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The Constitutionality of Indefinite Detainment of United States Citizens as Terrorist Suspects

Spencer Kelly, Tiffany Erickson, and Eric Backman¹

On April 27, 2010, Syed Fahad Hashmi appeared in federal district court to accept a plea bargain. He pled guilty to conspiracy to provide material support to Al Qaeda. Three other charges which the federal government and filed against him were dropped, and Hashmi was sentenced to 15 years in prison. This ended Hashmi’s nearly four-year pretrial incarceration and he was sent to a super maximum security prison in Colorado. However, the weeks and months spent in anticipation of a criminal trial were filled with demonstrations held, concerts performed, and letters written in support of Hashmi and to raise awareness of what many saw as inhumane conditions in which he was held. Hashmi was being held under Special Administrative Measures, had spent nearly three years in solitary confinement, and had gone five months without contact from anyone other than his attorney.

Hashmi’s story has raised public discussion regarding conditions of pretrial confinement, particularly regarding potential terrorist suspects. Other suspected terrorists, including Jose Padilla and Yaser Hamdi, have raised the visibility of the issue while giving it new dimension. For many, the mere mention of detainment of

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terrorist suspects brings to mind Guantanamo Bay and similar holding facilities. As complicated and, at times, messy as policies regarding terrorist suspects can be, the three above-mentioned men add a new wrinkle: they are American citizens. Their detainment and prosecution must also account for the rights and privileges afforded them by their citizenship. In recent years, the United States government has tightened security measures and passed tougher legislation to combat the threat of further terrorism.

The implementation of this legislation with other legislation, particularly SAMs (as outlined below) is unnecessarily overstepping the boundaries protecting the rights of American citizens—particularly those outlined in the fifth and sixth amendments. The most glaring violation is the disregard of habeas corpus. This legislation is riddled with loopholes and ought to be amended to reduce the excessive infringement on the Constitutional rights of American citizens. We contend that current legislation should be amended to impose a timeframe in which citizens deemed as terror suspects must be charged in order to preserve their right of habeas corpus, and the conditions under which they are held ought to be reexamined in order to meet the standards guaranteed these suspects by the Constitution. Ultimately, government infringement on the rights of American citizens held under suspicion of terror must be cut back where possible and carefully monitored where necessary.

Section one of this paper will give a brief history of the relevant legislation concerning detaining terror suspects. In section two of this paper, we explain the role of habeas corpus in the detention of terror suspects, how the government can legally infringe on that right, and how the government has overstepped their legal bounds regarding habeas corpus. In section three, we outline other various Constitutional rights that play a role in detaining suspected terrorists, how the government should uphold these rights, and how it has potentially violated them. Finally, in section four, we outline ways in which the government can cut back current policy to better protect Constitutional rights and better monitor detainment policy and procedure in order to minimize or eliminate infringement while still ensuring the safety of our nation. This section will propose changes to current legislation as well as suggestions to better protect
Constitutional rights under current detention policy and law. Specific changes in legislation to better ensure the Constitutional rights of suspected terrorists will be outlined, guided by principles of change that are in line with our argument that more can and should be done to protect the rights of detained terror suspects. Though the balance between national security and individual rights can be difficult to maintain, we argue that changes should be made in order to balance the scales that currently are tipped too far away from the Constitutional rights of American citizens held under suspicion of terrorism.

I. A History of Relevant Legislation

On May 17, 1996, the Code of Federal Regulations accepted new anti-terrorism measures. These came about, in large part, because of the recent domestic terrorist bombing attack in Oklahoma City just two years prior, and the new code Prevention of Acts of Violence and Terrorism in the Code of Federal Regulations (hereafter CFR) fell in line with contemporary legislation. The key element to the Prevention of Acts of Violence and Terrorism is the establishment and implementation of Special Administrative Measures. A Special Administrative Measure (hereafter SAM) is a restriction placed on a prisoner’s housing and/or communication privileges. Specifically, a SAM “may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone.” This is done by the Bureau of Prisons, under the direction of the Attorney General, in cases when such measures are “reasonably necessary to protect persons against the risk of death or serious bodily injury.” These measures are imposed for up to 120 days, though with approval from the Attorney General they can be extended for up to one year. However, they may be “extended thereafter by the Director, Bureau of Prisons, in increments not to exceed one year,” and such extensions may be continued indefinitely.²

