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Katherine Nesbitt, Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis, 17 B.U. PUB. INT. L.J. 39 (2007).

ALWD 7th ed.

Katherine Nesbitt, Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis, 17 B.U. Pub. Int. L.J. 39 (2007).

APA 7th ed.

Nesbitt, Katherine. (2007). Preventative detention of terrorist suspects in australia and the united states: comparative constitutional analysis. Boston University Public Interest Law Journal , 17(1), 39-98.

Chicago 17th ed.

Katherine Nesbitt, "Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis," Boston University Public Interest Law Journal 17, no. 1 (Fall 2007): 39-98

McGill Guide 9th ed.

Katherine Nesbitt, "Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis" (2007) 17:1 BU Pub Int LJ 39.

AGLC 4th ed.

Katherine Nesbitt, 'Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis' (2007) 17(1) Boston University Public Interest Law Journal 39

MLA 9th ed.

Nesbitt, Katherine. "Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis." Boston University Public Interest Law Journal , vol. 17, no. 1, Fall 2007, pp. 39-98. HeinOnline.

OSCOLA 4th ed.

Katherine Nesbitt, 'Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis' (2007) 17 BU Pub Int LJ 39
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PREVENTATIVE DETENTION OF TERRORIST SUSPECTS IN AUSTRALIA AND THE UNITED STATES: A COMPARATIVE CONSTITUTIONAL ANALYSIS

KATHERINE NESBITT*

Since the September 11th terrorist attacks, the United States and Australian governments have asserted that the threat of terrorism requires the adoption of preventative detention strategies to authorize the arrest and detention of terrorists before they carry out their horrific acts. Yet, the United States and Australia have diverged over whether to authorize such detention through new legislation or through executive orders and the expansive interpretation of existing laws. In the United States, the Bush Administration has adopted pretextual measures authorizing the preventative, and potentially indefinite, detention of terrorist suspects as "enemy combatants" or "material witnesses." In Australia, Parliament placed preventative detention directly into its Criminal Code, authorizing the imposition of preventative detention and control orders in cases of terrorism.

This Article examines and compares the unique preventative detention strategies employed by the U.S. and Australia in the "war on terrorism," and analyzes their constitutionality in light of the U.S. Supreme Court and Australian High Court precedents addressing administrative detention. The United States Supreme Court, armed with the Bills of Rights, has been more assertive than its Australian counterpart in striking down detention schemes, which authorize indefinite regulatory detention without charges. Nevertheless, the preventative detention strategies employed by the United States are far more intrusive of individual liberties than the Australian legislative model. While the Australian measures incorporate more procedural protections and safeguards from abuse than their U.S. counterpart, and, therefore, are the more favored approach, neither scheme is consistent with the fundamental principles and values underlying both the U.S. and Australian systems of criminal justice and due process.

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I. INTRODUCTION

In response to the terrorist attacks of September 11th, 2001, as well as the more recent attacks in Bali, Madrid, and London, both Australia and the United States, two of the closest allies in the “war on terror,” have shifted away from a traditional focus on the investigation and prosecution of crimes to the prevention of future attacks. In the days following September 11th, U.S. Attorney General John Ashcroft said in a written statement to the Senate Committee on the Judiciary:

The new terrorist threat to America is on our soil, and that makes it a turning point in history. It is a new challenge to law enforcement. Our fight against terrorism is not merely or primarily a criminal justice endeavor. It has to be a defensive and prevention endeavor. We cannot wait for terrorists to strike to begin investigations. The death tolls are too high, the consequences are too great. We must *prevent first, prosecute second*.¹

Australian Attorney-General Phillip Ruddock echoed these sentiments, stating: “[t]he law should operate as both a sword and a shield—the means by which offenders are punished but also the mechanism by which crime is prevented.”²

To this end, the Australian and the United States governments have adopted “preventative detention” policies which set lower standards for law enforcement officers to arrest and detain citizens and non-citizens alike in the scope of a terrorism investigation. Yet, while the two countries agree that the threat of terrorism warrants the use of preventative detention, each has adopted a strikingly different approach. In the United States, Congressional anti-terrorism legislation does not directly address the issue of preventative detention. Rather, the United States government has effected preventative detention through executive orders authorizing the detention of suspected terrorists as enemy combatants in Guantánamo Bay or through pretexts such as detention under the “material witness statute”—a statute which authorized the detention of individuals as witnesses to the grand jury investigations into the September 11th attacks.³ By labeling the detainees wartime combatants or witnesses rather than criminal suspects, the United States government aims to sidestep constitutional protections for criminal defendants while purporting to leave those safeguards in tact. Yet, in the end, the government’s policies do nothing more than create a parallel system of lawless and indefinite detention which violates the very principles which the Constitution supposedly protects. For this reason, the U.S. strategy

¹ *Homeland Defense: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 8, 9 (2001) (statement of John Ashcroft, Attorney Gen. of the United States) (emphasis added).

² Phillip Ruddock, Attorney Gen. of Australia, Legal Framework and Assistance to Regions, presentation before the Regional Ministerial Counter-Terrorism Conference in Bali, § 49 (Feb. 2004), available at http://www.ema.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_February_2004_-_Speech_-_Bali.

³ See *infra* Part III.

toward preventative detention has been characterized as “extra legal,” or as one scholar put it, “at the edges of the law.”⁴

In contrast, the Australian Parliament has placed preventative detention directly into the Criminal Code. Recent Australian anti-terrorism legislation has armed law enforcement and judicial officials with the authority to preventatively detain suspected terrorists, citizens and non-citizens alike, as well as the power to impose control orders which place significant limitations on individuals’ freedom of movement, ranging from travel restrictions to house arrests.⁵ Compared to the U.S. preventative detention measures, the Australian laws are more narrowly tailored and incorporate far more safeguards and procedural protections. At the same time, by legitimizing detention without trial through its incorporation into the Criminal Code, the Australian strategy sets a dangerous precedent which conflicts with the fundamental protections of the criminal justice system.

In both countries, these “preventative detentions” raise significant individual rights and constitutional issues regarding the scope of each government’s power to detain individuals within its borders without charge. Both the Australian and United States courts have recognized that their respective constitutions limit each government’s authority to detain individuals without charge.⁶ Indeed, courts in both jurisdictions have held that, as a general rule, the government cannot detain individuals absent an adjudication of guilt through the judicial process.⁷ The United States Supreme Court recognizes these principles in the Bill of Rights, specifically the Due Process Clauses of the Fifth and Fourteenth Amendments.⁸ In Australia, though the Commonwealth Constitution provides no similar express rights-based protections, the High Court has recognized limitations on the government’s authority to detain under separation of powers principles.⁹

This Article explores and compares the preventative detention policies of the United States with those of Australia to develop an understanding of the different constitutional approaches to administrative detention, the significance of rights protections, and the role of the courts in the so-called “war on terror.” While the caselaw addressing the scope of preventative detention has not set clear limits on the government’s authority to preventatively detain, I argue that both countries’ policies are constitutionally invalid and conflict with principles of due process and separation of powers. The detention policies in both the United States and Australia are overbroad and lack adequate procedural protec-

⁴ See Kent Roach, *The World Wide Expansion of Anti-Terrorism Laws After 11 September, 2001*, 3 *Studi Senesi* 487, 520 (2004).

⁵ See *infra* Part IV.

⁶ See *infra* Part II.

⁷ *Id.*

⁸ U.S. CONST. amend. V, XIV; see *infra* Part II.A.

⁹ See *infra* Part II.B.

tions against miscarriages of justice. Moreover, even if both countries adopt certain procedural protections, the substantive constitutionality of preventively detaining terrorist suspects found within the country's borders remains highly questionable absent an imminent threat or emergency.

Part Two of this Article discusses and compares the constitutional constraints on preventative detention in the United States and Australia given their distinct systems of government. Part Three outlines the United States' preventative detention strategies since September 11th, specifically, the "material witness" detentions and the military detention of "enemy combatants." Part Three also analyzes various constitutional problems with the current U.S. approach. Part Four discusses and compares Australia's recent anti-terrorism legislation authorizing preventative detention and analyzes the legality of such measures under Australia's Commonwealth Constitution. Finally, I set forth my conclusions regarding the Australian and United States' post-September 11th preventative detention strategies and the court's role in balancing security and individual rights in the age of terrorism.

II. CONSTITUTIONAL CONSTRAINTS ON PREVENTATIVE DETENTION IN THE UNITED STATES AND AUSTRALIA

Both the United States Supreme Court and the Australian High Court have recognized that preventative detention conflicts with well-established principles of English common law and criminal procedure. Those principles were set forth in the Petition of Right of 1628, and later the Habeas Corpus Acts of 1641 and 1679, which the British Parliament passed in response to the imprisonment without charge of hundreds of alleged traitors by King Charles I pursuant to a decree of "executive prerogative."¹⁰ Those Acts required, among other things, that in cases of imprisonment for any "criminal or supposed criminal matters," detainees must either be released or quickly brought to trial.¹¹ As William Blackstone explained:

To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order

¹⁰ See ROBERT S. WALKER, *The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty* 59 (1960). Five of the detainees imprisoned by King Charles I protested their indefinite imprisonment in Darnel's Case. See 3 St. Tr. 1 (K.B. 1627). Arguing that the Crown was required to charge them with a crime for which they could be tried, the King's attorney claimed that the imprisonment was by "special command of the majesty" and were "matters of the state" that were not "ripe or timely" for the ordinary criminal process. *Id.* at 37. The Court agreed and refused to free the prisoners. *Id.* at 59.

¹¹ See Petition of Right, 3 Car. 1, c. 1, §§ 5, 10; Habeas Corpus Act of 1679, 31 Car. 2, c. 2, §§ 3, 7 (cited in *Hamdi v. Rumsfeld*, 542 U.S. 507, 557-58 (2004) (Scalia, Stevens, JJ., dissenting)).

to be examined into (if necessary) upon a habeas corpus. If there be no cause expressed, the gaoler is not bound to detain the prisoner. For the law judges in this respect, . . . that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.¹²

Thus, under common law, detainees were not only ensured judicial “habeas” review of executive detention orders, but also had a right to be promptly charged and brought to trial or released.¹³

These principles are the foundation of the criminal justice systems in both the United States and Australia. In both countries, the law requires that an arrest by law enforcement authorities be supported by reasonable or probable cause that a crime was committed.¹⁴ The law also requires that suspects be brought promptly before a magistrate, charged with a crime, and quickly brought to trial.¹⁵ In Australia, the Crimes Act 1914 requires that individuals held for serious offenses may be held without charge for a maximum of twelve hours, and in the case of terrorist suspects, a maximum of twenty-four hours applies.¹⁶ In the United States, the Supreme Court has interpreted the Fourth Amendment to require that suspects be brought before a magistrate and charged with a crime as soon as possible and never later than forty-eight hours after arrest.¹⁷

Nevertheless, the constitutional limits on preventative detention in Australia and the United States are distinct. In the United States, individual liberties are

¹² W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 102 (Wayne Morrison ed., Cavendish Publishing Limited 2001) (1765), *quoted in* Chu Kheng Lim v. Minister of Immigration (1992) 176 C.L.R. 1, 27-28 (Deane, Brennan, Dawson, JJ.) and Hamdi v. Rumsfeld, 542 U.S. 507, 554-79 (2004) (Scalia, Stevens, JJ., dissenting) (citing T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 244 (1880) (“When life and liberty are in question, there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal, with proper jurisdiction, and a conviction and judgment before the punishment can be inflicted.”)(internal quotation marks omitted)).

¹³ See *supra* notes 11-12.

¹⁴ In the United States, the Fourth Amendment requires that the government establish probable cause before a person may be legally arrested and held in pretrial detention. *Gerstein v. Pugh*, 420 U.S. 103 (1975). In Australia, common law and statutory law require that arrests be made based on “reasonable suspicion.” See, e.g., Crimes Act 1900 (NSW).

¹⁵ The United States Constitution ensures that defendants receive a speedy trial. U.S. CONST. amend. VI. Under the U.S. Speedy Trial Act, a defendant’s trial must start within 70 days from the date the information or indictment was filed, or from the date the defendant appears before an officer of the court in which the charge is pending, whichever is later. 18 U.S.C. § 3161(c)(1) (2000). In Australia, there is no equivalent right to a speedy trial, although delays which prejudice a defendant may affect the indictment. See *Jago v. District Court of New South Wales* (1989) 168 C.L.R. 23 (holding that there is no right to a speedy trial; delays without prejudice will be insufficient to justify a stay of the indictment).

¹⁶ Crimes Act, 1914, §§ 23C, 23D, available at <http://www.comlaw.gov.au>.

¹⁷ See *Gerstein*, 420 U.S. at 103.

protected by both a system of separation of powers as well as by express rights protections in the Bill of Rights.¹⁸ In particular, the Due Process Clauses of the Fifth and Fourteenth Amendments provide strong substantive and procedural protections from government deprivations of individual rights, including the right to physical liberty.¹⁹ Moreover, where fundamental rights are at issue, these due process protections apply with equal force at both the state and federal level.²⁰

Australia's Commonwealth Constitution, on the other hand, does not incorporate a bill of rights. In drafting the Constitution, Australia's framers rejected a bill of rights like that of the United States, reasoning that under the doctrine of parliamentary sovereignty, civil liberties are sufficiently protected through the common law and the democratic process.²¹ In theory, if Parliament oversteps its bounds, its members would be elected out of government and any breach of liberties would be corrected.²² While there has been recent success at the state and territory level at installing statutory charters protecting human rights, movements to install a charter of rights in the Commonwealth Constitution failed.²³

This is not to say that there are no protections for individuals from arbitrary detention in Australia. Like the United States Constitution, the Australian Constitution incorporates a separation of powers doctrine which defines and limits the powers of each branch of government. Based on separation of powers principles, the High Court recognized certain limited due process protections in the

¹⁸ See generally, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6 (Aspen Publishers 1997).

¹⁹ U.S. CONST. amend. V, XIV.

²⁰ CHEMERINSKY, *supra* note 18, at 378-85.

²¹ See GEORGE WILLIAMS, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION 25-45, 33 (Oxford University Press 2002) (1969). See also *Australia Capital Television v. Commonwealth* (1992) 77 C.L.R. 106, 136 (Mason, C.J.) ("The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy So it was that Professor Harrison Moore, writing in 1901, was able to say of the Constitution: '[t]he great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power.'").

²² WILLIAMS, *supra* note 21, at 39-40.

²³ In March 2004, the Australian Capital Territory ("ACT") Parliament passed the Human Rights Act which enumerates certain human rights and grants the Supreme Court of the ACT power to declare a law incompatible with the rights therein. *Id.* at 66-67. Yet, unlike the U.S. system, the rights protections are statutory, not constitutional, and laws which are deemed incompatible with the rights are not immediately nullified, but referred back to Parliament for further consideration. See *id.* at 66-76. More recently, Victoria also passed a similar statutory charter of rights, and other states expressed interest in following in the ACT's and Victoria's footsteps. Charter of Human Rights and Responsibilities, Vic. Acts (2006).

Constitution.²⁴ Indeed, Justice Deane stated that the implied separation of judicial power set forth in Chapter III is “the Constitution’s only general guarantee of due process.”²⁵ These protections ensure that federal judicial power may only be wielded by Chapter III courts, and likewise the judiciary may not exercise non-judicial power.²⁶ Moreover, Australia lacks a counterpart to the Fourteenth Amendment, and thus protections at the state level are weaker. State courts are free to exercise non-judicial power as long as such powers are not “incompatible” with federal judicial power.²⁷

The due process protections of the U.S. Bill of Rights and the separation of powers principles in Australia overlap considerably in cases of preventative detention. Both courts recognized that freedom from imprisonment is a fundamental liberty and, as a general rule, detention may only be imposed by the courts pursuant to an adjudication of guilt by trial. The U.S. Supreme Court made clear that “[f]reedom from imprisonment—from government custody, detention or other forms of physical restraint—lies at the heart of the liberty that the [Due Process] Clause protects.”²⁸ Likewise, Justice Callinan of the Australian High Court stated that the right to personal liberty is “the most elementary and important of all common law rights,” the deprivation of which is a grave step.²⁹

Yet, as illustrated by the cases below, the constitutional constraints on preventative detention are stronger in the United States than in Australia. In Australia, the High Court, adhering to principles of parliamentary sovereignty, has

²⁴ See generally *R v. Kirby*; *Ex parte Boilermakers’ Society of Australia* (1956) 94 C.L.R. 254 [hereinafter *Boilermakers Case*]; *Polyukhovich v. The Queen* (1991) 172 C.L.R. 501.

²⁵ *Re Tracey*; *Ex parte Ryan* (1989) 166 C.L.R. 518, 580 (Deane J.). See also The Honorable Justice M. H. McHugh, Speech at the New South Wales Bar Association: Does Chapter III of the Constitution protect substantive as well as procedural rights? (October 17, 2001), available at <http://www.nswbar.asn.au/docs/resources/lectures/byers01.pdf> (stating that the “interpretation of Chapter III has revealed a number of procedural and substantive due process rights within its provisions.”).

²⁶ *Boilermakers’ Case*, 94 C.L.R. at 271.

²⁷ *Kable v. Director of Public Prosecutions* (1996) 189 C.L.R. 51, 77-79 (Dawson, J.); 101-05 (Gaudron, J.); 11218 (McHugh, J.); 82-86 (Dawson, J.).

²⁸ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). See also *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“Without doubt, [the liberty defined by the Fourteenth Amendment] denotes not merely freedom from bodily restraint,” but other privileges long recognized at common law.).

²⁹ *MIMIA v. Al Khafaji*, (2003) 219 C.L.R. 664, 678 (Callinan J.). See also *Fardon v. Attorney-General (Queensland)* (2004) 223 C.L.R. 575, 150 (Kirby J., dissenting) (“In Australian law, personal liberty has always been regarded as the most fundamental of rights. Self-evidently, liberty is not an absolute right. However to deprive a person of liberty, where that person is otherwise entitled to it, is a grave step.” (footnotes omitted)).

exercised extreme deference in reviewing preventative detention laws, upholding executive detention as long as it furthers a “non-punitive” purpose.³⁰ The U.S. Supreme Court similarly directed that preventative detention further a “non-punitive” purpose, but also required that the detention serve a compelling government interest and afford sufficient procedural protections.³¹ Consequently, U.S. courts examine cases of preventative detention with closer scrutiny than their Australian counterparts and are more aggressive in striking down laws that impose indefinite executive detention.

