

UNIVERSITY HONORS

Individual Rights vs. National Security

An Examination of Due Process Rights in the Context of the War on Terror

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Abstract: Since the Civil War the United States Government has indefinitely detained individuals that have threatened the national security of America and its citizens. Whether it was Lincoln's suspension of habeas corpus, the internment of Japanese-Americans during World War II, or the indefinite detention of individuals in Guantanamo Bay, the denial of due process rights in the name of security has been a highly contested legal topic. This Capstone examines the historical and legal precedents surrounding the use of indefinite detention and applies these precedents in an examination of suspected terrorists currently held by the United States. Through this examination, this study will determine the constitutionality of the Government's current use of indefinite detention and determine whether or not the individuals held in Guantanamo Bay are permitted due process rights. The specific scope of this Capstone will be limited to an examination of the due process rights of the high value detainees held at Guantanamo Bay.

Introduction

Prior to the attacks of September 11th, 2001 law enforcement officials primarily responded to terrorism. When an act of terrorism was perpetrated, the suspected terrorist was usually arrested, tried, and punished by law enforcement officials and public courts. In short, individuals suspected of terrorism were given their due process rights.¹ An example of a suspected terrorist receiving due process can be seen when looking at the Lockerbie bombing.² After the bombing both European police officials and the Federal Bureau of Investigation launched a joint criminal investigation in which witnesses were interviewed, evidence was collected, and suspects were apprehended to be tried for murder.³ Abdelbaset al-Megrahi was found guilty of murder by a Scottish court and was sentenced to life in prison. Megrahi was given a trial in open court and filed numerous appeals until he was eventually released from prison on compassionate grounds.⁴

Law enforcement officials did not only address terrorist actions abroad, but in the United States as well. An example of a United States terrorism case is the 1993 World Trade Center bombing.⁵ After this attack the Federal Bureau of Investigation launched a criminal investigation and apprehended numerous individuals suspected of the bombing.⁶ The four

¹ The Constitution of the United States, Amendment V. *Provisions Concerning Prosecution* (1791) “No person shall be...deprived of life, liberty, or property, without due process of law.” The scope of this paper will be limited to procedural due process.

² Sansone, Kurt. “A Lockerbie Nightmare that Keeps Coming Back.” Times of Malta (2012). The Lockerbie bombing refers to the Pan Am Flight 103 that was destroyed over Scotland by a bomb in December, 1988. This bombing was found to be an act of terrorism and Abdelbaset al-Megrahi was convicted of murder for the crime. He was released from Scottish prison in 2009 on compassionate grounds.

³ Scharf, Michael. “Terrorism on Trial: The Lockerbie Criminal Proceedings.” ILSA Journal of International and Comparative Law, Volume 6 (2000).

⁴ Sansone, Kurt. “A Lockerbie Nightmare that Keeps Coming Back.” Times of Malta (2012).

⁵ The History Channel (2012). <http://www.history.com/this-day-in-history/world-trade-center-bombed> The 1993 World Trade Center bombing was a terrorist attack on the World Trade Center in New York. The bombing occurred on February 26, 1993 and injured over 1000 people.

⁶ Id.

primary suspects were tried in a federal court and all were found guilty.⁷ Even though the primary suspects in the bombing were not United States citizens, the FBI, rather than the military, worked with law enforcement agencies around the world to apprehend the suspects.⁸

In both of these cases law enforcement officials gathered evidence, interviewed witnesses, and arrested suspects who were later given fair trials in open court. In other words, these terrorist were given their rights to the due process of law. These due process rights were upheld because law enforcement officials held and processed the suspected terrorists. The military did play a role in assisting law enforcement in their efforts to apprehend terrorists, but the military's role was primarily supportive and defensive. Military efforts against terrorist threats were primarily defined as force protection.⁹ The military often did not take the leading role or responsibility for missions that involved apprehending terrorists.¹⁰

The treatment of terrorists by law enforcement and military officials drastically changed after the attacks of September 11th, 2001. While the September 11th attacks were criminal acts similar to the Lockerbie and World Trade Center bombings, the September 11th attacks were of a far greater magnitude. Because of the magnitude of these devastating attacks, both the President¹¹ and Congress¹² invoked “the war powers of the nation as the primary modality for protecting the nation against future attacks.”¹³ The attacks on September 11th, 2001 were not only criminal acts, but inspired fear throughout the nation in hopes of using that fear as a

⁷ The Federal Bureau of Investigation (2008). http://www.fbi.gov/news/stories/2008/february/tradebom_022608

⁸ Id.

⁹ The Department of Defense Dictionary defines force protection as: Preventive measures taken to mitigate hostile actions against Department of Defense personnel...resources, facilities, and critical information. Force protection does not include actions to defeat the enemy or protect against accidents, weather, or disease.

¹⁰ Corn, Geoffrey and Jimmy Gurule. *Principles of Counter-Terrorism Law*. Concise Hornbook Series (2011).

¹¹ See *Transcript of President Bush's address to a joint session of Congress on September 20, 2001*. archives.cnn.com/2001/US/09/20/gen.bush.transcript/.

¹² See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹³ Corn, Geoffrey and Jimmy Gurule. *Principles of Counter-Terrorism Law*. Concise Hornbook Series (2011).

weapon. This weapon of fear was not only intended to harm individuals, but destroy the United States as a whole. This kind of attack was seen as an act of war by the United States government. By invoking the war powers of the United States, the President and Congress transferred the apprehension and prosecution of terrorists from law enforcement officials to the military. This meant that the apprehension and trials of terrorists would no longer be a public matter that involved a trial in open court, but it would become a military matter. While the rights of individuals arrested by law enforcement and sent to trial are very distinct, this is not the case with military proceedings. Individuals captured in the context of war can be denied certain rights, such as the right to a trial, because of their enemy status.¹⁴ The legal situation can be made even more complex when a suspected terrorist¹⁵ is a non-citizen that is apprehended outside of the United States.

Not only did the military take control of responding to terrorist threats, but the United States began a Global War on Terror (GWOT).¹⁶ Because the United States began to fight terrorism all over the world many of the suspected terrorists that were captured were non-United States citizens, and many had never even entered the United States. Given the fact that many of the suspected terrorists who were being captured were not United States citizens, it was unclear what due process rights suspected terrorists should be afforded by the United States forces that captured them. Because of the uncertainty of the constitutional protections granted to non-United States citizens, the rights of suspected terrorists were often considered on a case by case

¹⁴ Memorandum Opinion for the Counsel to the President, from Patrick Philbin, Deputy Assistant Attorney General. *Legality of the Use of Military Commissions to Try Terrorists* (2001)

¹⁵ For the purposes of this paper, the term “suspected terrorist” will refer primarily to the high value detainees held at Guantanamo Bay.

¹⁶ *The National Security Strategy*, Whitehouse.gov (2002). [http:// georgewbush-whitehouse.archives.gov/nsc/nss/2002/](http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/)

basis.¹⁷ Since the rights of suspected terrorists were determined on a case by case basis, it was possible for certain individuals who were apprehended in the war on terror to be denied their due process rights in the name of war time protection.

The transition from law enforcement to military actions in responding to suspected terrorists was made even more apparent by President Bush when he issued Military Order #1. This order stated that the attacks that had been perpetrated against the United States had “created a state of armed conflict that requires the use of the United States Armed Forces.”¹⁸ In issuing this order, the President showed that the United States would use the law of armed conflict to detain and punish terrorists in the context of the GWOT. By the time this order was issued in 2001 the United States was already carrying out a military operation within Afghanistan against al Qaeda and the Taliban. This operation showed a starkly different use of the military in fighting terrorism than its former support role.¹⁹ The military was now the primary enforcement agent in the United States’ fight against terrorism.

In its new offensive role, the military began apprehending suspected terrorists, one of which was Kalid Sheikh Mohammed. Upon his apprehension by the United States, Kalid Sheikh Mohammed was not arrested and tried in open court, but instead he was held by the CIA for questioning.²⁰ This questioning was not for the purpose of building a criminal case, but instead this questioning was meant to gather intelligence to help in the war on terror. The questioning that took place at the CIA site is not public information, and it is uncertain what means of interrogation were used. After being held at this CIA site, Mohammed was transferred to

¹⁷ United States v. Hamdan, 1 M.C.Rept. 121 (M.C. 2008)

¹⁸ Detainment, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 60 Fed. Reg. 57833, 57833 (2001).

¹⁹ Corn, Geoffrey and Jimmy Gurule. *Principles of Counter-Terrorism Law*. Concise Hornbook Series (2011).

²⁰ Davis, Morris. *Historical Perspective on Guantanamo Bay: The Arrival of the High Value Detainees*. Case Western Reserve Journal of International Law, Volume 42, No. 115 (2009)

Guantanamo Bay. After Mohammed was transferred to Guantanamo Bay, prison officials began to gather evidence from him to support a criminal prosecution. While the process of gathering this evidence was not completely open, it is known that some extreme measures, such as water boarding, were used.²¹ In 2011, the Obama Administration announced that Mohammed would be tried by military commission rather than in federal court.

