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February 2, 2009

Congressional Research Service

Report RL31724

Detention of American Citizens as Enemy Combatants

Jennifer K. Elsea, American Law Division

March 31, 2005

Abstract. This report provides background information regarding the cases of two U.S. citizens deemed "enemy combatants," Yaser Esam Hamdi, who has been returned to Saudi Arabia, and Jose Padilla, who remains in military custody. A brief introduction to the law of war pertinent to the detention of different categories of individuals is offered, followed by brief analyses of the main legal precedents invoked to support the President's actions, as well as *Ex parte Milligan*, which some argue supports the opposite conclusion. A discussion of U.S. practice during wartime to detain persons deemed dangerous to the national security follows, including legislative history that may help to shed light on Congress' intent in authorizing the use of force to fight terrorism. The report concludes that historically, even during declared wars, additional statutory authority has been seen as necessary to validate the detention of citizens not members of any armed forces, casting in some doubt the argument that the power to detain persons arrested in a context other than actual hostilities is necessarily implied by an authorization to use force.

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Updated March 31, 2005

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Summary

The Supreme Court in 2004 issued three decisions related to the detention of “enemy combatants,” including two that deal with U.S. citizens in military custody on American soil. In *Hamdi v. Rumsfeld*, a plurality held that a U.S. citizen allegedly captured during combat in Afghanistan and incarcerated at a Navy brig in South Carolina is entitled to notice and an opportunity to be heard by a neutral decision-maker regarding the government’s reasons for detaining him. The Court in *Rumsfeld v. Padilla* overturned a lower court’s grant of habeas corpus to another U.S. citizen in military custody in South Carolina on jurisdictional grounds. The decisions affirm the President’s powers to detain “enemy combatants,” including those who are U.S. citizens, as part of the necessary force authorized by Congress after the terrorist attacks of September 11, 2001. However the Court appears to have limited the scope of individuals who may be treated as enemy combatants pursuant to that authority, and clarified that such detainees have some due process rights under the U.S. Constitution. This report, which will be updated as necessary, analyzes the authority to detain American citizens who are suspected of being members, agents, or associates of Al Qaeda, the Taliban and possibly other terrorist organizations as “enemy combatants.”

The Department of Justice argues that the recent decisions, coupled with two World War II era cases, *Ex parte Quirin* and *In re Territo*, support its contention that the President may order that certain U.S. citizens as well as non-citizens be held as enemy combatants pursuant to the law of war and Article II of the Constitution. Critics, however, question whether the decisions permit the detention of U.S. citizens captured away from any actual battlefield, in order to prevent terrorist acts or gather intelligence; and some argue that Congress has prohibited such detention of U.S. citizens when it enacted 18 U.S.C. § 4001(a).

This report provides background information regarding the cases of two U.S. citizens deemed “enemy combatants,” Yaser Esam Hamdi, who has been returned to Saudi Arabia, and Jose Padilla, who remains in military custody while the government appeals a district court order to charge him with a crime or release him. A brief introduction to the law of war pertinent to the detention of different categories of individuals is offered, followed by brief analyses of the main legal precedents invoked to support the President’s actions, as well as *Ex parte Milligan*, which some argue supports the opposite conclusion. A discussion of U.S. practice during wartime to detain persons deemed dangerous to the national security follows, including legislative history that may help to shed light on Congress’ intent in authorizing the use of force to fight terrorism. Finally, the report briefly analyzes the proposed Detention of Enemy Combatants Act, H.R. 1076, which would authorize the President to detain U.S. citizens and residents who are determined to be “enemy combatants” in certain circumstances. The report concludes that historically, even during declared wars, additional statutory authority has been seen as necessary to validate the detention of citizens not members of any armed forces, casting in some doubt the argument that the power to detain persons arrested in a context other than actual hostilities is necessarily implied by an authorization to use force.

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Detention of American Citizens as Enemy Combatants

This report analyzes the authority to detain American citizens who are suspected of being members, agents, or associates of Al Qaeda, the Taliban, or other terrorist organizations as “enemy combatants.”¹ In June, 2004, the Supreme Court issued three decisions related to the detention of “enemy combatants.” In *Rasul v. Bush*,² the Court held that aliens detained at the U.S. Naval Station at Guantanamo Bay, Cuba, have access to federal courts to challenge their detention. In *Hamdi v. Rumsfeld*,³ a plurality held that a U.S. citizen allegedly captured during combat in Afghanistan and incarcerated at a Navy brig in South Carolina was entitled to notice and an opportunity to be heard by a neutral decision-maker regarding the government’s reasons for detaining him. The government instead reached an agreement with the petitioner that allowed him to return to Saudi Arabia, where he also holds citizenship, subject to certain conditions. The Court in *Rumsfeld v. Padilla*⁴ overturned a lower court’s grant of habeas corpus to another U.S. citizen in military custody in South Carolina on jurisdictional grounds, sending the case to a district court in the Fourth Circuit for a new trial. The district court found that Padilla’s detention is unlawful;⁵ the government has appealed.

¹ Under the law of war, enemy combatants are generally members of the military of the opposing party who are authorized to participate directly in battle (as opposed to non-combatants, such as military surgeons and medics). Enemy combatants may be targeted by the military or captured and detained as a wartime preventive measure. *See generally* Treatment of ‘Battlefield Detainees’ in the War on Terrorism, CRS Report RL31367. According to the government rules establishing Combatant Status Review Tribunals, in the context of the war against terrorism,

[T]he 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. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Department of Defense Order of July 9, 2004, *available at* [<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>] (last visited Feb. 2, 2005). In the context of foreign detainees held at the Guantanamo Bay Naval Station, one D.C. federal district judge has held the above definition to be overly broad because it potentially extends to persons who have not engaged in hostilities against the United States. *In re Guantanamo Detainee Cases*, 2005 WL 195356 (D.D.C. Jan. 31, 2005). The government has appealed the ruling to the D.C. Circuit Court of Appeals.

² 124 S.Ct. 2686 (2004).

³ 124 S.Ct. 2633 (2004).

⁴ 124 S.Ct. 2711 (2004).

⁵ *Padilla v. Hanft*, No. Civ.A. 2:04-2221-26A (D.S.C. Feb. 28, 2005).