A. *United States: Due Process Constraints on Preventative Detention*

The Due Process Clauses of the Fifth and Fourteenth Amendments provide that neither the federal nor state governments shall deprive a person of life, liberty, or property.³² The right to be free from physical restraint, however, is distinct from other constitutional liberties in that it not only raises issues regarding the balance between government regulatory interests and individual liberties, but also implicates the protections of the criminal justice system. Accordingly, the Supreme Court has stated that “government detention violates [the Due Process Clause] unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and ‘narrow’ non-punitive ‘circumstances’ where a special justification, such as a harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’”³³

The Supreme Court has applied this balancing test to limit the government’s authority to detain individuals indefinitely. A recent application of these principles was set forth in *Zadvydas v. Davis* where the Court held that the indefinite detention of non-citizens in immigration proceedings is incompatible with due process.³⁴ The two petitioners in that case were denied entry into the United States, but Immigration and Naturalization Service officials were unable to deport them to another country, and thus they remained in immigration detention indefinitely.³⁵ In a 5-4 decision, the Court held that a statute authorizing indefinite immigration detention would raise a “serious constitutional problem.”³⁶ The Court thus held that the statute must be construed to require release after six months if removal is no longer reasonably foreseeable.³⁷

³⁰ See *infra* Part II.B.

³¹ See *infra* Part II.A.

³² U.S. CONST. amend. V. (“No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .”); U.S. CONST. amend. XIV. (“nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .”).

³³ *Zadvydas*, 533 U.S. at 690 (citations omitted).

³⁴ *Id.* at 690-702.

³⁵ *Id.* at 682.

³⁶ *Id.* at 690.

³⁷ *Id.* at 701.

The Court assumed that the immigration detention was “non-punitive” in nature.³⁸ Nevertheless, the inquiry did not end there. The Court held that even “non-punitive” regulatory detention requires a “special justification” which “outweighs ‘the individual’s constitutionally protected interest in avoiding physical restraint.’”³⁹ Applying this standard, the Court found that in the instant case, “no sufficiently strong special justification” existed for the indefinite detention of inadmissible aliens.⁴⁰ The statute’s first purported goal, “ensuring the appearance of aliens at future immigration proceedings,” was weak or non-existent where removal is a remote possibility.⁴¹ The Court further held that indefinite detention was not justified by the second statutory goal: “[p]reventing danger to the community.”⁴² The Court found that the only special circumstance was the alien’s status, which “bears no relation to a detainee’s dangerousness.”⁴³

While in the case of *Zadvydas*, the Court’s balancing approach secured strong protections for aliens from indefinite detention, the Court has also applied this approach to justify the expansion of preventative detention beyond its traditional and historical purposes.⁴⁴ In *Salerno v. United States*, the Court upheld the constitutionality of the Bail Reform Act of 1984, an act which authorized judges to deny bail in cases of serious crimes where a court found by clear and convincing evidence that the accused was likely to commit future crimes if released.⁴⁵ Consistent with historical tradition, the prior act permitted a court to deny bail only on grounds related to risk of flight or other bases related to maintaining the integrity of the trial.⁴⁶ The Bail Reform Act marked a significant departure from this tradition by authorizing pretrial detention based solely on dangerousness.⁴⁷

In upholding the Act, the Court acknowledged that the right to be free of physical restraint is a fundamental one, but found that the government’s interest in protecting the community from dangerous pretrial detainees is sufficiently

³⁸ *Id.* at 690.

³⁹ *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

⁴⁰ *Id.*

⁴¹ *Id.* (citations omitted).

⁴² *Id.* at 690-91.

⁴³ *Id.* at 691-92.

⁴⁴ See, e.g., *Salerno v. United States*, 481 U.S. 739 (1987).

⁴⁵ *Id.* (citing 18 U.S.C. § 3141 *et seq.*).

⁴⁶ See John B. Howard, Jr., *The Trial of Pretrial Dangerousness: The Trial of Pretrial Detention after United States v. Salerno*, 75 VA. L. REV. 639, 641-53 (1989) (summarizing legislative history). See also *Bell v. Wolfish*, 441 U.S. 520 (1979) (citing 18 U.S.C. 3146 (1979) and explaining that under the Act “a person in the federal system is committed to a detention facility only because no other less drastic means can reasonably ensure his presence at trial”).

⁴⁷ See *Salerno*, 481 U.S. at 755.

“compelling” to outweigh this important right.⁴⁸ Moreover, the Court reasoned, the law was narrowly tailored to the government’s “non-punitive” purpose.⁴⁹ The Act was narrowly focused on those cases where probable cause that the individual committed a serious crime had been established.⁵⁰ In addition, the Court held that the procedural protections were adequate.⁵¹ The Act required that dangerousness be established by clear and convincing evidence, provided for right to counsel, established clear guidelines for determining the appropriateness of detention, required a judicial officer to include written findings of fact and conclusions of law, and provided for immediate appellate review.⁵²

As in *Zadvydas*, the Court’s analysis in *Salerno* emphasized the need for extensive safeguards and a compelling reason for preventative detention. Yet, the Court’s decision also marked an expansion of regulatory detention, an “entering wedge” as one commentator put it,⁵³ to broader schemes of preventative detention to protect community safety. As Justice Marshall pointed out in his dissent, if an indictment alone is a sufficient justification to detain a presumptively innocent person upon a showing of dangerousness, a person could be detained even after an acquittal of all charges.⁵⁴ Such an outcome, he concluded, would be constitutionally impermissible because “that would allow the Government to imprison someone for uncommitted crimes based upon ‘proof’ not beyond a reasonable doubt.”⁵⁵ Yet, by upholding the legislative scheme, the majority’s decision calls these basic principles into doubt, leaving open whether preventative detention may be constitutionally permissible where the defendant has not been charged with a crime at all.

While *Salerno* appeared to open the door to detention based solely on dangerousness in the United States, the Court’s later decision in *Foucha v. Louisiana* arguably closed it.⁵⁶ In *Foucha*, the Court found unconstitutional a Louisiana statute which authorized the continued and indefinite preventative detention of persons found not guilty by reason of insanity, but who, after treatment, recovered from their mental illness.⁵⁷ The statute’s basis for the deten-

⁴⁸ *Id.* at 750-51.

⁴⁹ *Id.* at 749-51.

⁵⁰ *Id.* at 750.

⁵¹ *Id.* at 751-52.

⁵² *Id.* at 751.

⁵³ See Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventative Detention*, 84 N.C. L. REV. 77, 82 (2005) (describing *Salerno* as the “opening move” and or “entering wedge” to preventative detention of terrorists) (quoting an 1807 Congressional statement by Representative Randolph objecting to a bill by President Jefferson suspending habeas corpus for three months)).

⁵⁴ *Salerno*, 481 U.S. at 763-65 (Marshall, Brennan JJ., dissenting).

⁵⁵ *Id.*

⁵⁶ *Foucha v. Louisiana*, 504 U.S. 71 (1992).

⁵⁷ *Id.* at 74-76.

tion was that the acquittee was considered dangerous to the community even though he or she was no longer mentally ill.⁵⁸

The Court held that the Louisiana statute violated due process, finding that the government failed to set forth a compelling reason for the confinement of a person who is no longer mentally ill, but still may be dangerous.⁵⁹ Significantly, the Court reasoned that the Louisiana scheme was constitutionally flawed because it authorized commitment based on dangerousness alone.⁶⁰ The Court made clear that to allow the indefinite detention of persons who were dangerous and merely antisocial, would "be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law."⁶¹ Moreover, the Court pointed out that if the State believed that Foucha was dangerous because of unlawful behavior in his commitment facility, the government was well within its power to bring charges against him under the ordinary criminal processes.⁶² Given that Foucha was acquitted on the criminal charges, the majority found that there was no basis for his continued detention.⁶³ The Court concluded, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."⁶⁴

Indeed, the only time the Court suggested that preventative detention based solely on dangerousness is permissible was during World War II when the government detained tens of thousands of Japanese-American citizens in the name of national security.⁶⁵ Yet, even in those cases, which today are considered questionable precedent,⁶⁶ the Supreme Court avoided directly addressing the legality of the detention measures, instead only upholding the curfew and exclusion orders.⁶⁷ In *Ex parte Endo*, the Court ordered the government to release petitioner Mitsuye Endo, an American citizen of Japanese ancestry, from her prolonged detention in a Relocation Center, finding her detention unlawful given that the government had already determined that she was a loyal citizen.⁶⁸ The Court, however, declined to decide broader questions of the validity

⁵⁸ *Id.*

⁵⁹ *Id.* at 80.

⁶⁰ *Id.* at 77-78.

⁶¹ *Id.* at 83.

⁶² *Id.* at 82.

⁶³ *Id.* at 82-83.

⁶⁴ *Id.* at 83 (quoting *Salerno v. United States*, 481 U.S. 739, 775 (1987)).

⁶⁵ *See, e.g., Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

⁶⁶ *Korematsu v. United States*, 584 F. Supp. 1406, 1416-17 (N.D. Cal. 1984) (vacating conviction of *Korematsu* as a "grave injustice").

⁶⁷ *Korematsu*, 323 U.S. 214 (upholding exclusion orders); *Hirabayashi*, 320 U.S. 81 (upholding curfew orders).

⁶⁸ *Endo*, 323 U.S. 283.

and constitutionality of the detention policy, instead deciding that as a matter of statutory construction, Endo must be released.⁶⁹ Acknowledging that the executive should be given a "wide scope" for the exercise of judgment so as to win the war, the Court cautioned that it must be mindful of the constitutional protections from detention afforded individuals in interpreting a law which restrains physical liberty.⁷⁰

In short, the scope of the executive's power to detain under the Constitution is unclear and has been debated by courts and scholars alike.⁷¹ While thus far, the Court has limited preventative detention to certain well-recognized categories, such as immigration or civil commitment, it has deliberately left open the possibility that preventative detention may be extended to other areas. The Court's balancing approach ensures that preventative detention laws are subject to close judicial scrutiny. Detention must be narrowly tailored to a compelling non-punitive purpose and must incorporate safeguards, including a fair hearing for the detainee and reasonable limits on the length of detention. Yet, simultaneously, the Court's approach also threatens rights once thought to be sacrosanct in the criminal justice system. The right to charges and a trial, which are considered absolute, may be balanced away in favor of "compelling" government interests. Given that public safety and protection is always a compelling interest, a balancing test gives little assurance that rights afforded individuals subject to criminal investigations are secure.

B. *Australia: Separation of Powers as a Constitutional Constraint on Preventative Detention*

In Australia, the High Court initially proposed protections from executive detention which were similar, if not stronger, than the standard set forth by the U.S. Supreme Court.⁷² In *Chu Kheng Lim v. Minister for Immigration*, Justices Brennan, Deane, and Dawson grounded the protections from arbitrary executive detention in the separation of judicial power, stating that aside from certain narrow exceptions, detention is punitive in nature and "exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt."⁷³ Accordingly, they concluded that citizens enjoy a general "constitu-

⁶⁹ *Id.* at 297-98.

⁷⁰ *Id.* at 298-303.

⁷¹ See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1031-37 (2004) (arguing in favor of preventative detention in times of declared emergency); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1755 (2004); Owen Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional*, 112 YALE L.J. 1011 (2003); Laurie L. Levenson, *Detention, Material Witnesses & The War on Terrorism*, 35 LOY. L.A. L. REV. 1217 (2002); Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 CARDOZO L. REV. 2151, 2196 (2006).

⁷² *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1.

⁷³ *Id.* at 27.

tional immunity” from imprisonment by the Commonwealth government.⁷⁴

As in the United States, the High Court Justices acknowledged certain well-established exceptions to the general bar on executive detention—such as immigration, civil commitment, military, and pretrial detention—but indicated that any extension of the list of categories would be subject to close scrutiny.⁷⁵ The Court firmly cautioned that the legislature could not cloak a law authorizing arbitrary executive detention with some purportedly legitimate, “non-punitive” purpose so as to render it constitutional:

[T]he Constitution’s concern is with substance and not mere form. It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt.⁷⁶

The Court concluded that a detention law must be limited to what is reasonably necessary for its non-punitive purposes, suggesting that the law must be both proportional and narrowly tailored to the government’s regulatory purpose.⁷⁷

However, recent High Court decisions on preventative detention have dismantled the *Chu Kheng Lim* opinion, dismissing its rule of constitutional immunity from detention outside the criminal process. As a result, the scope of executive detention in Australia is substantially broader, even beyond that which is permissible under the U.S. Constitution. For example, the Supreme Court held that the indefinite detention of inadmissible aliens is unconstitutional.⁷⁸ However, the High Court reached the opposite conclusion in *Al-Kateb v. Godwin*, upholding the indefinite detention of aliens under Australia’s Migration Act.⁷⁹ Like the petitioners in *Zadvydas*, the government rejected Al-Kateb’s visa application and, as a “stateless” person, the government was unable to deport him, at least not anytime in the foreseeable future.⁸⁰ Al-Kateb petitioned for release, arguing that his indefinite detention by the Executive was punitive and therefore usurped the exclusive power of the Judiciary to issue detention orders.⁸¹

In a 4–3 decision, the High Court rejected Al-Kateb’s claim, finding no con-

⁷⁴ *Id.* at 28. As support for their reasoning, the justices cited BLACKSTONE, *supra* note 12.

⁷⁵ *Chu Kheng Lim*, 176 C.L.R. at 28-29.

⁷⁶ *Id.* at 27.

⁷⁷ *Id.* at 33.

⁷⁸ See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

⁷⁹ See Migration Act, 1958, §§ 189, 196, 198 (Austl.); *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562.

⁸⁰ See *Al-Kateb*, 219 C.L.R. 562.

⁸¹ *Id.*

stitutional obstacle to indefinite immigration detention.⁸² The Court held that the detention of aliens continued to serve a "non-punitive" purpose even where the detainee had no prospect of being deported in the foreseeable future.⁸³ The majority adopted an extremely narrow view of what constituted punitive detention, suggesting that the detention scheme was permissible as long as it fell within the legislative grants of power.⁸⁴ Justice Hayne, for example, concluded that the line between punitive and non-punitive detention should turn upon "the connection between such detention and the relevant head of power, not upon the identification of detention as a step that can *never* be taken except in exercise of judicial power."⁸⁵

Justices McHugh and Callinan likewise concluded that the Migration Act's mandatory detention provisions maintain their non-punitive purpose even though prospects of deportation or admission have disappeared.⁸⁶ They noted that even indefinite detention of aliens furthered the non-punitive purpose of prohibiting aliens from entering Australia.⁸⁷ This explanation significantly broadened the Court's earlier justification for the detention of aliens, which was based on the administration of deportation and admission applications.⁸⁸ According to Justice McHugh, the length of immigration detention is a matter for the legislature, not the courts:

It is not for the courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.⁸⁹

Applying Justice McHugh's reasoning, a law may infringe on the most fundamental human rights, but it will not be found punitive as long as it relates to immigration and aliens.

The High Court addressed a separate but related question: whether the Judiciary (as opposed to the Executive) has the authority to preventatively detain individuals outside the traditional criminal process. In *Kable v. Director of*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 648 (Hayne, J.).

⁸⁶ *Id.* at 584, 658.

⁸⁷ *Id.* at 584-85, 658.

⁸⁸ *See, e.g., Koon Wing Lau v. Calwell* (1949) 80 C.L.R. 533, 555-56 (Latham, C.J.) ("The power to hold [the petitioner] in custody is only a power to do so pending deportation and until he is placed on board a vessel for deportation and on such a vessel and at ports at which the vessel calls. If it were shown that detention was not being used for these purposes the detention would be unauthorized and a writ of habeas corpus would provide an immediate remedy.").

⁸⁹ *Id.* at 595 (McHugh, J.).

Public Prosecutions, the High Court held that the Community Protection Act, which empowered the Supreme Court of New South Wales ("NSW") to make "preventive detention orders," was unconstitutional.⁹⁰ Section 5(1) of the Act authorized the NSW court to order that:

[A] specified person be detained in prison for a specified period if it is satisfied, on reasonable grounds: (a) that the person is more likely not to commit a serious act of violence; and (b) that it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody.⁹¹

Under the Act, a person may be detained for a maximum of six months; however, consecutive orders may be imposed without limit.⁹² Justice McHugh also notes that the Act removes traditional protections by "declaring the proceedings to be civil proceedings" and applying the civil rules of evidence.⁹³ However, the Act was applied only to Gregory Wayne Kable, a detainee who had been convicted for the manslaughter of his wife, who, while in prison, had written letters threatening the safety of his sister-in-law and children.⁹⁴

The High Court held the Act unconstitutional because it assigned a function to the NSW Supreme Court that was "incompatible" with the exercise of judicial functions under Chapter III.⁹⁵ The Court reasoned that although state courts are not directly subject to Chapter III constraints on federal judicial power, they may not be vested with powers "incompatible" with judicial power, given their jurisdiction over certain federal matters.⁹⁶ The majority found several flaws in this legislation. First, the Act only targeted Gregory Kable, thus constituting a legislative judgment, and second, it required the Court to issue a detention order without adhering to traditional judicial processes.⁹⁷ Justice

⁹⁰ See generally *Kable v. Director of Public Prosecutions* (1996) 189 C.L.R. 51.

⁹¹ See Community Protection Act, 1994 (NSW) § 5 (Austl.).

⁹² See *id.* §§ 5(2), 5(4).

⁹³ See *Kable*, 189 C.L.R. at 122. However, further provisions amended and broadened the scope of the admissibility of certain evidence. See *id.* at 120-21 (McHugh, J.) (noting that § 17(3) effectively negates § 17(1)(a), which states that the Court is bound by the rules of evidence).

⁹⁴ See *id.* at 52; Community Protection Act § 3.

⁹⁵ See *Kable*, 189 C.L.R. 51. A majority of the Justices (Brennan, C.J., Dawson, J., Toohey, J., McHugh, J.) rejected Kable's first argument that the Act violated the separation of judicial power under the Constitution Act (1902) (NSW). See, e.g., *id.* at 77-79 (Dawson, J.). Justice Toohey explained that, unlike at the Commonwealth level, NSW does not have a strict separation of powers in its state constitution. *Id.* at 91-94. Thus, any argument that Parliament improperly exercised judicial power contrary to the NSW constitution must fail. *Id.*

⁹⁶ *Id.* at 77-79 (Dawson, J.); 101-05 (Gaudron, J.); 112-18 (McHugh, J.); 82-86 (Dawson, J.).

