

## Searches and Dentions: Important Subsets of the Broader Civil Liberties Debate

**Resolved: The United States federal government should substantially decrease its authority either to detain without charge or to search without probable cause.**

By Stefan Bauschard<sup>1</sup>

### Introduction

The topic area advertised for vote, and the area paper from which this resolution grew, was articulated as “civil liberties.” The two areas discussed in this resolution – detention without charge and searches without probable cause — are small, but important, subsets of the civil liberties topic. There are many other potential threats to civil liberties beyond detention without charge and searches without probable cause, including the use of secret evidence, prosecution of people who are “associated” in any way with organizations deemed by the government to be “terrorist,” deportation for foreigners who have any “association” with any terrorist organization, required registration of foreign males from named countries, racial profiling, restrictions on access to information that the press and the public need to hold the executive branch accountable, restrictions on any type of assistance (humanitarian or otherwise) to groups deemed to be “terrorist,” and increased surveillance of citizens and groups who may disagree with various government policies. These are important civil liberties issues, and some of these issues may creep into your debates in related ways, but it is important to understand that the topic is focused exclusively on detention without charge and establishing probable cause for police searches. In fact, the probable cause are of the topic introduces issues that go well beyond debates about civil liberties, making this resolution both a small subset of the civil liberties debate and a larger topic

about criminal law enforcement beyond the civil liberties context.

This essay focuses on background information and debate arguments that stem from the two areas of focus in the topic. The article concludes with suggestions for strategizing and tips for additional research.

### Detention Without Charge

Individuals who are detained for a considerable length of time without charge fit into one of three categories: (1) war fighters from other countries detained on the battlefield, (2) U.S. citizens detained on the battlefield (the battlefield has been defined both as U.S. territory and foreign territory), and (3) non-citizens (unnaturalized aliens) who are living in the United States.

These individuals are likely to be detained in one of three places: (1) a foreign country occupied by U.S. forces or in a foreign area controlled by U.S. forces, (2) Guantanamo Bay Cuba, or (3) a standard legal detention facility in the United States.

Guantanamo Bay is the site of a U.S. Naval Base in Cuba. Located on the Southeast side of the island, it is the only naval base the U.S. has in a Communist country. The U.S. gained access to the base in 1904 under a leasing arrangement that makes cessation of the lease possible only if both sides agree or if the U.S. abandons the base. Although the U.S. leases the base, we concede full sovereignty over the base to Cuba.

For more on the history of the base visit <http://www.nsgtmo.navy.mil/history%201a.htm>

The U.S. agreement that Cuba retains full sovereignty over the base is what likely motivated the Bush administration to house all enemy combatants and many others the U.S. wishes to detain indefinitely. The administration hoped that the courts would agree that they had no authority over the base, though as we will see later, the courts have not accepted that and have intervened.

The authority of the President (acting as Command-in-Chief) and the military to detain foreign enemy combatants without charge until the cessation of hostilities is generally accepted. Although prisoners of war must be treated in particular ways, they do not need to be charged with a crime unless held beyond the duration of hostilities. The authority of the President and the military to detain U.S. citizens on the battlefield, particularly on U.S. soil, without charge is somewhat more controversial. In the only known instance prior to this new September 11<sup>th</sup> era, a U.S. citizen who was accused of aiding and abetting the enemy was *charged with a crime and tried in a civilian court*. The authority of the President and the Attorney General to indefinitely detain unnaturalized aliens is even more, and arguably the most, controversial since it affects the greatest number of people. The authority for these indefinite detentions was created both before and after 9-11 under legislation that will be discussed shortly.

Some of the authority that the **Attorney General** – the chief law officer of the federal<sup>1</sup> government — claims for making such detentions without charge of un-naturalized aliens or U.S. citizens not engaged in direct hostile action against U.S. forces is found in the PATRIOT Act. Under the PATRIOT ACT, the Attorney General has expansive powers to indefinitely detain non-citizens and individuals who are identified as contributing directly or indirectly to terrorist operations. As long as the Attorney General has “reasonable grounds” to believe that person at issue is “described in” the anti-terrorism provisions of the law, the individual is subject to indefinite detention (Cole, 2003, p. 65).

Chang (2002) explains that the authority to detain non-citizens springs from Section 411 of the PATRIOT Act that authorizes the attorney general to detain noncitizens that he has “reasonable grounds to believe” are involved in terrorism as long as seven days without charging him or her with an immigration or criminal violation (p. 64). Although the seven day window to charge seems reasonable, the government often claims that there are necessary circumstances that prevent a charge from being issued within that time period. Cole argues that the PATRIOT Act’s definition of “terrorism” is so broad for immigration purposes that even individuals who have provided “humanitarian” assistance to these groups could be deemed a terrorist.

Individuals detained under this authority do not necessarily have to be certified as “enemy combatants.”

The authority to detain non-citizens does not stem exclusively from the PATRIOT Act, however. Some authority also springs from changes made shortly after September 11<sup>th</sup>. On September 17, 2001, well before the PATRIOT Act was passed, the Code of Federal Regulations was amended to permit indefinite detention of aliens without arrest or bringing charge against them.

Immigrant Rights Clinic, New York University School of Law, New York University Review of Law & Social Change, *REVIEW OF LAW & SOCIAL CHANGE*, 2000/1, p. 398

The amendment to 8 C.F.R. 287.3(d), effected September 17, 2001, published in 66 Fed. Reg. 10,390 (Sept. 20, 2001) [hereinafter “amended rule” or “amended regulation”], has gone a long way toward creating this fear. In times of “emergency or extraordinary circumstance,” as the current situation undoubtedly has been called, the INS now may detain individuals indefinitely following a warrantless arrest without bringing any charges against them. The amended rule provides no definition of emergency or extraordinary circumstance nor any explanation of how long “an additional reasonable period” of detention may be.

It is important to note that many individuals, particularly unnaturalized aliens, who are subject to indefinite detention *have been charged with a crime* – usually a minor immigration violation (most of those detained are immigrants). Chang (2002) explains that if a non-citizen is “certified” as a terrorist and charged with an immigration violation – he or she is “subject to mandatory detention without release on bond until either he is deported from the United States or the attorney general determines that he should no longer be certified as a terrorist” (p. 64). Chang continues to explain that “Section 412 does not direct the Attorney General to notify the non-citizen of the evidence on which the certification is based, or to provide him with an opportunity to contest that evidence, either at an immigration judge hearing or through other administrative review procedure” (p. 64)

Another source of authority to detain is the Creppy Memorandum, which was issued by a U.S. Immigration Judge – Michael Creppy. Acting under “direct in-

struction from Attorney General Aschcroft, Creppy issued a sweeping order that excludes normal due process rights from cases deemed of “special interest.” U.S. Court of Appeals Judge Edward Becker, writing the decision for the court in *North Jersey Media Group, Inc. v. Ashcroft*, explained the terms of the Creppy Memorandum:

Chief Immigration Judge Creppy issued a memorandum (the “Creppy Directive”) implementing heightened security measures. The Directive requires immigration judges “to close the hearing[s] to the public, and to avoid discussing the case[s] or otherwise disclosing any information about the case[s] to anyone outside the Immigration Court.” It further instructs that “[t]he courtroom must be closed for these cases – no visitors, no family, and no press,” and explains that the restriction even “includes confirming or denying whether such a case is on the docket or scheduled for a hearing.” In short, the Directive contemplates a complete information blackout along both substantive and procedural dimensions. (Becker, 2003, pp. 310-311)

According to Muzaffar Chishti, director of the Migration Policy Institute, more than 600 cases have been designated for this special treatment under the Creppy Memorandum:

In our report we found that at least six hundred cases were classified as “special interest” cases. The courts barred access to records of the persons in detention, closed their deportation hearings and the cases were not listed on the immigration docket. Such practices not only violate the rights of the individual detainees, they also violate important First Amendment rights of the press to have access to public hearings. As we maintain in our report, there certainly can be situations when secrecy may be war-

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ranted, but it must be allowed only on a case by case basis, and only by judicial intervention. (Chishti, *America After 9/11*, 2003, pp. 86-87)<sup>4</sup>

The rationale for detention without charge is basically an argument in favor of **preventive detention** – detaining someone in order to prevent him or her from committing a crime. The government contends that if these individuals are released they could commit terrorist acts or support the commission of terrorist acts. In 2003, in *Denmore v. Kim*, the Supreme Court upheld a **statute** – a law passed by a legislature — mandating preventative detention during deportation proceedings of foreign nationals, even if the person posed no risk of flight or danger to the community (Cole, 2003, p. 224).