The decisions affirm the President's powers to detain "enemy combatants" as part of the necessary force authorized by Congress after the terrorist attacks of September 11, 2001.⁶ The Court found the President's detention of U.S. citizens is not necessarily foreclosed by 18 U.S.C. § 4001(a), which provides that no U.S. citizen may be detained except pursuant to an act of Congress. However, the Court appears to have limited the scope of individuals who may be treated as enemy combatants pursuant to that authority, and clarified that such detainees have some due process rights under the U.S. Constitution.⁷ Petitioners for Padilla maintain that 18 U.S.C. § 4001(a) bars his detention without trial.⁸ The District Court for the District of South Carolina has agreed, and ordered the government to end his military detention.

Background

The Attorney General announced on June 10, 2002, that an American citizen, Jose Padilla, also known as Abdullah Muhajir, was arrested May 8, 2002 upon his return from Pakistan, allegedly with the intent of participating in a plot to use a radiological bomb against unknown targets within the United States. Padilla was detained under a court order as a material witness until the Department of Justice faced a court deadline to either bring charges or release him. After prosecutors reportedly either lacked the physical evidence or were unwilling to disclose classified evidence necessary to bring charges against Padilla, President Bush signed an unspecified order declaring him to be an "enemy combatant," and transferred him to the custody of the Department of Defense.⁹ The Administration takes the position that the law of war allows the United States to detain indefinitely members, agents or associates of Al Qaeda and other terrorist organizations, without charging them with a crime under either criminal statutes or the international law of war, notwithstanding their American citizenship.¹⁰ The Administration also initially

⁶ Authorization for Use of Military Force ("the AUMF"), P.L. 107-40, 115 Stat. 224 (2001).

⁷ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2640 (2004).

There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

⁸ Two Justices who joined the *Hamdi* plurality of six, and Justice Scalia, who dissented, would have found that 18 U.S.C. § 4001(a) (the "Non-detention Act") precludes detention of persons in Hamdi's circumstances.

⁹ See Tom Brune and Craig Gordon, *American Arrested in "Dirty Bomb" Plot*, NEWSDAY, June 11, 2002, at A5.

¹⁰ See Press Release, Department of Defense General Counsel William J. Haynes II, DoD Responds to ABA Enemy Combatant Report, (Oct. 2, 2002), available at [http://www.defenselink.mil/news/Oct2002/b10022002_bt497-02.html](last visited Feb. 7, 2005).

denied Padilla access to his attorney,¹¹ arguing that he has no constitutional right to an attorney because he has not been charged with a crime.¹² After a federal judge ruled that Padilla has a right to challenge his detention and the concomitant right to consult with an attorney,¹³ the government moved for a reconsideration of the order based on its assertion that no conditions were possible that would permit Padilla to communicate with his lawyer without endangering national security, which the judge considered but rejected.¹⁴ The judge certified the case for interlocutory appeal to the U.S. Court of Appeals for the Second Circuit, including the issue of the President's authority to order Padilla's detention as an enemy combatant.¹⁵ The Second Circuit held that the President does not have the inherent authority, nor has Congress authorized him to declare U.S. citizens captured on U.S. territory in non-combat circumstances to be enemy combatants and place them under military jurisdiction.¹⁶ The government granted Padilla a limited right to meet with his attorney under government monitoring and appealed the decision to the Supreme Court, which heard the case on expedited appeal. The Court disposed of the case without deciding the merits, in a 5-4 order vacating the decision below and holding that the petition should have been brought in the Fourth Circuit, where Padilla is being held, rather than New York.

The Supreme Court decided the petition of another American citizen who was detained without charges as an "enemy combatant" on the same day.¹⁷ Yaser Eser

¹¹ A public defender was appointed to represent Padilla while he was detained as a material witness, pursuant to the Material Witness Statute, 18 U.S.C. § 3144. The judge determined that this relationship is sufficient to qualify her as "next friend" of Padilla, with standing to pursue a petition for *writ of habeas corpus* on his behalf. 233 F.Supp.2d at 578.

¹² The Administration takes the position that in the case of citizens who take up arms against America, any interest those individuals might have in obtaining the assistance of counsel for the purpose of preparing a habeas petition must give way to the national security needs of this country to gather intelligence from captured enemy combatants. Although the right to counsel is a fundamental part of our criminal justice system, it is undeniably foreign to the law of war. Imagine the burden on our ability to wage war if those trying to kill our soldiers and civilians were given the opportunity to 'lawyer up' when they are captured. Respectfully, those who urge the extension of the right to counsel to these combatants, for the purpose of filing a habeas petition, confuse the context of war with that of the criminal justice system.

See Alberto R. Gonzales, Remarks to the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004), *available at* [http://www.abanet.org/natsecurity/judge_gonzales.pdf] (last visited Feb. 7, 2005).

¹³ 233 F.Supp.2d at 605.

¹⁴ 243 F.Supp.2d 42 (S.D.N.Y. 2003), *aff'g on reh'g* 233 F.Supp.2d 564 (S.D.N.Y. 2002).

¹⁵ 256 F.Supp.2d 218 (S.D.N.Y. 2003).

¹⁶ Padilla *ex rel.* Newman v. Bush, 352 F.3d 695 (2d Cir. 2003), *vacated sub nom* Rumsfeld v. Padilla, 124 S.Ct. 2711 (2004).

¹⁷ The first American citizen caught up in the war on terrorism, John Walker Lindh, who was captured in Afghanistan, was charged in federal district court with conspiring to kill Americans. He asserted the defense of combat immunity, which the government argued is not possible given the fact that President Bush has declared that no member of the Taliban (continued...)

Hamdi, who had been captured in Afghanistan, was initially detained at the U.S. Naval Station in Guantánamo Bay, Cuba with other detainees captured in Afghanistan and other countries, until it was discovered that he was born in Baton Rouge and thus had a colorable claim to U.S. citizenship. He was then transferred to a high-security naval brig in South Carolina, where he was held in military custody without criminal charge. After an attorney filed a petition for *habeas corpus* on his behalf, the government asserted it had the unreviewable prerogative to detain him without trial and without providing him access to an attorney, as a necessary exercise of the President’s authority as Commander-in-Chief to provide for national security and defense.¹⁸ The Fourth Circuit largely agreed with the government’s position, reversing two orders issued by the district court and ordering the case dismissed.¹⁹ The Supreme Court reversed in part, affirming the President’s authority to detain Hamdi as an “enemy combatant” under the AUMF, but ruling that Hamdi was entitled to a hearing to challenge his status.²⁰ The government subsequently negotiated an agreement that would allow Hamdi to return to Saudi Arabia, obviating the need for a hearing and a determination of whether Hamdi was entitled to the assistance of counsel. The government interprets the decision in *Hamdi* to apply to Padilla as well as the detainees at Guantánamo Bay.