⁹⁷ See, e.g., *id.* at 99 (Toohey, J.) ("If the Act operated on a category of persons . . . different questions might arise. . . . But here the judicial power of the Commonwealth is

Toohy stated that, contrary to the traditional judicial process of adjudication and punishment for an unlawful act, the Act authorized the NSW Supreme Court “to participate in a process designed to bring about the detention of a person by reason of the Court’s assessment of what the person might do, not what the person has done.”⁹⁸ Other Justices provided similar reasoning, declaring the Act to be “repugnant” and impugning the integrity of the judiciary and the “antithesis of the judicial process.”⁹⁹ In addition, the Justices noted that the Act conflicted with the exercise of judicial power because it permitted the introduction of evidence that would not normally be admissible in traditional proceedings.¹⁰⁰

Subsequent decisions narrowed the *Kable* principle significantly. In *Fardon v. Attorney-General*, the High Court upheld a Queensland preventative detention scheme, distinguishing *Kable* as a “unique” case.¹⁰¹ Specifically, the Queensland Act authorized state courts to issue orders for the continuing preventive detention of convicted sex offenders who had served their terms of imprisonment, but were still considered a serious danger to the community.¹⁰² In holding that the Act was not “incompatible” with the exercise of judicial power, the majority distinguished the Queensland Act from the act in *Kable* because it incorporated the rules of evidence and was aimed at a class of individuals, rather than simply one person.¹⁰³ Chief Justice Gleeson emphasized the importance of procedural protections in upholding the Act:

The onus of proof is on the Attorney-General. The rules of evidence apply. The discretion is to be exercised by reference to the criterion of serious danger to the community. The Court is obliged . . . to have regard to a list of matters that are all relevant to that criterion. There is a right of appeal. Hearings are conducted in public, and in accordance with the ordinary judicial process. There is nothing to suggest that the Supreme Court is to act as a mere instrument of government policy. The outcome of each case

involved, in circumstances where the Act is expressed to operate in relation to one person only, the appellant, and has led to his detention without a determination of his guilt for any offen[s]e.”).

⁹⁸ *Id.* at 96-97 (Toohy, J.).

⁹⁹ *Id.* at 98 (Toohy, J.); 106-07 (Gaudron, J.). Justice McHugh stated that the Act impermissibly “removes the ordinary protections inherent in the judicial process” by departing from the traditional rules of evidence and removing the need to prove guilt beyond a reasonable doubt.” *Id.* at 122-23. Justice Gummow likewise found that the “most significant” feature of the legislation was that it was “punitive in nature, [but] . . . not consequent upon any adjudgment by the Court of criminal guilt.” *Id.* at 132.

¹⁰⁰ *See, e.g., id.* at 106-07 (Gaudron, J.).

¹⁰¹ *See, e.g., Fardon v. Attorney-General* (2004) 223 C.L.R. 575, 43 (McHugh, J.) (“*Kable* was the result of legislation that was almost unique in the history of Australia.”).

¹⁰² Dangerous Prisoners Act, 2003 § 8.

¹⁰³ *Id.* at 15-23 (Gleeson, C.J.).

is to be determined on its merits.¹⁰⁴

Likewise, Justice Gummow found that the “nature of the process for which the Act provides assumes particular importance.”¹⁰⁵

While *Fardon* was a significant setback for the protection of individual rights from preventative detention, the decision arguably is a narrow one. The Justices were careful to note that the detention in *Fardon* was authorized as a “consequential step in the adjudication of criminal guilt.”¹⁰⁶ Thus, *Fardon* is not necessarily inconsistent with the Supreme Court’s decision in *Foucha*, in which the defendant had been acquitted of criminal charges by reason of insanity.¹⁰⁷ Accordingly, *Fardon* does not necessarily undercut the argument that preventative detention, based solely on dangerousness and divorced from a criminal adjudication, violates Chapter III.

Unlike the U.S. Supreme Court, the High Court has expressly upheld the preventative detention of Australian citizens and residents as a legitimate exercise of Parliament’s war powers; however, such authority has been limited to circumstances of declared war.¹⁰⁸ The precedential value of these decisions is questionable. In *Al-Kateb v. Godwin*, Justice McHugh cited the wartime detention decisions as valid, binding precedent supporting the authority of Parliament to authorize executive detention without trial in times of war.¹⁰⁹ Justice Kirby took a different view, stating that the Australian internment cases are the “equivalent to the decision of the Supreme Court of the United States in *Korematsu v. United States* . . . [which] are now viewed with embarrassment in the United States and generally regarded as incorrect.”¹¹⁰ He opined that the Court, now strengthened by various post-war decisions limiting the government’s defense powers, would approach the matter differently if Australia were in the midst of a war.¹¹¹

In sum, neither the High Court nor the U.S. Supreme Court has set clear limits on the government’s power to detain individuals without charges. Both courts have recognized that as a general matter, preventative detention is inconsistent with due process and the right to liberty, but they also acknowledge that administrative detention may be permissible where it furthers a “non-punitive” purpose. The U.S. Supreme Court, equipped with a strong bill of rights, has provided additional assurances that preventative detention, if extended, will be

¹⁰⁴ *Id.* at 19 (Gleeson, C.J.).

¹⁰⁵ *Id.* at 90 (Gummow, J.).

¹⁰⁶ *Id.* at 80.

¹⁰⁷ See *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992).

¹⁰⁸ See *Lloyd v. Wallach* (1915) 20 C.L.R. 299, 307-308; *Little v. Commonwealth* (1947) 75 C.L.R. 94, 113.

¹⁰⁹ *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562, 588-89 (McHugh, J.) (stating that there is “no reason to think that [the High] Court would strike down similar regulations if Australia was again at war in circumstances similar to those of 1914-1918 and 1939-1945.”).

¹¹⁰ *Id.* at 620 (Kirby, J., dissenting).

¹¹¹ *Id.* at 621.

proportionate and carefully circumscribed with procedural safeguards. On the other hand, the Australian High Court has set the constitutional bar on preventative detention considerably lower, exercising extreme deference to the legislature regarding the legality of detention. In the end, the protections from preventative detention in both countries are precarious. While both Courts have set forth a broad constitutional framework for reviewing detention cases, they have both left questions regarding the scope of authority to preventatively detain individuals unresolved.

III. PREVENTATIVE DETENTION OF SUSPECTED TERRORISTS IN THE UNITED STATES: ENEMY COMBATANTS AND MATERIAL WITNESSES

Given the stronger due process protections for detainees under the U.S. Constitution, one might expect that preventative detention measures adopted by the U.S. government would be carefully limited and afford extensive procedural safeguards. Yet, this has not been the case. Instead of adopting narrowly tailored laws through the legislative process to arrest and preventatively detain suspected terrorists, the Department of Justice instead has relied on pretextual measures which have subverted the protections of the criminal justice system and intruded on fundamental individual rights. Law enforcement authorities have declared that suspects of terrorism could be arrested in the United States and preventatively detained as "material witnesses" to the government's grand jury investigations into the attacks of September 11th.¹¹² Alternatively, terrorist suspects also may be held in military detention as "enemy combatants."¹¹³

The arrest and indefinite detention of terrorist suspects in the United States as material witnesses or enemy combatants is constitutionally invalid. Both detention schemes are overbroad and not only skirt the constitutional protections of defendants in the criminal justice system, but also fail to incorporate necessary procedural protections and safeguards that are afforded in various other models of administrative detention. The Supreme Court has failed to address the deficiencies in these laws and has repeatedly ducked constitutional challenges to indefinite preventative detention in the age of terrorism. As a result, the United States, a country which is known for some of the strongest constitutional protections of individual rights in the world, has implemented a system of preventative detention which is far more draconian than those coun-

¹¹² See Alberto R. Gonzales, Counsel to the President, Remarks to American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004).

¹¹³ *Id.* The U.S. government also held approximately 600 suspects on immigration violations immediately following September 11th. The pretextual use of immigration laws to detain terrorist suspects is beyond the scope of this article, but has been discussed extensively in various recent books and law review articles. See generally DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003); Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U. L.J. 5 (2004).

tries like Australia with very limited constitutional safeguards for individual rights.

A. *The Material Witness Statute*

Following the terrorist attacks on September 11th, 2001, the U.S. Department of Justice and the FBI initiated an extensive terrorism investigation. Because in most cases the government lacked sufficient evidence to obtain criminal arrest warrants, Attorney General John Ashcroft directed federal law enforcement agencies to “use ‘every available law enforcement tool’ to arrest persons who ‘participate in, or lend support to, terrorist activities,’” including the material witness statute.¹¹⁴ Pursuant to this statute, at least seventy individuals were detained secretly in federal detention centers in the United States as material witnesses, while the government investigated whether they had ties to terrorist organizations.¹¹⁵

While several scholars and commentators describe these and similar cases as government “misuse” of the material witness statute, these cases also illustrate the constitutional problem with a statute authorizing detention of mere “witnesses” for extended periods of time without adequate procedural protections or charges.¹¹⁶ The current material witness statute is too broad and substantially infringes on individual liberty without compelling justification. Moreover, it lacks necessary procedural protections to guard against its misuse as an alternative to probable cause requirements for arrest and criminal charges.

¹¹⁴ OFFICE OF THE INSPECTOR GEN. U.S. DEP’T. OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS, at 8 (Apr. 2003), <http://www.usdoj.gov/oig/special/0306/full.pdf> (quoting Memorandum from Att’y Gen. to U.S. Attorneys entitled “Anti-Terrorism Plan” (Sept. 17, 2001)). John Ashcroft reportedly stated that the “[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting, or delaying new attacks.” See Cam Simpson, *Roundup Unnerves Oklahoma Muslims*, CHI. TRIB. Apr. 21, 2002, at C1.

¹¹⁵ See 18 U.S.C. § 3144 (2000); Human Rights Watch, *Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11*, at 16 (June 2005), <http://hrw.org/reports/2005/us0605/us0605.pdf> [hereinafter *Human Rights Watch*] (conducting separate research indicating that as of June 2005, the government has arrested at least seventy material witnesses in connection with the September 11th counter-terrorism investigation). The Justice Department, however, has refused to indicate the number of individuals held in secret detention under the material witness statute, claiming that the need to protect the secrecy of grand jury investigations and national security bars disclosure of any specific information that would be detrimental to the war on terrorism. See also John Ashcroft, Att’y Gen., Statement: Total Number of Federal Criminal Charges and INS Detainees (Nov. 27, 2001), available at http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks11_27.htm.

¹¹⁶ See Ricardo Bascuas, *The Unconstitutionality of “Hold Until Cleared”: Reexamining Material Witness Detentions in the Wake of September 11th Dragnet*, 58 VAND. L. REV. 677, 696 n.86 (2005) (collecting articles).

Under the statute, the federal government may arrest and detain a witness where it can establish that 1) the witness' testimony is material to the proceeding and 2) "it may become impracticable" to secure the presence of the witness by subpoena.¹¹⁷ Under the first prong, the government has an extraordinarily light burden to establish that the witness' testimony is material. Courts have required little, if any, factual basis to support an allegation that witness testimony is material to the proceeding.¹¹⁸ Indeed, in *Bacon v. United States*, the Ninth Circuit declared that "in the case of a grand jury proceeding, . . . a mere statement by a responsible official, such as the United States Attorney, is sufficient to satisfy [the materiality requirement]."¹¹⁹

Likewise, courts have been extremely deferential to government submissions in satisfying the second prong of the test—that it "may become impracticable" to serve a witness with a subpoena. Recent decisions have held that the government need not allege that the witness tried to evade service of a subpoena or show that it attempted to serve the subpoena.¹²⁰ Indeed, courts have granted arrest warrants for material witnesses even where the witness was shown to be cooperative in the police investigation.¹²¹ For example, after the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, authorities arrested Timothy McVeigh and charged him with crimes connected with the bombing.¹²² Two days later, a federal court in Oklahoma issued a material witness warrant for Terry Nichols, finding his testimony material to McVeigh's crimi-

¹¹⁷ 18 U.S.C. § 3144 provides:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

¹¹⁸ See *United States v. Awadallah*, 349 F.3d 42, 66 (2d Cir. 2003) (quoting *Bacon v. United States*, 449 F.2d 933, 943 (9th Cir. 1971)) (stating that "in the case of a grand jury proceeding, we think that a statement by a responsible official, *such as* the United States Attorney, is sufficient"). See also *In re De Jesus Berrios*, 706 F.2d 355, 358 (1st Cir. 1983); *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982) (finding that "a materiality representation by a responsible official . . . strikes a proper and adequate balance between protecting the secrecy of the grand jury's investigation and subjecting an individual to an unjustified arrest."); *In re Application of the United States for a Material Witness Warrant*, 213 F. Supp.2d 287, 294 (S.D.N.Y. 2002).

¹¹⁹ *Bacon*, 449 F.2d at 943.

¹²⁰ See cases discussed *supra*, note 118.

¹²¹ See, e.g., *In re Material Witness Warrant Nichols*, 77 F.3d 1277, 1278-79 (10th Cir. 1996).

¹²² See *id.*

nal proceeding and that Nichols had attempted to leave the jurisdiction.¹²³ In fact, the affidavit supporting the warrant application failed to allege any facts to support the claim that Nichols was a flight risk.¹²⁴ Nichols had voluntarily appeared at a Kansas police department when he learned that he was being sought for questioning.¹²⁵ Ultimately, Nichols' challenge to the material witness warrant was dismissed as moot because the government initiated charges against him in connection with the bombing.¹²⁶

Once arrested, a material witness must be treated under the same provisions that govern the pre-trial conditions of release and bail of criminal defendants.¹²⁷ A witness may be released on personal recognizance, execution of a bond and/or other conditions, or detained in government custody.¹²⁸ The statute places no specific time limits on detention, and thus, no statutory protections to prevent a witness from being detained indefinitely.¹²⁹ A witness may request to be deposed in lieu of detention by filing a written motion and notifying the government, however, if the government can show that the witness' testimony cannot be adequately secured by deposition, the request may be denied.¹³⁰

Before the court imposes an order of detention, a witness is entitled to a judicial hearing where both parties may present evidence.¹³¹ However, the government may submit hearsay testimony, which may be difficult to rebut.¹³² Moreover, there is no requirement that the witness be provided with underlying evidence that supports the warrant application.¹³³ In a recent report analyzing the government's use of the material witness statute to detain terrorist suspects, Human Rights Watch recounted one detainee's experience:

I kept asking what am I being charged. They would respond you're not being charged with anything. I asked why am I here. They said I was a witness. I said a witness to what? They said they couldn't tell me. It was like playing "Who's on First?" [an Abbott and Costello routine] for two

¹²³ *Id.*

¹²⁴ *Id.* at 1278.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See 18 U.S.C. § 3142 (2000). Section 3142(b) authorizes judicial officers to "order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required." *Id.*

¹²⁸ See 18 U.S.C. § 3142(c)(1)(b),(g).

¹²⁹ See 18 U.S.C. § 3142(e).

¹³⁰ See 18 U.S.C. § 3144; Fed. R. Crim. P. 15.

¹³¹ See 18 U.S.C. § 3142(f).

¹³² *Id.*

¹³³ See 18 U.S.C. § 3142(i)(1).

hours.¹³⁴

The report noted that witnesses are not apprised of the grounds for their detention until their first appearance, making it impossible to prepare an adequate defense at the hearing.¹³⁵

The statute does not require counsel to be appointed in cases of material witnesses, and in many cases witnesses were denied legal representation.¹³⁶ While most courts now agree that material witnesses are entitled to counsel at their detention hearing, officials have often restricted or delayed detainees' access to counsel while in detention.¹³⁷ In addition, although the statute does not abridge the attorney-client privilege, new regulations adopted after September 11th allow government officials to monitor attorney communications with detainees where the Attorney General certifies that "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism."¹³⁸

Finally, the statute places no limitations on the interrogation of material witnesses by law enforcement officers.¹³⁹ Witnesses have been aggressively interrogated without counsel and threatened with criminal charges, even though they presumably are not suspects in the government's investigation.¹⁴⁰

To date, only *United States v. Awadallah*, a case arising out of the September 11th investigation, has directly addressed the constitutionality of detaining material witnesses.¹⁴¹ The Second Circuit held that a grand jury proceeding constitutes a criminal proceeding within the meaning of the statute and that where Awadallah received "adequate process" he was properly detained.¹⁴² The appellate court's analysis, however, was flawed from the start. Citing three Supreme Court decisions, the court concluded that the "detention of material witnesses for the purpose of securing grand jury testimony has withstood constitutional challenge."¹⁴³ However, as Professor Ricardo Bascuas has pointed out, the court's sweeping conclusion that detaining material witnesses has been upheld by the Supreme Court is entirely unfounded.¹⁴⁴ Professor Bascuas explains that, contrary to popular belief, there is no basis in judicial precedent,

¹³⁴ See *Human Rights Watch*, *supra* note 115, at 48-49 (quoting Interview by HRW/ACLU with Mujahid Menepta in St. Louis, Mo. (July 22, 2004).

¹³⁵ *Id.*

¹³⁶ *Id.* at 56-57.

¹³⁷ *Id.* at 55-58.

¹³⁸ Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3 (2007).

¹³⁹ See *Human Rights Watch*, *supra* note 115, at 4, 61.

¹⁴⁰ *Id.*

¹⁴¹ See *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003).

¹⁴² See *id.* at 51-64 (finding that Awadallah received adequate process where judges in two bail hearings held soon after his arrest found that his detention was reasonable and necessary).

¹⁴³ See *id.* at 56-57.

¹⁴⁴ See Bascuas, *supra* note 116, at 714-716.

historical common law or statutory law authorizing the detention of witnesses who have given a recognizance—that is, an oral promise—to appear to testify.¹⁴⁵ Under earlier versions of the Act, only those witnesses who *refused* to give a recognizance could be imprisoned or required to post bond.¹⁴⁶ The common law underpinnings of witness detention does not support the conclusion that witnesses may be detained on mere risk of flight.¹⁴⁷ Rather, a witness may only be detained upon evidence of an affirmative refusal to appear in court.¹⁴⁸

The Second Circuit further held that the government's interests in detaining witnesses for grand jury investigations outweighed the deprivation of individual liberty and thus the detention was lawful.¹⁴⁹ The court reasoned that because the giving of grand jury testimony is an important and long recognized public duty, the statute was sufficiently "calibrated" to comply with due process.¹⁵⁰ Yet, the Court's conclusion is inconsistent with prior decisions balancing law enforcement interests with individual liberty. As pointed out in the trial court's opinion, under the Supreme Court's decision in *Terry v. Ohio*, investigating criminal behavior justifies only temporary intrusions on an individual where there is no probable cause that a crime was committed.¹⁵¹ Compared to the temporary intrusion of a stop and frisk involved in *Terry*, the intrusions suffered by a detained material witness go far beyond those deemed constitutionally permissible.