² 28 CFR §501.3
The creation and use of SAMs has been both enabled and expanded by other pieces of legislation. On April 24, 1996, the Antiterrorism and Effective Death Penalty Act was signed into effect. The biggest effect of the Antiterrorism and Effective Death Penalty Act (hereafter AEDPA) is the limitation in procedural and substantive scope of writ of habeas corpus. Procedurally, AEDPA banned successive petitions for habeas corpus, requiring instead that all appeals be put into one petition. Substantively, AEDPA limited the scope of habeas corpus in that such petitions are granted only if convictions are made “contrary to…clearly established Federal law” or “based on an unreasonable determination of the facts in light of the evidence”. This means that prisoners who wish to appeal for habeas corpus pursuant to trial and conviction are given one chance to make an appeal and are given a very limited scope in which to appeal.

Another piece of legislation that has greatly aided the implementation of SAMs is the Uniting and Strengthening by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (hereafter the Patriot Act). The Patriot Act provides terms under which any individual believed to be “engaged in any…activity that endangers the national security of the United States” may be detained indefinitely. This is under the terms that the individual, once in custody, “may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.” The combination of these measures allows for any individual suspected of terrorist activity or affiliation to be detained indefinitely in solitude.

II. The Role of Habeas Corpus

Habeas corpus plays a crucial role in evaluating the constitutionality of indefinite detainment without formal charges. A writ of habeas corpus is a procedural order that demands a prisoner’s detention be evaluated by a judge, and possibly suspended, based

3  28 U.S. Code § 2254
4  H.R. 3162—80
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on factual evidence and legality. The underlying principle of habeas corpus is to protect detainees from being victimized by the executive office’s whims, effectively acting as a judicial check on the executive. This privilege has existed in English law since the Magna Carta in 1215 and was included in American law with the drafting of the Constitution in 1787. Habeas corpus has a rich history of protecting citizens from an unchecked executive branch, and it has evolved tremendously since the inclusion in 1787.

While filing a writ of habeas corpus may provide some protection for uncharged detainees, the government, with the help of the courts, has so far preserved the right to deny release because the legality of detainment of terrorist suspects has yet to be detailed. Anti-terrorist legislation has provided loopholes for officials to detain suspects for up to a year without being formally charged, which can be renewed indefinitely.

In regards to detention, habeas corpus is oftentimes a prisoner’s most effective chance at being released, or even hearing the charges against them, particularly in cases involving national security. Habeas corpus not only provides a judge with the opportunity to review facts, but it can also provide a legal proceeding when there may not have been a formal trial before detention by reviewing the process of detainment, not merely the justification. If there had been no formal charges and/or court proceedings, this writ may be necessary for prisoners to receive any protection through the courts from executive detention. In essence, filing a writ of habeas corpus is a prisoner’s way to ensure that due process is followed, at least in the cases involving American citizens.

While the great writ may be a central component in detention trials, there is the Suspension Clause in the first article of the Constitution that states, “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public


Safety may require it”. Courts have refused to lend strong interpretation to this clause, which has left habeas corpus as a somewhat unavailable tool for wrongfully, or not so wrongfully, detained citizens. The clause is what has provided a legal cushion for the detainment of terrorist suspects by the executive branch. Up to this point, the extent of habeas corpus as a guaranteed protection of rights has not yet been determined, which provides the necessary loopholes that have been used by the executive office to indefinitely detain American citizens under the broad interpretation of the Suspension Clause. This clause not only means that some detentions may be appropriate, but that the opportunity of hearing charges and having a judge review factual evidence for detention may be denied completely.

