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Who May We Detain and How: Lessons from Post 9/11 Enemy Combatant Jurisprudence for New York's Civil Commitment of Sex Offenders

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NOTES

WHO MAY WE DETAIN AND HOW: LESSONS FROM POST 9/11 ENEMY COMBATANT JURISPRUDENCE FOR NEW YORK'S CIVIL COMMITMENT OF SEX OFFENDERS

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INTRODUCTION

> *[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 freed 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.*[1]

Theodore Sypnier, a 100-year-old man from New York, was recently put behind bars for failing to comply with parole conditions stemming from his sixty year history of molesting children.[2] It was the second time he violated his parole.[3] His youngest daughter has pleaded with local and state lawmakers to civilly confine her father, despite his advanced age, because she feels that he will almost certainly reoffend if he is out on the streets.[4] Mr. Sypnier contends that he is too old for treatment.[5]

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[1] Kansas v. Hendricks, 521 U.S. 346, 356–57 (1997) (citing Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905)).

[2] Lou Michel, *100-Year-Old Pedophile Sent Back to Jail*, THE BUFFALO NEWS, Jan. 26, 2010, at B1, *available at* http://www.buffalonews.com/incoming/article31528.ece.

[3] *Id.*

[4] *See id.*

[5] *Id.*

However, a psychotherapist familiar with Mr. Sypnier's case said that "he will likely continue to present a risk to the community. If he isn't a candidate for civil confinement, I don't know who is."[6]

Civil confinement[7] laws allow states to commit sex offenders after their terms of incarceration are completed.[8] The decision to civilly confine sex offenders occurs after they have served their time in prison. The Supreme Court has addressed the constitutionality of civil confinement laws in two decisions regarding a Kansas statute.[9] These cases established that involuntary detention of dangerous mentally ill sex offenders is constitutionally authorized, so long as due process requirements are met.[10]

New York recently passed its own civil confinement statute, the Sex Offender Management and Treatment Act ("SOMTA"), which closely resembles the Kansas statute. Although the Supreme Court spoke directly on the civil confinement of sexual offenders in the context of the Kansas statute, New York's similar civil confinement law has been attacked on constitutional grounds.[11] Since the Supreme Court has stated that detention of mentally ill and dangerous sex offenders is authorized and that civil confinement statutes are facially valid, those challenging the New York Act focus their objections on certain provisions that they find to be procedurally deficient.[12] Litigants contend that "specific aspects of the regime [that the Act] creates fail to

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[6] *Id.*

[7] The terms "civil confinement" and "civil commitment" shall be used interchangeably throughout this Note.

[8] *See* Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 38–39 (2008) (discussing the history and progression of civil commitment for sex offenders in the United States).

[9] Kansas v. Crane, 534 U.S. 407 (2002); Kansas v. Hendricks, 521 U.S. 346 (1997); *see also* discussion *infra* Part I.C.

[10] *Hendricks*, 521 U.S. at 356, 369–71 (holding that the civil confinement statute did not violate substantive due process and rejecting the offender's claims that the Double Jeopardy Clause or ex post facto issues were implicated); *see also infra* Part I.C.

[11] *See* Mental Hygiene Legal Serv. v. Spitzer, No. 07-Civ-2935, 2007 WL 4115936, at *1 (S.D.N.Y. Nov. 16, 2007) (focusing on procedural, and not substantive, due process), *aff'd sub nom.* Mental Hygiene Legal Servs. v. Paterson, No. 07-Civ-5548, 2009 WL 579445 (2d Cir. Mar. 04, 2009). "Plaintiffs do not challenge New York's [ultimate] authority to involuntarily commit individuals who have in the past committed sexual crimes and are at present mentally ill and dangerous." *Id.* at *6.

[12] *See id.*

provide the requisite procedural safeguards necessary to comport with the constitutional command that persons may not be deprived of liberty without due process of law."[13] In other states, legal challenges to civil confinement laws have been accompanied by commentary and academic literature denouncing the practice.[14] It is likely that the challenges in other states are indicative of those that the New York Act will face. Furthermore, the Supreme Court's decision to hear challenges to the same civil confinement statute twice within a five year period signifies the controversial nature of the issue.

Although the Supreme Court's decisions regarding the Kansas statute upheld the constitutionality of civil confinement, this method of addressing the social problem of sex offenders faces criticism. One of the concerns is that many states are using the ambiguity of the decisions to ignore the Supreme Court's holding in crafting and upholding their civil commitment statutes.[15] This Note proposes that another line of Supreme Court jurisprudence, the decisions addressing enemy combatants detained in Guantanamo Bay, provides a basis upon which the New York civil confinement law can be analyzed. Additionally, the Note offers a response to potential statutory challenges that could not otherwise be formed from the civil confinement cases alone.

After the September 11 attacks on the United States in 2001, Congress quickly passed a resolution authorizing the President to "use all necessary and appropriate force" against those connected to the attacks.[16] The conflict that followed was, and

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[13] *Id.* at *1.

[14] *See generally* Eric S. Janus, *The Preventative State, Terrorists, and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, 40 CRIM. L. BULL. 576 (2004) (pointing out the dangers of civil confinement and negative constitutional implications); Todd M. Grossman, Comment, Kansas v. Hendricks*: The Diminishing Role of Treatment in the Involuntary Civil Confinement of Sexually Dangerous Persons*, 33 NEW ENG. L. REV. 475 (1999) (suggesting that adequate treatment is a necessary component of civil commitment); Allison Morgan, Note, *Civil Confinement of Sex Offenders: New York's Attempt To Push the Envelope in the Name of Public Safety*, 86 B.U. L. REV. 1001 (2006) (discussing the possibility that states are creating a group of second-class citizens with fewer rights than the rest of us).

[15] *See* Peter C. Pfaffenroth, Note, *The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of* Kansas v. Crane, 55 STAN. L. REV. 2229, 2248–50 (2003).

[16] Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

continues to be, an unconventional "war" on terror. When individuals captured by the military were sent to Guantanamo Bay, legal challenges to their detention arose. Starting in 2004, and continuing until the present, the Supreme Court grappled with the question of what protections should be afforded to these individuals, termed "enemy combatants" by the Government.[17]

This Note argues that the post 9/11 enemy combatant cases are an appropriate lens through which to examine and ultimately defend the constitutionality of New York's civil confinement statute. Although civilly confining sex offenders and detaining enemy combatants are in part motivated by different concerns, it has been argued that these "two powerful streams of contemporary American public policy are converging on a single idea": identifying a dangerous class of persons and incapacitating them in order to prevent them from doing future harm.[18] The 9/11 cases illustrate that above a constitutionally minimum "floor" of due process requirements, which includes notice and opportunity to be heard, the political branches are free to craft procedures for detaining certain classes of individuals as they see fit. Three principles emerge with respect to both enemy combatants detained by the United States military and sex offenders civilly committed by the New York statute. These principles are first suggested in the civil confinement cases, and reinforced and clarified by the Guantanamo cases. First, it is difficult to draw bright-line rules in both areas, and in the absence of these rules, the political branches must draft legislation that meets the constitutional minimums. Second, the Court is willing to defer to these legislative judgments on how to best craft methods to detain individuals, so long as established

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[17] The four relevant cases, in chronological order, are Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding that a United States citizen held as an "enemy combatant [must] be given a meaningful opportunity to contest the factual basis for [his] detention"); Rasul v. Bush, 542 U.S. 466, 484–85 (2004) (establishing that federal courts have jurisdiction to hear detention challenges from foreign nationals); Hamdan v. Rumsfeld, 548 U.S. 557, 560 (2006) (finding that the military commissions created by the Executive Branch violated the Uniform Code of Military Justice and the Geneva Convention); and Boumediene v. Bush, 553 U.S. 723, 798 (2008) (holding that aliens detained as enemy combatants were entitled to the privilege of habeas corpus).