Indeed, material witnesses are provided fewer protections than criminal defendants. Unlike pretrial detention, where the length of detention is limited by the Speedy Trial Act, there are no definitive time limits on how long a material witness may be held.¹⁵² Unlike a criminal defendant, a witness is not a party to the proceeding and thus has no control over the schedule of the trial. Moreover, there is no similar time limitation for the scheduling of testimony in connection with grand jury proceedings.¹⁵³ The scheduling is entirely at the whim of the prosecutor. While a deposition may in some cases be used in lieu of live testimony, it may be denied where the government finds it to be an "inadequate" substitute.¹⁵⁴ Indeed, since September 11th, the Justice Department has consistently opposed depositions or stalled taking them.¹⁵⁵ In 2002, it was re-

¹⁴⁵ *Id.* at 705-715.

¹⁴⁶ *Id.* at 705-08.

¹⁴⁷ *Id.* at 707.

¹⁴⁸ *Id.*

¹⁴⁹ *See* *United States v. Awadallah*, 349 F.3d 42, 59 (2d. Cir. 2003).

¹⁵⁰ *Id.*

¹⁵¹ *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

¹⁵² 18 U.S.C. § 3161(c)(1) (2000); *see Human Rights Watch*, *supra* note 115, at 24 (stating that "[t]he material witness law does not state a specific limitation on the length of time a witness may be detained before testifying.").

¹⁵³ *Human Rights Watch*, *supra* note 115, at 24.

¹⁵⁴ *Id.* at 78.

¹⁵⁵ *Id.* at 79.

ported that nearly half of the material witnesses held in the war on terror never testified at all.¹⁵⁶

The Second Circuit acknowledged that “it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established.”¹⁵⁷ Yet, the court’s conclusion that there was no evidence that the government was engaged in such “improper” conduct in *Awadallah* is disingenuous at best.¹⁵⁸ Putting aside the misrepresentations the court found in the government’s affidavit in support of its petition for a material witness arrest warrant, the only admissible evidence supporting the court’s conclusion that *Awadallah* was a flight risk was the government’s speculation that *Awadallah* may try to avoid appearing before the grand jury because of a concern that he was a suspect in the September 11th investigation.¹⁵⁹ In other words, *Awadallah* was a flight risk by the very fact that he was a suspect in the government’s investigation.¹⁶⁰

In short, the material witness statute imposes restrictions on individual liberty which are disproportionate to government interests and sets forth a scheme which is inadequately tailored to its non-punitive purpose. These deficiencies have resulted in several cases of government blunders and miscarriages of justice. Brandon Mayfield—a U.S. citizen, veteran of the U.S. Army, and Muslim convert—was held as a material witness in connection with the March 2004 Madrid train bombings because the government claimed his fingerprint was found at the scene.¹⁶¹ After two weeks—part of which was spent in solitary confinement—the government suddenly filed a motion agreeing to his release, disclosing that the Spanish National Police had discovered that the recovered fingerprint in fact belonged to Ouhane Daoud, an Algerian man, not May-

¹⁵⁶ Steve Fainaru and Margot Williams, *Material Witness Law Has Many in Limbo; Nearly Half Held in War on Terror Haven’t Testified*, WASH POST, Nov. 24, 2002, at A01 (reporting that as of Nov. 24, 2002, at least forty-four persons have been arrested and detained as potential grand jury witnesses but nearly half have never been called to testify).

¹⁵⁷ See *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 66-67.

¹⁶⁰ *Id.* at 67. In a recent case, *Al-Kidd v. Gonzales*, a material witness detainee brought a Federal Tort Claims Act suit against government officials claiming, among other things, that the government “abused process” by detaining *Al-Kidd* as a terrorist suspect under the material witness statute. *Al-Kidd v. Gonzales*, No. CV:05-093-S-EJL, 2006 WL 2682346, at *8-9 (D. Idaho Sept. 18, 2006). The district court, affirming that the detention of criminal suspects under the material witness statute would be unconstitutional, denied the government’s motion to dismiss and allowed *Al-Kidd*’s case to go forward on this claim. *Id.*

¹⁶¹ See A Review of the FBI’s Handling of the Brandon Mayfield Case, Office of the Inspector General, U.S. Department of Justice, Executive Summary, at 1 (Mar. 2006), available at <http://www.usdoj.gov/oig/special/s0601/final.pdf>. For a summary of the facts of Mr. Mayfield’s case see Bascuas, *supra* note 116, at 678-80.

field.¹⁶² The government later paid a two million dollar settlement on the civil rights claim brought by Mayfield arising from his detention.¹⁶³

Similarly, Abdallah Higazy—an Egyptian-born graduate student, attending school in the United States on a grant from the U.S. Agency for International Development—was detained as a material witness to the September 11th grand jury investigation when a hotel security guard accused him of having an air traffic radio device in his hotel room near the World Trade Center.¹⁶⁴ During his four week detention, Higazy voluntarily agreed to a polygraph examination and was examined without counsel.¹⁶⁵ According to Higazy's lawyer, the agent came out of the interrogation room declaring that Higazy had confessed.¹⁶⁶ Higazy, visibly upset, told his lawyer that he had almost fainted and didn't recall exactly what he had said but began to sense that there was no way he could convince the government that he did not have the radio.¹⁶⁷ Based on this alleged confession, the government charged Higazy with lying to federal investigators and interfering with a government investigation.¹⁶⁸

"Five days later, the government dropped the charges after another hotel guest came forward to claim the radio."¹⁶⁹ The hotel security guard later admitted to lying to the FBI, stating that he did not find the radio in the safe in Higazy's room, but rather found it on the table.¹⁷⁰ After spending thirty-one days in solitary confinement in a New York detention center, Higazy was released in his prison scrubs and given three dollars for subway fare.¹⁷¹ Unfortunately, these cases are not isolated incidents. In more than a dozen cases, the Department of Justice apologized for a mistaken or unwarranted arrest under the material witness statute.¹⁷²

As these cases demonstrate, the material witness statute, in its current form,

¹⁶² See Bascuas, *supra* note 116, at 679.

¹⁶³ Dan Eggen, *U.S. Settles Suit Filed by Ore. Lawyer*, WASH. POST, Nov. 30, 2006, at A03.

¹⁶⁴ A summary of the facts of Mr. Higazy's case can be found in the following materials: See *Human Rights Watch*, *supra* note 115, at 24; *Higazy v. Millennium Hotel and Resort*, 346 F. Supp. 2d 430 (S.D.N.Y. 2004) (civil action by Higazy arising out of a material witness detention), *United States v. Awadallah*, 202 F. Supp. 2d 55, 79 n.29 (S.D.N.Y. 2002) (summarizing the Higazy case).

¹⁶⁵ *Higazy*, 346 F. Supp. 2d at 440.

¹⁶⁶ *Awadallah*, 202 F. Supp. 2d at 79 n.29.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Higazy*, 346 F. Supp. 2d at 443.

¹⁷¹ *Awadallah*, 202 F. Supp. 2d at 79 n.29.

¹⁷² See Oversight Hearing on the *USA Patriot Act* of 2001 and the Material Witness Statute Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Judiciary Comm. (May 26, 2005) (testimony of Gregory T. Nojeim, American Civil Liberties Union, at 8).

extends constitutional limits and allows the government to subvert the criminal justice process through pretextual arrests. The detention of material witnesses who refuse to appear to testify may be a permissible and narrow exception to the general bar on executive detention as long as there are time limits and other adequate safeguards to prevent misuse. However, the statute as currently drafted goes beyond what may be constitutionally permissible. The requirement that an individual be arrested only upon probable cause has no meaning if the government is so easily able to circumvent the requirement with a warrant authorizing indefinite detention upon a far lesser showing. In short, the material witness statute is a prime example of the dangers of preventative detention laws which subvert constitutional guarantees afforded defendants in the criminal justice process.

B. *Enemy Combatants*

A second measure adopted by the U.S. government for preventatively detaining suspected terrorists is to hold them as "enemy combatants." Enemy combatant detention stems from an Executive Order by President Bush dated November 13th, 2001, entitled the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."¹⁷³ The scope of the order is incredibly broad, authorizing the government to detain not only terrorists engaged in active conflict against U.S. troops overseas, but "sleeping cell" agents residing in the United States.¹⁷⁴ The language of the order authorized the Secretary of Defense to detain any non-U.S. citizen who the President has reason to believe:

- (i) is or was a member of the organization known as al Qaeda;
- (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor [sic] that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2 (a)(1) of this order.¹⁷⁵

The order not only authorized the military to detain present and former members of al Qaeda captured in the course of the conflict in Afghanistan, but also any suspect of "international terrorism" as well as their aiders and abettors (and those who harbor them).¹⁷⁶ It further authorized their capture and detention *anywhere*, including in the United States, regardless of whether there is an ac-

¹⁷³ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 57, 834.

¹⁷⁶ *Id.*

tive conflict in the area or not.¹⁷⁷ Moreover, while the order only applied to non-U.S. citizens, the Bush Administration declared the military to have the authority to preventatively detain citizens and non-citizens alike, designating at least two U.S. citizens, Yasser Hamdi and José Padilla, as enemy combatants and detaining them in a military brig in South Carolina.¹⁷⁸

Suspects held as enemy combatants enjoy even fewer procedural protections than individuals held as material witnesses. Significantly, the order placed no time limits on the length of preventative detention.¹⁷⁹ It also left open the possibility that detainees could be held in preventative detention indefinitely, regardless of whether charges are lodged or not.¹⁸⁰ It has been the government's position in its various court filings and media statements that the military may hold the detainees in preventative detention "until the end of America's war on terrorism or until the military determines . . . that a particular detainee no longer poses a threat to the United States or its allies."¹⁸¹ Given the amorphous nature of the "war on terrorism," the government has effectively imposed a life sentence on enemy combatants preventatively held in Guantánamo Bay.

The November 13th order also failed to detail any process for detainees to contest their combatant status. Unlike the small subset of detainees who were subject to prosecution in the military tribunals, individuals in preventative detention were not permitted access to counsel under the order. Nor did the order require that they be informed of the bases for their detention, let alone a formal opportunity to challenge their "enemy combatant" status. The Supreme Court has since held that detainees are entitled to at least some procedural due process rights to contest their status; however the Court failed to give useful guidance as to the safeguards necessary to ensure compliance with due process requirements¹⁸² and failed to comment on the constitutional admissibility of statements procured by torture. Such statements are permitted under the government's regime, but have traditionally been barred by due process under prior deci-

¹⁷⁷ *Id.*

¹⁷⁸ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); see also *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

¹⁷⁹ Detention, Treatment, and Trial of Certain Non-Citizens, 66 Fed. Reg. at 57834 (providing no time restriction on the detention authority of the Secretary of Defense).

¹⁸⁰ *Id.*

¹⁸¹ Then Deputy Assistant Attorney General John Yoo asked in a 2002 speech: "Does it make sense to ever release them if you think they are going to continue to be dangerous, even though you can't convict them of a crime?" Henry Weinstein, *The Nation*; *Prisoners May Face 'Legal Black Hole,'* L.A. TIMES, Dec. 1, 2002, at A1. See also *In re Guantánamo Detainees Cases*, 355 F. Supp. 2d 443, 447 (D.D.C. 2005) (summarizing the government's position as follows: an enemy combatant "can be held indefinitely until the end of American's war on terrorism or until the military determines on a case by case basis that the particular detainee no longer poses a threat to the United States or its allies").

¹⁸² See *Hamdi*, 542 U.S. at 508.

sions.¹⁸³ Nor did the Court address whether detainees may be denied access to certain “classified” evidence submitted by the government in support of its case for detention.¹⁸⁴ As pointed out by one lower court judge, there may be legitimate reasons for denying detainees access to such evidence, but the Court failed to consider whether alternative strategies may be employed—such as providing the evidence to defense counsel or a separately appointed special advocate “to investigate and ensure the accuracy, reliability, and relevance of that evidence.”¹⁸⁵

With respect to judicial review, the order purported to cut off any rights to seek redress or review outside the jurisdiction of the military tribunal.¹⁸⁶ The order stated that detainees were barred from seeking “any remedy or maintain[ing] any proceeding” in U.S. courts, foreign courts, or international tribunals.¹⁸⁷ The Supreme Court subsequently held in *Rasul v. Bush* that the detainees fell under the scope of the Habeas Corpus Act, however it made no findings with respect to the constitutional rights of the Guantánamo detainees to petition for habeas corpus.¹⁸⁸ In response to the Court’s decision in *Rasul*, Congress passed the Detainee Treatment Act and later the Military Commissions Act of 2006 (“MCA”), which effectively cut off the rights of non-citizen detainees in Guantánamo to seek habeas relief in U.S. courts.¹⁸⁹ The constitutionality of those provisions of the MCA restricting the due process rights of non-citizens is currently before the Supreme Court in *Boumediene v. Bush*, No-06115 (consolidated with *A-Odah v. Bush*, No. 06-1196).¹⁹⁰ Thus, unless the Supreme Court finds in a future case that the detainees’ rights are constitutional and not merely statutory, any new habeas petition challenging the underlying authority of the government to preventatively detain an alien will likely fail.¹⁹¹

The November 13th order outlined certain minimal standards relating to the

¹⁸³ See *In re Guantánamo Detainees Cases*, *supra* note 181 at 468-69, n.126.

¹⁸⁴ *Id.* at 468.

¹⁸⁵ *Id.* at 471.

¹⁸⁶ Detention, Treatment, and Trial of Certain Non-Citizens, 66 Fed. Reg. at 57, 835-36, § 7(b).

¹⁸⁷ *Id.*

¹⁸⁸ *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁸⁹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(1), 119 Stat. 2739 (2005). The Act further limited not only petitions for writs of habeas corpus but also “any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense . . . in Guantánamo Bay.” *Id.*

¹⁹⁰ *Boumediene v. Bush*, No-06115 (S. Ct. filed Mar. 5, 2007).

¹⁹¹ In *Hamdan v. Rumsfeld*, the Court has since held that the DTA’s restrictions on judicial review did not strip federal courts’ of jurisdiction over cases pending on the date of the DTA’s enactment, and thus avoided the constitutional question regarding the rights of those detainees who had not filed at the date of enactment. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2807 (2006).

conditions of detention in Guantánamo Bay.¹⁹² It directed that the detainees were to be treated humanely and provided with adequate food, drinking water, shelter, clothing, and medical treatment.¹⁹³ Nevertheless, in 2006, the United Nations declared that the conditions of detention at Guantánamo Bay—where most of the detainees are held—violate international human rights standards.¹⁹⁴ According to the report, detainees are continually held in solitary confinement, in cells that measure six feet, eight inches by eight feet, for all but two twenty-minute exercise breaks per week.¹⁹⁵ The cells are illuminated from flood lights twenty-four hours a day and detainees are shackled whenever they leave them.¹⁹⁶ Detainees are permitted to shower only two or three times per week and the guards reportedly use food as an incentive to get detainees to provide information.¹⁹⁷

In addition, detainees held under the order have been subjected to extensive and aggressive interrogation. In 2002, Secretary of Defense Donald Rumsfeld authorized, as part of the government's interrogation policy, the use of forced stress positions, hooding, denial of religious items, stripping and shaving of prisoners and the exploitation of detainees' phobias through such means as the use of dogs.¹⁹⁸ Official interrogation policy at Guantánamo still permits, among other techniques, dietary manipulation, exposure to extreme temperatures, sleep deprivation and isolation.¹⁹⁹ From 2001 to 2004, there have been thirty-four attempted suicides which, according to prison officials, can be attributed to the "effects of indefinite detention on prisoner morale."²⁰⁰

Like the material witness statute, the November 13th order is overbroad and thus raises serious constitutional issues. The Supreme Court, however, has failed to address the most pressing constitutional problems with preventative

¹⁹² Detention, Treatment, and Trial of Certain Non-Citizens, 66 Fed. Reg. at 57,834, § 3.

¹⁹³ *Id.*

¹⁹⁴ United Nations Economic and Social Council, *Situation of detainees at Guantánamo Bay*, §§ 53-71 (Feb. 15, 2006), available at <http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120.pdf>. See also Melissa A. Jamison, *Detention of Juvenile Enemy Combatants at Guantánamo Bay: The Special Concerns of Children*, 9 U.C. DAVIS J. JUV. L. & POL'Y 125, 134 (2005) (describing conditions at Delta Camp at Guantánamo Bay).

¹⁹⁵ Jamison, *supra* note 194, at 134.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Memorandum from William J. Haynes II to Sec'y of Def. re: Counter-Resistance Techniques (Dec. 2, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>.

¹⁹⁹ See Memorandum for the Commander, U.S. Southern Command re: Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf>.

²⁰⁰ *Guantánamo Inmate Tries to Kill Himself*, ST. LOUIS POST-DISPATCH, Jan. 7, 2004, at A8; *Guantánamo Bay Detainee Attempts Suicide Raising Number to 30*, ASSOCIATED PRESS, Aug. 13, 2003.

detention. Significantly, the Court has repeatedly declined to address the scope of the government's authority to preventatively detain suspected terrorists outside the theatre of the battlefield. In *Hamdi*, the Supreme Court upheld the detention of "enemy combatants," yet its decision was extremely narrow.²⁰¹ The Court declined to address the broad definition of "enemy combatant" under the November 13th order and limited its holding to those "enemy combatants" who were "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan" and who were "'engaged in the armed conflict against the United States' there."²⁰² Thus, the decision only related to the detention of persons captured on the battlefield in Afghanistan; it said nothing about whether that authority extended beyond the theatre of a traditional war overseas.

In a dissenting opinion, Justice Scalia, in an unusual pairing with Justice Stevens, asserted that preventative detention of U.S. citizens as enemy combatants is *never* permissible under the Constitution.²⁰³ Justice Scalia reasoned that where a citizen is deprived of liberty because of alleged criminal conduct, due process requires that the government adhere to certain common law criminal procedures, including committal by a magistrate followed by indictment and trial.²⁰⁴ Pointing out the panoply of treason laws that could be used to prosecute citizens who raise arms against their own country, he concluded that the executive's preventative detention scheme amounted to nothing more than a pretext for criminal prosecution:

It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.²⁰⁵

Justice Scalia thus found that, at least when it comes to the detention of U.S. citizens, the constitutional constraints on executive detention are rigid and absolute. In his view, preventative detention of citizens accused of waging war against the United States may only be accomplished through the suspension of the writ of habeas corpus.²⁰⁶ Absent such circumstances, the Constitution requires the government to employ the laws and procedures of the criminal jus-

²⁰¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (plurality opinion); *Hamdi*, 542 U.S. at 579 (Thomas, J., concurring in part and dissenting in part).