New anti-terrorism legislation, in partnership with the Suspension Clause, provides an opportunity for too broad of an interpretation of government’s power to detain American citizens. Currently the Suspension Clause operates as a somewhat unsupported and vague protection of a privilege, not a right—a procedural purpose that has been untouched and unexpanded to the point necessary for the protection of American citizens’ rights. While there may be some cases in which detainment is necessary to protect the American public, there should be additional specific legislation detailing the appropriate occurrences for executive detention to provide more protection and limit government invasion of rights, rather than open-ended clauses and legislation that unlawfully expands executive power. The current need for habeas corpus in post-9/11 government has evolved from its purpose in 1787 during the drafting of the Constitution, and the need has grown enough to require a more definite detailing of the executive branch’s power in detaining terrorist suspects.
The Supreme Court made some progress in defining and expanding the privilege of access to habeas corpus in the Boumediene case by ruling that those detained at Guantanamo Bay had the right to habeas corpus. Even having this right protected is crucial to upholding and protecting the rights that the framers of the Constitution fought so hard to keep. Indefinite detainment does not have to end, but prisoners should be able to request that a judge review the facts and the legality of detention. Through the Hamdi case, the Supreme Court ruled that habeas corpus might extend rights beyond the boundaries of due process. There have been some steps forward in defining and allowing the privilege of habeas corpus, but there must be a greater expansion and new legislation passed that will limit the executive office’s ability to indefinitely detain “enemy combatants”.

III. OTHER CONSTITUTIONAL FACTORS

As mentioned in the introduction, this section will outline other Constitutional rights which play a role in detaining suspected terrorists, how the government should uphold these rights, and how it has potentially violated them. Specifically, this section will examine the effect of SAMs on due process and how that relates to the cases of suspected terrorists. This section will also briefly discuss the suspension clause and its role in the cases of detaining suspected terrorists.

The fifth amendment protects American citizens from discretionary detention: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, […] nor be deprived of life, liberty, or property, without

7 Boumedine v. Bush, 553 U.S. 723, 785 (2008). Prisoners held at Guantanamo Bay had previously been denied the privilege of filing a writ of certiorari, which calls for judicial review of a lower court’s decision. This case overturned that ruling and allowed prisoners at Guantanamo Bay to request a judicial review of detainment. While this is not the exact same procedure as filing a writ of habeas corpus, the two work similarly in requesting a judge review the procedural legitimacy of detainment. In this instance, the two writs may be referenced interchangeably.

due process of law." This last clause—the Due Process Clause—is repeated elsewhere in the constitution, specifically in the fourteenth amendment, which, along with repeating the Due Process Clause, includes what came to be known as the Equal Protection Clause: "nor deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has determined that the Equal Protection Clause extends to the Bill of Rights. In short, due process of law is a constitutionally protected right in every jurisdiction in this country. The right to a trial by jury is something owed to every American citizen—including naturalized citizens, another protection guaranteed by the fourteenth amendment. The cases of Syed Fahad Hashmi, Jose Padilla, and others highlight the overstepping which has taken place by the federal government of its own laws.

There is undoubtedly an argument to be made that SAMs, the Patriot Act, and other related legislation and executive action form an ugly but necessary part of national defense in the modern world. Potential threats are greater, more numerous, and more insidious than ever before. It is not the purpose of this paper to discuss the needs and shortcomings of our national defense system, although there is much to be said in defense of counterterrorist measures. However, the case of Hashmi may prove particularly troublesome for that argument. First of all, as a United States citizen his right to due process is constitutionally protected—a right which has been violated not so much by any error on the part of the judicial system, but by executive action which sanctions the unlawful detention of American citizens. Any such action taken by a legislative body or, as in this case, by an executive branch, blurs the lines of checks and balances, and provides a scenario in which American’s rights—let alone human rights in general—can be systemically and repeatedly violated. This is seen in the lack of due process given to Hashmi and other citizens arrested on terror charges. Second, Hashmi’s

9 U.S. Const. amend. V.
10 U.S. Const. amend. XIV, § 1.
11 See id.
prosecution was never linked to any act of terrorism or violence\textsuperscript{12}. Hashmi did not have a history of violence nor of participation in extremist religious organizations—he was a college student in New York—and given that information, his detention seems much less just than it did simply knowing that he plead guilty to conspiracy to provide material support to Al Qaeda. Hashmi’s innocence (or lack thereof) is not the central point of this paper. However, regardless of whether or not Hashmi was truly guilty of conspiring to aid a terrorist organization, what has happened to him and others like him sheds light on the injustice that laws such as SAMs can create.