[18] Janus, *supra* note 14, at 576.

due process requirements are met. Finally, incapacitation for the purpose of preventing future harm is a legitimate goal of confinement in both instances.

Part I of this Note discusses the passage and provisions of the New York Sex Offender Management and Treatment Act. It also provides a brief discussion of the two Supreme Court cases directly addressing civil confinement of sex offenders. Part II analyzes how the 9/11 enemy combatant cases can be used to determine the constitutionality of the New York statute. Part III considers some actual and potential challenges to the New York law, with responses drawn from the reasoning of the Supreme Court's detainee cases.

I. CIVIL CONFINEMENT IN NEW YORK

This Part discusses the passage of New York's civil confinement law and includes a synopsis of the Act's key provisions. It also provides a brief summary and analysis of the Supreme Court's two recent civil confinement cases: *Kansas v. Hendricks*[19] and *Kansas v. Crane*.[20]

A. New York Passes a Civil Confinement Statute for Sex Offenders

New York's civil confinement statute was the product of the legislative branch's struggle to take a tough stance against sex offenders and the judiciary's response to this goal. In 2005, without a specific law in place to govern the procedure, Governor Pataki unilaterally ordered that more than two-dozen sex offenders with imminent release dates be committed using current state laws. His actions were challenged: The former prisoners who were involuntarily committed filed a petition for a writ of habeas corpus.[21]

The case went up to the Court of Appeals, which gave a "sharp rebuke" to the Governor and struck down the confinements.[22] In *State ex rel. Harkavy v. Consilvio*,[23] the

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[19] 521 U.S. 346 (1997).

[20] 534 U.S. 407 (2002).

[21] *See* State *ex rel.* Harkavy v. Consilvio, 10 Misc. 3d 851, 858, 809 N.Y.S.2d 836, 841 (Sup. Ct. N.Y. Cnty. 2005) (granting petition in part).

[22] *See* Nicholas Confessore, *Court Rebukes Pataki on Confining Sex Offenders After Prison*, N.Y. TIMES, Nov. 22, 2006, at B1.

[23] 7 N.Y.3d 607, 859 N.E.2d 508, 825 N.Y.S.2d 702 (2006).

unanimous court held that Pataki's use of existing mental hygiene laws was improper, because the offenders were in the custody of the state's Department of Correctional Services at the time.[24] The court found that in "the absence of specific statutory authority governing the release of felony offenders from prison to a psychiatric hospital," the corrections law should have been followed.[25] In striking down Pataki's confinements, the court recognized that he had acted "in an attempt to protect the community from violent sexual predators," and the judges did "not propose that these petitioners be released."[26] The court also noted that it did not want "to trump the interests of public safety."[27] The opinion almost reads as an instruction to the legislature: If you want to do this, then pass a law. New York legislators responded, and on April 13, 2007, they passed The Sex Offender Management and Treatment Act.[28] The Act was passed as "a balanced response to a compelling need."[29] The compelling need identified was "to protect [New York] residents . . . from sex criminals whose recidivism is predictable and uncontrollable."[30] Balanced against this compelling need were due process concerns, which require, at a minimum, notice and opportunity to be heard. The following section describes the procedures put in place by SOMTA in order to realize these requirements.

B. The Sex Offender Management and Treatment Act

In passing the Act, the legislature found that recidivistic sex offenders posed a danger to society that had thus far been inadequately addressed through the existing criminal framework.[31] The legislative findings repeatedly emphasized that the Act was designed for both treatment of the offenders and

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[24] *Id.* at 610, 859 N.E.2d at 509, 825 N.Y.S.2d at 703.

[25] *Id.*

[26] *Id.* at 614, 859 N.E.2d at 512, 825 N.Y.S.2d at 706.

[27] *Id.* (also "recogniz[ing] that a need for continued hospitalization may well exist").

[28] N.Y. MENTAL HYG. LAW § 10.01 (McKinney 2010).

[29] Introducer's Memorandum in Support, Bill Jacket, ch. 7, L. 2007, 2007 S.B. 3318 (Westlaw).

[30] *Id.*

[31] *See* N.Y. MENTAL HYG. LAW § 10.01(a).

for the protection of the community.[32] This Section identifies the key provisions of SOMTA and describes the three step process for civil confinement in New York.

1. Sex Offenders Affected by SOMTA

The Act creates two classes of offenders: those who are to be physically confined and those who are to be subject to strict supervision. It provides that individuals who pose a greater threat to society will be detained in secure facilities, while those who are capable of living in the community will be monitored under a system of strict supervision. The general "sex offender requiring civil management" is a detained sex offender who suffers from a mental abnormality.[33] In New York, a "mental abnormality" denotes "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct."[34] Whereas a

> "[d]angerous sex offender requiring confinement" means a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.[35]

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[32] *See generally id.* § 10.01. The integrated approach should "provide meaningful treatment and . . . protect the public." *Id.* § 10.01(a). Confinement should be extended by the civil process to provide the offender with treatment and "protect the public from [the offender's] recidivistic conduct." *Id.* § 10.01(b). The goal should be to "protect the public, reduce recidivism, and ensure offenders have access to proper treatment." *Id.* § 10.01(c). The system "must be designed for treatment and protection." *Id.* § 10.01(e).

[33] *Id.* § 10.03(q).

[34] *Id.* § 10.03(i).

[35] *Id.* § 10.03(e). There are currently two secure facilities for sex offenders in New York: Central New York Psychiatric Center, near Utica, and St. Lawrence Psychiatric Center, near Ogdensburg. *See* OFF. N.Y. ST. ATT'Y GEN., THE SEX OFFENDER MANAGEMENT AND TREATMENT ACT: THE FIRST YEAR: A REPORT ON THE 2007 LAW THAT ESTABLISHED CIVIL MANAGEMENT FOR SEX OFFENDERS, at 8, [hereinafter ATTORNEY GENERAL'S REPORT], *available at* http://www.ag.ny.gov/bureaus/sexual_offender/pdfs/April%202008%20Yearly%20Report.pdf.

An offender who requires strict supervision[36] also suffers from a mental abnormality but does not require confinement because it has been decided that he can live safely in the community.[37] If the offender violates the conditions of his supervision, he may be placed in a secure treatment facility.[38]

2. The Civil Confinement Process in New York

To ensure procedural protections, the civil confinement process under the Act takes place in three stages: a review of the case, a probable cause hearing before a judge, and a trial before a jury.[39] Complex "safeguards are necessary to ensure that the respondent's legal rights are respected and that decisions to civilly manage individuals withstand legal scrutiny."[40]

The first stage of the process begins when any detained sex offender is nearing the end of his incarceration; at this time, notice is given to the Attorney General's Office.[41] The case is then referred to the Office of Mental Health ("OMH"). OMH is responsible for reviewing every case and making a recommendation.[42] The case review panel, located within OMH, must consist of at least fifteen members, and each case should be reviewed by three members.[43] The Act requires that "[a]t least two members of each team shall be professionals in the field of

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[36] "Strict and Intensive Supervision and Treatment" is intended for offenders "who can, with supervision and support, live safely in the community." ATTORNEY GENERAL'S REPORT, *supra* note 35, at 7. It is supervised by parole officers with a case ratio of ten to one—a normal caseload in the state is sixty to one, and a normal sex offender caseload is twenty-five to one. *Id.* Offenders are also required to have six face-to-face contacts and six collateral contacts each month. *Id.* Other conditions imposed specifically relate to the offenders risk factors and prior behavior: for example, that he may not have contact with minors, or he may not use a computer. *Id.* Offenders are also required to attend treatment sessions and are subject to drug testing and polygraph examinations. *Id.*

[37] *See* N.Y. MENTAL HYG. LAW § 10.03(r) (McKinney 2010).