**Unnaturalized immigrants** – immigrants who do not yet have their citizenship but are in the United States – are usually detained under one of the previously discussed authorities. There are other categories of detained individuals – U.S. citizens detained at home and U.S. citizens detained abroad.

The government claims that the authority to detain U.S. citizens as “enemy combatants” comes from two potential places. The first is the “Authorization to Use Military Force” (AUMF) against Afghanistan. The AUMF states that the President has the power to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” The second is its Plenary Power under article II of the Constitution. The government relied on both of these in the Hamdi case that will be discussed below, but the court only evaluated the AUMF argument, finding that the government had the authority to detain Hamdi under the AUMF.

One of the most famous cases of someone who has been detained without charge is Joseph Padilla, who is a U.S. citizen and who was detained in the United States. Northwestern University’s Oyez project explains the facts of the case:

Jose Padilla was arrested in Chicago’s O’Hare International Airport after returning from Pakistan in 2002. He was initially detained as a material witness<sup>5</sup> in the government’s investigation of the al Qaeda terrorist network, but was later declared an “enemy combatant” by the Department of Defense, meaning that he could be held in prison indefinitely without access to an attorney or to the courts. The FBI claimed that he was returning to the United States to carry out acts of terrorism. Donna Newman, who had represented him while he was being held as a material witness, filed a petition for habeas corpus on his behalf. The U.S. District Court for the Southern District of New York ruled that Newman had standing to file the petition despite the fact that Padilla had been moved to a military brig in South Carolina. However, the court also found that the Department of Defense, under the President’s constitutional powers as Commander in Chief and the statutory authorization provided by Congress’s Authorization for Use of Military Force, had the power to detain Padilla as an enemy combatant. The district judge rejected Newman’s argument that the detention was prohibited by the federal Non-Detention Act, which states that no “citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” On appeal, a divided Second Circuit Court of Appeals panel reversed the district court’s “enemy combatant” ruling. The panel found that the Authorization

for Use of Military force did not meet the requirement of the Non-Detention Act and that the President could not, therefore, declare American citizens *captured outside a combat zone* as enemy combatants. (<http://www.oyez.org/oyez/resource/case/1730/>).

The U.S. government appealed the decision of the Second Circuit to the Supreme Court. The Supreme Court, in a 5-4 decision in June of 2004 dismissed the appeal on a “technicality,” claiming that Padilla’s attorney wrongly filed his **habeas corpus** – a petition to the government requiring the government to prove that someone is being legitimately held — application in New York and that it should have been filed in South Carolina, where Padilla had been moved. If the application had been properly filed, the majority would have ruled that Padilla could challenge his detention.

On February 28, 2005, a circuit court judge concluded that the government has no authority to detain Padilla unless they charge him with a crime. CNN explains:

Calling the case a “law enforcement matter, not a military matter,” a federal judge in South Carolina has ruled that the U.S. government cannot continue to hold “enemy combatant” Jose Padilla without charging him with a crime. The ruling says the government has 45 days to do so or Padilla would be eligible for release. The government vowed to appeal the ruling. The order from U.S. District Judge Henry Floyd sided with defense attorneys who advanced that argument in a hearing last month in Spartanburg, South Carolina, the jurisdiction where Padilla has been detained for 2 1/2 years as a military prisoner. Justice Department spokesman John Nowacki said, “We will appeal the judge’s decision.” The case would likely be heard next by the 4th U.S. Circuit Court of Appeals in Richmond. The government has argued that the president’s constitutional authority as commander-in-chief and Congress’s autho-

rization for the use of military force against the perpetrators of the Sept. 11 attacks are lawful grounds for Bush's action. But Floyd drew a distinction between combatants captured during military operations abroad and suspected terrorists arrested on American soil. He relied on the Supreme Court's ruling in the parallel enemy combatant case of Yaser Hamdi, in which the majority decision declared a "state of war is not a blank check for the president when it comes to the rights of the nation's citizens." Both Hamdi and Padilla are U.S. citizens. "To be more specific," Floyd wrote, "whereas it may be a necessary and appropriate use of force to detain a United States citizen who is captured on the battlefield, this court cannot find, in narrow circumstances presented in this case, that the same is true when a United States citizen is arrested in a civilian setting such as an United States airport." The high court has held the president does have the authority to detain "enemy combatants" captured on the battlefield, but even then the detainee is entitled to a fact-finding hearing. The government avoided such a hearing in Hamdi's case by releasing him to his native Saudi Arabia last October. Padilla's attorneys have always maintained that presidential authority does not extend to American citizens caught on American soil, and unlike Hamdi, who was allegedly carrying a Kalashnikov assault rifle and traveling with Taliban troops, Padilla was carrying no weapons and wearing civilian clothes. "It is true that, under some circumstances, such as those present in Hamdi, the president can indeed hold an United States citizen as an enemy combatant. Just because something is sometimes true, however, does not mean that it is always true," Floyd wrote. "The president's use of force to capture Mr. Hamdi was necessary and appropriate. Here, that same use of force was not," the judge wrote. Floyd said if the purpose of Padilla's indefinite detention is to prevent him from rejoining his alleged al Qaeda confederates, then the president ought to ask Congress to pass a law allowing him to do so. "If the law in its current state is found by the president to be insufficient to protect this country from terrorist plots, such as the one alleged here, then

the president should prevail upon Congress to remedy the problem," Floyd wrote. In a related case, however, the Supreme Court provided some hope of relief to those detained as enemy combatants. Yaser Esam Hamdi was accused of being an "enemy combatant" because he was captured in Afghanistan during "the conflict" and was "affiliated" with a Taliban unit. All of the evidence that the government relies on is a summary of testimony from Michael Mobbs, who interviewed Hamdi shortly after his capture in Afghanistan. Mobbs' synopsis is now known as the "Mobbs Declaration." (<http://www.cnn.com/2005/LAW/03/01/padilla.ruling/>)

After Hamdi was captured he was returned to the United States, where he was not permitted to meet with any attorneys. His father intervened as a **Next Friend** and a public defender who was assigned to the case became actively involved. His attorney argued that Hamdi since "the conflict" (the war on terrorism) had no definable endpoint and since the government never established what Hamdi's affiliation was, Hamdi could essentially be locked-up for life and never able to challenge his designation as an enemy combatant.

Hamdi originally found a sympathetic ear in U.S. District Judge Robert Doumar (Norfolk, VA). Doumar was skeptical of the government's assertion that Hamdi was an enemy combatant and wanted to look at the evidence certifying him as such. The government challenged Doumar's request, however, arguing that it may need to disclose sensitive intelligence information in order prove that Hamdi was an enemy combatant. The government found a sympathetic ear in the U.S. district court for the Fourth Circuit, which intervened, arguing that proper deference should be given to the military. But appellate court chief judge, J. Harvie Wilkinson, would not embrace the proposition that under no circumstances would judicial review of the "enemy combatant" designation be, but that it could be permitted in only a very limited manner.

In Hamdi, the majority of Supreme

Court justices took issue with the appeals court decision and held that "although Congress authorized the detention of combatants in the narrow circumstances alleged in this case, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker." Justices O'Connor, Rhenquist, Kennedy, Breyer, Souter, and Ginsburg, all agreed on this point, though Souter and Ginsburg did not even think the detention was authorized in the first place.

In response, the Department of Defense announced that it was creating a Combatant Status Review Tribunal in which detainees may challenge their designation as enemy combatants. The DOD has notified those who are designated as enemy combatants that they may challenge their designation (*Washington Post*, 2004). In the summer of 2004, the U.S. agreed to release Hamdi back to Saudi Arabia (<http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmmnt.html>).

It is interesting to note that the holding of this decision only stated that a "citizen" (of the United States) had the authority to challenge his determination as an enemy combatant. In *Rasul v. Bush*, however, the Supreme Court went a little farther, extending habeas corpus jurisdiction to challenge detention by the United States government of foreign citizens abroad.

In *Rasul v. Bush*, two Australians and twelve Kuwaitis captured during hostilities in Afghanistan challenged their detention in Guantanamo Bay, Cuba. They claimed that they were not combatants nor had they ever engaged in terrorist activity. The government argued that the courts had no jurisdiction to hear the case because Guantanamo Bay was outside the jurisdiction of the United States. Both the U.S. District Court and the U.S. Court of Appeals for the District of Columbia sided with the government in rejecting the suit, arguing that the while the U.S. exercises plenary authority and exclusive jurisdiction

over Guantanamo Bay, it does not exercise ultimate sovereignty.

