817, 828 (1977).
\item \textsuperscript{69} 312 U.S. 546, 548 (1941).
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Supreme Court invalidated the regulation. In the words of Justice Frank Murphy’s majority opinion:

The regulation is invalid. The considerations that prompted its formulation are not without merit, but the state and its officers may not abridge or impair petitioner’s right to apply to a federal court for a writ of habeas corpus. Whether a petition for a writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.⁷⁰

If the Supreme Court had permitted the regulations to stand, the government would possess the authority to prevent detained individuals from filing appeals to contest their criminal convictions, habeas corpus petitions to challenge the basis for their detention, and civil rights lawsuits to seek remedies for improper conduct by corrections officials. In effect, detained individuals would be completely at the mercy of corrections officials without any ability to use the courts to protect their legal rights and without any ability to inform the outside world about abusive actions taking place in corrections institutions.⁷¹

The precedent in *Ex parte Hull* established the foundation for later decisions that solidified a right of access to the courts.⁷² In particular, a series of later decisions identified specific contours of that right. First, in *Johnson v. Avery*,⁷³ decided in 1969, the Court held that states could not prevent prisoners from helping each other prepare court petitions unless the state provides an alternative means of assistance, otherwise the state could, in effect, impermissibly “adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions.”⁷⁴ Next, in *Younger v. Gilmore*,⁷⁵ a per curiam affirmation of a lower court.

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⁷⁰ Id. at 549.
⁷¹ Prior to the intervention of federal courts into the affairs of corrections institutions in the mid-twentieth century, jailers and prison wardens could control their institutions with impunity through the use of coercive violence, even if it led to the injuries and deaths of detainees and convicted offenders. See BEN M. CROUCH & JAMES W. MARQUART, APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS 14-15 (1989) (description of frequency of prisoners’ deaths from poor conditions and abuse prior). After federal courts intervened into prisons through their acceptance of prisoners’ lawsuits, correctional institutions were forced to move toward humane conditions and governance by formal rules and regulations. JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY 206 (1977).
⁷² CHRISTOPHER E. SMITH, LAW AND CONTEMPORARY CORRECTIONS 76-86 (2000).
⁷⁴ Id. at 487.
decision, the Court declared that "[r]easonable access to the courts [for prisoners] is a constitutional imperative which has been held to prevail against a variety of state interests."\textsuperscript{76} Last, in \textit{Bounds v. Smith},\textsuperscript{77} decided in 1977, the Court held that states must provide prisoners with law libraries or alternative legal resources in order to "assure meaningful access to the courts."\textsuperscript{78}

The consensus about this right of access to the courts seems especially strong because even Justices Antonin Scalia and Clarence Thomas, the two justices who generally oppose the recognition of constitutional rights for convicted offenders,\textsuperscript{79} agree that incarcerated individuals possess a right of access to the courts. Scalia has written that "the Constitution . . . [requires] that [prisoners] be able to present their grievances to the courts."\textsuperscript{80} Thomas reiterated recognition of the right of access:

In the end, I agree that the Constitution affords prisoners what can be termed a right of access to the courts. That right, rooted in the Due Process Clause and the principle articulated in \textit{Ex parte Hull}, is a right not to be arbitrarily prevented from lodging a claimed violation of a federal right in the federal court.\textsuperscript{81}

Although the four foregoing principles do not purport to represent all of the rights supported by consensus or near-consensus in contemporary constitutional law, they reflect principles that have been consistently upheld and supported in court decisions for many years. They are also principles that collide with the contemporary governmental responses to the threat of terrorism.

\textsuperscript{76} 319 F.Supp. 105, 109 (N.D.Cal. 1970).
\textsuperscript{77} 430 U.S. 817 (1977).
\textsuperscript{78} \textit{Id.} at 830.
\textsuperscript{79} In reliance on originalism as their theory of constitutional interpretation, Justices Thomas and Scalia argue that the Eighth Amendment does not apply to correct deficient and inhumane prison conditions and practices because the framers of the Amendment did not intend for it to be applied in that manner. Christopher E. Smith, \textit{The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas}, 43 DRAKE L. REV. 593, 599-603 (1995). According to a Thomas dissent, joined by Scalia, "primary responsibility for preventing and punishing [improper] conduct [by corrections officers] rests not with the Federal Constitution but with the laws and regulations of the various states." Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting).
\textsuperscript{80} Lewis v. Casey, 518 U.S. 343, 360 (1996).
\textsuperscript{81} \textit{Id.} at 381 (Thomas, J., concurring).
III. GOVERNMENT RESPONSES TO SEPTEMBER 11\textsuperscript{TH}