¹⁷ (...continued)

can qualify as a lawful combatant. See *United States v. John Walker Lindh*, Criminal No. 02-37-A (E.D. Va.), Government’s Opposition to Defendant’s Motion to Dismiss Count One of the Indictment for Failure to State a Violation of the Charging Statute (Combat Immunity)(#2). The defendant ultimately agreed to plead guilty to a charge of supplying services to the Taliban, in violation of 50 U.S.C. § 1705(b), and carrying an explosive during the commission of a felony in violation of 18 U.S.C. § 844(h)(2); the government dropped the conspiracy charge. The United States further agreed to forego any right it has to treat the defendant as an unlawful enemy combatant based on the conduct alleged in the Indictment ... [unless the government later] determine[s] that the defendant has engaged in conduct proscribed by the offenses now listed at 18 U.S.C. § 2332b(g)(5)(B), or conduct now proscribed under 50 U.S.C. § 1705, [in which case the plea] agreement ... shall be null and void, and the United States may immediately invoke any right it has at that time to capture and detain the defendant as an unlawful enemy combatant based on the conduct alleged in the Indictment.

See *United States v. John Walker Lindh*, Criminal No. 02-37-A (E.D. Va.), Plea Agreement at paragraph 21. Neither 18 U.S.C. § 2332b(g)(5)(B) (defining federal crime of terrorism) nor 50 U.S.C. § 1705 (providing criminal penalty for violation of any license, order, or regulation issued by the President pursuant to the International Emergency Economic Powers Act (IEEPA)) makes mention of the possibility that offenders may be declared to be “enemy combatants.”

¹⁸ See *Hamdi v. Rumsfeld*, No. 02-6895 (4th Cir.) Government Brief on Appeal of the United States District Court for the Eastern District of Virginia, *available at* [<http://news.findlaw.com/hdocs/docs/hamdi/hamdirums61902gbrf.pdf>](appealing the order to provide the federal public defender with unmonitored access to the detainee) (last visited Feb. 7, 2005).

¹⁹ *Hamdi v. Rumsfeld*, 316 F.3d 450, *reh’g denied* 337 F.3d 335 (4th Cir. 2003), *cert. granted* (U.S. Jan. 9, 2004)(No. 03-6696).

²⁰ *Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S.Ct. 2633 (2004).

These two cases are distinguishable because the government reportedly captured Hamdi on the battlefield, possibly creating a presumption that he is a combatant.²¹ Unlike Padilla, Hamdi was not alleged to have committed specific acts which could violate the law of war if committed by a lawful soldier. Padilla, even if he were a legitimate enemy combatant, would not likely be entitled to combat immunity for his alleged involvement in an enemy plot to commit acts of terrorism on American soil.²² In both cases, the Government invoked its authority under the international law of war, and the President's authority as Commander-In-Chief, to justify the detention.²³ The Administration also argued that if congressional authorization were necessary, it could be found in the Authorization to Use Force ("AUMF")²⁴ and other statutes. The Supreme Court agreed that the AUMF authorizes the detention of combatants captured during hostilities, but did not elaborate on the scope of that authority, nor did it decide whether the President has inherent authority to order detentions or if other statutory authority also applied.

Status and Detention of Persons in War

The law of war divides persons in the midst of an armed conflict into two broad categories: combatants and civilians.²⁵ This fundamental distinction determines the international legal status of persons participating in or affected by combat, and determines the legal protections afforded to such persons as well as the legal

²¹ The White House has stated it uses a more strenuous legal process for determining who among U.S. citizens arrested within the United States meets the legal definition to be designated an "enemy combatant." See Gonzales, *supra* note 8. While noting that no specific procedure is required by law, White House Counsel Gonzales described the procedure as follows:

In any case where it appears that a U.S. citizen captured within the United States may be an al Qaeda operative and thus may qualify as an enemy combatant, information on the individual is developed and numerous options are considered by the various relevant agencies (the Department of Defense, CIA and DOJ), including the potential for a criminal prosecution, detention as a material witness, and detention as an enemy combatant. Options often are narrowed by the type of information available, and the best course of action in a given case may be influenced by numerous factors including the assessment of the individual's threat potential and value as a possible intelligence source.

. . . When it appears that criminal prosecution and detention as a material witness are, on balance, less-than-ideal options as long-term solutions to the situation, we may initiate some type of informal process to present to the appropriate decision makers the question whether an individual might qualify for designation as an enemy combatant. But even this work is not actually commenced unless the Office of Legal Counsel at the Department of Justice has tentatively advised, based on oral briefings, that the individual meets the legal standard for enemy combatant status. . . .

²² See *Ex parte Quirin*, 317 U.S. 1 (1942).

²³ See DoD Press Release, *supra* note 6 ("Article II of the Constitution is the primary basis for the President's authority to detain enemy combatants").

²⁴ Authorization for Use of Military Force ("AUMF"), P.L. 107-40, 115 Stat. 224 (2001).

²⁵ See THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65 (Dieter Fleck, ed. 1995)(hereinafter "HANDBOOK").

consequences of their conduct.²⁶ Combatants are those persons who are authorized by international law to fight in accordance with the law of war on behalf of a party to the conflict.²⁷ Civilians are not authorized to fight, but are protected from deliberate targeting by combatants as long as they do not take up arms. In order to protect civilians, the law of war requires combatants to conduct military operations in a manner designed to minimize civilian casualties and to limit the amount of damage and suffering to that which can be justified by military necessity. To limit exposure of civilians to military attacks, combatants are required, as a general rule, to distinguish themselves from civilians. Combatants who fail to distinguish themselves from civilians run the risk of being denied the privilege to be treated as prisoners of war if captured by the enemy.

The treatment of all persons who fall into the hands of the enemy during an international armed conflict depends upon the status of the person as determined under the four Geneva Conventions of 1949. Under these conventions, parties to an armed conflict have the right to capture and intern enemy soldiers²⁸ as well as civilians who pose a danger to the security of the state,²⁹ at least for the duration of hostilities.³⁰ The right to detain enemy combatants is not based on the supposition that the prisoner is “guilty” as an enemy for any crimes against the Detaining Power, either as an individual or as an agent of the opposing state. POWs are detained for security purposes, to remove those soldiers as a threat from the battlefield. The law

²⁶ *See id.*

²⁷ *See id.* at 67. *See also* OPERATIONAL LAW HANDBOOK, chapter 2 (2002) *available at* [<http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf>]. (Lawful combatants have valid combatant status and receive law of war protection; however, others who participate in combat, without valid combatant status, may be treated as criminals under domestic law.) *Id.* Members of an organized armed force, group or unit who are not medical or religious personnel are combatants. *Id.* Combatants are lawful targets during combat operations. Prisoners of war are considered noncombatants and must be protected by the Detaining Power. *See id.* The term “enemy combatant” appears most frequently in the context of military rules of engagement, which stress that only enemy combatants may lawfully be attacked during military operations.