The Supreme Court reversed, making two important holdings: 1) The habeas statute doesn't distinguish between U.S. citizens and foreign nationals held in federal custody, and 2) the habeas writ acts upon the person who holds the prisoner, not the prisoner himself. This means the courts have jurisdiction over persons held in federal custody regardless as to where they are held.

Most recently, in January of 2005, in *Clark v. Martinez*, the Supreme Court ruled 7-2 that the federal government cannot indefinitely imprison immigrants who cannot be deported. This decision also limited detention of immigrants to no longer than six months:

In a defeat for the Bush administration, the Supreme Court ruled Wednesday that the government may not indefinitely imprison immigrants who cannot be deported, even if they are in the country illegally. The high court's 7-2 ruling means that about 920 immigrants, most of them Cubans, may be eligible to be released, according to the Homeland Security Department's Immigration and Customs Enforcement agency. The detainees in question entered the country illegally, 747 of them as part of the 1980 Mariel boatlift from Cuba. Most of the 747 committed crimes and completed prison sentences, yet remain in custody because attempts to deport them to Cuba have been blocked by Cuba's refusal to take them back. In 2001, the Supreme Court limited how long a legal immigrant could be detained to a reasonable period of time, usually six months, if deportation was not foreseeable. Wednesday's ruling expanded that ruling to illegal immigrants. Civil liberties and human rights advocates applauded the latest ruling.

"It adds to the growing list of Supreme Court rulings affirming the rights of noncitizens and overturning the Bush administration's overreaching claims," said Lucas Guttentag, director of the ACLU Immigrants' Rights Project, whose organization filed written arguments in court. "It points to the crucial role of judicial oversight over executive decisions." (Shogren, 2005, p.A24)

There are a number of interesting issues to consider as a result of these decisions. First, it has generally become accepted as a matter of law that the executive branch does have the authority to indefinitely detain *some* enemy combatants without charge. The issue of the authority of the government to indefinitely detain enemy combatants arose in the Hamdi case, but the court decided that the government did have the authority to detain enemy combatants. As stated, this is a logical, rationale conclusion since the military must be able to detain enemy combatants on the battlefield without charging them. Since the battlefield of the war on terror includes the U.S., and U.S. citizens have the potential to be terrorists, indefinite detention of said enemy combatants also makes sense. The concern expressed by litigants, and by the Supreme Court, however, is that since the geographic location of the battlefield has not been specifically defined and that the war on terrorism could go on indefinitely, almost anyone could be labeled by the government as an enemy combatant and subject to indefinite detention.

Second, courts are willing to assert jurisdiction outside the continental United States. They did in Hamdi and Rasul despite arguments that Guantanamo Bay is outside the sovereign authority of the United States and on December 16, 2004, "U.S. District Judge John D. Bates ruled that United States courts had jurisdiction in the case of Ahmed Abu Ali, a U.S. citizen *jailed in Saudi Arabia* as a terrorism suspect" (INTERNATIONALLAWENFORCEMENT REPORTER, February 2005, p. 26).

Third, the courts are not likely to permit indefinite detention. This is not only a limiter to affirmative harm claims, but also suggests that choosing the courts as an agent of action in the plan may be desirable because the courts are actively involved in policing the potential abuse of executive power.

The fourth interesting thing to consider is that most of the literature published from this day on will move the debate forward beyond the Supreme Court's important decisions. In other words, rather than rehashing the debate about whether or not the President should have the authority to detain *all* individuals without charge (the case of Padilla will make its way through the courts), it will focus on proposals for determining such things as how to define the "battlefield," when detentions should be "reviewed" (since the war is indefinite), and how detainees should be treated. Negatives may wish to exploit this literature to defend counterplans that potentially avoid abuses of detention without charge without removing the authority of the President to detain without charge. A recent (2005) article in the *Legal Times* explains:

Amid the uproar over the possible responsibility of White House Counsel Alberto Gonzales in the abuse of many "enemy combatants," a substantial consensus on the need for congressional rules to govern the detention of such people is quietly emerging among experts, including moderate conservatives, moderate liberals, and even some strong libertarians. The underlying issue — one of the most vexing posed by the war against terrorism — is when to detain suspected terrorists who seem bent on committing mass murder but who cannot be criminally tried because critical evidence is inadmissible, inconclusive, or too sensitive to be publicly disclosed. The emerging consensus is not over what the detailed rules should be, but rather over the need for Presi-

dent George W. Bush to stop making them up as he goes along, and to start working with Congress. “The president has the power to detain enemy combatants, including U.S. citizens, until the end of the relevant conflict,” stresses Goldsmith. Katyal and most other experts agree. But, Goldsmith adds, “because of the novel issues raised by this conflict, it would be prudent for the president to bring Congress on board in designing and legitimizing procedures appropriate for the identification and long-term detention of enemy combatants, especially those held in the United States. Trade-offs between liberty and security, and attendant accountability for errors of over- or underprotection of liberty or security, should rest with the political branches and not . . . with the courts” (January 10, p. 52)

In addition to these counterplans, a number of strong solvency arguments are available for negatives that wish to challenge the utility of simply charging someone with a crime. First, the government can simply charge the person with a crime, that’s all the plan can topically do. Many individuals, “thousands” according to Cole (2003), “have been locked up, many in secret, on **pretextual charges**” (p. 46)<sup>2</sup>. Many individuals are charged but lack any ability to challenge those charges.

Second, at least in the past, the government, primarily through executive action has made it impossible for those detained to consult with defense attorneys, and in many instances the outside world at large. A 2002 Amnesty International Report claims that in many instances defendants aren’t even being advised of their right to consult an attorney. At least in dealing with enemy combatants, however, the Supreme Court, has required that they be able to challenge their designation as “enemy combatants” and provided with a right to counsel. The AMERICAN LAWYER explains how many law firms have stepped-up to provide **pro bono** – free – legal assistance.

AMERICAN LAWYER, September 1, 2004, p. online

Since the June ruling that Guantanamo detainees had a right to counsel, individual lawyers, professors, firms, and nonprofit groups have signed up to represent them. Firms on the list include:

§ Allen & Overy  
§ Baach Robinson & Lewis  
§ Clifford Chance  
§ Covington & Burling  
§ Dorsey & Whitney  
§ Gibbons, Del Deo Dolan, Griffinger & Vecchione  
§ Jenner & Block  
§ Keller and Heckman  
§ Mayer, Brown, Rowe & Maw  
§ Paul, Weiss, Rifkind, Wharton & Garrison  
§ Perkins Coie  
§ Shearman & Sterling  
§ Wilmer Cutler Pickering Hale and Dorr

This right to counsel, however, has only been provided to those detained as “enemy combatants,” not all of those detained without charge. This, however, does not apply to unnaturalized citizens detained without charge or to those detained on pretextual charges. *It does not apply to individuals charged with immigration violations because those charges are civil and not criminal*<sup>8</sup>. Change (2002) explains:

The Supreme Court has held both immigration proceedings and habeas proceedings to be civil rather than criminal in nature, notwithstanding the fact that deportation is a “drastic measure and at times the equivalent of banishment or exile.” Because the Sixth Amendment extends only to criminal proceedings, the government has no obligation to provide noncitizens with free legal counsel in immigration proceedings or in habeas proceedings related to INS detention. As a practical matter, the cost of hiring a lawyer to litigate a habeas proceeding in federal district court, and to appeal the decision to the court of Appeals in Washington, D.C., the court granted exclusive jurisdiction over such appeals by statute, will prove prohibitively expensive for non-citizens in deten-

tion under Section 412. The number of attorneys available to provide legal representation to such non-citizens without charge is inadequate to meet the demand.

Third, where the DOJ has permitted defendants to consult with an attorney either voluntarily or through court order, the government has undermined the ability of attorneys to defend themselves by eavesdropping on attorney-client privilege. John Ashcroft, the former Attorney general, gave himself the power to eavesdrop on these conversations on October 31, 2001 by issuing an interim agency rule that permits this (Napolitano, 2004, p. 134; Chang, 2002, p. 15).

Fifth, the government has even gone so far as to threaten to prosecute attorneys who assist potential terrorists, accusing them of providing “material support” to terrorists (Ibid, pp. 137-8).

Sixth, in regard to those detained at Guantanamo Bay, individuals who are charged and tried will be charged in front of military tribunals.

