

COUNTERTERRORISM AND CHECKS AND BALANCES: THE SPANISH AND AMERICAN EXAMPLES

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Although the United States' so-called "War on Terror" has entailed significant military action, it has also involved the augmentation of the executive's law enforcement powers. The result has been the emergence of a distinct "counterterrorism" model of coercive government action, falling between the traditional models of war and criminal law enforcement. This Note seeks to place the U.S. counterterrorism model within a larger international context by comparing it with that of another Western democracy, Spain. The author contends that the U.S. model evinces less respect for customary checks and balances than does the Spanish. Nonetheless, the author questions whether the Spanish model's greater relative commitment to checks and balances has in practice prevented government overreaching. The author concludes that both the Spanish executive and Parliament have overstepped the bounds of their constitutionally prescribed counterterrorism competences, despite the existence of checks and balances. In addition to suggesting that these excesses may be partially attributed to the institutional heritage of Francoist Spain, the author surmises that government overreaching may be endemic in any regime, such as the Spanish, that transparently vests special counterterrorism competences in the executive and legislative branches.

INTRODUCTION

Since 9/11, the U.S. government has set out in earnest to develop a "counterterrorism" model of coercive action, which falls somewhere between law enforcement and warfare.¹ This still-developing counterterrorism model has been characterized by, among other things, its disregard for traditional checks on executive law enforcement powers in terrorism investigations.² Some scholars have criti-

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¹ See Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457, 458 (2002) (discussing crime/war distinction and suggesting that United States deploy hybrid crime/war model of coercive action to deal with terrorism).

² The U.S. counterterrorism model has also been characterized by the use of military force to pursue certain terrorists. Although the United States' recourse to military force is

cized this absence of checks and balances, seeing in it a recipe for unlimited, arbitrary government.³ Implicit in this criticism, of course, is a particular conception of the purpose of checks and balances. Under this conception, checks and balances spread decisionmaking authority across various governmental actors with distinct institutional perspectives in order to prevent any individual branch of government from overreaching its predefined competences and accumulating dangerous power.⁴

This Note adopts the foregoing understanding, but queries whether checks and balances can actually achieve the laudable goal of preventing government overreaching in the heated arena of counterterrorism. The answer to this query is sought at the intersection of two legal systems. Specifically, this Note analyzes the comparative commitment to checks and balances demonstrated by the Spanish and American counterterrorism models.⁵ The analysis shows that the Spanish model evinces greater facial respect for checks and balances, inasmuch as it explicitly provides a role for the three

largely beyond the scope of this Note, it is worth mentioning that the very notion of a “war on terror” sets American policymaking apart from that of many of its allies, who disdain the use of “war” in favor of terms such as “struggle” or “fight” (“*lucha*” in Spanish).

³ See, e.g., Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1915, 1955 (2004) (claiming that current U.S. emergency powers are abnormally expansive and weaken protections for individual liberties).

⁴ See *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (“[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.” (internal citation omitted)); *Furman v. Georgia*, 408 U.S. 238, 469–70 (1972) (Rehnquist, J., dissenting) (“[The Framers] sought to provide against [the expansion of officeholders’ authority at the expense of others] by erecting adequate checks and balances in the form of grants of authority to each branch of the government in order to counteract and prevent usurpation on the part of the others.”); THE FEDERALIST No. 47, at 269 (James Madison) (Clinton Rossiter ed., 1999) (arguing separation of powers and checks and balances serve to bar “accumulation of all powers, legislative, executive, and judiciary, in the same hands”); AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 60 (2005) (arguing that checks and balances serve to enforce “legal limits” on powers of government, keeping branches in their “proper” places).

⁵ For a general discussion of the benefits of comparative criminal procedure, see Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 283–84 (2004). Other scholars have applied comparative law methodologies to evaluate special law enforcement powers in the counterterrorism arena. See generally Manas Mohapatra, *Learning Lessons from India: The Recent History of Antiterrorist Legislation of the Subcontinent*, 95 J. CRIM. L. & CRIMINOLOGY 315, 317 (2004) (comparing American counterterrorism policy to Indian policy); Michael P. O’Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657 (2003) (comparing American and British counterterrorism policies); Schulhofer, *supra* note 3, at 1908 (comparing American counterterrorism policy to British and Israeli policies).

branches of government in the design and execution of counterterrorism policy.

Nonetheless, this Note argues that the Spanish model's greater evident concern for checks and balances has not prevented government actors from overreaching their predefined competences. In fact, the Spanish executive and legislature have frequently overstepped express constitutional limitations on their already expanded counterterrorism powers.⁶ Thus, the vesting of competing counterterrorism competences in the three branches of government, in accordance with the principle of checks and balances, does not necessarily discourage government overreaching. On the contrary, the Spanish experience suggests that the transparent recognition of competing special counterterrorism competences may lead ineluctably to their abuse.⁷ Therefore, checks and balances may be incapable of effectuating their assumed purpose of controlling government overreaching, at least in the arena of counterterrorism.

Part I of this Note analyzes recent terrorist violence against the United States and Spain in order to demonstrate the feasibility and

⁶ See CONSTITUCIÓN ESPAÑOLA [C.E.] art. 55(2) (allowing Spanish legislature to suspend constitutional protection of certain fundamental liberties and providing Spanish executive with special counterterrorism police powers); see *infra* notes 234–78 (describing how Spanish legislature and executive have overstepped limits on derogation power contemplated by Spanish Constitution).

⁷ This hypothesis parallels scholarly criticism of proposals allowing judicial authorization of torture. See ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 158–63 (2002) (proposing mechanism of judicial torture warrants as prerequisite to torturing suspected terrorists). In particular, critics of so-called “torture warrants” have argued that the authorization of interrogational torture in limited circumstances will lead to its application in others. See, e.g., Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1506 (2004) (stating that such authorizations “will likely expand beyond the scope of their originally intended use”); Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 322–23 (2003) (noting that some officials will view limited authorizations “as the starting point from which to push the envelope” with “extralegal physical pressure”); see also Jeremy Waldron, *Torture and the Positive Law*, 105 COLUM. L. REV. 1681, 1717 (2005) (“In the last hundred years or so [torture] has shown itself not to be the sort of thing that can be kept under rational control.”). These critics argue that the successful use of torture in “authorized” situations would lead government agents to seek its deployment in less-than-clearly authorized circumstances in order to achieve similar successes. See Kreimer, *supra*, at 322 (“If torture is permitted with a warrant, it will become increasingly difficult for officials under pressure to produce results to refrain from torture without one.”). Moreover, since torture will usually be considered only under emergency conditions, critics question whether formal checks on its use, such as the institution of aggressive judicial oversight, would be effective in such times of danger, fear, and hysteria. *Id.* at 1512.

Likewise, this Note queries whether the use of special counterterrorism powers, such as expansive powers of detention or surveillance, can be cabined by the establishment of formal checks and balances.

potential merit of comparing their distinct approaches to counterterrorism. Part II then sketches the contours of the Spanish and U.S. counterterrorism models. Part III builds on this sketch in order to demonstrate that the Spanish model more rigorously respects the principle of checks and balances. Nonetheless, Part III concludes that the Spanish model's respect for checks and balances has failed to eliminate government overreaching.

I

AMERICAN AND SPANISH TERRORISM: APPLES AND ORANGES?

A comparison of different nations' counterterrorism policies requires sensitivity to those nations' distinct legal traditions and the terrorist threats they face.⁸ The following discussion seeks to demonstrate that, if requisite attention is paid to relevant national differences, the United States and Spain share sufficient similarities to allow for a profitable comparison of their counterterrorism policies.

These similarities are evident despite the classification of the U.S. and Spanish legal systems under distinct common and civil law headings. Although these classificatory headings may signal disparities in each legal system's approach to the investigation of crime,⁹ they ought not be used to mask similarities between legal systems not sharing the same classification.¹⁰ A more sophisticated comparison of different

⁸ See Luna, *supra* note 5, at 326 (“[C]omparing and contrasting procedural rules requires great care and understanding, always mindful of the vast differences among nations in their legal traditions and adjudication styles, as well as distinct cultural values that pervade the criminal process.”).

⁹ Perhaps the most glaring disparity between the investigative approaches of common and civil law jurisdictions is the active role accorded the judge in civil law nations, as evidenced by the Spanish system of criminal procedure. In particular, the Spanish Examining Magistrate prepares a dossier of evidence against the suspect during the pretrial phase, and calls and examines witnesses, while also dictating the flow of evidentiary presentations during the trial phase. Richard Vogler, *Spain, in CRIMINAL PROCEDURE, A WORLDWIDE STUDY* 361, 361–68 (Craig M. Bradley ed., 1999).

¹⁰ In this context, it is significant that there is increasing convergence in the criminal procedure of common and civil law nations throughout the world. See Luna, *supra* note 5, at 326–27 (noting “a convergence of criminal law and procedure in otherwise disparate nations”). Moreover, even where convergence is not apparent, the differences between common and civil law approaches do not necessarily bear on the relative respect for the principle of checks and balances. For example, although the active prosecutorial and investigative role assumed by the Spanish judge is distinct from the role of the American judge, see *supra* note 9, it is unclear how this distinction relates to certain familiar aspects of checks and balances, such as judicial review of executive actions. See Schulhofer, *supra* note 3, at 1955 (discussing importance of judicial oversight to checks and balances). One might conclude that a Spanish judge who has prepared an investigative dossier would be more aligned with the prosecution, and thus judicial oversight would be less effective in Spain than in the United States. On the other hand, the fact that Spanish criminal adjudi-

nations' criminal procedures should not be limited to the common and civil law labels attached thereto, but rather should be attentive to the actual rights and values recognized by those procedures.

In this regard, both the United States and Spain have codified similar constitutional protections of the rights to freedom from prolonged preventive detention,¹¹ freedom from warrantless searches,¹² and access to defense counsel,¹³ among other rights.¹⁴ Thus, the actual baseline limitations on government investigatory powers in terrorism investigations are similar in the United States and Spain.¹⁵

Beyond these remarks on the similarities between the American and Spanish legal environments, the following sections will argue that the United States and Spain have faced similar terrorist threats. In this context, terrorism should be understood to mean the deliberate infliction of death or serious bodily injury on civilians, noncombatants, and military personnel in peacetime, with the goal of intimidating governments, populations, or international organizations.¹⁶ With this def-

tion is viewed as an official inquiry into the truth, rather than as a battle between the State and the defendant, suggests that the Spanish judge would be institutionally predisposed to limiting the use of unlawful investigatory techniques, thereby strengthening judicial oversight.

¹¹ Compare C.E. art. 17(2) (limiting preventive detention to 72 hours), with *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (holding that Fourth Amendment requires that detainee be brought before judicial officer for determination of probable cause within 48 hours).

¹² Compare C.E. art. 18(2) (requiring warrant or *in flagrante delicto* for search of domicile), with U.S. CONST. amend. IV (protecting individuals from unreasonable searches and seizures), and *Katz v. United States*, 389 U.S. 347, 353–54 (1967) (holding that Fourth Amendment protects individuals' reasonable expectations of privacy).

¹³ Compare C.E. art. 24(2) (guaranteeing right to defense and assistance by lawyer), with U.S. CONST. amend. VI (guaranteeing right to counsel and other rights necessary to effective defense), and *Massiah v. United States*, 377 U.S. 201, 206 (1964) (holding that petitioner was denied Sixth Amendment right to counsel when prosecutor used against him evidence of his own incriminating words, "which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel").

¹⁴ See generally *infra* Part II (comparing American and Spanish criminal procedure in terrorism investigations).

¹⁵ One might also expect that nations around the world, especially allies such as Spain and the United States, would employ similar counterterrorism policies, given the need for coordinated action to address the worldwide scope of the terrorist problem. Cf. Luna, *supra* note 5, at 327 (pointing to "globalization of crime" and "transjurisdictional threats facing our nation" as reasons for employing comparative law methodology).

¹⁶ This definition of terrorism bears much in common with proposed international definitions of terrorism, as well as American and Spanish legal definitions of terrorism. Compare The Secretary-General, *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change*, ¶ 164(d), delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004) (indicating that international definition of terrorism should include any act "intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to

inition in mind, the following discussion will show that both Spain and the United States have, in recent history, confronted (1) *substantial* terrorist threats (2) created by *homegrown* and *Islamist*¹⁷ terrorist enemies.

abstain from doing any act”), with 22 U.S.C. § 2656f(d)(2) (2000) (setting forth State Department’s definition of terrorism as including “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”), and C.P. arts. 571–580 (setting forth Spanish definition of terrorism as including all crimes committed by persons who are members of groups whose purpose is to subvert constitutional order or gravely endanger public peace, as well as certain other crimes committed by persons who are not members of such groups but seek to subvert constitutional order, gravely endanger public peace, or contribute to these purposes by terrorizing public).

However, the terrorism definition’s inclusion of acts of violence perpetrated against military personnel in peacetime is somewhat controversial, as is the failure to preclude the application of the term to state actions. See John Alan Cohan, *Necessity, Political Violence and Terrorism*, 35 STETSON L. REV. 903, 930–31 (2006) (arguing that definition of terrorism that fails to distinguish between military and civilian targets “makes it impossible to distinguish terrorism from ordinary political violence”); see also Igor Primoratz, *The Morality of Terrorism*, 14 J. APPLIED PHIL. 221, 221 (1997) (defining terrorism as involving “innocent” victims). Although this Note will not delve into the subject, there is widespread literature dealing with the activities of the state-sponsored Spanish terrorist group, GAL, which killed twenty-seven suspected Basque terrorists in the South of France in the mid-1980s. See, e.g., Fernando Reinares & Óscar Jaime-Jiménez, *Countering Terrorism in a New Democracy: The Case of Spain*, in EUROPEAN DEMOCRACIES AGAINST TERRORISM, GOVERNMENTAL POLICIES AND INTERGOVERNMENTAL COOPERATION 119, 121–23 (Fernando Reinares ed., 2000) (discussing GAL while describing terrorist activities in Spain during 1980s); *Indicios fundados de que los GAL son dirigidos por servicios de información españoles*, EL PAÍS (Spain), June 5, 1986, at 17 (describing evidence of links between Spanish government and GAL); Patxo Unzueta, *El Gobierno vasco cree extendida la sospecha de que hay vínculos entre Administración y GAL*, EL PAÍS (Spain), Feb. 20, 1986, at 15 (describing alleged links between Spanish government and GAL).

¹⁷ This Note uses the term “Islamist” to refer to persons who advocate the elimination of Western influence on the Islamic world, the purgation of corrupt internal leadership associated with the West, and the restoration of ideal Islamic theocracies. See Aliya Haider, *The Rhetoric of Resistance: Islamism, Modernity, and Globalization*, 18 HARV. BLACK LETTER L.J. 91, 109 (2002) (describing “defining feature of Islamism” as “its manipulation of religious rhetoric in order to achieve power and political ends,” with the goal of “dismantling the hegemonic presence of ‘the West’”). Although the distinction between homegrown and Islamist terrorism may be false in some Western democracies, such as the United Kingdom, the distinction largely withstands scrutiny in the American and Spanish contexts, where most Islamist terrorists hail from abroad. See Elaine Sciolino with Neil MacFarquar, *Naming of Hijackers as Saudis May Further Erode Ties to U.S.*, N.Y. TIMES, Oct. 25, 2001, at A1 (indicating that fifteen of nineteen 9/11 hijackers were Saudis); Marlise Simons, *Spain Says It Has Arrested 3 More Suspects in Train Bombings*, N.Y. TIMES, Apr. 17, 2004, at A3 (noting that fifteen of twenty-one suspects behind bars for Madrid train bombings were of Moroccan nationality). But see Renwick McLean, *World Briefing Europe: Spain: 6 Years for Teenager in Train Bombings*, N.Y. TIMES, Nov. 17, 2004, at A6 (indicating that Spanish teenager pleaded guilty for his involvement in train bombings); Elaine Sciolino, *Europe Confronts Changing Face of Terrorism*, N.Y. TIMES, Aug. 31, 2005, at A1 (acknowledging that most of Madrid train bombers were from Morocco or other countries, but noting at least two members of conspiracy were native Spaniards).

A. Overview of Recent Terrorist Violence Against the United States

Over the course of the last three decades, several terrorist attacks against the United States have claimed more than 3200 lives.¹⁸ Although 9/11 looms large in the public imagination, these casualties actually resulted from two general categories of terrorist violence: (1) homegrown antigovernment terrorism and (2) Islamist terrorism.

In the first category, homegrown terrorism has killed nearly 175 people and injured more than 1000 others since the mid-1970s.¹⁹ The eighteen-year bombing spree of the Unabomber,²⁰ the Oklahoma City bombing,²¹ and the Atlanta Olympics bombing²² fall into this category.

In the second category, Islamist terrorist actions have claimed more than 3000 lives, largely in an effort to alter American policy in the Middle East.²³ The first World Trade Center bombing²⁴ and the

¹⁸ See *infra* notes 19–29 and accompanying text.

¹⁹ See *infra* notes 20–22.

²⁰ William Glaberson, *The Unabomber Case: The Overview; Kaczynski Avoids a Death Sentence with Guilty Plea*, N.Y. TIMES, Jan. 22, 1998, at A1. The Unabomber exploded sixteen bombs from the early 1970s through the early 1990s, killing three people and injuring twenty-eight others. His terrorist activities were ostensibly designed “to promote social instability in industrial society.” David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 272 (1996) (quoting *Excerpts from Letter by ‘Terrorist Group,’ FC, Which Says It Sent Bombs*, N.Y. TIMES, Apr. 26, 1995, at A16).

²¹ The Oklahoma City bombing occurred in April 1995 and killed 168 people, while injuring 850 others. Jo Thomas, *Prosecution Rests in Oklahoma Bomb Trial*, N.Y. TIMES, Dec. 3, 1997, at A26. The attack was apparently meant as retaliation for the federal raid of the Branch Davidian compound in Waco, Texas. See Robert D. McFadden, *Terror in Oklahoma: John Doe No. 1—A Special Report; A Life of Solitude and Obsessions*, N.Y. TIMES, May 4, 1995, at A1 (“Mr. McVeigh was said by Federal investigators to have visited [the Davidian compound in Waco] and to have come away with a profound anger against the Federal Government.”).

²² Shaila Dewan, *Suspect in Blast at '96 Olympics to Plead Guilty*, N.Y. TIMES, Apr. 9, 2005, at A1. The Atlanta bombing killed one person and injured more than one hundred. *Id.* The perpetrator of the attack, Eric Robert Rudolph, also killed one person and injured nearly fifty others in three bombings aimed at abortion clinics and a gay club. *Id.* His actions were fueled by antigovernment and anti-abortion sentiment. See *id.* (describing Rudolph as “emblematic of a link between white supremacists, antigovernment sentiment and the anti-abortion movement”).

²³ See *infra* notes 24–29.

²⁴ See Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. TIMES, Jan. 9, 1998, at A1 (reporting that Ramzi Ahmed Yousef, mastermind of 1993 World Trade Center bombing, “claimed to be an Islamic militant”). The bombing occurred in February 1993 and killed six people, while injuring hundreds more. *Id.* The attack was apparently part of an effort to undermine U.S. support for Israel. See *id.* (describing prosecution’s theory that Ramzi Ahmed Yousef emigrated to United States to plan bombing in response to U.S. support of Israel).