Following the attacks on September 11, 2001, hundreds of suspected terrorists were detained. In \textit{Hamdi v. Rumsfeld}, the first of a series of Supreme Court cases regarding detention of suspected terrorists, the primary defense was the above-mentioned Due Process Clause. In a plurality decision from that case, the Court put forth that one of the most important protections offered by the Due Process Clause is “the interest in being free from physical detention by one’s own government\textsuperscript{13}.” The Court has also extended the reach of the Due Process Clause to protect pretrial detention. Legislation like SAMs stand in direct opposition to these decisions and constitutional clauses. To allow them to persist is to open a door through which citizens’ rights can be infringed upon unscrupulously.

In the aftermath of the attacks on September 11, 2001, there has been a heightened awareness on the part of the American people with regard to ongoing potential terrorist threats. There are those who would advocate impunity for those who are protecting the United States from other attacks. Such advocates argue that terrorists ought to be stopped at any cost since nothing could be worse than losing American lives in a manner like the September 11\textsuperscript{th} attacks. While it is true that we as a nation ought to do as much as legally possible to prevent future attacks from occurring, legislation like SAMs creates the risk that the rights of Americans will be violated. The case of Syed Hashmi serves as an example. As an American,

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he is to be considered innocent until proven guilty—something that cannot be proved if, as has been done thanks to SAMs, there is no due process for him. In other words, if people like Hashmi are detained indefinitely through extensions provided by SAMs and not brought to trial, where and when will they be able to defend themselves and their actions? It is understandable to take precautions that help protect American lives, but it need not happen at the expense of other American’s liberty.

Article 1 Section 9 of the Constitution states, “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” In another case involving a suspected terrorist, *Boumedine v. Bush*, instead of using the Due Process Clause, the defense argued that the Suspension Clause extended to detainees who were noncitizens. Even in cases involving noncitizen terrorist suspects, the Suspension Clause ensures that due process and habeas corpus are respected. This adds further evidence to suggest that, in the case of Hamdi, Hashmi, and others like him, detention for an undefined period of time is unlawful, as such detention suspends due process and limits habeas corpus nearly to the point of nonexistence.

**IV. RECOMMENDATIONS**

The right of all prisoners to file a writ of habeas corpus needs to be protected. While current legislation has been written to try and ensure the maximum protection of the United States against terrorist attacks, the level to which prisoners’ rights regarding habeas corpus have been infringed is unacceptable. Prisoners, including American citizens, are given one chance to file a writ of habeas corpus. Under normal circumstances, a prisoner is able to file multiple writs

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14 U.S. Const. art. I, § 9, cl. 2.
of habeas corpus in order to maximize their chances of release\textsuperscript{16}. If a detained terror suspect does not obtain release on his first writ of habeas corpus, he is out of chances. The injustice of this is multiplied by the ability of the government to detain a terror suspect indefinitely. Because the government can hold a suspect without filing charges for a year and renew that year indefinitely, theoretically, a suspect can be held for life without being charged and only one chance for freedom.

Ideally, a terrorist suspect should be allowed to file multiple writs of habeas corpus. The limit was originally imposed to prevent detainees from filing multiple writs frivolously, thus impeding the justice system. However, restricting filing to one time during an entire incarceration period is overly restrictive. Therefore, a terrorist suspect should be allowed to file a writ of habeas corpus multiple times while incarcerated, though removing all restrictions may not be well advised. The possibility of frivolous writs being filed would increase with an increase in the limit of writs. Courts have already taken measures generally to prevent frivolous writs by not requiring the courts to address a writ of habeas corpus if it either does not present new grounds for relief that were unaddressed in a previous writ, or if it is clear from the face of the petition that there are no applicable grounds for relief. Using these same measures for suspected terrorist suspects will help ensure them their Constitutional right to habeas corpus while preventing frivolous or needless use of the court system.