[38] *See id.* § 10.11(d)(1) (stating that the parole officer must have "reasonable cause to believe that the person has violated a condition").

[39] *See id.* §§ 10.05–.07.

[40] *See* ATTORNEY GENERAL'S REPORT, *supra* note 35, at 5.

[41] N.Y. MENTAL HYG. LAW § 10.05(b). Although the Act states that notice shall be given to the Attorney General "at least one hundred twenty days prior to the person's anticipated release," it also maintains that failure to give notice within the prescribed time period "shall not affect the validity of such notice or any subsequent action." *Id.*

[42] *See* ATTORNEY GENERAL'S REPORT, *supra* note 35, at 4.

[43] *See* N.Y. MENTAL HYG. LAW § 10.05(a).

mental health."[44] The case team is responsible for looking over medical, clinical, criminal, or institutional records, as well as actuarial risk assessment instruments and reports provided by the district attorney.[45] If the team finds that the offender is a sex offender requiring civil management, the case is referred to the Attorney General for litigation.[46] In the first year, 139 of the 1,603 cases reviewed by OMH were referred to the Attorney General.[47]

The second stage of the process is a petition and hearing before a judge.[48] At any time prior to the trial, the Attorney General may request a court order that the respondent submit to a psychiatric evaluation performed by an examiner of the State's choosing.[49] In addition, the respondent may obtain an evaluation by a psychiatrist of his own choosing.[50] At the hearing, the judge must determine "whether there is probable cause to believe that the respondent is a sex offender requiring civil management."[51] At the hearing, the offender's prior commission of a sex offense is deemed established and will not be relitigated, even if he was found not responsible by reason of mental disease or defect, or was incompetent to stand trial.[52] If the court determines that there is probable cause to believe that the respondent is a sex offender requiring civil management, he remains in the custody of the state and a date is set for a jury trial.[53]

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[44] *Id.*

[45] *See* N.Y. MENTAL HYG. LAW § 10.05(d). The offender's file is first reviewed by a multidisciplinary staff, who may then refer it to a case review team. In the first year 1,603 detained offenders were reviewed by the staff. Of these, 274 went on to a case review team. Out of the 274, 139 were ultimately referred to the Attorney General for litigation. *See* ATTORNEY GENERAL'S REPORT, *supra* note 35.

[46] The Act requires that the case review team provide its referral to the Attorney General within forty-five days of receiving the notice of the offender's anticipated release, but again, the failure to do so within the appropriate time period does not affect the continuation of the process. *See* N.Y. MENTAL HYG. LAW § 10.05(g).

[47] *See* ATTORNEY GENERAL'S REPORT, *supra* note 35.

[48] *See* N.Y. MENTAL HYG. LAW § 10.06. The attorney general should "seek to file the petition within thirty days after receiving notice of the case review team's finding." *Id.* § 10.06(a).

[49] *Id.* § 10.06(d).

[50] *Id.* § 10.06(e).

[51] *Id.* § 10.06(g). A "sex offender requiring civil management . . . is a detained sex offender who suffers from a mental abnormality." *See id.* § 10.03(q).

[52] *Id.* § 10.06(j).

[53] *Id.* § 10.06(k).

The third and final step of the process is a jury trial, in the same court that conducted the probable cause hearing.[54] The purpose of the trial is to "determine whether the respondent is a detained sex offender who suffers from a mental abnormality."[55] Unlike the probable cause hearing, at trial, the jury must make this determination "by clear and convincing evidence," and the Attorney General litigating the case has the burden of proof.[56]

If the jury finds that the respondent requires civil management, the court must then decide whether he must be confined or put under strict and intensive supervision. He will be confined only if there is clear and convincing evidence that: (1) his mental abnormality involves a strong predisposition to commit sex offenses; (2) he has an inability to control his behavior; and (3) that he is likely to be a danger to others if not confined.[57] If the court does not find that he must be committed, he will be placed under strict and intensive supervision.[58] After an offender has been committed, he receives an annual examination. Each year, a psychiatrist evaluates him and reports on whether he is still a dangerous sex offender requiring confinement.[59] The offender may also petition for discharge at any time.

C. The Supreme Court's Perspective on Civil Confinement of Sex Offenders

The United States Supreme Court has specifically addressed civil confinement of sex offenders in two cases. The Court's analysis in these cases highlights that civil confinement laws are facially valid, but certain procedures and provisions may be addressed through as-applied challenges. This Section

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[54] *Id.* § 10.07(a) (stating that the trial will occur within sixty days of the probable cause hearing).

[55] *Id.*

[56] *Id.* § 10.07(d). This determination must be made by a unanimous jury. *Id.*

[57] *See id.* § 10.07(f). "In such case, the respondent shall be committed to a secure treatment facility for care, treatment, and control until such time as he or she no longer requires confinement." *Id.*

[58] *See id.* "Strict and intensive supervision" is governed by section 10.11 of the Act. Possible requirements include electronic monitoring, global positioning satellite tracking, polygraph monitoring, residence restrictions, prohibition of contact with past or potential victims, and supervision by a parole officer. *See id.* § 10.11(a)(1); *see also supra* note 34 and accompanying text.

[59] *See* N.Y. MENTAL HYG. LAW § 10.09(b) (McKinney 2010).

summarizes both of the Court's civil confinement decisions regarding the Kansas statute, which is similar to the New York Act.

1. *Kansas v. Hendricks*

In *Kansas v. Hendricks*,[60] the Supreme Court held that Kansas's Sexually Violent Predator Act[61] satisfied substantive due process requirements for civil confinement.[62] Kansas used the statute for the first time to commit Hendricks, who had a long criminal history of molesting children.[63] Hendricks appealed his commitment, and the supreme court in the state of Kansas held the Act violated his substantive due process rights, because the Act's definition of "mental illness" did not satisfy the United States Supreme Court's "mental illness" requirement for involuntary commitment.[64] The United States Supreme Court disagreed, finding that the Act did "comport[ ] with due process requirements."[65]

In holding the Act constitutional, the Court noted that although individual freedom from personal restraint is a core liberty protected by due process, "that liberty interest is not absolute."[66] States, in narrow circumstances, may forcibly commit individuals who pose a danger to society.[67] Civil confinement of a small subclass of dangerous persons is not "contrary to our understanding of ordered liberty."[68] The Court did not elaborate on what would be considered an adequate procedure to forcibly commit a dangerous individual.

The Court also noted that the Act was civil in nature, rejecting Hendricks' argument that it established criminal proceedings. It stated that "[t]he categorization of a particular

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[60] 521 U.S. 346 (1997).

[61] KAN. STAT. ANN. § 59-29a01 (2008).