9/11 attacks²⁵ are salient examples of Islamist terrorism against the United States. The category of Islamist terrorism also includes four attacks on American interests abroad: the November 1995 bombing of a Saudi-U.S. joint facility in Riyadh;²⁶ the June 1996 bombing of the Khobar Towers residential complex in Dhahran, Saudi Arabia;²⁷ the 1998 U.S. Embassy bombings in Nairobi, Kenya, and Dar es Salaam, Saudi Arabia;²⁸ and the 2000 bombing of the USS *Cole* near Yemen.²⁹

B. Overview of Terrorist Violence Against Spain Since Transition to Democracy

Since the fall of Francisco Franco's dictatorial regime with his death on November 20, 1975, terrorist violence has claimed approximately 1150 lives in Spain.³⁰ This violence was most devastating during two historical moments—the transition to democracy from 1976 through 1980,³¹ and the 2004 Madrid train bombings³²—though

²⁵ The 9/11 attacks killed 2973 in New York City, Washington, D.C., and Pennsylvania. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 311 (2004) [hereinafter 9/11 COMMISSION REPORT]. The attacks seem at least partly to have been an effort to force the United States to abandon its presence in the Middle East, especially in Saudi Arabia, and to curtail its support of Israel. See John F. Burns, *A Nation Challenged: The Wanted Man; Bin Laden Taunts U.S. and Praises Hijackers*, N.Y. TIMES, Oct. 8, 2001, at A1 (describing Osama bin Laden's "two immediate objectives" as "the removal of American troops from Saudi Arabia and a clear Palestinian victory over Israel").

²⁶ See 9/11 COMMISSION REPORT, *supra* note 25, at 60 (noting deaths of five Americans and two Indians).

²⁷ See *id.* (noting deaths of nineteen Americans and injury to 372 others).

²⁸ See *id.* at 70 (noting deaths of twelve Americans and 212 others).

²⁹ See *id.* at 190 (noting bombing of USS *Cole* killed seventeen crew members and wounded forty more).

³⁰ This figure was compiled from several sources. For terrorist actions perpetrated between 1976 and 1998, primary reliance was placed upon Reinales & Jaime-Jiménez, *supra* note 16, at 122 (listing 911 fatalities from terrorist actions between 1976 and 1998); for actions taking place between 1999 and 2004, the principal source was La Guardia Civil frente al Terrorismo, Asesinatos de Bandas Terroristas en España, <http://www.guardiacivil.org/terrorismo/acciones/estadistica07.jsp> (last visited Mar. 16, 2007) [hereinafter La Guardia Civil] (listing 46 fatalities from terrorist actions by Basque separatist group ETA between 1999 and 2003); and statistics for the most recent terrorist actions were drawn from newspaper articles, see Renwick McLean, *Spain Arrested More Than 130 Suspects in Islamic Terrorism in '04*, N.Y. TIMES, Jan. 6, 2005, at A6 (documenting 191 deaths from 2004 Madrid train bombings); Elaine Sciolino, *No Negotiating with Separatists After Airport Attack, Spaniard Says*, N.Y. TIMES, Jan. 9, 2007, at A7 (noting that Basque separatist group ETA claimed responsibility for bombing at Madrid's Barajas Airport on December 30, 2006, which killed two people).

³¹ More than thirty percent (or 376) of the 1150 terrorism-related fatalities since the transition to democracy in 1976 occurred in the period from 1976 through 1980. See *supra* note 30 (discussing methodology underlying calculation); Reinales & Jaime-Jiménez, *supra* note 16, at 122 (listing 376 fatalities from terrorist actions between 1976 and 1980). That terrorist violence peaked during the crumbling of Franco's regime and the transition to democracy suggests that these conditions encouraged terrorist activity. Cf. *id.* at 142 (dis-

it has remained a consistent threat for the last thirty years.³³ The Spanish terrorist threat, like its American counterpart, emanates from two general sources: homegrown antigovernment terrorism and Islamist terrorism.

“Homegrown” Spanish terrorism embraces the activities of both ideologues and separatists. Anarchist³⁴ and fascist³⁵ terrorists inflicted widespread casualties on the Spanish public during the late 1970s, 1980s, and into the 1990s as they sought to impose their respective visions of government on the Spanish people. Nonetheless, the lion’s share of Spanish terrorism since the transition to democracy is attributable to the Basque separatist group, ETA, which has advocated the formation of an independent Basque Country.³⁶

cluding opportunities for disruptive groups provided by democratic transition). Experiences in present-day Iraq confirm that terrorist violence may spike as the repressive controls of an authoritarian regime are loosed.

³² Nearly seventeen percent (or 191) of the 1150 terrorism-related fatalities since 1976 resulted from the Madrid train bombings of March 11, 2004. *See supra* note 30 (discussing methodology underlying calculation); McLean, *supra* note 30 (documenting 191 deaths from 2004 train bombings).

³³ Apart from the intense terrorism of the transition to democracy and the Madrid train bombings, the Spanish lost 581 lives to terrorist violence between 1981 and 2003, an average of more than twenty-five dead per year. *See* Reinares & Jaime-Jiménez, *supra* note 16, at 122 (listing 535 fatalities from terrorist actions between 1981 and 1998); La Guardia Civil, *supra* note 30 (listing 46 fatalities from terrorist actions by Basque separatist group ETA between 1999 and 2003).

³⁴ The principal anarchist terrorist organization was known as GRAPO (*Grupos de Resistencia Antifascista Primero de Octubre*), which translates to the First of October Antifascist Resistance Groups. Reinares & Jaime-Jiménez, *supra* note 16, at 121. GRAPO was most active from the late 1970s through the early 1990s, during which time it killed eighty people. *Id.*

³⁵ During the late 1970s and 1980s, various right-wing terrorist organizations killed forty people in an effort to bring about a return to Franco’s era of quasi-fascist rule. *Id.* at 122. These terrorist organizations were allied, at least philosophically, with the military officers who staged a failed coup in February 1981. *See id.* at 133 (noting declining operational capacity of organizations after failed coup).

³⁶ ETA stands for *Euskadi ta Askatasuna*, which means Basque Homeland and Liberty in the Basque language. Undoubtedly, since its formation in 1959, ÓSCAR JAIME JIMÉNEZ, *POLICÍA, TERRORISMO Y CAMBIO POLÍTICO EN ESPAÑA, 1976–1996*, at 82 (2002), ETA has been the primary terrorist threat facing the Spanish nation. Of the 1150 terrorism-related fatalities in Spain since 1976, ETA has claimed responsibility for at least 800. *See supra* note 30 (discussing methodology underlying calculation); *see also* Reinares & Jaime-Jiménez, *supra* note 16, at 122 (attributing 740 fatalities from terrorist actions between 1976 and 1998 to ETA); La Guardia Civil, *supra* note 30 (listing 46 fatalities from terrorist actions by ETA between 1999 and 2003).

ETA’s impressive violence originated in Franco’s brutal repression of autochthonous Basque culture, FERNANDO REINARES, *TERRORISMO Y ANTITERRORISMO* 116 (1998), but it has nevertheless continued post-Franco. Since the inception of Spanish democracy, ETA has continued to advocate for an independent Basque Country. *See* ANTONIO VERCHER, *TERRORISM IN EUROPE: AN INTERNATIONAL COMPARATIVE LEGAL ANALYSIS* 168 (1992) (explaining that “ETA’s final aim is the full independence of four northern Spanish provinces” populated by Basque people). Moreover, although ETA has always been com-

In the second category of Spanish terrorism, Islamist terrorists have claimed at least 191 lives and injured more than 1000.³⁷ These casualties were the result of the coordinated Madrid train bombings of March 11, 2004, which were orchestrated largely by the Moroccan Islamic Combatant Group.³⁸ The March bombings were ostensibly part of a global jihad³⁹ and possibly directed at Spanish support for the war in Iraq.⁴⁰

C. Salient Similarities and Manageable Differences

The preceding two sections highlight basic similarities between the American and Spanish experiences with terrorism. Both nations

mitted to revolution by military means, it has resorted to change via political avenues as well, especially since the transition to democracy. See Reinares & Jaime-Jiménez, *supra* note 16, at 121 (differentiating between ETA's "political military faction" and its "military wing"). For example, the political party "Herri Batasuna," which means People's Unity in the Basque language, had ties with ETA from its formation in 1978, *id.* at 124, and advocated with some electoral success for the independence of the Basque Country until its National Cabinet was prosecuted and incarcerated in 1996, Katharine A. Sawyer, *Rejection of Weimarian Politics or Betrayal of Democracy?: Spain's Proscription of Batasuna Under the European Convention on Human Rights*, 52 AM. U. L. REV. 1531, 1538–41 (2003). Its successor organization, Batasuna, which had some—although substantially less—electoral success, was formally outlawed for ties to terrorism in 2002. *Id.* at 1546–49.

While ETA remains active today, some claim that the group is nearing extinction. See Renwick McLean, *Bombings in Spain Are Seen as a Sign of Basque Group's Decline, Not Strength*, N.Y. TIMES, Dec. 20, 2004, at A16 (describing "widespread agreement in the central government in Madrid and in the regional government in the Basque country that ETA is closer to extinction than at any point in its history, and that the main question now is when and how peace will come about, rather than if it will"). One sign of ETA's weakness is that seventy percent of its victims from 1994 to 2004 were civilians, as opposed to police officers and military personnel, who had traditionally borne the brunt of ETA's terrorism. *Id.* In fact, ETA declared a permanent ceasefire in March 2006 and entered into peace negotiations with the Spanish government in June 2006. Sciolino, *supra* note 30. Nonetheless, in December 2006, ETA resumed its terrorist violence, exploding a car bomb at Madrid's main airport, which killed two civilians. *Id.*

³⁷ McLean, *supra* note 30.

³⁸ Simons, *supra* note 17.

³⁹ See *In Their Own Words: Ahmed and Protege*, N.Y. TIMES, July 12, 2004, at A4 (quoting alleged mastermind of Madrid train bombings describing Madrid bombers as "martyrs" and predicting "there will be the victory of Islam").

⁴⁰ In the immediate aftermath of the bombings, elections for Prime Minister were held. Prime Minister Aznar of the conservative *Partido Popular* (Popular Party)—who had provided troops for the war in Iraq in the face of great popular Spanish opposition and had initially blamed the bombings on the Basque separatist group, ETA—was favored to win the election. See David E. Sanger, *Blow to Bush: Ally Rejected*, N.Y. TIMES, Mar. 15, 2004, at A1 ("[Aznar] was leading in the polls until the terrorist attack."). However, Aznar was soundly defeated by his opponent Zapatero of the more leftist *Partido Socialista de Obreros Españoles* (Socialist Party of Spanish Workers), who had run on a platform that promised to pull Spain out of Iraq and to move Spain closer to the position of France and Germany. See *id.* (noting France and Germany did not support Iraq war and "Mr. Zapatero rode to victory by . . . pledg[ing] to bring home Spain's 1300 troops in Iraq").

have suffered significant loss of life at the hands of homegrown and Islamist terrorists.⁴¹ These similarities notwithstanding, there are three evident differences between the American and Spanish experiences: (1) Whereas homegrown U.S. terrorism has been largely orchestrated by loners, homegrown Spanish terrorism has been perpetrated by organized terrorist groups; (2) whereas the United States has endured sporadic, large-scale violence, the Spanish have lived in daily fear of smaller-scale violence; and (3) whereas Islamist terrorists have caused the vast majority of American terrorism casualties, homegrown terrorists have claimed the majority of Spanish casualties. The following discussion argues that these three distinctions do not undermine the ensuing comparative analysis of Spanish and American respect for checks and balances.

First, insofar as the group-versus-loner distinction suggests that Spain has faced a more organized and hence more dangerous homegrown enemy, one might expect the Spanish to have taken more extraordinary steps to combat that enemy. For example, perhaps the Spanish would have been more willing to eliminate traditional limits on executive and legislative power embodied in the principle of checks and balances. If these expectations were borne out, the group-versus-loner distinction might be identified as a cause. In that case, it might be difficult to make any definitive conclusion concerning the relative commitment of Spain and the United States to the principle of checks and balances, as the factual environments these nations confronted would be relevantly different. However, the comparative legal analysis that follows will show that the United States has in fact been more prone to discard traditional checks and balances than has Spain. Since this result runs counter to reasoned expectations derived from consideration of the group-versus-loner distinction, that distinction in no way undermines—and probably reinforces—the potential merit of the instant comparative investigation.

Second, the purported dissimilarity between daily, small-scale Spanish terrorism and infrequent, catastrophic American violence is more perceived than real. In fact, the Spanish experienced the devastating effects of catastrophic terrorism during the Madrid train bomb-

⁴¹ Terrorist violence against American interests has taken 3200 lives since the mid-90s, *see supra* notes 19–29 and accompanying text, whereas terrorist violence in Spain has killed 1150 people, *supra* note 30 and accompanying text. Although these numbers may seem widely disparate, especially given the shorter time during which American casualties have been registered, the difference in population size in the United States and Spain is relevant when evaluating the intensity of terrorist violence. The population of Spain was 40,341,462 in 2005, whereas the population of the United States was 295,734,134. *THE WORLD ALMANAC AND BOOK OF FACTS* 2006, at 834, 846.

ings,⁴² much like the United States suffered those effects on 9/11. Conversely, although terrorist attacks have not occurred as frequently in the United States, there is still a high level of daily anxiety about such attacks,⁴³ as there is in Spain.⁴⁴ Moreover, even if there is a true difference in the scale of terrorism facing the United States and Spain, other scholars have embarked on comparative projects akin to that taken on in this Note.⁴⁵ Likewise, the purported difference in the scale of Spanish and American terrorism provides no insurmountable obstacle to comparison.

Third, the apparent homegrown-versus-Islamist distinction is exaggerated. Although homegrown Spanish terrorism has killed more people than its Islamist counterpart since the transition to democracy,

⁴² See *supra* notes 37–40 and accompanying text.

⁴³ See THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, STRONG SUPPORT FOR ISRAEL—NO SURGE IN TERROR CONCERNS OR BOOST FOR BUSH, AMERICAN ATTITUDES HOLD STEADY IN FACE OF FOREIGN CRISES 42–43 (2006), available at <http://people-press.org/reports/pdf/285.pdf> (listing data on responses to questions regarding fear of terrorist attack).

⁴⁴ See, e.g., CENTRO DE INVESTIGACIONES SOCIOLOGICAS, BARÓMETRO DE JULIO 3 (2005), http://www.cis.es/cis/export/sites/default/-Archivos/Marginales/2600_2619/Es2616.pdf (reporting that 50.4% of Spaniards considered terrorism one of nation's three largest problems, second only to 52% who believed unemployment was one of nation's top three problems); CENTRO DE INVESTIGACIONES SOCIOLOGICAS, BARÓMETRO DE ABRIL 1 (2004), http://www.cis.es/cis/export/sites/default/-Archivos/Marginales/2560_2579/Es2561.pdf (stating that 62.9% of Spaniards thought terrorism was one of nation's three principal problems, making terrorism largest concern of Spanish public); CENTRO DE INVESTIGACIONES SOCIOLOGICAS, BARÓMETRO DE MAYO 1 (2003), http://www.cis.es/cis/export/sites/default/-Archivos/Marginales/2500_2519/Es2511.pdf (indicating that 44.4% of Spaniards saw terrorism as one of nation's three top problems, second only to 63.6% who considered unemployment to be one of nation's three biggest problems); CENTRO DE INVESTIGACIONES SOCIOLOGICAS, BARÓMETRO DE SEPTIEMBRE 1 (2002), http://www.cis.es/cis/export/sites/default/-Archivos/Marginales/2460_2479/Es2466.pdf (asserting that 63.9% of Spaniards viewed terrorism as one of nation's three principal problems, ranking as highest percentage); CENTRO DE INVESTIGACIONES SOCIOLOGICAS, BARÓMETRO DE ENERO 1 (2001), http://www.cis.es/cis/export/sites/default/-Archivos/Marginales/2400_2419/Es2406.pdf (reporting that 65.9% of Spaniards considered terrorism one of nation's three largest problems, which made terrorism Spanish public's greatest concern). Since late 2005, anxiety about terrorism has dissipated somewhat. See CENTRO DE INVESTIGACIONES SOCIOLOGICAS, BARÓMETRO DE DICIEMBRE (2006), http://www.cis.es/cis/opencms/-Archivos/Marginales/2660_2679/2666/e266600.html (stating that 27.1% of Spaniards saw terrorism as one of nation's three largest problems); CENTRO DE INVESTIGACIONES SOCIOLOGICAS, BARÓMETRO DE OCTUBRE (2005), http://www.cis.es/cis/opencms/-Archivos/Marginales/2620_2639/2622/e262200.html (indicating that only 23.9% of Spaniards thought terrorism was one of nation's top three problems). Nonetheless, over the course of the last decade, terrorism has remained a consistent Spanish concern, usually second only to unemployment, though occasionally vying for attention with immigration and the cost of housing. See generally CENTRO DE INVESTIGACIONES SOCIOLOGICAS, BARÓMETROS DEPOSITADOS EN EL BANCO DE DATOS, http://www.cis.es/cis/opencms/ES2_barometros/depositados.jsp (providing links to monthly survey data from 1979 to 2006).

⁴⁵ See, e.g., Schulhofer, *supra* note 3 (comparing United States to United Kingdom and Israel).

Islamist terrorism has emerged in recent years as the greatest threat to Spanish security,⁴⁶ much like it is the greatest terrorist threat in the United States.⁴⁷ In spite of this emerging threat, Spain has retained counterterrorism policies that were designed to combat the homegrown terrorism of the 1970s and 1980s, even as they wage a new fight against Islamist terrorism.⁴⁸ Thus, if the homegrown-versus-Islamist distinction is invoked to explain the relative lack of commitment to checks and balances in the United States,⁴⁹ the question remains as to why Spain has retained its commitment to respecting checks and balances even after the Islamist threat emerged. Moreover, the fact that Spain has retained policies designed to confront homegrown terrorism calls into question the notion that the homegrown-versus-Islamist distinction would have any effect at all on counterterrorism policymaking.

In sum, recent American and Spanish experiences with terrorist violence evince salient similarities—such as the intense level of violence and the general identifying characteristics of its perpetrators—and manageable differences. The group-versus-loner, small-scale-versus-catastrophic, and homegrown-versus-Islamist distinctions neither explain nor trivialize differences in American and Spanish respect for checks and balances; rather, they serve in many ways to make such differences more intriguing and worthy of investigation.

II

THE SPANISH AND AMERICAN COUNTERTERRORISM MODELS

In response to the terrorist threats outlined in the preceding Part, the United States and Spain have each developed counterterrorism

⁴⁶ See *supra* notes 37–40 and accompanying text (describing effects of Madrid train bombings).

⁴⁷ See *supra* notes 23–29 and accompanying text (chronicling Islamic terrorist attacks on American interests).

⁴⁸ Spain's counterterrorism policies were developed in response to the homegrown terrorism of the 1970s and 80s. Notwithstanding plans for some new institutional arrangements and talk of more carefully scrutinizing the Muslim community, there have been relatively few changes in response to the emerging Islamist threat. See HUMAN RIGHTS WATCH, *SETTING AN EXAMPLE? COUNTER-TERRORISM MEASURES IN SPAIN* 8 (2005), available at <http://www.hrw.org/reports/2005/spain0105/spain0105.pdf> (outlining policies of government elected in wake of 2004 ETA bombings).

⁴⁹ The “foreignness” of Islamist terrorism may encourage resort to something like a war model of coercive action, which is less respectful of the principle of checks and balances. See Feldman, *supra* note 1, at 459–60 (indicating that recourse to war is more likely in response to aggression by “some force or power that is located outside the state’s jurisdiction”).

models of coercive government action.⁵⁰ These models, born in the crises of 9/11 and the Spanish transition to democracy, provide extraordinary powers of preventive detention, incommunicado detention, search and surveillance, and trial by special tribunals. The sections that follow will trace the contours of the American and Spanish models. This sketch lays the groundwork for the comparative analysis of Part III, which argues that though the Spanish model evinces more facial respect for the principle of checks and balances, it has nevertheless failed to prevent rampant government overreaching.