Furthermore, a limit needs to be established to the renewal of years held without charges. Within five years, the government should be able to provide enough evidence to file charges. If, within that time period, the government cannot substantiate charges against a terror suspect, the suspect should be able to obtain release. That way, even if terrorist suspects are still limited to filing one writ of habeas corpus, they can receive a fair chance at freedom. Although the

\textsuperscript{16} Multiple writs of habeas corpus are often filed as Constitutional rights may be violated in different steps of the legal process or as new pieces of evidence come to light. Normally, a prisoner can file a writ of habeas corpus at any stage of the judicial process to petition for release, while a citizen held as a terror suspect is only give one chance.
process of gathering evidence and forming a case against a suspected terrorist can be lengthy and difficult, we hold that five years is more than sufficient time. In highly publicized cases, the process often takes substantially less time. Recently, as the entire nation watched, Dzhokhar Tsarnaev was arrested and charged, and is currently being prepared for trial with preliminary measures already underway. This all took place within a year and a half. Surely, the same can be accomplished for other suspected terrorists in more than three times the amount of time.

The need to establish a limit to how long suspects can be held without being charged is further substantiated by the Constitutional right to a speedy trial. A citizen’s right to face trial under due process of law is clearly violated when a speedy trial is not granted. If a trial can be indefinitely delayed, the due process is clearly violated. Furthermore, terrorist suspects are often held under executive orders or SAMs, and the judicial system is entirely bypassed. This is a clear violation of the Fifth Amendment, because there is no indictment by a grand jury for these crimes. SAMs further infringe on Constitutional rights in the restrictions they place on a prisoner’s communication, including with his lawyer, which hampers due process.

(i) Counter-Arguments

The recommendations made herein are, in many ways, a drastic departure from current legislation. They would close loopholes established in current legislation that allow terror suspects to be held indefinitely and allows them to file multiple writs of habeas corpus. Essentially, they allows these suspects to be treated more equally under the law, just as others suspected of criminal behavior, with fewer added restrictions. Many people, however, are sensitive to the loosening of restrictions surrounding terror suspects. Terror suspects people are accused of heinous crimes. The citizens held under this legislation have betrayed their country and hurt or even killed their fellow countrymen. In light of the crimes of which these people stand accused, it may seem right or fulfilling to maintain harsh restrictions.
However, it is important to remember that the rights and protections that factor in to the criminal justice system were designed to protect people accused of all types of crimes, even the most extreme. As difficult as it may be to accept, all citizens deserve their legal protections. The emotion behind the crimes of which these citizens are accused are strong, but shouldn’t be allowed to influence the legality of treatment for terror suspects.

V. Conclusion

Combating terrorism is a serious issue in the United States and will likely continue to grow. As increased numbers of terrorists, both at home and abroad, are detained and tried for their crimes, the issues involved will only become bigger and more complex. While current policies and legislation have lasted this long, their flaws will only be magnified as the issue they address grows. Left unaddressed, these problems will become more complex and affect more people. These issues need to be nipped in the bud, rather than be allowed to grow.

Furthermore, these issues are ultimately a matter of the liberties and rights guaranteed to American citizens. Regardless of their position before the law, Americans deserve to exercise the full extent of their rights as outlined in the Constitution. As Benjamin Franklin said, “Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.” We should not be willing to sacrifice the liberty of a few for perceived temporary safety. In other words, the Constitutional rights of a few should not be sacrificed for the many. Furthermore, if the government is able to begin denying Constitutional rights of some citizens, it sets a dangerous precedent. Constitutional rights ought to be guaranteed and not conditionally. In order to preserve the liberty of all citizens, we need to preserve the liberty of each citizen.

The conditions regarding the detainment of terrorist suspects is a delicate issue. The importance of the balancing act between protecting national security and guaranteeing citizens their rights cannot be understated. However, the current situation has tipped the balance too far away from Constitutional rights, and unnecessarily so. The benefits gained from such extreme measures are little, especially
when compared to the gravity of depriving citizens their Constitutional rights. Particularly in terms of habeas corpus, due process, and other important Constitutional rights, change can be made that will ensure citizens their rights while still keeping the nation safe from terrorist attacks.