CONNECTICUT LAW TRIBUNE,  
December 6, 2004, p. 17

Only four prisoners among the 550 or so at Guantanamo have lawyers—the four men who have been formally charged with war crimes in military commissions created by the Bush Administration that require them to have U.S. military defense counsel.

You can argue these trials are bad and won’t protect individual rights.

Moreover, potential abuses of government power are difficult to monitor and overcome because under John Ashcroft’s September 21, 2001 order, all immigration hearings are now closed to the public. Even the court’s docket is no longer available to the public. Napolitano explains that “As such, the immigration court is prohibited from confirming or denying whether a particular case is listed for trial or, if so, if it is

deemed of “special interest. Essentially, once Attorney General Ashcroft makes that designation, that person disappears. Not even the immigrant’s family is able to find out what happened to the person, even after that person has been deported” (p. 141)

In a book titled *CONSTITUTIONAL CHAOS: WHAT HAPPENS WHEN THE GOVERNMENT BREAKS ITS OWN LAWS*, Napolitano (2004), working through examples of major Supreme Court cases, makes a persuasive case that when charged by the federal government, almost all charge individuals will either end up leading guilty or be convicted. Napolitano attributes this to a number of factors, including police officers who are willing to lie (p. 20),

Affirmatives are not going to be able to typically write additional protections, such as the right to counsel, into their plans, but they can make an argument that once the federal government were to file charges, such a right to counsel would be “triggered” (Napolitano, 2004, p. 156). That is still, of course probably the only thing that would be “triggered;” the government would still be permitted to eaves-drop on attorney-client communications, likely still harass attorneys who try to defend those charged. There is no reason to believe that the plan would include the provision of the interim agency rule that makes it possible.

## Searching Without Probable Cause

The second section of the topic gives the affirmative the option of limiting the authority of the police to search without probable cause. Even before September 11<sup>th</sup> searching without probable cause was a controversial issue. In 2000-1, the high school debate topic was privacy, and affirmatives sometimes chose to protect privacy by requiring that probable cause be demonstrated in some specific situations.

Although many of the affirmative case areas that deal with probable cause protections did not emerge in relation to civil liberties issues related to the war on

terrorism, the issue has come up in the context of the PATRIOT Act. This will be discussed shortly. Before doing so, however, it is important to understand a couple of critical definitional issues.

It is very important to understand that a “search” in the legal sense is not the same thing as we might generally understand a search to be. Whether or not a “search” occurred in the first place is usually what is disputed in court. There are a number of instances, for example, where the Supreme Court has said that a “search” did not occur. These are just a few examples:

- Police roadblocks do not constitute a “search” (Michigan v. Sitz (496 U.S.444))
- Use of drug-sniffing dogs is not a “search” (U.S. v. Place (462 U.S. 696))
- Police examination of an open-field is not a “search” (Olmstead v. U.S.)(277 U.S. 438)
- Listening device attached to a wall not a “search” (Goldman v. U.S.) (316 U.S. 439))

This list is far from comprehensive. In most instances where affirmatives will seek cases that intuitively seem like areas where probable cause should be required, negatives will be able to produce strong evidence that such police activity does not constitute a “search.” The negative will have a strong argument that requiring probable cause in one of these instances does not result in requiring probable cause for a “search,” though affirmatives may try to argue that a court’s probable cause requirement subsequently defines the behavior in question as a search. This will undoubtedly be an important topicality issue – can the affirmative simply require probable cause in a particular instance, consequently defining the affected behavior as a “search.”

There are other areas of the law that the affirmative can draw causes from where the Supreme Court has said that a “search” has occurred but that probable cause is not required:

- Searches incident to arrest (Chimel v. California, 395 U.S. 752)
- Stop and Frisk searches (Terry v. Ohio, 392 U.S. 1)

- Inventory searches (South Dakota v. Opperman, 428 U.S. 364)
- Consent searches (Schneckloth v. Bustamonte, 412 U.S. 218, 222)
- Border searches (U.S. v. Montoya de Hernandez, 473 U.S. 531)

One place that searches without probable cause are permitted is at the border. Nathaniel Saylor explains:

The executive has authority to conduct routine searches and seizures at the borders without probable cause or a warrant in order to collect duties and prevent the introduction of contraband. The courts have determined that to accomplish this task some of the protections that citizens take for granted on the interior have to be lessened. Specifically, it has been held that routine searches at the border can be conducted without any requirement of probable cause (2003, pp. 283-5).

In a footnote referencing the Supreme Court decision that provides this authority, he explains – “United States v. Montoya de Hernandez, 473 U.S. 531 (1985). “[T]he Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior.

Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant.” One strong affirmative in this section of the topic may be to overturn this Court decision and require probable cause for various border searches. You will be able to find strong evidence in the dissent, amicus briefs, and various law review articles that will have been written in opposition to the decision.

Consent searches, also referenced above in the list of exemptions to the probable cause requirement, have been criticized as providing a foundation for the police to engage in racial profiling. George Thomas (2003) explains how eliminating consent searches would eliminate racial profiling:

Abolishing consent searches would deprive police of their most effective racial profiling tool. As police can approach anyone on the street to ask for consent and can ask any driver who is stopped for a traffic infraction for consent, police are presently free to use race, and only race, to decide when to ask for consent in a huge number of situations. If police have to show probable cause to conduct a search, on the other hand, their discretion to use race is severely limited. Abolishing consent searches would do far more to remedy racial profiling in the real world than all the equal protection laws or statutory remedies that can be imagined (p. 551).

These are all somewhat old. Affirmatives wishing to run cases in these areas should explore if there are any more recent decisions in these areas (any cases, for example, where the court said probable cause was not required because a stop and frisk search occurred) and commentators and the dissent argued that probable cause should be required. This way you will be able to find more recent evidence on the issues. Finding affirmatives in this area will be difficult as it is rare for the courts not to require probable cause:

Dr. O'Connor, North Carolina Wesleyan College, PROBABLE CAUSE, 2004, <http://faculty.ncwc.edu/toconnor/315/315lect06.htm>

Not all search and seizures require warrants (e.g., automobile searches, arrest in a public place), but the Supreme Court has interpreted warrantless searches and seizures as unreasonable unless preceded by probable cause. This means that as a general rule, most searches and seizures require probable cause.

There are two at least two potential cases that deal with authority granted to

the federal government to search without probable cause by the PATRIOT Act. One deals with warrantless, non probable-cause based wiretaps (wiretaps are considered "searches". According to Cole (2003, pp. 66-7) the PATRIOT Act authorizes "secret searches and wiretaps in criminal investigations without probable cause to believe the target is engaged in criminal conduct or that evidence of a crime will be found." Cole also contends that the government can evade probable cause requirements in any criminal investigation that is conducted for a significant "foreign intelligence" purpose (p. 67).

A second area of authority under the PATRIOT Act where the federal government is given authority to search without warrants is in Section 215 and Section 505. These sections allow federal agents to require librarians to disclose the circulation history of library patrons. The American Library Association (ALA) and numerous civil rights advocacy groups strongly oppose these provisions. Bobb Barr, former U.S. Representative from Georgia and current 21st Century Liberties Chair for Freedom and Privacy with the American Conservative Union, explained the problem with the PATRIOT Act:

Under Section 215, FBI agents can obtain court orders for the release of, among other things, business information, reading histories, Internet surfing data, medical records and even lawful firearm purchase receipts, under a standard of evidence that equates to a "rubber stamp." Known primarily for its effect on access to library records – it could be used to monitor Americans' book borrowing habits – 215 is legally wide-ranging; extending, frighteningly, even to medical and genetic information. While much has – appropriately – been written about this provision's chilling effect on library users (a result that is very real regardless of how many times the government says it has or hasn't employed the power), the dangers in its broad reach cannot

be over emphasized. A companion provision, found in Section 505 of the USA PATRIOT Act, raises concerns similar to those raised by Section 215. Section 505 is, in some respects even more troubling; it expands the government's ability to use so-called "national security letters," which are essentially administrative subpoenas, to secure access to a wide range of data and information on U.S. citizens. As this Committee knows, administrative subpoenas can be issued without probable cause, and without even the "rubber stamp" judicial review of a Section 215 search. (Barr, 2003, p. 175)"

So far I have evaded a discussion of what "probable cause" is. This is because it is difficult to define. There are, in fact, three different ways that it can be defined:

Dr. O'Connor, North Carolina Wesleyan College, 2004, PROBABLE CAUSE, <http://faculty.ncwc.edu/toconnor/315/315lect06.htm>