A. *The Spanish Counterterrorism Model*

The Spanish Constitution expressly provides generous rights for targets of criminal investigations, thereby cabining Spanish police powers.⁵¹ However, the Constitution also provides that Parliament, by way of a duly enacted organic law,⁵² may suspend several of these rights in order to facilitate the investigation of armed bands or terrorist groups.⁵³ The Constitution requires that the suspension of constitutional rights be accompanied by “necessary” judicial intervention and “adequate” parliamentary oversight.⁵⁴ Therefore, the Spanish Constitution expressly constructs its own counterterrorism model of coercive action, whereby special counterterrorism powers may be

⁵⁰ See *supra* note 1 and accompanying text (referring to counterterrorism model of coercive action as falling somewhere between traditional war and law enforcement models, and as involving creation of special law enforcement powers).

⁵¹ See, e.g., C.E. art. 17(2) (requiring that arrestee be brought before judge within 72 hours of arrest); *id.* art. 17(3) (providing that detainee shall be guaranteed assistance of lawyer during police and judicial proceedings, under terms laid down by law); *id.* art. 18(2) (requiring warrant for domiciliary searches, except in cases of *in flagrante delicto*); *id.* art. 18(3) (requiring warrant for surveillance of postal, telegraphic, and telephonic communications); *id.* art. 24(2) (protecting right to present defense, to assistance of counsel, and to trial before ordinary judge predetermined by law).

⁵² The four basic types of Spanish legislation, in order of importance, are: (1) organic laws; (2) ordinary laws; (3) decree laws; and (4) legislative decrees. Organic laws are reserved for special subject matters. In particular, organic laws deal with the regulation of fundamental rights and public liberties, the passage of the autonomous communities’ Statutes of Autonomy, and the regulation of the electoral regimen. C.E. art. 81(1). Moreover, organic laws can be passed only by the affirmative vote of an absolute majority of Parliament. *Id.* art. 81(2). Ordinary laws are those passed by a simple majority of the legislature, and which regulate matters not subject to organic laws. *Id.* art. 90(2). Decree laws are temporary laws passed by the executive subject to approval by the legislature within thirty days. *Id.* art. 86(1)–(2). Like ordinary laws, decree laws may not affect subjects regulated by organic laws. *Id.* art. 86(1). Finally, legislative decrees are laws promulgated by the government pursuant to a legislative grant of authority. *Id.* art. 82(3).

⁵³ *Id.* art. 55(2). Among the rights subject to derogation are the 72-hour cap on preventive detentions, *id.* art. 17(2); the warrant requirement for domiciliary searches, *id.* art. 18(2); and the warrant requirement for surveillance of postal, telegraphic, and telephonic communications, *id.* art. 18(3).

⁵⁴ *Id.* art. 55(2).

wielded through the concerted action of the three branches. Parliament, for its part, may pass an organic law creating special police powers, provided that the law guarantees judicial involvement in, and adequate parliamentary oversight of, the use of these powers. The executive may then deploy its special powers, subject always to the requirement that the judiciary authorize and oversee that deployment.⁵⁵ The four sections that follow will elucidate the operation of this Spanish counterterrorism model of coercive action by discussing its application to four police powers: preventive detention, incommunicado detention, searches and surveillance, and trial by specially constituted tribunals.

1. Preventive Detention

Preventive detention is the practice of detaining an individual without criminal charges in order to prevent that individual from engaging in criminal (or otherwise dangerous) conduct. Although the Spanish Constitution expressly limits the permissible duration of preventive detention to 72 hours,⁵⁶ it permits Parliament to suspend this protection in cases involving armed bands or terrorist groups.⁵⁷ As the following discussion demonstrates, Parliament has made regular use of this “power of derogation” since the late 1970s.

During the first decade of Spanish democracy, legislative derogations generally allowed police to detain suspected terrorists preventively for a period of ten days, provided that the competent judicial officer authorized and oversaw detentions stretching beyond the 72-hour constitutional maximum.⁵⁸ However, in 1987, the Spanish Constitutional Court invalidated the prevailing practice, holding that

⁵⁵ *Id.*

⁵⁶ *Id.* art. 17(2).

⁵⁷ *Id.* art. 55(2) (allowing Parliament to suspend constitutional cap on duration of preventive detention through passage of organic law that guarantees adequate judicial and parliamentary oversight).

⁵⁸ *See, e.g.*, Art. 2 of the Ley de Medidas Especiales en Relación con los Delitos de Terrorismo Cometidos por Grupos Armados (B.O.E. 1978, 293) (allowing maximum of ten days of preventive detention of terrorism suspects, provided that government requested prolongation of detention during first 72 hours and received judicial approval of request within 24 hours); Art. 3(1) of the Ley Orgánica sobre los Supuestos Previstos en el Artículo 55.2 de la Constitución (B.O.E. 1980, 289) (same); Art. 13 of the Ley Orgánica contra la Actuación de Bandas Armadas y Elementos Terroristas y de Desarrollo del Artículo 55.2 de la Constitución (B.O.E. 1985, 3) (same).

There was an exception to the otherwise consistent provision for ten days of preventive detention in terrorism investigations. In particular, during the last six months of 1978, the police were empowered to detain suspected terrorists preventively for the indefinite period of time necessary to complete the underlying investigation. Art. 2 of the Real Decreto-Ley sobre Medidas en Relación con los Delitos Cometidos por Grupos o Bandas Armados (B.O.E. 1978, 156).

preventive detentions lasting up to ten days were unconstitutional.⁵⁹ After the Constitutional Court's decision, Parliament shortened the allowable period of preventive detention of suspected terrorists to five days, which remains the current maximum.⁶⁰

2. *Incommunicado Detention and Other Restrictions on the Right to Counsel*

Incommunicado detention refers to the practice of severely limiting or denying detainees' rights to communicate with the outside world while in detention. This practice is regulated by the Spanish Constitution, which protects the right to the assistance of counsel during police and judicial proceedings.⁶¹ However, the Constitution also permits Parliament to define the terms under which effective assistance of counsel shall be guaranteed, thereby affording Parliament some discretion to establish the scope and content of this right.⁶²

In 1983, Parliament made use of this discretion, creating a repressive regime of incommunicado detention that remains in effect today.⁶³ Under this regime, incommunicado detainees may not select their own attorneys,⁶⁴ communicate with anyone other than their

All of these early democratic legislative enactments derived in substantial part from measures in effect during Franco's regime. See Art. 13 of the Decreto-Ley sobre Prevención y Enjuiciamiento de los Delitos de Terrorismo y la Seguridad Personal (B.O.E. 1975, 204) (allowing ten days of preventive detention in terrorism investigations).

⁵⁹ STC, Dec. 16, 1987 (R.T.C., No. 199, p. 518, at 555). The decision also invalidated another aspect of the prevailing practice that effectively allowed the government to detain a suspected terrorist preventively for 24 hours beyond the 72-hour constitutional maximum before obtaining authorization from the relevant judicial authority. See *id.* at 554 (holding unconstitutional provision requiring government to request judicial authorization for preventive detention within 72 hours of detention, and allowing government to hold suspect for up to 24 hours while judge considered request); *cf. infra* note 60 (describing legislative enactment passed after Constitutional Court's 1987 decision and still in effect today, which requires that government make request for prolongation of detention during first 48 hours, and that judicial officer rule on request within 24 hours).

⁶⁰ Ley Orgánica de Reforma de la Ley de Enjuiciamiento Criminal (B.O.E. 1988, 126) (codified at L.E. CRIM. art. 520 *bis*(1) (2004)). The police must request judicial approval for prolonged preventive detention during the first 48 hours of detention, and the judicial authority must rule on that request within 24 hours. *Id.* Moreover, the competent judicial authority retains the power to oversee and dictate the conditions of preventive detention. *Id.* art. 520 *bis*(3).

⁶¹ C.E. art. 17(3); *id.* art. 24(2).

⁶² *Id.* art. 17(3).

⁶³ Ley Orgánica por la que se Desarrolla el Artículo 17.3 de la Constitución en Materia de Asistencia Letrada al Detenido y al Preso y Modificación de los Artículos 520 y 527 de la Ley de Enjuiciamiento Criminal (B.O.E. 1983, 310).

⁶⁴ L.E. CRIM. art. 527(a) (2004).

appointed counsel and doctors,⁶⁵ or consult in private with their counsel.⁶⁶ The situation of incommunicado detainees contrasts sharply with that of other detainees, who are generally guaranteed a broad array of legal protections.⁶⁷

Although harsh restrictions apply to all incommunicado detainees, Parliament has usually subjected suspected terrorists to incommunicado detentions of potentially longer duration. Since the transition to democracy, suspects accused of offenses unrelated to terrorism have been subject to incommunicado detention lasting, at most, five to eight days.⁶⁸ Conversely, for the first decade of democratic rule, suspected terrorists could be held incommunicado for the indefinite period of time necessary to complete the underlying investigation, without prior judicial authorization.⁶⁹ This extraordinary prac-

⁶⁵ See *id.* art. 527(b) (restricting detainee's right in art. 520(2)(d) to communicate with family or friends, or consular officials of his home country).

⁶⁶ See *id.* art. 527(c) (restricting detainee's right in art. 520(6)(c) to have private interview with his attorney). It is unclear whether a suspect's attorney may intervene in formal proceedings or whether he may only observe such proceedings to ensure that the detainee's rights are respected. See HUMAN RIGHTS WATCH, *supra* note 48, at 44 (discussing "lack of consensus among legal experts as to the limits of the legal aid attorney's role during the police statement").

⁶⁷ A detainee generally enjoys at least six basic rights, including: (a) the right to remain silent; (b) the right against forced self-incrimination; (c) the right to retain an attorney, or have one appointed, and to have that attorney present at judicial proceedings where the detainee's statement is requested and at lineups; (d) the right to notify family or friends, or the relevant consular official if the detainee is a foreigner, of the fact of his detention and the location of the same; (e) the right to the assistance of an interpreter; and (f) the right to be examined by a medical doctor or his legal substitute. L.E. CRIM. art. 520(2)(a)–(f) (2004). The detainee's right to adequate assistance of counsel generally empowers his attorney to: (a) request that the detainee be informed of the six aforementioned rights; (b) request that the competent judge take appropriate action in oversight of the detention; and (c) conduct an interview in private with the detainee. *Id.* art. 520(6)(a)–(c).

⁶⁸ Today, persons suspected of committing non-terrorism-related offenses may generally be held incommunicado for a period not to exceed five days. L.E. CRIM. art. 509(1) (2004). Between Franco's death and 2003, such individuals generally could not be held incommunicado for longer than eight days. See, e.g., L.E. CRIM. arts. 506, 508 (1979); L.E. CRIM. arts. 506, 508 (1986) (derogated by Ley Orgánica de Reforma de la Ley de Enjuiciamiento Criminal en materia de prisión provisional (B.O.E. 2003, 13)).

⁶⁹ Art. 2 of the Ley de Medidas Especiales en Relación con los Delitos de Terrorismo Cometidos por Grupos Armados (B.O.E. 1978, 293) (allowing detaining authority to order incommunicado detention of suspected terrorists for period of time deemed necessary for completion of preparatory investigation); Art. 3(3) of the Ley Orgánica sobre los Supuestos Previstos en el Artículo 55.2 de la Constitución (B.O.E. 1980, 289) (same); Art. 15(1) of the Ley Orgánica contra la Actuación de Bandas Armadas y Elementos Terroristas y de Desarrollo del Artículo 55.2 de la Constitución (B.O.E. 1985, 3) (same). The dovetailing of the law of preventive detention and these special provisions regarding incommunicado detention allowed executive officials to order incommunication without prior judicial authorization. Since the government was empowered to detain suspected terrorists preventively for an initial 72-hour period without judicial intervention, *supra* note 58, it, as the "detaining authority," was also free to order that suspected terrorists be

tice came to an end in 1987 and 1988, through the combined force of a decision by the Spanish Constitutional Court requiring judicial authorization for incommunication decisions,⁷⁰ and Organic Law 4/1988, which subjected terrorism suspects to the same eight-day period of incommunication applicable to suspects accused of other crimes.⁷¹ In 2003, Parliament reversed course once again, returning to its practice of subjecting suspected terrorists to potentially longer periods of incommunicado detention.⁷² Since 2003, a terrorist suspect may be held incommunicado for a maximum of thirteen days, whereas suspects accused of other crimes now face a maximum of five days of incommunication.⁷³

3. Searches and Surveillance

The Spanish Constitution contains at least two provisions directly regulating the conduct of searches and surveillance. These provisions establish the inviolability of the home,⁷⁴ as well as the privacy of postal, telegraphic, and telephonic communications.⁷⁵ Nevertheless, these ample guarantees of privacy are subject to parliamentary suspension in cases involving armed bands or terrorist groups.⁷⁶ As discussed below, Parliament has again made regular use of its suspension power.⁷⁷

Although the Spanish police generally may not search a domicile in the absence of a reasoned judicial order finding cause to believe

held incommunicado during these first 72 hours, *see* STC, Dec. 16, 1987 (R.T.C., No. 199, p. 518, at 562) (describing absence of legal requirement that judge authorize incommunication during first 72 hours of detention). Even though the competent judicial authority could actively oversee detention decisions after the initial 72 hours, the Court nonetheless ruled that the government's unbridled authority during the first hours of detention violated the Constitution's requirement of judicial oversight. *Id.*

⁷⁰ STC, Dec. 16, 1987 (R.T.C., No. 199, p. 518, at 562) (requiring that incommunication be ordered by competent *judicial* authority, and holding that, although executive may order initial incommunication prior to suspect's appearance before judge, initial order must be accompanied by application to judge for incommunication).

⁷¹ Disposición Final of the Ley Orgánica de Reforma del Código Penal (B.O.E. 1988, 126) (suspending Ley Orgánica 9/1984, thereby eliminating special provision for incommunicado detention of suspected terrorists).

⁷² *See* Ley Orgánica de Reforma de la Ley de Enjuiciamiento Criminal en Materia de Prisión Provisional (B.O.E. 2003, 257) (codified at L.E. CRIM. art. 509 (2004)) (extending maximum possible period of incommunicado detention from eight days to ten days).

⁷³ *See id.* art. 509(2) (setting limit of five days on incommunicado detention, but allowing judge in terrorism cases to extend incommunication for additional periods of five and three days by reasoned determination).

⁷⁴ C.E. art. 18(2).

⁷⁵ *Id.* art. 18(3).

⁷⁶ *Id.* art. 55(2).

⁷⁷ *See infra* notes 79–81 (regarding domiciliary searches); notes 83–85 (concerning surveillance).

that the suspect or evidence of a crime will be found therein,⁷⁸ special exceptions have often obtained in terrorism cases. During the first decade of Spanish democracy, police officers were authorized to conduct warrantless searches of domiciles where they believed suspected terrorists had hidden or taken refuge.⁷⁹ In 1988, Parliament narrowed this broad police power through the passage of an organic law that remains in effect today.⁸⁰ Under that law, the police must obtain a warrant for domiciliary searches conducted in terrorism investigations, unless there are urgent circumstances.⁸¹

In addition to their extraordinary powers to conduct warrantless searches, the police have also enjoyed special powers of surveillance in terrorism investigations. In nonterrorism investigations, the police may conduct surveillance of protected communications only pursuant to a judicially issued warrant, which must be predicated on a finding that there is reason to believe that the target is engaged in criminal activities.⁸² Nonetheless, the earliest legislative dispositions regarding counterterrorism surveillance permitted an executive official to authorize surveillance of the electronic communications of any individual who he rationally suspected was a member of a terrorist organization, so long as the reasons therefor were communicated to the relevant judicial authority.⁸³ Later legislative provisions have vested

⁷⁸ L.E. CRIM. art. 550 (2004). The “reasoned determination” must elaborate grounds for concluding that the contemplated infringement of the domicile’s inviolability is proportional to the benefits to be obtained thereby, and necessary in light of available alternative methods of investigation. See STC, May 29, 2000 (R.T.C., No. 136, p. 374, at 381) (providing that judicial orders should contain detailed information explaining specific need for, and advantages of, residential searches); see also C.E. art. 18(2) (protecting inviolability of domicile); L.E. CRIM. art. 545 (2004) (indicating that domiciliary search is unlawful unless expressly authorized by law).

⁷⁹ See, e.g., Art. 3 of the Ley de Medidas Especiales en Relación con los Delitos de Terrorismo Cometidos por Grupos Armados (B.O.E. 1978, 293) (indicating that terrorist suspects shall be deemed to have been caught *in flagrante delicto*, thereby permitting warrantless search of place where they were found); Art. 4(1) of the Ley Orgánica sobre los Supuestos Previstos en el Artículo 55.2 de la Constitución (B.O.E. 1980, 289) (allowing warrantless arrest and search in any place or domicile where suspected terrorist may have hidden or taken refuge); Art. 16(1) of the Ley Orgánica contra la Actuación de Bandas Armadas y Elementos Terroristas y de Desarrollo del Artículo 55.2 de la Constitución (B.O.E. 1985, 3) (same).

⁸⁰ Ley Orgánica de Reforma de la Ley de Enjuiciamiento Criminal (B.O.E. 1988, 126) (codified at L.E. CRIM. art. 553 (2004)).

⁸¹ See L.E. CRIM. art. 553 (2004) (indicating that in cases of exceptional or urgent necessity, police may conduct warrantless arrest and search in any place or domicile where suspected terrorist may have taken refuge).

⁸² *Id.* art. 579(3).

⁸³ Art. 4 of the Real Decreto-Ley sobre Medidas en Relación con los Delitos Cometidos por Grupos o Bandas Armados (B.O.E. 1978, 156) (authorizing government to order surveillance, provided that order is communicated to competent judicial authority, who may revoke it); Art. 4 of the Ley de Medidas Especiales en Relación con los Delitos de

primary authority for ordering surveillance in the judiciary and empowered the executive to order brief periods of surveillance in urgent circumstances.⁸⁴ The competent judicial authority must approve or revoke surveillance ordered by the executive within three days, or the surveillance must cease.⁸⁵

4. *Special Counterterrorism Tribunal: The National Court (Audiencia Nacional)*

The Spanish Constitution guarantees defendants the right to be tried before an ordinary judge predetermined by law,⁸⁶ which calls into question the use of special counterterrorism tribunals. Nonetheless, since the transition to democracy, Parliament has relied on its constitutional power to regulate certain fundamental rights⁸⁷ in order to justify the vesting of exclusive jurisdiction for the trial of terrorist offenses in the National Court in Madrid.⁸⁸ Many have criticized the

Terrorismo Cometidos por Grupos Armados (B.O.E. 1978, 293) (authorizing government to order renewable three-month periods of surveillance, provided that order is communicated to competent judicial authority, who may revoke it).

⁸⁴ Art. 5 of the Ley Orgánica sobre los Supuestos Previstos en el Artículo 55.2 de la Constitución (B.O.E. 1980, 289); Art. 17 of the Ley Orgánica contra la Actuación de Bandas Armadas y Elementos Terroristas y de Desarrollo del Artículo 55.2 de la Constitución (B.O.E. 1985, 3); L.E. CRIM. art. 579(4) (2004).

⁸⁵ Art. 5(2) of the Ley Orgánica sobre los Supuestos Previstos en el Artículo 55.2 de la Constitución (B.O.E. 1980, 289); Art. 17(2) of the Ley Orgánica contra la Actuación de Bandas Armadas y Elementos Terroristas y de Desarrollo del Artículo 55.2 de la Constitución (B.O.E. 1985, 3); L.E. CRIM. art. 579(4) (2004).

⁸⁶ C.E. art. 24(2).