[62] *See* Kansas v. Hendricks, 521 U.S. 346, 371 (1997).

[63] *See id.* at 350.

[64] *See id.* at 356 (the majority of the Kansas Supreme Court did not address Hendricks' double jeopardy or ex post facto claims).

[65] *Id.* at 371.

[66] *Id.* at 356. The Court quoted an earlier case, which warned that "[t]here 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." Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

[67] *Hendricks*, 521 U.S. at 357 (explaining that the individual's liberty interest may be overridden even in the civil context).

[68] *Id.*

proceeding as civil or criminal is first of all a question of statutory construction. . . . [Once w]e ascertain [that] the legislature meant the statute to establish 'civil' proceedings [then] we ordinarily defer to the legislature's stated intent."[69] Although the Court recognized that incapacitation was a goal of the Act, it noted that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment."[70] Here, the Court decided that the confinement at issue was not punitive in nature but was instead intended simply to "hold the person until his mental abnormality no longer causes him to be a threat to others."[71] The Court also found that even though there was no adequate treatment provision in the Act, "incapacitation [alone] may be a legitimate end of the civil law."[72]

2. *Kansas v. Crane*

Perhaps indicating the uncertainty surrounding the *Hendricks* decision, the same Kansas statute was revisited by the Supreme Court five years later in *Kansas v. Crane*.[73] The Court once again evaluated the constitutionality of the state's civil commitment law. The issue presented this time was more narrow: In order for the statute to comport with substantive due process, did *Hendricks* require that the sex offender exhibit total or complete lack of control over his behavior?[74] The Kansas Supreme Court found that under *Hendricks*, the Constitution requires that the subject be completely unable to control his behavior.[75] The State of Kansas disagreed, arguing that the

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[69] *Id.* at 361 (internal quotation marks omitted). This deference to the judgment of the legislature will be discussed further Part II below, in the context of the detainees at Guantanamo Bay.

[70] *Hendricks*, 521 U.S. at 363 (quoting United States v. Salerno, 481 U.S. 739, 746 (1987)).

[71] *Id.* ("This is a legitimate nonpunitive governmental objective and has been historically so regarded."). For a further discussion of the importance of incapacitation as a preventative measure see *infra* Part II.B.

[72] *Hendricks*, 521 U.S. at 365–66.

[73] 534 U.S. 407 (2002).

[74] *Id.* at 411.

[75] *In re* Crane, 7 P.3d 285, 290 (Kan. 2000).

> A fair reading of the majority opinion in *Hendricks* leads us to the inescapable conclusion that commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior. To conclude otherwise would require that we ignore the plain language of the majority opinion in *Hendricks*. Justice Thomas, speaking for the

Constitution does not require any lack of control determination in order to civilly commit an offender.[76] The United States Supreme Court split the difference and concluded that under its previous decision in *Hendricks*, and consistent with the Constitution, a person could be committed under the Kansas statute with "proof of serious difficulty in controlling behavior."[77] In addition, the Court suggested that "the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules."[78] The Court emphasized that individual states retain "considerable leeway" in defining who is eligible for civil commitment due to mental abnormalities.[79]

An analysis of the two civil confinement decisions demonstrates a few key points, each of which will be examined further in this Note. First, the Court is willing to allow states to craft their civil confinement statutes as their legislatures see fit. It states in definite terms that it will normally defer to the legislature in this area of the law, so long as the civil confinement statute meets basic due process requirements. Second, the Court recognizes that it is difficult to draw bright-line rules with regard to due process and civil confinement of sex offenders. In the absence of these rules, it is necessary for states to ensure that they draft legislation that meets the minimum constitutional protections of due process. Third, the Court identifies incapacitation for the purpose of preventing future harm as a legitimate goal of civil confinement. Each of these principles can be better illustrated when examined through the lens of the Guantanamo Bay detainee cases.

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majority, stated that to be constitutional, a civil commitment must limit involuntary confinement to those "who suffer from a volitional impairment rendering them dangerous beyond their control."

Id. (quoting *Hendricks*, 521 U.S. at 358 (1997)). The Kansas court interpreted this language from *Hendricks* as requiring a *complete* or *total* lack of control. *Id.* at 288–89.

[76] Kansas v. Crane, 534 U.S. 407, 412 (2002) (citing the Brief for Petitioner at 17, Kansas v. Crane, 534 U.S. 407 (2002) (No. 00-957), 2001 U.S. S. Ct. Briefs LEXIS 390; Transcript of Oral Argument at 30–31, Kansas v. Crane, 534 U.S. 407 (2002) (No. 00-957), 2001 U.S. Trans. LEXIS 58).

[77] *Id.* at 413.

[78] *Id.*

[79] *Id.*

II. HOW THE POST 9/11 DETAINEE CASES INFORM CIVIL CONFINEMENT

The enemy combatant cases are relevant for analyzing New York's civil confinement statute, due to similarities in the problems both seek to address, the related solutions crafted, and the comparable discourse between the judicial and political branches. The Court's enemy combatant decisions highlight what is insufficient for purposes of due process: This Note proposes that if these deficiencies are not implicated by the New York statute, it follows that it is adequate for due process purposes. This Part first briefly discusses the process of how sex offenders and enemy combatants arrive in their respective detentions. It then notes the emphasis on prevention as a legitimate goal of incapacitation in both scenarios. Finally, it sketches out how the minimum protections of due process can be met through a procedure specially tailored by the Executive or the legislature in certain circumstances.

A. How Do Sex Offenders and Enemy Combatant Detainees "Get There?"

Kansas v. Crane was decided in 2002, after September 11 but before the first Guantanamo Bay detainee case[80] came before the Court. The Guantanamo cases are relevant for analysis of the New York statute, because although the Court addressed the Kansas statute in its civil confinement cases, it did not spell out exactly what a statute must avoid to be considered constitutional. Rather, it spoke in terms of why the Kansas statute was constitutional.

With the New York civil confinement statute, there is a clearly defined path for how the offender "gets there": He has been convicted of at least one designated offense in the past,[81] been incarcerated and close to release, and then been deemed to have a mental abnormality. After these conditions are met, and he goes through the civil commitment process, he is deemed a

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[80] Hamdi v. Rumsfeld, 542 U.S. 507 (2004) and Rasul v. Bush, 542 U.S. 466 (2004) were both decided on June 28, 2004.

[81] "[I]n order for a valid sex offender civil management petition to be filed, a respondent must have been convicted of committing a defined sex offense." State v. P.H., 22 Misc. 3d 689, 705, 874 N.Y.S.2d 733, 745 (Sup. Ct. 2008) (finding that respondent was previously convicted of attempted rape in the first degree and sexual abuse in the first degree, two qualifying offenses under the Act).

"sex offender requiring civil management."[82] With the detainees at Guantanamo, it is slightly more ambiguous, but the general path toward being detained is a capture on the "battlefield" and the government's designation of the individual as an "enemy combatant."[83]

B. The Importance of Prevention in Both Schemes

Both civil confinement laws and enemy combatant policies seek to prevent future harm to society by incapacitating dangerous individuals. One of the recurring themes of the New York civil confinement statute is the need to prevent sex offenders from harming the community in the future. The first sentence of the legislative findings states that "recidivistic sex offenders pose a danger to society that should be addressed through comprehensive programs of treatment and management."[84] The idea of protecting the public by addressing the risk of sex offenders comes up five more times in the next four sections of the Act: "[C]onfinement of the most dangerous offenders will need to be extended by the civil process in order to provide them [with] treatment and to protect the public from their recidivist conduct."[85] The Attorney General has said that

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[82] *See generally* N.Y. MENTAL HYG. LAW § 10.01 (McKinney 2010); *see also supra* Part I.B.