The process that Khalid Sheikh Mohammed has gone through presents a stark contrast to criminal proceedings for individuals suspected of terrorism before 2001. After both the Lockerbie bombing and the 1993 World Trade Center bombing, the FBI immediately launched a criminal investigation into who was responsible for the acts of terror. Once captured, charges were immediately filed against the suspects in the Lockerbie bombing and the 1993 World Trade Center bombing, and the suspects were tried in a federal court. All of these suspects had lawyers and access to the legal process. In contrast, after the September 11th attacks the military took the lead in apprehending the individuals responsible for the attacks, such as Khalid Sheikh Mohammed. Once captured, Mohammed was not tried in a federal court, but held by the military. Additionally, Mohammed was not granted access to the legal process. Instead he has been denied any rights to the legal process and has been detained indefinitely. This contrast demonstrates just how much the United States policy of apprehending and trying terrorists has changed.

While it is obvious that there has been a shift in the way the United States approaches terrorism since 2001, the implications of this shift are not entirely obvious. By invoking the law of armed conflict the United States has changed terrorism from a criminal matter to a military matter. Many of these suspected terrorists are not American citizens and have violated United

²¹ Id.

States law outside of the borders of the United States. These facts make the necessary application of due process for these individuals unclear. This uncertainty has led to numerous instances in which the individuals who are being held as suspected terrorists are denied due process of law.²² These denials have included the indefinite detention of suspected terrorists and extreme measures used in their interrogations.²³ The government has argued that these denials are necessary to ensure the safety and defense of the American people,²⁴ but there is a price for this safety.

The cost of this safety is the fundamental right of due process that the United States legal system was built upon. By denying suspected terrorists, such as Kalid Sheikh Mohammed, their due process rights, the United States is compromising its essential core value of due process. Terrorist attacks do not only aim to cause physical damage to a nation, but are used to inspire fear and enact negative change within the targeted country.²⁵ Compromising due process values in the name of safety is exactly the kind of action that terrorist attacks hope to encourage. It is in conducting the criminal proceedings surrounding suspected terrorists that America should be most concerned with upholding due process rights. By giving the right to due process to suspected terrorists, the United States can show that the fear of terrorism has not caused negative change in America. These criminal proceedings will be viewed by the whole world as a model for American jurisprudence, and denials of due process rights in these proceedings paint a dark picture of the American legal system. The denial of due process to suspected terrorists, such as

²² Doyle, Charles. U.S. Congressional Research Service. "Terrorism, Miranda, and Related Matters." R41252 (2010).

²³ Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay Bybee, Assistant Attorney General. *Re. Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (2002)

²⁴ *Id.*

²⁵ Wellman, Carl. *On Terrorism Itself*. The Journal of Value Inquiry, Vol. 13, No. 4 (1979).

Khalid Sheikh Mohammed, is a mistake on the part of the American government, and should be corrected by any possible means.

Due Process and the Fifth Amendment

To understand the true importance of the due process of law, one must understand the origins of due process within America. The Federal Due Process Clause is located within the Fifth Amendment to the Constitution of the United States.²⁶ The clause states that “No person shall be...deprived of life, liberty, or property, without due process of law.”²⁷ This guarantee means, among other things, that no person shall be held indefinitely without the due process of law. This idea dates back long before the founding of America. The English idea of due process, from which the American version is derived, can be found in the Magna Carta as early as 1214. Clause 39 of the Magna Carta states that “No free man shall be seized or imprisoned...except by the lawful judgment of his equals or by the law of the land.”²⁸ This idea marks the beginning of a formal due process in English common law. The phrase “due process” was first used in English law in 1354 in a rewriting of the Magna Carta²⁹.

The idea of due process was included in the Magna Carta to limit the power of the king. Unfortunately, this attempt was not always successful. In England, the requirement of due process was viewed simply as the requirement of following existing law.³⁰ Because the King and Parliament could write laws as they pleased, it was almost impossible for them to violate this idea of due process. If the English government wanted someone arrested, they could create a law and use it as they liked. There was no body to oversee the creation of these laws because the

²⁶ The Constitution of the United States, Amendment V. *Provisions Concerning Prosecution* (1791)

²⁷ *Id.*

²⁸ Orth, John. *Due Process of Law: A Brief History*. University of Kansas Press (2003).

²⁹ *Id.*

³⁰ *Id.*

English law system lacked a form of judicial review.³¹ This lack of judicial review stemmed from the English idea of a sovereign parliament. The concept of the sovereign parliament is one in which the parliament is accountable to no other governing body. This means that parliament may create and follow any laws or regulations that it wishes, with no possibility of these laws being found in violation of due process. With the lack of checks on the power of the King and Parliament, the only true check on the sovereign powers was rebellion. While there are some indications of the need for judicial review within English common law, these indications are few and often disregarded.³² Ultimately, this led to English law makers using the law as a weapon to achieve their own gains.

The English lack of real due process and a form of judicial review are bedrock to the American use of due process. The harsh and tyrannical rule of the English common law system was one of the key factors to the inclusion of the right of due process in the American Constitution. The American founders feared that the new government that was being established might abuse its power and create arbitrary legal decisions,³³ much like the English government. A legal decision can be viewed as arbitrary if “it is made without allowing those affected to participate.”³⁴ This would mean that the indefinite detention of individuals without allowing them to contest this detention would be an arbitrary legal action.

To make sure that the American form of due process would truly limit the power of the government the Founders created a system of checks and balances within the Constitution. This system allows each branch of the government to check the others so that no one branch can

³¹ Id.

³² Id.

³³ Rutherford, Jane. “The Myth of Due Process.” Boston University Law Review, Volume 72, Number 1 (1992).

³⁴ Id.

become too powerful.³⁵ It is within this system that the idea of judicial review was born in America. Judicial review allows the Judicial Branch to declare a law unconstitutional. Because there is a body to determine if a law is unconstitutional, any law that would violate the due process rights guaranteed in the Constitution can be struck down. It is the protection of rights offered by judicial review that truly separates the American from of due process from the English version. When combined with the system of checks and balances, the due process clause helps to keep the government in check. Without due process, these branches could use their vast authority to bend the law in any way they see fit.

Since its inception, the idea of due process has helped to shape the current criminal law system in America. Case after case has been decided and added to America's legal precedents to strengthen the criminal law system. Each of these cases has been connected to the idea of due process, and has helped to shape the due process clause through time. Because the American legal system operates on precedent, or the principle that rules established in legal cases may be applied when deciding subsequent cases,³⁶ the true meaning of the due process clause has evolved throughout time. While the base values behind the clause are the same, as more due process cases arise the exact application of the clause can change. To understand the current application of the due process clause, one must look at modern case law.

As America approached the middle of the 20th century, numerous landmark cases arose to define the state of procedural due process.³⁷ One of the key cases that established Fifth Amendment protections was the case of *Miranda v. Arizona*. In *Miranda*, the Supreme Court

³⁵ Orth, John. *Due Process of Law: A Brief History*. University of Kansas Press (2003).

³⁶ Rutherford, Jane. "The Myth of Due Process." *Boston University Law Review*, Volume 72, Number 1 (1992).

³⁷ This paper will focus on procedural due process which is the protection of codified rights. These rights can include the right to a trial by jury and the right to a lawyer. This paper will not examine substantive due process which concerns the fairness of the laws themselves.

held that statements made by a suspect while being questioned in police custody could only be used in court if that suspect had been made aware of his Fifth Amendment rights.³⁸ Not only did this decision mean that a suspect must be informed of what rights were guaranteed to him by the Constitution, but the decision also meant that those rights must be upheld if any information gathered would be used in a court of law. The rights that are protected by *Miranda* are a part of the legal due process that is guaranteed in the Fifth Amendment.

In 1968, Congress passed a law that overruled the rights given in *Miranda*. Congress argued that giving the *Miranda* rights was not a Constitutional requirement, and because of this the rights were not needed in the case of voluntary statements. However, the Supreme Court disagreed with Congress. In 2000 the Supreme Court heard the case of *Dickerson v. United States*.³⁹ In *Dickerson*, the Court used the principle of judicial review to determine that the exception to *Miranda* was unconstitutional and struck the law down.⁴⁰ This ruling showed that the Fifth Amendment protections provided by *Miranda* were a necessary part of any criminal proceeding.

Due to the changing nature of capturing and punishing suspected terrorists, many individuals who are suspected of terrorism are given neither the *Miranda* warnings nor the Fifth Amendment rights that *Miranda* warnings clarify. This is a serious problem if the government hopes to uphold these suspects' due process rights and grant the individual suspected of terrorism a fair trial.⁴¹ One of the few exceptions to the requirements listed in *Miranda* is a public safety exception. In the case of *New York v. Quarles*, the Supreme Court determined that questioning

³⁸ *Miranda v Arizona*, 384 U.S. 436 – Supreme Court (1966)

³⁹ *Dickerson v. United States*, 530 U.S. 428 – Supreme Court (2000)

⁴⁰ *Id.*

⁴¹ The Obama Administration has shown that they hope to grant high value detainees a trial rather than hold them indefinitely.

without stating the *Miranda* rights was acceptable and information gathered could be admissible to a court in a time sensitive situation that threatened public safety.⁴² This exception could be applied to the lack of rights given to suspected terrorists. One could argue that terrorism is a constant threat. It could be argued that because of this constant danger, any suspected terrorist must immediately be questioned upon their capture in case they have information about an imminent threat. Unfortunately, this public safety argument would be a very challenging one to make due to the amount of time that many suspected terrorists have been held by the United States. In *Quarles*, the Court stated that the exception only applied in time sensitive situations in which the providing of Fifth Amendment rights could delay the gathering of information and jeopardize public safety.⁴³ Many of the High Value Detainees that are being held as suspected terrorists have been detained for a number of years. The public safety exception outlined in *Quarles* was only allowed for imminent threats. The Court would argue that any threat uncovered over years of questioning would not be considered imminent. Because of this lengthy detention, it would be challenging to argue that their Fifth Amendment rights have been denied due to a public safety exception.