⁸⁷ *See id.* art. 55(2) (allowing Parliament to suspend, inter alia, prohibition on preventive detentions lasting longer than 72 hours and guarantee of inviolability of domicile and privacy of communications). Significantly, Article 55(2) does not expressly permit suspension of the right to be tried before an ordinary judge predetermined by law. *See infra* notes 89–90 (discussing arguments, both constitutional and practical, against trial for terrorist offenses by special tribunal).

⁸⁸ Art. 2 of the Real Decreto-Ley sobre Medidas en Relación con los Delitos Cometidos por Grupos o Bandas Armados (B.O.E. 1978, 156) (vesting exclusive jurisdiction for pretrial and trial matters connected with terrorist offenses in National Court); Art. 5 of the Ley de Medidas Especiales en Relación con los Delitos de Terrorismo Cometidos por Grupos Armados (B.O.E. 1978, 293) (same); Art. 6 of the Ley Orgánica sobre los Supuestos Previstos en el Artículo 55.2 de la Constitución (B.O.E. 1980, 289) (same); Art. 11 of the Ley Orgánica contra la Actuación de Bandas Armadas y Elementos Terroristas y de Desarrollo del Artículo 55.2 de la Constitución (B.O.E. 1985, 3) (same); Disposición Transitoria of the Ley Orgánica de Reforma de la Ley de Enjuiciamiento Criminal (B.O.E. 1988, 126) (same).

In using special counterterrorism tribunals, the Spanish democracy has continued a practice with roots stretching back to the regime of Francisco Franco and beyond. Specifically, Franco often vested jurisdiction for the investigation and prosecution of terrorist and other political offenses in special tribunals. VERCHER, *supra* note 36, at 312–13. In so doing, Franco drew on a long history of trials for terrorist offenses by special courts and military tribunals. *See id.* at 306–13 (describing Spain's historical use of "military" and "public order" courts).

exclusive jurisdiction of the National Court as a violation of nonderogable constitutional rights.⁸⁹ Moreover, critics have emphasized the hardships faced by terrorism suspects who are hauled to Madrid for trial, even though many of them are Basque and allegedly committed crimes in the Basque Country.⁹⁰ A criminal trial in the capital imposes additional costs on a criminal defendant with few ties to that region, such as the possible need to hire counsel more familiar with Madrid and to secure the attendance of witnesses who may reside far away.⁹¹ In addition, this setup may undermine confidence in the fairness of the final verdict, which will be rendered by a judge far removed from the crime's local context.⁹² These arguments notwithstanding, the National Court has been a mainstay of the Spanish counterterrorism model since the transition to democracy.⁹³

As the foregoing discussion demonstrates, the Spanish counterterrorism model expressly provides a role for each branch of government in the design and execution of counterterrorism policy. The legislature may create special police powers through the passage of organic laws, but such laws must ensure judicial and parliamentary oversight of these powers' use. The executive may then employ such powers, but usually only with prior authorization and continuing oversight by the judiciary.⁹⁴ In requiring that counterterrorism policy be the product of concerted action by the three government branches, the Spanish model allows each branch to act as a check on the others. As such, the model spreads decisionmaking authority across the three branches of government, in apparent respect for the principle of checks and balances.⁹⁵

⁸⁹ See Bonifacio de la Cuadra, *Jueces, fiscales y catedráticos critican los criterios del Gobierno para modificar la ley antiterrorista*, EL PAÍS (Spain), Nov. 2, 1987, at 16 (reporting that various legal experts and organizations consider National Court to constitute violation of several provisions of Constitution, which prohibit such "exceptional" tribunals); see also VERCHER, *supra* note 36, at 316 (recounting Basque Country's 1981 constitutional challenge to organic law establishing National Court).

⁹⁰ See, e.g., VERCHER, *supra* note 36, at 315 (citing Amnesty International's criticism of expense and delay of centralized habeas proceedings).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *supra* note 88 (listing Spanish counterterrorism laws providing for trial before National Court).

⁹⁴ See C.E. art. 55(2) (requiring maintenance of "necessary" judicial intervention in, as well as "adequate" parliamentary oversight of, use of special counterterrorism police powers). The requirement of adequate parliamentary oversight has not been consistently observed in practice. See *infra* notes 266–70 and accompanying text (describing parliamentary failure to implement this command).

⁹⁵ See *supra* note 4 and accompanying text (discussing notion that checks and balances spread decisionmaking across various governmental actors in order to limit overreaching).

B. *The American Counterterrorism Model*

The American Constitution, much like the Spanish, has been interpreted to provide significant protections to targets of criminal investigations, thereby limiting police powers.⁹⁶ Unlike the Spanish Constitution, however, the U.S. Constitution does not expressly construct its own counterterrorism model, whereby Congress or the President may create special counterterrorism police powers.⁹⁷ Nonetheless, since 9/11, American law enforcement officers have exercised special police powers in the investigation of terrorist offenses. The executive has cobbled together these powers from various legislative enactments and from claims of inherent constitutional authority, thereby sketching the contours of an American counterterrorism model. The following four sections will fill out these contours, discussing how the emergent U.S. counterterrorism model has been applied to create special powers of preventive detention, incommunicado detention, searches and surveillance, and trial by specially constituted tribunals.

1. *Preventive Detention*

The U.S. Constitution has been interpreted to require that detainees receive a probable cause hearing before a judicial officer, ordinarily within 48 hours of their arrest, thereby capping the possible duration of preventive detention.⁹⁸ Although the Constitution makes

⁹⁶ The Fourth Amendment protects against unreasonable searches and seizures. U.S. CONST. amend. IV; *see also* *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991) (holding that Fourth Amendment generally requires that detainee be brought before judicial officer for determination of probable cause within 48 hours); *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (holding that Fourth Amendment “requires a timely judicial determination of probable cause as a prerequisite to detention”); *Katz v. United States*, 389 U.S. 347, 353, 359 (1967) (holding that Fourth Amendment protects individuals’ reasonable expectations of privacy). The Fifth Amendment enforces the right against self-incrimination. U.S. CONST. amend. V; *see also* *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (holding that, unless he initiates exchange, suspect may not be questioned in absence of counsel once he has asserted Miranda right to counsel). The Sixth Amendment guarantees the right to counsel, as well as other rights necessary for an effective defense. U.S. CONST. amend. VI; *see also* *Massiah v. United States*, 377 U.S. 201, 206 (1964) (holding that petitioner was denied Sixth Amendment right to counsel when prosecutor used against him evidence of his own incriminating words, which federal agents had deliberately elicited from him after his indictment but in absence of counsel).

⁹⁷ *Cf.* Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1077 (2004) (proposing that Congress pass framework statute allowing “[e]xecutive to detain suspected terrorists for a period of forty-five to sixty days, without ordinary safeguards of habeas corpus, but only in exchange for the principles of supermajoritarianism, compensation and decency”).

⁹⁸ *See* *McLaughlin*, 500 U.S. at 56–57 (holding that Fourth Amendment requires probable cause hearing within 48 hours absent “bona fide emergency or other extraordinary circumstance”).

no express exception to this requirement, in recent years the executive has evaded its reach by employing various provisions of immigration law and the material witness statute,⁹⁹ and claiming unreviewable inherent authority to detain enemy combatants.¹⁰⁰

Immigration law was a vehicle for obtaining indefinite preventive detention without judicial authorization long before 9/11.¹⁰¹ However, the Supreme Court cabined this practice in June 2001, holding that deportable aliens could not be detained once there was no longer a “significant likelihood of removal in the reasonably foreseeable future.”¹⁰² In dictum, the Court indicated that terrorism might provide a reason to deviate from that standard.¹⁰³

Immediately after 9/11, the executive relied on this dictum to create a regime of preventive detention, rounding up at least 762 foreigners of Arab descent on purported immigration violations and holding most of them for several months in order to investigate the attacks.¹⁰⁴ These detentions were part of the policy announced by former Attorney General John Ashcroft, providing for the use of existing immigration laws to fight terrorism.¹⁰⁵ Just six weeks after the

⁹⁹ Bail Reform Act of 1984 § 203(a), 18 U.S.C. § 3144 (2000).

¹⁰⁰ See *infra* notes 114–26 and accompanying text (discussing detentions of enemy combatants at Guantánamo Bay and naval briggs in context of evaluating incommunicado detention in American counterterrorism model).

¹⁰¹ See, e.g., *Supreme Court Hears Arguments in Indefinite Detention Cases*, 78 INTERPRETER RELEASES 397, 397 (2001) (noting that 3000 noncitizens were in indefinite preventive detention on Feb. 26, 2001).

¹⁰² *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

¹⁰³ *Id.* at 696.

¹⁰⁴ See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 20–21 (2003) (describing demographics of 9/11 detainees); *id.* at 52 tbl.3 (reporting that it took FBI average of 80.1 days to clear detainees of involvement in 9/11); *id.* at 105 fig.9 (charting processing time from arrest to removal or release for various detainees). The prolonged length of detention of the 9/11 immigration detainees was apparently due to delays caused by the FBI's clearance process, whereby the FBI determined whether individual detainees were involved in the attacks. See *id.* at 48 (noting that FBI was required “to clear all September 11 detainees before they could be released,” and reporting that “the FBI clearance process for the [detainees] was slow and not given sufficient priority, which resulted in most detainees being held for months before they were cleared”). Of the 762 aliens detained on immigration charges in relation to 9/11, nearly all were affirmatively cleared of any connection to terrorism prior to their release or removal. *Id.* at 2, 15, 37, 52, 104. None were charged with an offense related to the attacks.

¹⁰⁵ See Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1033 n.115 (2004) (quoting Attorney General Ashcroft's October 25, 2001, declaration of policy of prosecuting minor violations of criminal and immigration law in order to combat terrorism); *id.* at 1033 (describing “regime of preventive detention,” cloaked by “the fig leaf of legality,” which “grew primarily from the insincere assertion that terrorism suspects were really being held for other criminal or administrative investigations, most commonly for immigration violations”).

attacks, the USA PATRIOT Act granted the executive the authority to preventively detain noncitizens suspected of terrorism offenses.¹⁰⁶ However, rather than make use of the USA PATRIOT Act's grant of authority, which contains certain procedural limitations, the executive has implemented its detention policy through its broad authority to detain in connection with removal proceedings.¹⁰⁷

In addition to immigration law, the executive has deployed the material witness statute to detain several high-profile 9/11 detainees, as well as enemy combatants from Afghanistan.¹⁰⁸ The statute allows a judge to order the detention of witnesses who possess information material to a criminal proceeding where such witnesses pose a high flight risk.¹⁰⁹ Critics claim that the required judicial authorization is little more than a rubber stamp, so that indefinite incarceration may occur “[u]pon the mere conclusory statement of a government official that a person has material information and might not respond to a

¹⁰⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350–52 (codified as amended at 8 U.S.C. § 1226a(a) (Supp. III 2003)). Under this provision, the Attorney General must place the alien in removal proceedings or charge him with a crime within seven days. 8 U.S.C. § 1226a(a)(5). Once the alien has been ordered removed, the Attorney General may continue to detain him beyond the general 90-day removal period required by 8 U.S.C. § 1231(a)(1)(A) (2000), “if the release of the alien will threaten the national security of the United States or the safety of the community or any person.” 8 U.S.C. § 1226a(a)(6)–(7) (Supp. III 2003) (allowing Attorney General, in his sole discretion, to order indefinite preventive detention, which must be reviewed every six months).

¹⁰⁷ See OFFICE OF THE INSPECTOR GEN., *supra* note 104, at 28 n.28 (noting that as of March 26, 2003, executive had not made use of PATRIOT Act's preventive detention provision); Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 153–55 (2004) (reporting that executive had relied on general detention authority—and not on PATRIOT Act—to detain suspected terrorists preventively because latter required certification by Attorney General of ties to terrorism); *id.* at 155–59 (describing post-9/11 regulatory changes designed to exploit full scope of statutory power to detain); see also 8 U.S.C. § 1226(a) (2000) (setting forth Attorney General's general statutory authority to detain “pending a decision on whether the alien is to be removed from the United States”); 8 U.S.C. § 1231(a)(6) (2000) (permitting Attorney General to detain beyond general 90-day removal period any alien ordered removed who is inadmissible or removable due to violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy, or who has been determined by Attorney General to be risk to community or unlikely to comply with order of removal); *Zadvydas*, 533 U.S. at 682 (reading implicit “‘reasonable time’ limitation” into § 1231(a)(6)).

¹⁰⁸ See Heidee Stoller et al., *Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy*, 22 YALE L. & POL'Y REV. 197, 200–01 (2004) (indicating that enemy combatants Jose Padilla and Ali Saleh Kahlah al-Marri were originally arrested under material witness statute, as were James Ujaama, Zacharias Moussaoui, and Mike Hawash, who are facing charges in connection with 9/11).

¹⁰⁹ 18 U.S.C. § 3144 (2000).

subpoena.”¹¹⁰ Furthermore, the fact that many detainees have never been asked to testify in the criminal prosecutions purportedly at issue¹¹¹ suggests that they were only pretextually detained as witnesses and were actually investigatory targets. This hypothesis is only reinforced by the fact that many material witnesses have eventually been tried for crimes.¹¹²

2. *Incommunicado Detention and Other Restrictions on the Right to Counsel in the United States*

Although the U.S. Constitution provides no express exceptions to its guarantees of the assistance of counsel and the right to present a defense,¹¹³ the executive has unilaterally set in motion two programs to secure the incommunicado detention of suspected terrorists. First, immediately following 9/11 the executive began holding so-called “enemy combatants” in indefinite incommunicado detention.¹¹⁴ These enemy combatants have been held in solitary confinement, often without any access to courts and counsel for periods lasting several years, and have been subjected to exceedingly harsh conditions of imprisonment.¹¹⁵ Given the profound consequences of being labeled

¹¹⁰ Robert Boyle, *The Material Witness Statute Post September 11: Why It Should Not Include Grand Jury Witnesses*, 48 N.Y.L. SCH. L. REV. 13, 13 (2004).

¹¹¹ Stoller et al., *supra* note 108, at 200.

¹¹² *See id.* (stating that later trial of alleged witnesses raises concern that government uses statute “as a pretext to detain individuals for reasons other than securing their testimony”); *see also* Laurie L. Levenson, *Detention, Material Witnesses, and the War on Terrorism*, 35 LOY. L.A. L. REV. 1217, 1223 (2002) (“The designation of material witness has often become a temporary moniker to identify an individual who will soon bear the status of defendant.”).

¹¹³ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”).

¹¹⁴ JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 3–4 (2006).

¹¹⁵ *Id.* at 4–6. Indefinite incommunicado detention is part of a larger plan to break down the resistance of suspected terrorists. *Id.* at 39–40. Denied nearly any contact with the outside world, these individuals feel helpless and utterly dependent on their interrogators. *Id.* The executive has amplified these distressing feelings with recourse to several interrogational techniques. For example, suspected terrorists have been subjected to prolonged periods of sleep deprivation and loud music, and have been forced to stand and sit in uncomfortable or painful positions. *Id.* at 86–88. In addition, they have been forced to bark or behave like dogs, urinate in their pants, and stand or sit in close proximity to nude or scantily clad women. *Id.* at 87–88. Finally, they have also been made to believe that they were being rendered to countries known for brutal treatment of prisoners. *Id.* at 88; *see also id.* at 96–99 (describing “interrogation” techniques approved by Secretary of Defense Donald Rumsfeld in December 2002); *id.* at 107 (describing “interrogation” techniques authorized by Rumsfeld in April 2003); ALAN DERSHOWITZ, *THE CASE FOR ISRAEL* 137 (2003) (relating interrogation tactics used by United States on suspected terrorist,

an enemy combatant, it is of obvious importance that the categorization be properly made. Nonetheless, the executive has claimed since the inception of its detention policy that its enemy combatant determination is unreviewable.¹¹⁶

Despite this claim of unreviewable authority, the process whereby individuals are designated enemy combatants has been cabined by Supreme Court jurisprudence. In June 2004, the Supreme Court issued decisions concerning the detention of U.S. citizen¹¹⁷ and alien¹¹⁸ enemy combatants. In *Hamdi v. Rumsfeld*, the Court ruled that an American citizen classified as an enemy combatant is entitled to “notice of the factual basis for his classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decisionmaker.”¹¹⁹ In *Rasul v. Bush*, the Court decided that aliens classified as enemy combatants have the right to file a habeas petition challenging that status.¹²⁰ The effect of these decisions on the executive’s claimed unreviewable authority to designate an individual as an enemy combatant and hold him incommunicado is not entirely clear. On the one hand, *Hamdi* and *Rasul* suggest the existence of a role for the courts in making these decisions. On the other, *Hamdi* does not clarify when a U.S. citizen’s right to counsel kicks in, what restrictions may be placed on it, or whether it protects noncitizens;¹²¹ and *Rasul*

which included sleep deprivation, exposure to extreme heat and cold, provision of inadequate alimentation, and placement in uncomfortable positions).

¹¹⁶ See MARGULIES, *supra* note 114, at 12 (“The president claims that only he may make this designation, and that his designation is conclusive and may not be reviewed by any court.”). The executive has rested its claim of unreviewable authority on the Authorization for Use of Military Force, Pub. L. No. 107-40, 114 Stat. 224 (2001) (authorizing President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons”), as well as on the President’s inherent powers as Commander in Chief, *see Hamdi v. Rumsfeld*, 542 U.S. 507, 540 (2004) (Souter, J., concurring) (“The Government responds that Hamdi’s incommunicado imprisonment as an enemy combatant seized on the field of battle falls within the President’s power as Commander in Chief under the laws and usages of war, and is in any event authorized by two statutes.”).

¹¹⁷ See *Hamdi*, 542 U.S. at 510 (discussing detention of citizen enemy combatant held in naval brigs at Guantánamo Bay, Cuba, Norfolk, Virginia, and Charleston, South Carolina); *Rumsfeld v. Padilla*, 542 U.S. 426, 430–32 (2004) (addressing detention of citizen enemy combatant at naval brig in Charleston, South Carolina).

¹¹⁸ See *Rasul v. Bush*, 542 U.S. 466, 470–71 (2004) (discussing detention of Australian and Kuwaiti enemy combatants at Guantánamo Bay, Cuba).

¹¹⁹ *Hamdi*, 542 U.S. at 532–33.

¹²⁰ *Rasul*, 542 U.S. at 483–84.

¹²¹ See Schulhofer, *supra* note 3, at 1913–14 (describing procedural issues left unaddressed by Court in *Hamdi*).

entirely fails to specify any rights possessed by an alien in proceedings brought to challenge his status.¹²²

Beyond the Supreme Court's efforts to limit the executive's claimed unreviewable authority to decide enemy combatant status, the executive itself has instituted certain limitations on the designation process. In the wake of the Supreme Court's decisions in *Hamdi* and *Rasul*, the executive established Combatant Status Review Tribunals, or C.S.R.T.'s, to review enemy combatants' classification as such.¹²³ The C.S.R.T.'s are composed of three military officers who decide the propriety of an enemy combatant's classification by a preponderance of the evidence.¹²⁴ Although enemy combatants are permitted to consult with midlevel officers in connection with proceedings before the C.S.R.T.'s, they may not consult with an attorney.¹²⁵ Moreover, the C.S.R.T.'s have denied three-quarters of enemy combatants' requests for the production of witnesses in their defense, raising obvious obstacles to combatants' effective presentation of a defense.¹²⁶

The second executive program securing the incommunicado detention of suspected terrorists was established by Bureau of Prisons regulations promulgated in October 2001. These regulations grant the Attorney General unreviewable authority to monitor conversations between federal government detainees¹²⁷ and their lawyers, and to limit these detainees' other communicative rights.¹²⁸ Specifically, if the Attorney General certifies that a prisoner's communications with his attorney create a substantial risk of death or serious bodily injury to others, such communications may be monitored.¹²⁹ In addition, the Attorney General may limit a prisoner's correspondence, visits, interviews with representatives of the news media, and use of the telephone, if there is a similar risk of harm.¹³⁰

¹²² See *id.* at 1912 (noting that in *Rasul* opinion, "Court did not . . . express any view on what proceedings, if any, would be appropriate on remand").