[83] There is no definitive or exclusive definition of an "enemy combatant." However, in a 2004 order establishing the military teams to review detainees, it was stated that "[f]or purposes of this Order, the term 'enemy combatant' shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), *available at* http://www.defense.gov/news/jul2004/d20040707review.pdf. In *Hamdi v. Rumsfeld*, the Court pointed out that,

> [t]here is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that is uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was " 'part of or supporting forces hostile to the United States or coalition partners' " in Afghanistan and who " 'engaged in an armed conflict against the United States' " there.

542 U.S. 507, 516 (2004) (quoting Brief for the Respondents at 3, Hamdi v. Rumsfeld, 542 U.S. 507 (No. 03-6696), 2004 WL 724020).

[84] N.Y. MENTAL HYG. LAW § 10.01(a).

[85] *Id.* § 10.01(b); *see also id.* ("These offenders may require long-term specialized treatment modalities to address their risk to reoffend."); *id.* § 10.01(c) ("The goal of a comprehensive system should be to protect the public, [and] reduce recidivism . . . ."); *id.* § 10.01(d) (noting protection of society as a goal of civil commitment); *id.*

the system is designed to "closely supervise and treat" offenders who "pose a substantial risk to commit new sex crimes."[86] The Attorney General also notes that civil management "enhances public safety by filling a void"[87] and provides "a new mechanism to protect New Yorkers from mentally abnormal and potentially dangerous sex offenders."[88]

The Supreme Court directly addressed the issue of prevention in its enemy combatant cases, and its analysis supports New York's stated goals in passing its civil confinement law. In *Hamdi v. Rumsfeld*, a plurality of the Court considered the government's interest in detaining enemy combatants.[89] It found that the government's concern in making sure enemies do not return to battle is "weighty and sensitive."[90] The Court willingly conceded that the Constitution allows for decisions concerning war to be made by those who are "best positioned and most politically accountable for making them."[91] The Court's due process analysis "need not blink at those realities."[92]

In his *Boumediene v. Bush* dissent, Justice Scalia emphasized a legitimate goal of confining enemy combatants at Guantanamo.[93] His discussion is constructive in the context of civil commitment when he stresses the importance of prevention in detaining enemy combatants, because many of the reasons that justify detaining enemy combatants also justify confining sexual predators. Both groups are dangerous to society, it is difficult to predict the future behavior of each, and incapacitating these individuals seems to be the only practical way to protect potential victims. Justice Scalia notes the "disastrous consequences" stemming from the Court's holding that detained alien enemy combatants have a right to the writ of habeas corpus and states his fundamental disagreement with the proposition that the writ runs in favor of aliens abroad.[94] He then goes on to

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§ 10.01(e) ("That the system for responding to recidivistic sex offenders with civil measures must be designed for . . . protection.").

[86] ATTORNEY GENERAL'S REPORT, *supra* note 35, at 1.

[87] *Id.* at 3.

[88] *Id.* at 12 (concluding that after a year of being implemented, SOMTA has made New York communities "safer").

[89] 542 U.S. 507 (2004).

[90] *Id.* at 531.

[91] *Id.*

[92] *Id.*

[93] Boumediene v. Bush, 553 U.S. 723, 827 (2008) (Scalia, J., dissenting).

[94] *Id.*

emphasize a point important for the civil confinement issue: there is no real way of knowing if an enemy combatant will reoffend once released.[95] Some enemy combatants released from Guantanamo "succeeded in carrying on their atrocities against innocent civilians."[96] This "return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant . . . ."[97]

Despite the attempt to craft a stringent standard for civilly committing sex offenders in New York, it, too, is a fallible process. In the end, it comes down to the judgment of mental health professionals, judges, and juries. However, despite the inherent difficulties in predicting who will reoffend, the legislature has chosen to pursue civil confinement as a means of preventing future crimes. Just as the military does not want enemy combatants returning to engage in more hostilities against American forces, New York does not want convicted sex offenders returning to society to commit more crimes. It can be argued that this "impulse for prevention" is implicated by the "ongoing legislative innovations in the campaign against sexual violence."[98]

New York courts have also noted the importance of prevention in the context of civil commitment. The Court of Appeals recognized the legislature's goal of "protect[ing] the community from violent sexual predators."[99] In a presently ongoing federal case involving procedural due process challenges to SOMTA, it was noted that "New York . . . has a strong interest in ensuring the safety of potential victims of [sexual] offenses."[100] Coupled with the legislature's stated intent of using civil confinement as a means of protecting society, it is evident that the judiciary in New York recognizes prevention as a legitimate goal of civil confinement.

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[95] *Id.* at 826.

[96] *Id.* at 828.

[97] *Id.* at 829.

[98] Janus, *supra* note 14, at 576.

[99] State *ex rel.* Harkavy v. Consilvio, 7 N.Y.3d 607, 614, 859 N.E.2d 508, 512, 825 N.Y.S.2d 702, 706 (2006).

[100] Mental Hygiene Legal Serv. v. Spitzer, No. 07-Civ-2935, 2007 WL 4115936, at *5 (S.D.N.Y. Nov. 16, 2007) (discussing Plaintiff Mental Hygiene Legal Service's motion for injunctive relief), *aff'd sub nom.* Mental Hygiene Legal Servs. v. Paterson, No. 07-Civ-5548, 2009 WL 579445 (2d Cir. 2009).

C. How Can the Minimal Protections of Due Process Be Tailored for Civil Confinement?

In responding to constitutional challenges to SOMTA, the federal court in *Mental Hygiene Legal Service v. Spitzer*[101] stated that "[w]hen a person's liberty interests are implicated, due process requires at a minimum notice and an opportunity to be heard."[102] However, beyond this minimum "floor" of constitutional protection, "[d]ue process is not a fixed concept, but flexible, and depends on the particular circumstances."[103] The court also recited the traditional two-step inquiry for examining a due process claim: first, whether there is a liberty interest that has been interfered with by the State, and, second, whether "the procedures attendant upon that deprivation were constitutionally sufficient."[104] In the case of civil confinement, "there is no question" as to the first inquiry—persons affected by the Act face a serious liberty deprivation: Those found to be sex offenders requiring civil management are confined against their will.[105] The remaining question is whether the procedures created by the Act are constitutionally sufficient.

The Supreme Court has said that procedural due process requirements may be tailored to fit exceptional circumstances. In *Hamdi*, a Guantanamo case, a plurality of the Court held that a United States citizen being held within United States territory

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[101] In New York, the Mental Hygiene Legal Service is placed within the judicial branch of the government. It is responsible for protecting the rights of the mentally disabled and advocating for individuals regarding the status of their mental health. *See Mental Hygiene Legal Service*, NEW YORK STATE UNIFIED COURT SYSTEM, http://www.courts.state.ny.us/ad4/MHLS/MHLS_default.htm (last visited Mar. 17, 2011).

[102] *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *5. It should be noted for purposes of this discussion that the District Court in New York pulled this particular phrasing of the due process minimum from *Hamdi v. Rumsfeld*, which stated that

> the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.

542 U.S. 507, 533 (2004) (quoting Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (internal quotation marks omitted).