One might argue that *Miranda* warnings are not required for suspected terrorists because they are not in police custody, but are instead in military detention. The Supreme Court stated in the case of *Yarborough v. Alvarado* that *Miranda* rights are not needed for the questioning of an individual if they are not in police custody.⁴⁴ The *Yarborough* case was centered on Michal Alvarado who was a minor that was convicted of second degree murder. The case against Alvarado was based primarily on statements made by Alvarado to police that he made without

⁴² *New York v. Quarles*, 467 U.S. 649 – Supreme Court (1984)

⁴³ *Id.*

⁴⁴ *Yarborough v. Alvarado*, 541 U.S. 652 – Supreme Court (2004).

being told his *Miranda* rights. The Court determined that Alvarado's statements were admissible in court because he was not technically in custody. Certain factors that proved Alvarado was not in police custody were the age of Alvarado, the voluntary nature of his presence, and if the fact that the questions being asked were not for the purpose of gathering evidence against the individual being questioned.⁴⁵ However, this exception would not apply due to the nature of the suspected terrorists' detention. The suspected terrorists who are currently being detained have been questioned about their activities not only for safety purposes, but also for evidence gathering purposes.⁴⁶ They have been questioned about their illegal activities to gain evidence, and this evidence has been collected as a part of an investigation against them.⁴⁷ Because of these steps, one can see that the Supreme Court would view the suspected terrorists as being in custody for the purposes of *Miranda*.

The nature of the suspected terrorists' detention is patently in violation of the *Miranda* rights. Because of these violations, much of the evidence amassed for any criminal case against these suspects is unusable in a court of law. It would seem that due to the lack of admissible evidence against these suspects a criminal trial is not feasible. Without the ability to try suspected terrorists for their crimes, one might think that the only course of action left is to release these individuals. However, the United States has followed another course of action. Instead of releasing or granting trials to suspected terrorists, the United States has held these individuals in indefinite detention.

⁴⁵ Id.

⁴⁶ Davis, Morris. *Historical Perspective on Guantanamo Bay: The Arrival of the High Value Detainees*. Case Western Reserve Journal of International Law, Volume 42 (2009)

⁴⁷ During the Bush Administration the evidence gathered from suspected terrorists was to support military tribunals rather than criminal proceedings. The Obama Administration is working to bring the cases against suspected terrorists into federal courts rather than military tribunals.

Cutler, Leonard. *Bush vs. Obama Detainee Policy Post9/11: An Assessment*. Strategic Studies Quarterly (2010).

Due Process Concerning Detention

The Federal Rules of Criminal Procedure state that following an arrest, a suspect should be presented to a magistrate and advised of his rights without “unnecessary delay.”⁴⁸ This rule creates two requirements that must be fulfilled when conducting any criminal proceeding. The first requirement to be examined is that following an arrest, a suspect should be advised of his rights.⁴⁹ Court precedent has established that to inform a suspect of their rights they must be Mirandized.⁵⁰ In *Missouri v. Seibert* the Court ruled that extracting a confession from a suspect, then Mirandizing them, and then extracting the same confession “for the record” is a violation of the Fifth Amendment.⁵¹ This and other rulings demonstrate that there are very few exceptions to the Miranda requirements when extracting information from a suspect for a criminal proceeding.

The second requirement is that following an arrest, a suspect should be presented to a magistrate without “unnecessary delay.”⁵² While the rule against an unnecessary delay derives from the Sixth Amendment “right to a speedy trial,”⁵³ the Fifth and Sixth Amendments inseparable in the context of due process. The Fifth Amendment provides a guarantee for due process, while the Sixth Amendment outlines what that process entails. The Court has established that this rule must be followed when detaining any criminal for trial. In *Mallory v. United States* the Court stated that any confessions made during an “unnecessary delay” are invalid, even if the individual being held was Mirandized during the delay.⁵⁴ By declaring

⁴⁸ Federal Rules of Criminal Procedure, Rule 5 Section (a).

⁴⁹ *Id.*

⁵⁰ *Miranda v Arizona*, 384 U.S. 436 – Supreme Court (1966)

⁵¹ *Missouri v. Seibert*, 542 U.S. 600, 617 (2004)

⁵² Federal Rules of Criminal Procedure, Rule 5 Section (a).

⁵³ United States Constitution Amendment VI

⁵⁴ *Mallory v. United States* 354 U.S. 449, 455 (1957)

suspect confessions invalid due to a delay, even after a suspect has been Mirandized, the Court established that a suspect's right to timely due process is paramount.

However, the Federal Rules of Criminal Procedure do not specifically clarify what an "unnecessary delay" is. While it may seem obvious that holding suspected terrorists in custody for years without access to a lawyer or a court is an example of an "unnecessary delay," the line is not as obvious as one may think. One could argue that the lengthy delay for suspected terrorists is necessary to bolster the war against terror. Suspected terrorists may have information that is vital to the "War on Terror." Holding these suspected terrorists for a lengthy time may be the only way to ensure that the information they hold is gathered completely.⁵⁵

Ultimately, the ability to deny a suspect's habeas rights and hold them indefinitely comes down to what "unnecessary" means. The Executive has shown that it believes the long term detention of high value terrorists such as Kalid Sheikh Mohammed is certainly "necessary." This confirmation has come from the extended detention of Kalid Sheikh Mohammed and other high value targets with no access to attorneys, courts, or habeas rights of any kind.⁵⁶ While the executive may claim that these lengthy detentions are necessary, through judicial review the Supreme Court has the ultimate say over what acts are Constitutional, and what acts are not. Since the Civil War⁵⁷ the Court and the Executive have often been at odds over the issue of indefinite detention. While there have been many cases and opinions concerning the

⁵⁵ The Executive could also argue that they are holding suspected terrorists as prisoners of war who can be detained for the duration of hostilities. While this paper will not address the international law involved with the detention of suspected terrorists, there are numerous arguments against holding suspected terrorists as prisoners of war. Some of these arguments include the fact that many terrorist organizations do not identify with any specific country, they do not issue military uniforms, and the United States has not officially declared war on anyone since World War II.

⁵⁶ Davis, Morris. *Historical Perspective on Guantanamo Bay: The Arrival of the High Value Detainees*. Case Western Reserve Journal of International Law, Volume 42 (2009)

⁵⁷ The Civil War serves as an appropriate starting point because it was the first example of the Executive and the Court formally disagreeing over the use of indefinite detention.

constitutionality of indefinite detention, the precedent behind the issue is not always clear. Often times, the constitutionality of a suspect's detention is determined on a case by case basis.

Precedent Supporting the Use of Indefinite Detention

One of the only arguments for depriving a suspected criminal of their Fifth Amendment rights is a public safety exception. This exception has been affirmed by the Supreme Court recently with the *Quarles* exception.⁵⁸ The idea of the *Quarles* exception is that the safety interests of America and its citizens outweigh the personal liberties of suspected criminals when those criminals pose a threat to the public. This safety concern is the basis of indefinite detention. While the lengthy detention of suspected criminals may not always be found constitutional, the safety interest behind indefinite detention is greatly heightened during a time of war. While the War on Terror is not a congressionally declared war, the safety interests surrounding the detention of suspected terrorists are still pronounced. The increase in safety concerns, especially surround the High Value Detainees, has led to a number of individuals being detained indefinitely. Although many individuals might argue that the limitation of a suspected criminal's Fifth Amendment rights is never constitutional, there is legal support and precedent for such a denial.

During the Civil War President Lincoln suspended habeas corpus in an effort to keep America intact. A primary example of Lincoln's suspension of habeas rights was the case of *Ex parte Merryman*.⁵⁹ Merryman was a member of the Maryland militia and was a supporter of the Confederate army. He had helped to cut Union telegraph lines and burn rail road bridges. Merryman was eventually captured by the Union and held at Fort McHenry. While at the fort,

⁵⁸ *New York v. Quarles*, 467 U.S. 649 – Supreme Court (1984)

⁵⁹ *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861)

Merryman was denied his due process rights and held without access to the legal process.

Justice Taney of the Supreme Court issued a writ of attachment which authorized a US Marshall to bring Merryman from the fort to the Court. When the US Marshall arrived at Fort McHenry to take possession of Merryman, the soldiers at the fort refused to turn Merryman over. The soldiers cited the suspension of Habeas rights by President Lincoln to justify their refusal to comply with the writ of attachment. Even though Merryman was not brought to the Court, Justice Taney still issued an opinion stating that Merryman's detention was not constitutional because only Congress could suspend habeas corpus, not the President.⁶⁰

Although the Chief Justice of the Court ruled against Lincoln's suspension of habeas corpus, the *Merryman* case can be viewed as one supporting the use of indefinite detention for a few reasons. One of the first things to consider when looking at the *Merryman* case is the fact that Lincoln did suspend habeas corpus. While the Constitution allows only Congress to suspend habeas rights,⁶¹ Lincoln issued a suspension as the President. This order from Lincoln was not only followed, but Lincoln's actions were later authorized retroactively by Congress.⁶² This is because Lincoln's actions were viewed as necessary in the effort to save the nation. Should Lincoln have taken this same action today, he would have satisfied the requirement for indefinite detention established by Federal Rule of Criminal Procedure 5.