¹²³ Tim Golden, *For Guantánamo Review Boards, Limits Abound*, N.Y. TIMES, Dec. 31, 2006, § 1, at 1.

¹²⁴ See *id.* (noting that in reaching their decision, military officers may rely on "a wide range of intelligence, including statements obtained by coercion").

¹²⁵ *Id.*

¹²⁶ See *id.* ("According to a recent study of 102 unclassified C.S.R.T. files by the Seton Hall University law school, the military denied all requests by the detainees for witnesses who were not also being held at Guantánamo and denied requests for detainee witnesses 74 percent of the time.").

¹²⁷ The regulations apply to all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of crimes, and persons held as witnesses and detainees. See 28 C.F.R. § 500.1(c) (2006).

¹²⁸ *Id.* § 501.2.

¹²⁹ *Id.* § 501.3(d).

¹³⁰ *Id.* § 501.3(a).

3. Searches and Surveillance

The conduct of searches and surveillance is directly regulated by the U.S. Constitution, which generally proscribes warrantless invasions of an individual's reasonable expectations of privacy.¹³¹ Although there are no express exceptions to the Constitution's regulation of searches and surveillance, the USA PATRIOT Act has created special counterterrorism powers in this field.¹³² For example, the Act allows the executive to obtain authorization to use pen registers¹³³ and trap-and-trace devices¹³⁴ merely by certifying to the Foreign Intelligence Surveillance Court (FISC)¹³⁵ that the information sought is rel-

¹³¹ U.S. CONST. amend. IV; *see* *Katz v. United States*, 389 U.S. 347, 353 (1967) (holding that Fourth Amendment protects individuals' reasonable expectations of privacy).

¹³² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, §§ 214, 215, 218, 115 Stat. 272, 286–88, 291 (codified as amended in scattered sections of 50 U.S.C.). Although not directly related to the instant analysis, the USA PATRIOT Act has also expanded executive powers in normal criminal investigations. For example, the Act allows the police to retrieve voicemail messages under normal Fourth Amendment procedures as opposed to the more restrictive federal wiretap laws. *Id.* § 209; U.S. DEP'T OF JUSTICE, *THE USA PATRIOT ACT: MYTH VS. REALITY* 7 (2003).

Moreover, the Act codifies new rules for the use of pen registers and trap-and-trace devices on Internet communications. These devices provide access to the source and destination of Internet communications. U.S. DEP'T OF JUSTICE, *supra*, at 17–18. The Act authorizes the use of these devices on a showing that the information sought is “relevant to an ongoing criminal investigation,” instead of requiring a showing of probable cause. USA PATRIOT Act § 216(b)(1).

Furthermore, the Act has codified the executive's power to conduct “sneak-and-peek” searches and seizures. USA PATRIOT Act § 213(2); U.S. DEP'T OF JUSTICE, *supra*, at 11–12. Pursuant to this authority, the police may obtain a court order delaying notice of a search and seizure of private property, so long as the police show reasonable cause to believe that immediate notification would result in death or physical harm to an individual, flight from prosecution, evidence tampering, or witness intimidation. *See* 18 U.S.C. § 2705(2) (2000); U.S. DEP'T OF JUSTICE, *supra*, at 12.

¹³³ 18 U.S.C. § 3127(3) (Supp. I 2001) (“[T]he term ‘pen register’ means a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication . . .”).

¹³⁴ The statute defines “trap and trace device” as:

[A] device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication . . .

Id. § 3127(4).

¹³⁵ The FISC was created by the Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978), which was designed to construct a “secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of [the United States'] commitment to privacy and individual rights.” S. REP. NO. 95-604, at 15 (1977). The FISC is composed of eleven judges

evant to an investigation of international terrorism.¹³⁶ On the basis of the same certification, the executive may also obtain from the FISC an order compelling the production of any tangible thing from any business regarding any person.¹³⁷ Businesses that have been compelled to release information under this provision are barred from communicating the fact of that compulsion to anyone.¹³⁸ Furthermore, the Act has altered the basic requirements for the executive's use of the Foreign Intelligence Surveillance Act (FISA).¹³⁹ Rather than being required, as was formerly the case, to certify that the "primary purpose" of its actions involves foreign intelligence,¹⁴⁰ the executive now only need certify that a "significant purpose" of its surveillance relates to foreign intelligence.¹⁴¹

Finally, these special investigatory tools have been supplemented by the executive's claimed inherent authority to monitor phone conversations without the prior authorization of the FISC or any other court.¹⁴² Although the exact scope of the executive's claimed authority remains unclear, it is undisputed that the National Security Agency (NSA) has deployed this authority to monitor telephone and Internet communications between persons in the United States and others outside the country since 2002.¹⁴³ The lawfulness of this warrantless surveillance has been called into question by a recent federal

who act in near total secrecy. See USA PATRIOT Act § 208(1) (raising number of FISC judges from seven to eleven).

¹³⁶ USA PATRIOT Act § 214; U.S. DEP'T OF JUSTICE, *supra* note 132, at 13.

¹³⁷ USA PATRIOT Act § 215; U.S. DEP'T OF JUSTICE, *supra* note 132, at 14.

¹³⁸ USA PATRIOT Act § 215; U.S. DEP'T OF JUSTICE, *supra* note 132, at 15.

¹³⁹ USA PATRIOT Act § 218; U.S. DEP'T OF JUSTICE, *supra* note 132, at 20–21.

¹⁴⁰ See, e.g., *United States v. Truong*, 629 F.2d 908, 915 (4th Cir. 1980) (holding that foreign intelligence exception to warrant requirement applies only where surveillance is conducted "‘primarily’ for foreign intelligence reasons”).

¹⁴¹ *In re Sealed Case*, 310 F.3d 717, 717 (FISA Ct. Rev. 2002). This change makes possible the routine use of FISA, with its less onerous evidentiary requirements, in normal criminal investigations. Cf. O'Connor & Rumann, *supra* note 5, at 1657, 1681–82 (outlining United Kingdom's misuse of emergency counterterrorism powers to combat normal street violence). FISA can still only be used if the FISC finds probable cause to believe that the target is a foreign power or agent thereof. U.S. DEP'T OF JUSTICE, *supra* note 132, at 20.

¹⁴² See David D. Kirkpatrick, *Republicans Seek to Bridge Differences on Surveillance*, N.Y. TIMES, Mar. 1, 2006, at A13 (noting Republican lawmakers' increasing determination "to impose some form of oversight on the program, through which the administration has secretly sidestepped the existing legal authorities for years to spy on thousands of domestic communications with terror suspects abroad"); see also David D. Kirkpatrick, *G.O.P. Senators Say Accord Is Set on Wiretapping*, N.Y. TIMES, Mar. 7, 2006, at A1 (reporting Senate proposal to allow President to "authorize wiretapping without seeking a warrant for up to 45 days if the communication under surveillance involved someone suspected of being a member of or a collaborator with a specified list of terrorist groups and if at least one party to the conversation was outside the United States").

¹⁴³ *ACLU v. NSA*, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006).

district court decision, which held that such searches violated the Administrative Procedure Act, the Separation of Powers doctrine, and the First and Fourth Amendments of the U.S. Constitution.¹⁴⁴ Although the Bush administration vigorously defended the lawfulness of its surveillance program even in the aftermath of the district court's decision,¹⁴⁵ it announced on January 17, 2007, that it would voluntarily desist from deploying the program in light of an "innovative agreement" reached with the FISC, which would oversee future surveillance in a manner that did not endanger U.S. security.¹⁴⁶ Since this "innovative" agreement is not open to the public, it remains unclear whether it contemplates FISC review of individual requests for permission to conduct surveillance, or more general review of the propriety of executive surveillance programs as a whole.¹⁴⁷ Moreover, as the executive retains the ability to reauthorize the original NSA program at any time, the limits on executive surveillance of terrorism suspects are less than crystal clear.

4. *Special Terrorism Tribunals*

The U.S. Constitution has been interpreted to guarantee the right of due process to terrorism detainees held in the United States and at certain non-U.S. territories within exclusive U.S. control, such as Guantánamo Bay.¹⁴⁸ Nonetheless, the executive has unilaterally decided to invest military tribunals and commissions with responsibilities concerning the detention and trial of suspected terrorists in the absence of many basic procedural safeguards. Since 2004 the execu-

¹⁴⁴ *Id.* at 782.

¹⁴⁵ See Eric Lichtblau, *Bush Predicts Appeals Court Will Lift Ban on Wiretaps*, N.Y. TIMES, Aug. 19, 2006, at A10 (indicating that Bush administration "strongly disagrees" with district court's decision in *ACLU v. NSA* and fully believes that surveillance program is lawful). The surveillance program first came to light in January 2006, at which time Attorney General Alberto Gonzales justified the program by reference to the actions of other Presidents. See Eric Lichtblau, *Gonzales Invokes Actions of Other Presidents in Defense of U.S. Spying*, N.Y. TIMES, Jan. 25, 2006, at A19 (referring to Attorney General Gonzales's claim that warrantless wiretaps in war on terror were "legal under both the president's inherent constitutional authority as commander in chief and [under the Authorization for Use of Military Force]").

¹⁴⁶ Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1.

¹⁴⁷ *Id.* Some critics viewed the administration's decision to abandon voluntarily the NSA wiretapping program as an effort to avoid potentially unfavorable appellate review of the district court decision overturning the program. *Id.* If this is indeed the case, it represents another example of the executive's efforts to exclude the judiciary from involvement in counterterrorism policy.

¹⁴⁸ See U.S. CONST. amend. V; *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–40 (2004) (applying due process case law, including *Mathews v. Eldridge*, 424 U.S. 319 (1976), to outline procedural requirements of enemy combatant classification hearings for detainees held at Guantánamo).

tive has used C.S.R.T.'s to review the propriety of an enemy combatant's detention.¹⁴⁹ In reaching their decisions, the C.S.R.T.'s consult a wide range of evidence, including coerced statements, and do not guarantee the right to consult an attorney or to have compulsory process for the production of witnesses.¹⁵⁰ In addition to these C.S.R.T.'s, the President promulgated an Order in November 2001 providing for the trial by military commission of certain aliens suspected of terrorist offenses.¹⁵¹ Aliens covered by the Order included any noncitizen who the President has determined there is "reason to believe" is or was a member of al Qaeda or has engaged or participated in acts of terrorism that harmed or were directed at U.S. interests.¹⁵²

The procedures governing these special military commissions were set forth in Department of Defense Commission Order No. 1 (Commission Order No. 1).¹⁵³ Three aspects of these procedures merit mention. First, Commission Order No. 1 provided for trial before military officers.¹⁵⁴ Second, although the accused was entitled to counsel,¹⁵⁵ the accused and his counsel could be excluded from any proceedings in order to protect secret information.¹⁵⁶ Third, the gov-

¹⁴⁹ See *supra* notes 123–26 and accompanying text (describing C.S.R.T.'s).

¹⁵⁰ See Golden, *supra* note 123 (indicating that review panels were permitted to review broad array of intelligence, including statements obtained from coercion, and that combatants were represented by midlevel officers and were generally refused process for obtaining witnesses).

¹⁵¹ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

¹⁵² *Id.* at 57,834.

¹⁵³ Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. §§ 9.1–9.12 (2006); see also Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786–98 (2006) (discussing Commission Order No. 1).

¹⁵⁴ See 32 C.F.R. § 9.3 (providing jurisdiction to military commission to conduct trials); *id.* § 9.4(a)(3) (providing commissions' members shall be commissioned officers of U.S. armed forces). Each commission consisted of between three to seven members, *id.* § 9.4(a)(2), and one of the members was designated as the presiding officer, *id.* § 9.4(a)(4), who made all determinations of law. *Id.* § 9.4(a)(5). The accused could be convicted and sentenced on the basis of a two-thirds vote by commission members, provided that the imposition of a death sentence required unanimity. *Id.* § 9.6(f).

Commission decisions could only be appealed to a three-member review panel composed of military officers designated by the Secretary of Defense. *Id.* § 9.6(h)(4). Once the panel rendered its decision, the Secretary of Defense could remand the case for further proceedings, or forward the case on to the President for his final decision. *Id.* § 9.6(h)(5)–(6).

¹⁵⁵ *Id.* § 9.4(c)(2). Under Commission Order No. 1, the accused was entitled to appointed counsel and could hire civilian counsel at his own expense, provided that such counsel was a U.S. citizen with high-level security clearance. *Id.* § 9.4(c)(2)(iii)(B).

¹⁵⁶ *Id.* § 9.6(b)(3). The accused and his civilian counsel could be excluded from the trial and precluded from learning what evidence was presented if the presiding officer decided to "close" the proceedings. *Id.* The grounds for closure included "the protection of information classified or classifiable . . . ; information protected by law or rule from unautho-

ernment could admit any evidence that “would have probative value to a reasonable person.”¹⁵⁷ In June 2006, the Supreme Court found that the last two aspects of Commission Order No. 1 violated statutory law, including the Uniform Code of Military Justice (UCMJ).¹⁵⁸

Congress responded to this ruling by passing the Military Commissions Act of 2006 (MCA),¹⁵⁹ which formally codifies many aspects of the commissions set up by the President. The MCA applies to alien unlawful enemy combatants, including: (1) persons who are not lawful enemy combatants and have engaged in hostilities against the United States or purposefully and materially supported such hostilities; and (2) persons adjudged unlawful enemy combatants by a C.S.R.T. or other competent tribunal.¹⁶⁰ The MCA permits trial of enemy combatants before a commission composed of military officers and presided over by a military judge.¹⁶¹ In addition, the MCA guarantees the right to the assistance of counsel¹⁶² but places important limitations on the ability of the accused and his attorney to view classified information of evidentiary value.¹⁶³ Moreover, the MCA allows

rized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests.” *Id.* The presiding officer would direct withholding of “protected information” from the accused and civilian counsel “as necessary to protect the interests of the United States” *Id.* § 9.6(d)(5)(ii).

¹⁵⁷ *Id.* § 9.6(d)(1).

¹⁵⁸ See *Hamdan*, 126 S. Ct. at 2791–93 (holding that military commissions violate UCMJ art. 36(b) because their procedures deviate substantially from procedures in courts-martial without sufficient Presidential determination that it would be impracticable to adopt more courts-martial-like procedures for military commissions); *id.* at 2794–98 (holding that military commissions violate Common Article 3 of Geneva Conventions, and consequently, infringe UCMJ art. 21, which incorporates that provision of Geneva Conventions).

¹⁵⁹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at scattered sections of 10 U.S.C. and 28 U.S.C. § 2241).

¹⁶⁰ *Id.* sec. 3(a), §§ 948a(1)(A), 948c.

¹⁶¹ *Id.* §§ 948i(a), 948j(a). The military judge is charged with deciding all questions of law, *id.* § 949l(b), whereas members of the commission determine the accused’s guilt or innocence and the proper sentence, *id.* § 949l(a). Findings of guilt must be made by the concurrence of two-thirds of the members of the commission present. *Id.* § 949m(a). Sentences generally must be determined by the concurrence of two-thirds of the voting members, *id.* § 949m(b)(3), provided that death sentences require unanimity, *id.* § 949m(b)(1)(D), and sentences of ten years of imprisonment or more may be imposed only by the concurrence of three-fourths of the voting members, *id.* § 949m(b)(2). Commissions must be comprised of at least twelve members in death penalty cases, *id.* § 949m(c), and at least five members in all other cases, *id.* § 948m(a)(1).

¹⁶² *Id.* § 948k(a), (c)–(e). The accused is entitled to military defense counsel, *id.* § 949c(b)(2), and may also hire civilian defense counsel at his own expense, provided that such counsel is a U.S. citizen who is eligible for access to information classified at the level Secret or higher, *id.* § 949c(b)(3).

¹⁶³ *Id.* § 949j(c). These limitations are much less restrictive than those of Commission Order No. 1, which permitted the exclusion of the accused and his counsel from any proceeding to protect classified information. See *supra* note 156 (discussing Commission

the introduction of all probative evidence, including unlawfully gathered evidence, coerced statements, and hearsay evidence, so long as the probative value of such evidence is not substantially outweighed by its prejudicial effect.¹⁶⁴

In enacting the MCA, Congress also limited the extent to which the executive's use of military tribunals is subject to judicial review. The MCA divests the federal courts of jurisdiction to hear "an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."¹⁶⁵ In addition, the MCA provides that only the Court of Appeals for the District of Columbia Circuit may review C.S.R.T. determinations that an alien is an "enemy combatant" subject to indefinite detention and trial by military commission.¹⁶⁶ Furthermore, the MCA specifies that the D.C. Court of Appeals is the only court empowered to review final decisions made by military commissions.¹⁶⁷ In conducting this review, the court is limited to consid-

Order No. 1's closure provisions). Nonetheless, the MCA allows the government to meet its disclosure obligations by submitting a redacted version of classified information or a prepared summary thereof, or simply by submitting a statement of facts that the classified information would tend to prove, even if such classified information is exculpatory. Military Commissions Act sec. 3(a), § 949j(c)-(d).

¹⁶⁴ *Id.* § 949a(b)(2). The MCA provides that evidence is not excludable on the grounds that it was not seized pursuant to a search warrant or other authorization, thereby making the Fourth Amendment's exclusionary rule largely inapplicable to the proceedings of military commissions. *Id.* § 949a(b)(2)(B). Moreover, the MCA allows the introduction into evidence of coerced statements, provided that: (1) the totality of circumstances renders such statements reliable and possessing sufficient probative value; (2) the interests of justice would be best served by the admission of such statements; and (3) such statements were not the product of torture or cruel, degrading, and inhuman treatment. *Id.* §§ 948r(b)-(d), 949a(b)(2)(C). Finally, the MCA permits the introduction of probative hearsay evidence unless the party *opposing* its introduction demonstrates that it is unreliable. *Id.* § 949a(b)(2)(E).

¹⁶⁵ *Id.* sec. 7(a). This provision closed a possible avenue of relief opened by the Supreme Court in 2006. In *Hamdan*, the Court had ruled that section 1005(e)(1) of the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2739, 2742-43, did not divest courts of jurisdiction to hear habeas petitions pending at the time the DTA was passed. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762-69 (2006). As the MCA's jurisdiction-stripping provision applies to all cases pending on or after the date of the MCA's enactment, Military Commissions Act sec. 7(b), Congress has effectively closed the *Hamdan* loophole.

¹⁶⁶ *Id.* sec. 7(a), § 2241(e)(2) (stripping jurisdiction except as provided by DTA § 1005(e)(2)-(3)).

¹⁶⁷ *Id.* sec. 3(a), § 950g(a)(1)(A). The decision of a military commission is final after being approved by the convening authority, *id.*, which may be either the Secretary of Defense or his designate, *id.* § 948h. The convening authority may, in his sole discretion, reverse any finding of guilt or change such a finding to a lesser-included offense. *Id.* § 950b(c)(3). Any guilty judgment is also referred to the Court of Military Commission

ering matters of law¹⁶⁸ and may only determine whether the final decision is consistent with the standards and procedures governing trial by military commission, and with the Constitution and laws of the United States.¹⁶⁹ As such, an individual subject to trial by military commission may not invoke the Geneva Conventions as a source of rights, either at trial or on appeal.¹⁷⁰

In light of the preceding discussion, it is clear that the MCA largely reinstates the regime of military commissions previously put in place by the executive's unilateral action. Therefore, although Congress has intervened in the design of the military commissions,¹⁷¹ that intervention can scarcely be viewed as the imposition of a check on presidential action. In addition, the MCA sharply limits judicial review of the various functions performed by C.S.R.T.'s and military commissions, thereby eliminating a potential check on the executive.¹⁷²

As the foregoing discussion makes clear, the U.S. counterterrorism model has not effectively guaranteed a role for the three branches of government in the design and execution of counterterrorism policy. Rather, the model has been characterized by the executive's assertion of unilateral authority to engage in preventive detention,¹⁷³ incommunicado detention,¹⁷⁴ searches and surveillance,¹⁷⁵ and trial by special tribunals.¹⁷⁶ Where Congress has taken

Review, *id.* § 950c(a), which is composed of at least three military judges, *id.* § 950f(a), and is empowered to review only errors of law, *id.* § 950f(d).

