THE USE AND ABUSE OF DOMESTIC NATIONAL SECURITY DETENTION

Nicole Hallett[*]

ABSTRACT

Are people convicted of terrorism-related offenses so dangerous that we must bend the Constitution to keep the public safe? Or should we treat them like people who commit other crimes – by prosecuting, convicting, sentencing, and then releasing them after they have served their criminal sentences? Can we trust the government to use the power to detain people without criminal charge without abusing it? The case of Adham Amin Hassoun raises these questions. Prosecuted after 9/11 for providing support to Muslims abroad in the 1990s, and sentenced under the United States' expansive material support laws, Hassoun avoided a life sentence only to find that the government never planned to release him after he served his sentence. He became the first person held under Section 412 of the USA PATRIOT ACT, which purports to give the government broad authority to detain non-citizens who the government certifies are national security risks. The government abused that authority in Hassoun's case. But perhaps more importantly than what happened to Hassoun himself, his case illustrates the ease with which domestic national security detention can be abused by government actors with perverse political incentives. Above all, Hassoun's case should cause us to reexamine the traditional deference given to the government in national security matters, particularly when the government's targets are from disfavored groups such as Muslims or other religious and racial minorities. More than 20 years after 9/11, it is time to interrogate the national security apparatus that rose up in the aftermath of the attacks and which ensnared Hassoun in a legal battle that only ended after the government was forced to justify its actions, and failed.

[*] Associate Clinical Professor of Law, University of Chicago Law School.

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INTRODUCTION

Adham Amin Hassoun was not the most high-profile person to be convicted for terrorism-related offenses in the years after the 9/11 attacks. That title might go to Jose Padilla, the so-called "dirty bomber" and Hassoun's co-defendant.[1] Nor was he the most high profile person to finish a criminal sentence in the post-9/11 era. That would probably be John Walker Lindh, the "American Taliban," who was released from custody in May 2019.[2] The conduct for which he was convicted – providing support to Muslims fighting in conflicts in places like Bosnia, Kosovo, and Chechnya

[1] Abby Goodnough, *After Five Years, Padilla Goes on Trial in Terror Case*, N.Y. Times, May 15, 2007, https://www.nytimes.com/2007/05/15/washington/15padilla.html.

[2] Niraj Chokshi & Carol Rosenberg, *John Walker Lindh, the 'American Taliban,' Was Released. Trump Said He Tried to Stop It*, N.Y. TIMES, May 23, 2019, https://www.nytimes.com/2019/05/23/us/john-walker-lindh-american-taliban-released.html.

in the 1990s – involved no plans to attack the United States or Americans abroad and had no identifiable victims.

Yet, Hassoun would become the test case for the government's use of preventative detention on national security grounds in the United States. In April 2019, Hassoun became the first individual held under a provision of the USA PATRIOT Act and the second person held under a similar regulation promulgated by the Department of Homeland Security.[3] Hassoun's legal saga, which ended in July 2020 when he was resettled in Rwanda, is instructive for examining how the government can use these unprecedented powers and how, unconstrained by concerns about due process and the rule of law, it can lead to appalling abuse by governmental actors.

Section 412 of the USA PATRIOT Act, passed by Congress less than three weeks after the United States' invasion of Afghanistan, provides breathtakingly broad power to the government to detain individuals in the United States.[4] It purports to allow the government to detain a non-citizen indefinitely without criminal charge upon a certification that the individual poses a risk to national security.[5] It does so for individuals who have never taken up arms against the United States and who have never been on a battlefield. It collapses the distinction between the Supreme Court's long line of cases carefully limiting preventative civil detention and the government's expansive war powers overseas. Its widespread use would swallow the criminal justice system whole.

This is the next chapter of the War on Terror. Many of the individuals prosecuted for terrorism-related crimes in the aftermath of 9/11 are close to finishing their criminal sentences.[6] For many who are non-citizens, deportation may not be an option because they are stateless, their country of origin will not accept them, or the United States cannot remove them under the Convention Against Torture.[7] The government will have to make choices about what to do with such individuals. The USA PATRIOT Act is one arrow in its quiver. The related regulation promulgated after the Supreme Court's decision in *Zadvydas v. Davis* is another.[8]

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[3] Charlie Savage, *Testing Novel Power, Trump Administration Detains Palestinian After Sentence Ends*, N.Y. TIMES, Mar. 26, 2019, https://www.nytimes.com/2019/03/26/us/politics/adham-hassoun-indefinite-detention.html.

[4] 8 U.S.C. § 1226a (2020).

[5] *Id.* § 1226a(a)(3).

[6] For a summary of all terrorism prosecutions in the U.S. since 9/11, *see* the Center for National Security at Fordham University's Terrorism Prosecution Database, https://www.centeronnationalsecurity.org/terrorism-database.

[77] The Convention Against Torture contains a non-refoulement obligation that has no recognized exceptions. See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment as modified, UN Doc A/139/51, art. 3 (1984).

[8] 533 U.S. 678 (2001); 8 C.F.R. § 241.14(d).

Hassoun's case illustrates just how dangerous these detention authorities are. The government detained Hassoun for sixteen months based on anonymous jailhouse informants recounting double and triple hearsay about what Hassoun was allegedly planning to do if released into the United States. The government argued that it had no obligation to present any evidence whatsoever to prove these allegations and that the court had no role in reviewing the certification or its underlying factual allegations. After it lost this argument, the government abandoned its case on the eve of trial and conceded that it could prove that Hassoun was dangerous.

During the course of those sixteen months, the government's main witness was outed as a crook and serial liar who had fabricated the allegations against Hassoun. The government accused Hassoun of threatening a witness and then deleted video evidence that could have exonerated him. The government's other witnesses were discredited or rejected as unreliable by the court, leaving the government with only one witness willing to recount a single conversation with Hassoun to support the government's allegation that he was dangerous. A still-pending motion for sanctions accuses the government attorneys of repeatedly lying to the Court and agents of hiding exculpatory evidence.

After realizing that it was going to lose, the government mooted out the case by making a deal with Rwanda, then convinced the Second Circuit to vacate the district court's decision.[9] Hassoun is now free, but the next individual detained under these authorities will not be so lucky. The government may now feel emboldened to use its authority to detain anyone convicted of a terrorism offense after they have served their sentence, even if the factual predicate for the detention is flimsier than the case against Hassoun. If the government decides to interpret "national security" and "terrorism" broadly, it could sweep in many non-citizens who cannot be deported, rendering moot the Supreme Court's carefully cabined exceptions to the general rule against preventative detention. Even if courts eventually reject this argument, the government can hold people for months or years under these authorities, then moot out the case if it appears it will lose.

I was one of Hassoun's attorneys,[10] and can speak first hand to the ways in which the government abused its authority in his case. Hassoun's

[9] *Hassoun v. Searls,* 976 F.3d 121 (2d Cir. 2020).

[10] I began representing Hassoun in August 2018 when I was a clinical professor at the University at Buffalo School of Law together with my husband and colleague, Jonathan Manes. I later moved to the University of Chicago Law School and he moved to the MacArthur Justice Center at Northwestern Law School. We were also joined, as co-counsel, by the national American Civil Liberties Union and the New York Civil Liberties Union in April 2019. There were generations of clinical students who assisted on this case: Erin Barry, Colton Kells, Sam Winter, Jesslyn Zailac, Kerri Bejger, Marline Paul, Emily Staebell, Andrew Kij, Richard Barney, Naphtalie Librun-Ukiri, Brian Zagrocki, and Samantha Becci.

story should serve as a warning to anyone who worries about preserving individual freedoms and shows clearly that the government cannot be trusted to use national security detention judiciously. Indeed, it may be the paradigmatic case for illustrating why the rule against preventative detention remains a necessity. In the absence of court intervention, Congress must step in.

A. Background

It is not typical in landmark cases raising important constitutional issues to focus on the stories of the individuals involved, but I choose to do so here for several reasons.[11] First, it would be very easy for readers to dismiss Hassoun as a terrorist and approach his legal case through that lens. Indeed, that is what the PATRIOT Act allows the government to do. But Hassoun's story is illustrative of the dangers of reducing people to stereotypes. He is a convicted terrorist, yes, but his story is far more complex than that label would suggest. Second, understanding Hassoun's story is important to understanding the War on Terror itself: from the under reaction in the 1990s to the overreaction after 9/11, and the way we have come to view that overreaction in the years since.

My purpose here is not to disprove all of the allegations against Hassoun. That would be an impossible project and pointless given that a jury convicted him of three terrorism-related offenses. Instead, I hope to complicate the picture that the government has painted about who he is; to humanize him; and ultimately, to convince you that the government abused its power to detain him on national security grounds after he served his criminal sentence.[12]

1. Hassoun's Early Life

Adham Amin Hassoun was born in Beirut, Lebanon on April 20, 1962 to Palestinian parents who had fled Haifa, currently within Israel's borders, during the 1948 Arab-Israel War.[13] Like all Palestinian refugees born in Lebanon, he was not eligible for Lebanese citizenship. In order to have a right to remain in Lebanon, Hassoun's parents would have had to register with the

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[11] I would like to thank one of my law professors, the late Drew Days, for teaching me that understanding the story behind a case is often just as important as understanding the doctrinal significance of the holding.

[12] As one of Hassoun's attorneys, I am privy to some information that is protected by confidentiality and that I will not disclose here. Hassoun has consented to allowing me to write this article based on publicly available documents and news reports.

[13] *Hassoun v. Sessions*, Case No. 18-cv-586-FPG, ECF No. 29-1 (Declaration of Adham Hassoun)(hereinafter First Hassoun Dec.), at ¶ 2-3.

United Nations Relief and Works Agency (UNRWA), the UN agency that supports the relief and human development of Palestinian refugees.[14] For reasons that remain unclear, they failed to do so, although they did register with the Red Cross.[15] His parents' failure to register effectively barred Mr. Hassoun from ever gaining refugee status in Lebanon.[16] From Lebanon's perspective, Hassoun had no legal rights in the country.

Life in Beirut growing up was difficult for Hassoun. In 1975, when Hassoun was thirteen, the Lebanese civil war between the ruling Maronite Christian government and a coalition of Palestinian and Muslim forces broke out. Over 120,000 people were killed during the 15-year conflict, which extended all the way through Hassoun's adolescence and early adulthood. Hassoun did not participate in the fighting, but the conflict touched his life in many ways. As a teenager, he and some friends converted a car into a makeshift ambulance to take wounded to the hospital.

In 1982, when Hassoun was 20 years old, a militia associated with a Christian far-right party, Phalange, raided a Palestinian refugee camp near where Hassoun lived and massacred all of the inhabitants, allegedly to clear out Palestinian fighters who had taken up residents in the camp.[17] In a span of two days, 1,300 or more civilians were massacred in plain sight of the Israeli Defense Forces (IDF).[18] Hassoun assisted in the recovery of bodies from the wreckage. Shortly afterwards, his father was detained by the Lebanese military and held incommunicado for eight months.[19]

Throughout this period, Hassoun became acutely aware of his Muslim identity and his status as a religious minority. He developed a strong belief that Muslims had to stand up for each other, and that he personally had an obligation to help other members of the Muslim community. He continued his education at the American University of Beirut, but his studies were interrupted by civil warfare.[20] In 1986, Hassoun was himself detained for four days and tortured by Shiite militia forces.[21] Hassoun went into hiding shortly afterwards, escaping first to Dubai, then to Cyprus, then back to Dubai until

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[14] United Nations Relief and Works Agency, https://www.unrwa.org/who-we-are; *Hassoun v. Sessions*, Case No. 18-cv-586-FPG, ECF No. 29-3 (Declaration of Ardi Imseis), at ¶ 6.

[15] First Hassoun Dec., supra note 13, at ¶ 5.

[16] Imseis Dec., supra note 14, at ¶ 10.

[17] First Hassoun Dec., supra note 13, at ¶ 8; BAYAN NUWAYHED, SABRA AND SHATILA : SEPTEMBER 1982 13 (2004).

[18] NUWAYHED, supra note 17, at 13 (2004). Historians have called into question whether there were not, in fact, thousands of Palestinian fighters left in the camp at the time of the attack, but rather several dozen. *Id.* at 309.

[19] First Hassoun Dec., supra note 13, at ¶ 9.

[20] *United States v. Hassoun*, Case No. 04-cr-60001-MGC (Pre-Sentence Report) at ¶ 193.

[21] First Hassoun Dec., supra note 13, at ¶ 14.

he could apply for a visa to come to the United States.[22]

Hassoun arrived in Miami, Florida on September 10, 1989 on a tourist visa. He then applied for a student visa to get a Master's Degree at Novia Southeastern University in Miami in computer science. By that time, his mother had obtained permanent residency, and in 1990, she filed a petition to sponsor him for a green card.[23]

By all outward appearances, Hassoun continued to integrate into American life. He married his wife, Naheed, in 1991 and had three sons in 1992, 1994, and 2000.[24] He moved into a small house with his brother in a residential neighborhood in Sunrise, FL, next door to his sister, who had also immigrated to the United States.[25] After finishing his schooling, he got a job as a computer programmer at MarCom Technologies, a small software firm.

At his sentencing years later, twelve MarCom employees, including his boss, provided letters on his behalf. The letters portrayed him as "hardworking," "dedicated," "honest," and a "trustworthy employee." Personally, he was described as "considerate and compassionate," a "loyal friend," "a man of his word," and "a man I always stated would give the last $5.00 he had."[26] He was also very involved in his community. Friends wrote that he "help[ed] people in need regardless of their race, color, or social background" and was "always willing to go out of his way to help anyone, Muslim or not."[27] Others relayed instances in which Hassoun helped families who were struggling financially with food and rent money.[28] Hassoun would come to love the United States during this time, he would later explain in court documents.[29]

The government would later describe this phase of Mr. Hassoun's life very differently, painting him as a radicalized extremist who was recruiting and raising money for terrorist groups around the globe. According to court documents, the government began an investigation into an alleged Al Qaeda terrorist cell in South Florida in 1993, which expanded to include Hassoun in 1994.[30] Through wiretaps obtained under the Foreign Intelligence Surveillance Act (FISA),[31] the FBI gathered evidence of what they believed

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[22] Pre-Sentence Report, supra note 20 at ¶ 171.

[23] First Hassoun Dec., supra note 13, at ¶ 14-16.

[24] *Id.* at ¶ 17.

[25] Pre-Sentence Report, supra note 13 at ¶ 174.

[26] *Hassoun v. Sessions*, Case No. 18-cv-586-FPG, ECF No. 29-26 (Letters of Support Filed in Criminal Case).

[27] *Id.*

[28] *Id.*

[29] *Hassoun v. Sessions*, Case No. 18-cv-586-FPG, ECF No. 248-1 (Declaration of Adham Hassoun).

[30] Pre-Sentence Report, supra note 13, at ¶ 2.

[31] 50 U.S.C. § 1801, *et seq.*

was an active terrorist cell run by members of the Majid al-Iman Mosque in Ft. Lauderdale, Florida, including Hassoun.[32] Despite the government's suspicions, however, he was not arrested.[33]

In the mid-1990s, Hassoun's life in the United States took a turn. His student visa expired in 1996, but the government had not yet approved his green card.[34] Hassoun became impatient with the delay, contacting the Immigration and Nationality Service (INS) multiple times asking about why it had not be approved yet. The INS sat on the application, presumably because of the pending criminal investigation. During these years, Hassoun continued to work at MarCom while he waited for a decision on his green card application.

2. The September 11 Attacks and Their Aftermath

On September 11, 2001, everything changed – for the world and for Hassoun. The FBI initially focused its response on the direct perpetrators of the attacks in a sweeping investigation called PENTTBOM."[35] However, the FBI quickly expanded the scope to include investigations of people who had nothing to do with 9/11.[36] Over 1200 Muslims living in the United States were picked up between September 2001 and August 2002 for questioning, and some 762 non-citizens were held on immigration violations pending an investigation into their ties to terrorism.[37] A 2003 report by the Department of Justice Inspector General described how investigators used immigration violations to hold Muslims suspected of terrorist ties. According to Michael Chertoff, the Assistant Attorney General for the Criminal Division, "the

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[32] Greg Allen, *Prosecution Plays Bin Laden Tape at Padilla Trial*, NAT'L PUB. RADIO, June 27, 2007, https://www.npr.org/templates/story/story.php?storyId=11478149.

[33] *Man Tied to Bomb Suspect Is Arrested*, N.Y. TIMES, June 16, 2002, https://www.nytimes.com/2002/06/16/world/man-tied-to-bomb-suspect-is-arrested.html.

[34] *Feds tie expired visa to associate of 'dirty bomb' suspect*, CNN.com, June 16, 2002, https://www.cnn.com/2002/US/06/16/padilla.associate/index.html.

[35] J. T. Caruso, Deputy Assistant Director, Counterterrorism Division, FBI Federal Bureau of Investigation Before the House Intelligence Subcommittee on Terrorism and Homeland Defense
Washington, DC, October 03, 2001, https://archives.fbi.gov/archives/news/testimony/penttbom; Press Release, Federal Bureau of Investigations, "9/11 Investigation (PENTTBOM), https://www2.fbi.gov/pressrel/penttbom/penttbomb.htm.