Additionally, one must consider the ruling itself. While Justice Taney ruled against Lincoln's action, the Justice did not rule against the suspension of habeas rights itself. In fact, the Court upheld that, in a time of necessity, Congress could suspend habeas corpus. While the

⁶⁰ Id.

⁶¹ United States Const. Art. I, § 9, Cl 2

The ability to suspend habeas corpus is located in the suspension clause of Article I of the Constitution. This article relates to the powers of Congress and because the suspension clause is located in Article I, the suspension power rests with Congress.

⁶² Paulson, Michael. *The Constitution of Necessity*. Notre Dame Law Review, Volume 79, pg. 1257 (2004).

confirmation of Congresses ability to suspend habeas rights may not seem extraordinary in the context of the War on Terror, it may actually allow the Executive to initiate a suspension of habeas corpus when combined with another past precedent. In the *Youngstown Sheet* case, Justice Jackson wrote a concurrence in which he outlined the different ways in which the President and Congress can act.⁶³ In his concurrence, Justice Jackson wrote that the President can be seen as working with Congress in a manner if he acts “in absence of either a congressional grant or denial of authority.”⁶⁴ Jackson wrote that if Congress is silent in this way, then the President’s powers enter a “zone of twilight in which he and Congress may have concurrent authority.”⁶⁵ Due to this “zone of twilight” one could argue that the President may be able to suspend habeas rights in a time of war if Congress acquiesces to his actions.

The only other time in America’s history in which a large number of individuals were indefinitely detained was World War II. After the attacks on Pearl Harbor, the United States government became worried that some Japanese Americans may act as saboteurs within America’s borders.⁶⁶ To foil any would-be sabotage, the government began interning Japanese Americans for a large portion of the war. In 1944 the Supreme Court heard the case of *Korematsu v. United States* in which the internment was challenged.⁶⁷ In *Korematsu*, the Court held that the indefinite detention of Japanese Americans was constitutional because the need to protect the country against espionage outweighed the individual rights of Americans of Japanese descent.⁶⁸ This was a landmark case because it is one of the only times in the history of the

⁶³ *Youngstown Sheet & Tube v. Sawyer*. 343 US 579 (1952)

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Korematsu v. United States*, 323 US 214 - Supreme Court (1944)

⁶⁷ *Id.*

⁶⁸ *Id.*

Supreme Court that a law has passed the test of strict scrutiny,⁶⁹ the highest level of scrutiny for a law.

This case is arguably the strongest precedent in support of indefinite detention. The Court not only allowed, but supported the indefinite detention of individuals captured in the context of a declared war. These individuals were not held as enemy soldiers, but instead were detained as citizens with no access to courts. Additionally, the Court reasoned that the use of indefinite detention in the *Korematsu* case had a “close relationship”⁷⁰ to the purpose of preventing espionage. The situation surrounding the indefinite detention that occurred during World War II is fairly similar to the situation today. In the context of the War on Terror, the government wants to indefinitely detain individuals who may pose a threat to the nation, even if a court has not confirmed this action. If the government were to apply the same reasoning as was used in *Korematsu*, then it would seem that the indefinite detention of suspected terrorists has a close relationship to the stated goal of stopping terrorist acts, and is therefore constitutional.

While the Court has not directly issued an opinion in favor of indefinite detention since the *Korematsu* decision, it has issued more recent opinions that deal with the matter of indefinite detention. In 2001 the Court heard the case of *Zadvydas v. Davis*.⁷¹ The issue argued in *Zadvydas* was a federal law on immigration that stated, “[a]n alien who [is removed for national security reasons] may be detained beyond the removal period and, if released shall be subject to

⁶⁹ Strict scrutiny was first established in the case of *United States v. Carolene Products*, 304 U.S. 144 (1938). It is the highest of three standards that can be applied to a law to weigh the government’s interest in the law against a constitutional right. To satisfy strict scrutiny a law must promote a compelling government interest, be narrowly tailored, and use the least restrictive means to achieve its interest.

⁷⁰ *Korematsu v. United States*, 323 US 214 - Supreme Court (1944)

⁷¹ *Zadvydas v. Davis* 533 U.S. 678 (2001)

certain terms of supervision.”⁷² When taken on its face, the law allows for the indefinite detention of any alien removed from the country for national security reasons. Furthermore, the law also allows for any individual that poses a security threat who is not able to be removed from the country to be subject to supervision by the government. While the law in *Zadvydas* is an immigration law, it may suggest that there is a national security exception to the Fifth Amendment that could be applied broadly to the High Value Detainees. Because aliens within America would enjoy Fifth Amendment protections, the ability to hold them in indefinite detention for national security purposes violates their constitutional rights. However, the law discussed in *Zadvydas* allows for that constitutional violation on the grounds of national security protections. This broad power is a modern day example of the Federal Government’s ability to detain suspected terrorists, such as the High Value Detainees, indefinitely.

Although the federal law in *Zadvydas* allows the government to indefinitely detain suspected terrorist on its face, the Court had issue with the federal government having such extensive power.⁷³ The Court determined that the federal law was not intended to be read on its face. Instead, the law was meant to be interpreted in a more limited manner. The Court reasoned that, if read on its face, the federal law in question would be too broad and allow for permanent detention. The Court determined that this permanent detention would not be constitutionally viable. However, the holding in *Zadvydas* did not repeal the law. Instead, the Court determined that any alien who was found to be a national security threat could only be held for more than six months if there government showed a continuing national security interest in that alien’s detention.⁷⁴ The Executive would argue that there is a continuing national security

⁷² Id.

⁷³ Id.

⁷⁴ Id.

interest in holding the High Value Detainees because they could pose an imminent threat to America if released. The security exception stated by the Court in *Zadvydas* is similar to the *Quarles* exception. Clearly, the government may only suspend due process rights in the face of an imminent threat. However, there is disagreement as to how broadly this security exception can be applied.

One case that dealt with how broad the security exception to due process can be applied was heard on the federal level in the case of *Mahmoad Abdah v. Barack Obama*.⁷⁵ In this case, Muhmoad Abdah was being detained indefinitely as a suspected terrorist after being apprehended in Afghanistan.⁷⁶ Abdah filed a petition to challenge his detention and to suppress any statements that he had made while detained. Abdah argued that he had been denied his right to due process by being detained indefinitely without access to a court, and that he had only made statements during his detention that might be used against him after being tortured.⁷⁷ The federal court found that not only did the government have enough reason to detain Abdah indefinitely due to the threat he posed to the United States, but that any and all evidence that had been collected against him would be allowed in court under the security exception to the Fifth Amendment.⁷⁸

Although the *Abdah* is not a Supreme Court case, it was heard in the D.C. Circuit Court in which most High Value Detainees' cases are filed. Because future cases concerning the High Value Detainees would be heard in the D.C. Circuit Court, *Abdah* carries a strong precedential value. Federal courts can certainly take precedent created by other courts into account when writing opinions, but if a circuit court has already decided an issue, such as indefinite detention,

⁷⁵ *Mahmoad Abdah v. Barack Obama*, F. Supp. 2d. (D.D.C. 2010)

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

then it will likely use that decision in any subsequent case it hears. However, the fact that the D.C. Circuit Court has established a precedent concerning indefinite detention does not mean that the lower courts are in agreement on the issue.

Lower courts have often disagreed on how broadly to apply the security exception to Fifth Amendment protections such as Miranda and due process rights.⁷⁹ Some courts have argued that security exceptions should be applied broadly. A broad approach would allow for law enforcement officials to apply the security exception to the Fifth Amendment to any dangerous situation that the official believes presents an imminent threat.⁸⁰ This broad application of the security exception would most likely allow for indefinite detention of suspected terrorists like the High Value Detainees. The executive could trigger the security exception by arguing that these suspects possess information that constitutes an imminent threat to the United States. Additionally, the law enforcement officials could further argue that allowing suspects like the High Value Detainees to speak in open court could pose even more of a security threat to the nation. Many of the High Value Detainees are outspoken terrorist leaders who have strong negative views towards the United States. These individuals could use the ability to speak in open court as a chance to spread more propaganda and fear throughout America, and to martyr themselves for the purpose of bolstering their followers.

On the other hand, some lower courts have narrowed the security exception to the Fifth Amendment to only apply in situations where there is concrete evidence of an imminent threat to the nation.⁸¹ The courts have justified this narrow interpretation of *Quarles* because the

⁷⁹ Norton, Rorie. *Matters of Public Safety and the Current Quarrel over the Scope of the Quarles Exception to Miranda*. Fordham Law Review Volume 78, Issue 4 (2010)

⁸⁰ Id.

⁸¹ Id.

exception established in that case was to protect against an immediate threat to public safety.⁸²

This narrow standard is a far more challenging standard for law enforcement officials to meet.

Rather than simply stating that the nation could be threatened by terrorist suspects, law enforcement officials would have to present tangible evidence that the United States' security would be jeopardized by granting certain suspected terrorists the rights of due process.

Satisfying this standard would be problematic in many ways. Many times, when a terrorist is apprehended the information gathering process takes time to complete. If the security exception did not apply, then the suspected terrorist would need to be given their due process rights within that time to avoid an unnecessary delay. Additionally, it is challenging for law enforcement officials to know if the information they have obtained from a suspected terrorist is credible. If a federal judge believes that the intelligence collected is not credible then the judge might be inclined to deny the use of the security exception.