¹⁶⁸ *Id.* § 950g(b).

¹⁶⁹ *Id.* § 950g(c).

¹⁷⁰ *Id.* § 948b(g). This ban on the invocation of the Geneva Conventions also extends to any civil proceeding brought against the United States or one of its current or former agents. *Id.* sec. 5(a).

¹⁷¹ Congress requires that the Secretary of Defense report to Congress on the procedures being employed to determine the classification of aliens as enemy combatants. *Id.* sec. 3(b). Moreover, the Secretary of Defense must submit to Congress an annual report concerning all trials conducted by military commission. *Id.* sec. 3(a), § 948e.

¹⁷² The MCA creates a legal regime operating in a world unto itself. In fact, rulings made by military commissions may not be introduced or even considered in any regular court-martial proceeding. *Id.* § 948b(e).

¹⁷³ See *supra* notes 106–07 and accompanying text (describing how executive has not made use of congressionally prescribed procedure to obtain indefinite detention of immigration detainees, but has chosen to rely instead on general authority to detain when coincident to removal).

¹⁷⁴ See *supra* notes 114–16 and accompanying text (tracing executive's claimed inherent authority to detain enemy combatants indefinitely without prior authorization or subsequent oversight).

¹⁷⁵ See *supra* notes 142–46 and accompanying text (outlining executive's claimed inherent authority to engage in surveillance of phone conversations).

¹⁷⁶ See *supra* notes 151–57 and accompanying text (describing executive's unilateral decision to set up military tribunals to try terrorists).

action, it has occasionally ratified unilateral decisions previously taken by the executive.¹⁷⁷ Moreover, although the Supreme Court has pushed back against the executive's unilateral assertions of authority—most notably in *Hamdi* and *Hamdan*—it has not clarified the precise contours of the judiciary's oversight function.¹⁷⁸ In sum, the executive has taken and retained the exclusive initiative in U.S. counterterrorism policy.¹⁷⁹ In this regard, the U.S. counterterrorism model does not reflect the principle of checks and balances, which advocates the spreading of competences across the various branches of government.¹⁸⁰

III

EVALUATING THE AMERICAN AND SPANISH COUNTERTERRORISM MODELS

Building on the descriptions of the American and Spanish counterterrorism models in the preceding Part, this Part will argue that the Spanish model exhibits more facial commitment to the principle of checks and balances.¹⁸¹ However, this Part will also demonstrate that the Spanish model has failed in practice to prevent government overreaching, which this Note has taken as the primary purpose of checks and balances.¹⁸² Finally, this Part will suggest that the express bestowal of competing special counterterrorism powers on the three branches of government, in accordance with the principle of

¹⁷⁷ See *supra* notes 159–72 and accompanying text (describing MCA and concluding that it largely ratified Military Commission Order No. 1, which was declared unlawful in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)).

¹⁷⁸ See Schulhofer, *supra* note 3, at 1907 (indicating that 2004 trilogy of Supreme Court enemy combatant cases left open many questions relating to specifics of courts' role in overseeing detentions at Guantánamo).

¹⁷⁹ In addition to taking the initiative, the executive has successfully stymied certain congressional and judicial efforts to act as a check. See *infra* note 217 (describing executive efforts to avoid occasions for potentially damaging judicial pronouncements).

¹⁸⁰ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 469–70 (1972) (Rehnquist, J., dissenting) (indicating that Constitution explicitly spreads powers across branches of government in order to prevent usurpation of powers by any branch).

¹⁸¹ This conclusion parallels Professor Schulhofer's conclusion about the greater commitment to checks and balances in Israel and Britain as compared to the United States. See Schulhofer, *supra* note 3, at 1909–10. Schulhofer explains that the British and Israeli experiences with domestic terrorism actually led to a larger judicial role in reviewing and restraining executive and military power, rather than abdication of the judiciary's supervisory role. *Id.* Their example, Schulhofer argues, reveals that the expansive executive powers currently claimed by the U.S. government are not in any sense normal, even for a nation in crisis. *Id.* at 1910.

¹⁸² See *supra* note 4 and accompanying text (identifying common conceptualization of principal goal of checks and balances).

checks and balances, may, paradoxically, lead to government overreaching.

A. *The Spanish Counterterrorism Model in Relief: Superior (Facial) Respect for Checks and Balances*

Although there are various theories defining the elements of a robust system of checks and balances,¹⁸³ these theories generally concur on at least two core elements. First, the decisionmaking authority in any given legal area should be spread across the various governmental branches.¹⁸⁴ Second, the executive's application of the law should be subject to prior authorization and subsequent review by the legislature or judiciary.¹⁸⁵ With these core elements in mind, this Section argues that the Spanish counterterrorism model appears more committed to checks and balances than the American.

In general, the Spanish model guarantees the involvement of the three branches of government in the design and execution of counterterrorism policy. Constitutional protections belonging to the targets of coercive government actions may only be limited pursuant to legislative action that guarantees judicial supervision and provides for adequate parliamentary oversight.¹⁸⁶ Thus, the design and execution of special counterterrorism competences requires the concerted action of the three branches of government: Parliament must, through the passage of an organic law, create any special competences to be exercised;¹⁸⁷ these may then be deployed by the executive, but

¹⁸³ See Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of Checks and Balances*, 53 AM. U. L. REV. 1, 5–17 (2004) (describing various scholarly approaches to defining and justifying checks and balances).

¹⁸⁴ See *Furman*, 408 U.S. at 469–70 (Rehnquist, J., dissenting) (stating that Constitution divides decisionmaking authority among three branches in order to avoid accumulation of power by any single branch); see also *supra* note 4 and accompanying text (discussing functioning and purpose of checks and balances).

¹⁸⁵ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 535–37 (2004) (arguing that “separation of powers principles” support availability of judicial review even of detentions of alleged enemy combatants); *STC*, Dec. 16, 1987 (R.T.C., No. 199, p. 518, at 552) (indicating that Spanish Constitution demands maintenance of efficacious judicial role, that constitutional rights may not be suspended without prior judicial authorization, and that judiciary must always retain authority to ratify or lift any suspension of constitutional rights); Schulhofer, *supra* note 3, at 1955 (stressing importance of judicial review to system of checks and balances); see also Peabody & Nugent, *supra* note 183, at 17, 36–42 (arguing that “maintenance of separation of powers depends upon the vigilance and active participation of all the federal departments and the states, and not just the federal courts”); Michel Rosenfeld, *Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror*, 27 CARDOZO L. REV. 2079, 2082 & n.20 (indicating that legislature may act as check on executive, as may judiciary).

¹⁸⁶ C.E. art. 55(2).

¹⁸⁷ See *id.* art. 55(2) (allowing suspension of fundamental rights only through passage of duly enacted organic law); see also *supra* Part II.A (describing Spanish provision of special

only subject to “necessary” judicial supervision and “adequate” parliamentary oversight.¹⁸⁸

The requirement of judicial involvement has been borne out in the specific counterterrorism powers created by the Spanish Parliament. Since the transition to democracy, extended preventive detention has been permissible only with prior judicial approval and continuing judicial oversight of the length and conditions of detention.¹⁸⁹ Likewise, a decision of the Constitutional Court in 1987 requires that the competent judicial authority order the incommunication of suspected terrorists, rather than permitting executive officials to do so.¹⁹⁰ Moreover, since 1988 Parliament has required that the police obtain judicial authorization to conduct domiciliary searches, unless there are urgent circumstances.¹⁹¹ Similarly, since 1980,

powers of preventive detention, incommunicado detention, search and surveillance, and trial by counterterrorism tribunals).

Exceptions to this consistent legislative involvement in the elaboration of counterterrorism policy occurred during the early democracy, when the executive itself promulgated temporary dispositions creating expansive police powers to deal with terrorism. For example, the Decree-Law 21/1978 of July 1978 was an urgent measure promulgated by the executive while the legislature deliberated on similar legislation, which would become the Law 56/1978. *Hoy entra en vigor el decreto-ley antiterrorista*, EL PAÍS (Spain), July 1, 1978, at 1. Moreover, the Law 56/1978, which was subject to an automatic sunset after one year, see Disposiciones Finales, Primera, of the Ley de Medidas Especiales en Relación con los Delitos de Terrorismo Cometidos por Grupos Armados (B.O.E. 1978, 293), was reinstated by executive action. Francisco Gor, *El Gobierno prorroga mediante decreto-ley la ley Antiterrorista*, EL PAÍS (Spain), Dec. 4, 1979, at 19. Decree-Laws are temporary laws passed by the executive, which must be voted on by the legislature within thirty days. See *supra* note 52.

¹⁸⁸ C.E. art. 55(2). The creation of special police powers by transparent legislative enactment facilitates subsequent judicial and parliamentary oversight of their use, allowing the judiciary and Parliament to compare the executive’s actions to the scope contemplated by the relevant enactment.

¹⁸⁹ See *supra* notes 58 & 60 and accompanying text (describing requirement of prior judicial authorization for periods of preventive detention beyond constitutional maximum of 72 hours). See *generally supra* Part II.A.1 (discussing preventive detention in Spanish counterterrorism investigations). In addition, the Constitutional Court has ruled that both the executive’s request for extended preventive detention and the competent judicial officer’s approval of that request must be registered during the first 72 hours of detention. STC, Dec. 16, 1987 (R.T.C., No. 199, p. 518, at 554); see also *supra* note 59 (addressing occasion for and implications of this ruling).

¹⁹⁰ See STC, Dec. 16, 1987 (R.T.C., No. 199, p. 518, at 562) (requiring that incommunication be ordered by competent *judicial* authority). Although the decision explicitly contemplates that the executive may order incommunication prior to bringing terrorist suspects before the competent judicial officer, the decision also requires that the executive accompany its initial incommunication order with a contemporaneous request for judicial approval of the same. *Id.* Thus, the Court’s decision guarantees judicial involvement in all incommunication decisions, even those made during the first 72 hours of preventive detention.

¹⁹¹ Ley Orgánica de Reforma de la Ley de Enjuiciamiento Criminal (B.O.E. 1988, 126) (codified at L.E. CRIM. art. 550, 553 (2004)). The Constitution requires that no warrant be

Parliament has mandated that the police obtain a warrant before they monitor the electronic communications of suspected terrorists, absent urgent circumstances.¹⁹² Furthermore, even in the presence of urgent circumstances, Parliament has allowed the executive to order surveillance on its own authority only if that order is accompanied by a contemporaneous request for judicial approval, which the competent judicial official must rule on within three days.¹⁹³

Judicial participation in Spanish counterterrorism has not been limited to overseeing executive actions. In fact, the Constitutional Court has invalidated several legislative provisions for police powers, including provisions that: (1) allowed the executive to prolong preventive detentions beyond the constitutional maximum of 72 hours without obtaining prior judicial authorization;¹⁹⁴ (2) permitted periods of preventive detention of up to ten days;¹⁹⁵ and (3) authorized the executive to order the incommunication of terrorist suspects during the first 72 hours of detention without any judicial involvement.¹⁹⁶

In reaching these conclusions, the Constitutional Court has emphasized the importance of ensuring as efficacious a judicial role as is compatible with the Constitution's authorization of special

issued unless the expected usefulness of the search is proportionate to the infringement of privacy, and the search is necessary in light of available alternative methods of investigation. STC, May 29, 2000 (R.T.C., No. 136, p. 374, at 381).

¹⁹² Art. 5(1) of the Ley Orgánica sobre los Supuestos Previstos en el Artículo 55.2 de la Constitución (B.O.E. 1980, 289); Art. 17(1) of the Ley Orgánica contra la Actuación de Bandas Armadas y Elementos Terroristas y de Desarrollo del Artículo 55.2 de la Constitución (B.O.E. 1985, 3); Ley Orgánica de Reforma de la Ley de Enjuiciamiento Criminal (B.O.E. 1988, 126) (codified at L.E. CRIM. art. 579(3)–(4) (2004)).

¹⁹³ Art. 5(2) of the Ley Orgánica sobre los Supuestos Previstos en el Artículo 55.2 de la Constitución (B.O.E. 1980, 289); Art. 17(2) of the Ley Orgánica contra la Actuación de Bandas Armadas y Elementos Terroristas y de Desarrollo del Artículo 55.2 de la Constitución (B.O.E. 1985, 3); Ley Orgánica de Reforma de la Ley de Enjuiciamiento Criminal (B.O.E. 1988, 126) (codified at L.E. CRIM. art. 579(4) (2004)).

¹⁹⁴ STC, Dec. 16, 1987 (R.T.C., No. 199, p. 518, at 554). The then-current counterterrorism law permitted preventive detentions lasting up to ten days, provided that the government requested the prolongation during the first 72 hours of detention and obtained judicial approval within 24 hours. Art. 13 of the Ley Orgánica contra la Actuación de Bandas Armadas y Elementos Terroristas y de Desarrollo del Artículo 55.2 de la Constitución (B.O.E. 1985, 3). Under this regime, the government could preventively detain suspected terrorists for a full 96 hours before obtaining any judicial input, which is 24 hours longer than the prescribed constitutional maximum. See C.E. art. 17(2) (stipulating 72-hour cap on preventive detentions); cf. *supra* note 60 (setting forth current regime of preventive detention, under which government must request prolongation within 48 hours of initiation of detention and receive judicial approval of request within 24 hours, thereby safeguarding judicial involvement before elapsion of 72-hour constitutional maximum).

¹⁹⁵ STC, Dec. 16, 1987 (R.T.C., No. 199, p. 518, at 555).

¹⁹⁶ *Id.* at 562.

counterterrorism legislation.¹⁹⁷ The court has stated that the judiciary must in any event intervene before the suspension of fundamental constitutional rights.¹⁹⁸ Even where such prior intervention is impracticable or would defeat the very purpose of derogating from the relevant fundamental rights, the court has required the government to make a contemporaneous application for approval of its unilateral derogation determination, which may be overturned or upheld by the judiciary.¹⁹⁹ Moreover, the court has asserted that the judiciary must always retain the authority to ratify or lift any suspension of rights.²⁰⁰ Therefore, the Constitutional Court has self-consciously asserted a role for the judiciary in the authorization and oversight of any special counterterrorism powers that infringe on fundamental rights.²⁰¹

The American counterterrorism model, on the other hand, has been less committed to ensuring the involvement of the three branches of government and maintaining judicial oversight. The legislature has indeed played an important role in defining counterterrorism policy through the passage of the Antiterrorism and Effective

¹⁹⁷ *Id.* at 552. In the Constitutional Court's most important pronouncement on special counterterrorism legislation, the theme of judicial "intervention" or "oversight" was a central focus. *See id.* at 551 (noting that substantial portion of submissions made reference to scope of Constitution's requirement of "necessary judicial intervention"). In fact, the court overturned two provisions of the prevailing counterterrorism law due to their failure to respect the judicial oversight requirement. *See id.* at 554 (concerning preventive detention); *id.* at 562 (concerning incommunicado detention).

¹⁹⁸ *Id.* at 552.

¹⁹⁹ *See id.* at 562 (requiring government to make contemporaneous application for judicial approval of decision to hold suspected terrorist incommunicado during first 72 hours of detention, prior to his appearance before judge).

²⁰⁰ *Id.* at 552.

²⁰¹ *See generally* *El Tribunal Constitucional anula 4 apartados de la ley antiterrorista*, EL PAÍS (Spain), Dec. 18, 1987, at 1 (describing 1987 Constitutional Court decision, which invalidated several key portions of then-current counterterrorism law).

The Constitutional Court was not always eager to invalidate excessively repressive counterterrorism measures. In 1981, the court passed on the opportunity to review the Organic Law 11/1980 by pointing to standing issues, which the court incidentally would not find compelling in 1987, when it invalidated similar provisions of the Organic Law 9/1984. *See* STC, July 14, 1981 (R.T.C., No. 25, p. 354, at 365–66) (holding that Basque Parliament lacked standing to challenge provisions of Organic Law 11/1980 because creation of special counterterrorism powers and resultant infringement of fundamental rights were within competence of national Parliament, not of respective Autonomous Communities); *La oposición considera positiva la decisión del Constitucional*, EL PAÍS (Spain), Dec. 19, 1987, at 17 (quoting Basque party representative who criticized Constitutional Court for denying standing of Basque Parliament in 1981, only to face essentially same issues in 1987 and acknowledge Basque Parliament's standing); *see also* STC, Dec. 16, 1987 (R.T.C., No. 199, p. 518, at 536–38) (acknowledging standing of Basque Parliament to challenge provisions of Organic Law 9/1984, in large part because competences, including police powers, of Autonomous Communities had expanded vastly since Court denied standing of Basque Country to challenge similar provisions of Organic Law 11/1980).

Death Penalty Act of 1996,²⁰² the Authorization for Use of Military Force,²⁰³ the Detainee Treatment Act of 2005,²⁰⁴ the USA PATRIOT Act,²⁰⁵ and the MCA.²⁰⁶ Moreover, Congress has required that the Secretary of Defense report on the procedures being used to classify aliens as enemy combatants and on any trials by military commissions.²⁰⁷ Nevertheless, Congress has not been involved in the design of many important aspects of U.S. counterterrorism policy. For example, the executive has claimed unilateral and inherent authority to engage in extended preventive and incommunicado detention,²⁰⁸ searches and surveillance,²⁰⁹ and trial by special tribunals.²¹⁰ In these instances, the executive has been the sole creator and executor of counterterrorism policy.

Moreover, the executive has at times ignored Congress's defined counterterrorism policies, and at other times stretched these policies beyond recognition. On the first count, the executive has obtained the prolonged preventive detention of certain aliens by relying on its general authority to detain incident to removal proceedings, rather than by making use of the congressionally prescribed procedure designed for that purpose.²¹¹ On the second, the executive has converted the material witness statute into a tool of preventive detention.²¹² In other instances, such as the provision for trial of suspected terrorists by military commissions, Congress has belatedly ratified unilateral

²⁰² Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 42, and 49 U.S.C. (2000)).

²⁰³ Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. I 2001)).

²⁰⁴ Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified in scattered sections of 10 and 42 U.S.C.A. (Supp. 2006)).

²⁰⁵ Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 12, 15, 18, 20, 21, 22, 28, 31, 42, 47, 49, and 50 U.S.C. (Supp. I 2001)).

²⁰⁶ Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, 28, and 42 U.S.C.S. (LEXIS)).

²⁰⁷ See *supra* note 171 (discussing reporting requirement).

²⁰⁸ See *supra* notes 113–22 and accompanying text (discussing executive's claimed inherent authority to hold indefinitely enemy combatants incommunicado).

²⁰⁹ See *supra* notes 142–45 and accompanying text (outlining executive's claimed inherent authority to engage in surveillance of phone conversations).

²¹⁰ See *supra* notes 151–54 and accompanying text (describing executive's unilateral decision to set up military tribunals to try suspected terrorists).

²¹¹ See *supra* note 107 and text accompanying notes 106–07 (describing how executive has not made use of congressionally prescribed procedure for detentions but has chosen to rely instead on general authority to detain individuals indefinitely as necessary coincident of removal powers).