[36] Memorandum, Attorney General John Ashcroft to United States Attorneys, *Anti-Terrorism Plan* (September 17, 2001).

[37] DOJ Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection With the Investigation into the September 11 Attacks*, April 2003, https://oig.justice.gov/sites/default/files/legacy/special/0306/full.pdf (hereinafter OIG Report).

Department's policy was to 'use whatever means legally available' to detain a person linked to the terrorists who might present a threat and to make sure that no one else was killed."[38]

The FBI identified these individuals in a variety of ways, from leads generated from the 9/11 investigation to tips from "members of the public suspicious of Arab and Muslim neighbors."[39] The connection of many of these individuals to the September 11 attacks was tenuous or non-existent. Many of the tips were clearly motivated by racial or religious profiling. For example:

- "Shortly before the September 11 attacks, an alien from [redacted], who worked at a [redacted] struck up a conversation with a [redacted] who paid for a purchase using an aviation-related credit card. During the conversation, the alien allegedly told the [redacted] that he would like to learn how to fly an airplane. After the September 11 attacks, the [redacted] called the FBI and recounted his conversation with the [redacted]. The INS subsequently arrested the alien when it determined he was out of immigration status, and he was considered a September 11 detainee."
- "Another alien was arrested, detained on immigration charges, and treated as a September 11 detainee because a person called the FBI to report that the [redacted] grocery store in which the alien worked, 'is operated by numerous Middle Eastern men, 24 hrs – 7 days a week. Each shift daily has 2 or 3 men. . . . Store was closed day after crash, reopened days and evenings. Then later on opened during midnight hours. Too many people to run a small store.'"[40]

In the interest of national security, the FBI subverted the common maxim that it is better to let many guilty people go free than to imprison one innocent man. A risk that a terrorist sympathizer would fall through the cracks was clearly unacceptable. Instead, "the FBI wanted to be certain that no terrorist was inadvertently set free" and acted accordingly.[41]

Hassoun was picked up as part of this operation. On June 12, 2002, The FBI's Joint Terrorism Task Force arrested him at his home in Sunrise, Florida and charged him with overstaying his student visa.[42] That day began an 18-year journey through the American legal system that only ended when

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[38] *Id.* at 13.
[39] *Id*. at 15-16.
[40] *Id.* at 16-17.
[41] *Id.* at 16.
[42] Man Tied to Bomb Suspect Is Arrested, supra note 33.

Hassoun was released to Rwanda in July 2020.

At his removal hearing, the immigration judge found him removable for overstaying his visa, and Hassoun applied for various forms of relief from removal, including asylum.[43] In response, the government submitted declarations attesting that Hassoun was ineligible for relief because he had engaged in terrorist activity.[44] The immigration judge agreed. He was ordered removed in December 2002 and his appeal was dismissed in June 2003.[45] At that point, Hassoun could have been deported. But he was not, presumably because he was stateless and had nowhere to go. Instead, he languished in detention at the Krome Detention Center in Miami, much of the time in solitary confinement.

The Supreme Court had recently decided *Zadvydas v. Davis*, which held that the government had to release non-citizens with final orders of removal after six months if their removal was not reasonably foreseeable.[46] Hassoun had filed a habeas petition in 2002 challenging his detention, but the district court found that the challenge was premature because he had not been detained for six months post-final order of removal.[47] Coincidence or not, Hassoun was indicted and moved to criminal custody on January 13, 2004, six months and twelve days after Hassoun's order of removal became final.[48]

I am not sure why the government only arrested Hassoun after September 11 even though he had been under investigation for close to a decade, but I have two guesses. First, the FBI shifted law enforcement strategies after the attacks, deciding it "needed to disrupt such persons from carrying out further attacks by turning its focus to prevention, rather than investigation and prosecution."[49] The FBI's suspicions might not have been enough for an arrest before 9/11; afterwards, with its new focus on prevention, Hassoun clearly posed an unacceptable risk.

Secondly, Hassoun had the misfortune of having come into contact with one of the most well-known figures in the War on Terror – Jose Padilla. Padilla had been arrested in Chicago one month before Hassoun, but unlike

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[43] *See Hassoun v. Sessions*, Case No. 18-cv-586-FPG, ECF No. 17-2 (BIA Decision Dated June 27, 2003), at 19. Hassoun argued that he was not out of status because he had a pending application for adjustment of status. The BIA determined that the government had discretion to not pursue removal proceedings but that Hassoun had no right to remain. *Id.* at 23.

[44] *Id.* at 19.

[45] *Id.* at 22, 31.

[46] 533 U.S. 678 (2001).

[47] *Hassoun v. Ashcroft*, Case No. 02-cv-23576, ECF No. 13 (Report and Recommendation of Magistrate Judge) ("Any challenge to the post removal detention is premature at this time.").

[48] *United States v. Hassoun*, Case No. 04-cr-60001-MGC, ECF No. 1 (Indictment).

[49] OIG Report, *supra* note 37, at 13.

Hassoun, he was a U.S. citizen and could not be held in immigration detention.[50] Instead, the government initially arrested him at the airport on a material witness warrant related to a grand jury investigation out of the Southern District of New York.[51] Then, two days before the scheduled hearing on a motion to vacate the warrant, George W. Bush executed a military order designating him as an enemy combatant and declaring that he had "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States."[52] Publicly, the Department of Justice accused Padilla of plotting to set off a radioactive "dirty bomb" in the United States.[53] Padilla quickly became known as the "dirty bomber." He was transferred to the Consolidated Naval Brig in Charleston, South Carolina and held for three years in military custody.

Padilla's detention was challenged in a habeas action, and the Second Circuit found that detaining him as an enemy combatant was unconstitutional.[54] However, on a writ of certiorari, the Supreme Court reversed, finding that Padilla had brought his habeas petition against the wrong person and had filed it in the wrong court.[55] The petition was refiled in South Carolina, where Padilla was being held.[56] The case made its way up to the Supreme Court again, but the government indicted him on terrorism charges before the Court could decide whether to hear the case.

Throughout this time, the government could have transferred Padilla into criminal custody at any time. Yet, it appears that they did not have sufficient evidence to make out a criminal case. When he was finally indicted, the charges contained no mention of the "dirty bomb" plot.[57] The government's "detain first, investigate later" strategy meant that the government often had to be creative in holding people until it could build its

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[50] Donna R. Newman, *The Jose Padilla Story*, 48 N.Y.L. Sch. L. Rev. 39, 40 (2004).

[51] *Id.*

[52] President's Order to the Secretary of Defense to detain Mr. Padilla as an Enemy Combatant, June 9, 2002, https://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/prespadilla.html.

[53] James Risen and Philip Shenon, *U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 10, 2002, https://www.nytimes.com/2002/06/10/national/us-says-it-halted-qaeda-plot-to-use-radioactive-bomb.html.

[54] *Padilla v. Rumsfeld*, 352 F.3d 695, 712 (2d Cir. 2003).

[55] *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

[56] *Padilla v. Hanft*, 389 F. Supp. 2d 678, 679 (D.S.C. 2005), *rev'd*, 423 F.3d 386 (4th Cir. 2005).

[57] Eric Lichtblau, *In Legal Shift, U.S. Charges Detainee in Terrorism Case*, N.Y. TIMES, Nov. 23, 2005, https://www.nytimes.com/2005/11/23/politics/in-legal-shift-us-charges-detainee-in-terrorism-case.html; *United States v. Hassoun*, Case 0:04-cr-60001-MGC, ECF No. 141 (Superseding Indictment).

case. [58]

Hassoun had known Padilla in South Florida – they attended the same mosque – and the government clearly believed Hassoun might be useful to the investigation. He was picked up a month after Padilla and was held in immigration detention for two years while Padilla was in military custody. During this time, Hassoun was interrogated repeatedly by the FBI about Padilla and other people he knew.[59] At one point, the government offered him a plea deal if he would testify against his co-defendants. He refused. Shortly afterwards, Hassoun was indicted, about eight months before Padilla himself was charged.[60]

3. Hassoun's Trial and Conviction

The superseding indictment filed on November 17, 2005 describes a conspiracy between five individuals, including Padilla and Hassoun and another individual, Dr. Kifah Jayyousi a Jordanian-American doctor who had previously been the chief facilities officer for the DC public schools.[61] The conspiracy purportedly revolved around funding and recruiting armed Muslim groups in Afghanistan, Bosnia, Chechnya, and Somalia in the 1990s. The government alleged that Hassoun was the mastermind of this conspiracy and that he had recruited Padilla and another man to attend terrorist training camps in the late 1990s. The indictment also alleged that Hassoun and his co-defendant, Dr. Jayyousi, had sent checks to various charities and groups that operated in these areas, and that these charities and groups were fronts for terrorist organizations.[62]

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[58] It remains unclear whether there was ever any plot involving a dirty bomb and Padilla. Later reports suggest that Padilla had gotten the idea from an internet joke and that he had used the plot to get out of fighting in Afghanistan. Al-Qaida appears to never have taken it seriously. *See* Adam Taylor, *The CIA claimed its interrogation policy foiled a 'dirty bomb' plot. But it was too stupid to work*, N.Y. Times, Dec. 9, 2014, https://www.washingtonpost.com/news/worldviews/wp/2014/12/09/the-cia-claimed-its-interrogation-policy-foiled-a-dirty-bomb-plot-but-it-was-too-stupid-to-work.

[59] Pre-Sentence Report, supra note 20, at ¶ 125-129.

[60] Later, the government would argue that Hassoun posed a danger to national security precisely because he refused to cooperate in the Padilla investigation. *See Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 261-1 (FBI Memorandum Dated February 21, 2019), at 2.

[61] The other two charged members of the conspiracy, Mohammed Youssef and Kassem Daher, had not been apprehended and remained at large. *United States v. Jayyousi*, 657 F.3d 1085, 1091 n.1 (11th Cir. 2011).

[62] Some of the charities he donated to – most notably, the Global Relief Foundation – were designated as "Specially Designated Global Terrorist" by the U.S. Department of the Treasury after 9/11. The FBI had begun an investigation into its financing and support activities prior to 9/11, but it did not become public knowledge until afterwards. *See* Office of Public Affairs, Treasury Department Statement Regarding the Designation of the Global Relief Foundation, Oct. 18, 2002, https://www.treasury.gov/press-center/press-

The indictment charged three counts that were tried at trial: conspiracy to murder, kidnap, or main persons in a foreign country,[63] provision of material support or resources "knowing or intending that they are to be used" to murder, kidnap, or main persons in a foreign country, and conspiracy to provide that material support.[64] Importantly, the government did not charge the defendants with providing material support to a designated terrorist organization,[65] presumably because the government could not prove that the material support had gone to any particular group, including Al Qaida. Instead, the claim was more general: that the defendants had conspired to kill people abroad and that they provided funds and personnel in furtherance of that goal.

The trial on the three primary offenses lasted four months. The opening statements of counsel provided starkly different interpretations of Hassoun's conduct. The government connected Hassoun and his co-defendants to the global War on Terror:

> This case is about the people that provided the material things needed to support terrorism . . . the defendants were well aware of the violence that was going on in these conflicts, violence that included acts of murder, kidnapping and maiming. And armed with this knowledge, these defendants decided to support these kinds of violence, to send equipment, money and people who could keep that kind of violence going. The evidence will be that Islamic terrorism is a global phenomenon, but it is also one that took root in our own backyard. This support cell's planning was done here, its money was collected here and its recruits came from here. South Florida is where the story of Hassoun, Jayyousi and Padilla's support and recruitment activities started, and this is where we will ask you to end it.[66]

Hassoun's defense attorney portrayed his actions differently – as being in defense of vulnerable people around the globe who were themselves

releases/Pages/po3553.aspx.

[63] 18 U.S.C. § 956.

[64] 18 U.S.C. § 371 (conspiracy to commit offense); 18 U.S.C. § 2339A(b) (providing material support). The indictment also contains several counts against Hassoun only, namely, unauthorized possession of a firearm, making false statements to the FBI, five counts of perjury related to testimony Hassoun gave in his removal proceedings, and obstruction of justice. Hassoun was never prosecuted for these offenses and they dismissed by the government in 2012. *See United States v. Hassoun*, Case No. 04-cr-60001-MGC, ECF No. 1411.

[65] 18 U.S.C. § 2339B.

[66] *United States v. Hassoun*, Case No. 04-cr-60001-MGC, Trial Transcript, May 14, 2007, 76:12-77:7.

victimized by violence.

> The evidence will show that what Adham knew about the charities is, as I've told you, that he was giving for assistance and relief. What he believed about jihad is that it was and is a noble endeavor to aid embattled Muslims. It is a blessing to do that in the Islamic religion. He believed that whatever he did he was helping to protect and defend Muslims against murder. That is not an intent to commit murder. That is just the opposite. . . . He had nothing to do with Al-Qaeda. He had nothing to do with the other organizations, this one from Lebanon, and MAK. He was just a very passionate Muslim trying to help his people.[67]

The prosecution and defense did not disagree much on the overt acts of the alleged conspiracy. Hassoun had written checks to various charities and individuals; the amounts and the payees of these checks were undisputed. He had spoken on the phone about providing this support and the government had recorded those phone calls. He had encourage Padilla to go to the Middle East and he had sent him money there. Hassoun had spoken of "jihad" and of the religious obligation to help Muslims fighting for freedom in other countries.

But there was a chasm between how the two sides interpreted the meaning of what had occurred. The disconnect took two forms: one temporal, one positional. First, Hassoun was being prosecuted in a post-9/11 world for conduct that happened before the attacks.[68] The world had changed so quickly and so drastically that it was hard to remember it changing at all. But it had changed. In the 1990s, Islamic terrorism was not viewed as a military conflict but as a transnational criminal problem; not against a global conspiracy, but as a series of acts committed by particular actors.

Moreover, the conflicts in which Hassoun was allegedly involved were not, at the time, views as skirmishes in a global war but as regional ethnic conflicts that required humanitarian intervention and aid. As Darryl Li has written:

> There have been two primary ways of characterizing armed conflicts: localized ethnic wars and a globally threatening militant Islam. The former, marked by the "post–Cold War," is presented as

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[67] *United States v. Hassoun*, Case No. 04-cr-60001-MGC, Trial Transcript, May 14, 2007, 90:13-20, 96:14-18.

[68] The only conduct that post-dated 9/11 was a single check that Hassoun wrote in November 2001. *See Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 1-1 (Sentencing Transcript), at 8:21-25.

> peripheral, regionally confined, and destabilizing in only a distant sense, producing hordes of hapless victims in need of mercy and management. While the West may decide to intervene on one side or another, formally it projects an image of neutrality as a referee or policeman committed only to lofty values such as humanitarianism. The latter, framed as "post-9/11," produces the figure of the terrorist as the one the world must band together to defeat.[69]

Before the entire U.S. government reoriented itself to fighting this purportedly singular enemy, it had fought on the same side as many of the groups that Hassoun supported. In Afghanistan, the U.S. government had armed the mujahedeen and others in the 1980s to fight back the Soviet invasion of the country, one of the last Cold War proxy conflicts.[70] The United States intervened militarily in Bosnia and Kosovo on the side of Muslim minority populations who were been persecuted and killed by the ruling Serbs. And in Chechnya, the United States had condemned Russian aggression in the region and even met with separatist leaders.[71]

After 9/11, these Muslim "mujahedeen" became soliders in the War on Terror, which colored how the government – and the jury – saw Hassoun's support of them. Before 9/11, Al Qaida was best known as the group responsible for 1998 bombing at the U.S. embassies in Tanzania and Kenya.[72] That is not to say that the United States did not recognize Islamic terrorism as a threat; it clearly did. Al Qaida was designated as a terrorist organization in 1999, and other Islamic groups were designated before that. [73] But while they had attacked U.S. assets, it was not seen as a domestic U.S. problem, and certainly had not been universalized into a global war.

The prosecution clearly understood these dynamics. The best example of how prosecutors used it to their advantage came when the they played a 1997 CNN interview of Osama Bin Laden, in which he discussed why he had declared jihad against the United States a year earlier.[74] In one of the recorded

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[69] DARRYL LI, UNIVERSAL ENEMY 5 (2019).

[70] BRUCE RIEDEL, WHAT WE WON : AMERICA'S SECRET WAR IN AFGHANISTAN, 1979-89 99, 126 (2014).

[71] Matt Vasilogambros, et al, *What You Need to Know About Chechnya*, THE ATLANTIC, April 19, 2013, https://www.theatlantic.com/politics/archive/2013/04/what-you-need-to-know-about-chechnya/438234.

[72] Andrea Mitchell and Haley Talbot, *Two far-away bombings 20 years ago set off the modern era of terror*, NBS NEWS, Aug. 7, 2018, https://www.nbcnews.com/news/world/two-far-away-bombings-20-years-ago-set-modern-era-n898196 (noting that while the embassy bombings ushered in a new era in the fight against terrorism, few Americans realized it at the time).