The federal government's response to September 11\textsuperscript{th} took many forms, from reorganizing federal agencies into the new Department of Homeland Security\textsuperscript{82} to enacting legislation to increase surveillance and search powers\textsuperscript{83} to military action against Afghanistan.\textsuperscript{84} One element of this response is the Bush administration's orientation toward enhancing executive powers aimed at fighting terrorism at the expense of constitutional rights. The most extreme illustration of this orientation was Attorney General John Ashcroft's initial plan to suspend access to habeas corpus for all Americans so that no one detained by the government would have the opportunity to challenge that detention in court.\textsuperscript{85} According to one book on the aftermath of September 11\textsuperscript{th}, Ashcroft's pragmatism about the Bill of Rights led to plans for broad expansions of governmental powers. "[Congressman] Sensenbrenner, marking up the [proposed bill submitted by Ashcroft] furiously, was astounded. Ashcroft and his people had written the magna carta of federal agents, freeing them to wiretap, search, arrest, and hold almost at will, with little judicial oversight."\textsuperscript{86}

In light of the illustrative principles of the Bill of Rights in the foregoing section, this section will focus specifically on the treatment of detainees resulting from governmental action rather than on the constitutional rights implications of the full range of responses to September 11\textsuperscript{th}.\textsuperscript{87}

A. Foreign Detainees on "Foreign" Soil

American forces' success in overthrowing the Taliban government of Afghanistan resulted in the capture of hundreds Afghans affiliated with the Taliban regime as well as hundreds of foreign

\textsuperscript{82} COLE & SMITH, THE AMERICAN SYSTEM, supra note 30, at 68-69.
\textsuperscript{84} SMITH, CONSTITUTIONAL RIGHTS, supra note 18, at 196-97.
\textsuperscript{85} See Brill, supra note 7, at 68 ("Most shocking was that the bill suspended what was known in the law as habeas corpus—which gave anyone detained on American soil the right to demand a court hearing to challenge the authority of those holding them.").
\textsuperscript{86} Id.
fighters who had come to Afghanistan to support the regime. The U.S. government sent at least 650 of these detainees to a makeshift prison at the U.S. Navy base at Guantanamo Bay, Cuba. Other detainees were kept at American military bases in Afghanistan or sent to cooperating countries where they could be interrogated using coercive methods that would be labeled as “torture” by most Americans.

The U.S. government chose to hold these foreign prisoners in overseas locations and to label them as “unlawful combatants” rather than “prisoners of war” specifically to prevent them from successfully claiming entitlement to any legal rights. If they were “prisoners of war,” they would be entitled to certain rights under the Geneva Conventions. Through the creation of a new legal category (“unlawful combatants”) for which rights have not been defined under American or international law, the U.S. government asserted for itself the authority to control their treatment and fates without the constraints of legal rules.

The Supreme Court established legal precedents for freeing American officials from the requirements of the Bill of Rights in their treatment of people on foreign soil. In United States v. Verdugo-Urquidez, agents from the U.S. Drug Enforcement Administration joined with Mexican police in conducting warrantless searches of homes in Mexico owned by a Mexican citizen who had been arrested and turned over to American officials a few days earlier. A Fourth Amendment challenge to the searches was rejected by the Supreme Court, which declared that such rights are reserved for the “class of persons who are part of [our] national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” Such doctrines enabled the U.S. government to assert that their treat-

89. Id.
90. See Eyal Press, Tortured Logic, 29 AMNESTY NOW 20-23 (Summer 2003) (“A former CIA official told Newsday about one detainee transferred from Guantanamo Bay to Egypt: ‘They promptly tore his fingernails out, and he started telling things.’”).
92. Lelyveld, supra note 88, at 100-03.
93. Id.
95. Verdugo, 494 U.S. at 260.
ment of post-September 11th detainees was beyond the reach of American law.

One of the most controversial aspects of American treatment of Taliban detainees and terrorism suspects is the use of coercive interrogation methods. Those in American custody in Afghanistan and elsewhere are "held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights."\(^{96}\) According to Americans who have witnessed interrogations, "alleged terrorists are commonly blindfolded and thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep."\(^{97}\) American officials have conceded that "our guys may kick them around a little bit."\(^{98}\) According to Amnesty International, "[a]t least two prisoners have been killed in U.S. custody . . . In March, the story broke that death certificates for two Al Qaeda suspects at the Bagram base in Afghanistan showed both to have been killed by "blunt force injuries" . . . A military doctor listed the deaths as homicides."\(^{99}\) An unnamed U.S. official was quoted in the national news media as saying, "There's a reason why [a specific Al Qaeda suspect] isn't going to be near a place where he has Miranda rights or the equivalent. You go to some other country that'll let us pistol-whip this guy."\(^{100}\)

In addition to its own coercive interrogation practices, the U.S. government transfers some suspects into the custody of allied nations whose intelligence services are known to have used torture as a means to obtain information from detainees.\(^{101}\) At least one suspect was sent to Syria where, according to a report from the U.S. State Department, officials employ torture methods that include pulling out fingernails and "using a chair that bends backwards to asphyxiate the victim or fracture the spine."\(^{102}\) Other suspects have been transferred to Egypt where, according to the U.S. State Department, the people in custody of intelligence services are "suspended from the ceiling or doorframe with feet just


\(^{97}\) Priest & Gellman, supra note 96.