²⁸ *See* The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter “GPW”). GPW art. 21 states:

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

²⁹ *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter “GC”]. GC art. 42 states:

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

³⁰ *See* GPW, *supra* note 26, art. 21.

of war encourages capture and detention of enemy combatants as a more humane alternative to accomplish the same purpose than by wounding or killing them.

Enemy civilians may be interned for similar reasons, although the law of war does not permit them to be treated as lawful military targets. As citizens of an enemy country, they may be presumed to owe allegiance to the enemy. The law of war traditionally allowed for their internment and the confiscation of their property, not because they are suspected of having committed a crime or even of harboring ill will toward the host or occupying power; but rather, they are held in order to prevent their acting on behalf of the enemy and to deprive the enemy of resources it might use in its war efforts. Congress has delegated to the President the authority, during a declared war or by proclamation, to provide for the restriction, internment or removal of enemy aliens deemed dangerous.³¹ The Supreme Court has upheld internment programs promulgated under the Alien Enemy Act.³² This form of detention, like the detention of POWs, is administrative rather than punitive, and thus no criminal trial is required.³³

The Detaining Power may punish enemy soldiers and civilians for crimes committed prior to their capture as well as during captivity, but only after a fair trial in accordance with the relevant convention and other applicable international law. However, it is unclear whether a person who is neither a POW nor an enemy alien may be detained without criminal charges,³⁴ and if such detention is lawful, what process is due the detainee under the Constitution or international law. The

³¹ 50 U.S.C. § 21 (defining “enemy” as “all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized”).

³² *See* *Ludecke v. Watkins*, 335 U.S. 160 (1948) (upholding President’s authority to order the removal of all alien enemies “who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States”). The Supreme Court declined to review the determination by the Alien Enemy Hearing Board that the petitioner was dangerous, and noted that no question as to the validity of the administrative hearings had been raised. *Id.* at 163, n.4. However, the Court also noted that an enemy alien restrained pursuant to the act did have access to the courts to challenge whether the statutory criteria were met, in other words, whether a “declared war” existed and whether the person restrained is in fact an enemy alien fourteen years or older. *Id.* at 170-72, n.17.

³³ Internees may challenge their detention in court. *See id.*

³⁴ *See generally* Treatment of “Battlefield Detainees” in the War on Terrorism, CRS Report RL31367. The question appears to turn on whether the label “unlawful combatant” may be applied across the board to all members of a belligerent group, or whether it applies only on an individual basis to those who participate unlawfully in combat. It would seem that denying belligerent status to all members of a group amounts to denying the group as a whole belligerent status, in which case it would not be possible to engage in armed conflict with it. As one observer comments:

According to their terms, the Geneva Conventions apply symmetrically — that is to say, they are either applicable to both sides in a conflict, or to neither. Therefore the White House statement that the Geneva Conventions do not extend to Al Qaeda is effectively a declaration that the entire military campaign against terrorism is not covered by the Geneva Conventions.

See Dworkin, *supra* note 1.

conditions of detention may also give rise to the question of whether they amount to punishment, in this case, notwithstanding DoD's recognition that the purpose for detaining "enemy combatants" is not punitive in nature.³⁵

U.S. Precedent for Detention of Citizens as Enemy Combatants

The Department of Justice reads the *Hamdi* decision as supporting its reliance primarily on two cases to support its contention that the Constitution permits the detention without criminal charge of American citizens under certain circumstances. The government argues that the 1942 Supreme Court decision in *Ex parte Quirin* (the German saboteurs case) and the 9th Circuit case *In re Territo*, read together, permit the government to hold American citizens as "enemy combatants," regardless of their membership in any legitimate military organization. Others, however, distinguish those cases as dealing with occurrences during a war declared by Congress and involving members of the armed forces of hostile enemy states, and further argue that the Civil War case *Ex parte Milligan* forecloses this theory.

Ex Parte Quirin

After eight Nazi saboteurs were caught by the Federal Bureau of Investigation (FBI), the President issued a proclamation declaring that "the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the law of war."³⁶ The eight German saboteurs (one of whom claimed U.S. citizenship) were tried by military commission for entering the United States by submarine, shedding their military uniforms, and conspiring to use explosives on certain war industries and war utilities. In the case of *Ex parte Quirin*, the Supreme Court denied their writs of *habeas corpus* (although upholding their right to petition for the writ, despite language in the Presidential proclamation purporting to bar judicial review), holding that trial by such a commission did not offend the Constitution and was authorized by statute.³⁷ It also found the citizenship of the saboteurs irrelevant to the determination of whether the saboteurs were "enemy belligerents" within the meaning of the Hague Convention and the law of war.³⁸

³⁵ See DOD Press Release, *supra* note 6 ("The purposes of detaining enemy combatants during wartime are, among other things, to gather intelligence and to ensure that detainees do not return to assist the enemy.... Then, as now, the purpose of detention was not to punish, but to protect.")

³⁶ Proclamation No. 2561, of July 2, 1942, 7 Fed. Reg. 5101, 56 Stat. 1964.

³⁷ See *Ex parte Quirin*, 317 U.S. 1, 26-28 (1942) (finding authority for military commissions in the Articles of War, *codified at* 10 U.S.C. §§ 1471-1593 (1940).

³⁸ See *id.* at 37-38 ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.");

(continued...)

To reach its decision, the Court applied the international common law of war, as Congress had incorporated it by reference through Article 15 of the Articles of War,³⁹ and the President's proclamation that

[A]ll persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States ... through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.⁴⁰

Whether the accused could have been detained as "enemy combatants" without any intent to try them before a military tribunal was not a question before the Court,⁴¹ but the Court suggested the possibility. It stated:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. *Unlawful combatants are likewise subject to capture and detention*, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.⁴²

In its discussion of the status of "unlawful combatant," the Court did not distinguish between enemy soldiers who forfeit the right to be treated as prisoners of war by failing to distinguish themselves as belligerents, as the petitioners had done, and civilians who commit hostile acts during war without having the right to participate in combat. Both types of individuals may be called "unlawful combatants," yet the circumstances that give rise to their status differ in ways that

³⁸ (...continued)

see also Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) ("[T]he petitioner's citizenship in the United States does not ... confer upon him any constitutional rights not accorded any other belligerent under the laws of war."), *cert. denied*, 352 U.S. 1014 (1957).