²¹² See *supra* notes 108–12 and accompanying text (discussing executive's use of material witness statute to detain suspected terrorists).

decisions reached by the executive, while further stripping the courts of any oversight or review function.²¹³

This last point is especially significant. The aspect of the American counterterrorism model most inconsistent with the principle of checks and balances is the absence of a well-defined role for the judiciary.²¹⁴ This absence stems from two principal causes.

First, the President and Congress have attempted to limit the judiciary's role in important respects. For example, the executive has asserted that the judiciary may not review the former's classification of a suspected terrorist as an enemy combatant,²¹⁵ and that judicial authorization need not be obtained to conduct surveillance.²¹⁶ Moreover, where judicial intervention has appeared imminent, the executive has unilaterally changed course in order to preempt such intervention.²¹⁷ Examples of this "moving-target" strategy include: (1) the decision to allow Yaser Hamdi and José Padilla to meet with their attorneys immediately before the Supreme Court heard the 2004 trilogy of Guantánamo detainee cases, perhaps to moot the issue; (2) the release of Hamdi to Saudi Arabia after the Supreme Court determined that he was entitled to challenge his detention in 2004; (3) the transfer of Padilla to the criminal justice system just as the Supreme Court was preparing to hear his appeal in 2006; and (4) the voluntary abandonment of the NSA wiretapping program before the Sixth

²¹³ See *supra* notes 159–72 and accompanying text (describing how provisions of MCA merely ratified executive action aimed at, among other things, curbing judicial review of detentions).

²¹⁴ See Schulhofer, *supra* note 3, at 1955 (stressing importance of judicial review to system of checks and balances).

²¹⁵ See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 527 (2004) (citing government claim that "respect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict ought to eliminate entirely any individual process [for reviewing the executive's determination of enemy-combatant status], restricting the courts to investigating only whether legal authorization exists for the broader detention scheme" (internal citations and quotation marks omitted)).

²¹⁶ See *supra* notes 142–45 and accompanying text (discussing secret NSA wiretapping program and executive's initial refusal to submit program to limited judicial oversight contemplated by PATRIOT Act and FISA). In any event, the judicial oversight contemplated by FISA, which relies on the government-friendly and secretive FISC, may be of little value. In fact, in the twenty-seven years from 1979 through 2005 the FISC denied four government applications for surveillance out of a total of tens of thousands of applications. Electronic Privacy Information Center, Foreign Intelligence Surveillance Act Orders 1979–2004, http://www.epic.org/privacy/wiretap/stats/fisa_stats.html (last visited Mar. 13, 2007).

²¹⁷ Critics claim that the Bush administration employs a moving-target strategy, changing course whenever it senses that Congress or the judiciary is prepared to intervene. Adam Liptak, *The White House as a Moving Legal Target*, N.Y. TIMES, Jan. 19, 2007, at A1.

Circuit had an opportunity to rule on its lawfulness in 2007.²¹⁸ In addition to executive efforts to limit judicial involvement in counterterrorism, Congress has significantly curtailed judicial oversight of the detention and trial of enemy combatants through the passage of the MCA.²¹⁹

Second, the Supreme Court has done little to clarify the scope of judicial authority with respect to terrorism detainees. For example, although the Court has ruled that a U.S. citizen being held as an enemy combatant has a right to some process to challenge his classification,²²⁰ the Court has not sufficiently specified the content of that process.²²¹ Moreover, although the Court has suggested that the procedures governing the trial of terrorism suspects by military commissions must be similar to those governing courts-martial,²²² the Court has not indicated what specific procedural protections afforded by courts-martial, if any, must be imported to the commissions.²²³

In sum, the U.S. counterterrorism model has been characterized largely by unilateral executive action, and judicial and congressional acquiescence.²²⁴ Although this acquiescence may be seen as tacit approval of the executive's policy decisions, such tacit approval cannot replace affirmative action for at least two reasons. First, tacit approval threatens to weaken the judiciary and Congress. If the executive designs counterterrorism policy without any input from the other branches, the executive may come to believe, through the force of precedent, that the other branches have no relevant policymaking role.²²⁵ Therefore, from the perspective of checks and balances, affirmative

²¹⁸ *Id.*; see also *supra* note 147 (discussing executive abandonment of NSA wiretapping program).

²¹⁹ See *supra* notes 165–70 and accompanying text (discussing limitations placed on judicial review by MCA).

²²⁰ *Hamdi*, 542 U.S. at 533.

²²¹ See *Schulhofer*, *supra* note 3, at 1908–09 (noting that it is unclear how long preventive or incommunicado detention of enemy combatants may last and under what circumstances enemy combatants have right to counsel).

²²² See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2791–92 (2006) (holding executive's justification for deviation from court-martial procedures insufficient).

²²³ See Neil A. Lewis, *Court's Decision Offers Scant Guidance*, N.Y. TIMES, July 10, 2006, at A15 (describing uncertainty regarding required procedural safeguards resulting from *Hamdan*). Of course, it may be that there are no core procedural requirements for the military commissions, so long as there is congressional approval of their design and use.

²²⁴ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2351 (2006) (describing how Congress has “[s]ilently ced[ed] . . . terrain to [the] President” on counterterrorism issues); *id.* at 2352 (“[T]he most glaring institutional fact about the war on terror so far is how little Congress has participated in it. The President has resolved most of the novel policy and institutional challenges terrorism poses with virtually no input or oversight from the legislative branch.”).

²²⁵ See Peabody & Nugent, *supra* note 183, at 44–45 (“We do, however, anticipate long-run difficulties in securing the goals of separated powers where one or more branches

ratification of other branches' decisions in a shared field of competence is preferable to silent acquiescence.

Second, decisionmaking by tacit approval impinges on the branches' accountability to one another and to the people. The branches can hardly check one another's decisions if it is unclear that a decision has been made, or by whom. Moreover, the division of competences envisioned by the American system of checks and balances contemplates that the people will play a role in checking the actions of the elected branches.²²⁶ The people cannot perform this role if they cannot determine which branch is responsible for given actions or results.

Thus, the theory of tacit approval does not rescue the U.S. counterterrorism model from the critique of its apparent lack of concern for checks and balances. Nonetheless, one might postulate that the U.S. model does in fact contain sufficient checks and balances, but that Congress and the courts have simply failed to exercise their prescribed powers.²²⁷ This argument highlights the most basic distinction between the U.S. and Spanish counterterrorism models. The Spanish Constitution contemplates the creation of special counterterrorism powers and expressly requires the involvement of the three branches of government in the design and execution of any such special powers.²²⁸ Therefore, there is no doubt that each branch has a role to play in Spanish counterterrorism, and there is general consensus as to

cedes authority, becomes a passive political actor, or fails to express and assert its special institutional character on a consistent basis.”).

²²⁶ See Paul E. McGreal, *Ambition's Playground*, 68 *FORDHAM L. REV.* 1107, 1107 (2000) (“Day in and day out, four combatants—the three branches of the federal government and the People—duke it out in the prescribed arena known as the American system of checks and balances.”).

²²⁷ Recent Supreme Court opinions suggest some increased concern for checks and balances in counterterrorism. See *Hamdan*, 126 S. Ct. at 2774–75 (holding that executive power to convene military commissions is limited by terms of congressional grant of authority to convene such commissions, including requirement that commissions comply with laws of war); *id.* at 2773 (indicating that authority to convene military commissions must be derived, if at all, from constitutional grants of power to President and Congress); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (stressing importance of separation of powers, even in times of war); *cf.* Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, *N.Y. TIMES*, June 30, 2006, at A1 (implying that *Hamdan* decision forces President to work with Congress in designing constitutional military commissions). Likewise, Congress's recent passage of the MCA might suggest some congressional desire to act as a check. *But see supra* notes 159–72, 213 and accompanying text (arguing that MCA merely ratifies unilateral decisions previously reached by executive regarding trial of terrorism suspects by military commissions).

²²⁸ C.E. art. 55(2); *see also* STC, Dec. 16, 1987 (R.T.C., No. 199, p. 518, at 539) (indicating that Spanish Constitution's framers were conscious of problems posed by terrorism and provided for creation of special counterterrorism powers in manner prescribed by C.E. art. 55(2) as result).

the contours of these roles. Conversely, the U.S. Constitution does not directly address counterterrorism.²²⁹

In the absence of a constitutional blueprint establishing the branches' special counterterrorism competences, the U.S. counterterrorism model has been defined by action. In this context, it is perhaps unsurprising that the branch best suited to initiate government activity, the executive,²³⁰ has largely succeeded in putting its stamp on the U.S. counterterrorism model.²³¹ Hence there has been a proliferation of executive claims of unreviewable authority and an absence of clear substantive limits on the government's counterterrorism competences.²³² On the other hand, the constitutionally predefined Spanish counterterrorism model has largely avoided these peculiar aspects of the American model.²³³ Therefore, in addressing the American

²²⁹ See Ackerman, *supra* note 97, at 1041 (noting that U.S. Constitution contains "a rudimentary emergency provision, permitting the suspension of habeas corpus," although "it largely leaves the rest to the judicial imagination").

²³⁰ See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 1292 & n.167 (1988) (pointing to venerability of "notion that the President is institutionally best suited to initiate government action").

²³¹ In evaluating why the President always "wins" in foreign affairs, Harold Koh has emphasized three factors that appear equally applicable to the counterterrorism arena:

First, and most obviously, the President has won because the executive branch has taken the initiative in foreign affairs, and has often done so by construing laws designed to constrain his actions as authorizing them. Second, the President has won because Congress has usually complied with or acquiesced in what he has done, because of legislative myopia, inadequate drafting, ineffective legislative tools, or sheer lack of political will. Third, the President has won because the federal courts have usually tolerated his acts, either by refusing to hear challenges to those acts, or by hearing those challenges and then affirming his authority on the merits. This simple three-part combination of executive initiative, congressional acquiescence, and judicial tolerance explains why the President almost invariably wins in foreign affairs.

Id. at 1291.

²³² The actual scope of the American executive's counterterrorism powers remains unclear in many instances. For example, the executive's claimed inherent authority to engage in preventive and incommunicado detention of enemy combatants held at Guantánamo is not temporally limited, except by reference to vague notions of the end of the war on terror. See *Hamdi*, 542 U.S. at 520 ("If the Government does not consider this unconventional war won for two generations . . . , then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life."). Likewise, the executive's immigration detention powers are not temporally bounded. See, e.g., *supra* notes 104–07 and accompanying text (describing indefinite detention of aliens through use of immigration law). Moreover, the scope of the executive's power to conduct domestic surveillance remains shrouded in mystery. See *supra* notes 142–47 and accompanying text (discussing uncertainty as to scope of executive's unilateral surveillance authority).

²³³ Although Spain allowed suspected terrorists to be held incommunicado indefinitely during the first decade of democratic rule, see *supra* note 69 and accompanying text (discussing relevant counterterrorism laws of early democracy), this practice no longer obtains

counterterrorism model, it is appropriate to talk not of what Congress and the judiciary might have done, but of what the executive has in fact done, with the unavoidable conclusion that the United States has failed to implement as thorough a scheme of checks and balances as has Spain.

B. The Spanish Counterterrorism Model in Action: Failure to Limit Executive Overreaching in the 1980s

Despite the Spanish counterterrorism model's facial commitment to checks and balances, application of the model has failed to ensure the executive's observance of limits on its authority. For example, during the early 1980s, enhanced counterterrorism police powers were deployed for purposes other than those envisioned by the legislators who created them.²³⁴ Specifically, these powers were used to investigate crimes other than terrorism²³⁵ and to detain large sectors of the Basque population in order to obtain intelligence.²³⁶ More troublingly, police torture was frequent during the late 1970s and the 1980s,²³⁷ in part due to opportunities for torture arising from extended

in the present day. *See supra* notes 71–73 (discussing relevant laws since 1988). The sense of boundlessness that has characterized the American counterterrorism powers has not been prevalent in the Spanish model. *See, e.g., supra* notes 58–60 and accompanying text (demonstrating that Spain has generally allowed periods of preventive detention lasting no longer than five or ten days); *supra* notes 84–85 and accompanying text (indicating that, since 1980, executive has been empowered to conduct at most three days of warrantless surveillance before obtaining judicial authorization).

²³⁴ This is somewhat similar to the executive's use of FISA for normal criminal investigations. *See supra* note 141.

²³⁵ *See* VERCHER, *supra* note 36, at 232 (noting that between 1980 and 1983, prolonged preventive detention was applied to 443 ordinary criminals in Madrid); *cf.* Mohapatra, *supra* note 5, at 342 (warning that Indian counterterrorism legislation was frequently applied to investigate and prosecute normal criminal offenses).

²³⁶ *See* JAIME JIMÉNEZ, *supra* note 36, at 259–60 (reporting that police used broad counterterrorism powers for purposes not envisioned by legislators, including indiscriminate detentions of certain sectors of Basque population to gather intelligence); Editorial, *El Defensor del Pueblo y la ley antiterrorista*, EL PAÍS (Spain), Jan. 4, 1985, at 8 [hereinafter *El Defensor*] (criticizing police "sweeps" of Pilar neighborhood in Madrid); Editorial, *El Gobierno y las garantías constitucionales*, EL PAÍS (Spain), Apr. 9, 1983, at 6 (condemning police sweeps of Madrid neighborhoods as violative of citizens' constitutional rights).

²³⁷ *See* Editorial, *Amnesty y España*, EL PAÍS (Spain), Dec. 3, 1980, at 10 (calling on government to respond to Amnesty International report regarding torture and antiterrorism legislation in Spain in late 1970s); José Luis L. Aranguren & Carlos Castilla del Pino, Op-Ed, *Setenta días y setenta veces*, EL PAÍS (Spain), May 6, 1983, at 11 (discussing claims of regular torture and calls for investigations into such claims by judges, government officials, and public interest organizations); F.G. Basterra, *EE UU juzga "alto" el respeto de los derechos humanos en España*, EL PAÍS (Spain), Feb. 14, 1986, at 17 (discussing U.S. State Department report rating respect for human rights in Spain as "high" while noting continuing presence of state-sponsored torture); Editorial, *El "caso Arregui" y los derechos humanos*, EL PAÍS (Spain), Dec. 13, 1983, at 10 (reporting evidence of torture in high-profile trial of two police officers); Bonifacio de la Cuadra, *La Asociación Pro Derechos*

periods of preventive detention.²³⁸

Furthermore, the frequency of erroneous counterterrorism detentions and searches during the 1980s suggests that police misused their expanded powers. For example, under the Organic Law 11/1980, which was in effect from 1981 to 1984, probably less than half of those who were preventively detained were indictable.²³⁹ Similarly, under the Organic Law 9/1984, which was in effect from 1985 to 1987, probably no more than forty-three percent of those who were preventively detained by the police were indictable.²⁴⁰ Moreover, the police often

Humanos afirma en su 'Informe 1984' que en España persiste la tortura, EL PAÍS (Spain), Dec. 7, 1984, at 15 (citing report of human rights group alleging torture of those accused of "common" crimes and blaming torture on antiterrorism legislation); *Frecuentes procesos por torturas y malos tratos*, EL PAÍS (Spain), Sept. 6, 1986, at 13 (chronicling investigations by Basque judges against members of state security forces on charges of torture); Editorial, *El Supremo y la tortura*, EL PAÍS (Spain), July 18, 1985, at 8 (applauding Constitutional Court for overturning rulings in favor of government officials accused of torture).

²³⁸ See *El Defensor*, *supra* note 236, at 8 (citing claims by human rights groups that legislation permitting incommunicado preventive detention may lead to torture); see also Bonifacio de la Cuadra, *Una Pregunta que acusa*, EL PAÍS (Spain), Feb. 3, 1985, at 19 (discussing allegations of members of Parliament that only purpose of extended incommunicado detention must be to torture detainees in hopes of obtaining confessions).

²³⁹ This conclusion is derived from the author's analysis of statistics provided in Spanish legislative history and newspaper articles. See Memorandum from Ari MacKinnon to Dustin Brown, Executive Editor, *New York University Law Review* 1-2 (Mar. 20, 2007) (on file with the *New York University Law Review*) [hereinafter Memorandum from Ari MacKinnon]. First, only 65% of those who were preventively detained by the police from 1981 through 1984 were brought before a judge; the rest were released without charges. See DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS, COMISIÓN DE JUSTICIA E INTERIOR, SESIÓN INFORMATIVA, Leg. II, No. 39, at 2 (Feb. 3, 1984) (statement of Minister of Interior Barrionuevo Peña) (providing statistics on number of suspected terrorists detained, and of those, number brought before judge); DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS, COMISIÓN DE JUSTICIA E INTERIOR, SESIÓN INFORMATIVA, Leg. II, No. 73, at 9 (May 7, 1985) (statement of Minister of Interior Barrionuevo Peña) (same). Second, of those suspected terrorists who were eventually brought before a judge in 1982, 68% were imprisoned while the rest were set free, whereas 57% and 69% were imprisoned in 1983 and 1984, respectively. Bonifacio de la Cuadra, *La Audiencia Nacional puso en libertad a casi un tercio de los detenidos en 1984 acusados de terrorismo*, EL PAÍS (Spain), Jan. 21, 1985, at 12; see also Bonifacio de la Cuadra, *Los 'aciertos' policiales en la lucha antiterrorista han disminuido durante el mandato del Gobierno socialista*, EL PAÍS (Spain), Nov. 25, 1983, at 13 (reporting increase in erroneous preventive detentions under socialist administration in 1983); Bonifacio de la Cuadra, *Más dureza y menos eficacia contra el terrorismo*, EL PAÍS (Spain), Dec. 3, 1983, at 19 (noting harshness of socialist administration's response to terrorism in 1983, which was not accompanied by increased effectiveness, as reflected by increase in erroneous detentions).

²⁴⁰ This conclusion follows from the fact that only 43% of those who were preventively detained were ever brought before a judge for presentment. See Memorandum from Ari MacKinnon, *supra* note 239, at 2-3; DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS, COMISIÓN DE JUSTICIA E INTERIOR, SESIÓN INFORMATIVA, Leg. II, No. 73, at 9 (May 7, 1985) (statement of Minister of Interior Barrionuevo Peña) (providing statistics on number of suspected terrorists detained, and of those, number brought before judge); DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS, COMISIÓN DE JUSTICIA E INTERIOR, SESIÓN INFORMATIVA, Leg. III, No. 264, at 9168, 9180 (Apr. 20, 1988) (statement of

erred in searches conducted pursuant to the Organic Laws 11/1980 and 9/1984, achieving “positive” results in only around thirty percent of their attempts.²⁴¹

This evidence of executive overreaching during the 1980s suggests that facial respect for the principle of checks and balances cannot alone control government overreaching. Research conducted in other national settings has reached similar conclusions. For example, studies of post-Soviet Russia have shown that a formal constitutional commitment to liberal legal principles did not ensure effective respect for those principles.²⁴² This literature has also highlighted the importance of cultural and societal values to the success of constitutional guarantees of limited government.²⁴³ Limits on police powers are less likely to be respected where police officers have become accustomed to unchecked authority.²⁴⁴

Minister of Interior Barrionuevo Peña) (same). In fact, in 1985, approximately two-thirds of those whom the police detained for terrorist offenses never appeared before a judge. Juan José Echevarría, *Un tercio de los detenidos bajo la legislación de bandas armadas pasa a disposición judicial, según el ministro*, EL PAÍS (Spain), Feb. 21, 1986, at 19.