\(^{98}\) Id.

\(^{99}\) Press, supra note 90, at 21.

\(^{100}\) Id. at 22.

\(^{101}\) Priest and Gellman, supra note 96.

\(^{102}\) Press, supra note 90, at 22.
touching the floor; beaten with fists, whips, metal rods, or other objects; [and] subjected to electric shocks." Others have been transferred to Jordan where "frequently alleged methods" of interrogation have included "beating the soles of the feet [and] prolonged suspension with ropes in contorted positions."

B. U.S. Citizens Detained on American Soil

At least two U.S. citizens are under indefinite detention in American military jails without being granted the constitutional rights due to criminal suspects under the Bill of Rights. The government created the label "enemy combatant" to use for American terrorism detainees whom they wish to hold without granting any of the usual rights under the Bill of Rights.

Yaser Esam Hamdi was taken into custody in Afghanistan where he was allegedly fighting for the Taliban. After he was taken to the U.S. Navy base in Cuba, it was discovered that he was a U.S. citizen by virtue of being born in Louisiana when his father, a Saudi Arabian citizen, was working for an American company. He was subsequently transferred to solitary confinement at a military jail in Virginia and denied access to an attorney or to any court proceedings. After several proceedings filed in federal court by Hamdi's father, a federal public defender, and dozens of law professors, the U.S. Court of Appeals for the 4th Circuit rejected various challenges to Hamdi's status as an "enemy combatant" and attendant indefinite, incommunicado detention at a military facility. The Court concluded that:

[B]ecause it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that the submitted declaration [of factual allegations submitted by government] is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi.

103. Id.
104. Priest and Gellman, supra note 96.
105. SMITH, CONSTITUTIONAL RIGHTS, supra note 18, at 201-02.
107. Id.
108. Id.
109. Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002); Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002); Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).
pursuant to the war powers entrusted to him by the United States Constitution.\textsuperscript{110}

Under the court’s decision, the government was not required to present contestable evidence in a courtroom proceeding and Hamdi was not permitted to enjoy any rights under the Bill of Rights.

In May 2002, federal agents arrested Abdullah al-Muhajir, a 31-year-old former gang member from Chicago, who had changed his name from Jose Padilla after he converted to Islam.\textsuperscript{111} The federal government asserted that al-Muhajir planned to build a “dirty bomb” containing radioactive materials to use in a terrorist attack within the United States.\textsuperscript{112} Al-Muhajir was arrested in the United States and initially held in New York City where he met with a defense attorney.\textsuperscript{113} However, before charging him with any crimes, the government labeled him as an “enemy combatant” and sent him to a military jail in South Carolina where he is held in isolation without any contact with his attorney or any court proceedings to present evidence against him.\textsuperscript{114} At the time that his arrest was announced, American intelligence sources indicated to news media outlets that the government may not have possessed enough evidence to bring criminal charges against al-Mujahir without risking the revelation of sensitive intelligence information.\textsuperscript{115} Thus, it was easier for the government to lock him away definitely in military custody rather than go through the formal processes of criminal court. The federal government has resisted a district judge’s orders requiring that al-Mujahir be given the opportunity to meet with his attorney.\textsuperscript{116}

The government expanded this treatment to a non-citizen on American soil, Ali Saleh Kahlal al-Marri, who faced criminal charges for allegedly conspiring with terrorist organizations.\textsuperscript{117} One month before his scheduled trial, the government decided to end the criminal prosecution and declare al-Marri to be an “enemy

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110. Hamdi, 316 F.3d at 459.
112. Id.
113. Id.
114. Id.
115. Id.
\end{flushright}
"combatant" who would lose his rights and be placed in a military jail. Critics viewed the government's action as expanding the threat of rights deprivations and indefinite detention as the means to preempt criminal proceedings in which terrorism suspects would have otherwise possessed constitutional rights. The news media carried reports that the six men of Yemeni origin in Lackawanna, New York, who pleaded guilty to terrorism-related charges, were pressured to plead after prosecutors confronted them with a terrible choice: either admit guilt and accept a prison term for criminal charges or be labeled as an "enemy combatant" and be locked away without rights, potentially forever. In effect, the threat of "enemy combatant" status may be the ultimate coercive threat, especially if it is used as a means of gaining guilty pleas and confessions from people who fear disappearing forever, potentially never to be heard from again, in a military jail. Secretary of Defense Donald Rumsfeld has said that "enemy combatants" will not be released until the "war" on terrorism is over. However, there is no reason to believe that the "war" will ever be over as various groups and individuals around the world will continue to plot against the United States for various reasons.