The precise meaning of "probable cause" is somewhat uncertain. Most academic debates over the years have centered around the differences between "more probable than not" and "substantial possibility". The former involves the elements of certainty and technical knowledge. The latter involves the elements of fairness and common sense. There's more adherents of the latter approach, but how do you define common sense. Supreme Court case law has indicated that rumor, mere suspicion, and even "strong reason to suspect" are not equivalent to probable cause. Over the years, at least three definitions have emerged as the best statements:

· Probable cause is where known facts and circumstances, of a reasonably trustworthy nature, are sufficient to justify a man of reasonable caution or prudence in

the belief that a crime has been or is being committed. (*reasonable man definition; common textbook definition; comes from Draper v. U.S. 1959*)

· Probable cause is what would lead a person of reasonable caution to believe that something connected with a crime is on the premises of a person or on persons themselves. (*sometimes called the nexus definition; nexus is the connection between PC, the person's participation, and elements of criminal activity; determining nexus is the job of a judicial official, and it's almost always required in cases of search warrants, not arrest warrants*)

· Probable cause is the sum total of layers of information and synthesis of what police have heard, know, or observe as trained officers. (*comes from Smith v. U.S. 1949 establishing the experienced police officer standard*)

In *Carroll v. the U.S.* (276 U.S. 132)(1925) the Supreme Court outlined some general standards for determining if probable cause exists.

The PATRIOT Act expands the authority of the government to conduct warrantless searches by amending the Foreign Intelligence and Surveillance Act (FISA). Cole (2003) explains, FISA authorizes wiretaps and searches, based notion the much easier showing of probable criminal conduct or evidence, but on the much easier showing that the target of the intrusion is “an agent of a foreign power,” defined broadly to include any officer or employee of a foreign-based political organization” (p 67). Since an “agent of a foreign Power” has been “defined broadly to include any officer or employee of a foreign-based political organization,” U.S. citizens could also be subject to a wiretap as a foreign agent.

Under the original FISA Act, the “primary purpose” of the warrant had to be to *collect intelligence* and not to investigate crimes. Under the PATRIOT Act, however, the “primary purpose” requirement was replaced with a “significant purpose” requirement, opening the door to the use of FISA warrants issued without probable cause to

investigate crimes (Ibid, p. 68).

One strong affirmative on the 2005-6 topic will be to replace the current “significant purpose” language with the prior “primary purpose” language in order to reduce the number of warrantless wiretaps.

Solvency arguments against the probable cause area of the topic are also strong. First, the courts can always side with the government in determining that probable cause exists for a search. If the courts nearly always determine that probable cause exists for a search, then requiring it simply will not accomplish anything. Second, the courts could simply say that the activity that the government has engaged in is not a “search” and that probable cause is therefore not required. This has already been discussed. Third, it is becoming more and more difficult to challenge the validity of an issued warrant. Under Section 213 of the PATRIOT Act, federal agents are authorized to conduct more “sneak and peak” searches. “Sneak and peak” searches are “covert” searches of a person’s home or office where a warrant is required but the person is not notified until after the **warrant has been executed**—after the search has taken place (Chang, 2002, p. 51).

## Advantage Areas

Some of the advantage areas are relatively unique to the particular topic area. First I will discuss advantage areas that are unique to reducing detention without charge, ones unique to instilling probably cause protections, and ones that are generally applicable to both.

## Detention Without Charge Advantages

*Tyranny.* The most basic advantage for the detention without charge area of affirmatives is a “tyranny” advantages. If the government can lock anyone up against their will at any moment, there is nothing to prevent a complete police state. There is good evidence that being detained against one’s will is the ultimate loss of freedom.

Justice Souter, writing for the majority in the Hamdi decisions, explains:

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi’s “private interest ... affected by the official action,” *ibid.*, is the most elemental of liberty interests—the interest in being free from physical detention by one’s own government. *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 governmental action”); see also *Parham v. J. R.*, 442 U. S. 584, 600 (1979) (noting the “substantial liberty interest in not being confined unnecessarily”). “In our society liberty is the norm,” and detention without trial “is the carefully limited exception.” *Salerno, supra*, at 755. “We have always been careful not to ‘minimize the importance and fundamental nature’ of the individual’s right to liberty,” *Foucha, supra*, at 80 (quoting *Salerno, supra*, at 750), and we will not do so today.

*Racial profiling.* Prior to September 11<sup>th</sup>, the use of **racial profiling** – targeting of an individual based on his or her race — by law enforcement officials had become very controversial. There was a lot of pressure at both the state and local level to stop the use of racial profiling because it had come to be considered an ineffective law enforcement tool and was discriminatory. After September 11<sup>th</sup>, law enforcement officials argued the tactic was necessary in the new war on terrorism to target Arab Americans and it is no longer politically controversial.

Affirmatives can read general evidence that impacts the harms of racial profiling at-large because, as Cole (2003) explains, federal support for the profiling of Arab Americans translates into condoning racial profiling by other actors:

(E)ven the federal government’s profiling is expressly limited to foreign nationals, its actions send a message to private employers, airlines, and local police that Arab and Muslim identity is a central, perhaps the central,

factor for suspicion of terrorism. That message in turn encourages private discrimination of the type suffered by Edgardo Cureg, Michale Dasarth, and countless others who are or appear to be Arab or Muslim. Because people do not wear their passports on their sleeves, on-the-spot judgments about nationality inevitably rely on ethnic appearance. Thus, what starts as nationality-based profiling swiftly becomes a national campaign of ethnic profiling.

*Otherization.* If you do a substantial amount of reading on the topic, you will quickly discover that most of the individuals detained without charge and subject to most violations of civil liberties are Arab foreign nationals. Cole (2003) argues that the targeting of such individuals contributes to a mentality where we view these individuals as the “other.” You find evidence that such “otherization” is at the root of violent conflict and the war system. Cole explains, “Foreign nationals are the paradigmatic “other,” especially in times of war. As one critic has argued in connection with the current crisis, “The state’s ability to label people as terrorists or terrorist sympathizers, no matter how absurd or far-fetched, works to position those so labeled as non-citizens, outside the moral community, to whom human rights have no relevance.”

*General rights.* Deprivation of fundamental rights that have been discussed in this essay are as problematic for citizens as they are for non-citizens. It is important to understand that almost all constitutional rights protections<sup>1</sup> do not apply only to citizens of the United States, but also to anyone that happens to fall under its purview, particularly persons physically present in the United States.

Over the law two centuries, philosophers have engaged in a debate over the origin of rights. The debate largely centers on whether rights stem from natural law or positive law. Natural law advocates contend that rights stem from the inherent, natural dignity of every human being. Posi-

tive law advocates argue that the origin of these rights is solely the constitutional governing structure, a “social contract” so to speak. The US Constitution embraces the natural law conception of rights and argues that rights are possessed by every human being.

## Probable-Caused Driven Advantages

*Privacy.* One right which is arguably at the core of the search area of topic is the right to privacy. Requirements of probable cause are essential to protect people’s privacy. Napolitano (2004) explains:

The Constitution prohibits invasions of privacy by the government by denying it the power to engage in unreasonable searches and seizures absent a warrant issued upon probable cause. Probable cause hinges on having an amount of evidence sufficient to induce the belief in the mind of a neutral judge that the target of the search more likely than not has committed or is committing a crime. Without enough evidence for probable cause, the government must respect our right to be left alone. An individual’s right to be left alone has, for centuries, been a quintessential hallmark of a free society (p. 144).

## Cross-Cutting Advantages

*Racism.* The links to the advantage for either topic area are distinct, but the impacts are similar. First, largely targeting foreign nationals for detention without charge largely targets immigrants and is arguably inherently racist. Cole (2003) argues that this racism spills-over to other areas of society. He writes: “What we are willing to allow our government to do to immigrants today creates a template for how it will treat citizens tomorrow....As the **Japanese internment** demonstrated, alien discrimination is often closely tied to (and a cover for) racial animus, and it is therefore particularly susceptible to being extended to citizens along racial lines” (p. 7).

*Soft Power.* One advantage that was debated frequently on the UN peacekeeping topic was **soft power**. Threats to the rights of both citizens and foreigners undermines our soft power.

So, too, in matters of individual rights, we deny to other nations’ citizens the very protection that we insist upon for ourselves. This exceptionalism feeds the view that the United States exploits its status as the world’s most powerful nations with arrogance and self-interest, and is virtually certain to spawn new recruits to the causes mobilized against us (Cole, 2003, p. 194)

Foreign governments have also complained. By November 2001 at least seven nationals had complained that the Justice Department domestic preventive detention campaign had held their nationals longer than warranted and failed to form the embassies upon taking their foreign nationals into custody, as required by international law (Ibid, p. 195).