[103] *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *4 (citing Zinermon v. Burch, 494 U.S. 113, 127 (1990)).

[104] *Id.* (quoting Ky. Dep't. of Corr. v. Thompson, 490 U.S. 454, 460 (1989)).

[105] *Id.* ("Persons affected by Article 10 are threatened with deprivation not merely of *a* liberty interest, but of liberty *tout court* . . . .").

should receive notice of the government's factual basis for holding him and an opportunity to contest that basis before an impartial judge.[106] Just as with civil confinement, the Court found that the private liberty interest affected by the official action was "the most elemental of liberty interests—the interest in being free from physical detention by one's own government."[107] The Court concluded that the government may not hold a citizen indefinitely without basic due process protections enforceable through judicial review.[108]

Beyond these basic due process protections, the plurality found that "the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings *may be tailored* to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[109] The Court elaborated on general principles that should guide the executive in crafting these "tailored" procedures. First, hearsay might have to be accepted as a reliable form of evidence from the government.[110] In addition, the "Constitution would not be offended by a presumption in favor of the Government's evidence," as long as there was a fair opportunity for the detainee to rebut that presumption.[111] Once the government puts forth credible evidence, the burden could shift to the detainee to challenge with "more persuasive evidence that he falls outside the [enemy combatant] criteria."[112] The plurality thought it was possible that these standards could be met by a "properly constituted military tribunal."[113] However, in

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[106] *Hamdi*, 542 U.S. at 509.

[107] *Id.* at 529 (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

[108] *Id.* at 533. The plurality also pointed out that a "clearly established principle of the law of war" is that detention may last no longer than hostilities. *Id.* at 519. However, due to the nature of the "war on terror," Hamdi's detention "could last for the rest of his life." *Id.* at 520. This concern has been raised, albeit in a different context, with civil confinement of sex offenders. *See infra* Part III.C.

[109] *Hamdi*, 542 U.S. at 533 (emphasis added).

[110] *Id.* at 533–34.

[111] *Id.* at 534.

[112] *Id.* This type of burden shifting would ensure that the "errant tourist, embedded journalist, or local aid worker" is able to prove military error but still gives "due regard to the Executive." *Id.*

[113] *Id.* at 538.

crafting an alternative to established habeas procedures,[114] Congress will ultimately be told by the Court what is "good enough" to be an adequate substitution.

Similarly, with the New York civil confinement statute, the judiciary will be the final arbiter on whether the procedures are "good enough." In evaluating the constitutionality of the newly enacted statute, a federal district court suggested that "it is preferable to give the New York State courts the opportunity to determine the proper scope of a New York law before a federal court declares whether it offends the federal Constitution."[115] The federal court also noted the role of judicial restraint in evaluating a statute passed by the legislature: If it is "conceivable that the statute may be susceptible to constitutional application," the court will be hesitant to invalidate it on a facial level.[116] Chief Justice Roberts echoed this preference for a restrained judicial role in his *Boumediene* dissent. He chided the majority that "we ought not to pass on questions of constitutionality . . . unless such [questions are] unavoidable."[117]

Much of the Supreme Court jurisprudence regarding enemy combatants has been marked by a back and forth with the political branches. In *Boumediene*, the Court deferred to the legislature when it considered the legislative history of enemy combatant statutes. It found that "this ongoing dialogue between and among the branches of Government . . . [should] be respected."[118] This parallels the "dialogue" between the New York government and the Court of Appeals leading up to the passage of SOMTA.[119] In each instance, the judiciary and the government are involved in a "conversation": the legislature initiates it with a law, the court responds with an opinion.

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[114] The federal habeas statute states that "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241 (2006 & Supp. II).

[115] Mental Hygiene Legal Serv. v. Spitzer, No. 07-Civ-2935, 2007 WL 4115936, at *11 (S.D.N.Y. Nov. 16, 2007) ("Depending upon how New York courts interpret their own statute, there may be no need to reach any federal constitutional issue."), *aff'd sub nom.* Mental Hygiene Legal Servs. v. Paterson, No. 07-Civ-5548, 2009 WL 579445 (2d Cir. 2009).

[116] *Id.* at *10–11.

[117] Boumediene v. Bush, 553 U.S. 723, 805 (2008) (Roberts, C.J., dissenting) (alteration in original) (quoting Spector Motor Serv. Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).

[118] *Id.* at 738 (majority opinion).

[119] *See supra* Part I.A.

Depending on the court's response, the legislature may have to amend the law. Despite the government's power to start the dialogue, the judiciary has the final say in the conversation.

III. CHALLENGES TO CIVIL CONFINEMENT AND DETAINEE RESPONSES

This Part summarizes a few of the actual and potential challenges to New York's civil confinement statute. The actual challenges are those currently being raised through litigation; potential challenges are informed by the experiences of other states and the commentary criticizing civil commitment statutes generally.

A. Non-Judicial Determinations and Deficient Evidence Standards

One challenge to New York's statute might be that a non-judicial body, the case review team from OMH, exercises power over the confinement decision. Using the enemy combatant cases, the appropriate response is that since that decision is reviewed by both a judge and a jury, due process requirements are met. In both civil confinement and enemy combatant proceedings, a non-judicial body has authority over the detention decision. With civil confinement, the OMH and a case review team provide the initial review of the respondent's file. There must be a panel of at least fifteen members, at least three of whom must evaluate each case. Two members must be mental health professionals with experience in the treatment, diagnosis, risk assessment, or management of sex offenders.[120] With SOMTA, the case review team is the first step in the chain. Its recommendation is ultimately considered by both a judge in the probable cause hearing and a jury in the trial.

The parallel non-judicial body in enemy combatant cases is the Combatant Status Review Tribunal ("CSRT"). CSRTs are composed of three members of the military, none of whom was involved in the apprehension of the detainee.[121] The Supreme Court's most recent detainee case did not explicitly endorse or

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[120] *See* N.Y. MENTAL HYG. LAW § 10.05(a) (McKinney 2010).

[121] *See* Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), *available at* http://www.defense.gov/news/jul2004/d20040707review.pdf.

reject the CSRTs.[122] Although it held that the Detainee Treatment Act ("DTA") passed by Congress was an inadequate substitute for habeas, it did not "endeavor to offer a comprehensive summary of the requisites" of a sufficient procedure.[123] The Court expressly made "no judgment [as to] whether the CSRTs, as currently constituted, satisfy due process standards."[124] It did, however, identify some deficiencies. First, it noted that it was difficult for the detainee to rebut the factual basis for the Government's assertion that he was an enemy combatant.[125] He was allowed to present "reasonably available evidence," but his ability was limited by his confinement.[126] Next, he was not permitted the assistance of counsel[127] but rather had a "personal representative."[128] The Court backpedaled from its *Hamdi* suggestion that hearsay evidence is acceptable in this context and found that the admission of hearsay makes the "detainee's opportunity to question witnesses . . . more theoretical than real."[129]

Since the Court did not offer its view of what *would* constitute an adequate habeas procedure in *Boumediene*, the political branches were left to deduce what it requires. However, it is logical to assume that if the aforementioned deficiencies make the DTA *inadequate*, the inclusion of these safeguards would make the procedure *adequate*.

Provisions of SOMTA state that the Attorney General has the burden of showing that the respondent requires confinement, and the respondent is allowed to contest the factual basis of the state's assertion at the trial.[130] He may employ his own

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[122] *See* Boumediene v. Bush, 553 U.S. 723, 785 (2008) (holding that non-citizen detainees had the right to the writ of habeas corpus).