²⁴¹ This conclusion is derived from the author’s analysis of statistics provided in Spanish legislative history. See Memorandum from Ari MacKinnon, *supra* note 239, at 3–5. For the Organic Law 11/1980, see DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS, COMISIÓN DE JUSTICIA E INTERIOR, SESIÓN INFORMATIVA, Leg. II, No. 39, at 2 (Feb. 3, 1984) (statement of Minister of Interior Barrionuevo Peña) (providing statistics on number of domiciliary searches conducted and, of those, number that yielded positive results), and DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS, COMISIÓN DE JUSTICIA E INTERIOR, SESIÓN INFORMATIVA, Leg. II, No. 73, at 9 (May 7, 1985) (statement of Minister of Interior Barrionuevo Peña) (same). For the Organic Law 9/1984, see DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS, COMISIÓN DE JUSTICIA E INTERIOR, SESIÓN INFORMATIVA, Leg. II, No. 73, at 9 (May 7, 1985) (statement of Minister of Interior Barrionuevo Peña) (providing statistics on number of domiciliary searches conducted and, of those, number that yielded positive results), and DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS, COMISIÓN DE JUSTICIA E INTERIOR, SESIÓN INFORMATIVA, Leg. III, No. 264, at 9168, 9180 (Apr. 20, 1988) (statement of Minister of Interior Barrionuevo Peña) (same).

²⁴² See, e.g., Todd Foglesong, *Habeas Corpus or Who Has the Body?: Judicial Review of Arrest and Pre-trial Detention in Russia*, 14 WIS. INT’L L.J. 541, 541–42 (1996) (arguing that Russia’s formal recognition of habeas corpus has not in practice protected criminal suspects from unfounded detention and abuse); Shannan C. Krasnokutski, Note, *Human Rights in Transition: The Success and Failure of Polish and Russian Criminal Justice Reform*, 33 CASE W. RES. J. INT’L L. 13, 15–16 (2001) (noting that Russia evinces formal respect for individual rights but has failed effectively to protect such rights).

²⁴³ See, e.g., Krasnokutski, *supra* note 242, at 68 (“Societal, more than legal, conditions have impeded Russia thus far in completing its transition and protecting human rights at a level acceptable to the world community.”); see also Michael William Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT’L L. & POL. 1, 35 (2002) (“Constitutional development is ultimately a cooperative endeavor: Without a general cultural commitment to act cooperatively, true constitutionalism is unlikely to be realized—regardless of whatever formal institutional structures are in place.”).

²⁴⁴ See Foglesong, *supra* note 242, at 543 (discussing Russian chief of police’s occasionally violent opposition to judicial supervision of police actions); cf. David Alan Sklansky,

The Spanish police force of the 1980s, with its roots in the brutal Francoist police state, was accustomed to unchecked authority and probably looked with disdain on new, democratic limits on its powers.²⁴⁵ Since police officers often act in the absence of immediate oversight, prevailing police culture and views on rights play an important role in determining whether the police actually respect limits on their powers.²⁴⁶ In this context, it is perhaps unsurprising that Spain's formal system of checks and balances was unable to prevent significant overreaching by its counterterrorism forces.

*C. Dangerous Tendencies of the Spanish Counterterrorism Model:
Possible Consequences of Transparency*

Beyond its failure to eliminate executive overreaching during the 1980s, the Spanish counterterrorism model may contain a more general inherent flaw: Its recognition of limited special legislative competences in the highly volatile field of counterterrorism may have led ineluctably to the parliamentary provision for broader counterterrorism powers than are constitutionally permissible. This argument is similar to that made by various scholars objecting to torture warrants for fear that they will be issued in cases outside the contemplated scope of their use.²⁴⁷ A study of Spanish counterterrorism legislation suggests that Parliament has in fact abused its special powers.

Police and Democracy, 103 MICH. L. REV. 1699, 1820 (2005) (suggesting that accountability of police in United States has been undermined by theories of democracy deemphasizing institutional structures).

²⁴⁵ See JAIME JIMÉNEZ, *supra* note 36, at 261–62 (discussing failure of 1980s antiterrorism legislation to account for Francoist backgrounds of state security force members, many of whom were retained out of necessity by democratic regime). The failed military coup of February 1981 is obvious evidence that certain elements of the executive did not respect basic constitutional limits on executive authority. See Reinales & Jaime-Jiménez, *supra* note 16, at 133 (discussing coup attempt).

²⁴⁶ This is not to say that the establishment of a formal system of checks and balances will have no effect on police conduct. On the contrary, judicial oversight with accompanying sanctions for misconduct might deter police officers from abusing their powers. In addition, formal codification of the principle of limited government protected by checks and balances might alter police views on the propriety of limits on their authority. See, e.g., Dowdle, *supra* note 243, at 78 (arguing that existence of norms of constitutionalism in China has positive effects on government action despite frequent violations of such norms). Moreover, although judicial review may not immediately alter the executive's conduct, it nonetheless prevents the executive from relying on judicial quiescence as a source of legitimacy. See *Korematsu v. United States*, 323 U.S. 214, 244–46 (1944) (Jackson, J., dissenting) (explaining importance of judicial review of military orders, even if such review will not alter executive conduct). This Note does not disclaim the positive effects of formal recognition of the principle of checks and balances. Rather, it seeks only to point to possible shortcomings of a narrow focus on such formal recognition.

²⁴⁷ See *supra* note 7 (outlining argument against torture warrants). This Note does not delve deeply into why the legislature (or other branches) might overuse expanded

The Spanish Constitution allows Parliament to suspend certain fundamental liberties through the passage of an organic law, provided that the law guarantees “necessary” judicial intervention and adequate parliamentary oversight.²⁴⁸ The language of the Constitution clearly (1) limits the rights that may be suspended,²⁴⁹ while (2) requiring judicial oversight of infringements of fundamental liberties,²⁵⁰ (3) mandating adequate parliamentary oversight of special counterterrorism powers,²⁵¹ and (4) suggesting that derogations be confined to exceptional circumstances.²⁵² Nonetheless, since the inception of democracy, the Spanish Parliament has pushed against these four constraints.

First, Spanish counterterrorism legislation has severely impacted or nullified rights not subject to derogation. These impacted rights include the right to the effective assistance of counsel²⁵³ and the guarantee of trial before an ordinary judge predetermined by law.²⁵⁴ Indefinite incommunication during the early democracy wholly undermined the guarantee of effective assistance of counsel.²⁵⁵ Moreover, the assistance of counsel continues to be severely hampered by the modern regime, which allows incommunication for up to thirteen days and prevents incommunicado detainees from selecting counsel and from speaking in private with appointed counsel.²⁵⁶ Moreover, trial of terrorist offenses before the National Court in Madrid implicates the constitutional safeguard of trial before an ordinary judge predetermined by law, dragging offenders whose crimes often took place in Basque Country before a tribunal hundreds of miles away.²⁵⁷

counterterrorism competencies. However, one plausible reason is that there may be little political support for protecting the rights of suspected terrorists.

²⁴⁸ C.E. art. 55(2).

²⁴⁹ These include the 72-hour cap on preventive detentions, *id.* art. 17(2), the warrant requirement for the search of a domicile, *id.* art. 18(2), and the warrant requirement for surveillance of postal, telegraphic, and telephonic communications, *id.* art. 18(3).

²⁵⁰ *Id.* art. 55(2).

²⁵¹ *Id.*

²⁵² *See id.* (authorizing suspension of liberties for particular individuals in individual cases involving armed bands or terrorist groups).

²⁵³ *Id.* art. 17(3). Parliament is given authority to set forth the terms of the protection of the assistance of counsel. *Id.*

²⁵⁴ *Id.* art. 24(2); *see supra* notes 86–90 and accompanying text (chronicling use of National Court in Madrid, instead of ordinary courts in Basque Country, to try terrorism suspects).

²⁵⁵ *See supra* note 69 and accompanying text (describing regime of indefinite incommunication in early democracy); *see also El Defensor, supra* note 236 (claiming that antiterrorism legislation allowing incommunication subverts Constitution).

²⁵⁶ HUMAN RIGHTS WATCH, *supra* note 48, at 26, 31. *See generally id.* at 30–34, 41–45 (addressing effects of incommunication on effective assistance of counsel).

²⁵⁷ *See de la Cuadra, supra* note 89 (reporting constitutional objections to trials before National Court in Madrid levied by judges and law professors).

Second, although the Spanish Constitution requires that Parliament guarantee adequate judicial oversight whenever it creates special counterterrorism powers,²⁵⁸ Parliament has at times paid this requirement little more than lip service. For example, during the first decade of democratic rule, Parliament did not require that a judicial officer (1) see a suspected terrorism detainee during his ten-day preventive detention,²⁵⁹ (2) participate in the initial decision to hold that detainee incommunicado during the initial 72 hours of detention,²⁶⁰ or (3) authorize the search of a domicile where a suspected terrorist might have taken refuge.²⁶¹ Moreover, since the quality of judicial review depends on the willingness of judicial officials to engage in such review, obvious questions arise as to whether judicial officials in the early democracy, accustomed to working under Franco, could adequately perform their oversight role.²⁶² In this regard, it is worth noting that critics of the counterterrorism measures of the early Spanish democracy contended that judicial oversight was “minimal and distant and practically nominal.”²⁶³ Although it is true that the Spanish counterterrorism model has guaranteed more judicial involve-

²⁵⁸ C.E. art. 55(2).

²⁵⁹ See, e.g., Art. 2 of the Ley de Medidas Especiales en Relación con los Delitos de Terrorismo Cometidos por Grupos Armados (B.O.E. 1978, 293) (permitting, but not requiring, competent judicial officer to make personal contact with detainee and obtain information concerning his preventive detention, which could last up to ten days); Arts. 3(1)–(2) of the Ley Orgánica sobre los Supuestos Previstos en el Artículo 55.2 de la Constitución (B.O.E. 1980, 289) (same); Arts. 13 & 14(1) of the Ley Orgánica contra la Actuación de Bandas Armadas y Elementos Terroristas y de Desarrollo del Artículo 55.2 de la Constitución (B.O.E. 1985, 3) (same).

²⁶⁰ See *supra* notes 69–70 and accompanying text (indicating that prior to December 1987 decision of Constitutional Tribunal, incommunication could be ordered by detaining authority, which need not be judicial); see also STC, Dec. 16, 1987 (R.T.C., No. 199, p. 518, at 562) (requiring that incommunication be ordered by competent *judicial* authority).

²⁶¹ See, e.g., Art. 3 of the Ley de Medidas Especiales en Relación con los Delitos de Terrorismo Cometidos por Grupos Armados (B.O.E. 1978, 293) (indicating that terrorist suspects shall be deemed to have been caught in flagrante delicto, thereby permitting warrantless search of place where they were found); Art. 4(1) of the Ley Orgánica sobre los Supuestos Previstos en el Artículo 55.2 de la Constitución (B.O.E. 1980, 289) (allowing warrantless arrest of terrorist suspects in whatever place or domicile they may be found, and warrantless search of that place or domicile); Art. 16(1) of the Ley Orgánica contra la Actuación de Bandas Armadas y Elementos Terroristas y de Desarrollo del Artículo 55.2 de la Constitución (B.O.E. 1985, 3) (same).

²⁶² See *supra* notes 245–46 and accompanying text (indicating that police officers of early democracy may have been resistant to limits on their authority because of their authoritarian heritage); cf. Foglesong, *supra* note 242, at 578 (arguing that failure of habeas corpus statute in Russia has been due in part to judges’ discomfort with new roles overseeing police actions).

²⁶³ Bonifacio de la Cuadra, *Historia de un monstruo legal*, EL PAÍS (Spain), Feb. 3, 1985, at 18 (quoting Cándido Conde-Pumpido Tourón, spokesman, Judges for Democracy) (translated from Spanish by author).

ment in counterterrorism actions from 1988 forward,²⁶⁴ the Spanish example provides reason to doubt that Parliament can be relied upon to share its special counterterrorism competences with the judiciary.²⁶⁵

Third, Parliament has largely flouted its constitutional duty to maintain adequate parliamentary oversight of the use of special counterterrorism powers.²⁶⁶ The democracy's earliest counterterrorism provisions explicitly required the government to report to Parliament concerning the use of those powers, at least every three months.²⁶⁷ However, critics frequently argued that the "parliamentary oversight" provided by these laws was entirely inadequate, consisting in practice of little more than the presentation of cursory, quarterly statistical analyses by the Ministry of the Interior.²⁶⁸ Moreover, whatever minimal oversight these laws provided, subsequent counterterrorism legislation has guaranteed no special parliamentary oversight at all.²⁶⁹ The Constitutional Court has held that this more recent counterterrorism legislation does not violate the Constitution because the required "adequate parliamentary oversight" may be provided through Parliament's normal tools of oversight, which are applicable to other government action.²⁷⁰ This ruling only confirmed parliamentary practice, which had already rendered the Constitution's

²⁶⁴ See, e.g., Ley Orgánica de Reforma de la Ley de Enjuiciamiento Criminal (B.O.E. 1988, 126) (allowing preventive detention of suspected terrorists to last no longer than five days, requiring that incommunication be ordered by competent judicial authority, and proscribing warrantless domiciliary searches absent urgent circumstances).

²⁶⁵ This conclusion parallels the U.S. Congress's curtailment of judicial review through the passage of the MCA. See *supra* text accompanying notes 165–70 (discussing jurisdiction-stripping provisions of MCA).

²⁶⁶ C.E. art. 55(2).

²⁶⁷ See, e.g., Art. 6 of the Ley de Medidas Especiales en Relación con los Delitos de Terrorismo Cometidos por Grupos Armados (B.O.E. 1978, 293) (requiring at least one report per quarter); Art. 7 of the Ley Orgánica sobre los Supuestos Previstos en el Artículo 55.2 de la Constitución (B.O.E. 1980, 289) (same); Art. 18(2) of the Ley Orgánica contra la Actuación de Bandas Armadas y Elementos Terroristas y de Desarrollo del Artículo 55.2 de la Constitución (B.O.E. 1985, 3) (same).

²⁶⁸ See, e.g., JAIME JIMÉNEZ, *supra* note 36, at 247 (reporting that parliamentary oversight under Organic Law 9/1984 consisted essentially of quarterly receipt of cursory statistical analyses prepared by government).

²⁶⁹ See Ley Orgánica de Reforma de la Ley de Enjuiciamiento Criminal (B.O.E. 1988, 4) (replacing previous counterterrorism legislation without providing for special parliamentary oversight); see also STC, Mar. 3, 1994 (R.T.C., No. 71, p. 797, at 809) (noting that Organic Law 4/1988 contains no provision concerning parliamentary oversight of its special counterterrorism powers).

²⁷⁰ STC, Mar. 3, 1994 (R.T.C., No. 71, p. 797, at 810); but see *id.* at 824–25 (Magistrado don Pedro Cruz Villalón, dissenting) (indicating that Organic Law 4/1988 is unconstitutional for failure to provide explicitly for special parliamentary oversight, as required by C.E. art. 55(2)).

provision for parliamentary oversight of counterterrorism something of a dead letter.

Fourth, although the language of the Spanish Constitution suggests that the suspension of fundamental liberties should be exceptional,²⁷¹ Parliament had created a comprehensive regime of criminal procedure to deal with terrorism offenses by 1980.²⁷² Moreover, whereas earlier counterterrorism legislation was exceptional in the sense that it did not amend the Code of Criminal Procedure, special police powers have been incorporated into the Code since 1988, suggesting that they form a more permanent, stable exception to regular Spanish criminal procedure.²⁷³ At least one judge of the Constitutional Court has lamented the regularization of this anomalous regime of criminal procedure, especially in the absence of any concomitant dedication on the part of Parliament to effective oversight.²⁷⁴ In any event, Spain's special counterterrorism regime has been well entrenched in the Spanish legal system since the inception of democracy and has probably only dug its claws in deeper since 1988. This entrenchment has not been greatly affected by varying rates of terrorist violence during the last thirty years,²⁷⁵ which suggests that Parliament has not been responsive to changing terrorist threats.²⁷⁶ Furthermore, the staying power of Spain's counterterrorism regime suggests that there are powerful inertial forces that prevent the elimination of counterterrorism powers once created. It may be that once special counterterrorism powers have been created, the relevant institutional actors come to depend on their existence, and thus oppose their alteration. If that is the case, the very vesting of

²⁷¹ See C.E. art. 55(2) (authorizing suspension of liberties for particular individuals in individual cases involving armed bands or terrorist groups).

²⁷² See Ley Orgánica sobre los Supuestos Previstos en el Artículo 55.2 de la Constitución (B.O.E. 1980, 289) (setting forth comprehensive special regime of criminal procedure for suspected terrorists).

²⁷³ See, e.g., Ley Orgánica de Reforma de la Ley de Enjuiciamiento Criminal (B.O.E. 1988, 126) (altering aspects of Code of Criminal Procedure that regulate preventive detention, searches, and surveillance); Ley Orgánica de Reforma de la Ley de Enjuiciamiento Criminal en Materia de Prisión Provisional (B.O.E. 2003, 13) (modifying portions of Code of Criminal Procedure that dealt with incommunicado detention).

²⁷⁴ See STC, Mar. 3, 1994 (R.T.C., No. 71, p. 797, at 825) (Magistrado don Pedro Cruz Villalón, dissenting) (expressing concern over introduction of special counterterrorism provisions, which by their nature comprise constitutional anomaly, into Code of Criminal Procedure).

²⁷⁵ See *supra* text accompanying notes 31–32 (indicating that Spanish terrorist violence has been concentrated in two periods corresponding to transition to democracy from 1976 through 1980 and Madrid train bombings of March 2004).

²⁷⁶ See JAIME JIMÉNEZ, *supra* note 36, at 312 (arguing that Spanish counterterrorism legislation has not been calibrated to changing terrorist threat and has served largely symbolic purposes).

even limited special counterterrorism competences in the legislature may lead ineluctably to their regular use.

Of course, there is no way to know whether Parliament would have gone further than it did if the existence and limits of its special powers were not constitutionally defined. Nonetheless, the Spanish example shows that these purported limits on special counterterrorism competences will not necessarily be observed. Moreover, the Spanish example suggests that at least one mechanism selected by the Spanish in service of the principle of checks and balances—i.e., the requirement that the suspension of rights be accorded by transparent legislative enactment—may actually encourage government overreaching.²⁷⁷ It may be better, from the standpoint of checks and balances, that nothing at all be said about special counterterrorism competences and that the three branches of government be left to “duke it out” in relative uncertainty.

The Spanish experience also points to a potentially more significant hypothesis about the functioning of checks and balances in general. Although there are means of constructing checks and balances other than those employed by the Spanish model, these may be doomed to fail, unless political actors and the public are committed to their success. That is, the Spanish experience suggests that an intricate system of checks and balances cannot on its own prevent government overreaching. This goal can be accomplished, if at all, only through actual political struggle.

CONCLUSION

In comparing U.S. counterterrorism legislation to that of other nations, scholars have bemoaned the United States’ relative failure to observe the requirements of the principle of checks and balances.²⁷⁸ The preceding discussion provides support for this critique, but argues that it may be incomplete. In particular, if checks and balances are viewed as a means of controlling government overreaching, attention should be paid to whether they actually accomplish that goal. The Spanish example indicates that checks and balances may not control overreaching if the executive does not respect the legitimacy of limits on its authority. In addition, the Spanish example suggests that the express recognition of special counterterrorism powers, even if accompanied by concern for checks and balances, may encourage the exer-

²⁷⁷ See C.E. art. 55(2) (allowing Parliament to suspend fundamental rights only through passage of organic law).

²⁷⁸ See, e.g., Schulhofer, *supra* note 3, at 1955 (noting that wartime checks and balances are “considered an essential component of the rule of law”).

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cise of such powers in situations where their use is not authorized. Although the transparent recognition of competing competences ostensibly serves the principle of checks and balances, transparency may lead to government overreaching. In sum, the preceding analysis highlights the risks that inhere in efforts to define special counterterrorism powers clearly, and that should be weighed against any benefits arising from open respect for the principle of checks and balances.