Since the Civil War, law enforcement officials have used indefinite detention in the name of securing the nation. Lincoln independently suspended habeas corpus and ignored orders from the Supreme Court. President Lincoln justified his actions by stating that he did what was necessary to save the Union. While habeas corpus has not been officially suspended by the Executive, the High Value Detainees held in indefinite detention have been denied their habeas rights. During World War II President Roosevelt authorized the indefinite detention of Japanese Americans with the approval of the Supreme Court. Again, the need to protect the nation in a time of war was cited as the primary reason for the suspension of Fifth Amendment rights. Even outside of war the security exception has been applied to the due process rights of Aliens deemed a security threat. Each of these examples are part of a precedent that the Supreme Court has

⁸² *New York v. Quarles*, 467 U.S. 649 – Supreme Court (1984)

established allowing for the security concerns of the nation to override the Constitutional rights of dangerous criminals. Some lower courts have taken this precedent and applied it broadly to allow for indefinite detention. However, many lower courts have also found indefinite detention to be unconstitutional.

Statutes Opposing the Use of Indefinite Detention

While numerous courts have allowed for suspected criminals to be deprived of their due process rights on the basis of security, many courts have disagreed as to exactly how broad this security exception can be. Some courts have used past precedent to apply the security exception broadly enough to encompass any and all safety threats.⁸³ However, several courts have argued that the security exception should be narrowly tailored to allow for the greatest protection of individual rights.⁸⁴ While there have been examples of indefinite detention in America dating back to the Civil War, there has also been a great deal of controversy surrounding each use of indefinite detention.

Although Lincoln was successful in his efforts to indefinitely detain individuals that he deemed dangerous through the suspension of habeas corpus, many precedents arose out of the Civil War era that oppose the use of indefinite detention. The primary example to consider is the opinion issued by Chief Justice Taney in *Merryman*. Taney noted in his opinion that, even if Congress did suspend habeas corpus, a civilian detainee could not be detained indefinitely and ultimately had the right to a trial in federal court. One could argue that, because the high value terrorists held in Guantanamo Bay do not belong to the formal army of any country, individuals like Khalid Sheikh Mohammed are civilian detainees. If one did consider a suspected terrorist a

⁸³ Norton, Rorie. *Matters of Public Safety and the Current Quarrel over the Scope of the Quarles Exception to Miranda*. Fordham Law Review Volume 78, Issue 4 (2010)

⁸⁴ Id.

civilian detainee, then Taney's precedent established in *Merryman* would strongly oppose their indefinite detention. Taney went on to conclude that as long as federal courts were open and functioning that the government could not indefinitely detain any individuals.⁸⁵ Chief Justice Taney found this assertion against indefinite detention to be so necessary to America's legal precedent that he issued his opinion even without Supreme Court proceedings because the Union officials holding Merryman would not release him. One could contend that the federal court system was not completely viable during the tumultuous time of the Civil War, but no one could successfully argue that the federal court system is not viable today. Even with the fighting of multiple wars, the United States has not suffered any infrastructural damage that would limit the court system like it did during Lincoln's presidency. In America's current legal situation, indefinite detention would not be constitutional according to the *Merryman* precedent.

Another important piece of history to examine when considering Lincoln's suspension of habeas corpus is his requests for Congress to approve his actions. Chief Justice Taney noted that one of his major objections to Lincoln's suspension of habeas corpus was that "the privilege of the writ [of habeas corpus] could not be suspended except by an act of Congress."⁸⁶ Lincoln did not try to argue that he had the power to independently suspend the writ, but instead asserted that his actions were warranted by "public necessity."⁸⁷ When Congress returned to session, Lincoln sought retroactive approval for his decision to suspend habeas corpus. Lincoln admitted that his actions may not have been "strictly legal," but that they were necessary and he believed that they were in Congress's authority to approve.⁸⁸ However, Congress did not immediately authorize Lincoln's actions. Instead, it waited two years to pass the Habeas Corpus Act of 1863. This act

⁸⁵ William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime*. William Morrow & Co. (2000)

⁸⁶ *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861)

⁸⁷ President Lincoln's July 4, 1861 message to Congress,
<http://teachingamericanhistory.org/library/index.asp?document=1063>

⁸⁸ *Id.*

retroactively approved Lincoln's decision to suspend habeas corpus, and gave him the ability to suspend habeas corpus at any time during "the present rebellion."⁸⁹ The reason for Congress's delay may have been because they did not want to establish a precedent that would allow for the Executive to indefinitely detain individuals without Congressional approval. By delaying in their approval of Lincoln's actions, Congress was able to send a message that the President cannot unilaterally suspend habeas corpus and indefinitely detain individuals. When applied to the current War on Terror, this precedent against unilateral presidential action would not allow for the indefinite detention of any suspected terrorists. Congress has not suspended habeas corpus which means that any indefinite detention occurring today, such as the indefinite detention of the High Value Detainees at Guantanamo Bay, is not "strictly legal."⁹⁰

While the President acted without congressional approval during the Civil War, Congress did approve the detention of Japanese Americans during World War II. While the Court allowed for this detention at the time via the *Korematsu* decision, a plethora of legal acts and judicial decisions have followed that indicate that the denial of due process rights during World War II was unconstitutional. Congress viewed the indefinite detention of Japanese Americans as such a mistake that it passed the Civil Liberties Act of 1988. The Civil Liberties Act of 1988 was passed by Congress and enacted by law as an official apology to Japanese –Americans who were denied their due process rights and indefinitely detained during World War II.⁹¹ One of the primary purposes of the Civil Liberties Act of 1988 was to "acknowledge the fundamental injustice of the evacuation, relocation, and internment of citizens and permanent resident aliens

⁸⁹ Mayers, Lewis. *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*. University of Chicago Law Review, Vol. 33, No. 31 (1966).

⁹⁰ President Lincoln's July 4, 1861 message to Congress, <http://teachingamericanhistory.org/library/index.asp?document=1063>

⁹¹ The Civil Liberties Act of 1988. <http://www.civics-online.org/library/formatted/texts/civilact1988.html>

of Japanese ancestry during World War II...without adequate security reasons.”⁹² Although the Civil Liberties Act of 1988 did not overrule the *Korematsu* decision, it shows that the United States Government viewed the decision as a mistake.

Not only did Congress official apologize for the indefinite detention of Japanese-Americans during World War II, but it passed the Non-Detention Act in 1971 to make sure that such a violation of rights would never happen again.⁹³ This Act was signed into law by President Nixon and states that “no citizen shall be imprisoned or detained by the United States except pursuant to an Act of Congress.”⁹⁴ The Non-Detention Act was passed to repeal the Emergency Detention Act of 1950 which allowed for the detention of individuals during a time of “internal security emergency.”⁹⁵ The Non-Detention Act echoes the precedent established by Chief Justice Taney that only Congress can authorize a suspension of habeas corpus and allow for individuals to be indefinitely detained. The focus on Congress being the only body with the authority to suspend habeas corpus shows the importance of any decision for the United States to indefinitely detain individuals. Rather than allow an individual, the president, or an unelected body, the Court, to suspend habeas corpus, legal precedent and history has placed this authority squarely in the hands of Congress. Congress is viewed as the body of government that most directly serves the people of the United States. If the fundamental right to due process is to be suspended, it would make sense to allow only Congress the authority to suspend a right that specifically protects the people. The Non-Detention Act was not only passed to protect the rights of American citizens, but it was also viewed as an effort to prevent the reoccurrence of the mass

⁹² Id.

⁹³ Fisher, Louis. *The Constitution and 9/11: Recurring Threats to America's Freedoms*. University Press of Kansas (2008).

⁹⁴ Id.

⁹⁵ Id.

indefinite detentions perpetrated during World War II.⁹⁶ Although many individuals may view the *Korematsu* decision as the strongest precedential support for indefinite detention, it is apparent through the legal acts passed afterwards that the *Korematsu* should only be viewed as a legal misstep by the Supreme Court.

Case Precedent Opposing the Use of Indefinite Detention

Legal precedent denying the ability to detain suspected criminals indefinitely has also been established in the modern context of the War on Terror. One of the modern cases addressing the indefinite detention of suspected terrorists was *Hamdi v. Rumsfeld*.⁹⁷ Hamdi was a United States Citizen who moved to Saudi Arabia during his youth. He was captured in Afghanistan in 2001 by Afghan officials and turned over to the United States as a suspected terrorist. Hamdi was brought to Guantanamo Bay to be indefinitely detained in 2002. Hamdi's father filed a habeas petition for his son in the District Court for the Eastern District of Virginia. The Bush administration argued that Hamdi was captured in support of the War on Terror and he could therefore be held indefinitely without access to an attorney or any of his due process rights. Hamdi won his case at the district level, but this decision was overturned by the Fourth Circuit. Hamdi appealed to the Supreme Court which reversed the decision of the appellate court and found in favor of Hamdi.⁹⁸

Justice O'Connor wrote the opinion for the court in which she stated that "although Congress authorized the detention of combatants in the narrow circumstances alleged here, 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 decision

⁹⁶ Id.

⁹⁷ *Hamdi v. Rumsfeld*, 542 US 507 - Supreme Court (2004)

⁹⁸ Id.

maker.”⁹⁹ The authorization by Congress that O’Connor wrote of was the passage of the Authorization for the Use of Military Force. While the AUMF did not officially suspend habeas corpus, it does allow for the President “to use all necessary and appropriate force...in order to prevent any future acts of international terrorism.”¹⁰⁰ If the President asserts that indefinite detention is necessary and appropriate to protect the nation, then one could argue that Congress supports this suspension of habeas rights through the AUMF. However, by asserting that Hamdi deserves the right to challenge his detention even after Congress has acted to suspend his habeas rights, the Court began to enforce even stricter protections of due process that had been seen in past cases such as *Merryman* and *Korematsu*. The assertion that not even Congress can limit the due process rights of a United States citizen to the degree of indefinite detention is one that certainly values individual rights over a United States security interest.