Apparently, the Justice Department has made plans for the possible expansion of the use of the "enemy combatant" label by detaining other Americans whom they deem to be threatening and disloyal. As described by Professor Jonathan Turley,

Attorney General John Ashcroft's announced desire for camps for U.S. citizens he deems to be "enemy combatants" has moved him from merely being a political embarrassment to being a constitutional menace. Ashcroft's plan, disclosed last week but little publicized, would allow him to order the indefinite incarceration of U.S. citizens and summarily strip them of their constitutional rights and access to the courts by declaring them enemy combatants . . . . [A]lides have indicated that a "high-level" committee will recommend which

118. Id.
119. Id.
121. Shuffled Off in Buffalo, CHRISTIAN SCI. MONITOR, April 7, 2003, at 10.
122. Miles Harvey, The Bad Guy, MOTHER JONES, March/April 2003, at 32, 35.
citizens are to be stripped of their constitutional rights and sent to Ashcroft’s new camps.123

Clearly, the strategy of using labels that will remove suspects from the protection of law is attractive to the federal government. When a federal district judge ruled that Zacarias Moussaoui, who is accused of participating in the September 11th attacks, must be able to obtain potentially exculpatory information from an important al Qaeda leader held by American officials overseas, the government claimed that any questioning would threaten intelligence gathering and national security.124 The Bill of Rights is potentially inconvenient for prosecutors because it requires that they follow certain procedures and respect specific rights when they pursue a criminal prosecution. In the Moussaoui case, the government is reportedly considering transferring him to the Navy base prison in Cuba to join the foreign “unlawful combatants,” who enjoy no enforceable rights and who may eventually face trials and possible executions through military tribunal procedures.125

IV. THE BILL OF RIGHTS IN A POST-SEPTEMBER 11TH WORLD

As described in the foregoing section, contemporary governmental responses to the threat of terrorism collide directly with the principles of the Bill of Rights that have enjoyed broad, consistent support for the preceding forty years or longer.

A. Right to Counsel and Protection Against Compelled Self-Incrimination

Foreign detainees in Cuba and American “enemy combatants” held at military jails in the United States have been denied access to and representation by attorneys. The purpose of defense attorneys in the American legal system is to protect the suspect’s constitutional rights, contest the evidence presented against the suspect by the government, and advocate on behalf of the suspect in the context of the legal system’s technical rules and arcane proce-
In sum, "[i]f individuals do not have professional representation in the criminal justice process, they are at a significant disadvantage and they are unlikely to be able to fulfill the adversary system's ideal of revealing the truth through the clash of skilled advocates." Thus, the detainees held on suspicion of terrorist activities have little hope of being protected against coercive techniques of self-incrimination, for which the right to counsel aspect of *Miranda* rights was created. They also have no hope of utilizing judicial processes (if they had access to such processes) in order to contest evidence against them or to vindicate rights under the Bill of Rights and international law.

Courts have often made the point that the Sixth Amendment right to counsel applies only to criminal investigations and trials, and, to a limited extent, an initial appeal of a criminal conviction. The federal government has made use of this limitation by classifying detainees as *not* criminal suspects, but rather, as either "unlawful combatants" (Guantanamo detainees) or "enemy combatants" (American citizens Hamdi and al-Muhajir). Yet, the government has demonstrated that these decisions are a discretionary sleight-of-hand to avoid the Bill of Rights by pursuing criminal prosecutions against other terrorism suspects, including the prosecution and conviction of the "American Taliban," John Walker Lindh, whose alleged misdeeds and circumstances of being taken into custody in Afghanistan while fighting with the Taliban are virtually identical to the case of "enemy combatant" Hamdi. Acts of terrorism against the United States are covered

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126. **COLE & SMITH**, *supra* note 30, at 320.
128. In *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), Chief Justice Earl Warren's opinion emphasized the importance of access to counsel during questioning: "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel . . . ." *Id.*
131. *See text and footnotes, supra* notes 88-104.
132. *See text and footnotes, supra* notes 105-25.
133. **Purdy & Bergman**, *supra* note 120.
134. **SMITH, CONSTITUTIONAL RIGHTS**, *supra* note 18, at 199.
135. *See Turley, supra* note 123, at 11A.

Hamdi has been held without charge even though the facts of his case are virtually identical to those of the case of John Walker Lindh. Both Hamdi and Lindh were
by criminal statutes,\(^{136}\) but the government's treatment of detainees as something other than criminal suspects permits the detention and interrogation of people against whom there is little or no evidence, as well as allowing avoidance of the limitations imposed by constitutional rights.