[73] Bureau of Counterterrorism, U.S. Department of State, Foreign Terrorist Organizations, https://www.state.gov/foreign-terrorist-organizations.

[74] Transcript, CNN Interview with Osama Bin Laden, March 1997,

conversations that was introduced at trial, Hassoun had discussed the interview, praising bin Laden for resisting U.S. policy in the Middle East in places like Israel and Lebanon.[75]

In 2007, this seemed incredibly damning – Hassoun had praised Osama bin Laden, the mastermind of the 9/11 attacks and countless other acts of terrorism against the United States. But in 1997, this future was not yet known. At that point – a year before the embassy bombings – bin Laden was someone who had declared "war" against the United States but had not yet marched into battle. And his criticism of U.S. foreign policy in Israel would have resonated with Hassoun, who had experienced that injustice first hand as a child and through his family's history as refugees.

This temporal schism caused a second disconnect. If the world was divided into "us" and "them," then there could be no definition of "jihad" that did not equate to a declaration of war against the United States. And when Hassoun undertook acts in support of "jihad," it could only mean that he was an enemy of the United States. Hassoun's argument – that he was helping needy people in conflicts around the world – did not make sense in this context. You can provide humanitarian relief to refugees, or oppressed people or freedom fighters. You cannot provide relief to terrorists. They are, by definition, unworthy of support. Once the question was set up this way at trial, the conclusion was foregone.

The otherizing of Muslims also explains why neither the government nor the jury was persuaded by the argument that "jihad" can mean many different things in Islam. "Jihad" in Arabic simply means "struggle," and can mean anything from self-actualization and affirmation of religious faith to defense of Muslims living under oppressive regimes to the kind of violent jihad the Al Qaida espoused. But if we are fighting a global war against a unified enemy, it hardly matters which definition you choose; there is no justification for giving aid and comfort to the enemy.

Hassoun, for his part, argued that he never intended any of the funds he provided to go towards supporting violence. Instead, he maintained throughout, and still maintains to this day, that he was trying to help people by providing humanitarian aid. He believed that he was supporting Padilla's religious education, not supporting his journey to Afghanistan to join an Al Qaida training camp. The jury did not buy it. After two days of deliberation, it voted to convict Hassoun and his co-defendants on all three counts.

The judge, however, pushed back on the government's case theory at sentencing. The government asked for a life sentence for Hassoun and the other two defendants, but the district court refused and instead issued a

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http://www.crono911.net/docs/Arnett1997.pdf.

[75] Abby Goodnough, *Old bin Laden Interview Is Allowed Into Padilla's Trial*, N.Y. TIMES, June 22, 2007, https://www.nytimes.com/2007/06/22/washington/22padilla.html.

sentence below the sentencing guidelines range.[76] She explained that the jury had rejected the defendants' argument that their acts were humanitarian, not criminal.[77] Still, she did not think a life sentence was appropriate. She concluded:

> No so-called act of terrorism occurred on United States soil. These defendants did not seek to damage United States infrastructure, shipping interests, power plants or government buildings. There was never a plot to harm individuals inside the United States or to kill government or political officials. There was never a plot to overthrow the United States government. . . What the defendants sought to do was provide support to people sited in various conflicts involving Muslims around Eastern Europe, the Middle East and Northern Africa that was found to be criminal. The evidence indicated the defendants sought to provide financial, personnel and material to individuals engaged in armed conflict in these areas. This material support is a violation of the statutes that form the basis of this indictment. However, there is no evidence that these defendants personally maimed, killed, or kidnapped anyone in the United States or elsewhere. Also, the government has pointed to no identifiable victims. Despite this, this behavior is a crime.[78]

As for the government's argument that Hassoun and his co-defendants were so dangerous, they must be given a life sentence, the judge found that argument specious:

> The government intercepted most of Mr. Hassoun telephones, work, home, cell and fax. The interceptions and investigation continued for many, many years. He was questioned and never charged with a crime. The government knew where Mr. Hassoun was, knew what he was doing and the government did nothing. This does not support the government's argument that Mr. Hassoun poses such a danger to the community that he needs to be imprisoned for the rest of his life.[79]

He received a sentence of 188 months less the amount of time he spent in immigration detention. The government did not appeal the sentence.[80]

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[76] Sentencing Transcript, supra note 68, at 8:14-16.
[77] *Id.* at 6:4-6.
[78] *Id.* at 5:19-25, 6:1-19.
[79] *Id.* 8:8-16.
[80] The defendants did appeal a number of different issues, including the court's decision

Hassoun served his criminal sentence in various Bureau of Prisons' facilities, including in the Communications Management Unit (CMU) in Marion, Illinois. Dubbed "Little Guantanamo"[81] or "Guantanamo North,"[82] these CMUs – opened first in Terre Haute, Indiana and then in Marion – were created in 2006 specifically to house those convicted of terrorism offenses. The CMU tightly controlled the inmates' communications, allowing them only one 15-minute phone call per week and one two-hour visit per month.[83] After the ACLU sued BOP,[84] the government began moving non-Muslims into the unit to mitigate allegations of racial profiling and religious discrimination.[85] Still, most CMU inmates were Arab and/or Muslim, including some prisoners who had not been convicted of terrorism offenses at all.[86]

One of the non-Muslim inmates who was moved into CMU, Andy Stepanian, got to know Hassoun during his stint in the unit, and later spoke about their friendship to Reuters. He described how after Hassoun learned he was vegan, he worked with the other inmates to gather vegan food for Stepanian to eat. Watching demonstrators protesting the Iraq War on television, Hassoun became teary and said to the other inmates, "I told you not everyone in this country is bad."[87]

Stepanian expanded on his friendship with Hassoun in a declaration

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to allow the prosecution to play the Osama bin Laden interview, and the government appealed Padilla's sentence. On appeal, the 11th Circuit affirmed the judgment and found that the court had imposed an unreasonably low sentence for Padilla. *United States v. Jayyousi*, 657 F.3d 1085, 1119 (11th Cir. 2011).

[81] Dean Kuipers, *Isolation Prisons Under Fire*, L.A. TIMES, June 18, 2009, https://www.latimes.com/archives/la-xpm-2009-jun-18-na-terror18-story.html.

[82] Nausheen Husain, *'Guantanamo North' prison units in the Midwest are under fire for their harsh conditions. After 10 years, one man is still fighting his case*, CHICAGO TRIB., Dec. 6, 2019, https://www.chicagotribune.com/news/ct-muslims-special-prison-units-midwest-20191206-yjcnfmcdwjcbpaovtcw3trttnq-story.html.

[83] Dan Eggen, *Facility Holding Terrorism Inmates Limits Communication*, WASH. POST, Feb. 25, 2007, https://www.washingtonpost.com/wp-dyn/content/article/2007/02/24/AR2007022401231_pf.html; Daniel McGowan, *"Tales from Inside the U.S. Gitmo,"* HUFFINGTON POST, June 8, 2009, https://www.huffpost.com/entry/tales-from-inside-the-us_b_212632.

[84] *Benkahla v. Federal Bureau of Prisons*, et al, Case No. 2:09-cv-0002, https://www.aclu.org/legal-document/benkahla-v-federal-bureau-prisons-et-al-amended-complaint

[85] Carrie Johnson, *'Guantanamo North': Inside Secretive U.S. Prisons*, NAT'L PUB. RADIO, March 3, 2011, https://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons.

[86] McGowan, supra note 83.

[87] Basil Katz, *Locked up with militants, freed American talks*, REUTERS, March 30, 2010, https://www.reuters.com/article/us-usa-prisons-rights/locked-up-with-militants-freed-american-talks-idUSTRE62T3MF20100330.

he later submitted in Hassoun's habeas case. He described Hassoun as "not Muslim enough through the eyes of the other Muslim inmates."[88] He described Hassoun's political views this way:

> Did Adham support the Palestinian struggle for self determination? Yes, but I never once heard Adham express support for violent actions to be taken against Israelis. Did Adham have criticisms of US foreign policy, especially policies that related to US wars overseas? Yes, but again I never once heard Adham express any violent sentiments towards US forces, state actors, or anyone related to those policies. I observed Adham to be a deeply principled and compassionate man that abhorred all cruelty and violence, regardless if that violence comes from Israel, the United States, or his fellow Muslims.[89]

Stepanian also told the story of how Hassoun responded to the terrorist attacks in Mumbai in 2010. After several other inmates expressed support for the terrorists' actions, Hassoun "expressed disgust over the attacks," and recounted him saying "if you kill one innocent life, all of innocence dies with them!"[90] Stepanian's overall impression of Hassoun is reminiscent of the letters of support from his co-workers and friends in his criminal case:

> What I observed of Adham while I was at the CMU was that Adham was a compassionate, kind, generous, deeply principled man, who valued human life both inside and outside of his community. Adham greeted me with warmth and attempted to diffuse something dangerous in me . . . He just convinced me to do as much good as I can, but also be good to myself, and become better for the sake of my loved ones.[91]

Stepanian credited Hassoun with helping him overcome his anger at being imprisoned, and said that he "was on a path to self-destruct or recidivate, and had it not been for people like Adham who interrupted that trajectory I don't know if I'd be where I am today."[92]

During his in Bureau of Prisons' custody, including in the CMU where all of his communications were monitored, there was not a single allegation that Hassoun was radicalizing others or expressing support for terrorism or terrorist groups, let alone planning attacks for when he got out.

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[88] *Hassoun v. Searls*, 1:19-cv-00370-EAW, ECF No. 248-3 (Declaration of Andy Stepanian), at ¶ 11.

[89] *Id.* ¶ 15.

[90] *Id.* ¶ 17.

[91] *Id.* ¶ 18.

[92] *Id.* ¶ 21

4. ICE Detention

Hassoun completed his sentence in October 2017, and was transferred to the custody of Immigration and Customs Enforcement so that DHS could effectuate his removal. There was only one problem: as a stateless Palestinian, Hassoun still had nowhere to go.[93] After six months in detention, Hassoun filed a habeas petition under *Zadvydas v. Davis*.[94]

ICE attempted to delay Hassoun's release. First, it informed that court that it was in high-level talks with Lebanon, as well as several other countries with which Hassoun or his family members had potential ties.[95] After Hassoun's counsel received confirmation that Lebanon was no longer considering the government's request, and after expert testimony from the former head of UNWRA explaining that neither Lebanon nor Israel (which controls access to the Palestinian territories) would allow Hassoun to return, the government identified a mystery country with which it was allegedly in high-level discussions.

On January 2, 2019, the district judge Frank Geraci granted Hassoun's habeas petition, rejecting the government's arguments that his removal would occur in the reasonably future.[96] It gave the government two months before it required Hassoun's release.[97] The government filed a notice at the end of January identifying two additional mystery countries with which it was in contact about Hassoun, but the judge refused to delay Hassoun's release. The government was faced with a firm deadline – March 1 – before which it needed to release Hassoun, remove him, or figure out another plan.

B. History of Prolonged Civil Detention

National security detention is not a category that courts have recognized as an exception to the general prohibition against preventative detention. Perhaps the closest courts have come was in *Koremastu v. United*

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[93] The government failed to recognize that Hassoun was stateless for quite some time. As long as a year after Hassoun was detained by ICE, the agency was issuing paperwork identifying him as "a citizen of Lebanon." *Hassoun v. Sessions*, Case No. 18-cv-00586-FPG, ECF No. 42-1 (Notice of Supplemental Evidence).

[94] *Hassoun v. Sessions*, Case No. 18-cv-00586-FPG, ECF No. 1 (Petition for Writ of Habeas Corpus).

[95] *Hassoun v. Sessions*, Case No. 18-cv-00586-FPG, ECF No. 14 (Resp.'s Response) ("To date, ICE has requested travel documents for Petitioner from Egypt, Iraq, Israel, Lebanon, the Palestinian Territories, Somalia, Sweden, and the United Arab Emirates, and discussed the matter with high-level representatives of those foreign governments.").

[96] *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019 WL 78984 (W.D.N.Y. Jan. 2, 2019).

[97] *Id.* at * 7.

States, in which the Supreme Court upheld the internment of Japanese-Americans during World War II on national security grounds.[98] That case was heavily criticized for decades before the Supreme Court finally overturned it in *Trump v Hawaii* in 2018.[99] *Korematsu* concerned the rights of U.S. citizens, however, and so overturning it did not answer the question of whether a non-citizen could be held in preventative detention on national security grounds, the question the Hassoun case raised.

National security detention lies at the intersection of three distinct types of civil, detention, each of which has developed separately in the law: civil commitment, detention of enemy combatants and prisoners of war, and immigration detention. In order to understand where national security detention fits into this legal landscape, I briefly outline the legal development of each of the three types of detention below.

1. Civil Commitment

Since its inception, the United States has embraced a general prohibition against preventative civil detention. The right against detention without trial is considered a pillar of democratic governance that dates back to the Magna Carta[100] and was enshrined in the U.S. Constitution as part of the Due Process Clause of the Fifth Amendment and the Sixth Amendment.[101] However, the constitutional right to liberty was never absolute. In 1905, the Supreme Court explained that:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.[102]

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[98] *Korematsu v. United States*, 323 U.S. 214 (1944).

[99] *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.').

[100] *Duncan v. State of La*., 391 U.S. 145, 151 (1968)("[B]y the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.").

[101] U.S. Const., Am. V ("No person shall… be deprived of life, liberty, or property, without due process of law"); Am. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…"). The Declaration of Independence also lists "depriving us in many cases, of the benefits of Trial by Jury" as one of the grievances justifying the country's independence from England.

[102] *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

In the late 18th and 19th centuries, civil commitment laws were most commonly used against individuals suffering from mental illness (who were called "lunatics" or the "insane" in the vernacular of the time), either after a jury verdict of not guilty by reason of insanity or in lieu of criminal charges.[103]

Courts justified these early laws[104] on the grounds that those with mental illness could not control their behavior and so traditional deterrence through criminal penalties would fail.[105] This same justification underpinned the early quarantine laws that allowed temporary commitment of individuals with communicable diseases to protect public health[106] – an infectious individual cannot help but be a danger to the community and they therefore present a problem not readily addressed by the criminal justice system.[107]

The categories of individuals subject to preventative detention expanded in the 20th century, even as the procedural protections for such individuals increased.[108] Most notably, states began passing laws that allowed

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[103] JUDITH LYNN FAILER, WHO QUALIFIES FOR RIGHTS: HOMELESSNESS, MENTAL ILLNESS, AND CIVIL COMMITMENT 71 (2002).

[104] Prior to the incorporation of the Due Process Clause into the Fourteenth Amendment, state courts approved of the practice of civilly committing the mentally ill. *Colby v. Jackson*, 12 N.H. 526, 533 (1842); In re Oakes, 8 Law Rep. 122, 125 (Mass.1845). The practice was later upheld by the Supreme Court. *State of Minnesota ex rel. Pearson v. Prob. Court of Ramsey Cty*., 309 U.S. 270, 274, 60 S. Ct. 523, 526, 84 L. Ed. 744 (1940).

[105] *In re Oakes*, 8 Law Rep. at 126. *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1290 (1966) ("Whether persons who are not mentally ill commit dangerous acts or avoid them is thought to depend on a process of choice. This process is respected and valued; only by not confining even those who can be accurately predicted to be dangerous can all persons be permitted to make the choice. On the other hand, whether mentally ill persons act dangerously is thought to depend not on their own choice but on the chance effects of their disease. Confining them hinders no respected process."). In fact, this is only true for a very small percentage of mentally ill individuals. Most individuals who suffer from mental illness are not dangerous and can control their behavior.

[106] *Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health*, 186 U.S. 380 (1902).

[107] These laws were also sometimes justified under the principle of *parens patriae*. FAILER, supra note 103, at 72. The Supreme Court rejected this justification in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), holding that the government could not hold a non-dangerous person indefinitely merely because it was in their best interest.

[108] Failer, supra note 103, at 80-82; *Sarzen v. Gaughan*, 489 F.2d 1076 (1st Cir. 1973); *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated on other grounds, 414 U.S. 473, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974); *Bell v. Wayne Cty. Gen. Hosp. At Eloise*, 384 F. Supp. 1085 (E.D. Mich. 1974); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Dixon v. Attorney Gen. of Com. of Pa*., 325 F. Supp. 966, 972 (M.D. Pa. 1971); *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975); *Stamus v. Leonhardt*, 414 F. Supp. 439 (S.D. Iowa 1976). The Supreme Court weighed in on

for the civil commitment of sex offenders after their criminal sentences had been completed,[109] a practice that the Supreme Court upheld in *Kansas v. Hendricks* in 1997.[110] The factual predicate of these laws – that sex offenders are at a high risk of recidivism because they have a mental defect that render their conduct compulsory – is more stereotype than truth. Recent research suggests that sex offenders are actually less likely to reoffend than other offenders.[111]

Yet, while the justification for these exceptions was sometimes dubious, it at least provided a limiting principle. The Court in *Hendricks* made clear that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment."[112] Instead, preventative detention was only permitted when there was some additional factor that rendered the traditional criminal justice system an inadequate alternative.