[123] *Id.* at 779.

[124] *Id.* at 785.

[125] *See id.* at 767.

[126] *Id.* (internal quotation marks omitted).

[127] *Id.* at 783–84.

[128] A personal representative is a designated military officer with appropriate security clearance who assists the detainee with the review process. *See* Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), *available at* http://www.defense.gov/news/jul2004/d20040707review.pdf. The representative may share information with the detainee unless it is classified. *Id.*

[129] *Boumediene*, 553 U.S. at 784.

[130] N.Y. MENTAL HYG. LAW § 10.07(d) (Mckinney 2010).

psychiatric evaluator.[131] Additionally, at all stages of the process, he is represented by counsel. The DTA deficiencies of *Boumediene* are not present with SOMTA.

Finally, in the New York civil confinement statute, the case review team does the initial review and does not make a final decision. A judicial body ultimately reviews its recommendation. In *Rasul v. Bush*,[132] the Court went through a lengthy discussion of habeas corpus and came to the conclusion that "the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."[133] After this decision, the judiciary was able to exercise control over enemy combatant determinations, just as a judicial body has authority over the OMH civil confinement recommendation.

B. These Are Criminal Procedures Couched in Civil Terms

Another potential challenge to the New York statute is that it couches criminal provisions in civil terms. Civil confinement law has been criticized as being "a criminal wolf in a civil sheep's clothing."[134] It has been argued that overly broad statutes "blur the distinction between civil and criminal proceedings."[135] The response from the detainee cases is that in order to promote safety, procedures may be tailored, and the judiciary will defer to the legislature's judgment so long as the statute may be construed constitutionally. In *Hendricks*, the Supreme Court rejected the argument that the Kansas civil confinement statute was criminal in nature.[136] In New York, there have been challenges to the Act that raise the question of whether certain provisions are more criminal than civil. In responding to one of these challenges, a district court judge found that the criminal tone of the statute necessitated a closer look at one of its

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[131] *Id.* § 10.09(b).

[132] 542 U.S. 466 (2004).

[133] *Id.* at 485.

[134] Steven I. Friedland, *On Treatment, Punishment and the Civil Confinement of Sex Offenders*, 70 U. COLO. L. REV. 73, 115 (1999).

[135] *See* Pfaffenroth, *supra* note 15, at 2251 (proposing that civil commitment justifications create a "slippery slope" that might be used to allow confinement of other types of criminals).

[136] *See* Kansas v. Hendricks, 521 U.S. 346, 361 (1997).

provisions.[137] Section 10.07(d) authorizes civil confinement of individuals who were charged with sex offenses but were unable to stand trial, due to mental incapacitation. At the civil commitment trial, if the Attorney General can prove by "clear and convincing evidence . . . that respondent did engage in the conduct constituting [the sex] offense," he can be committed.[138] The court noted the *Hendricks* proposition that a legislature's assertion that the statute is civil in nature may be overcome only when it is clear that it is punitive either in nature or effect. Here, the court found that the wording[139] and purpose of the statute necessitated a finding *beyond a reasonable doubt* that the individual had actually committed the qualifying sex offense.[140]

The enemy combatant proceedings are concerned with criminal acts and penalties. However, *Hamdi* provides crucial guidance in its proposition that the judiciary should defer to the legislature to craft procedures as they see fit, so long as the procedures meet the minimum due process requirements, in either the civil or criminal contexts. As discussed earlier, the *Hamdi* plurality found that the executive could tailor the enemy combatant proceedings to meet the special needs of the military without running afoul of due process requirements.[141] In his *Hamdi* dissent, Justice Thomas went so far as to say that the executive branch has plenary powers to detain enemy combatants even without hearings.[142] He emphasized the practical reality that the judiciary did not have the "expertise and capacity" to second-guess the executive branch's determination that an individual required detention.[143] Although Thomas's conclusion may be extreme, his argument that "no governmental interest is more compelling than the security of the

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[137] *See* Mental Hygiene Legal Serv. v. Spitzer, No. 07-Civ.-2935, 2007 WL 4115936, at *17–21 (S.D.N.Y. Nov. 16, 2007), *aff'd sub nom.* Mental Hygiene Legal Servs. v. Paterson, No. 07-Civ-5548, 2009 WL 579445 (2d Cir. 2009).

[138] *Id.* at *17 (alteration in original) (quoting N.Y. MENTAL HYG. LAW § 10.09 (Mckinney 2010)).

[139] In particular, the court emphasized the use of the words "offender" and "recidivist," concluding that they have "clear criminal implications." *Id.* at *19. It also found that the statute expresses "moral condemnation" that is "normally reserved for criminal judgments." *Id.*

[140] *Id.* at *21.

[141] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

[142] *Id.* at 579 (Thomas, J., dissenting).

[143] *Id.*

Nation"[144] is convincing when grounded in the Supreme Court's recognition that the community's interest in safety can outweigh an individual's liberty interest.[145]

C. Chances for Release Are Slim

Many argue that civil commitment of sex offenders amounts to an indefinite confinement.[146] The response from the detainee cases is that as long as individuals have an adequate basis to challenge their detention, due process requirements are satisfied. In New York, as in many other states, confined offenders have a statutory basis to challenge their detention annually.[147] SOMTA requires that each individual be examined "at least once every year" by a state psychiatric examiner.[148] At the same time, the individual also has "the right to be evaluated by an independent psychiatric examiner."[149] In addition, the subject may petition the court "at any time" for release from a secure facility into strict and intensive supervision and treatment.[150]

Some of the federal statutes and procedures regarding enemy combatants had similar provisions for periodic review of an enemy combatant's status. The DTA was enacted in response to the Court's 2004 decision in *Hamdi*. Congress seemed to be following the advice of the plurality, who had suggested that an appropriately authorized, proper military tribunal could meet the Court's articulated due process minimums.[151] The DTA required the Secretary of Defense to submit an annual report to Congress, detailing its review procedures and the number of detainees

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[144] *Id.* at 580 (quoting Haig v. Agee, 453 U.S. 280, 307 (1981)).

[145] *See id.* at 591 (noting that "the Due Process Clause 'lays down [no] categorical imperative' " (alteration in original) (quoting United States v. Salerno, 481 U.S. 739, 748 (1987))).

[146] *See, e.g.*, Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1034 (2002) ("Substantive due process requires a . . . workable limiting standard to justify the massive deprivation of liberty that indefinite involuntary civil commitment imposes."); Edward P. Ra, Note, *The Civil Confinement of Sexual Predators: A Delicate Balance*, 22 ST. JOHN'S J. LEGAL COMMENT. 335, 352 (2007) ("Since civil confinement laws involve a deprivation of liberty for an indefinite period of time, the due process clause protections must be met.").

[147] *See* N.Y. MENTAL HYG. LAW § 10.09 (McKinney 2010) (annual examinations and petitions for discharge).

[148] *Id.* § 10.09(b).

[149] *Id.*

[150] *Id.* § 10.09(f).