This quarrel between an individual’s “private interest that will be affected by [government] action” and the governments “asserted [security] interest...and the burdens the Government would face in providing greater process” is discussed in depth by Justice O’Connor’s opinion.¹⁰¹ Justice O’Connor separates this quarrel into two considerations that must be weighed against each other: “the risk of an erroneous deprivation” of the private interest if the process were reduced and the probable value, if any, of additional or substitute safeguards.”¹⁰² When considering the deprivation of rights, O’Connor looks to the true threat of the individual whose rights are in question. She writes that “history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression

⁹⁹ Id.

¹⁰⁰ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹⁰¹ Id. (quoting *Mathews v. Eldridge*, 424 U.S. 319 (1976))

¹⁰² Ibid.

and abuse of others who do not present [an immediate] threat.”¹⁰³ It is clear that the Court’s primary concern when considering the deprivation of due process rights for a United States citizen is determining the nature of the threat they pose. O’Connor’s assertion in *Hamdi* seems to imply that no United States citizen could ever be deprived of their due process rights because only a court could make the true determination of the threat that the individual poses to the nation. In fact, O’Connor went as far as to say that any citizen who seeks to challenge their indefinite detention in the context of a war “must receive...a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.”¹⁰⁴ While this holding dictates that indefinite detention may never be used on United States citizens, it does not speak to the rights of non-citizens. However, the Court also released another opinion on the same day as *Hamdi* that dealt directly with the rights of non-citizens.

On the same day that it released the *Hamdi* opinion, the Court also released its opinion for the case of *Rasul v. Bush*.¹⁰⁵ Rasul was a foreign national captured as a suspected terrorist in Afghanistan in 2002. He was transferred to Guantanamo Bay where he was held without access to a lawyer or the courts. In 2002 Rasul filed for a writ of habeas corpus, but was denied by the District Court for a lack of jurisdiction citing that Rasul was held outside of the United States¹⁰⁶. The Court of Appeals affirmed this decision, but the Supreme Court reversed the lower courts and found in favor of Rasul. The Court reasoned that it did have jurisdiction to consider Rasul’s request for habeas corpus even though he was indefinitely detained by the Executive outside of the United States.¹⁰⁷

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ *Rasul v. Bush*, 542 US 466 - Supreme Court (2004)

¹⁰⁶ While Guantanamo Bay is operated by the United States it is located in Cuba.

¹⁰⁷ *Rasul v. Bush*, 542 US 466 - Supreme Court (2004)

Justice Stevens wrote the opinion for the Court and based his reasoning primarily in historical evidence. He argued that the writ of habeas corpus has always “served as a means of reviewing the legality of Executive detention,” and that the Court has “recognized the federal courts’ power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace.”¹⁰⁸ The primary difference between past habeas precedent, such as in *Merryman*, and the case of *Rasul* was the fact that Rasul was being held in “a territory over which the United States exercises plenary and exclusive jurisdiction, but not “ultimate sovereignty.””¹⁰⁹ Stevens determined that the answer to the question of whether the US District Court had jurisdiction to issue the writ was that United States law and past precedent “confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.”¹¹⁰ In short, Justice Stevens believed that the District Court has the jurisdiction to hear habeas challenges from suspected terrorists held in Guantanamo Bay.

By finding in favor of Rasul, the Court had established that the Executive could not indefinitely detain any individual, citizen or alien, even if that individual was not held within United States. By extending the right to habeas relief to non-citizens held outside of the United States, the Supreme Court was sending a message that any individual who would be held as a suspected criminal by the Executive is entitled to due process. No longer could the Executive argue that individuals apprehended abroad as suspected terrorists were not entitled to Constitutional protections. When combined with the *Hamdi* decision, *Rasul* completely

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Id.

eliminated the possibility for Constitutional indefinite detention in the context of the War on Terror. However, these two cases did not put an end to the due process debate within America.

In 2005 and 2006 Congress passed the Detainee Treatment Act and the Military Commissions Act respectively.¹¹¹ These acts were signed into law by President Bush and authorized the denial of federal court jurisdiction over detainees held in Guantanamo Bay and approved the use of military commissions to try individuals apprehended in the context of the War on Terror.¹¹² Although Bush had authorized the use of military commissions when he signed the 2001 Military Order for the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, this Act was a unilateral step by the President.¹¹³ The Military Commissions Act of 2006 was an example of Congress and the Executive working together to approve the use of military commissions for the Guantanamo detainees. By denying federal court jurisdiction and authorizing the use of military commissions for the trials of suspected terrorists, Congress had effectively denied individuals held in Guantanamo Bay the right to habeas corpus and other due process rights. These acts flied in the face of the *Hamdi* and *Rasul* decisions, but it did not take long for them to be challenged in the Court.

In 2008 the Court heard the case of *Boumediene v. Bush*.¹¹⁴ Lakhdar Boumediene was arrested by United States law enforcement officials in 2002 in relation to suspected terrorist attack on the United States Embassy in Sarajevo. Boumediene was detained in Guantanamo Bay and filed a petition for a writ of habeas corpus, alleging, among other things, a violation of his due process rights. The District Court found for the government and denied the writ citing that

¹¹¹ HR – 2863, Detainee Treatment Act of 2005 and HR – 6166, Military Commissions Act of 2006

¹¹² *Id.*

¹¹³ Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. President George W. Bush. November 13, 2001

¹¹⁴ *Boumediene v. Bush*. 128 S. Ct. 2229 – Supreme Court (2008)

the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 eliminated the jurisdiction of federal courts for cases concerning individuals held in Guantanamo Bay. This decision was affirmed by the D.C. Circuit Court, but the Supreme Court reversed the District Court and found in favor of Boumediene.¹¹⁵

Justice Kennedy wrote the opinion of the Court. In his holding, Kennedy considered a few questions. First, the Court determined whether the Detainee Treatment Act of 2005 could function in place of the Guantanamo detainees' habeas rights.¹¹⁶ Kennedy's opinion stated that the Detainee Treatment Act did not act as "an adequate and effective substitute for habeas corpus."¹¹⁷ Because the Act did not provide an adequate substitute for habeas relief, the Court determined that the Detainee Treatment Act could not constitutionally authorize the suspension of habeas corpus.

Next, the Court needed to examine whether the Military Commissions Act should be interpreted to remove federal courts jurisdiction over habeas petitions filed by foreign citizens detained at Guantanamo Bay. Justice Kennedy determined that by ordering military commissions for all individuals detained in Guantanamo Bay rather than trials in federal court, the Military Commissions Act was indeed an attempt to strip the courts of their jurisdiction. By stripping the federal courts of their rights to hear the cases of individuals held in Guantanamo Bay, Congress had effectively overruled the Court's decision in *Rasul*. However, Kennedy rectified this misstep in Congressional power and made it clear that overturning the Court's decisions was well outside the purview of Congress.

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id.

Additionally, Kennedy considered if this application of the Military Commissions Act violated the Constitution. The Court concluded that the Act was in violation of the Suspension Clause of the Constitution. The Suspension Clause reads that “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.”¹¹⁸ Because the United States is not in a state of rebellion, the only justification for the suspension of habeas corpus in modern times would if the public safety required it. This public safety requirement is similar to the governmental interest considered by the Court in the *Hamdi* decision. Again, the Court found that the government security interest in indefinitely detaining suspected terrorists did not outweigh their individual rights. Due to the lack of a public safety need, the suspension of habeas rights could not constitutionally be triggered.

Finally, the Court determined if detainees at Guantanamo Bay were entitled to the due process protections guaranteed by the Fifth Amendment. Although the United States does not technically have sovereignty over Cuban soil, the Court determined that the United States does have de facto sovereignty over the military base at Guantanamo Bay. Because the United States does exert sovereignty over the base at Guantanamo Bay, the United States courts may also exert jurisdiction over the base. The jurisdiction of federal courts over individuals detained at Guantanamo Bay is not simply a one-way exchange. Due to the fact that the courts have jurisdiction over individuals held at Guantanamo Bay, those individuals must also have access to these courts. With the access to courts comes the right of due process. Therefore, the Military Commissions Act could not deny Fifth Amendment protections to detainees at Guantanamo Bay because that denial would be equivalent to denying the federal courts jurisdiction over United States soil.