*First Amendment.* One of the most important parts of the First Amendment is the protection of the right of association. The First Amendment states that “Congress shall make no law...prohibiting...the right of the people peaceably to assemble.” While Congress has not made a law that prohibits dissidents to assemble, the Supreme Court has allowed “the government to engage in surreptitious surveillance and the use of informants without probable cause” (Cole & Dempsey, p. 103). Others who have provided assistance, financial or otherwise, to groups that have been labeled as “terrorist” have also been detained without charge, threatening the freedom of association. According to Cole & Dempsey (2002), “The PATRIOT Act...authorizes executive detention on the mere suspicion that an immigrant has at some point engage in a violent crime or provided humanitarian aid to a proscribed organization” (p. 153).

## Cross-Cutting Solvency Arguments

There are a number of solvency ar-

guments that can be made against affirmatives in either area of the topic. First, enforcement. As discussed in the section on the police backlash disadvantage, the police may be simply unwilling to follow the law. Cole & Dempsey explain that “restrictions....are often difficult to enforce for a variety of reasons, from doctrines extending immunity for official misconduct to the very secrecy that surrounds the FBI’s activities” (p. 91). Second, “the courts have been reluctant to interpret the Fourth Amendment to rein in FBI investigations” (Cole & Dempsey, 2003, p. 98). The courts may simply be unwilling to enforce the plan, or at least interpret the protection made in the plan to not apply to many specific situations.

## General Disadvantages

*Politics.* Politics lies at nexus of the debate between national security and civil liberties. Not long after the tragedy of September 11<sup>th</sup>, Congress passed, with little resistance, the PATRIOT Act. Despite the draconian measures included in it, there was little resistance from the Congress. Many Congress people voted for the law without even reading it. Affirmative plans that attempt to repeal all or part of the law are likely to encounter significant political opposition, particularly by Republicans. Cole & Dempsey (2003) explain:

Mounting a political campaign to curb investigative excesses of the FBI and other federal intelligence-gather agencies is a steep, uphill battle. Powerful law enforcement institutions will vigorously resist any challenge to their control over dissenters,; and they will claim that they must be free from constraints in order to protect the public from terrorists, militants, and other threatening elements (p. xiii).

Affirmatives will be able to find link turn evidence. There is evidence that both very liberal Democrats and very conservative Republicans oppose the law because they believe it intrudes too far on civil liberties (Hentoff, 2003, p. 113).

*Terrorism/Crime.* At the heart of the civil liberties topic area is the tension between rights and national security. In modern times, the primary threat to national security that the government feels it is necessary to guard against via reduced civil liberties is terrorism. Generally speaking, affirmatives to require that probable cause be demonstrated in more instances makes it harder for the police to act with less immediate evidence, making it more difficult to prevent any crime, terrorism being only one example. This is relatively straight-forward.

The links to reducing detention without charge are more problematic. One basic link story that is offered by the government is that if the government had to prosecute many of the detained individuals through the legal system they would have to disclose not only the names of people who have been detained, but also evidence that they have against the individual. Disclosing such evidence could threaten the anonymity of foreign agents in the field who have collected the information. This is probably the best link story because it could impact the war on terror abroad at-large.

If you want to run this disadvantage on the negative, you have to be very good at it. First, there is arguably a minimal link. Many scholars contend that the charges against many of these people are fecious and that they would likely be acquitted if charged. The direct link to terrorism is probably minimal at best (Change, 2002, pp. 71-2). Second, there is really good turn evidence that indicates that status quo policies are alienating many of the Muslim communities whose cooperation may be needed to fight the war on terror. Cole (2003) explains: At home, law enforcement is more effective when it works with rather than against communities. If authorities have reason to believe there might be potential terrorists lurking in Arab and Muslim immigrant communities, it would make sense to work with the millions of law-abiding members of those communities to obtain their assistance in identifying potential targets” (p. 9). Third, focusing largely on foreign

nationals may encourage police to ignore other important leads and “drop their guard” against those who” truly warrant attention (Ibid, p. 185). Fourth, if it is easier to arrest someone the police may arrest too early, undermining investigations into larger terror plots (Ibid, p. 188). Fifth, acting in ways that threaten the rights of individuals makes the U.S. look bad abroad. Such perceptions arguably increase the recruiting abilities of terrorists:

Sacrificing legitimacy is also counterproductive in the international arena, where sensitivity to double standards selectively denying foreign nationals’ rights is likely to be the highest. It is in Osama bin Laden’s interest, not ours, to portray the struggle as pitting the united States against Arabs and Muslims. The more we act in ways that support that image, the more likely bin Laden or others will be able to attract adherents to their terrorist cause. Anti-Americanism is at an all-time high now (Cole, 2003, p. 194).

Sixth, the real problem that the FBI arguably has is not a lack of law enforcement power, but rather an inability to process all of the intelligence information that already comes across their desks (Ibid, p. 16).

*Human rights promotion bad.* There is very strong evidence that violations of civil liberties by the United States undermines our ability to promote human rights abroad. Heymann (2993) explains:

Thus the most serious questions of human rights, and of the price we are prepared to pay in terms of lost respect for the United States, will arise not here but abroad if we attempt to export the human counterterrorism costs of extensive searches, electronic surveillance, coercive interrogation, detention, and limitations on association and speech. Each of these measures, controlled or forbidden at home by the U.S. Constitution and abroad by international con-

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ventions, are likely to be promising ways of getting needed information about terrorists' plans and of otherwise preventing terrorist planning. But each can prove extremely costly in the long run" (p. 82)

Kenneth Roth, and renowned expert in international human rights law, adds:

That is hardly to say that the United States is among the worse human rights offenders. But because of America's extraordinary influence, the Bush administration's willingness to compromise human rights to fight terrorism set a dangerous precedent. Because of the leadership role that the U.S. government so often has played in promoting human rights, the weakening of its voice weighed heavily, particularly in some of the front-line countries in the war against terrorism, where the need for a vigorous defense of human rights was great" (2003, p. 238)

Negatives can argue that such a loss of human rights credibility is desirable because if we promote human rights it will result in imperialism and a loss of relations with other countries. Affirmative can, of course, impact turn this argument and claim that promoting human rights is critical to enhance global dignity and to reduce the risk of war.

*Police/law enforcement backlash.* As the above evidence indicates, intelligence and law enforcement agencies will resist any efforts to limit their authority to detain without charge or search without probable cause. Police opposition to the plan not only significantly undermines solvency, but if it generates a backlash could make the police more likely to violate civil rights.

*Judicial Deference.* Traditionally, the courts have deferred to the President's interpretation of his legal powers in the area of national security and military matters.

The basic argument behind the principle is that the President knows more about these matters than the courts and that the courts should therefore defer to his judgment. The negative disadvantage argues that if the *courts* rule against the President in a matter of national security that could set a precedent for future rulings in these areas, undermining the President and national security. The civil-military relations disadvantage that was popular this year could be extended as an impact to this argument or presented as its own disadvantage.

*Presidential Power.* There is some strong general evidence that a strong, unified President/executive is necessary for global leadership and to deter global aggression. Blatant calls to limit the President's "authority" link well to this disadvantage.

*Hollow Hope.* This disadvantage argues that if the courts make more liberal rulings that liberal interest groups will flock to the courts in the hope of obtaining social change but that they will ultimately be crushed by the more conservative courts. Given recent court decisions in opposition to the juvenile death penalty and in favor of the rights of detainees, link uniqueness to this position will be difficult to win.

*Supreme Court Legitimacy.* This is the opposite of the Hollow Hope disadvantage. This disadvantage argues that if the Courts does something unpopular or seemingly crazy the Court, and potentially the entire court system, will lose legitimacy. Loss of legitimacy can undermine the court's ability to enforce the law, particularly civil rights laws.

*Judicial Activism.* This disadvantage argues that when the court makes a ruling that it does not have the authority to make it is engaging in "judicial activism." Some scholars say that such activism is inherently tyrannical because the court is usurping the power of other branches. Determining precisely what is and what is not activist is a large part of the battle since one person's activist decision is another person's legitimate decision.

*Separation of Powers.* This disadvantage is similar to the judicial activism disadvantage, except that it deals with any branch of government. The disadvantage argues that if one branch of government usurps the legitimate authority of another branch of government then it is threatening the separation of powers between the three branches of government – the executive, the legislative, and the judicial. The framers designed the government to have three different branches so the branches would check each other's power.