³⁹ Similar language is now part of the UCMJ. *See* 10 U.S.C. § 821 (providing jurisdiction for courts-martial does not deprive military commissions of concurrent jurisdiction in relevant cases).

⁴⁰ 317 U.S. at 22-23 (citing Proclamation No. 2561, 7 Fed. Reg. 5101(1942)).

⁴¹ At oral argument before the Supreme Court, Attorney General Biddle suggested that had the prisoners been captured by the military rather than arrested by the FBI, the military could have detained them "in any way they wanted," without any arraignment or any sort of legal proceeding. *See* 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 597 (Philip B. Kurland and Gerhard Casper, eds. 1975).

⁴² 317 U.S. at 30-31 (emphasis added; footnote omitted).

may be legally significant.⁴³ However, the Court did recognize that the petitioners fit into the first category,⁴⁴ and expressly limited its opinion to the facts of the case:

We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform — an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.⁴⁵

In Re Territo

In the case *In re Territo*,⁴⁶ an American citizen who had been inducted into the Italian army was captured during battle in Italy and transferred to a detention center for prisoners of war in the United States. He petitioned for a writ of *habeas corpus*, arguing that his U.S. citizenship foreclosed his being held as a POW. The court disagreed, finding that citizenship does not necessarily “affect[] the status of one captured on the field of battle.”⁴⁷ The court stated:

Those who have written texts upon the subject of prisoners of war agree that *all* persons *who are active in opposing an army in war* may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war.⁴⁸

The petitioner argued that the Geneva Convention did not apply in cases such as his. The court found no authority in support of that contention, noting that “[i]n war, all residents of the enemy country are enemies.”⁴⁹ The court also cited approvingly the following passage:

A neutral, or a citizen of the United States, domiciled in the enemy country, not only in respect to his property but also as to his capacity to sue, is deemed as

⁴³ Combatants are bound by all of the laws of war regulating conduct during combat, while civilians are not really combatants at all, and are thus prohibited from participating in combat, regardless of whether they follow generally applicable combat rules. *See generally* CRS Report RL31367.

⁴⁴ *See supra* note 36.

⁴⁵ 317 U.S. at 45-46.

⁴⁶ 156 F.2d 142 (9th Cir. 1946).

⁴⁷ *Id.* at 145.

⁴⁸ *Id.* (emphasis added; citations omitted).

⁴⁹ *Id.* (citing *Lamar’s Executor v. Browne*, 92 U.S. 187, 194 (1875)).

much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation.⁵⁰

While recognizing that *Quirin* was not directly in point, it found the discussion of U.S. citizenship to be “indicative of the proper conclusion”:

Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.⁵¹

The court had no occasion to consider whether a citizen who becomes associated with an armed group not affiliated with an enemy government and not otherwise covered under the terms of the Hague Convention could be detained without charge pursuant to the law of war,⁵² particularly those not captured by the military during battle.

Confining the *Territo* and *Quirin* opinions to their facts, they may not provide a solid foundation for the President’s designation and detention of Padilla as an enemy combatant. It may be argued that the language referring to the capture and detention of unlawful combatants — seemingly without indictment on criminal charges — is *dicta*; the petitioners in those cases did not challenge the contention that they served in the armed forces of an enemy state with which the United States was engaged in a declared war. We are unaware of any U.S. precedent confirming the constitutional power of the President to detain indefinitely a person accused of being an unlawful combatant due to mere membership in or association with a group that does not qualify as a legitimate belligerent, with or without the authorization of Congress.⁵³ The Supreme Court rejected a similar contention in the Civil War case of *Ex parte Milligan*, discussed *infra*, where Congress had limited the authority to detain persons in military custody.

⁵⁰ *Id.* (citing WHITING, WAR POWERS UNDER THE CONST., 340-42 (1862)).

⁵¹ *Id.* (citing *Quirin* at 37-38).

⁵² Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277. Article 1 states:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions:
 To be commanded by a person responsible for his subordinates;
 To have a fixed distinctive emblem recognizable at a distance;
 To carry arms openly; and
 To conduct their operations in accordance with the laws and customs of war.
 In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army.”

⁵³ In that regard, *cf. Ex parte Toscano*, 208 F. 938 (S.D. Cal. 1913) (applying Hague Convention to authorize holding of Mexican federalist troops, who had crossed the border into the United States and surrendered to U.S. forces, as prisoners of war although the United States was neutral in the conflict and the belligerent parties were not recognized as nations).

At most, arguably, the two cases above may be read to demonstrate that, at least in the context of a declared war against a recognized state, U.S. citizenship is not constitutionally relevant to the treatment of members of enemy forces under the law of war. Neither case addresses the constitutionality of the process used to determine who is a member of an enemy force and whether a detainee qualifies for POW privileges. Inasmuch as the President has determined that Al Qaeda is not a state but a criminal organization to which the Geneva Convention does not apply,⁵⁴ and inasmuch as the Hague Convention would seem to apply to neither Al Qaeda nor the Taliban for the same reasons that have been given to preclude their treatment as prisoners of war,⁵⁵ it may be argued that Al Qaeda is not directly subject to the law of war and therefore its members may not be detained as “enemy combatants” pursuant to it solely on the basis of their association with Al Qaeda.⁵⁶ Taliban fighters captured in Afghanistan are a closer fit within the traditional understanding of who may be treated as enemy combatants, but may be able to contest the determination that they are not entitled to POW status.⁵⁷

Ex Parte Milligan

In *Ex parte Milligan*,⁵⁸ the Supreme Court addressed the question whether a civilian citizen of Indiana who was allegedly a member of the Sons of Liberty, an organized group of conspirators with alleged links to the Confederate States that planned to commit acts of sabotage against the North, could constitutionally be tried by military commission. The Court recognized military commission jurisdiction over violations of the “laws and usages of war,” but stated those laws and usages “... can never be applied to citizens in states which have upheld the authority of the

⁵⁴ See Press Release, White House, Status of Detainees at Guantanamo (Feb. 7, 2002) available at [<http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>] (last visited Feb. 7, 2005).