The Court's rationale for the "dangerousness-plus" rule does not withstand close scrutiny. Some individuals will be dangerous whether or not there is a plus factor and it is not clear why the state has a lesser interest in preventing those individuals from committing crimes. Some people will never be deterred from criminal activity, regardless of their volitional state. Why should it matter that someone commits a crime because of mental illness or because they suffer from pedophilia, rather than because of economic necessity, a traumatic childhood, drug addiction, or another of the myriad of reasons people commit crimes?

Practically speaking, however, it is clear why the Supreme Court adopted this limiting principle. Unwilling to overturn the centuries-old practice of civilly committing the mentally ill and other disfavored groups, it needed some principle beyond dangerousness to prevent the exception from swallowing the general rule against preventative detention. Without a limiting principle, the government would never have an incentive to charge someone criminally if they could accomplish the same goal (and perhaps

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the procedural protections required for civil commitment under the Due Process Clause in *Addington v. Texas*, 441 U.S. 418 (1979), holding that the government must bear the burden of showing that an individual suffers from a mental defect and is a danger to the community by clear and convincing evidence.

[109] Raquel Blacher, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 897 (1995).

[110] The Supreme Court has also upheld detention that is incident to the criminal process, such as pre-trial detention. *United States v. Salerno*, 481 U.S. 739 (1987).

[111] Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Sex Offender Management Assessment and Planning Initiative, Ch. 5: Adult Sex Offender Recidivism, https://smart.ojp.gov/somapi/chapter-5-adult-sex-offender-recidivism.

[112] *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

even hold someone longer) by declaring them a danger to the community. Without a limiting principle, the criminal justice system would quickly become obsolete, as the government would undoubtedly decide that it preferred not to grant individuals the constitutional rights that come with criminal prosecutions. In order to avoid this slippery slope, the Supreme Court has carefully limited the categories of individuals who can be detained because they are dangerous even if they have not committed any crime.

2. Enemy Combatants and the Laws of War

Rules regarding detention in international conflicts are rooted in international, not constitutional, law. The Third Geneva Convention of 1949 allows the detention of prisoners of war for the duration of hostilities, requiring their release "without delay after the cessation of active hostilities."[113] In order to legally detain an individual under the Third Geneva Convention, a nation must only designate the individual as a prisoner of war as defined by the Convention; no other proceeding is required.[114] Historically, most prisoners of war have not been held on U.S. soil, and thus, have not been able to challenge their detention in U.S. courts.[115] However, there have been exceptions, most notably during the Civil War and in the War on Terror, during which individuals detained in Afghanistan were sent to Guantanamo Bay, Cuba, over which the United States exercises territorial jurisdiction.[116]

In these cases, the Supreme Court has made quite clear that detaining enemy combatants during hostilities is legal. As the Supreme Court explained in *Hamdi v. Rumsfeld*:

> The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." *Ex parte Quirin, supra*, at 28, 30, 63 S.Ct. 2. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.[117]

But the *Hamdi* Court put several important limitations on the government's power to detain enemy combatants. First, Hamdi – a U.S.

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[113] Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364, Art. 118.

[114] *Id*. at Art. 4.

[115] *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (nonresident enemy aliens have no right to petition for habeas corpus).

[116] *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

[117] *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

citizen – was captured on the battlefield in Afghanistan. The Court distinguished that case from *Ex parte Milligan*, a Civil War era case in which the Court had found that a citizen arrested in a state not in rebellion (Indiana) in his home could not be tried by military commission. Second, enemy combatants must be given a chance to challenge their designation as enemy combatants. The Court left open exactly what process was due. A few years later, in *Boumediene v. Bush*,[118] the Court held that those rights included the right to petition for a writ of habeas corpus under the Constitution, and lower courts have since provided guidance on what exactly must occur in those habeas proceedings.[119]

Still, in the years after 9/11, the government attempted to expand its well-established war power to include individuals detained on U.S. soil. Padilla was one example of this. Another example was the case of Ali Saleh Kahlah al-Marri, a lawful permanent resident who was arrested in December 2001 as a material witness and then indicted on credit card fraud charges before being designated as an unlawful enemy combatant and transferred to military custody in 2003.[120] The government never provided a reason for transferring Al-Marri to military custody after he had been criminally charged, but the timing of the transfer suggests that the government was concerned either about what would come out during the pre-trial proceedings or that it would be unable to obtain a guilty verdict. The transfer came on the eve of a pre-trial hearing on Al-Marri's motion to suppress illegally obtained evidence.[121]

The Fourth Circuit initially struck down Al-Marri's detention, holding that the government could not exercise its power to detain enemy combatants with respect to individuals who the government did not allege had ever fought against U.S. forces overseas:

> The core assumption underlying the Government's position . . . seems to be that persons lawfully within this country, entitled to the protections of our Constitution, lose their civilian status and become "enemy combatants" if they have allegedly engaged in criminal conduct on behalf of an organization seeking to harm the United States. Of course, a person

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[118] 553 U.S. 723, 728 (2008).

[119] *See, e.g.*, *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2011)(determining what evidence the government can use to prove enemy combatant status); *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) (determining that use of preponderance of the evidence standard in detention hearings did not violate the Constitution and that hearsay was admissible).

[120] Jane Meyer, *The Hard Cases*, THE NEW YORKER, Feb. 23, 2009, https://www.newyorker.com/magazine/2009/02/23/the-hard-cases.

[121] Jonathan Hafetz, *Al-Marri's End and the Failed Experiment of Domestic Military Detention*, https://www.justsecurity.org/19168/al-marris-failed-experiment-domestic-military-detention.

> who commits a crime should be punished, but when a civilian protected by the Due Process Clause commits a crime, he is subject to charge, trial, and punishment in a civilian court, not to seizure and confinement by military authorities.[122]

The Fourth Circuit then took the *Al-Marri* decision *en banc*, producing a dizzying array of decisions that did little to resolve the legality of Al-Marri's detention,[123] though the *en banc* court did conclude that if what the government said about Al-Marri was true, the government could detain him as an enemy combatant. The Supreme Court agreed to hear the case,[124] but the government – as in Padilla's case – mooted it out before it could be heard[125] by transferring Al-Marri back to criminal custody.[126] Though the government's motives were again unclear, it was understood by commentators at the time as an admission by the government that it was concerned about losing at the Supreme Court.[127]

Both Al-Marri and Padilla were eventually convicted of criminal offenses,[128] and when Al-Marri completed his criminal sentence in 2015, he was removed to Qatar without incident,[129] deferring the question of what the government could do in cases in which removal was impossible. But even though the Supreme Court did not have an opportunity to weigh in on the legality of either Padilla's or Al-Marri's detention, the legal challenges discouraged the government from exercising its authority in this manner. After 2003, when both Padilla and Al-Marri were put in military detention, the United States has not done so for any other suspected terrorist caught on U.S. soil.[130]

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[122] *Al-Marri v. Wright*, 487 F.3d 160, 186 (4th Cir. 2007).

[123] *Al-Marri v. Pucciarelli*, 534 F.3d 213, (4th Cir. 2008).

[124] *Al-Marri v. Pucciarelli*, 555 U.S. 1066 (2008).

[125] *Al-Marri v. Spagone*, 555 U.S. 1220 (2009).

[126] Press Release, Dep't of Justice, Ali Al-Marri Indicted for Providing Material Support to Al-Qaeda, Feb. 27, 2009, https://www.justice.gov/opa/pr/ali-al-marri-indicted-providing-material-support-al-qaeda.

[127] Hafetz, supra note 121.

[128] *See* Section I.B, supra; Press Release, Department of Justice, Ali Al-Marri Pleads Guilty to Conspiracy to Provide Material Support to Al-Qaeda, April 30, 2009, https://www.justice.gov/opa/pr/ali-al-marri-pleads-guilty-conspiracy-provide-material-support-al-qaeda.

[129] Missy Ryan, *Qatari Man, Once Held as Enemy Combatant, is Quietly Released from Supermax Prison*, WASH. POST, Jan. 20, 2015, https://www.washingtonpost.com/world/national-security/qatari-man-once-held-as-enemy-combatant-is-quietly-released-from-supermax-prison/2015/01/20/0ada86ec-a0d0-11e4-9f89-561284a573f8_story.html.

[130] Hafetz, supra note 121.

3. Immigration Detention

Immigration detention was historically viewed through a different lens than civil commitment because of the unique power of the federal government over immigration; it implicates national sovereignty and foreign relations in a way that other civil detention does not.[131] Nor does immigration detention resemble military detention during armed conflict – most immigrants arrive from countries with whom the United States is not at war.

Congress passed the first statute authorizing immigration detention in 1891,[132] shortly after passing the infamous Chinese Exclusion Laws that barred the admission of most laborers from China.[133] It was not until five years later that the Supreme Court weighed in on the legality of immigration detention. In *Wong Wing v. United States*, the Supreme Court officially sanctioned "temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens"[134] as a means of bolstering the sovereign authority to exclude non-citizens from the country.

The Court did not explain exactly why detention was necessary to protect national sovereignty, though a half-century later it explained that "[d]etention is necessarily a part of t[he]deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings."[135] The real reason the government wanted immigrants detained at the border was probably less a concern about public safety and more a concern about accidentally granting them rights that would complicate their removal. If an immigrant was released into the United States, he was no longer "at the border," where the federal government's plenary power over immigration was at its highest.[136]

Throughout the early to mid-20th century, the U.S. detained millions of immigrants, most notably on Angel Island in California and Ellis Island in New York.[137] Although *Wong Wing* did not contemplate prolonged detention,

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[131] *Demore v. Kim*, 538 U.S. 510, 522 (2003) ("[A]ny policy toward [immigrants] is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.").

[132] CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON : AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 27 (2019).

[133] *Id.* at 25.

[134] *Wong v. United States*, 163 U.S. 228, 235 (1896).

[135] *Carlson v. Landon*, 342 U.S. 524, 538 (1952).

[136] GARCÍA HERNÁNDEZ, supra note 132, at 25; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (explaining that the Due Process Clause of the Fourteenth Amendment protects "all persons within the territorial jurisdiction" of the United States).

[137] *Id.* at 29.

a later case – *Shaughnessy v. United States ex rel. Mezei* – did. In *Mezei*, the Supreme Court upheld the long-term detention of an arriving resident on Ellis Island.[138] In *Knauff v. Shaughnessy*, decided a few years before *Mezei*, the Supreme Court rejected a due process challenge brought by a non-citizen in removal proceedings, declaring that non-citizens did not enjoy the protections of the Due Process Clause except to the extent granted by Congress. [139] These cases seemed to place immigration detention into an entirely different category from civil commitment, and put few restrictions on its use.

Angel Island was closed in 1940 and Ellis Island in 1954 and for a few decades, immigration detention fell out of favor. However, beginning in the 1980s after the Mariel boatlift precipitated the detention of over 10,000 Cubans, immigration detention became politically popular once again, and the numbers of immigrants in detention rose, from 7,000 immigrants per day in 1994 to more than 50,000 per day in 2019.[140] The rise in detained immigrants required more detention facilities. Private prison companies fulfilled part of the need; local jails fulfilled the rest.[141]

In 1996, Congress enacted a broad mandatory detention statute for many immigrants with criminal convictions and detention of immigrants without criminal records increased as well.[142] At the same time, the number of immigrants in removal proceedings skyrocketed, causing long delays and increasing the time immigrants spent in detention fighting their removal.

In 2003, the Supreme Court again affirmed that immigration detention was legal, holding in *Demore v. Kim*, holding that the government can detain a non-citizen "for the limited period of his removal proceedings,"[143] although it left open precisely what a "limited period" meant.[144] *Demore* also added an additional justification for limited detention during removal proceedings – "releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight."[145]

However, in *Zadvydas v. Davis*, decided a few months before September 11, the Court addressed immigration detention that was not for a limited period but was potentially indefinite.[146] In many cases, the

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[138] *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

[139] 338 U.S. 537 (1950).

[140] Katharina Buchholz, Number of Immigrant Detainees Rises Quickly, https://www.statista.com/chart/17977/number-of-detainees-in-facilities-of-dhs-immigration.

[141] ADAM GOODMAN, THE DEPORTATION MACHINE 190 (2020).

[142] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. 104–208, 110 Stat. 3009-546, enacted September 30, 1996, Art. 236(c).

[143] *Demore*, 538 U.S. at 531.

[144] *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

[145] *Demore*, 538 U.S. at 520.

[146] *Zadvydas v. Davis*, 533 U.S. 678 (2001).

government cannot effectuate removal after a final order of removal is entered. This can occur for several different reasons: if an individual is stateless, if their country of nationality will not accept them, or if the government has granted deferral of removal because of international non-refoulement obligations under the 1984 Convention Against Torture.

An individual detained in these circumstances may never be removed, and so it is distinct from the brief detention contemplated by *Wong Wing*. For the first time, the Supreme Court determined that this kind of prolonged civil detention was subject to the same rules as traditional civil commitment, namely, that there must be a "special justification, such as harm-threatening mental illness that outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'"[147] A few years later, the Supreme Court extended this ruling to cover non-citizens caught at the border as well as those detained in the United States.[148]

Though *Zadvydas* was technically decided on constitutional avoidance grounds – the Court determined that the statute should be construed not to authorize prolonged detention after six months unless removable was reasonably foreseeable – the decision made clear that a statute that allowed for the indefinite detention of non-citizens solely on the grounds of dangerousness would not pass constitutional muster. Unlike in previous cases, the Court did not cabin immigration detention in a separate category, but instead treated it as it would any other kind of civil detention.

But the Court left open the possibility that additional special justifications could be recognized. Justice Breyer made clear that his opinion did not "consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[149]

C. National Security Detention

After Hassoun could no longer be held under 8 U.S.C. § 1231 as a normal immigration detainee, [150] the government faced a dilemma. Hassoun

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[147] *Id.* at 690 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). It is unclear after *Zadvydas* and *Clark* whether *Mezei* remains good law. *See Zadvydas v. Davis*, 533 U.S. 678, 703 (2001)(Scalia, J., dissenting) ("The Court expressly declines to apply or overrule *Mezei*, but attempts to distinguish it—or, I should rather say, to obscure it in a legal fog.").

[148] *Clark v. Martinez*, 543 U.S. 371 (2005).

[149] *Zadvydas*, 533 U.S. at 696.

[150] *Hassoun v. Sessions*, Case No. 18-CV-586-FPG, 2019 WL 78984, at *6 (W.D.N.Y. Jan. 2, 2019) ("Accordingly, because the Court cannot conclude that there is a significant likelihood of removal in the reasonably foreseeable future, Petitioner's continued detention is no longer authorized under § 1231(a)(6).").

was not an enemy combatant, and thus could not be held under the laws of war, but neither did he fall into any of the categories in which the Supreme Court had previously held could justify civil preventative detention in the domestic context – he was not suffering from mental illness, for example. Instead, the government turned to two other post-9/11 detention authorities that had never been tested in court: a regulation promulgated after the Supreme Court's decision in *Zadvydas* and a provision of the USA PATRIOT Act.

1. A. Section 412 of the USA PATRIOT ACT

Section 412 of the USA PATRIOT Act, signed into law on October 26, 2001,[151] purports to give the government broad authority to detain non-citizens convicted or suspected of terrorism offenses.[152] In order to detain an individual under Section 412, the Secretary of Homeland Security must first certify that they have

> reasonable grounds to believe that the [non-citizen]--
> (A) is described in section 1182(a)(3)(A)(i), 1182(a)(3)(A)(iii), 1182(a)(3)(B), 1227(a)(4)(A)(i), 1227(a)(4)(A)(iii), or 1227(a)(4)(B) of this title; or
> (B) is engaged in any other activity that endangers the national security of the United States.[153]

The statutes cited in Subsection (a)(3)(A) are sections of the Immigration and Nationality that allow for the exclusion or deportation of non-citizens that have engaged in terrorist activity or have committed other national security related offenses, such as espionage or attempted overthrow of the U.S. government by violent or other unlawful means.[154] None of these statutes require a *conviction*.[155] Instead, a unilateral assertion by the executive

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[151] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), Pub. L. 107–56, 115 Stat 272, October 26, 2001.

[152] 8 U.S.C. § 1226a.

[153] 8 U.S.C. § 1226a(a)(3). Although the statute references the Attorney General, certification authority transferred to the Secretary of Homeland Security pursuant to the Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135, enacted November 25, 2002; 8 U.S.C. § 1103.

[154] 8 U.S.C. §§ 1182(a)(3)(A)(i), 1182(a)(3)(A)(iii), 1182(a)(3)(B), 1227(a)(4)(A)(i), 1227(a)(4)(A)(iii), 1227(a)(4)(B).