²⁰² *Id.* at 516 (quoting Br. for Respondents 3) (emphasis added).

²⁰³ *Id.* at 554 (Scalia, Stevens, JJ., dissenting).

²⁰⁴ *Id.* at 556.

²⁰⁵ *Id.* at 556-57.

²⁰⁶ *Id.* at 554. In a recent article, Professor Trevor Morrison argues that Justice Scalia improperly characterizes suspension of the writ as an *authorization* of preventative detention by the executive. Morrison argues that suspension of the writ merely bars detainees from seeking relief in federal courts. Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411 (2005-2006).

tice system to detain citizens accused of aiding the enemy during wartime.²⁰⁷

In *Rumsfeld v. Padilla*, the Supreme Court again skirted the issue of indefinite preventative detention—this time in a case where the terrorist suspect was captured within U.S. borders.²⁰⁸ José Padilla, a U.S. citizen, was arrested by civil law enforcement authorities in Chicago's O'Hare International Airport as he exited a plane arriving from Pakistan.²⁰⁹ Padilla was seized by federal agents pursuant to a material witness warrant issued by a federal court in the Southern District of New York in connection with a grand jury investigation into the September 11th terrorist attacks.²¹⁰ Authorities transported him to New York, where he was held in federal criminal custody but was not charged with any crime.²¹¹ Soon thereafter, the President issued an order designating Padilla an "enemy combatant" and directed the Secretary of Defense Donald Rumsfeld to hold him in military custody.²¹² Padilla was transferred to a military brig in Charleston, South Carolina.²¹³

Following conflicting decisions at the trial and appellate court level, the Supreme Court granted certiorari to review Padilla's habeas claims. Yet, in what Owen Fiss described as "judicial cowardice,"²¹⁴ the majority declined to reach the merits of Padilla's challenge to the executive's authority to detain.²¹⁵ The Court held that Padilla named the wrong respondent and, therefore, must refile in a different jurisdiction.²¹⁶ Thus, the Court once again found a way to avoid critical questions regarding the scope of executive authority in the war on terrorism.

Had the case been decided on the merits, it seems likely that a majority of the Court would have found the detention of Padilla, at the very least, unlawful, if not unconstitutional. The four dissenting justices, Justice Stevens, joined by

²⁰⁷ *Hamdi*, 542 U.S. at 554.

²⁰⁸ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

²⁰⁹ *Id.* at 431.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 431 n.2 (explaining that the order included a brief and vague description of the basis of the designation, asserting that Padilla "'is closely associated with al Qaeda,'" that he "'engaged in . . . hostile and war-like acts, including . . . preparation for acts of international terrorism' against the United States," that he possessed intelligence that would aid the government in preventing future attacks by al Qaeda, and that he "'represents a continuing, present, and grave danger to national security of the United States,' such that his military detention 'is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States.'")

²¹³ *Id.* at 432.

²¹⁴ See Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 239 (2006) (Eng.) (stating that "[g]iven the stakes for the individual and the nation, the failure of the Court even to address the merits of Padilla's claim of freedom was, pure and simple, an act of judicial cowardice.").

²¹⁵ See generally *Padilla*, 542 U.S. 426.

²¹⁶ *Id.* at 430.

Justices Souter, Ginsburg, and Breyer, argued that the Court should address the merits given that the case raised questions of “profound importance to the Nation,”²¹⁷ and while they did not address the merits in full, they made clear that the detention of Padilla was illegal.²¹⁸ “[T]he Non-Detention Act . . . prohibits—and the [AUMF] . . . does not authorize—the protracted, incommunicado detention of American citizens arrested in the United States.”²¹⁹ Describing the government’s purported justification for detaining Padilla—“investigating and preventing subversive activity”—as the “hallmark of the Star Chamber,” they stated:

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.²²⁰

Justice Scalia did not join in the dissent, but given his disapproval of the preventative detention of citizens captured overseas in *Hamdi*, there is little doubt that he would find detention of citizens captured in the United States similarly unlawful on constitutional grounds.

The Supreme Court, however, never had a second opportunity to address *Padilla* on the merits, again leaving the scope of executive authority to detain an open question. On remand, the district and appellate courts were at odds with one another, the former finding in favor of Padilla²²¹ and the latter dismissing his claims.²²² Padilla petitioned for a writ of certiorari, but within days of when the government’s response was due, the government filed a motion in the Fourth Circuit declaring its intention to transfer Padilla from military to

²¹⁷ *Id.* at 454 (Stevens, Souter, Ginsburg, Breyer, JJ., dissenting).

²¹⁸ *Id.* at 464 n.8.

²¹⁹ *Id.*

²²⁰ *Id.* at 465.

²²¹ The district court distinguished *Hamdi*, noting that unlike *Hamdi*, Padilla was seized in a civilian setting by civilian law enforcement authorities, and was initially detained under a civil statute—the material witness statute. The court concluded that “[s]imply stated, this is a law enforcement matter, not a military matter.” *Padilla v. Hanft*, 389 F. Supp. 2d 678, 691(D.S.C. 2005).

²²² On appeal, however, the Fourth Circuit reversed, affirming the summary power of the government to detain Padilla as an enemy combatant and concluding that his alleged unlawful acts in Afghanistan were dispositive of his status as an enemy combatant. *Padilla v. Hanft*, 423 F.3d 396 (4th Cir. 2005). The locus of the capture, in their opinion, was irrelevant. *Id.*

civilian custody and try him on criminal charges in a federal court in Florida.²²³

The issue is also at the forefront of a more recent case, *Al-Marri v. Hanft*.²²⁴ Al-Marri, a Qatari national, legally entered the United States on September 10, 2001, with his wife and children to return to his alma mater at Bradley University in Indiana to obtain a master's degree.²²⁵ On December 12, 2001, al-Marri was arrested by the FBI as a material witness in the investigation of the September 11th, 2001 terrorist attacks, and was transferred to New York City.²²⁶ Nearly two months later, he was indicted for various offenses related to credit card fraud as well as making a false statement to the FBI.²²⁷ He pled not guilty on all counts.²²⁸ Just weeks before al-Marri's trial was to begin, President Bush issued an order designating al-Marri as an enemy combatant and directing that he be transferred to the Naval Brig in Charleston, South Carolina.²²⁹ The government alleged that intelligence sources confirmed that al-Marri was a "sleeping agent" for al Qaeda, sent to the United States for the purpose of engaging in terrorist activities and "exploring ways to hack into the computer systems of U.S. banks" and financial institutions.²³⁰ Al-Marri remains in indefinite military detention.²³¹

Al-Marri's fate remains unclear as courts continue to debate the constitutionality of his detention. The district court initially upheld al-Marri's detention because he was not entitled to the same due process protections as a U.S. citizen—a decision which was fundamentally flawed.²³² Yet, as the Fourth Circuit pointed out on appeal,²³³ although al-Marri, as a non-citizen, may not be covered under the Non-Detention Act, it is well established that as a resident of the United States he is entitled the same criminal due process protections afforded to U.S. citizens—including the right to a fair trial under the Fifth and Sixth Amendments.²³⁴ The government may have plenary authority over aliens with

²²³ *Padilla v. Hanft*, 547 U.S. 1062 (2006).

²²⁴ *Al-Marri v. Hanft*, 378 F. Supp. 2d 673 (D.S.C. 2005).

²²⁵ *Id.* at 674.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 674-75.

²³⁰ See Respondent's Answer to Habeas Corpus Petition, Attachment B, Unclassified Declaration of Mr. Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism, 7 (filed Sept. 9, 2004), available at <http://collegefreedom.org/marri.htm>.

²³¹ *Al-Marri*, 378 F. Supp. 2d. at 676-77.

²³² *Id.* at 673.

²³³ See *Al-Marri v. Wright*, No. 06-7427, slip op. (4th Cir. June 11, 2007) (rehearing en banc granted).

²³⁴ *United States ex rel v. Williams*, 194 U.S. 279, 291 (1904) (observing that aliens are protected under the Fifth and Sixth amendments once they are in this country); *Wong-Wing v. United States*, 163 U.S. 228, 290-291 (1896) (stating that while Congress can "forbid aliens or classes of aliens from coming within [our] borders," it cannot punish such aliens

respect to matters of immigration—indeed, al-Marri may be vulnerable to deportation on the basis of the government's allegations—however the government's detention of al-Marri has nothing to do with immigration or deportation.²³⁵ Thus, the court's suggestion that aliens have diminished due process rights with respect to detention outside of immigration has no basis under U.S. law.

The designation and indefinite detention of suspected terrorists arrested in the United States as enemy combatants can no longer be constitutionally justified by a war paradigm. Six years have passed since September 11th and, while terrorism remains a serious threat, the current situation in the United States no longer bears any resemblance to a war or a state of emergency. As the war in Afghanistan abates, the Court's reasoning in *Hamdi* can no longer serve as support for the indefinite preventative detention of terrorists as enemy combatants. The rationale for the military's preventative detention of individuals as enemy combatants does not hold when the government is engaged in a war where there are no boundaries to the battlefield and there is no identifiable end to the conflict.

The Supreme Court has made clear that, except in situations of emergency or martial law, the jurisdiction of the military does not extend to resident civilians suspected of criminal activity in the United States, even if that activity involves acts of terrorism or sabotage.²³⁶ There is a wide array of criminal laws under which al-Marri could be prosecuted if in fact the government possesses credible evidence that al-Marri was assisting al-Qaeda or at the very least was committing fraud.²³⁷ In short, the government's position that any individual who may be assisting or otherwise associated with a terrorist organization is subject to

without "a judicial trial to establish the guilt of the accused"). See also, *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (explaining that all aliens within the jurisdiction of the United States enjoy the protections of the Fifth and Fourteenth amendments and may not be invidiously discriminated against by the federal government).

²³⁵ See *Al-Marri*, 378 F. Supp. 2d at 674 n.3 (citing bases asserted by executive for al-Marri's detention as an enemy combatant).

²³⁶ See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

²³⁷ Al-Marri initially was indicted and charged with possession of fifteen or more unauthorized or counterfeit access devices with intent to defraud. In a second indictment, he was charged with two counts of making a false statement to the FBI, three counts of making a false statement in a bank application, and one count of using a means of identification of another person for purposes of influencing the action of a federally insured financial institution. See *United States v. Al-Marri*, 239 F. Supp. 2d 366, 367 (S.D.N.Y. 2002); *United States v. Al-Marri*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003). Other criminal laws related to terrorism include those set forth in 18 U.S.C. § 2332b (acts of terrorism transcending national boundaries); 18 U.S.C. § 2339A (providing material support to terrorists); 18 U.S.C. § 2339B (providing material support to designated foreign terrorist organizations); 18 U.S.C. § 2339C (financing of terrorism); 18 U.S.C. § 2339D (receiving military type training from a terrorist organization).

indefinite military detention is untenable and unsupported by any legal precedent.

Thus, as with the material witness statute, the enemy combatant orders extend beyond their legitimate reach. There is no question that the government has the authority to detain combatants on the battlefield; however, military detention cannot extend to United States residents who are suspected of criminal violations, even where those criminal violations are acts of terrorism. There is a broad set of laws under which terrorists, as well as those who are planning, aiding, abetting, or providing material support to terrorist activities, may be prosecuted.²³⁸ To single out suspects and hold them indefinitely in military detention undermines the criminal justice process and violates constitutional due process protections. Accordingly, the government's enemy combatant policies, at least to the extent that they apply to persons like al-Marri, are unlawful and cannot be sustained.

IV. PREVENTATIVE DETENTION IN AUSTRALIA: PREVENTATIVE DETENTION AND CONTROL ORDERS

Unlike the United States, Australia has not relied on pretextual measures to accomplish preventative detention. Rather, the government codified preventative detention in its Criminal Code through anti-terrorism legislation. The events of September 11th prompted Australia, like most western nations, to set into motion a legislative initiative to dramatically expand executive powers in law enforcement and security. Then Attorney General Daryl Williams noted that while there was no known specific threat against Australia, "the profound shift in the international security environment has meant that Australia's profile as a terrorist target has risen and our interests abroad face a higher level of terrorist threat."²³⁹

In the five years following September 11th, Australian Parliament has passed over 35 acts relating to anti-terrorism. Like in the United States, the Australian response was one that emphasized prevention. Attorney-General Philip Ruddock stated that "[t]he first line of defense in the war [on] terrorism is to make sure that we have the power to deal with terrorists and to catch them before they have a chance to commit a crime."²⁴⁰ To this end, the laws passed by Parliament incorporated new criminal offenses related to terrorism which would allow law enforcement authorities to make arrests and prosecute before the terrorist act is completed and its horrible consequences are suffered.²⁴¹ By

²³⁸ See criminal laws cited *supra* note 237.

²³⁹ Press Release, Daryl Williams, Att'y Gen., Upgrading Austl.'s Counter-Terrorism Capabilities (Dec. 18, 2001).

²⁴⁰ Press Release, Philip Ruddock, Att'y Gen, Nat'l Sec.—Overseas Dev. (Feb. 19, 2004), available at <http://www.ema.gov.au/agd/www/MinisterRuddockhome.nsf/Page/RWP5B8D376BE792B92CCA256E3F001D407E?OpenDocument>.

²⁴¹ See Criminal Code Act, 1995, §§ 101.1 *et seq.* (2007) (Austl.), available at <http://>

2005, the Criminal Code criminalized preparatory acts such as “providing or receiving training connected with terrorist acts,” “possessing things connected with terrorist acts,” “collecting or making documents likely to facilitate terrorist acts,” and “acts done in preparation for, or planning, a terrorist act.”²⁴² Similarly, the Code barred certain conduct when connected with a terrorist organization regardless of preparation or planning.²⁴³

Nevertheless, the London Underground bombings in July 2005 prompted Australian Prime Minister Howard’s government to declare that additional powers were needed to combat the threat of terrorism. Recognizing that the nature of the terrorist threat changed from a “known threat from overseas to include a relatively unknown ‘home grown’ one,” Prime Minister Howard argued that law enforcement agencies (specifically, the Australian Federal Police “AFP”) needed preventative detention measures to “better deter, prevent, detect and prosecute acts of terrorism.”²⁴⁴ On September 27, 2005, representatives from the Commonwealth, State and Territory Governments (COAG) met in Canberra for a Terrorism Summit and reached an Agreement, pursuant to which, the federal government introduced the Anti-Terrorism (No. 2) Bill. The bill authorized, among other things, preventative detention orders for up to forty-eight hours and control orders to restrict the movement of those who pose a terrorist threat to the community.²⁴⁵ The State Premiers and Northern Territory and ACT Chief Ministers agreed to introduce complementary legislation, authorizing preventative detention for a period of up to fourteen days. Thus, like the United Kingdom and Canada, Australia enacted a scheme for preventative detention of suspected terrorists.²⁴⁶

The Australian scheme is more limited in scope than the U.S. preventative detention measures. Unlike the U.S. enemy combatant or material witness laws, which effectively authorize indefinite detention, the Australian preventative detention orders strictly limit the length of detention to a maximum of two weeks. While control orders may last longer—up to one year with an option to

www.comlaw.gov.au/. See also ANDREW LYNCH & GEORGE WILLIAMS, WHAT PRICE SECURITY?, 14-28 (2006) (summarizing the criminal offenses related to terrorism in Australia).

²⁴² Criminal Code Act, 1995, *supra* note 241, §§ 101.2, 101.4, 101.5, 101.6.

²⁴³ See *Id.* §§ 102.2 (directing the activities of a terrorist organization), 102.3 (membership in a terrorist organization), 102.4 (recruiting for a terrorist organization), 102.5 (training or receiving training from a terrorist organization), 102.6 (getting funds to, from, or for a terrorist organization).

²⁴⁴ 2005 The S. Legal and Constitutional Comm. Rep., Provisions of the Anti-Terrorism Bill (No. 2) §§ 2.6-2.15 (hereinafter “Senate Committee Report”); Press Release, The Hon John Howard MP, Counterterrorism Laws Strengthened, (Sept. 8, 2005), available at http://www.pm.gov.au/media/Release/2005/media_Release1551.cfm#top.

²⁴⁵ Press Release, Council of Australian Governments, Special Meeting on Counter-Terrorism (Sept. 27, 2005).

²⁴⁶ See Roach, *supra* note 71, at 2196-2203 (outlining preventative detention laws in the UK and Canada).

renew—they impose lesser constraints on individual liberty than incommunicado detention in a government facility. Moreover, as discussed in more detail below, both the preventative detention and the control order laws set forth a detailed procedural process for the application and issuance of the orders and incorporate various other safeguards to deter government abuse.

Furthermore, unlike the U.S. measures, the Australian preventative detention measures have been used sparingly. While Australia has not yet suffered a terrorist attack like September 11th, the government has arrested and tried individuals for various planning and preparation offenses relating to terrorism. For example, in November 2005, police arrested seventeen people in coordinated anti-terrorism raids in Melbourne and Sydney following reports that a group of men were stockpiling chemicals to carry out a terrorist attack.²⁴⁷ During this investigation, as well as other investigations which have led to arrests, the Executive never applied for a preventative detention order, and to date has applied only once for a control order.²⁴⁸

A. Preventative Detention Orders

Division 105 of the Act authorizes the AFP to preventatively detain an individual without charges to either prevent an imminent terrorist attack or to gather evidence relating to a recent terrorist attack.²⁴⁹ An individual subject to a federal preventative detention order may be detained for an initial period of up to twenty-four hours.²⁵⁰ That twenty-four hour period may be continued under a second order for a total period not exceeding forty-eight hours.²⁵¹ Nevertheless, as noted above, suspects may be detained longer under a corresponding state preventative detention statute.²⁵² Accordingly, an individual may be turned over to NSW authorities and subjected to a more extended detention.²⁵³

The preventative detention scheme under the Anti-Terrorism (No. 2) Act (Cth) aims to be purely administrative in nature. The AFP submits written applications to an “issuing authority” which has the power to authorize a deten-

²⁴⁷ See Elizabeth Lopez & Dewi Cooke, *Raid's Disrupt 'Imminent' Attack*, THE AGE, Nov. 8, 2005 at 1.

²⁴⁸ Jabbour v. Thomas (2006) 165 A. Crim. R. 32. See 2005-2006 Australian Federal Police Preventative Detention and Control Orders Annual Report 2005-06 and 2006-07, available at http://www.afp.gov.au/about/publications/annual_reports/afp (reporting only one interim control order since the legislation was passed).