⁵⁵ See *id.*

⁵⁶ See Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, 8 n.16 (2001)(arguing that “[u]nder international law, war conduct and war crimes can occur at the hands of non-state actors, but they must be participants in a war or insurgency, or have achieved a status of belligerents or insurgents involved in an armed conflict”). An alternate interpretation might start from the premise that what is not prohibited by the Geneva Conventions is permitted under international law. This appears to be the point of departure for Judge Mukasey’s analysis in the initial *Padilla* opinion. See *Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564, 592-93 (S.D.N.Y. 2002) (“It is not that the Third Geneva Convention authorizes particular treatment for or confinement of unlawful combatants; it is simply that that convention does not protect them.”). However, it may be argued that GC, *supra* note 27, which had no corollary in previous Geneva Conventions on prisoners, would protect persons who are not protected by GPW. See Karman Nabulsi, *Evolving Conceptions of Civilians and Belligerents* 9, 18-20, in *CIVILIANS IN WAR* (Simon Chesterman, ed. 2001).

⁵⁷ *Rasul v. Bush*, ___ U.S. ___, 124 S.Ct. 2686 (2004) (federal courts have jurisdiction to hear petitions for habeas corpus on behalf of detainees held at Guantanamo Bay).

⁵⁸ 71 U.S. (4 Wall.) 2 (1866).

government, and where the courts are open and their process unobstructed.”⁵⁹ The Supreme Court explained its reasoning:

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration.⁶⁰

The government had argued in the alternative that Milligan could be held as a prisoner of war “as if he had been taken in action with arms in his hands,”⁶¹ and thus excluded from the privileges of a statute requiring courts to free persons detained without charge. The government argued:

Finally, if the military tribunal has no jurisdiction, the petitioner may be held as a prisoner of war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates, then to be handed over by the military to the civil authorities, to be tried for his crimes under the acts of Congress, and before the courts which he has selected.⁶²

Milligan, however, argued “that it had been ‘wholly out of his power to have acquired belligerent rights, or to have placed himself in such relation to the government as to have enabled him to violate the laws of war,’”⁶³ as he was charged. The Court appears to have agreed with Milligan, replying:

It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?⁶⁴

In *Quirin*, the Supreme Court distinguished its holding from *Milligan*, finding that the petitioners were enemy belligerents and that the charge made out a valid allegation of an offense against the law of war for which the President was authorized

⁵⁹ *Id.* at 121.

⁶⁰ *Id.* at 127.

⁶¹ *Id.* at 21 (argument for the government).

⁶² *Id.* The statute expressly excepted prisoners of war.

⁶³ *Id.* at 8.

⁶⁴ *Id.* at 131.

to order trial by a military commission.⁶⁵ The Court noted that Milligan had not been a part of or associated with the armed forces of the enemy, and therefore was a non-belligerent, not subject to the law of war.⁶⁶ The Sons of Liberty, it seems, did not qualify as a belligerent for the purposes of the law of war, even though it was alleged to be plotting hostile acts on behalf of the Confederacy. *Milligan* was interpreted by some state courts to preclude the trial by military commission of persons accused of participating in guerrilla activities in Union territory,⁶⁷ and despite Congress' efforts to immunize executive officials for actions done under military authority during the Civil War,⁶⁸ the Supreme Court of Illinois upheld damages awarded to Madison Y. Johnson, who, accused of being "a belligerent" but never charged with any offense, was confined under orders issued by the Secretary of War.⁶⁹

The *Hamdi* Court found that *Milligan* did not apply to a U.S. citizen captured in Afghanistan. Justice O'Connor wrote that *Milligan*

does not undermine our holding about the Government's authority to seize enemy combatants, as we define that term today. In that case, the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.⁷⁰

Moyer v. Peabody

The government cites *Moyer v. Peabody*⁷¹ to support its contention that the President has the authority during war, subject only to extremely deferential review by the courts, to detain an individual the government believes to be dangerous or likely to assist the enemy.⁷² The government further asserts that the case supports the historical "unavailability" of due process rights, such as the right to counsel, in the

⁶⁵ *Ex Parte Quirin*, 317 U.S. 1, 45 (1942).

⁶⁶ *Id.*

⁶⁷ *Thompson v. Wharton*, 70 Ky. (7 Bush) 563 (Ky. 1870); *Eginton v. Brain*, 7 Ky.Op. 516 (Ky. 1874).

⁶⁸ Act Cong. March 2, 1867, 14 Stat. 432.

⁶⁹ *Johnson v. Jones*, 44 Ill. 142 (Ill. 1867); *see also* *Carver v. Jones*, 45 Ill. 334 (Ill. 1867); *Sheehan v. Jones*, 44 Ill. 167 (Ill. 1867).

⁷⁰ 124 S.Ct. at 2642 (citations omitted).

⁷¹ 212 U.S. 78 (1909).

⁷² *See* Respondents' Reply in Support of Motion to Dismiss the Amended Petition for a Writ of Habeas Corpus, *Padilla ex rel. Newman v. Bush*, 02 Civ. 4445, at 18, *available at* [<http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf>].

case of enemy combatants.⁷³ In *Moyer*, the Supreme Court declined to grant relief to the plaintiff in a civil suit against the governor of Colorado based on the former's detention without charge during a miners' strike (deemed by the governor to be an insurrection), stating:

So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief.⁷⁴

The Court based its views in part on the laws and constitution of the state of Colorado, which empowered the governor to repel or suppress insurrections by calling out the militia, which the Court noted, envisioned the

ordinary use of soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power.⁷⁵

The Court further clarified:

If we suppose a governor with a very long term of office, it may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the governor to revision by a jury. It is not alleged that his judgment was not honest, if that be material, or that the plaintiff was detained after fears of the insurrection were at an end.

Based on the context of the case, the holding may be limited to actual battles and situations of martial law where troops are authorized to use deadly force as necessary.⁷⁶ While the Court notes that “[p]ublic danger warrants the substitution of executive process for judicial process,”⁷⁷ it also noted that

[t]his was admitted with regard to killing men in the actual clash of arms; and we think it obvious, although it was disputed, that the same is true of temporary

⁷³ *Id.* at 23-24.

⁷⁴ 212 U.S. at 85. The Court noted that “[t]he facts that we are to assume are that a state of insurrection existed and that the governor, without sufficient reason, but in good faith, in the course of putting the insurrection down, held the plaintiff until he thought that he safely could release him.”

⁷⁵ *Id.* at 84-85.

⁷⁶ *See Sterling v. Constantin*, 287 U.S. 378, 400-01 (1932)(limiting *Moyer* to its facts and stating that is well established that executive discretion to respond to emergencies does not mean that “every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat”).