Anthony Lewis, a writer who became famous for his best-selling book on \textit{Gideon v. Wainwright},\(^ {137}\) has harshly criticized the government's denial of counsel for terrorism suspects. His criticism helps to highlight the gap between current practices and the idealistic intentions of the Bill of Rights:

The government argues, and in the other "enemy combatant" case [concerning Hamdi] the United States Court of Appeals for the Fourth Circuit agreed, that the Sixth Amendment's guarantee of the right to counsel "in all criminal prosecutions" does not apply because Padilla is not being prosecuted. In other words, the government can hold an American in prison for life without letting him see a lawyer if it takes care not to charge him with a crime and try him. James Madison and the others who added the Sixth Amendment and the rest of the Bill of Rights to the Constitution in 1791 would surely have regarded that argument as sophistry.\(^ {138}\)

Is representation by counsel essential to prevent errors or abuse directed at people detained by the government? Do our principles of government genuinely reflect a belief that adversary processes provide the best mechanism to discover the truth and protect against abusive practices by government?\(^ {139}\) Court decisions con-

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\(^{136}\) Id.

\(^{137}\) Title 18, section 113B of the United States Code defines terrorism crimes concerning use of weapons of mass destruction, acts of terrorism transcending national boundaries, harboring or concealing terrorists, and other matters. 18 U.S.C. § 113B (2003).

\(^{138}\) LEWIS, supra note 39.


\(^{140}\) See DAVID O. FRIEDRICHS, \textit{LAW IN OUR LIVES: AN INTRODUCTION} 42 (2001).

In the American criminal justice system, the adversarial model is used in major felony cases. On the plus side, adherents of the adversarial model claim that the truth in a criminal case is most likely to emerge when each side is best able to put forth its case. Furthermore, the defendant in a major criminal case, up against the intimidating resources of the state, has the best chance to put forward a case with the capacity to introduce evidence and witnesses and to challenge the state's evidence and cross-examine the state's witnesses.

\(^{141}\) Id.
cerning criminal suspects over the past forty years supported this principle, but the current actions by the federal government convey the impression that commitment to this principle is situational and transitory. If we adopt a pragmatic approach to representation for people detained by the government, how far might our pragmatism spread with respect to rights available for individuals suspected of other offenses eligible for the label of "terrorism"? We have already seen anti-terrorism laws used in an attempt to enhance penalties for common criminals, such as the methamphetamine defendant in North Carolina who faced a sentence of 12 years to life instead of merely six months in jail because he was charged with manufacturing a weapon of mass destruction for producing illegal drugs. Moreover, how do we ensure that discretionary decisions by government will not be erroneous or abusive when determinations are made about whom to detain and how to treat detainees during their indefinite incommunicado detention? The principle of the right to counsel was intended to counteract these problems, but the current pragmatic avoidance of this right enhances the risks of abusive governmental actions and errors that constitutional rights are intended to prevent.

As Professor Stephen Schulhofer observes, prior to the contemporary anti-terrorism practices, "regardless of context (civil, criminal, immigration, or military) detention incommunicado has never been permitted for any appreciable time at all." When government officials keep individuals in detention from being observed by others or from communicating with others, then there is no way to know how they are being treated. Are they being tortured? Are they being fed? Are they even still alive? Only the government officials can know for sure.

As discussed in the foregoing sections, there are widespread reports that the United States is willing to engage in and facilitate forms of physical coercion of terrorism suspects that human rights advocates regard as "[American] complicity in torture." Such actions clash directly with underlying purposes of the Fifth

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142. See text and footnotes, supra notes 96-104.
143. Press, supra note 90, at 22.
Amendment's prohibition on compelled self-incrimination. Even one of *Miranda*’s harshest academic critics, Professor Joseph Grano, concluded unequivocally that “we can convincingly claim that torture—meaning, for present purposes, physical violence against defendants to procure confessions or information—violates fundamental principles of justice that are deeply rooted in the traditions and conscience of our nation.” Professor Amar reiterates this point by noting that “[s]ome leading Framers [of the Bill of Rights] thought of the self-incrimination clause as a protection against torture . . . . Our main concern today should still be protecting against third-degree tactics . . . .” There is evidence that such actions are being applied to detainees abroad and there is no way to know whether the government is refraining from similar tactics with the “enemy combatants” detained incommunicado in military jails within the United States. Without contact between attorneys and detainees, what will provide the check against the use of torturous methods against terrorism suspects held within the United States?

B. Right to Probable Cause Determination and Right of Access to the Courts

As described earlier in this article, the Fourth Amendment requires a judicial determination of probable cause to justify an arrest and detention, and furthermore, detained individuals possess a right to access to the courts under the Due Process Clause and various precedents. These principles, respectively, are obviously intended to prevent arbitrary, unjustified deprivations of liberty based on discretionary decisions of government officials and to remedy such unjustified detentions and vindicate other

146. It is known that John Walker Lindh, the so-called “American Taliban” who was convicted of terrorism-related crimes rather than isolated as an “enemy combatant,” was subjected to physical tactics as part of the treatment associated with his interrogation prior to his return to the United States:

   During this time, Lindh was sometimes kept blindfolded, naked, and bound to a stretcher with duct tape, according to a declassified account from a Navy physician.