[155] *See, e.g.*, 8 U.S.C. § 1182(a)(3)(A)(Attorney General must have "reasonable ground to believe" that a non-citizen has engaged in espionage or other conduct that threatens national security.).

branch that someone falls within the statute is sufficient. In removal proceedings, the government must prove these grounds of deportability by clear, unequivocal, and convincing evidence,[156] but Section 412 provided only that the government have "reasonable grounds to believe," which is akin to a probable cause standard.[157]

Subsection (a)(3)(B) is even broader, allowing the government to certify an individual "engaged in any other activity that endangers the national security of the United States."[158] If the government chose to interpret this definition capaciously, it could encompass many more individuals than those we would think of as "terrorists" in the traditional sense of the word. For instance, could someone accused of alien smuggling be certified as endangering national security? What about a drug trafficker? Or those who took part of the Black Lives Matters protests in 2020, some of which ending in looting? Or the pro-Trump insurrectionists who attempted to take over the Capitol? It presumably must mean something more than run-of-the-mill petty crime, but what counts beyond that is unclear.

Once an individual is certified, the statute permits two kinds of national security detention. First, the statute provided for detention prior to the initiation of criminal or removal proceedings, and gives the government seven days to either charge individuals criminally, or initiate removal proceedings in immigration court.[159] Normally, an individual arrested on criminal charges must be arraigned within 48 hours, or 72 hours over weekends.[160] Thus, the statute provides the government with 4-5 additional days within which it can detained suspected terrorists before bringing criminal charges or filing a notice to appear.

As it turns out, the government had already granted itself this power in an interim regulation issued on September 20, 2001,[161] and it is far from clear the government needed this power anyway. Previously, the regulation had required that the INA issue a notice to appear ("NTA"), the equivalent of a charging document, within 24 hours of arrest. But the interim regulation expanded this time period to 48 hours and also provided that the time limitation did not apply "in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional

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[156] *Woodby v. INS*, 385 U.S. 276 (1966).

[157] *Yusupov v. Attorney Gen. of U.S.*, 650 F.3d 968, 975 (3d Cir. 2011) ("reasonable grounds to believe" under the INA is equivalent to probable cause"); *United States v. Gorman*, 314 F.3d 1105, 1114 (9th Cir. 2002)("The phrase 'reasonable grounds to believe' . . . is often synonymous with probable cause.").

[158] 8 U.S.C.§ 1226a(a)(3)(B).

[159] *Id.* §1226a(a)(5).

[160] *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); Fed. R. Crim. Pro 5.

[161] Custody Procedures, 66 FR 48334-01, 2001 WL 1094737 (Sept. 20, 2001).

reasonable period of time,"[162] essentially permitting indefinite detention absent some sort of legal challenge. The Office of the Inspector General later found that 41% of the individuals arrested as part of the investigation into the 9/11 attacks were not served an NTA within three days, and some were held for more than a month before being charged.[163]

Perhaps most importantly, the INA has never contained a requirement for when the non-citizen must be served with the NTA, when the NTA must be filed in court, or when the non-citizen must receive a hearing in immigration court. To the contrary, the first master calendar hearing cannot be scheduled any *sooner* than 10 days after the government serves a notice to appear in order to give the non-citizen time to find counsel.[164] In practice, it is common for non-citizens to wait weeks or months to have a first appearance in immigration court.[165] During this time, the executive branch makes the determination about whether an individual is removable and subject to mandatory detention. A non-citizen can challenge that determination at his first court hearing, but even then, the standard of review is extremely deferential to the government.[166] No court has held that the Due Process Clause requires that non-citizens must receive a hearing sooner than 7 days after arrest and in 2001, no court had considered the question at all.[167]

Finally, the NTA is much less detailed than a criminal indictment; the government can charge someone as removable without providing anything more than the statutory provision. Thus, all the government would have to do is allege that a non-citizen "has engaged in terrorist activity" and could hold them for months before being required to provide any evidence at all.[168] Moreover, because of the certification requirements in Section 1226a,

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[162] 8 C.F.R. § 287.3(d).

[163] OIG Report, supra note 37, at 30. In response to the OIG report on abuses of immigration detention after 9/11, a bill was introduced to change the law to require that ICE serve a notice to appear within 48 to 72 hours of being arrested on immigration violations, but that bill did not pass. *See* Civil Liberties Restoration Act of 2005, H.R.1502, https://www.congress.gov/bill/109th-congress/house-bill/1502?s=1&r=50.

[164] 8 U.S.C. § 1229(a)(2)(B).

[165] *See, e.g.*, *Vazquez Perez v. Decker*, No. 18-CV-10683, 2020 WL 7028637, *3-4 (S.D.N.Y. Nov. 30, 2020) (average time to first appearance is 11 to 42 days); *Cancino Castellar v. McAleenan*, 388 F. Supp. 3d 1218, 1237 (S.D. Cal. 2019)(average time to first appearance is 1 to 3 months).

[166] *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999)(non-citizen bears the burden of showing that the government is "substantially unlikely" to prevail on his charges of removability).

[167] *Vazquez Perez*, 2020 WL 7028637, at *15 (setting 10-day limit between arrest and presentment in immigration court).

[168] For a sample Notice to Appear, see National Immigrant Justice Center, Sample Notice to Appear, https://immigrantjustice.org/for-attorneys/legal-resources/file/sample-notice-appear.

including the fact that either the Secretary or Deputy Secretary of Homeland Security must issue the certification, whenever the government has the grounds to invoke it, it will be easier to simply issue an NTA.

In short, if the government wants to detain a non-citizen while pursuing a removal order on the grounds that the non-citizen is engaged in terrorist activity, it is extremely easy for them to do so. And the government can transfer the non-citizen to criminal custody and charge them at any time during the removal process or afterwards. There is simply no circumstance in which the government would need these additional 4-5 days of (a)(3) detention.

In fact, this sequence of events is precisely what happened to Hassoun. He was initially arrested on the charge of overstaying his visa. When he challenged his detention, the immigration judge, and subsequently the BIA, found that he was properly detained under the mandatory detention statute.[169] The government then held him in immigration detention for a year and a half before transferring him to criminal custody. In other words, the removal process bought the government an additional eighteen months during which it could make its criminal case against Hassoun, much longer than the 4-5 days allowed under the USA PATRIOT Act.

Why did Congress pass a statute creating an extraordinary new form of preventative detention that the government did not actually need? The answer is in the legislative history. The Bush Administration's original draft of the bill that eventually became the USA PATRIOT Act, called the Anti-Terrorism Act of 2001, contained *no* requirement that criminal or removal proceedings be initiated within a set period of time.[170] But Congress pushed back, and the bill was amended to include the 7-day limitation.[171]

Why Congress did not just remove it entirely is a mystery. Perhaps members of Congress were not familiar enough with the immigration system to know how few rights non-citizens have once they enter the system, and how easy it would be for the government to detain non-citizens for months or years during their removal proceedings without relying on Section 412. Not surprisingly, it appears that the government has never invoked Section 412 with respect to this initial period of detention. It simply has never had reason to.

The second kind of national security detention authorized by Section 412 concerns individuals certified under (a)(3) whose removal proceedings have concluded but for whom removal is unlikely in the reasonably

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[169] BIA Decision Dated Feb. 24, 2003, supra note 43.

[170] Anti-Terrorism Act of 2001, Sec. 202, https://www.epic.org/privacy/terrorism/ata2001_text.pdf.

[171] Senate Consideration, Amendment, and Passage of S. 1510, 2001 WL 35670364, Oct. 11, 2001, *36.

foreseeable future – the exact situation addressed by the Court in *Zadvydas*. Subsection (a)(2) instructs that once an individual is certified pursuant to (a)(3), the government "shall maintain custody of such an alien until the alien is removed from the United States" even if the individual has won relief from removal.[172] But this authority is subject to a limitation that the certified individual "may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person."[173]

Like the seven-day charging requirement, this limitation did not exist in the first draft of the Anti-Terrorism Act of 2001;[174] it was added in committee by two members of Congress, Jerry Nadler and Barbara Lee, who would go on to vote against the USA PATRIOT Act.[175] Concerns about the constitutionality of the statute without the limitation were clearly what motivated their colleagues to vote for the amendment; *Zadvydas* was explicitly referenced as the reason for the amendment.[176]

Some Senators continued to express reservations about giving the government such broad-reaching detention authority even with the limitations. Senator Russ Feingold objected to Section 412 because "it falls short of meeting even basic constitutional standards of due process and fairness. The bill continues to allow the Attorney General to detain persons based on mere suspicion. Our system normally requires higher standards of proof for a deprivation of liberty." He also expressed concern that the government would use the statute to detain individuals engaged "innocent associational activity."[177] Other Senators expressed hope that the government would use the power sparingly,[178] but in the end, only Feingold voted against it; the USA PATRIOT Act passed the Senate 98-1,[179] and the House of Representatives 357–66.[180]

Section (a)(6) detention allows for the indefinite detention of an even

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[172] 8 U.S.C. § 1226a (a)(2).

[173] *Id.* § 1226a(a)(6).

[174] Anti-Terrorism Act of 2001, Sec. 202, https://www.epic.org/privacy/terrorism/ata2001_text.pdf.

[175] House Report No. 107–236, USA PATRIOT Act, 2001 WL 34113833, *56.

[176] Senate Consideration and Passage of H.R. 3162, 2001 WL 35670371, Oct. 25, 2001, *157 (("For aliens whose removal is unlikely in the reasonably foreseeable future, the Attorney General is required to demonstrate that release of the alien will adversely affect national security or the safety of the community or any person before detention may continue beyond the removal period. Indefinite detention of aliens is permitted only in extraordinary circumstances. *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001).")

[177] 147 Cong. Rec. S10990-02, 147 Cong. Rec. S10990-02, S11022, 2001 WL 1297566.

[178] 147 Cong. Rec. S10990-02, 147 Cong. Rec. S10990-02, S11004, 2001 WL 1297566.

[179] https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00313.

[180] Final Vote Results for Roll Call 398, https://clerk.house.gov/evs/2001/roll398.xml.

broader category of individuals than Section (a)(3). Whereas Section (a)(3) requires a connection to terrorism or other national security concerns, Section (a)(6) allows the government to detain an individual on national security grounds *or* if they "threaten . . . the safety of the community or any person." In other words, the government does not need to assert than an individual is a national security risk; a danger to any individual person will suffice to be held under (a)(6) indefinitely.

Moreover, the statute does not provide the individual with any process before they are placed in (a)(6) detention; instead, a non-citizen certified under Section (a)(2) and held under (a)(6) can only challenge that certification after the fact in a habeas petition.[181] Given the speed at which litigation occurs, it could be a year or more before the government is forced to justify the detention to anyone other than itself.

Until Hassoun, the government did not use its authority under (a)(6), and the reason, again, is how the government has used a series of overlapping authorities to hold individuals suspected of terrorism for as long as possible. Many of the individuals for whom the government would want to use Section 412 to detain were prosecuted criminally for terrorism-related offenses and often faced long sentences after juries inevitably convicted them. But as those criminal sentences come to an end, the government will face decisions about what to do. Section 412 provides one available option.

2. 8 C.F.R. § 241,14(d)

A few weeks after the enactment of the USA PATRIOT Act, the government gave itself an additional detention authority it could use to hold suspected terrorists. In an interim regulation promulgated on November 14, 2001, the Department of Justice ("DOJ") laid out a number of "special circumstances" that it contended would justify holding a non-citizen past six months in post-final order removal even when removal was not likely in the reasonably foreseeable future.[182] Though this regulation took on increased importance after 9/11, it is likely that the DOJ had begun work on the regulation prior to the attacks, especially given the normal timeline for regulatory action.[183] Instead, the Supreme Court's ruling in *Zadvydas* the previous June precipitated the promulgation of the regulation.[184]

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[181] 8 U.S.C.§ 1226a(b)(1).

[182] Continued Detention of Aliens Subject to Final Orders of Removal, 66 FR 56967-01, *56967, 2001 WL 1408247 (Nov. 14, 2001).

[183] DOJ determined it had "good cause" to forgo the regular notice and comment process because "it is essential to implement without delay a standardized plan for dealing with the detention or release of numerous aliens whom the Service had determined should not be released because of a danger to the public or a risk of flight." *Id.* at 56975.

[184] *Id*. at 56967.

8 C.F.R. § 241.14 allows for the continued detention of individuals in four categories: (1) "Aliens with a highly contagious disease that is a threat to public safety"; (2) "Aliens detained on account of serious adverse foreign policy consequences of release"; (3) "Aliens detained on account of security or terrorism concerns"; and (4) "Detention of aliens determined to be specially dangerous" because of a mental condition or personality disorder. The first, second, and fourth category clearly track the case law of civil commitment. As explained, supra, quarantine laws and civil commitment of the mental ill are well-established exceptions to the general rule against preventative civil detention.

The third category – non-citizens detained on account of security or terrorism concerns – creates the type of prolonged national security detention that the USA PATRIOT Act had created statutorily the month before, though the regulation differs from the statute in minor ways. In order to be held under Section 241.14(d), the Director of ICE must make a determination that:

> (i) The alien is a person described in section 212(a)(3)(A) or (B) or section 237(a)(4)(A) of (B) of the Act or the alien has engaged or will likely engage in any other activity that endangers the national security;
>
> (ii) The alien's release presents a significant threat to the national security or a significant risk of terrorism; and
>
> (iii) No conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism, as the case may be.[185]

The ICE Director then makes a recommendation to the Secretary of Homeland Security, who can certify the detention for successive six-month periods.

The statute and the regulation are substantively similar, though there are differences. Subsections (i) and (ii) collapse the requirements of subsections (a)(3) (initial certification) and (a)(6)(certification for prolonged detention) of Section 412 into a single certification. Also, the regulation does not contain the "safety to the community or any person" language of Section 412, at least superficially providing a narrower definition of whom can be detained, and it contains an additional requirement that DHS must determine that there are no conditions of release that could avoid the threat posed by releasing the individual.

Procedurally, the regulation and the statute diverge. While Section 412 provides for judicial review of the certification in a writ of habeas corpus,

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[185] 8 C.F.R. § 241.14(d)(1).

there is no judicial review provided for in the regulation, and in fact, the regulation explicitly strips jurisdiction from immigration judges and the Board of Immigration Appeals.[186] Nor is there an administrative review process beyond the initial unilateral executive decision to invoke the regulation, other than a pro forma re-certification that must happen every six months. The non-citizen can submit their own evidence contesting the determination, but the non-citizen has no right to see the evidence against them. By putting the onus on the non-citizen to develop the record, the regulation requires the non-citizen to prove a negative when the government has no duty to disclose the grounds for its determination. This is particularly problematic because the negative the non-citizen needs to prove is about future events. As DOJ explained when it promulgated the regulation:

> A decision to continue detention of a removable alien because of national security or terrorism concerns requires a predictive judgment. It is an attempt to predict an alien's possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might act in a way that creates a real and legitimate national security threat or an imminent threat to public safety. The decision may be based upon past or present conduct, but it also may be based on a wide variety of other circumstances. Thus, the attempt to define not only the individual's future actions, but those of outside and unknown influences renders the decision an inexact science at best.[187]

Needless to say, this description of the certification process is not reassuring, considering that the regulation allows for indefinite detention without judicial review and minimal administrative procedures that would mitigate the risk of an erroneous decision.

Subsection (d) provides for much less process than other subsections of the regulation. For example, for non-citizens who are specially dangerous due to "mental condition or personality disorder," the regulation provides for review of detention in a hearing in immigration court.[188] DHS must "attach a written statement that contains a summary of the basis for the Commissioner's determination to continue to detain the alien, including a description of the evidence relied upon to reach the determination regarding the alien's special

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[186] 8 C.F.R. § 241.14(d)(a)(2) ("[I]mmigration judges and the Board do not have jurisdiction
with respect to aliens described in paragraphs (b),(c), or (d) of this section.").

[187] Continued Detention of Aliens Subject to Final Orders of Removal, 66 FR 56967-01, 56973 (citations, brackets, and quotation marks omitted).

[188] 8 C.F.R. § 241.14(f)(3),(g)

dangerousness" and must "attach copies of all relevant documents used to reach its decision to continue to detain the alien."[189] At the hearing, the non-citizen has the right to cross-examine any government witnesses, including the medical professional who conducted any mental health examination.[190] The non-citizen can appeal an adverse decision to the Board of Immigration Appeals, ensuring two levels of review.[191]

The reasons for the differences in the procedural protections of each subsection are obvious. Not wanting to run afoul of *Addington v. Texas* and *Foucha v. Louisiana*,[192] the government preempted constitutional challenges by writing a regulation for detaining of the mentally ill that provided ample process. But in the context of suspected terrorists, there was no case law – because it had never been attempted before – and so the government provided almost no process.

There is no way to know how often the government has utilized this regulation in the years since it was promulgated. Though the government enacted detailed regulations implementing the *Zadvydas* decision, the government often rubber stamps decisions to continue detention. In many cases, particularly with respect to high-security detainees, the only possibility of release comes with the filing of a habeas petition, something out of reach for most detainees. Thus, for individuals who never file a habeas petition under *Zadvydas*, the government may not need to invoke the regulation to detain them indefinitely. It is also possible that ICE has invoked the regulation in cases that never became public because the detainee did not challenge the certification in court.