⁷⁷ *Id.* at 85 (citing *Keely v. Sanders*, 99 U.S. 441, 446 (1878)).

detention to prevent apprehended harm. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the governor to deprive citizens of life under such circumstances was consistent with the 14th Amendment, we are of opinion that the same is true of a law authorizing by implication what was done in this case.⁷⁸

It may also be argued that, as a claim for civil damages rather than a direct challenge in the form of a petition for *habeas corpus*, the *Moyer* case does not stand for a general executive authority to detain individuals deemed to be dangerous, without the ordinary constitutional restrictions. As an interpretation of Colorado's constitution rather than that of the United States, the decision may not apply to Presidential action. Other courts have reached the opposite conclusion — that those wrongfully detained by order of the President may recover damages from their captors.⁷⁹

U.S. Practice - Detention of Enemies on U.S. Territory

The following sections give a brief treatment of the twentieth-century history of the internment of individuals who are deemed “enemies” or determined to be too dangerous to remain at liberty during a national emergency. A survey of the history reveals that persons who are considered likely to act as an enemy agent on U.S. territory traditionally have been treated as alien enemies rather than prisoners of war or “enemy combatants” by the military, even when the individuals were members of the armed forces of enemy nations, although in the latter case they might also be tried by military commission or court-martial, if accused of a crime. Persons acting within the territory of the United States on behalf of an enemy state who were not members of the armed forces of that state, including American citizens accused of spying or sabotage, have been tried in federal court. Individuals captured on the battlefield abroad have been handled in accordance with government regulations interpreting the law of war.⁸⁰

⁷⁸ *Id.* at 85-86.

⁷⁹ *See, e.g., Ex parte Orozco*, 201 F. 106 (W.D. Texas 1912) (alien held by military without charge on suspicion of organizing military expedition in violation of neutrality laws awarded damages); *ex parte De la Fuente*, 201 F. 119 (W.D. Texas 1912) (same); *see also Hohri v. United States*, 586 F.Supp. 769 (D.D.C. 1984), *aff'd per curiam* 847 F.2d 779 (Fed. Cir.1988), *cert denied* 488 U.S. 925 (1988) (Japanese-American internees and their descendants suffered damages for unconstitutional taking based on World War II internment where government was aware that military necessity to justify the internment was unfounded, although suit was barred by statute of limitations).

⁸⁰ *See* DoD Dir. 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees (1994); *see generally* CRS Report RL31367 (summarizing history of U.S. treatment of battlefield captives).

Internment of Enemy Aliens during World War I

The Alien Enemy Act was originally enacted in 1798 as part of the Alien and Sedition Act,⁸¹ but saw greater use during World War I than in previous wars.⁸² The statute grants the President broad authority, during a declared war or presidentially proclaimed “predatory invasion,” to institute restrictions affecting alien enemies, including possible detention and deportation. On April 6, 1917, the date Congress declared war against Germany, President Wilson issued a Proclamation under the Alien Enemy Act warning alien enemies against violations of the law or hostilities against the United States.⁸³ Offenders would be subject not only to the applicable penalties prescribed by the domestic laws they violated, but would also be subject to restraint, required to give security, or subject to removal from the United States under regulations promulgated by the President.⁸⁴

The government urged the courts to uphold the constitutionality of the act as a proper exercise of Congress’ power over the persons and property of alien enemies found on U.S. territory during war, a power it argued derives from the power of Congress to declare war and make rules concerning captures on land and water,⁸⁵ and which was also consistent with the powers residing in sovereign nations under international law. The law was vital to national security because “[a]n army of spies, incendiaries, and propagandists may be more dangerous than an army of soldiers.”⁸⁶ The President reported to Congress a list of 21 instances of “improper activities of German officials, agents, and sympathizers in the United States” prior to the declaration of war.⁸⁷ The government further argued that the statute did not require

⁸¹ Act of July 6, 1798, §1,1 Stat. 577.

⁸² See Supplemental Brief for the United States in Support of the Plenary Power of Congress over Alien Enemies, and the Constitutionality of the Alien Enemy Act 20 (1918), *Ex parte Gilroy*, 257 F. 110 (S.D.N.Y. 1919), (hereinafter “Alien Enemy Brief”) (observing that the cases arising under the Alien Enemy Act “contain no expression of doubt by the courts as to its constitutionality”). In *Gilroy*, the government argued that the Executive’s determination that an individual is an enemy alien is final, even though it can be shown that the individual is a citizen. 257 F. at 112. The court rejected that contention, finding the petitioner was an American citizen and not subject to the Alien Enemy Act. *Id.*

⁸³ 40 Stat. 1650 (1917).

⁸⁴ 40 Stat. 1651 (1917).

⁸⁵ See Alien Enemy Brief, *supra* note 80, at 39. The government further argued that the issue of what was to be done with enemy persons as well as property was dictated by policy, to be determined by Congress rather than the courts, and did not flow as a necessary power as the result of a declaration of war. See *id.* at 50 (citing *Brown v. United States*, (8 Cranch) 110, 126).

⁸⁶ *Id.* at 40.

⁸⁷ See *id.* at 41. The list was excerpted from H.Rept. 65-1 (1917) and listed 21 incidents “chosen at random” to demonstrate the dangerousness of German agents and the need to intern them. The list included both civilians and military members. One incident described a group of German reservists who organized an expedition to go into Canada and carry out hostile acts. See *id.* at 71 (reporting indictments had been returned against the conspirators).

(continued...)

a hearing prior to internment, because the power and duty of the President was to act to prevent harm in the context of war, which required the ability to act based on suspicion rather than only on proven facts.⁸⁸

While the act would permit regulations affecting all persons within the statutory definition of alien enemy,⁸⁹ it was the practice of the United States to apply restrictions only to alien enemies who were found to constitute an active danger to the state.⁹⁰ Aliens affected by orders promulgated under the act did not have recourse to the courts to object to the orders on the grounds that the determination was not made in accordance with due process of law, but could bring *habeas corpus* petitions to challenge their status as enemy aliens.⁹¹

In at least two instances, enemy spies or saboteurs entered the territory of the United States and were subsequently arrested. Pablo Waberski admitted to U.S. secret agents to being a spy sent by the Germans to “blow things up in the United States.” Waberski, who was posing as a Russian national, was arrested upon crossing the border from Mexico into the United States and charged with “lurking as a spy” under article 82 of the Articles of War.⁹² Attorney General T. W. Gregory opined in a letter to the President that the jurisdiction of the military to try Waberski by military tribunal was improper, noting that the prisoner had not entered any camp or fortification, did not appear to have been in Europe during the war, and thus could not have come through the fighting lines or field of military operations.⁹³ An ensuing disagreement between the Departments of War and Justice over the respective

⁸⁷ (...continued)

The report of the Attorney General for the year ending 1917 contained another list of federal court cases involving German agents, some of whom were military officers. *See id* at Appendix C. Some of the cases cited involved hostile acts, such as using explosives against ships and other targets, conducting military expeditions, and recruiting spies and insurrectionists. *See id*.