²⁴⁹ Criminal Code Act, 1995, *supra* note 241, § 105 (5).

²⁵⁰ *Id.* § 105.8 (5).

²⁵¹ *Id.* §§ 105.10(5), 105.9(3).

²⁵² See, e.g., Terrorism (Police Powers) Act, 115 (N.S.W.) § 26K (2002) (Austl.) (stating that a suspect of terrorism may be detained for up to 14 days).

²⁵³ The federal law bars applications for an order under the federal statute where the order is made under the corresponding State preventative detention law. Criminal Code Act, 1995, *supra* note 241, § 105.6. The NSW laws, however, do not incorporate a similar prohibition. See generally Terrorism (Police Powers) Act 2002 (NSW).

tion order.²⁵⁴ With respect to an *initial* preventative detention order—which authorizes detention for up to twenty-four hours—the “issuing authority” is a senior member of the AFP.²⁵⁵ Thus, unlike the U.S. material witness statute, the execution of an initial preventative detention order is carried out exclusively by the executive branch. No judicial or other form of independent judgment authorization is required for an initial detention order.

A *continued* preventative detention order—which extends detention up to a total of 48 hours—requires approval from a more independent authority: a serving or retired Federal or State Supreme Court judge, a Federal Magistrate, or a lawyer holding an appointment to the Administrative Appeals Tribunal as President or Deputy President.²⁵⁶ Accordingly, judicial officers may serve as “issuing authorities,” but may only do so in their *personal* capacity, not in their *official* capacity as members of the court.²⁵⁷

Not only are the time limits stricter, but the type of individuals subject to detention is far more limited than the U.S. material witness statute or enemy combatant policy. Under the Act, a preventative detention order only may be issued in two situations: 1) to prevent a terrorist attack that is “imminent” and “expected to occur, in any event, at some time in the next 14 days;”²⁵⁸ or 2) to preserve evidence related to a terrorist attack that has occurred in the past twenty-eight days.²⁵⁹

With respect to the first situation—a preventative detention order to prevent an imminent terrorist attack—the issuing authority must be satisfied that there are “reasonable grounds to suspect” that the individual:

- 1) will engage in a terrorist act;
- 2) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist attack; or
- 3) has done an act in preparation for, or planning of, a terrorist act.²⁶⁰

The issuing authority must also be satisfied that

- 1) the making of a preventative detention order would substantially assist in preventing a terrorist act from occurring; and
- 2) detaining the subject for the period for which the person is to be detained is ‘reasonably necessary’ for this purpose;
- 3) the terrorist attack is imminent and expected to occur within the next 14 days.²⁶¹

This provision is narrow in some respects and incredibly broad in others. On

²⁵⁴ Criminal Code § 105.7.

²⁵⁵ *Id.* § 100.1(1).

²⁵⁶ *Id.* §§ 100.1(1), 105.12.

²⁵⁷ *Id.* § 105.19(2).

²⁵⁸ *Id.* §§ 101.1, 105.4(5)–(6).

²⁵⁹ *Id.* §§ 101.1, 105.4(6).

²⁶⁰ *Id.* § 105.4(4).

²⁶¹ *Id.* § 105.4(4)–(5).

one hand, the requirement that a terrorist attack be “imminent” places significant limits the government’s ability to obtain a preventative detention order in the ordinary terrorism investigation. Law enforcement authorities aim to prevent terrorism attacks in their early stages, yet this law may only be used when the planning is in its final stages. The “reasonably necessary” requirement is vague, but does suggest consideration of proportionality and whether less intrusive measures are available.

On the other hand, the government’s burden of proof is extremely low. The “reasonable grounds to suspect” standard is a significantly lower standard than the “reasonable cause” standard typically required in criminal arrests. Rebutting an assertion that the authorities had “reasonable grounds to suspect” a person of involvement in a terrorist act would be a difficult, if not impossible, burden on the detainee. Moreover, the requirement that the evidence “substantially assist” the prevention of a terrorist attack is as vague as the “reasonably necessary” requirement and equally difficult to contest.

With respect to the second situation—a preventative detention order for the purpose of gathering evidence relating to a past terrorist attack—the issuing authority must be satisfied that that the preventative detention is:

- 1) necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and
- 2) detaining the subject is “reasonably necessary” for the purpose of gathering evidence of a recent terrorist attack.²⁶²

A preventative detention order under this second subsection casts a wider net over potential detainees. Unlike the first subsection, the government need not establish any connection between the subject of the order and any terrorist related activity. Thus, not only may the government detain terrorist suspects, but it may also detain witnesses and any other persons who may come within the scope of a terrorist investigation. As media organizations pointed out in their submissions to Parliament, under these provisions, journalists and other media personnel could be subject to detention if they refused to turn over material, even if the material is subject to professional privilege or a journalist’s obligation to protect the identity of confidential sources.²⁶³

At the same time, the government’s burden of proof appears somewhat heavier than under the first subsection. The requirement that the government establish that the detention is “necessary” to preserve evidence suggests that government must show that detention is the *only* way that the government can preserve the evidence. Still, the statute does not expressly require the government to demonstrate that the evidence could not be obtained by less intrusive methods. As a practical matter, the issuing authority will likely defer to the

²⁶² *Id.* § 105.4(6)(b)-(c).

²⁶³ 2005 Senate Legal and Constitutional Legislation Committee Report, Provisions of the Anti-Terrorism Bill (No. 2) § 3.43, available at http://www.aph.gov.au/senate/committee/legcon_ctte/terrorism/report/report.pdf.

executive's determination of what measures are "necessary" with respect to the police investigation and the preservation of evidence.

Unlike the United States preventative detention schemes which are geared toward interrogation and information gathering, the police and ASIO are barred from questioning a detainee held under a preventative detention order (either state or federal), other than verifying the detainee's identity or inquiring about their safety and well-being.²⁶⁴ An officer who fails to comply with this requirement may be subject to criminal sanctions.²⁶⁵ The restriction on questioning is an important safeguard from using detention as a method of coercion to obtain information through interrogation. In the Explanatory Memorandum accompanying the Anti-Terrorism Bill, Parliament acknowledged that the "detention itself . . . can impact on the reliability of answers to questions," and thus interrogation of the detainee is not permissible.²⁶⁶

Nevertheless, preventative detention orders can operate in conjunction with other questioning and detention powers. A detainee may be released from preventative detention, immediately transferred to ASIO custody, and detained under a questioning warrant.²⁶⁷ Similarly, a detainee may be transferred to criminal custody and subjected to questioning in relation to criminal offenses.²⁶⁸

While the Australian preventative detention scheme is significantly narrower in scope than the United States preventative detention measures and incorporates strict time limits on detention, it shares similar problems relating to unreliable evidence, lack of judicial review, and secrecy. The issuing authority may consider evidence which would not otherwise be admissible in regular court proceedings. Indeed, an application for an initial order need not even be sworn by the AFP officer.²⁶⁹ Once a preventative detention order is issued, the police are required to inform the arrestee of a summary of the grounds of the order and must provide the detainee a copy of the order.²⁷⁰ The preventative detention order must set forth the name, date and duration of custody, as well as a summary of the grounds upon which the order is made, but may exclude any information that is likely to prejudice national security even if that information is the sole ground for the order.²⁷¹ Detainees are not entitled to see the application nor are they entitled to any of the underlying evidence or materials supporting the application.

Even if a detainee were provided more extensive information regarding the grounds for his detention, the Act is silent regarding potential avenues to con-

²⁶⁴ Criminal Code Act, 1995, *supra* note 241, § 105.42 (1).

²⁶⁵ *Id.* § 105.45 (stating that a violation of cited section may be a criminal offense).

²⁶⁶ Explanatory Memorandum, Anti-Terrorism Bill (No. 2) 2005.

²⁶⁷ Criminal Code Act, 1995, *supra* note 241, § 105.42(1).

²⁶⁸ Crimes Act, 1914, *supra* note 16, §§ IAA, IC.

²⁶⁹ *See* Criminal Code Act, 1995, *supra* note 241, § 105.7.

²⁷⁰ *See* Criminal Code Act, 1995, *supra* note 241, §§ 105.28, 105.31, 105.32.

²⁷¹ *Id.* § 105.8 (6), (6A).

test the order before the issuing authority. Thus, while the U.S. material witness statute and the enemy combatant order (after *Hamdi*) require a hearing at which a detainee may present evidence and contest the basis of the detention, the preventative detention order provisions fail to provide the detainee any similar right to a hearing following arrest at which the detainee may contest the government's application and present rebuttal evidence.

Moreover, opportunities for judicial review are limited for subjects of preventative detention orders. A detainee may seek a common law remedy in a federal court through a habeas petition, however the scope of such review is limited to errors of law and does not allow for any *de novo* examination of the evidence.²⁷² The Act does allow appeal to the Administrative Appeal Tribunal (AAT), but only after the order has expired.²⁷³ In addition, a detainee may submit a complaint to the Commonwealth Ombudsman under the Complaints (Australian Federal Police) Act 1981 or to an equivalent State or Territory body, however the complaint procedure is not designed to address petitions for release.²⁷⁴

Similar to the U.S. preventative laws, the preventative detention orders in Australia are cloaked in secrecy and thus eliminate a significant check on government power: public scrutiny. While individuals arrested under the Crimes Act 1914 (Cth) have the right to freely communicate with a friend, relative, and legal practitioner before being questioned by police,²⁷⁵ the right to communicate with any one in the outside world while in custody under a preventative detention order is severely limited. As a general rule, contact with the outside world is prohibited. A detainee may contact one family member, one housemate (if not living with a family member), his or her employer, an employee if detainee is an employer, one business partner, and any other person that the detaining police officer allows the detainee to contact.²⁷⁶ When making contact with these individuals the detainee may say only that he or she is "safe but is not able to be contacted for the time being" and the communications are monitored.²⁷⁷ The AFP also may seek an order from the issuing authority prohibiting even these limited contacts under certain specified circumstances where the contacts may harm or impede a terrorist investigation.²⁷⁸ Moreover, the consequences of violating the non-communication provisions are severe. The Act makes it a crime for anyone to disclose the existence of a preventative deten-

²⁷² *Id.* § 105.51(1).

²⁷³ *Id.* § 105.51(4)-(5).

²⁷⁴ *Id.* § 105.28(2)(c).

²⁷⁵ See Crimes Act, 1914, *supra* note 16, § 23G (providing that a person under arrest or being questioned by police have the right to communicate with a friend, relative, and legal practitioner before being questioned by police).

²⁷⁶ Criminal Code Act, 1995, *supra* note 241, §§ 105.34, 105.35(1).

²⁷⁷ *Id.* § 105.35(1)(f).

²⁷⁸ *Id.* § 105.14A(4)(a).

tion order punishable by up to five years in prison.²⁷⁹ Thus, individuals who have been detained are not permitted to discuss their detention with the media or anyone else during their detention.

The Act further infringes on the detainee's access and communication with an attorney. A detainee is permitted to contact an attorney for the limited purpose of obtaining advice about rights under a preventative detention order or for the lawyer to act for them in proceedings, including those relating to an order.²⁸⁰ Nevertheless, all contacts with an attorney or other persons may be monitored by the police.²⁸¹ As noted by the Australian Council for Civil Liberties and the Law Council in their submissions to the Senate Committee, the monitoring of attorney-client communications conflicts with the practice in place for hundreds of years that an attorney's communications with his or her client in police custody are confidential.²⁸² If a detainee is aware that the conversation is being monitored and taped by government officials, the detainee will not be open with his attorney for fear that the information will be used in other investigations.²⁸³ While the Act further provides that the lawyer client communications are inadmissible in any court proceedings, the use immunity only applies to those communications which fall within the strict limits for which access to legal advice is permitted.²⁸⁴

Finally, with respect to conditions of detention, subjects of preventative detention orders are detained in state prisons. There are no requirements that they be housed separately from those charged with or convicted of a crime, except that children under eighteen years of age must be housed separately from adults.²⁸⁵ The Criminal Code Act of 1995 requires that a person detained must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment.²⁸⁶ AFP officers who violate these terms are subject to criminal penalty.²⁸⁷

Preventative detention orders thus offer a more restrictive regime for detention than the U.S. measures. Nevertheless, they potentially violate separation of powers principles in two related, but distinct ways. First, the preventative detention orders authorize the executive to detain an individual without charges or a trial, and thus may usurp the exclusive power of the judiciary to punish and detain criminal suspects. Second, the preventative detention scheme authorizes

²⁷⁹ *Id.* § 105.41.

²⁸⁰ *Id.* § 105.37(1)(a).

²⁸¹ *Id.* § 105.38.

²⁸² Legal and Constitutional Legislative Committee, Senate, Provisions of the Anti-Terrorism Bill (No.2) 2005 (2005) [3.142] (citing ACCL Submission No. 17, p. 11 and Law Council Submission No. 222, p. 8).

²⁸³ *Id.*

²⁸⁴ Criminal Code Act, 1995, *supra* note 241, § 105.38(5).

²⁸⁵ *Id.* § 105.33A.

²⁸⁶ *Id.*

²⁸⁷ *Id.* § 105.45 (2 years imprisonment penalty for violation of § 105.33).

a judicial officer, in his or her *personal* capacity, to issue a continued detention order. While the High Court has upheld legislation delegating certain non-judicial administrative powers to judges in their personal capacity, authorizing judges to detain an individual without charges or trials is likely incompatible with their judicial functions and undermines the integrity of the judiciary as a whole.

1. Preventative Detention Orders and Usurpation of Judicial Power

The scheme of preventative detention orders authorizes executive—specifically the AFP and other individuals not currently serving as judges²⁸⁸—to issue detention orders, and thus resurrects the question in *Chu Kheng Lim* regarding the scope of executive power to detain individuals without trial. As previously discussed, the High Court recognized in *Chu Kheng Lim* that, as a general rule, the power to detain individuals is exclusively a judicial function, and thus executive detention may be an unlawful usurpation of judicial power.²⁸⁹ Justice Gummow recently reiterated this principle in *Fardon*, stating that “the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts.”²⁹⁰ While *Chu Kheng Lim* and subsequent cases recognized certain exceptions to that general rule, including immigration, military tribunals, and civil commitment for the mentally ill,²⁹¹ the preventative detention orders set forth in Anti-Terrorism Act (No. 2) 2005 do not fall into any of these well-recognized and historically based categories of administrative detention. Thus, preventative detention orders will survive constitutional scrutiny only if the High Court expands the list of acceptable categories to include the new counter-terrorism measures.

Echoing the language in administrative detention cases such as *Al-Kateb*, the Attorney General has argued that the preventative detention scheme is constitutionally permissible because it furthers the “non-punitive” purpose of “protecting the safety of the community.”²⁹² The High Court justices have made clear that the categories of executive detention recognized in *Chu Kheng Lim* are not closed and may be extended where detention is not punitive.²⁹³ Given the High Court’s extreme deference to government’s assignment of a “non-punitive”

²⁸⁸ See Criminal Code Act, 1995, *supra* note 241, § 105.2 (listing issuing authorities including retired judges and lawyers appointed to the Administrative Appeals Tribunal as President or Deputy President).

²⁸⁹ *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 27.

²⁹⁰ *Fardon v. Attorney-General* (2004) 223 C.L.R. 575, 80.

²⁹¹ See *supra* Section II.B.

²⁹² See Submission by the Third Defendant on behalf of the Commonwealth of Australia, in *Thomas v. Mowbray & Ors* (submitted Nov. 17, 2006), 41-55.

²⁹³ *Fardon* (2004) 223 C.L.R. 575, 75, 92, 108-09. See also *Lim* (1992) 176 C.L.R. at 55; *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 109-10; *Vaslijkovic v. Commonwealth* (2006) 228 A.L.R. 447, 460, 475, 491.

purpose to detention legislation in other cases, the court may likely agree with the Attorney General's conclusion and find that the preventative detention scheme does not infringe on Chapter III judicial power. The anti-terrorism legislation clearly states that the provisions are needed in order to "prevent an imminent terrorist attack" or to "preserve evidence of, or relating to a recent terrorist attack"—not to punish the detainees.²⁹⁴ Under reasoning like that of Justice McHugh, who said in *In re Wooley* that protective detentions are non-punitive, the preventative detention orders would likely be upheld.²⁹⁵

Nevertheless, as Justice Gummow pointed out in *Al-Kateb*, the overlapping purposes of criminal and civil law make the punitive/non-punitive distinction "apt to mislead," particularly in the case of preventative detention orders.²⁹⁶ Protecting the community from a terrorist attack is a purpose which is furthered not only by the preventative detention laws, but also by those laws criminalizing *preparations* for acts of terrorism. Indeed, preventative detention orders are virtually identical to those laws criminalizing acts of terrorism, yet simply apply lower standards of proof and require a shorter detention period. The preventative detention orders authorize detention where an individual is planning or preparing to commit a terrorist attack—the same acts barred under the new criminal laws relating to terrorism.²⁹⁷ The primary difference in detaining an individual under a preventative detention order versus detaining that same person for the criminal violation is the burden of proof. In a criminal case, the government must prove its case beyond a reasonable doubt, but to obtain a preventative detention order, the government merely needs to establish that it has "reason to suspect" an individual of committing those prohibited acts.²⁹⁸ To suggest that a law serves a protective and not punitive purpose merely because it provides for a lighter burden of proof and carries a lighter sentence makes no sense. If this were true, the entire Criminal Code could be reinvented as a "non-punitive" civil code aimed at "protecting the community."

Moreover, it unclear whether the legislation can be connected to any existing head of power under section 51.²⁹⁹ The government has cited a variety of legislative powers in support of its authority to implement preventative detention in cases of terrorism, including the defense power, the external affairs power, and the implied power to protect the Commonwealth and its authorities.³⁰⁰ Howev-

²⁹⁴ Criminal Code Act, 1995, *supra* note 241, § 105.1.

²⁹⁵ *In Re Kit Wooley*, 2004 WL 2244198 (HCA) at 61 (McHugh J.).

²⁹⁶ *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562, 612.

²⁹⁷ See, e.g., Criminal Code Act, 1995, *supra* note 241, § 101.6. See also LYNCH & WILLIAMS, *supra* note 241, at 14-28.

²⁹⁸ Compare Criminal Code Act, 1995, *supra* note 241, § 105.4(4) ("reason to suspect") and § 13.2 ("beyond a reasonable doubt").

²⁹⁹ *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 111 (Gaudron, J.); *Al-Kateb* (2004) 219 C.L.R. at 565 (Hayne, J.).