## General Counterplans

*The Courts.* One plan option for the affirmative or counterplan option for the negative is the courts. The affirmative or negative could fiat that the federal district courts or the Supreme Court interpret the various Amendments to the Constitution, an existing legislation, or existing court case law to prohibit a particular practice. It will be easy for teams to find cards that say practice "X" violates the law in some way and that it would be struck-down. For example, a team could argue that detention of immigrants without charge violates the due process clause. Chang (2002) explains:

Under the due process clause, a person who has not been accused of a crime has a fundamental right to freedom and bodily restraint. The due process clause requires that a non-citizen who has been charged with an immigration violation but not with a crime to be released from prison on bond unless he is shown to pose either a danger to security or a flight risk (p. 70)

Although practical in debate, such a "fiating" of court action may seem rather whimsical because the courts often side with executive policy. Chang (2002), in reference to the PATRIOT Act, explains that "this draconian law, worthy of a police state, is extremely unlikely to be overthrown by the courts, given the historic subservience of the courts to executive authority in time of war" (p. 11).

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Nonetheless, teams can probably fiat around such arguments. And, if the affirmative were to make them against a courts counterplan and their agent was the Congress, they would be undermining their own solvency because the courts would ultimately fail to enforce the affirmative plan against executive action. And, as we have seen from a discussion of the major court cases, often the courts do challenge the executive.

One important thing to understand is that immigration judges are not “regular judges” who function to interpret the law and check the power of the Executive branch. Immigration judges are simply Justice Department employees who are subject to DOJ and executive branch policy (Cole, 2003, p. 23).. Affirmative plans, or negative counterplans, which simply have immigration courts rule function to protect immigration rights are likely to fail because their rules will just be over-riden by Executive policy.

*Congressional Reform.* As discussed, one counterplan option for the negative is to reform the practice of detention without charge while leaving the authority to do so in place. Congress has the authority to craft rules regarding those kept in detention.

Philip Hayman, Professor, Harvard Law, Julliette Kayyem, Professor, JFK School of Government, PRESERVING SECURITY AND DEMOCRATIC FREEDOM IN THE WAR ON TERRORISM, November 2004, [http://bcsia.ksg.harvard.edu/BCSIA\\_content/documents/LTLS\\_final\\_02\\_05.pdf](http://bcsia.ksg.harvard.edu/BCSIA_content/documents/LTLS_final_02_05.pdf)

It is fundamental that, under the U.S. Constitution, the war power is shared by Congress and the President, as reflected in the explicit grant to Congress of the power to declare war and the power of the Congress to define rules governing the armed forces. Even though the President, as commander in chief, has the exclusive constitu-

tional power to direct the armed forces in the execution of an armed conflict, Congress clearly has the authority under Article 1, Section 8, Clause 11 of the U.S. Constitution to create rules and procedures relating to the detention of persons captured or otherwise detained in connection with that conflict. Other major democracies that have indefinitely detained suspected terrorists without trial have carefully crafted legislation governing this practice.

*The Executive.* Negatives could have the executive act to stop a particular abuse of civil liberties without having Congress or the Courts remove the authority of the President to do so. Negative could claim that executive action makes the politics link less likely or makes the court disadvantages less likely. Moreover, the negative could probably find some evidence that claims that retaining the “authority” to prevent terrorism is essential to countering it.

*The states.* As far as I can discern, all controversial detention without charge occurs on the federal level. State counterplans will not get at that. But, most of the searching that occurs without probable cause occurs by state and local police forces. Since this part of the topic has the greatest potential for growth in terms of the absolute number of affirmatives, negatives that can counterplan to have the states implement these protections will do a lot to undermine a lot of affirmative ground.

*Consultation.* Given that many affirmative this year will deal with changes in how the U.S. government deals with international terrorism suspects, traditional consultation counterplans will likely be popular. Also, since many affirmative plans will be done through executive orders, counterplans to consult Congress will also be popular. Hentoff (2003) explains that “And at times, he and other administration officials have not consulted Congress at all – until press accounts forced them to acknowledge at least to some extent, the role of Congress” (p. 97).

## Kritiks

Almost all kritiks are useful on almost all topics. Cataloging all of the kritiks that could be run on next year’s topic would take up more space than all of the pages in the *Rostrum*. Nonetheless, I think it is useful to highlight a few core kritiks that I think will get a lot of play on the topic.

*Critical Legal Studies.* Critical legal studies is a branch of scholarship in the legal academy (law professors) who argue that the law is “indeterminate” – that the meaning of language is imprecise and that the meaning of the laws can be manipulated to protect the interests of those with power. For example, affirmatives could require that searches be conducted with “probable cause,” but if the courts are always willing to find that the police had probable cause in particular instances then such protection is useless.

*Capitalism.* This kritik makes it into every topic. The link on this year’s topic is that legal rights protections best serve the interests of the capitalist class.

*Communitarianism.* This critique argues that community interests should be valued over individual interests. This issue of community interests vs. individual rights was the focus of the March-April 2005 Lincoln-Douglas topic.

*General kritiks of the legal system.* Solvency for both areas of the topic is premised upon the idea that providing opportunities to individuals to work through the legal system will improve their lot. Any general criticism of the legal system applies.

## Topicality

I do not want to take up a lot of space in this essay with a discussion of topicality. For a further discussion of the basic terms of the topic you should see the essay in my *Wake Debater’s Topic Guide* and the sections of this article that discuss “searching” and “probable” cause. In this section, however, I do want to discuss one

critical term in the resolution – “authority.” Definitions of authority will drive both case selection on the topic as well as negative strategizing.

Common definitions of authority explain it as “the power or right to give orders or make decisions; “he has the authority to issue warrants”; “deputies are given authorization to make arrests” ([www.cogsci.princeton.edu/cgi-bin/webwn](http://www.cogsci.princeton.edu/cgi-bin/webwn)). In the context of this topic, you would argue that the authority to detain without charge or conduct searches without probable cause includes the general permission to do so. Authority does not necessarily entail actually detaining someone or searching without probable cause. Such definitions of “authority” set-up the Executive action strategy discussed above.

One interesting debate over the definition of authority is whether or not “authority” Congressional specifications of detention *conditions* or how *detention without charge can take place* would *decrease* the authority of the President to detain without charge. If a reduction in authority to detain without charge includes placing general conditions on how that detention occurs, then there are not only many more affirmatives in the quantitative sense but also many more affirmatives that access much of the debate in the post the world of the new Supreme Court decisions.

This is important because negatives can make a strong case that affirmative cases to simply have the executive choose to exercise its discretion and simply not detain individuals or search without probable cause does not decrease the *authority* of the President to do so. For example, as the Director of Debate at St. Mark’s I have the authority to take my students to debate tournaments. I may chose not to do so, but if I decide not to take them to debate tournaments, that does not mean that I no longer have the authority to do so.

The only agents that can probably remove the authority of the President to detain without charge or search without

probable cause are the Congress or the courts. The Congress should remove legislative authority that the President has or the courts could interpret the Constitution and relevant legislation to say that it does not provide the President with authority to searchers or detention.

In some instances it is quite clear that the President has the authority to engage in a particular practice. For example, it is quite clear in the Patriot Act that the President has the authority to detain without charge for up to 7 days. What is potentially less clear, however, is that the President has the authority to detain someone indefinitely without charge who was capture on the battlefield of Afghanistan. Although the Supreme Court has interpreted Congress’ Authorization to Use Military Force (AUMF) against Afghanistan as providing that authority, it was a source of contention, with two justices in the Hamdi decision even going so far as to say that the authority was not provided. There are definitely instances where claimed authority is at least ambiguous and there are calls on the courts to limit the President’s authority.

## Strategizing

### Developing a Negative Strategy

One of the most important things that negatives need to understand when approaching this topic is that there are two related, but also rather distinct topic areas within this resolution. The detention without charge area is one small subset of a general civil liberties topic. The search without probable cause area provides an additional way for the affirmative to access some civil liberties issues, but also potentially opens the door to a floodgate of affirmatives that have very little to do with civil liberties.