¹¹⁸ United States Const. Art. I, § 9, Cl 2

The Indefinite Detention of Khalid Sheikh Mohammed

By finding the Military Commission Act of 2006 unconstitutional, the Court reaffirmed its holding in *Rasul* and denied the indefinite detention of suspected terrorists. However, there are still individuals being held without trial in Guantanamo Bay today. Among these individuals are the High Value Detainees. Arguably, the most well-known of the High Value Detainees is Khalid Sheikh Mohammed. With the recent Court precedent against the suspension of habeas rights established in *Boumediene* and *Rasul*, it seems almost farfetched that anyone would still be held in indefinite detention by the United States. Nevertheless, the Bush administration commonly used indefinite detention to hold individuals “captured in connection to the 9/11 attacks.”¹¹⁹ Unfortunately, there has not always been enough evidence proving the danger of suspected terrorists to support indefinite detention due to the current War on Terror.¹²⁰ Because many of the individuals held at Guantanamo Bay are not dangerous enough to indefinitely detain for specific crimes, the Obama Administration has made it clear that many suspected terrorists should be tried in federal court.¹²¹ However, the trials of the High Value Detainees in federal court may raise many constitutional issues. Due to the length of their detention and the denial of their due process rights, there may be a point at which a criminal trial is no longer feasible for certain suspected terrorists because of the constitutional violations caused by their treatment. If the due process rights of a suspected terrorist have been violated to an extreme degree, a federal judge may deem it necessary to release the suspected terrorist rather than try them. Because of the myriad of circumstances surrounding the detention of suspected terrorists in Guantanamo Bay, this paper will focus on the different precedents surrounding indefinite detention since the

¹¹⁹ Cole, David. *Out of the Shadows: Preventive Detainment, Suspected Terrorists, and War*. California Law Review Volume 97 (2009)

¹²⁰ *Id.*

¹²¹ Ryan, Jason. “In Reversal, Obama Orders Guantanamo Military Trial for 9/11 Mastermind Kalid Sheikh Mohammed.” ABC News. April 4, 2011

Civil war and apply them to the case of Khalid Sheikh Mohammed. Through the examination of the detention of Khalid Sheikh Mohamed, one can better understand the process of determining whether suspected terrorists can be indefinitely detained by the United States during the War on Terror or if they must be tried.

The first case to apply to Khalid Sheikh Mohammed's detention is *ex parte Merryman*. The precedent established in *Merryman* is patently in opposition to the indefinite detention of Khalid Sheikh Mohammed for a few different reasons. Primarily, Chief Justice Taney stated in his opinion that, even if the writ of habeas corpus is suspended by Congress, detention cannot be indefinite unless the courts are no longer functioning.¹²² Khalid Sheikh Mohammed has been held without any due process for years in multiple United States facilities. During this time the federal court system has been fully functional and available to hear Mohammed's case. Due to the length of Mohammed's detention and the availability of the federal court system, the United States is blatantly violating the precedent established by Chief Justice Taney in *Merryman*. While one might argue that the suspension of Mohammed's habeas rights is only a temporary in order to protect public safety during the War on Terror is over, the precedent in *Merryman* excludes this possibility. Chief Justice Taney stated that habeas rights may only be suspended by Congress in a time of "invasion or rebellion."¹²³ While the attacks of September 11th, 2001 did occur on American soil, no one could correctly assert that the United States is currently facing an invasion or a rebellion. Even though the Court has established that there is a public safety exception to the guarantee of due process rights for individuals suspected of terrorism, the precedent in *Merryman* would argue that the public safety exception cannot be triggered by the mere existence of an ongoing conflict. The conflict necessary to trigger the public safety

¹²² *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861)

¹²³ *Id.*

exception on must be taking place on American soil, or pose an imminent threat of taking place on American soil for Congress to suspend habeas corpus rights.

Even though it is apparent that Khalid Sheikh Mohammed's indefinite detention violates the precedent established in *Merryman*, one could argue that Merryman was a United States citizen, so the precedents stemming from this case would not apply to a non-citizen. While Merryman was a citizen of the United States, the precedent set in *Merryman* rested on the fact that no criminal can be indefinitely detained while the United States court system was functioning.¹²⁴ One might posit that this precedent would not apply to non-citizens held at Guantanamo Bay, but the Court established in *Rasul* that individuals such as the High Value Detainees held at Guantanamo have the right to access the United States courts to file for habeas relief.¹²⁵ Because the suspected terrorists held at Guantanamo Bay have the right to access United States courts, and because those courts are currently functioning, the *Merryman* precedent can apply to the case of Khalid Sheikh Mohammed.

A far more recent example of precedent dealing with indefinite detention is the *Korematsu* decision surrounding the internment of Japanese-Americans during World War II. While Khalid Sheikh Mohammed is not an American Citizen nor has he ever resided in America, the *Korematsu* decision is still applicable to the indefinite detention of the High Value Detainees. The *Korematsu* decision applies to Khalid Sheikh Mohammed because the case centers on the clarification of the security reasons required to trigger indefinite detention of individuals during wartime. This security standard cannot only be applied to World War II, but to the current War on Terror as well because the standard established was a universal wartime standard. In the Civil

¹²⁴ Id.

¹²⁵ *Rasul v. Bush*, 542 US 466 - Supreme Court (2004)

Liberties Act of 1988, Congress apologized to Japanese-Americans for their unjust internment during World War II. Within the act, Congress noted that the mere involvement in World War II did not trigger “adequate security reasons” for the indefinite detention of the Japanese American population.¹²⁶ This admission by Congress is applicable to the modern law because the manner in which the United States was brought into World War II mirrors in many ways the circumstances that caused the United States to become involved in the War on Terror. During World War II the United States was hit with a surprise attack on American soil that caused the United States Military to become involved in a world-wide military operation. Similar to the attack on Pearl Harbor, the September 11th attacks were a surprise attack that pulled the United States into a world-wide conflict. If the security reasons for indefinitely detaining suspected threats during World War II were not “adequate,” then it stands to reason that the security reasons to indefinitely detain suspected terrorists during the War on Terror are not adequate. One could argue that a major distinction between the precedent that arose from the detention of Japanese-Americans during World War II and the current detention of suspected terrorists is that the internment during World War II was undertaken without any real evidence against those interned. However, without access to any kind of court system or due process rights, there is not body to examine any evidence that might be used to hold Khalid Sheikh Mohammed. The only public evidence that Khalid Sheikh Mohammed poses an imminent threat to America’s national security is the assertion of this threat by the Executive. The only evidence of the security threat posed by Japanese-Americans during World War II was the assertion of their danger by the Executive. Because of this parallel, it is clear that the precedent arising from the *Korematsu*

¹²⁶ The Civil Liberties Act of 1988. <http://www.civics-online.org/library/formatted/texts/civilact1988.html>

decision would not allow for the indefinite detention of Khalid Sheikh Mohammed due to the absence of “adequate security reasons.”¹²⁷

The argument against indefinitely detaining suspected terrorists like Khalid Sheikh Mohammed becomes even stronger when considering the modern Supreme Court cases of *Hamdi* and *Rasul*. In *Hamdi*, the Court focused on the conflict between the “private interest” in due process rights and the government’s “asserted [security] interest...and the burdens the Government would face in providing greater process.”¹²⁸ While the private interest that the Court focused on in *Hamdi* was that of a citizen’s, the private interest in due process rights still applies, to a lesser degree, to Khalid Sheikh Mohammed. Although Mohammed is not a citizen of the United States, the nation still has a concern in promoting Mohammed’s rights to due process. This concern arises from the collective interest of America for the preservation of due process rights. As stated earlier in this paper, the right of due process is one of the most fundamental to the formation of America’s legal system. By rejecting the right of due process through denying access to United States courts to individuals entitled to accessing those courts, the Executive would be eroding the concept of due process within America. One could use the fact that Khalid Sheikh Mohammed was denied access to the court system to argue that any individual who poses a threat to the nation should be denied access to courts, even if that threat is a United States citizen. While the denial of due process to Khalid Sheikh Mohammed may not immediately affect the rights of American citizens, this erosion of due process within the United States could establish a precedent that would jeopardize the due process rights of citizens in the future.

¹²⁷ Id.

¹²⁸ *Hamdi v. Rumsfeld*, 542 US 507 - Supreme Court (2004) (quoting *Mathews v. Eldridge*, 424 U.S. 319 (1976))

As the ruling in *Hamdi* also established, the personal interest in due process rights must also be weighed against the government interest in indefinite detention along with the “burdens the Government would face in providing greater process.”¹²⁹ The level of government interest in the indefinite detention of Khalid Sheikh Mohammed cannot properly be determined because, without access to a court, Mohammed does not have “a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.”¹³⁰ Because there is no neutral party to determine the validity of the government’s assertions against Mohammed, there is no fair method to calculate the government’s actual interest in holding Mohammed in indefinite detention. Without the ability to weigh the true governmental interest in keeping Mohammed indefinitely detained, the only argument that could be made in favor of indefinite detention is that providing more due process rights would place too great of a burden upon the government. New York City projected that the trial of suspects related to the September 11th attacks would cost over \$400 million if the trial proceedings only lasted for two years.¹³¹ While the figure of \$400 million may seem staggering, this money would go towards the trials of more suspected terrorists than just Khalid Sheikh Mohammed. With the public desire to the individuals involved in the September 11th attacks brought to justice, and the fundamental nature of due process rights to the foundation of the American legal system, \$400 million may not be such an onerous number. Because the burden of providing more due process to Mohammed would not be restrictive, the precedent established in *Hamdi* points towards allowing Mohammed to argue his case in front of a federal judge.