³⁰⁰ See Criminal Code Act, 1995, *supra* note 241, § 100.3 (listing powers legislative powers authorizing the legislation); Daryl Williams & James Renwick, *The War Against*

er, as Professors Andrew Lynch and Alex Reilly have pointed out, the government's authority to promulgate preventative detention legislation may largely rely on the "constitutional 'references'" of power by the states to the Commonwealth Parliament pursuant to section 51(xxxvii) of the Commonwealth Constitution.³⁰¹ Based on this power, it may be more difficult to conclude that the legislation is non-punitive.

Unlike the immigration detention cases such as *Al-Kateb*, preventative detention orders do not operate in a civil administrative arena separate from criminal law enforcement, but instead are part and parcel of the criminal code itself. In immigration cases like *Al-Kateb*, detention was deemed necessary to the administration of the deportation of non-citizens—a purpose which is distinct from the detention of criminals.³⁰² Here, the preventative detention orders aim to accomplish precisely what the criminal justice system traditionally has barred—the detention of criminal suspects without trial or the initiation of criminal charges.

In sum, the constitutionality of the preventative detention orders is not entirely sound. While the Court has been extremely deferential in the past with respect to upholding preventative detentions schemes which purport to further a non-punitive purpose, those cases upholding executive detention schemes can be easily distinguished from the most recent anti-terrorism scheme. Given the overlap with the criminal justice system, there are strong arguments that the preventative detention orders usurp the power of the judiciary to detain individuals in criminal proceedings and thus violate the protections of Chapter III of the Australian Constitution.

2. The Incompatibility of Preventative Detention Orders with the Exercise of Judicial Power

Preventative detention orders may also run afoul of separation of power principles by requiring judicial officers to function in a way that is incompatible with judicial power under Chapter III of the Constitution. As explained earlier, the issuing authority for a continued preventative detention order includes Federal Magistrate Judges. While the Criminal Code Act states that in issuing preventative detention orders, the Magistrate Judges would be acting in their personal capacity not their official capacity, the scheme raises serious questions about whether it is consistent with the nature of judicial power for judges to detain individuals without the benefit of a trial or a hearing based on evidence admissible in ordinary judicial proceedings.

On one hand, use of judicial officers to issue detention orders laudably seeks

Terrorism, National Security and the Constitution, BAR NEWS: JOURNAL OF NSW ASSOCIATION, Summer 2002/2003, at 43, 44.

³⁰¹ See Andrew Lynch, Alex Reilly, *The Constitutional Validity of Terrorism Detention Orders*, 10 FLINDERS J. OF L. REFORM 105, 107-08 (2007).

³⁰² *Al-Kateb* (2004) 219 C.L.R. 562.

to secure an independent and unbiased decision regarding the propriety of issuing a preventative detention or control order. Yet, as Justices McHugh and Gummow have stated, the reputation of the judicial branch for impartiality and nonpartisanship “may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action.”³⁰³ While federal judges acting in a personal capacity (as a *personal designata*) may exercise certain non-judicial functions, those functions may not be “inconsistent with the essence of the judicial function and the proper performance by the judiciary of its responsibilities for the exercise of judicial power.”³⁰⁴ Thus, for example, in *Grollo v. Palmer*, the High Court upheld the authority for judges to act in their personal capacity and issue telephone interception warrants sought by police officers.³⁰⁵

Preventative detention orders, however, are significantly different from telephone interception warrants, which merely authorize law enforcement officers to exercise their investigative functions. The preventative detention and control orders require judicial officers to do precisely what they cannot do under the traditional criminal justice system—detain an individual without trial merely on suspicion of criminality. For that reason, the orders more closely resemble the preventative detention orders found unconstitutional in *Kable*.³⁰⁶ Like the Community Protection Act in *Kable*, the preventative detention orders implemented by the Anti-Terrorism Act (No. 5) 2005 authorize detention “not on the basis that [the detainee] ha[s] breached any law,” but “by reference to material which may or may not be admissible in legal proceedings. . . .”³⁰⁷ Moreover, as in *Kable*, the preventative detention orders impose a detention scheme for suspected criminals which dispenses with the presumption of innocence and authorizes detention based on the standard of proof that falls well below the beyond a reasonable doubt standard required for criminal conviction.³⁰⁸

The Court’s decision in *Fardon* does not change the analysis, and indeed provides support for the invalidity of the preventative detention provisions. While the Court in *Fardon* upheld a Queensland preventative detention scheme authorizing the extended detention of convicted sexual offenders beyond their initial prison sentence, a critical fact was that the detainee had been convicted of a crime.³⁰⁹ For this reason, the Court deemed the extended detention a “consequential step in the adjudication of criminal guilt.”³¹⁰ In contrast, the preventative detention orders under the anti-terrorism legislation authorize detention that is entirely divorced from any adjudication of guilt. Preventative

³⁰³ *Grollo v. Palmer* (1995) 184 C.L.R. 348, 377, 392 (both justices separately quoting U.S. Supreme Court in *Mistretta v. United States*, 488 U.S. 361, 407 (1989)).

³⁰⁴ *Hilton v. Wells* (1985) 157 C.L.R. 57, 83.

³⁰⁵ *Grollo* (1995) 184 C.L.R. 348.

³⁰⁶ *Kable v. Director of Public Prosecutions* (1996) 189 C.L.R. 51.

³⁰⁷ *Id.* at 107 (Gaudron, J.).

³⁰⁸ *Id.* at 106-107.

³⁰⁹ *Fardon v. Attorney-General* (2004) 223 C.L.R. 575.

³¹⁰ *Id.* at 80.

detention orders are not the extension of a sentence of a criminal convicted through the criminal justice system. Rather, they serve as a substitute for criminal justice in its entirety.

Moreover, unlike the detention scheme incorporated in *Fardon*, the rules of evidence do not apply to anti-terrorism preventative detention orders.³¹¹ Preventative detention orders may be issued based on evidence that would be ruled inadmissible in court, including evidence that is procured by torture or that is otherwise unreliable.³¹² Additionally, detainees are neither provided a right of appeal nor a public hearing conducted in accordance with the ordinary judicial process.³¹³ Even if there were a hearing, detainees may be denied access to certain information and evidence submitted by the government. To allow judges to detain individuals under such circumstances, even for a limited period of time, seriously undermines the integrity of the court and the principles upon which the judicial process is founded.

B. Control Orders

Division 104 of the Anti-Terrorism Act sets forth a scheme for the imposition of control orders. Control orders are distinct from preventative detention orders in that they stop short of authorizing the detention of an individual in a government facility. Nevertheless, like preventative detention orders, control orders impose significant obligations, prohibitions and/or restrictions on individual liberties for the purpose of protecting the public from a terrorist act. Indeed, Justice Sullivan of the High Court in the United Kingdom found that a control order which had been issued under a similar scheme in the UK and imposed house arrest for eighteen hours a day, amounted to imprisonment.³¹⁴ Control orders impose broad restrictions on a person's physical movements and communications including:³¹⁵

- A prohibition or restriction on the person being at specified areas or places;
- A requirement that the person remain at specified premises between specified times each day, or on specified days;
- A prohibition or restriction on the person communicating or associating with specified individuals;
- A requirement that the person wear a tracking device;

³¹¹ See Criminal Code Act, 1995, *supra* note 241, § 105.11 (application for preventative detention order does not restrict the type of evidence upon which it is based).

³¹² *Id.*

³¹³ See *supra* notes 271-73. Cf. *Fardon* (2004) 223 C.L.R. 575, 19 (Gleeson, J.).

³¹⁴ See *Secretary of State for the Home Department v. JJ* [2006] EWHC 1623 (Admin), 69-74.

³¹⁵ See Criminal Code Act, 1995, *supra* note 241, § 104.5(3) (listing obligations, prohibitions, and restrictions).

- A prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation).

Other possible prohibitions under the Criminal Code Act include a restriction on the use of communication devices such as the Internet or a restriction on the possession of certain articles or substances.³¹⁶ In addition, a control order may impose certain obligations, such as an obligation to report to a specified person at specified times and places, be photographed, be fingerprinted, or participate in specified counseling or education.³¹⁷ Significantly, failure to comply with a control order is a criminal offense punishable by up to five years in jail.³¹⁸

Unlike preventative detention orders, control orders are issued by the courts.³¹⁹ Before requesting a control order from a court, a senior member of the AFP must first obtain written consent from the Attorney General.³²⁰ Once the Attorney General has consented to the proposed order, the AFP member may apply for an interim order from an issuing court.³²¹ Federal Courts, Family Courts, and Federal Magistrate's Court all qualify as issuing courts.³²²

The scope of individuals subject to a control order is significantly broader than those subject to a preventative detention order. The AFP member merely must establish on the "balance of probabilities":

- 1) that making the order would substantially assist in preventing a terrorist act; or
- 2) that the person subject to the order has provided training to, or received training from a listed terrorist organization.³²³

Thus, the AFP member is not required to suspect that the individual subject to the order is involved in any specific terrorist activity or attack. Indeed, the government need not establish any evidence that a specific attack is even being planned. Rather, the Act authorizes the imposition of a control order as a measure to prevent terrorism generally.

A control order imposed on an individual who has provided or received training from a listed terrorist organization is likewise incredibly broad. The Act does not require that the training be related to terrorism, but rather may include non-violent training such as religious study or community service. Also, there are no time limits as to when the training may have taken place and thus a person trained by a listed organization a decade ago could be subject to a control order for life.

A request for an interim control order is made *ex parte* by a senior AFP

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.* § 104.27.

³¹⁹ *Id.* §§ 104.4, 100.1 (defining "issuing court").

³²⁰ *Id.* § 104.2.

³²¹ *Id.* § 104.3.

³²² *Id.* § 100.1.

³²³ *Id.* § 104.4(1)(c).

member after obtaining consent from the Attorney General.³²⁴ The AFP officer must set forth a statement of facts supporting the application, an explanation as to why each of the obligations, prohibitions, and restrictions should or should not be imposed on the person, as well as any mitigating facts relating to why the order should not be made.³²⁵ Just as with preventative detention orders, if there is information which is likely to prejudice national security, it simply need not be included in the statement of facts.³²⁶ Also, there is again no requirement that the statement be sworn. While a court may request further information from the AFP officer,³²⁷ there is no requirement that the AFP member submit admissible (or even inadmissible) evidence in support of the statement.

Once a court is satisfied that the terms of the interim control order are “reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act,”³²⁸ it will issue an interim order outlining its terms and length.³²⁹ There is no provision for a hearing, either *ex parte* or otherwise, with respect to interim orders. Thus, the subject of the order is not allowed any opportunity to contest a request for an interim order, nor is he or she even notified of the application before the order is issued.

The subject of a interim control order is allowed a hearing later to contest a confirmation of a control order, and that hearing date must be “as soon as practicable, but at least 72 hours after the order is made.”³³⁰ The subject of the order must be served with the order at least forty-eight hours prior to the hearing date.³³¹ In addition to the order, the AFP must provide the subject a copy of the statement of facts supporting the order and “any other details required to enable the person to understand and respond to the substance of the facts, matters, and circumstances which will form the basis of the confirmation of the order.”³³² Nevertheless, the statute provides a gaping hole of exceptions to this general rule of disclosure. The AFP need not turn over any information or documents if the disclosure is likely to:

- a) prejudice national security . . .; or
- b) be protected by public interest immunity; or
- c) put at risk ongoing operations by law enforcement agencies or intelligence agencies; or
- d) put at risk the safety of the community, law enforcement officers or

³²⁴ *Id.* §§ 104.2(3), 104.3.

³²⁵ *Id.* § 104.2(3).

³²⁶ *Id.* § 104.2(3A).

³²⁷ *Id.* § 104.4(1)(b).

³²⁸ *Id.* § 104.5(1).

³²⁹ *Id.* § 104.5.

³³⁰ *Id.* § 104.5(1A).

³³¹ *Id.* § 104.12(1).

³³² *Id.* § 104.12A(2).

intelligence officers.³³³

At the “confirmation” hearing, the subject of the control order has an opportunity to challenge the government’s application for the control order and both parties are afforded the opportunity to provide evidence and make submissions.³³⁴ The Act, however, is silent as to the admissibility of evidence that may be submitted or considered. According to the Senate Committee Report, the government has advised that the Evidence Act would apply to interim control orders (as interlocutory proceedings) and confirmation hearings (as proceedings in a federal court).³³⁵ Nevertheless, the Act also fails to address whether the court can confirm the order by relying on evidence that has not been turned over to the subject of the order because of national security or “community safety” concerns.

Unlike a preventative detention order, a control order may be imposed for an extended period of time. The Act states that an order may last up to one year, but also provides that an order may be renewed after expiration.³³⁶ There are no limits on how many times a control order may be renewed, and thus a person could be subject to a control order for years, if not a lifetime.

Finally, the Act provides a sunset provision of ten years for the control order provisions.³³⁷ During that ten year period, the Attorney General must issue annual reports reporting various statistics regarding the number of interim and confirmed control orders issued, as well as particulars of any complaints related to control orders.³³⁸

To date, the only case in which the government has applied for a control order is the case of Joseph Terrence Thomas, (nicknamed by the media “Jihad Jack”). Thomas, an Australian citizen, traveled to Afghanistan in 2001, where he allegedly trained at the Al Faroq training camp.³³⁹ Over the next year and a half, Thomas stayed in various Al Qaeda safe houses and allegedly met several Al Qaeda officials, including Osama bin Laden.³⁴⁰ On January 4, 2003,

³³³ *Id.* § 104.12A(3).

³³⁴ *Id.* § 104.14(1).

³³⁵ 2005 Senate Legal and Constitutional Committee Report, Provisions of the Anti-Terrorism Bill (No.2), §§ 4.39, 4.40. *See also* Criminal Code Act, 1995, *supra* note 241, § 104.28A (stating that proceedings in relation to an interim control order are to be taken as interlocutory proceedings for all purposes including for the purpose of section 75 of the Evidence Act 1995 and that confirmation proceedings are *not* to be classified as interlocutory proceedings.).

³³⁶ Criminal Code Act, 1995, *supra* note 241, §§ 104.5(f), 104.5(2).

³³⁷ *Id.* § 104.32.

³³⁸ *Id.* § 104.29.

³³⁹ *R v. Thomas* [2006] VSCA 165, 1-7 (outlining facts and procedural history). *See also* Sally Neighbor, *The Transcript: What Thomas told Four Corners*, THE AUSTRALIAN, Aug. 21, 2006, <http://www.theaustralian.news.com.au/story/0,2087,20199530-610,00.html> (describing Thomas’ account of his experience in Afghanistan).

³⁴⁰ *Id.*; Neighbor, *supra* note 339, at 278.

Thomas was arrested by Pakistani officials as he crossed the border into Pakistan and was held in various detention facilities for five months.³⁴¹

During that time, Thomas allegedly was tortured by Pakistani officials and interrogated without counsel by Pakistani as well as U.S. and Australian officials about his Al Qaeda ties and activities.³⁴² During an interview with the Australian Federal Police and ASIO, Thomas admitted that he had altered his passport and that he had been given money and an airline ticket by a high ranking al Qaeda official.³⁴³ In June 2003, he was released from Pakistani custody and deported to Australia where he returned to live with his family in Melbourne.³⁴⁴ It was not until eighteen months later that he was arrested by the AFP and charged with several federal offenses, including receiving funds from a terrorist organization, providing resources to a terrorist organization, and holding a false passport.³⁴⁵

Thomas was tried on these charges before a jury in the Supreme Court of Victoria.³⁴⁶ The case was controversial as the prosecution relied heavily, if not exclusively, on the confession obtained by the Australian authorities in the Pakistani military prison, a confession which Thomas' defense counsel argued was inadmissible because it had been obtained under duress and without the option of counsel.³⁴⁷ The trial court disagreed and admitted the evidence, finding that Thomas had made the statement voluntarily.³⁴⁸ On February 26, 2006, the jury convicted Thomas of receiving funds and false passport charges and in March, he was sentenced to five years in jail with a minimum term of two years.³⁴⁹

On appeal, the conviction was reversed.³⁵⁰ The appellate court found that Thomas' statement was involuntary and therefore inadmissible.³⁵¹ The appellate court issued an order acquitting Thomas on all charges.³⁵² The government, however, argued that a retrial was in order based on "new evidence," which was an interview Thomas had given to ABC's *Four Corners* the day after his conviction where he admitted to falsifying his passport and receiving funds from al Qaeda officials.³⁵³

Significantly, in addition to requesting a new trial, the government also filed

³⁴¹ R v. Thomas [2006] VSCA 165, 1-2.

³⁴² *Id.* at 8-61 (outlining the various interviews of Jack Thomas in Pakistan).

³⁴³ *Id.* at 6.

³⁴⁴ *Id.* at 2.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 3.

³⁴⁷ *Id.* at 4-5.

³⁴⁸ DPP v. Thomas [2006] VSC 243, 52.

³⁴⁹ R v. Thomas (No 2) [2006] VSCA 165, 3.

³⁵⁰ *Id.* at 120.

³⁵¹ *Id.* at 66-95.

³⁵² *Id.* at 120.

³⁵³ R v. Thomas (No 3) [2006] VSCA 300, 6, 18; Neighbor, *supra* note 339, at 278.

an application for an interim control order to be imposed on Thomas which was granted.³⁵⁴ Among other things, the order required Thomas to remain in his house at night and to report three times a week to one of three designated Victorian police stations.³⁵⁵ It further prohibited him from leaving the country, from communicating with any individuals associated with terrorist organizations, and it limited his use of telephone and internet services.³⁵⁶

The Thomas case is a pointed example of how control orders give the government a second bite at the apple at punishing suspected terrorists when there is insufficient evidence to prosecute. Through the control order system, the government, having failed to prove its case against Thomas, through the criminal justice system, was able to impose an alternative form of “trial” and punishment on Thomas for his past activities—activities for which Thomas either was acquitted or could not be charged. His liberties were restricted based not upon a finding of guilt beyond a reasonable doubt, but rather a “balance of probabilities” that he had trained at a terrorist training camp. Even though Australia had not passed legislation criminalizing such activities, control orders may be imposed based on acts which were lawful at the time they were undertaken. Finally, the liberties denied Thomas under the control order may be less significant than the detention he would have faced had his conviction been upheld, but unlike a criminal sentence, a control order may be imposed for an indefinite period of time. Indeed, Thomas could easily be subject to control orders for years, if not for the rest of his life. The finding that he trained with a terrorist organization in 2001 will always support the issuance of an order under the Act regardless of whether the order is imposed this year or in twenty years.