[151] Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004).

reviewed.[152] The decisions of the CSRTs were explicitly reviewable by the Court of Appeals for the District of Columbia.[153] In his *Boumediene* dissent, Chief Justice Roberts emphasized that the DTA expressly directs the Secretary of Defense to review any new evidence pertaining to the enemy combatant status of a detainee.[154] There must be a yearly review of each prisoner's status to "afford every detainee the opportunity 'to explain why he is no longer a threat to the United States.' "[155] The *Boumediene* Court's problem with the review of new evidence was that on its face, the DTA did not allow the reviewing Court of Appeals to consider evidence outside the CSRT record.[156] Roberts disagreed with this "hand wringing" of the Court because he found that it declared the evidence issue unconstitutional with reference only to abstract hypotheticals.[157]

It is fair to say that the procedural opportunities for annual review in SOMTA would fall within the *Boumediene* Court's allowable limits. Once the subject is evaluated by a psychiatric professional, the report is sent to OMH.[158] If the subject cannot afford his own evaluator, the court will appoint him one of his choice.[159] After reviewing the new report, and the rest of the subject's file, OMH makes "a determination in writing as to whether the respondent is *currently* a dangerous sex offender requiring confinement."[160] If the respondent petitions for a hearing, it is held within forty-five days. If the reviewing court finds that there is a substantial issue as to whether he still

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[152] Detainee Treatment Act of 2005, Pub. L. No. 109-163, § 1405(d), 119 Stat. 3136 (codified as amended in scattered sections of 10 U.S.C., 22 U.S.C., and 42 U.S.C.). *Boumediene* later held that the Detainee Treatment Act was not an adequate substitute for habeas, but this was not based on the annual review procedures alone. *See* Boumediene v. Bush, 553 U.S. 723, 728–30 (2008).

[153] *Boumediene*, 553 U.S. at 803 (Roberts, C.J., dissenting).

[154] *Id.* at 801 (Roberts, C.J., dissenting) ("Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants.").

[155] *Id.* at 821 (quoting Petition for Writ of Certiorari, Boumediene v. Bush, 553 U.S. 723 (2008) (No. 06-1196), 2007 WL 671010).

[156] *Id.* at 789 (majority opinion).

[157] *Id.* at 821–22 (Roberts, C.J., dissenting). "The Court's new method of constitutional adjudication only underscores its failure to follow our usual procedures and require petitioners to demonstrate that *they* have been harmed by the statute they challenge." *Id.* at 821–22.

[158] N.Y. MENTAL HYG. LAW § 10.09 (McKinney 2010).

[159] *Id.*

[160] *Id.* § 10.09(b) (emphasis added).

requires confinement, an evidentiary hearing is held. Unlike the enemy combatant proceedings, where the government's basis has a presumption of validity, in this evidentiary hearing, the Attorney General has the burden of proof.[161] The respondent will continue to be confined only if the court finds by clear and convincing evidence that he requires it.[162]

D. Notice and Opportunity To Be Heard Are Lacking in Certain Provisions

One of the challenged provisions in SOMTA is section 10.06(f),[163] which authorizes detention of a sexual offender before the probable cause hearing stage of the commitment proceedings. In *Mental Hygiene Legal Service*,[164] Plaintiff Mental Hygiene Legal Service ("MHLS") argued that this provision violates the "most basic tenets of due process": notice and opportunity to challenge the detention.[165] The court found that the statute did not require notice be given to the respondent in advance of his detention by a securing petition.[166] It also agreed with Plaintiff MHLS that it gives the individual no opportunity to contest the petition and thus, detention.[167] Though the court recognized that this provision might empower an executive branch official to order an individual detained beyond his sentence, it declined to

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[161] *Id.* § 10.09(d).

[162] *Id.* § 10.09(h).

[163] New York Mental Hygiene Law provides:

> [I]f it appears that the respondent may be released prior to the time the case review team makes a determination, and the attorney general determines that the protection of public safety so requires, the attorney general may file a securing petition at any time after [the respondent's] receipt of written notice. . . . In such circumstance, there shall be no probable cause hearing until such time as the case review team may find that the respondent is a sex offender requiring civil management. If the case review team determines that the respondent is not a sex offender requiring civil management, the attorney general shall so advise the court and the securing petition shall be dismissed.

Id. § 10.06(f).

[164] No. 07-Civ-2935, 2007 WL 4115936 (S.D.N.Y. Nov. 16, 2007), *aff'd sub nom.* Mental Hygiene Legal Servs. v. Paterson, No. 07-Civ-5548, 2009 WL 579445 (2d Cir. 2009).

[165] *Id.* at *7, *11 (declining to deem the provision facially unconstitutional). This case is still being litigated.

[166] *Id.* at *7.

[167] *Id.* at *7–8.

declare the provision facially unconstitutional, because "the present record [did] not demonstrate that the statute cannot be administered or interpreted in a way to avoid these problems."[168]

Unlike the Guantanamo detainees, many of whom have faced six years without judicial oversight,[169] the sex offenders affected by section 10.06(f) will be granted a probable cause hearing within seventy-two hours of the securing petition.[170] The court in *Mental Hygiene Legal Service* also found it relevant that in the first six months of the statute's passage, securing petitions were only used twice. The court took this as an indication that the Attorney General was not abusing the process.[171]

Another potential challenge might arise with regard to notice under SOMTA. Many of the provisions setting deadlines for the Attorney General contain an "out" clause. In these instances, the Attorney General's failure to give notice within the psrescribed time does not affect the validity of the notice and also does not impair any subsequent action.[172] However, the detainee cases illustrate that so long as an individual has a meaningful opportunity to be heard, due process requirements are met. With SOMTA, the respondent is given the opportunity to challenge his confinement in both the probable cause hearing and the trial. If the Attorney General's office abuses its discretion in filing papers, the judiciary is able to respond and perhaps change its interpretation the permissive language of the statute.

IV. CONCLUSION

Civil confinement of sex offenders is not without controversy. As suggested already, the proper scope of the Sex Offender Management and Treatment Act will be defined in the courts.[173] There must be a careful balancing of interests between the

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[168] *Id.* at *10. In explaining the plaintiff's burden on a facial challenge, the court declared facial invalidation "an extraordinary remedy" that is "generally disfavored." *Id.* This type of challenge will only succeed if there is "no set of circumstances under which the challenged practices would be constitutional." *Id.*

[169] *See* Boumediene v. Bush, 533 U.S. 723, 729–30 (2008) (finding that the case for requiring detainees to exhaust administrative review before a habeas corpus hearing would be "much stronger" if the individuals had only been waiting a short period of time).

[170] *See* N.Y. MENTAL HYG. LAW § 10.06(h) (McKinney 2010).

[171] *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *11.

[172] *See* N.Y. MENTAL HYG. LAW §§ 10.05(b), (g), 10.06(a).

[173] *See Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *11.

liberty of the confined individual and the safety of the community. With recognition of this balance, the Supreme Court has ruled that civil confinement is constitutional. It did so in the context of a Kansas statute, similar to the New York Act. Despite these rulings, the civil confinement issue is still controversial.

More guidance is necessary to determine whether the New York statute's procedures are adequate. With enemy combatants, a similar weighing of liberty and safety occurs. The Supreme Court's take on enemy combatants illustrates that so long as the procedures used to accomplish legitimate governmental goals comport with the minimum floor of due process, the legislature is free to address the issue as it sees fit. The government may tailor proceedings to meet unique circumstances. More specifically, by identifying due process deficiencies in the enemy combatant procedures, the detainee cases illustrate what is unacceptable. Challenges to the New York statute can be met with a thoughtful response from these detainee cases. By holding New York's statute to these standards, and using the enemy combatant cases as a framework for analysis, it becomes evident that its established procedures are constitutional.