   He was fed only a thousand calories a day, and was left cold and sleep-deprived in a pitch-dark steel shipping container. The physician described Lindh as “disoriented” and “suffering lack of nourishment,” adding that “suicide is a concern.”

147. See supra notes 58-67 and accompanying text.
148. See supra notes 68-81 and accompanying text.
rights. Because the "unlawful combatants" in Cuba and the American citizen "enemy combatants" are being held incommunicado based on unsubstantiated declarations of suspicion by government officials, neither of these principles provide benefits for the detainees.

Outsiders have attempted to gain access to the courts on behalf of both sets of detainees, but, for several reasons, they have been unsuccessful in gaining judicial protection of rights. Relatives and supporters of the "unlawful combatants" detained in Cuba have been unsuccessful in gaining judicial scrutiny and protection of rights for detainees because of issues of standing as well as World War II-era precedents rejecting constitutional protections for foreigners held in American custody overseas. Issues of American courts' jurisdiction seem inevitable whenever cases concern people and events that are overseas, but in this instance, the U.S. Navy base has for 100 years been entirely under the control of the United States and is governed entirely by American laws. Thus, the outside-an-American-jurisdiction argument, like the labels used for the detainees, appears to resort to the application of questionable categories or labels as a means to avoid application of the Bill of Rights and other potentially applicable treaties and laws.

Hamdi's father and other supporters have thus far been unsuccessful in gaining access to the courts for substantive examination of Hamdi's rights claims due to judicial deference to the president's war powers as commander in chief. Al-Muhajir, through litigation filed by his attorney and supporters, has gained favorable district court rulings about his right to meet with his attorney, but the government has resisted implementing these rulings

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149. E.g., Hamdi, 316 F.3d at 450.
151. The United States assumed control of Guantanamo Bay through a lease agreement in 1903 that was later confirmed by the Treaty of 1934. The United States effectively has a perpetual lease. As described in a detailed history of Guantanamo Bay on the website of the U.S. Navy Base located there: [T]hus, it is clear that at Guantanamo Bay, we have a Naval reservation which, for all practical purposes, is American territory. Under the foregoing agreements, the United States has for approximately fifty years exercised the essential elements of sovereignty over the territory, without actually owning it . . . . Persons on the reservation are amenable only to United States legislative enactments.
152. See Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002); Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002); Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).
and sought interlocutory appeals to challenge the conclusions of the district judge.\textsuperscript{153}

There is a provision in the Constitution that creates the possibility of presidential decisions that deny access to the courts during times of national emergency: the Habeas Corpus Suspension Clause.\textsuperscript{154} The Clause says, "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."\textsuperscript{155} As indicated by the founders' decision to mention and protect the opportunity for individuals to petition the courts to remedy unlawful detentions (except in times of emergencies), the Americans drew from English antecedents to emphasize the importance of this avenue for judicial protection of individuals.\textsuperscript{156} Yet, there is precedent for the suspension of the writ in the United States. Presidents Lincoln and Grant imposed suspension in certain geographic areas during the Civil War and Reconstruction, although the later suspensions came pursuant to authorizing acts of Congress rather than solely by executive fiat.\textsuperscript{157} There were also limited, temporary suspensions in the Philippines related to the Spanish-American War's aftermath and in Hawaii during World War II.\textsuperscript{158} It is notable, however, that President George W. Bush has not sought to exercise this suspension authority as a means to justify the detentions without due process or access to the courts.\textsuperscript{159} Instead, his administration has, at least in the case of al-Muhajir, employed specious manipulations to deny access to courts: the government claimed that no habeas petition could be filed on al-Muhajir's behalf because he did not personally sign the petition, but the government has blocked all access to him by outsiders so that he is physically prevented from signing the petition.\textsuperscript{160} Unfortunately, such tactics convey the impression that the government will go to any lengths

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  \item \textsuperscript{153} Padilla v. Rumsfeld, 243 F.Supp. 2d 42 (S.D.N.Y. 2003).
  \item \textsuperscript{154} U.S. CONST., art. I, § 9, cl. 2.
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} See Larry W. Yackle, The Habeas Hagioscope 66 S. CAL. L. REV. 2331, 2337 (1993). Habeas corpus had a long and distinguished history in England before it was imported to the American colonies. The courts at Westminster and Parliament contributed to its development as the Great Writ of Liberty—the means by which English courts could enforce the 'law of the land' against governmental power.
  \item \textsuperscript{158} Id.
  \item \textsuperscript{159} Schulhofer, supra note 141, at 92-93.
  \item \textsuperscript{160} Id.
\end{itemize}
to manipulate arguments and contexts in order to deny access to
courts and the potential protection of the Bill of Rights.