1. Control Orders and the Exercise of Judicial Power

Like preventative detention orders, control orders place significant restrictions on individual liberty. In fact, while control orders do not authorize imprisonment, the restrictions can be equally onerous and may be imposed for far more time than preventative detention orders, thus bearing an even closer resemblance to a criminal sentence than preventative detention orders. The control order scheme authorizes courts—both federal and state—to deprive individuals of significant, if not fundamental, liberties without the benefit of a trial. Courts are to issue the control orders in their official capacity as courts, not in a personal or administrative capacity as in the case of preventative detention orders. Thus, the question with respect to control orders is a slightly different one. It is not simply whether the imposition of control orders is incompatible with judicial power, but rather whether it falls within the scope of the definition and function of judicial power under the Commonwealth Constitution.

The Australian High Court addressed these questions head on in *Thomas v*

³⁵⁴ Interim Control Order, [2006] FMCA 1286 (Aug. 27, 2006) (attachment 1).

³⁵⁵ *Id.*

³⁵⁶ *Id.*

Mowbray and held that the control order regime does not violate the Australian Constitution.³⁵⁷ In a 5-2 decision, the High Court held that the imposition of control orders is a valid exercise of Parliament's external affairs and defense powers and does not violate separation of power principles in Chapter III.³⁵⁸ The Court's decision significantly expanded the Commonwealth government's defense powers to include domestic terrorism. By equating the threat of terrorism to the threat of war, the court is affirming the government's "war on terror."³⁵⁹

In addressing whether the control order regime violated Chapter III, the court rejected Thomas' argument that control orders are in fact punitive, not protective, and thus may only be imposed by courts upon adjudication of guilt in accordance with the established processes of the criminal justice system.³⁶⁰ The Court held that control orders are distinct from orders imposing detention; they are more analogous to orders imposing bail or "apprehended violence orders" (similar to a protective order in the United States) which impose certain restrictions on individuals based on their propensity to commit a crime.³⁶¹

The Court's conclusion, however, in many ways defies reality. The Jack Thomas case is illustrative of how the control order regime can operate as a parallel system of criminal justice. The government, unable to secure a criminal conviction because of inadmissible evidence, has been able to effectively prosecute Thomas a second time through a process which replaces the traditional "beyond a reasonable doubt" standard of proof with "on a balance of probabilities" and replaces elements of a criminal offense, including *mens rea*, with a showing that the order would "substantially assist in preventing a terrorist attack."³⁶² While the government adamantly argues that the restrictions imposed on Thomas are not punitive but protective, it seems clear that the government seeks to incapacitate Thomas in a similar way it would a criminal defendant.³⁶³

The justices in *Thomas* further found that the issuance of control orders does not conflict with the function and exercise of judicial power because of the significant safeguards and procedures incorporated in the regime.³⁶⁴ Citing its decision in *Fardon*, the Court suggests that there is nothing inherently wrong with a court making an order for preventative, as distinct from punitive, deten-

³⁵⁷ *Thomas v. Mowbray* [2007] HCA 33 (Gleeson, C.J., Heydon, Gummow, Callinan, Crennan, JJ.).

³⁵⁸ *Id.* at 1-32 (Gleeson, J.), 33-156 (Crennan, Gummow, JJ.), 519-609 (Callinan, J.). 610-52 (Heydon, J.).

³⁵⁹ *See id.* at 585-90 (Callinan, J.).

³⁶⁰ *See, e.g., id.* at 111-26 (Crennan, Gummow, JJ.).

³⁶¹ *Id.* at 16 (Gleeson, J.).

³⁶² *Id.*

³⁶³ *Id.* at 18 (Gleeson, J.).

³⁶⁴ *Id.* at 30 (Gleeson, J.); *id.* at 599 (Heydon, J.).

tion as long as certain procedural protections are afforded.³⁶⁵ Indeed, compared to preventative detention orders, which provide the detainee with virtually no due process rights, the control order provisions detail a process which more closely resembles that in *Fardon*. The control order provisions place the burden of proof on the government. Likewise, the rules of evidence apply, the subject of the order has a right to appeal, and in confirming a control order, the court conducts a hearing at which both sides are permitted to present evidence. Furthermore, the High Court held that it is entirely within the court's usual functions to determine which is "reasonably necessary" and "reasonably appropriate and adapted" for the purpose of protecting the community.³⁶⁶

Nevertheless, the Court failed to address the fact that there are key distinctions between the control order scheme and the preventative detention upheld in *Fardon*. Control orders are not consequent upon an adjudication of guilt and therefore cannot be viewed as an extension of the judicial sentencing power or more general power to administer criminal adjudications. As illustrated by the Jack Thomas case, a conviction is not a prerequisite to the issuance of a control order. Rather a control order may be imposed based on criminal allegations even where the subject of the order was cleared of all criminal charges. Thus, Thomas, who had been acquitted of criminal charges, was still held to be subject to restrictions under a control order based on allegations identical to those which were dismissed in the criminal proceeding.

In addition, while control orders do provide certain due process protections, there remain substantial differences between the hearing process in a typical judicial proceeding and a control order proceeding. The most glaring shortcoming is that an individual is not necessarily told the grounds upon which the control order is based or shown the evidence supporting the control order. Under the control order provisions, an individual is provided only with a summary of the basis for the control order. Information deemed by the government to be related to national security may be withheld from both the subject of the order and his or her attorney, yet may still serve as a principal, if not the exclusive, basis for the imposition of the order. Finally, with respect to interim control orders, the subject of the order has no opportunity to contest the validity of the interim order. Thus, until a confirmation hearing is held—which in the Thomas case was not a matter of days, but months—an individual is subject to the order's restrictions without any opportunity to contest the basis of the order.

In the United Kingdom, courts have struck down the imposition of control orders. In the *In re MB* case, Justice Sullivan concluded that control order measures were incompatible with the respondent's right to a fair hearing under Article 6.1 of the European Convention on Human Rights.³⁶⁷ Justice Sullivan found particularly troubling the low standard of proof required in issuing a

³⁶⁵ *Id.* at 15-18; *Fardon v. Attorney-General* (2004) 223 C.L.R. 575, 20 (Gleeson, C.J.).

³⁶⁶ *Mowbray* [2007] HCA 33, 19-29 (Gleeson, C.J.), 94-110 (Crennan, Gummow, JJ.).

³⁶⁷ *In re MB*, [2006] EWHC (Admin) 1000, [104] (Apr. 12, 2006).

control order, as well as the procedure which allows the government to put “a significant part, and in some cases *the* significant part of his case, before the court in the absence of the respondent and his legal representatives.”³⁶⁸ “Without access to the material,” Justice Sullivan concluded, “it is difficult to see how, in reality, the respondent could make any effective challenge to what is, on the open case before him, no more than a bare assertion.”³⁶⁹

By restricting fundamental individual liberties without the usual attendant criminal charges or trial, both preventative detention and control orders undermine basic tenets of criminal justice, including presumption of innocence, the requirement of proof beyond a reasonable doubt, and the right to a fair trial.³⁷⁰ Yet, as the High Court’s decision in *Thomas* made clear, the separation of powers constraints in the Australian Constitution do not provide as strong protections for individual liberty as those countries with express constitutional or statutory human rights provisions. While the *Thomas* Court was careful in its decision to distinguish a control order from one that imposes detention in government custody—thus leaving the scope of the government’s detention powers an open question—the decision affirms Australia’s tradition of parliamentary sovereignty in determining the balance between human rights and national security.

V. CONCLUSIONS

The United States and Australian constitutions both protect individuals from involuntary detention without trial. However, the limits they place on each government’s authority to detain individuals without charges or a trial are not entirely clear. Courts in both jurisdictions have recognized that the government’s preventative detention powers are limited. In Australia, the opinion of Justices Brennan, Deane, and Dawson in *Lim*, set forth a straightforward rule that the power to detain was an exclusively judicial one. Thus, except in certain well-established categories, detention could only be imposed by a court as a consequential step in the adjudication of guilt. Similarly, in the United States, the Supreme Court repeatedly recognized that the Constitution’s Due Process Clause generally bars detention pursuant to criminal process without an adjudi-

³⁶⁸ *Id.* at 65.

³⁶⁹ *Id.* at 67. Judge Sullivan bolstered his conclusion that the procedures were unfair based on several additional procedural flaws, some of which are not applicable to the Australian regime. For example, he noted that under the U.K. control order system, an order is issued by the Secretary of State and the court’s role is more supervisory. *Id.* at 51-55. Under the Australian regime, the court is the principal decision-maker and issuing authority of the control order.

³⁷⁰ See Lynch & Reilly, *supra* note 301; LYNCH & WILLIAMS, *supra* note 241, at 54-58. See also, e.g., Submission to the Senate Committee on Legal and Constitutional by Dr. Gregory Carne (Nov. 10, 2005); same by the Gilbert + Tobin Centre for Public Law (Nov. 10, 2005); same by the Law Council of Australia (Nov. 11, 2005).

cation of guilt. In so holding, courts in both nations recognized that detention without trial conflicts with English legal principles dating back to the *Magna Carta*, which require that in criminal matters, suspects who have been arrested must be brought before a magistrate to be charged with a crime and soon thereafter tried before a court or else released.

Both U.S. and Australian courts have recognized that preventative detention for the protection of the community may be non-punitive, at least in cases of pretrial detention and civil commitment. In Australia, however, the High Court has adopted an extremely deferential analysis, suggesting that preventative detention is permissible as long as it falls within one of the legislative grants of power. The U.S. Supreme Court has found that substantive and procedural due process requires additional protections. Under the Court's framework, any scheme which deprives an individual of fundamental liberty rights must be narrowly tailored to serve a compelling government purpose and incorporate adequate procedural safeguards. Further, the Supreme Court has noted that there must be a "special justification" for detention.

The United States, however, has failed to live up to its constitutional due process obligations in the age of terrorism. The government's designation of individuals as material witnesses and enemy combatants make it possible to detain U.S. residents virtually incommunicado for an indefinite period of time with few procedural protections. The preventative detention measures deny detainees fundamental rights such as notice and opportunity to review and contest the evidence upon which their detention is based. As a result, the country with the strongest protections of individual liberties has adopted the most repressive measures of preventative detention.

In contrast, Australia's preventative detention laws are limited in scope and thus better protect individual liberties. Australia's laws set forth a comprehensive legal structure and process for preventative detention in terrorism cases that places clear limits on the government's authority to detain individuals. While U.S. measures authorize the indefinite detention of terrorist suspects, the Australian preventative detention orders place strict time limits on detention. Preventative detention orders are also limited in terms of who can be targeted. They can be used only in situations of recent or imminent terrorist attack. While it is unclear exactly how it would be determined that an attack was imminent, the U.S. measures incorporate no similar limitations. Moreover, both control and preventative detention orders incorporate more extensive procedural safeguards and oversight mechanisms to prevent misuse or injustices than exists in respect of their U.S. equivalents.

Based on the comparison between the U.S. and Australian preventative detention policies, it is tempting to conclude that bills of rights are meaningless. The United States Constitution provides a powerful Bill of Rights, yet the Supreme Court is reluctant to invoke those rights in cases of preventative detention. While the Supreme Court suggested, without explicitly stating, that detention cases are to be analyzed under its strict scrutiny approach, in practice this

has not produced increased respect for individual rights. The Court has refused to address the glaring constitutional problems of indefinite preventative detention in the most recent Guantánamo Bay cases. Even in cases such as *Ex parte Endo* and *Zadvydas* where the Supreme Court found the preventative detention of the petitioner to be unlawful, the Court ordered release of the detainee on statutory grounds, not constitutional grounds. In short, despite the United States having historically strong and express protections of individual rights, the government has been able to effect the harshest preventative detention policies.

The relative aggressiveness of the U.S. preventative detentions may be due to the fact that its measures were undertaken unilaterally by the executive acting through the Department of Justice or military. Unlike the U.S. measures, the Australian preventative detention system was the product of the legislative process, not unilateral executive decision-making, enabling a compromise consensus on reasonable limitations on government power to be reached.

Yet, ultimately, the courts' failure to exercise their judicial responsibility to check executive and legislative power allows the extraordinary measures adopted by the U.S. government to persist. There may be valid reasons for deference to the legislature and executive in the age of terrorism. The executive and legislature have access to confidential information regarding threats to national security and the expertise in how best to respond to such threats. Yet, while the other branches undoubtedly have the expertise to thwart threats, this alone cannot justify the courts abdicating their responsibility to ensure that the government's measures respect civil liberties and comply with constitutional limits on executive and legislative power. As illustrated by the World War II internment programs in both the United States and Australia, the executive has a tendency to overstate a threat, or at least omit mitigating facts, where a political agenda is at stake. The legislature then reacts to that characterization of the threat and grants the executive broad powers to do whatever it views as necessary to ensure national security. While it is the province of the executive and legislature to assess threats and fashion effective policies to address them, it is likewise the duty of the judiciary to ensure that such policies do not encroach upon the limits on government power set forth in the nation's constitution.

A judicial check on executive and legislative power with regard to terrorism is all the more necessary because the public is routinely denied access to information underlying the government's claims of imminent threat. Both the U.S. and Australian governments have repeatedly stated that when there is significant threat, national security interests preclude them from disclosing their reasons for reaching that conclusion. In essence, the public is asked simply to trust the government and support legislation premised on assertions of danger without any further inquiry. Just as governments during war do not disclose all they know about the war effort or campaigns, doubtless there are valid reasons for not disclosing intelligence on terrorist activity. However, a government accountable to an uninformed constituency is not accountable at all. Under

these circumstances, principles of democracy underlying principles of parliamentary sovereignty and democratic populism are least effective. The courts must therefore be particularly vigilant at this time rather than excessively deferential.

The need for judicial oversight is all the more pressing given that, unlike a declared war which has a finite end, the threat of terrorism is not going to go away anytime soon and, like ordinary crime, may never abate. Accordingly, courts must take an active role in ensuring that the counterterrorism measures adopted by the government strike the right balance with individual liberties. The U.S. Supreme Court has placed limits on the executive's most egregious assertions of power by, for example, requiring that enemy combatants have some opportunity to contest their confinement. However, the Court has ignored the various ways through which the executive has detained individuals arrested off the battlefield.

In Australia, the absence of a bill of rights has afforded the government more flexibility to implement forthright measures to address the threat of terrorism. However, at the same time, without a bill of rights there is an increased danger that preventative detention may expand and become a permanent fixture of the criminal law. The separation of judicial power provides an awkward mechanism for the courts to protect civil liberties in Australia. While the U.S. Supreme Court has recognized that deprivations of fundamental rights must further only the most compelling of government interests, the High Court of Australia has not inquired whether the government's preventative detention policies balance the government's interests with their impact on individual rights. Nor has the High Court been willing to examine whether the executive has provided sufficient safeguards in executive detention laws. As the U.S. experience demonstrates, a bill of rights does not resolve the difficult questions posed by the government's asserted need to detain people without charges. However, the lack of an express bill of rights leaves the Australian High Court without a clear framework for analyzing or reviewing whether measures enacted by the democratic branches are excessive or heavy-handed.

Despite the different approaches to civil liberties issues, neither country's legal tradition supports a system of preventative detention in lieu of charging individuals suspected of criminal activity, even for the most serious of crimes. Preventative detention of suspected terrorists in the United States and Australia undermines the basic protections and purposes of the criminal justice system. Fundamental to both systems of justice and the rule of law is the presumption of innocence and its concomitant principle that the government cannot establish order by identifying groups of potential criminals and imprisoning them. Preventative detention measures purport to carve out exceptions to this fundamental norm. Neither the protections of judicial power under Chapter III of the Commonwealth Constitution nor the due process protections of the U.S. Bill of Rights have meaning if the executive can sidestep the criminal justice process through an alternative system of detention, dispensing with the presumption of

innocence and the government's burden to prove guilt beyond a reasonable doubt.

The preventative detention mechanisms of both the United States and Australia purport to authorize the detention of individuals for acts that could also provide a basis for prosecution. The difference is that the government's burden is lightened when the detention is labeled "preventative." The one exception to this rationale for the preventative detention laws, the United States' claim that individuals are incarcerated as material witnesses, is disingenuous. In fact, those individuals are also targeted for arrest and confinement because they are suspected of criminal behavior but proof is lacking. Accordingly, because these schemes simply allow the government to evade criminal processes prescribed constitutionally by the law of both nations, the preventative detention laws are constitutionally invalid.

Moreover, the laws as currently designed lack the necessary procedural protections to ensure that defendants have a fair opportunity to contest their detention. The burden of proof is so low that contesting detention is effectively impossible. Additionally, a detainee and his lawyer may be denied access to evidence upon which the detention is based if the government decides that the evidence should be withheld for national security reasons. This decision too is essentially unquestionable. Indeed, even the court issuing the detention order may be denied access to such evidence. A fair hearing under these circumstances is simply not possible.

This is not to say that preventative detention for national security purposes is never permissible. Limited recourse to preventative detention may be appropriate and indeed necessary in situations of emergency. History shows that governments routinely resort to preventative detention in wartime and other emergencies. The law in fact recognizes that safeguards on liberty may be limited during times of emergency or imminent threat. Most notably, it is well-established in both the United States and Australia that the legislature has the authority to suspend the writ of *habeas corpus*. In such cases, compliance with the traditional criminal processes may be impossible, and thus an exception to the general bar on detention without charges may be justified. Furthermore, as illustrated by the United States' recent terrorism strategies, a strict bar on preventative detention altogether may simply force the government to adopt more extreme measures outside the law. A legislative scheme for preventative detention limited to situations of declared emergency thus would not only sit more comfortably with constitutional protections of the criminal process, but also may prevent the widespread suspicionless detentions which have repeatedly occurred in times of crisis.

The scope of the preventative detention in the age of terrorism has been the subject of great debate among legal scholars.³⁷¹ Nevertheless, most scholars agree that critical to the constitutionality and success of any such detention

³⁷¹ See cases cited *supra* note 71.

scheme is the incorporation of adequate procedural safeguards. Such safeguards must include, at the very least, strict time limits, clear and objective standards upon which detention is to be imposed, a neutral decision-maker, notice to the detainee of the factual basis for the detention, an immediate hearing and opportunity to rebut the detention evidence, and prompt judicial review. This is best accomplished through a legislative process in the manner that the Australian preventative detention scheme was created. At the same time, a just system for preventative detention must recognize the severe and fundamental infringement on individual rights that incarceration for any length of time entails, as the United States Constitution expressly acknowledges.