Despite the dissimilarities in these areas, there is some common strategic ground. First, all affirmatives to reduce the authority of the federal government to de-

tain without charge and to restrict its abilities to search without probable cause will be politically unpopular. The current political climate simply favors and approach that is tough on crime/terrorism. Negatives that are well-prepared with strong politics disadvantages are likely to do well. Second, negatives that are able to win that the definition of authority forces the affirmative choose Congress or the courts as an agent of action will have a strong counterplan to simply have the executive exercise his power to reduce detention without charge and searching without probable cause. Politics is a potential net-benefit to both of these counterplans as well as the state’s counterplan. Negatives teams that are prepared to debate the utility of acting through Congress, the courts, and the Executive and the political implications of each are likely to do well on this upcoming topic.

In addition to this more strategic ground there is also more traditional ground. Negatives can argue that detention without charge and searching without probable cause are both necessary to fight crime and/or the war on terrorism. Furthermore, negatives can find basic defense against traditional affirmative advantages, arguing that rights are not absolute and that some infringements are necessary to fight the war on terrorism. And, of course, even absent the strength of the general affirmative advantage claims, there are strong solvency arguments that the negative can lodge against the utility of limiting detention without charge or searching without probable cause.

### Choosing An Affirmative

Although affirmatives will have a large number of potential cases to choose from, there will only be a limited number of cases that the affirmative will be able to win from a strategic perspective. As a result, there are a number of important things to consider when choosing an affirmative. First, affirmatives need a strong justification for *federal action*. Without this, affirmatives will repeatedly lose to the

simple strategy of the states counterplan with a politics net-benefit. Second, affirmatives need to defend an agent of action. Given that I think that negatives will be able to win that the Executive cannot limit his own authority by deciding not to act, I think that affirmatives will be forced to defend either the courts or the Congress. At this point, I'd lean toward defending the Courts because they have already weighed-in heavily on this issue, finding that at least basic habeas corpus protections apply to detainees. This provides some strong non-uniqueness ground against popular generic court disadvantages, such as the deference argument discussed above.

Third, affirmatives should pick a case where they can impact their advantage outside of rights claims and outside of the United States. As discussed, there is strong evidence that other countries have modeled our detention without charge policies and police search policies. Such modeling has arguably produced human rights violations in other countries, threatening wider human rights violations and greater ethnic conflict. These modeling advantages not only give the affirmative larger impacts to weigh against potential disadvantages, but they can also provide an additional justification for federal action – federal policies have more international salience and are more likely to be modeled than state policies. Moreover, affirmatives can fight off solvency arguments with general claims that the plan is still important because it is modeled and can use the advantage to “outweigh” or “trump” solvency-based and disadvantage-style kritiks.

## Suggestions for Future Research

Learning more about each area of the topic will require some additional reading. Given that the two areas of the topic are relatively distinct subsets, it is not possible to point you to literature that thoroughly discusses both. So I will make some suggestions for each.

In the area of detention without probable cause I suggest starting with reading the Hamdi Supreme Court decision. This decision discusses some of the major issues related to detention without charge. Since the justice split at a number of different points, you can find strong arguments on both sides. Reading through the circuit court decisions and the amicus briefs – “friend of the court” briefs authored by interested parties – you can also find a lot of general evidence. All of these decisions and briefs are indexed on Planet Debate in the “Detention Without Charge” section of the Research Links. After reading those I'd pick up a couple of the books listed in the bibliography as well as some law review articles.

The area of probable cause for searching is a little more difficult to provide research direction to because there are not any seminal, recent cases to point you to. Moreover, I think it is an open question whether or not cases to require probable cause in areas where the Supreme Court has said a “search” has not occurred are topical. For now, I would start by reading articles that include general discussions of the court's Fourth Amendment jurisprudence as well as some articles on border and library searches.

## Conclusion

The topic area chosen for debate – civil liberties – is certainly a timely one. The resolution, through the detention without charge area, accesses one of the “hottest” of the contemporary civil rights issues. The searching without probable cause area enables the affirmative to access some important civil rights issues – such as wiretaps on potential terrorist groups – but generally opens the door to a number of affirmatives that have little or nothing to do with civil liberties.

While the overall breadth of the topic in terms of the raw number of affirmatives is quite large, affirmatives will be somewhat constrained in that they have to find a case area where they can defend the unique need for federal action vis-à-vis a states

counterplan or a federal justification argument, have to defend a specific actor, and fight of strong disadvantages that can be weighed against minimized case impacts. Since there are a number of common advantage areas and solvency mechanisms (rights protections, court access, etc), negatives should be able to be well-prepared with general attacks.

## Bibliography

Web resources: All web-references are indexed at Planet Debate under Research à Civil Liberties. The resources are available for free.

### General

1. Chang, Nancy. (2003). How Democracy Dies: The War on Our Civil Liberties. *LOST LIBERTIES: ASHCOT AND THE ASSAULT ON PERSONAL FREEDOM*. 33-51.
2. Henderson, Harry. (2003). *TERRORIST CHALLENGE TO AMERICA*.
3. D. Leonnig, Carol. *Pentagon Tells Detainees About Their Right To Go to Court*, WASH. POST, Dec. 16, 2004, p. A21.
4. Ludoc, Don. (2004). Order Versus Liberty. *THOMAS M. COOLEY LAW REVIEW*. 1-74. Symposium on the liberty versus security debate.
5. Musch, Donald. (2003). *BALANCING CIVIL RIGHTS AND SECURITY*.

### Affirmative

1. Baldwin, Fletcher. (2004). The Rule of Law, Terrorism, and Countermeasures. *FLORIDA JOURNAL OF INTERNATIONAL LAW*. 2004. 43-87.
2. Chang, Nancy. (2002). *SILENCING POLITICAL DISSENT*.
3. Cole, David. (2003). Security and Freedom: Are the Governments' Efforts to Deal With Terrorism Violative of Our Freedoms?. *UNITED STATES LAW JOURNAL*. pp. 339-49.

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4. Cole, David. (2002). TERRORISM AND THE CONSTITUTION.
5. Curtis, Alan. (2004). PATRIOTISM, DEMOCRACY, AND COMMON SENSE: RESTORING AMERICA'S PROMISE AT HOME AND ABROAD.
6. Eland, Ivan. (2003). Bush's War and the State of Civil Liberties. MEDETERRANEAN QUARTERLY. 158-75. Good Middle East modelling evidence.
7. Hentoff, Nate. (2003). THE WAR ON THE BILL OF RIGHTS.
8. Heymann, Philip. (2003). TERRORISM, FREEDOM, AND SECURITY.
9. Leone, Richard. (2003). THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN THE AGE OF TERRORISM.
10. Leone, Richard. (2003). THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN THE AGE OF TERRORISM.

## Negative

1. Gonzalez, Tracey. (2003). Individual Rights Versus Collective

1. Security. INTERNATIONAL AND COMPARATIVE LAW REVIEW. Fall. 75-113.
2. Napolitano, Andrew. (2004). CONSTITUTIONAL CHAOS: WHEN THE GOVERNMENT BREAKS ITS OWN LAWS.
3. Sievert, Ronald. (2003). War on Terrorism or Global Law Enforcement?. NOTRE DAME LAW REVIEW. January. 307-53.

## Civil Liberties Links

1. Rabkin, Jeremy. (2005). Judges and Terrorists. AMERICAN SPECTATOR. February. 10-14.
2. Rosenzweig, Paul. (2004). Civil Liberties and the Response to Terrorism. DUQUESNE UNIVERSITY LAW REVIEW. Summer. 663-723.

## Footnotes

<sup>1</sup> Stefan Bauschard is the Director of Debate at the St. Mark's School of Texas, the President of PlanetDebate.com, and an Assistant Debate Coach for Harvard Debate.

<sup>2</sup>Under the ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, all assistance to groups labeled by the Secretary of State, is prohibited.

<sup>3</sup> States also have attorney generals.

<sup>4</sup> This description of the Creppy Memorandum is taken from Rich Edward's forthcoming FORENSICS QUARTERLY.

<sup>5</sup>Under the BAIL REFORM ACT OF 1984, the government can indefinitely detain material witnesses if they think they may flee before providing testimony.

<sup>6</sup>A pretextual charge is a charge that is unrelated to the crime for which the government is really holding the suspect.

<sup>7</sup>Cole & Demsey (2003b) claim that the "vast majority are being held on routine immigration charges (p. 149)

<sup>8</sup>Explain the difference between criminal and civil justice.

<sup>9</sup>Quoted from the forthcoming FORENSICS QUARTERLY by Rich Edwards.

<sup>10</sup>The only rights that exclusively apply to citizens are the right to vote and the right to run for election to certain federal offices. A Presidential candidate, for example, must be a naturally-born citizen.

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