How does this contemporary practice of detention without ac-
cept to the courts compare to the original constitutional vision of
the nation's founders? It is instructive to look at Alexander Ham-
ilton's words in Federalist No. 84:

The establishment of the writ of habeas corpus, the prohibi-
tion of ex-post-facto laws, and of titles of nobility...are perhaps
greater securities to liberty and republicanism than any
[other provisions that the Constitution] contains....[T]he prac-
tice of arbitrary imprisonments, have been, in all ages, the fa-
ovorite and most formidable instruments of tyranny.\(^{161}\)

The treatment of detainees is clearly "deprivation of . . . liberty .
. . without due process of law" in direct contravention of the words
of the Fifth Amendment.\(^{162}\) The contemporary practice that treats
access to the courts as a luxury that becomes unavailable to spe-
cific citizens by discretionary decision of government officials pro-
vides a stark contrast with a principled view of the Constitution
and the Bill of Rights that regards such access as an essential
shield against arbitrary or unjustified deprivations of liberty.

V. CONCLUSION

The Bill of Rights was unquestionably intended to impose limits
on governmental actions that would harm the autonomy, privacy,
and liberty of individuals within the United States.\(^{163}\) As Professor
Jack Rakove observes, "The belief that Britons and Americans
enjoyed unparalleled liberty in the exercise of their rights perme-
ated their political science and even popular culture [in the eight-
eenth century] . . . Life, liberty, and property comprised the fun-
damental trinity of inalienable rights . . . ."\(^{164}\) These elements are
reflected in the language of the Bill of Rights\(^{165}\) and the Fourteenth

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161. THE FEDERALIST NO. 84 (Alexander Hamilton), available at
www.yale.edu/lawweb/avalon/federal/fed84.htm (online edition—the Avalon Project at Yale
Law School).
162. U.S. CONST., amend V.
163. DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S.
165. U.S. CONST. amend V.
Amendment. Over the history of the Supreme Court's interpretations of the Bill of Rights, there have been many disputes about the meaning and applicability of individual amendments. However, there has been little doubt that their underlying purpose is to "guarantee a range of personal freedoms," especially with regard to the federal government, against which the rights were originally directed. Even those who do not interpret those rights broadly will acknowledge, in the words of Judge Robert Bork, that "the principles of the Bill of Rights are, by and large, timeless principles of our free society."

The anti-terrorism tactics of the contemporary federal government in holding detainees without the presentation of incriminating evidence or the protection of law or access to courts clearly clash with the principles of the Bill of Rights that purport to guard against unchecked assertions of governmental power that impinge on individual liberty. These tactics appear to be based on pragmatic considerations concerning an urgent need to protect national security rather than a principled interpretation of the Bill of Rights. In the words of Viet Dinh, an Assistant Attorney General in the U.S. Justice Department who advises Attorney General John Ashcroft on legal policy:

I think it is critical that one recognizes that the first function – even if you are an ardent anarchist you have to recognize – that the function of government is the security of its polity and the safety of its people. For without them, there can be no structure so that liberty can survive. We see our work not as balancing security and liberty. Rather, we see it as securing liberty by assuring the conditions for true liberty.

There are precedents for such exercises of governmental power during times of war, such as the detention of Japanese-Americans during World War II.

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166. U.S. CONST., amend. XIV.
170. The Advocates, LIFE, Fall 1991, at 98.
during World War II, an action that scholars have characterized as "violat[ing] in a flagrant fashion the fundamentals of due process of law." However, critics note that governmental crackdowns during wartime far exceed the nature of demonstrated threat posed by Japanese-American during World War II and other targeted groups during other eras. According to historian Alan Brinkley:

Some alteration in our understanding of rights is appropriate and necessary in dangerous times, as even the most ardent civil libertarians tend to admit. But the history of civil liberties in times of emergency suggests that governments seldom react to crises carefully or judiciously. They acquiesce to the most alarmist proponents of repression.

The contemporary use of detentions without due process raises numerous important and difficult questions. Is the terrorist threat posed to the United States by al Qaeda really so severe as to jeopardize institutional survival and social stability to such an extent that there may be "no structure so that liberty can survive," as described in the Assistant Attorney General's justification for incommunicado detentions? Will the "war on terrorism" that defines the government's intended length of detentions ever end, in light of the fact that it is not a war against an identifiable country but is instead a conflict with shadowy groups and individuals around the world who may be able to recruit new zealots for years and years to come? And finally, what will the U.S. Supreme Court say about the government's tactics that deny the importance and effect of constitutional rights and law?