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Ryan, Jason. “In Reversal, Obama Orders Guantanamo Military Trial for 9/11 Mastermind Kalid Sheikh Mohammed.” ABC News. April 4, 2011

A precedent that can be applied to the case of Khalid Sheikh Mohammed more directly than the *Hamdi* decision is the *Rasul* decision. The *Rasul* decision may be the strongest opposition to the indefinite detention of Khalid Sheikh Mohammed. In the *Rasul* opinion, Justice Stevens asserted that the writ of habeas corpus was an important check on the Executive's power to detain individuals.¹³² Justice Stevens believes that the courts are essential in "reviewing the legality of Executive detention."¹³³ The belief that courts provide necessary oversight when it comes to the validity of Executive detention is present not only in *Rasul* but nearly all cases involving indefinite detention. By denying Khalid Sheikh Mohammed access to federal court, the Executive is denying the courts their long standing ability to review the constitutionality of an individual's detention. Justice Stevens also makes it clear in *Rasul* that suspected terrorists such as Mohammed have a right to habeas relief even though they are being held in a facility that is not technically part of the United States. Because the Guantanamo Bay facility that the suspected terrorists, such as Mohammed, are being held in is run by the United States, Stevens asserts that the United States federal courts have de facto jurisdiction over the suspected terrorists held within. Through Justice Stevens' reasoning, it is obvious that the precedent established in *Rasul* does not support the indefinite detention of Khalid Sheikh Mohammed on any grounds.

While the Court has established numerous precedents against the indefinite detention of suspected terrorists, Congress has provided one of the few justifications for indefinitely detaining Khalid Sheikh Mohammed in passing the Military Commissions Act of 2006. The Act stripped the federal courts of their jurisdiction over suspected terrorists held in Guantanamo Bay which meant that Mohammed had no right to habeas relief. However, the Court quickly struck down

¹³² *Rasul v. Bush*, 542 US 466 - Supreme Court (2004)

¹³³ *Id.*

this unconstitutional law in *Boumediene*. Not only did the Court remove one of the only justifications for indefinitely detaining individuals suspected of terrorism such as Khalid Sheikh Mohammed, but it also created even more legal precedent to support their right to habeas corpus. One of the arguments made in Kennedy's opinion in *Boumediene* for granting individuals like Mohammed the right to due process was that any suspension of habeas corpus by Congress during the current War on Terror would be a violation of the Suspension Clause.¹³⁴ By arguing that the suspension of habeas rights would violate the Suspension Clause, Kennedy asserted that suspected terrorists being held in Guantanamo Bay, such as Khalid Sheikh Mohammed, cannot be stripped of their rights simply because they are designated enemies of the United States.

Declaring that Mohammed does not pose enough of a safety threat to allow for indefinite detention has a far broader impact than just overruling the Military Commissions Act of 2006. The lack of a threat to public safety implied by Kennedy's decision also renders the arguments made by lower courts in favor of indefinite detention moot. One such example can be found in the case of *Mahmoad Abdah v. Barack Obama*.¹³⁵ While the lower court in *Abdah* argued that the Federal Government could indefinitely detain a suspected terrorist due to the threat he posed to the safety of America, Kennedy's decision staunchly stands against that federal court's decision by asserting that even enemies of the United States must have the right to challenge their detention when held by the American government. Through an examination of Supreme Court precedent, the federal courts should employ the public safety exception to due process rights in the narrowest way possible when deciding the cases of suspected terrorists. With such a narrow application of the security exception to the Fifth Amendment, any federal court would

¹³⁴ *Boumediene v. Bush*, 128 S. Ct. 2229 – Supreme Court (2008)

¹³⁵ *Mahmoad Abdah v. Barack Obama*, F. Supp. 2d. (D.D.C. 2010)

have to allow Khalid Sheikh Mohammed access to the court and the legal process to challenge his detention.

Because the Court has shown that triggering the security exception to Fifth Amendment rights is nearly impossible in the context of the current War on Terror, the final argument that one may be able to use in denying Khalid Sheikh Mohammed due process is that Mohammed is not an American citizen. Because Mohammed is not a citizen, one might argue that the due process protections of the Constitution do not apply to him. However, the Court has denied this assertion in cases concerning non-citizens. In *Yick Wo v. Hopkins*, the Court concluded that “the rights of every citizen of the United States” must be considered “equally with those of the strangers and aliens who now invoke the jurisdiction of the court.”¹³⁶ By stating that the rights of United States citizens are applicable to any individual within the jurisdiction of United States courts, the Supreme Court declared that even non-citizens are entitled to the protections of the Bill of Rights within United States courts. One might argue that *Yick Wo* does not apply to Khalid Sheikh Mohammed because he is not being held on United States soil. However, the holding in *Rasul* clarified that individuals held in Guantanamo Bay, like Mohammed, are under the jurisdiction of federal courts. Because Khalid Sheikh Mohammed has access to the federal court system, he would “invoke the jurisdiction of the court” and be entitled to the equal rights guaranteed by *Yick Wo*.¹³⁷ In *Boumediene*, the Court reaffirmed the holding in *Rasul* that confirmed the jurisdiction of United States courts over suspected terrorists held in Guantanamo Bay.¹³⁸ Through applying these arguments to Khalid Sheikh Mohammed, one can see that he is

¹³⁶*Yick Wo v. Hopkins*, 118 U.S. 356 – Supreme Court (1886)

¹³⁷ *Id.*

¹³⁸ *Boumediene v. Bush*, 128 S. Ct. 2229 – Supreme Court (2008)

under the jurisdiction of the United States federal court system and therefore is entitled to the due process rights guaranteed by the Constitution.

By guaranteeing Constitutional rights to suspected terrorists held in Guantanamo Bay, the Court struck down the last viable argument in favor of indefinite detention in the context of the War on Terror. Due to the applicability of the Constitution to non-citizens held by the United States and the inability to deny due process rights on the basis of national security in the current context of the War on Terror, it would seem that there could be no viable legal reasoning that would allow the continued indefinite detention of Khalid Sheikh Mohammed. Unfortunately, it seems that the Obama Administration is pursuing the same unconstitutional path with Mohammed that the Bush administration followed by deciding to deny him due process and try him in a military commission rather than a federal court. The Obama Administration could argue that the trial of Khalid Sheikh Mohammed is a military matter and therefore using a military commission would not violate the Constitution. However, this argument has been countered in *Rasul* and *Boumediene* by the Court declaring all suspected terrorists held in Guantanamo Bay, such as Khalid Sheikh Mohammed, under the jurisdiction of the federal court system. Because Mohammed is under the jurisdiction of the federal court system, his ability to challenge his detention is a matter for the courts and not the military.

Conclusion

Since the attacks of September 11th, 2001, the United States has not only been engaged in a War on Terror, but in a fundamental discussion of the importance of due process in a time of war. While the discussion of due process rights may seem a simple one, when closely examined it is clear that there are many layers to the due process rights guaranteed by the Fifth

Amendment. When determining how to apply due process rights to suspected terrorist held in Guantanamo Bay, one must consider the history of due process in America, the precedents supporting the suspension of due process rights, and the precedents supporting the granting of due process rights throughout America's legal history.

Among all of the rights written into the Constitution, the right to due process may be the most fundamental to the legal structure of America. The lack of due process in the oppressive and biased legal culture of 18th century England was a key factor in the creation of America. The founding fathers wanted to create a nation that would shed the subjective legal system of England and establish a new legal framework based on fairness and equality. Arguably the most core right needed to guarantee this objective legal system is the right to due process. Without the guarantee of due process to grant everyone access to the written laws, the laws of a nation are meaningless. The laws would be meaningless without due process because even the most just and virtuous law is useless if an individual does not have access to it. However, even the founding fathers knew that there would be a select few times throughout the life of a nation that the right to due process would need to be suspended.

Although the Fifth Amendment right to procedural due process is one of the most fundamental rights in America's legal system, the founding fathers realized that there would be certain times in which it would be necessary to suspend certain rights to due process. For example, the Constitution allows for Congress to suspend the writ of habeas corpus "when in cases of rebellion or invasion the public safety may require it."¹³⁹ This national security exception has been used throughout America's legal history. Lincoln suspended the writ of habeas corpus during the Civil War in order to protect the unity of the nation. All three branches

¹³⁹ United States Const. Art. I, § 9, Cl 2

of government supported the internment of Japanese-Americans during World War II in order to defend against acts of espionage. The Executive is currently indefinitely detaining suspected terrorists in Guantanamo Bay in order to effectively wage the War on Terror. However, each of these suspensions of due process rights has also led to numerous precedents opposing the use of indefinite detention.

Although the Constitution allows for the suspension of habeas corpus in some extreme cases, the Court has determined that the limitation of due process rights may not be so extreme as to allow for indefinite detention. The Court ultimately determined that Lincoln's use of indefinite detention during the Civil War was not constitutional, even in the face of rebellion. Although all three branches of the government allowed for the indefinite detention of Japanese-Americans during World War II, all three branches later admitted that this was a mistake and an egregious violation of the Constitution. In the current context of the War on Terror, suspected terrorists have been indefinitely detained in Guantanamo Bay. However, the Court has time and time again declared that this use of indefinite detention is not constitutional.

While there are arguments both for and against the use of indefinite detention, the legal precedent must be applied to an existing case to have any meaning. One of the most publicized cases of a suspected terrorist being held in Guantanamo Bay is the case of Khalid Sheikh Mohammed. Although the Executive has gone to great lengths to detain Mohammed indefinitely in the name of national security, to deny Khalid Sheikh Mohammed his due process rights would be a violation of the Constitution. While the Executive may hope to bolster its ability to fight the War on Terror by denying individuals like Khalid Sheikh Mohammed the right to due process, the cost of these actions is far too great. By turning its back on the very rights it is sworn to protect, the Federal Government is eroding the foundation of America's legal culture and

jeopardizing the very principles it is hoping to protect through the War on Terror. The only course of action that the Executive can take to correct these missteps is to stop the practice of indefinite detention and grant suspected terrorists like Khalid Sheikh Mohammed access to the federal court system.