Nevertheless, we know that DHS has invoked the regulation at least once because it was the subject of a court challenge. Mohammed Rashed pleaded guilty in 2002 to the 1982 bombing of a PanAm flight from Tokyo to Honolulu in which a 16-year-old died.[193] His criminal sentence ended in 2013, and he was transferred to ICE custody.[194] But Rashed was a Jordanian-born Palestinian and, like Hassoun, was stateless. A habeas petition was not filed until he had already been in immigration detention for two years.[195] In

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[189] *Id.* § 241.14(g)(2).

[190] *Id.* § 241.14(g)(1), (3).

[191] *Id.* § 241.14(h)(4).

[192] *Addington v. Texas*, 441 U.S. 418 (1979); *Foucha v. Louisiana*, 504 U.S. 71 (1992).

[193] *Man who placed bomb on 1982 Pam Am flight stuck in US detention limbo*, ASSOCIATED PRESS, June 21, 2015, https://www.theguardian.com/us-news/2015/jun/21/mohammed-rashed-pan-am-830-bombing-detention.

[194] Rashed's plea agreement promise that the government would send him to the country of his choice after the completion of his criminal sentence, but Israel would not allow him to enter the West Bank, where he wanted to be sent. *Id.*

[195] *Rashed v. United States*, Case No. 1:15-cv-00888-RJA, ECF No. 1 (Petitioner for Habeas Corpus).

November 2016, he was removed to Mauritania without the court ever having decided the legality of his detention.[196]

D. Hassoun's Legal Challenges to His Detention

On February 22, 2019, one week before Hassoun was to be released, the government informed Hassoun that it was "initiating procedures in order to determine whether you will be subject to continued detention."[197] With this, Hassoun's detention entered its next and final stage as the government tried one thing after another to prevent him from being released.

1. Certification under 8 C.F.R. § 24.14(d)

The first step ICE took was to make a recommendation to the Secretary of Homeland Security that Hassoun's detention should continue pursuant to 8 C.F.R. § 24.14(d). In a letter signed by Matthew Albence, the Acting Deputy Director, the government told Mr. Hassoun that "[y]our case appears to meet these three criteria [of 8 C.F.R. § 241.14(d)] because you assumed a leadership role in a criminal conspiracy to recruit fighters and provide material support to terrorist groups, and because you remain a continuing threat of recruiting, planning, and providing material support."[198] The statement regarding Hassoun's past criminal conviction was clear enough, but the letter provided no support for the statement that Hassoun "remain[ed] a continuing threat" beyond the mere fact of his criminal conviction. There was no timeline provided for how long it would take Secretary of Homeland Security to decide whether to accept the recommendation. And while Hassoun had not actually been certified for continued detention, he would remain detained throughout the process.

The letter promised that Hassoun would "be provided with a reasonable opportunity to review any evidence against [him]."[199] However, when Hassoun was provided the administrative record two months later, it became clear that the government had no intention of providing Hassoun with access to any evidence at all. The administrative record consisted of documents related to his criminal conviction and immigration proceedings,

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[196] Phil Fairbanks, *Terrorist Bomber Held Here Finds New Home in West Africa*, BUFFALO NEWS, Nov. 26, 2016, https://buffalonews.com/news/local/crime-and-courts/terrorist-bomber-held-here-finds-new-home-in-west-africa/article_580e0ab9-e777-54bb-972e-3b39284cf86d.html; *Rashed v. United States,* Case No. 1:15-cv-00888-RJA, ECF No. 48 (Notice of Dismissal).

[197] *See Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 13-4 (Notice of Intent and Factual Basis for Continued Detention), at 1.

[198] *Id.* at 2.

[199] *Id*.

including news stories and press releases about his case. The only new evidence was a FBI Letterhead Memorandum, signed by Christopher Wray, that recommended his detention as a national security risk.

According to the FBI Memorandum, its assessment was based on "Hassoun's prior criminal terrorism conviction . . . , his recent statements, his lack of cooperation with law enforcement, and his failure to accept responsibility for his actions."[200]

Two of these factors had nothing to do with dangerousness at all: Hassoun's failure to cooperate with the government during the initial period of his detention and his refusal to admit guilt. To this day, Hassoun maintains his innocence and says that he did not cooperate because he had nothing to cooperate about.[201] In essence, Hassoun argued that he was *not* dangerous, and never had been. To hold his lack of cooperation against him created a Catch-22. The government argued that in order for Hassoun to prove that he was not dangerous, he had to admit that he was dangerous first. At which point, undoubtedly, the government would have used his own admissions against him.

With respect to the criminal conviction, the sentencing judge had explicitly rejected a life sentence, finding that Hassoun did not post "such a danger to the community that he needs to be imprisoned for the rest of his life."[202] Moreover, and perhaps more importantly, if the government could prove future dangerousness based solely on past criminal conduct, it would eviscerate the protections of the criminal justice system, with every criminal sentence potentially becoming a life sentence based on the government's "assessment" that the person remained dangerous.

Finally, the Memorandum described "recent statements" that formed part of the basis for its assessment, stating that "Hassoun previously sought to advance his Salafist extremist beliefs by fundraising and recruiting on behalf of al Qaeda-affiliated groups fighting in Bosnia, Chechnya, Somalia, and Afghanistan. Since his detention, Hassoun shifted his allegiance to Islamic State of Iraq and ash-Sham (ISIS)."[203] The Memorandum further alleged that:

- "[T]hree detainees . . . reported that Hassoun was attempting to recruit fellow detainees in support of ISIS."
- While speaking at Muslim services in the facility, he espoused "radical ideology" and used "incendiary rhetoric."

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[200] February FBI Letterhead Memorandum, supra note 60, at 2.

[201] *Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 94 (Letter from Adham Hassoun to the Court).

[202] Hassoun Sentencing Transcript, supra note 68, at 8.

[203] February FBI Memo, supra note 60, at 2.

- "Hassoun told a fellow detainee that he was communicating with Faroud Abubaker, a recruiter for ISIS in Trinidad and Tobago" and "Hassoun also expressed his intentions to travel to Trinidad and Tobago to attack American interests such as ships exporting oil. Hassoun identified potential targets for attack, specifically oil refineries."
- Hassoun plans to observe when ships traveling from Trinidad and Tobago transfer "liquid nitrile gas" to mobile extraction ships in the open port waters. In or about early 2018, Hassoun stated that should he be released, "I [will] make that dock and port go boom."
- "Hassoun was overheard by a different individual telling a fellow detainee how to make explosives and plan attacks."
- "Hassoun told a fellow detainee, who is Egyptian but self-identifies as American, that '[he] deserve[s] to die with them.'"[204]

On the basis of these statements, the FBI assessed "that Hassoun is likely to continue his material support of ISIS and continue to recruit individuals to carry out attacks against the United States on behalf of ISIS. More significantly, Hassoun's admission to a fellow detainee that he was in contact with a legitimate ISIS recruiter in Trinidad and Tobago coupled with recent comments that he wants to make Port Everglades 'go boom' reflects a continued and persistent willingness to personally conduct an attack against the United States."[205]

Hassoun argued that it was impossible for him to rebut these allegations without knowing who the informants were and having the chance to cross-examine them. However, even though he knew few details about these allegations, a few things stood out immediately. First, the government now accused Hassoun of directly plotting violent attacks against the United States, which was very different from the indirect support and recruitment that formed the basis of his criminal conviction. Second, all of the allegations arose from his time in ICE detention; none of the statements were made during Hassoun's 13 years in criminal custody despite the fact that he spent some of that time in a facility that monitored all of his communications. Finally, it was clear that at least some of what Hassoun was accused of doing could provide the basis for criminal charges or, at the very least, would violate the terms of his supervised release. Yet, the government did not move to indict him or to revoke his supervised release.[206]

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[204] *Id*. at 3-4.

[205] *Id.* at 4.

[206] *Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 256 (Decision and Order of Release) at 36.

Still, the allegations were serious and raised the stakes of Hassoun's detention. The veracity of these statements, what precisely the government needed to do to prove them, and whether the Constitution allowed the government to detain Hassoun at all would be litigated over the next fifteen months in a second habeas petition that Hassoun filed shortly after the government notified him of its decision to continue his detention.[207]

2. Hassoun's Second Habeas Petition and Certification Pursuant to Section 412

Hassoun brought several constitutional and statutory claims in his second habeas petition.[208] He argued that the substantive Due Process Clause did not allow preventative detention based on a finding of future dangerousness unless some additional factor, such as mental illness, was present. The Supreme Court had reaffirmed this principle in *Zadvydas*, when it held that the government could not detain non-citizens after a final order of removal solely because they were dangerous.[209] When removal was likely in the reasonably foreseeable future, the government could satisfy the dangerousness-plus test because the government's interest in effectuating removal provided an additional justification for the detention.[210] In the Hassoun case, removal had already been deemed not likely in the reasonably foreseeable future,[211] rendering his detention illegal under *Zadvydas*, *Kansas v. Hendricks*, and the other civil commitment cases.[212]

Even if the Due Process Clause did permit detention in this circumstance, Hassoun argued, the procedural Due Process Clause guaranteed him certain protections that were absent under the regulation, but that the Supreme Court had held were required in other civil commitment contexts. Namely, he argued that the government had to bear the burden by clear and convincing evidence, [213] that he was entitled to a determination by a neutral decision-maker,[214] and that he had a right to see the evidence against

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[207] Petition for Writ of Habeas Corpus, supra note 94.

[208] *Id.*

[209] *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001).

[210] *Id*. at 690.

[211] *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019 WL 78984 (W.D.N.Y. Jan. 2, 2019).

[212] *See Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment.") (collecting cases).

[213] *Addington v. Texas*, 441 U.S. 418, 431 (1979)(clear and convincing standard applies to civil commitment).

[214] *United States v. Salerno*, 481 U.S. 739, 750 (1987); *Foucha v. Louisiana*, 504 U.S. 71, 81–83 (1992).

him and to cross-examine the government's witnesses.[215]

Hassoun also argued that the regulation was invalid and ultra vires based on the Supreme Court's decision in *Zadvydas v. Davis*. In *Zadvydas*, the Court interpreted 8 U.S.C. 1231(a)(6) to be consistent with the Due Process Clause by reading it not to authorize indefinite detention. The Court suggested that a different, more narrowly tailored statute that permitted indefinite civil detention might pass constitutional muster.[216] But Section 1231 was not narrow-tailored – it applied to an extremely broad category of non-citizens. Because it would raise constitutional concerns if interpreted to authorize indefinite detention and because there was no evidence that Congress intended such a result, the Court read a presumptively reasonable six-month period into the statute. At that point, the government had to prove that removal was likely in the reasonably foreseeable future to continue detention.

Hassoun argued that Supreme Court's interpretation was definitive and that if the *statute* did not authorize indefinite detention, a regulation promulgated under the statute could not either. Instead, Hassoun argued, Congress would need to pass a new statute (as it did in Section 412 of the USA PATRIOT ACT) if the government wanted new detention authority.[217]

The petition also alleged that Hassoun's detention violated the Double Jeopardy Clause because the regulation allowed him to be punished twice for the same conduct, and the void for vagueness doctrine because the terms national security and terrorism were so vague that they did not give the average person notice of what conduct was penalized by the regulation.[218] Additionally, Hassoun argued that his detention violated the Fifth Amendment because the regulation allowed discrimination of the basis of alienage because it permitted the detention of non-citizens in circumstances in which U.S. citizens would be released.[219] In fact, Hassoun pointed out, his

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215215215 *See, e.g., Addington*, 441 U.S. at 421 (detainee had right to confront witnesses before judge and jury); *Kansas*, 521 U.S. at 353 (detention scheme offered "the right to present and cross-examine witnesses, and the opportunity to review documentary evidence presented by the State"); *Vitek v. Jones*, 445 U.S. 480, 494–95 (1980) (requiring, before inmate could be transferred to mental hospital, "an opportunity . . . to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding . . . of good cause").

216 *Zadvydas*, 533 U.S. at 691 ("The provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations.")(internal citations omitted).

217 *Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 14 (Pet.'s Mem. in Support of His Petition for Habeas Corpus), at 9-16.

218 *Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 1 (Petition for Writ of Habeas Corpus), at 18.

219 Pet.'s Mem. in Support of His Petition for Habeas Corpus, supra note 217, at 35-38.

co-defendant Kifah Jayyousi, had already been released,[220] and Jose Padilla would be released in just a few years.

Finally, Hassoun argued that even if the regulation was constitutional, he did not meet the three criteria for detention. Hassoun not only maintained his innocence of what he was convicted of, he categorically denied that he had made any of the statements attributed to him in the FBI Memorandum.[221]

The government's response to the petition took an extreme view of executive power to detain non-citizens who it deemed a threat to national security. It argued that *Zadvydas* explicitly left open the possibility of national security detention,[222] that the substantive Due Process Clause did not protect non-citizens from indefinite detention, and that in any event,[223] Hassoun had been provided access to "robust" procedures to guard against possibility of error.[224] These procedures were, according to the government, the fact that Hassoun was notified by the government of his continued detention, that the government "described the factual basis" of the detention, that Hassoun could have sat for an interview at which he could plead his case, and that the Secretary must review his determination every six months. The government forcefully argued that the Court had no role in reviewing the underlying facts of the certification, making the extreme claim that "the agency's bottom-line factual conclusion . . . is untouchable."[225]

But perhaps the most troubling argument the government made was that a propensity of terrorism was itself the "special circumstance" that provided a justification for Hassoun's detention. This would put Islamic extremism in the same category as mental illness or pedophilia. In other words, the government identified Islamic extremism as a "volitional" factor that meant that individuals who shared this ideology could not control their behavior, could not be rehabilitated, and could not be deterred by normal criminal sanctions. These individuals were, in the government's eyes, irredeemable and uncontainable. To make its point, the government invoked the most-oft used quotation in national security matters: "the constitution is

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For analysis of this clain, see Nino Guruli, *The Unreasonableness of the Citizenship Distinction: Section 412 of the USA PATRIOT Act and Lessons from Abroad*, U. CHI. ONLINE, Feb. 24, 2020, https://lawreviewblog.uchicago.edu/2020/02/24/the-unreasonableness-of-the-citizenship-distinction-section-412-of-the-usa-patriot-act-and-lessons-from-abroad-by-nino-guruli.

[220] The Intercept, Trial and Terror, https://trial-and-terror.theintercept.com/people/3566e001-b98a-4de8-8c61-f9e70d99a3b0.

[221] *Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 17-2, at 351-357.

[222] *Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 17-4 (Govt.'s Mem. in Opp'n to Pet.'s Pet. for Habeas Corpus), at 12.

[223] *Id.* at 15.

[224] *Id.* at 21.

[225] *Id.* at 39.

not a suicide pact."[226]

Although it is often assumed that terrorists will recidivate at high levels when they are released from custody, the research does not bear this out. A study of all individuals convicted of terrorism offenses after 9/11 and subsequently released from custody found a recidivism rate of 1.6%, much lower than the recidivism rate for other offenders, which is as high as 66% in the first three years after release.[227] Of the four individuals who recidivated after release, none were accused of terrorism-related crimes: one violated his plea agreement by using the internet, one committed fraud by illegally buying food stamps, one was convicted of forgery, and the last was convicted of a drug offense.[228] Another study of international jihadists found a recidivism rate of 1%.[229]

Moreover, the government has not sought to indefinitely detain other offenders convicted of political crimes, including eco-terrorists, White Supremacists, or the Weather Underground. The same justification – that people convicted of ideological or political crimes cannot control their behavior – would apply to these groups as well, but the government has not tried to use it to prolong criminal sentences in those cases. In other words, the government has declared that a particular ideology is more dangerous than any other extremist belief, even when the evidence suggests that the government's central contention about this ideology – that followers recidivate at higher rates – is false.

What really underlies this argument is Islamophobia. Islamophobia is what causes government actors to believe that anyone even remotely associated with Islamic extremism is uniquely dangerous. Fear of Muslims, together with government attempts to capitalize on that fear, is what causes the firmly held belief that a Muslim "terrorist" can never be rehabilitated and should never be released. The government in Hassoun's case asked the court to approve of this problematic view by exempting individuals convicted of terrorism-related crimes from the normal protections of due process.

3. Hassoun's Section 412 Evidentiary Hearing

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[226] *Hassoun v. Sessions*, Case No. 18-cv-586-FPG (Govt.'s Return in Opposition to Pet.'s Habeas Pet.), ECF No. 17-4 at 17 (quoting *Mendoza-Martinez*, 372 U.S. at 560).

[227] Omi Hodwitz, *The Terrorism Recidivism Study (TRS): Examining Recidivism Rates for Post-9/11 Offenders*, 13 PERSPECTIVES ON TERRORISM at 56 (2019).

[228] *Id.* at 57. A similar study on the recidivism rate of individuals convicted of terrorism crimes in Western Europe was 2.5%. *See* EDWIN BAKKER, JIHADI TERRORISTS IN EUROPE, THEIR CHARACTERISTICS AND THE CIRCUMSTANCES IN WHICH THEY JOINED THE JIHAD: AN EXPLORATORY STUDY (2006).