Historically, the Supreme Court has generally deferred to executive authority in wartime cases, including the case of the

173. Id. at 544.
175. Brinkley, supra note 174, at 45.
177. See Turley, supra note 123.
Japanese-Americans held in detention during World War II.\textsuperscript{179} Several Rehnquist Court justices have made statements that may demonstrate an inclination to defer to executive authority during the current "war on terrorism."\textsuperscript{180} The Court's initial encounter with these issues looms ahead because of its agreement to hear a case concerning the Guantanamo Bay detainees' entitlement to access to the courts. The Supreme Court will consider the following question: "Whether the United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba?"\textsuperscript{181} In the lower courts, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a district court decision\textsuperscript{182} that, relying on a World War II era precedent concerning a habeas corpus claim by German military personnel in American custody,\textsuperscript{183} concluded that U.S. district courts lack jurisdiction to entertain habeas corpus claims from foreign combatants in American custody overseas.\textsuperscript{184} According to the opinion of the Court of Appeals:

[T]he [Guantanamo] detainees are in all relevant respects in the same position as the [World War II German] prisoners in \textit{Eisentrager}. They cannot seek release based on violations of the Constitution or treaties or federal law; the courts are not open to them. Whatever other relief the detainees seek, their claims necessarily rest on alleged violations of the same category of laws listed in the habeas corpus statute, and are therefore beyond the jurisdiction of the federal courts.\textsuperscript{185}

Some observers believe that the Supreme Court accepted the case, not because of a desire to provide legal protections for detainees, but merely to reject the Bush administration's assertion that the Supreme Court could not hear the case.\textsuperscript{186} According to this prediction, the Court will say, with respect to the jurisdictional issue, that it has the authority to choose to hear this case

\begin{itemize}
\item 179. Korematsu v. United States, 323 U.S. 214 (1944).
\item 180. Smith, \textit{Constitutional Rights}, supra note 18, at 208-09.
\item 184. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).
\item 185. Id. at 1145.
\end{itemize}
debating federal courts' jurisdiction to consider the detainees' entitlement to a right of access to the courts through habeas corpus proceedings.\textsuperscript{187} However, it will likely continue by concluding that the detainees' are not entitled to have the substance of their claims heard in the federal courts.\textsuperscript{188}

If the Court actually issues the decision as predicted, it will reinforce the pragmatic precedents that have previously rejected requests to apply constitutional principles to limit actions directed by American officials toward foreign nationals at overseas locations. However, the starker issue of American citizens' rights within their own country will be unaffected by this case. It remains to be seen whether the Supreme Court will defer to the Bush administration's actions and, in effect, endorse a pragmatic view of the applicability of the Bill of Rights. The purported principles of the Bill of Rights, as reflected in the underlying intentions of the amendments and consensus, or near-consensus, support by Supreme Court justices and public opinion, are clearly in conflict with contemporary detentions of American citizens indefinitely and incommunicado, without any presentation of substantiated incriminating evidence,\textsuperscript{189} any access to advice of counsel, or any access to courts for judicial protection of constitutional rights. Because the government's treatment of the detained American citizens is unprecedented, the Supreme Court cannot easily wrap itself in the purported legitimacy of \textit{stare decisis} if it chooses to defer to the government. Instead, any decision that fails to provide access to the courts and a right to counsel, even if it comes through a Supreme Court decision that denies a writ of certiorari in these cases,\textsuperscript{190} will effectively deliver the message that Bill of Rights' image as the repository of powerful protective principles is merely illusory. Such a decision may be "regretted by later gen-

\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} The only evidence presented to a court against al Muhajir, for example, is the so-called "Mobbs declaration," a brief statement of accusations presented by Michael H. Mobbs, a Defense Department official. Al Muhajir has never had any opportunity to contest the factual assertions in the declaration. Benjamin Weiser, \textit{Judge Affirms Terror Suspect Must Meet With Lawyers}, \textit{N.Y. Times}, March 12, 2003, available at www.nytimes.com/2003/03/12/national/12DIRT.html.
\textsuperscript{190} Cases arrive at the U.S. Supreme Court through petitions for a writ of certiorari, which is the traditional action through which the justices make discretionary decisions about the small number of cases that they will select for hearing and decision. The justices are free to decline to hear cases, even when these cases reflect burning controversies that are hotly debated by the American public. \textit{David M. O'Brien, Storm Center: The Supreme Court in American Politics} 207-08, 226-56 (3d ed. 1993).
erations of Americans, as the World War II detention of Japa-
nese-Americans ha[s] been.” Constitutional rights will become
mere luxuries that are unavailable to those segments of the
American population that the executive branch – the officials
whose authority was supposed to be limited and restrained by the
Bill of Rights – deems unworthy of judicial access and legal pro-
tection. Moreover, it may be much more difficult to hold our legal
system out to the world as the exemplar of the protection of rights
and liberties.  

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192. See Van Atta, *supra* note 96 (“In the past, the United States harshly criticized
Egypt when there was human rights violations, but now, for America, it is security first–
security, before human rights,’ said Muhammad Zarei, a lawyer who had been director of
the Cairo-based Human Rights Center for the Assistance of Prisoners.”); see also Clifford
Krauss, *Quada Pawn, U.S. Calls Him, Victim, He Calls Himself*, N.Y. *Times*, November 15,
(Canadian resident with dual Canadian-Syrian citizenship was detained at New York air-
port and deported to Syria where he was jailed and tortured for a year before being re-
leased because he had no connection to al Qaeda; the episode created outrage in Canadian
Parliament and news media). *Id.*