[229] Christopher Wright, A*n Examination of Jihadi Recidivism Rates in the United States*, CTC SENTINEL, vol. 12, at 26-31 (2019).

Shortly after briefing was complete on the regulation, the government moved to invoke Section 412 as an alternate detention authority, certifying Hassoun under both the regulation and Section 412.[230] According to the government, because Section 412 had no notice requirement, it was not required to inform Hassoun that it would be invoked until after the certification process was complete. Now the government needed to win on only one of its two authorities in order to detain Hassoun indefinitely.

In December 2019, the district judge issued a decision on both the regulation and Section 412. On the regulation, Judge Wolford agreed with Hassoun that the regulation was ultra vires and invalid, in part because it lacked basic procedural protections.[231] On Section 412, however, she decided to defer deciding the constitutional issues until after an evidentiary hearing on the merits of the certification.[232] In a subsequent decision, she held that the government would have the burden of showing by clear and convincing evidence that Hassoun met the statutory requirements for Section 412 detention.[233] She further determined that the government could, consistent with the practice of the D.C. District Courts in the Guantanamo cases, present hearsay evidence to make its case, but that the hearsay had to be reliable and non-hearsay evidence had to be unavailable.[234] She allowed both parties to take discovery, and set a date for the evidentiary hearing.

The government could have sought an interlocutory appeal of this decision, but it did not. Instead, the government acquiesced to a relatively short period of discovery, made slightly longer because of the delay due to the coronavirus pandemic. At first, the government resisted providing Hassoun's legal team with the identity of the informants whose allegations formed the basis of the FBI Memorandum. When the judge made clear that they could not rely on the hearsay testimony of informants unless the government disclosed their identities to Hassoun, the government grudgingly disclosed the informants' identities, together with over 10,000 pages of discovery.[235]

Through a review of these documents, the investigation into Hassoun began to come in to focus. It had started shortly after Hassoun arrived at the facility when a detainee reported having an argument with Hassoun during which they argued over a terrorist attack in Spain. According to this detainee, Ahmad Hamed, Hassoun had stated support for the terrorist attack and for al-

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[230] *Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 26 (Govt.'s Notice of Certification).

[231] *Hassoun v. Searls*, 427 F. Supp. 3d 357, 372 (W.D.N.Y. 2019).

[232] *Id.* at 373.

[233] *Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 75 (Decision and Order Regarding Procedures for Evidentiary Hearing), at 9.

[234] *Id.* at 17.

[235] *Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 225 (Decision and Order), at 9-10.

Baghdadi, the leader of ISIS.[236] When Hamed allegedly disagreed, Hamed reported Hassoun saying "you deserve to die with them," which the FBI had interpreted to mean that Hamed should die along with the American victims of the terrorist attacks. Hamed reported this conversation and an agent from the Buffalo Joint Terrorism Task Force (JTTF) interviewed him. A second detainee, Ahmed Abdulraouf, was present during the argument, but was not interviewed before he was released from custody. Hamed was deported shortly after his report.

In early 2018, a second detainee, Mohamed Hirsi, complained to the facility's chaplain about the content of Hassoun's religious sermons.[237] The chaplain talked to Hassoun and told him to stop using "incendiary rhetoric." Hassoun agreed. The chaplain had attended services himself and, while he had heard Hassoun say bad things about other religions, had never heard him espouse violence or make specific threats. ICE officers regularly attended the services as well, but did not make any reports of violent statements.

At this point, it is unclear whether DHS had formally opened an investigation into Hassoun, but investigators do not appear to have taken any further investigative steps. Then, in May 2018, there was a breakthrough. Shane Ramsundar, a detainee from Trinidad and Tobago, wrote a message to facility staff claiming he had information about Hassoun recruiting for ISIS and planning terrorist attacks in the facility. Over the next several months, Ramsundar recounted increasingly fantastical stories, alleging that Hassoun had terrorist contacts in Africa, that he was supposedly plotting attacks on port in South Florida where "ships traveling from Trinidad and Tobago transfer 'liquid nitrile gas'" and that he was communicating with a terrorist recruiter named "Faroud Abubaker" who was "a recruiter for ISIS in Trinidad and Tobago."[238]

The JFTF apparently did not find it strange that Hassoun, a stateless Palestinian from Lebanon, would be planning an attack with a terrorist group from Trinidad and Tobago, where Hassoun had no connections but which was Ramsundar's country of origin. Nor did they seem concerned when they were unable to corroborate elements of Ramsundar's story. For example, after Ramsundar told agents that Hassoun was speaking to contacts on the phone, the facility listened to months' worth of Hassoun's recorded phone calls and found nothing.

As the investigation into Hassoun began ramping up, a few other reports trickled in. In November 2018, ICE received an anonymous letter

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[236] *Hassoun v. Searls*, Case No. 19-cv-370, ECF No. 248-14 (FBI 302 of Ahmed Hamed).

[237] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 248-11 (Intelligence Report).

[238] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 263-1 (Pet,'s Unredacted Motion to Compel and for Sanctions).

alleging that he had overheard Hassoun speaking with another detainee about how to build an explosive. The anonymous informant was identified a few months later as Hector Rivas Merino, a detainee from Honduras and a converted Muslim who attended services.[239] Another detainee, Abbas Raza, reported in January 2019 that Hassoun had said that civilian deaths on 9/11 were just a casualty of war, and that Hassoun had "pledged support for ISIS."[240] Oddly, although investigators were clearly interested in the stories of Rivas Merino and Raza, they did not take statements from them. Abbas Raza was never formally interviewed by the FBI and Rivas Merino's testimony was never preserved in a declaration or deposition even when investigators knew he would be deported from the United States.[241]

When the FBI was called upon to write the Letterhead Memorandum that would serve as the basis for Hassoun's indefinite detention, it was these reports from fellow detainees that it used to make the case that Hassoun was dangerous.

Hassoun denied the allegations, but it was difficult to prove that the conversations did not happen. Still, there were reasons to doubt the credibility of some of the government's informants. Ramsundar was facing deportation after defrauding immigrants in Queens out of $1.75 million by impersonating an ICE agent.[242] Hamed had also been convicted of fraud, and had disappeared after being deported to Egypt.[243] The report of the interview with Rivas Merino made clear that he was reporting about a conversation in Arabic, a language that he did not speak.[244] Moreover, the FBI had closed the case file after doing an investigation into the allegation[245] and had released the other detainee from custody, undercutting the FBI's contention that it took the conversation seriously.[246]

The only allegation that Hassoun conceded was partly true is that he had criticized the U.S. government and Israel in some of his sermons, that it had made some of the other detainees uncomfortable, and that he had stopped after the chaplain spoke with him.[247] He was, by all accounts, an outspoken

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[239] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 243-6 (FBI 302 of Hector Rivas Merino).

[240] Decision and Order, supra note 235, at 31.

[241] *Id.* at 32-33.

[242] Kirk Semple, *3 Charged With Stealing $1.75 Million From Immigrants*, N.Y. TIMES, Mar. 8, 2010, https://www.nytimes.com/2010/03/19/nyregion/19fraud.html.

[243] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 256 (Decision of Order of Release), at 22.

[244] *Id.* at 29–30.

[245] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 243-8 (FBI Case File).

[246] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 243-7 (Order of Supervision for Rami Abuziyad).

[247] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 243-1 (Declaration of Adham Hassoun), at ¶¶ 16-20.

person who often shared his political opinions with anyone who would listen. But neither the chaplain, nor the detainee who made the complaint, alleged that Hassoun was making violent threats during the sermons.

The question for Hassoun's legal team was why the other informants were lying. The government maintained that none of the informants had sought, or received any benefit for their cooperation.[248] And it was multiple informants who had accused Hassoun of supporting terrorist organizations, which meant that Hassoun would need to show that each had a motive for lying.

As the case proceeded towards discovery, several developments occurred. First, the government tracked down Abdulraouf and recorded an interview with him. Abdulraouf had a very different memory of the argument between Hamed and Hassoun. In his retelling, there was no mention of specific terrorist attacks or ISIS, nor did he remember Hassoun saying that Hamed should die with the Americans. According to Abdulraouf, the argument was a dispute about a religious text and whether the Koran allowed the killing of innocent women and children to advance religious causes.[249]

Second, at a Muslim service in February, Hassoun stood up and warned the other detainees not to talk to Ramsundar because he had made up allegations against Hassoun. Ramsundar reported that he felt intimidated by Hassoun's comments.[250] He later wrote a letter accusing Hassoun of threatening his life when he encountered Ramsundar in the legal visitation area,[251] a charge Hassoun vociferously denied.

On the basis of this violation of the protective order in the case – Hassoun was not supposed to publicly reveal the names of the informants – and the alleged threat against Ramsundar, the government filed a motion for sanctions, accusing Hassoun of witness tampering and arguing that his habeas petition should be dismissed, or in the alternative, that Ramsundar's statements against Hassoun should be admitted to the record and deemed true.[252] According to several other declarations filed with the motion for sanctions, other detainees were also afraid to testify for fear that Hassoun would retaliate against them.[253] These detainees were later identified as Mohamed Hirsi, the detainee who had expressed concern about the content of Hassoun's religious sermons, and Mohamed Al-Abed, a one-time friend

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[248] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 263-5 (Govt.'s Responses to Pet.'s Requests for Production), at 5.

[249] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 243-10 (FBI 302 of Interview with Ahmed Abdulraouf).

[250] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 225 (Decision and Order), at 18.

[251] *Id.* at 25.

[252] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 172 (Govt.'s Mot. for Sanctions), at 2.

[253] *Id.* at 23.

of Hassoun who had surfaced recently as an additional witness against Hassoun.[254]

Then, something almost unbelievable occurred that blew the case wide open. Through a serendipitous series of events, Hassoun's legal team came into possession of a several documents that showed Ramsundar's allegations against Hassoun to be false, caused the government to abandon him as a witness, and eventually caused the government's entire case against Hassoun to collapse.[255]

The documents in question were in Ramsundar's A-file, the central file that the government maintains about each non-citizen. The government had not disclosed them, even though they were clearly responsive to Hassoun's discovery requests. The file included a statement by Ramsundar, dated one month prior to his first allegations against Hassoun, in which he detailed his long history of serving as an FBI informant as a reason why the government should allow him to stay in the United States. In the statement, Ramsundar bragged about developing and then informing the FBI about a plot almost identical to the one he accused Hassoun of plotting as a confidential informant *in the 2000s*. The statement also contained an admission that Ramsundar had personal and intimate knowledge of the terrorist organization in Trinidad and Tobago, including the Abu Bakr family that leads it, with which he accused Mr. Hassoun of conspiring. In short, the documents strongly suggested that Ramsundar had recycled and fabricated the allegations against Hassoun.[256]

The government responded to the Motion for Sanctions by abandoning Ramsundar as a witness, telling the court that the government had "concerns about Mr. Ramsundar's credibility and ability to truthfully testify,"[257] and withdrawing its request that Ramsundar's allegations be accepted by the court as true. In response to a court order, the government also turned over thousands of additional documents about Ramsundar and the other informants that it had failed to disclose earlier, many of which were exculpatory for Hassoun. For instance, Ramsundar had explicitly requested relief from deportation in exchange for further information about Hassoun in a letter to Thomas Feeley, the head of the ICE Buffalo Field Office, but the letter had not been turned over in the government's original disclosures and directly contradicted the government's assertion that no informant had sought a benefit for testifying against Hassoun.

The newly-disclosed documents also cast doubt on one of the

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[254] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 274 (Pet.'s Memo on Sanctions), at 8-9 (identifying Al-Abed); ECF. No. 256 (Decision and Order on Release), at 23.

[255] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 263-1 (Pet.'s Mot. for Sanctions), at 2.

[256] *Id.* at 5-9.

[257] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No 180 (Govt.'s Reply in Support of Sanctions), at 2.

government's other witnesses who connected Hassoun to ISIS, Abbas Raza. Raza also had a history of working as an FBI informant and had previously received relief from deportation for his cooperation. In addition, Raza's file had been marked as a special interest case by the FBI, which suggested that Raza had had previous ties to terrorism and suggested that he, like Ramsundar, had independent knowledge of the people and groups that he accused Hassoun of supporting. Finally, Raza had asked for relief from deportation because of his previous work for the FBI just a few months before he made his allegations against Hassoun.[258]

At the same time, the government was facing intense scrutiny from the Court about misrepresentations to the Court and spoliation of evidence. After Ramsundar had alleged that Hassoun had threatened him, Hassoun's legal counsel requested that the facility provide the surveillance videos of the area on the day in question. As it turned out, the government had already viewed the videotape, determined that it did not support Ramsundar's allegation, and then allowed the video to be deleted.[259] In addition, the government had reviewed movement logs from the day Ramsundar said the threat occurred and found that neither Hassoun nor Ramsundar had visited the legal visitation area that day.[260]

Yet, despite the fact that its independent investigation had proven the allegation false, it did not withdraw the allegation and continued to press it in court. In response to allegations that it had destroyed evidence, the government argued that there was no reason to keep the videotape because it did not show anything,[261] which seemed to suggest that the only evidence that the government had a duty to preserve was evidence that supported its position.

Other misrepresentations to the court also emerged. While the government's attorneys argued in court that Al Abed was afraid to testify against Hassoun, contemporaneous emails to those same attorneys made clear that Al-Abed was willing to testify, but that he wanted a benefit for it.[262] The government failed to disclose those emails until after Hassoun's attorneys had contacted Al Abed.

The court also threw out much of the hearsay that the government sought to introduce, including the statements of Hector Rivas Merino and Abbas Raza. For Rivas Merino's statement, the court found that there was no

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[258] *Hassoun v. Searls,* Case No 19-cv-370, ECF. No 212 (Pet. Suppl. Objections to Govt.'s Intro. of Hearsay Evidence).

[259] *Hassoun v. Searls*, Case No 19-cv-370, ECF. No. 205 (Pet.'s Reply in Support of Mot. for Sanctions), at 4.

[260] *Id.* at 26.

[261] *Id.* at 4.

[262] *Hassoun v. Searls*, Case No 19-cv-370, ECF No. 274 (Pet.'s Mem. on Sanctions), at 9-10.

evidence to suggest Rivas Merino even understood the conversation he reported, and the fact that the FBI subsequently closed the investigation seriously undercut its probative value. The court rejected Abbas Raza's statements because of the significant questions about his credibility and the fact that he had sought relief from deportation for informing on Hassoun,[263] and the fact that he only came forward after the government had been searching for additional evidence to hold Hassoun for months. Moreover, the court faulted the government for not preserving Rivas Merino's and Raza's testimony before they were deported. The court allowed the government to present the hearsay statement of Ahmed Hamed, and ruled that Abdulraouf had to testify from Egypt.[264]

That left the government with four witnesses: Ahmed Abdulraouf, Ahmed Hamed, Mohamed Al-Abed, and Mohamed Hirsi. Of these witnesses, only Hamed – the one hearsay witness – said Hassoun had supported ISIS. That account was disputed by Abdulraouf, who said only that Hassoun supported an interpretation of the Koran that allowed for violence against civilians (which Hassoun still denied).[265] Al Abed also denied the Hassoun had ever expressed support for any terrorist group or supported ISIS. In the report of his FBI interview, Al Abed stated only that Hassoun had made statements against Israel.[266] Mohamed Hirsi likewise did not accuse Hassoun of supporting or recruiting for terrorist groups, just that he had made anti-American statements in his sermons.[267] The government's case had been whittled down to a few anti-American or anti-Israel statements and a dispute about the meaning of a religious text.

In a last ditch effort to resuscitate its case, the government attempted to add several witnesses that it had known about for months but had failed to include on its witness list, presumably because their statements were utterly implausible and were clearly designed to curry favor with deportation officials.[268] The court denied the government's motion as untimely and because the government identified no reason it could not have identified the witnesses sooner.[269] The government then filed a new FBI Memorandum with the Ramsundar allegations removed,[270] filed a motion to cancel the

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[263] *Hassoun v. Searls*, Case No 19-cv-370, ECF No. 225 (Decision and Order), at 28-33.

[264] *Id.* at 28, 34-35.

[265] Decision and Order of Release, supra note 206, at 22-23.

[266] *Id.* at 23-24; *Hassoun v. Searls*, Case No 19-cv-370, ECF No. 248-9 (FBI 302 of Mohamed Al Abed.

[267] Decision and Order of Release, supra note 206, at 23.

[268] *Hassoun v. Searls*, Case No 19-cv-370, ECF No. 213 (Pet.'s Opp'n to Govt.'s Late Filed Witnesses).

[269] Decision and Order, supra note 235, at 39-40.

[270] *Hassoun v. Searls*, Case No 19-cv-370, ECF No. 261-2 (FBI Memorandum Dated June 4, 2020).

evidentiary hearing, and urged the Court to deny the petition based on the new FBI Memorandum. During a hearing on the motion, the government conceded that it could not even meet its burden of proving that Hassoun was dangerous by even a preponderance of the evidence.

Despite the fact that the government had abandoned its case, it sought a stay of Hassoun's release pending appeal on the grounds that an appellate court could conclude that the government had no burden to meet at all.[271] The court denied the stay. In a 43-page opinion, the court wrote that:

> Distilled to its core, Respondent's position is that he should be able to detain Petitioner indefinitely based on the executive branch's say-so, and that decision is insulated from any meaningful review by the judiciary. The record in this case demonstrates firsthand the danger of adopting Respondent's position. Respondent's position cannot withstand constitutional scrutiny.[272]

The Court conceded that on their face, the allegations in the FBI Memo "paint a serious and disturbing picture regarding Petitioner's alleged dangerousness." But, the Court continued, these allegations "cannot bear meaningful scrutiny."[273] The Court agreed with Petitioner that "there is substantial evidence that Ramsundar. . . completely fabricated the allegations against Petitioner. . . yet it was not until it was independently obtained by Petitioner's counsel that the government apparently performed any meaningful assessment of Ramsundar's credibility."[274] The other allegations, the Court concluded, "fare little better upon inspection" for the reasons Hassoun argued.[275] In short, the Court found the Memorandum to be "an amalgamation of unsworn, uninvestigated, and now largely discredited statements by jailhouse informants, presented as fact. Respondent's position, of which he will have to persuade an appellate court, is that it is constitutionally permissible to detain Petitioner for the rest of his life on the basis of this document, without any opportunity for a habeas court (or any other neutral decisionmaker) to test its claims."[276]

The Court thus concluded that the government had not come even remotely close to proving that Hassoun was a danger to national security: "Far from demonstrating that Petitioner is so dangerous that he must be detained, the [FBI Memos] illustrate[] a more potent danger—the danger of

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[271] *Hassoun v. Searls*, Case No 19-cv-370, ECF No. 242-1 (Govt.'s Mot. to Stay).
[272] *Hassoun v. Searls*, 469 F. Supp. 3d 69, 82 (W.D.N.Y. 2020).
[273] *Id.* at 84-85.
[274] *Id.* at 85.
[275] *Id.*
[276] *Id.* at 86.

conditioning an individual's liberty on unreviewable administrative factfinding."[277] The Court ordered Hassoun's release, but gave the government a short stay to seek a longer stay from an appellate court.

4. The Government's Post-Judgment Actions

When the government understood that Hassoun was on the verge of being released, it took quick action to try to prevent it. It immediately filed two notices of appeal and motions for a stay of release – one in the D.C. Circuit, which had jurisdiction over the Section 412 claim, and the Second Circuit, which the government argued had jurisdiction over the claim on the regulation.[278]

It also renewed its efforts to find a country that would accept Hassoun, and a few days after it had filed its motions for a stay in the courts of appeals, it found one. On July 13, 2020, it filed in both courts announcing that it had reached an agreement with an unidentified country – later identified as Rwanda – to receive Hassoun and that they expected him to be removed by July 27, 2020.[279] It sought an administrative stay in both courts until after Hassoun was removed.

Hassoun was removed on July 24 and welcomed to Rwanda. When the government of Rwanda announced that it had accepted Hassoun for resettlement, the Rwandan press portrayed him very differently than the U.S. government had:

> Despite the 'terrorism' charges, Hassoun was not found to be violent. He was not found guilty of engaging in terrorism activities. Analysts say his conviction was part of the hysteria in the immediate aftermath of 9/11, as the U.S government moved to apprehend and bring to justice all individuals with suspected links to terrorists.[280]

Rwanda cited the 1954 Convention of the Status of Stateless Persons in its announcement and called the resettlement "humanitarian"[281] Commentators framed the generous terms of the resettlement as an

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[277] *Id.* at 91.

[278] *See Hassoun v. Searls*, No. 20-5191 (D.C. Cir.); *Hassoun v. Searls*, No. 20-2056 (2d Cir.).

[279] *Hassoun v. Searls*, No. 20-5191, Dkt. 1851292 (D.C. Cir. July 13, 2020); *Hassoun v. Searls*, No. 20-2056, Dkt. 43 (2d Cir. July 13, 2020).

[280] Edmund Kagire, *How Rwanda Offered To Take In Stateless Amin Hassoun*, KT TIMES, July 25, 2020, https://www.ktpress.rw/2020/07/how-rwanda-offered-to-take-in-stateless-amin-hassoun.

[281] Statement on Resettlement of Stateless Person to Rwanda, https://twitter.com/rbarwanda/status/1286731397630177281.

expression of Rwanda's values and history. "[M]any Rwandans were hosted in many countries and some still have dark memories of mistreatment and suffering," one editorial wrote. "It only makes sense for it to spare its wards from the same fate."[282]

That might have been the end of the case, except for an unusual move by the Second Circuit. Even though the government had asked for an administrative stay, the Court granted a stay pending appeal, and issued a short notice that an opinion would be forthcoming.[283] Then, one week after Hassoun had been removed, it issued an opinion that sharply criticized the district court's decisions in the case.[284]

The Second Circuit found that the government had demonstrated a strong likelihood of success on the merits of their appeal. It found that the regulation was not ultra vires and invalid because *Zadvydas* had left open the possibility that its ruling might not extend to terrorists and other specially dangerous individuals.[285] It also held that the due process clause only required that the government prove its allegations by a preponderance of the evidence and that there was no need for a neutral decisionmaker because there was habeas review.[286]

The Court did not address the fact that the government's case had collapsed, that most of its allegations had been proven false or discredited, or that the government had conceded that it could not even meet the preponderance of the evidence standard. In other words, there was no way that the government would succeed on the merits even if it had won on the legal issues identified by the Court.[287]

It is unclear what would have happened next if Hassoun had not already gained his freedom. Presumably, he would have sat in detention for a year or more while the appeal was being decided. Then, after the same panel issued an opinion likely to be similar to the one it issued on the motion to stay, the case would be remanded to the district court. At that point, unless the government was able to conjure up new evidence by that point, it would lose again, probably prompting another appeal. The case could have dragged

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[282] *There is a reason why Rwanda has an open door for all who suffer*, The New Times, July 25, 2020, https://www.newtimes.co.rw/opinions/editorial-there-reason-why-rwanda-has-open-door-all-who-suffer.

[283] *Hassoun v. Searls*, No. 20-2056, Dkt. 60 (2d Cir. July 16, 2020).

[284] *Hassoun v. Searls*, 968 F.3d 190 (2d Cir. 2020).

[285] *Id.* at 200.

[286] *Id*. at 201-02.

[287] In a footnote, the Court suggested that it would not violate due process even if the judicial review of the certification under the regulation did not include review of the factual predicate, perhaps suggesting that perhaps the government could win on remand because the court would be unable to review the underlying factual allegations. However, the court also noted that it did not believe that review was so limited. *Id.* at 201 n.2.

on for several more years with Hassoun sitting in detention.

It is also unclear why the court felt the need to opine on such important issues of constitutional law on a motion to say the release of an individual who was no longer in custody in an appeal that was already moot and would never be heard. But, in a later opinion rejecting Hassoun's request to have the opinion vacated, the Court did not explain why it had reached out and decided the issues unnecessarily, declaring only that the case was not technically moot at the time it granted the stay and that therefore, issuing the decision was not improper.[288]

The Second Circuit also vacated the district judge's decision on the regulation under *United States v. Munsingwear*,[289] which held that vacatur of a lower court opinion is proper when the case is mooted out unless the losing party is responsible for the appeal becoming moot. The Court reasoned that the timing of Hassoun's removal was happenstance and that the government had been trying to remove him the entire time.[290]

The D.C. Circuit refused to vacate the decision with respect to Section 412,[291] but the Second Circuit had already granted a gift to the government. There will be no reason for the government to ever invoke Section 412 if it can claim the same authority under the regulation. And now that the regulation has been declared valid by the Second Circuit, even if it was less than fully precedential because it was an opinion on a preliminary motion. The next person in Hassoun's position will likely face greater odds in challenging his detention, giving the government valuable time to come up with a Plan B if the detention is eventually struck down.

E. Analysis

What lessons can we draw from Hassoun's case? Fundamentally, cases like Hassoun's remind us why we have due process protections in the first place. There are cases where parties warn that if the executive branch is given unreviewable authority, it will abuse that power. This case proves these warnings right. It was the procedural protections the court granted to Hassoun that allowed him to challenge the government's case against him – and win. With the Supreme Court poised to pull back on the protections due process affords to non-citizens,[292] this is an important take away.

There will be some for whom Hassoun's case will prove the opposite

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[288] *Hassoun v. Searls*, 976 F.3d 121, 128 (2d Cir. 2020).

[289] 340 U.S. 36, 41 (1950).

[290] *Hassoun*, 976 F.3d at 132.

[291] *Hassoun v. Searls*, No. 20-5191, Dkt. No. 1853898 (D.C. Cir. Aug. 5, 2020).

[292] *Department of Homeland Security v. Thuraissigiam*, 591 U.S. ___, 140 S.Ct. 1959, 1963-64 (2020)(limiting due process rights to some non-citizens arrested near the border).

– that we cannot provide due process when national security is at stake because dangerous people might be ordered released. But this perspective assumes that he is dangerous. I hope I have provided you enough to have a good measure of doubt about Hassoun was ever dangerous, let alone that he is dangerous today. And yet, if you had read the newspaper articles about him, or the government's depiction of him, you would have come away convinced that the government was correct. Avoiding erroneous deprivations is the paradigmatic purpose of the procedural Due Process Clause.

Another notable aspect of Hassoun's case was the way the government used overlapping legal authorities to detain him for almost two decades. At each step, Hassoun had to fight his detention, and even when he won, he lost. He was moved to criminal custody just at the point that the government lost its authority to hold him in immigration detention. He fought back a life sentence only to have the government try again in the civil context after he served his sentence. He won his first habeas just to have the government invoke another authority. By the time a court found that authority unlawful, it had invoked yet another. It was not until the government ran out of options did it find a country to accept him. The government claims this timing was coincidental, but it beggars belief that the government would have expended diplomatic (and possibility financial) resources finding Hassoun a country when it could just hold him forever under Section 412.

The more detention authorities proliferate, the more tools the government has to skirt constitutional rules. Even if the procedural protections under each authority are robust – which, as discussed, they often are not – the legal system moves slowly enough that it won't matter. Hassoun's second habeas action proceeded at breakneck pace, and yet it took 15 months for the judge to order him released. That could easily stretch to years in other cases. In order to prevent this gaming of the system, courts must look at how detention authorities are used sequentially to prolong an individual's detention and not evaluate each authority separately.

Hassoun's case also provides a good opportunity to reevaluate the special deference we give to the government in matters related to national security and immigration. Indeed, there may be reasons to think that less deference should be given in these areas because of the unique vulnerabilities non-citizens face and the unique incentives the government has. The political consequences the government risks when releasing a dangerous person are grave, and the incentives weigh strongly in favor of keeping people detained. Law enforcement officers – like all of us – have implicit and explicit biases that predispose them to certain stereotypes or prejudices about immigrants in general or Muslims in particular.

These biases are layered on top of the cognitive biases that human beings experience in any situation they encounter, including confirmation

bias (the tendency to seek out information that confirms what you already believe) and anchoring bias (the tendency to rely most heavily on the first piece of information you receive about someone and filter all new information through that lens). These biases can infect any law enforcement investigation. The Innocence Project has documented hundreds of cases where police and prosecutors were laser focused on a single suspect, disregarding all evidence to the contrary.[293] As Emily Bazelon has explained:

> Exonerations tend to expose bad police work . . . They also reveal prosecutors blinded by tunnel vision and breaking the rules to nail down a conviction. Chillingly, prosecutors may be more likely to withhold evidence when proof of guilty is uncertain. If you think the suspect did it but you don't quite have the goods to convict, you may be tempted to put a thumb on the scale.[294]

Many of these factors were present in the investigation into Hassoun. The investigation was handled poorly from beginning to end. Ramsundar's allegations confirmed what the investigators probably already believed about the person convicted as the co-conspirator of the "dirty bomber."

When additional informants began to come forward, the investigators missed clear signs that their informants were telling them what they wanted to hear. Hassoun's criminal conviction was well known by other detainees at the facility. Hassoun was an obvious target for individuals who were hoping to avoid deportation. He also may have been made a victim of the same prejudices that influenced the investigators. A Middle Eastern Muslim "imam" making statements criticizing the U.S. government resonates differently that a white non-Muslim making the same comments.

Prosecutors often use jailhouse informants to get a guilty verdict, even though the practice is ethically dubious.[295] As Ninth Circuit judge Stephen Trott argued:

> The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air.[296]

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[293] *See* EMILY BAZELON, CONVICTED 225 (2019).

[294] *Id.*

[295] Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413, 1419–20 (2007)

[296] *Words of Warning for Prosecutors Using Criminals As Witnesses*, 47 HASTINGS L.J.

In fact, research shows that prosecutor's use of jailhouse informants is "strongly correlated with allegations or findings of official misconduct."[297]

There is reason to believe that jailhouse informants are even less reliable in the immigration context than they are in the criminal justice system. Immigrant detainees know that ICE retains ultimate discretion about whether they are deported. A single ICE officer can decide to release a detainee on an order of supervision, effectively nullifying the removal order. And the consequences of being deported are often very dire – detainees risk being separated from families, losing jobs and communities, and sometimes fear being persecuted in their home countries. This all creates enormous incentives for immigrant detainees to lie to law enforcement.

In addition, the consequences of lying are probably lower in the immigration context. A pre-trial detainee might risk an even longer criminal sentence if he lies to law enforcement and gets caught. Although an immigrant detainee could theoretically get prosecuted for perjury, more likely he will just be deported – the very outcome he seeks to avoid by becoming a jailhouse informant.

Finally, I believe that the government never expected to have to prove its allegations against Hassoun, assuming the court would find that he could be detained based on the government's say-so. This is not surprising. ICE is not used to subjecting its allegations to searching judicial review. In immigration court, asserting something to be true in a declaration is often enough. Law enforcement is even more likely to cut corners when there is no judge and no jury checking their work, such as when courts give deference to the government in matters related to immigration and national security. [298]

Thus, Hassoun existed in a liminal space where he had fewer rights than criminal defendants or civil detainees in other contexts, and was more at risk for an erroneous deprivation of liberty because of the context in which he found himself and his history as a "convicted terrorist." He was uniquely vulnerable, and as such, needed the extra protections the Due Process Clause provided him.

Give how far off the rails the government's case against Hassoun went, we should also ask the question of whether national security detention should be permitted at all, even if the Constitution is interpreted to allow it. Although it may not be possible to draw a conclusion based on a single case,

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1381, 1394 (1996).

[297] Russell D. Covey, *Suspect Evidence and Coalmine Canaries*, 55 AM. CRIM. L. REV. 537, 539 (2018).

[298] *Hawaii v. Trump*, 585 U.S. ___, 138 S.Ct. 2392, 2409 (2018) ("[A] searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere.").

the post-9/11 experience with national security detention, when viewed as a whole, is not promising. Many, if not most, of the individuals detained at Guantanamo as enemy combatants turned out to be innocent.[299] In one horrifying example, Chinese Uighurs captured in Afghanistan were detained at Guantanamo at the urging of the Chinese government.[300] It was later determined that they were political refugees and had never taken up arms against the United States.[301] Other "enemy combatants," such as Padilla and Al-Marri, were successfully prosecuted criminally, negating any need for a new kind of national security detention. Hassoun's case should likewise give us pause as to whether government really needed to bend and stretch the Constitution to detain him.

CONCLUSION

On January 20, 2021, Hassoun messaged me from Rwanda. He had watched the inauguration of Joe Biden on television and had been moved by the fireworks display behind the Washington Monument. He was hopeful about the future of America. It reminded me of what he said about the country he had called home for 30 years in his statement to the court:

> I admire and appreciate your country. There are many people here who I have great respect for and have an overwhelming gratitude for their support during my ordeal. I have lived a peaceful life; I was able to do what I love most, to help people. There is no greater pleasure than extending a hand of help to those who need it. The United States is a pioneer in doing that and I love and respect the country for that.[302]

Hassoun now has a new home, but I hope his experience will not be in vain. That is up to us.

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[299] *Most Guantanamo Detainees are Innocent: Ex-Bush Official*, ASSOCIATED PRESS, March 19, 2009, https://www.cbc.ca/news/world/most-guantanamo-detainees-are-innocent-ex-bush-official-1.804550.

[300] Richard Bernstein, *When China Convinced the U.S. That Uighurs Were Waging Jihad*, THE ATLANTIC, March 9, 2019, https://www.theatlantic.com/international/archive/2019/03/us-uighurs-guantanamo-china-terror/584107.

[301] *Id.*; Josh White, *Lawyers Demand Release of Chinese Muslims*, WASH. POST, Dec. 5, 2006, https://www.washingtonpost.com/wp-dyn/content/article/2006/12/04/AR2006120401191.html.

[302] *Hassoun v. Searls*, Case No 19-cv-370, ECF No. 248-1 (Declaration of Adham Hassoun), at ¶ 31.