⁸⁸ *See id.* at 43.

⁸⁹ *See* 50 U.S.C. § 21 (including all natives, citizens, denizens, or subjects of the hostile nation or government over the age of 18 within the United States, excepting those who had been naturalized). The act was broadened in 1918 to include women. Act of April 16, 1918, P.L. 65-131, 40 Stat. 531 (1918).

⁹⁰ *See* National Defense Migration, Fourth Interim Report of the House Select Committee Investigating Migration, Findings and Recommendations on Problems of Evacuation of Enemy Aliens and Others from Prohibited Military Zones, H.Rept. 77-2124, at 153 n.4 (1942) (hereinafter “Defense Migration Report”)(contrasting U.S. practice against history of indiscriminate internment of enemy aliens applied during World War I in the United Kingdom, France and Germany). International law now provides protection for enemy aliens, including those definitely suspected of hostile activity against the state. *See* GC, *supra* note 27, art. 5.

⁹¹ *See* *Minotto v. Bradley*, 252 F. 600 (N.D. Ill. 1918); *Ex parte Fronklin*, 253 F. 984 (N.D. Miss. 1918).

⁹² Now article 106, UCMJ, *codified at* 10 U.S.C. § 906.

⁹³ *See* 31 Op. Att’y Gen. 356 (1918) (citing article 29 of the Hague Convention of 1917, Respecting the Laws and Customs of War on Land).

jurisdictions of the FBI and military counterintelligence to conduct domestic surveillance was resolved by compromise.⁹⁴

Waberski, an officer of the German armed forces whose real name turned out to be Lothar Witzke, was sentenced to death by a military commission. Subsequently, the new Attorney General, A. Mitchell Palmer, reversed the earlier AG opinion based on a new understanding of the facts of the case, including proof that the prisoner was a German citizen and that there were military encampments close to the area where he was arrested.⁹⁵ President Wilson commuted Witzke's sentence to life imprisonment at hard labor in Fort Leavenworth and later pardoned him, possibly due to lingering doubts about the propriety of the military tribunal's jurisdiction to try the accused spy,⁹⁶ even though Congress had defined the crime of spying and provided by statute that it was an offense triable by military commission.⁹⁷

The question of military jurisdiction over accused enemy spies arose again in the case of *United States ex rel. Wessels v. McDonald*,⁹⁸ a *habeas corpus* proceeding brought by Herman Wessels to challenge his detention by military authorities while he was awaiting court-martial for spying. The accused was an officer in the German Imperial Navy who used a forged Swiss passport to enter the United States and operated as an enemy agent in New York City. He was initially detained as an alien enemy pursuant to a warrant issued in accordance with statute. He contested his detention on the basis that the port of New York was not in the theater of battle and courts in New York were open and functioning, arguing *Milligan* required that he be tried by an Article III court.⁹⁹ The court found that its inquiry was confined to determining whether jurisdiction by court martial was valid, which it answered affirmatively after examining relevant statutes and finding that, under international law, the act of spying was not technically a crime.¹⁰⁰ The court concluded that the constitutional safeguards available to criminal defendants did not apply, noting that whoever "joins the forces of an enemy alien surrenders th[e] right to constitutional protections." The Supreme Court did not have the opportunity to address the merits of the case, having dismissed the appeal per stipulation of the parties.¹⁰¹ However, two American citizens who were alleged to have conspired to commit espionage with

⁹⁴ See National Counterintelligence Center, Counterintelligence Reader: American Revolution to World War II, available at [<http://www.fas.org/irp/ops/ci/docs/ci1/ch3e.htm>].

⁹⁵ See 40 Op. Att'y Gen. 561 (1919). The opinion was not published until July 29, 1942, during the trial of the eight Nazi saboteurs.

⁹⁶ See National Counterintelligence Center, *supra* note 92.

⁹⁷ Article of War 82 provided that those caught lurking as spies near military facilities "or elsewhere" could be tried by military tribunal.

⁹⁸ 265 F. 754 (E.D.N.Y.1920).

⁹⁹ *Id.* at 758.

¹⁰⁰ *Id.* at 762 (noting that a spy may not be tried under international law when he returns to his own lines, and that spying is a military offense only).

¹⁰¹ *Wessels v. McDonald*, 256 U.S. 705 (1921).

Wessels were tried and acquitted of treason in federal court,¹⁰² and subsequently released.

In 1918, a bill was introduced in the Senate to provide for trial by court-martial of persons not in the military who were accused of espionage, sabotage, or other conduct that could hurt the war effort.¹⁰³ In a letter to Representative John E. Raker explaining his opposition to the idea, Attorney General T.W. Gregory provided statistics about war-related arrests and prosecutions.¹⁰⁴ According to the letter, of 508 espionage cases that had reached a disposition, 335 had resulted in convictions, 31 persons were acquitted, and 125 cases were dismissed.¹⁰⁵ Sedition and disloyalty charges had yielded 110 convictions and 90 dismissals or acquittals.¹⁰⁶ Acknowledging that the statistics were incomplete, the Attorney General concluded that the statistics did not show a cause for concern.¹⁰⁷ He also reiterated his position that trial of civilians for offenses committed outside of military territory by court-martial would be unconstitutional, and attributed the complaints about the inadequacies of the laws or their enforcement to:

the fact that people, under the emotional stress of the war, easily magnify rumor into fact, or treat an accusation of disloyalty as though it were equal to proof of disloyalty. No reason, however, has as yet developed which would justify punishing men for crime without trying them in accordance with the time-honored American method of arriving at the truth.¹⁰⁸

The record does not disclose any mention of the option of deeming suspects to be unlawful combatants based on their alleged association with the enemy, detaining them without any kind of trial.

Internment of Enemies during World War II

During the Second World War, President Roosevelt made numerous proclamations under the Alien Enemy Act for the purpose of interning aliens deemed

¹⁰² See *United States v. Fricke*, 259 F. 673 (S.D.N.Y. 1919); *United States v. Robinson*, 259 F. 685 (S. D. N. Y. 1919).

¹⁰³ S. 4364, 65th Cong. (1918). The bill would have found that:
owing to changes in the conditions of modern warfare, whereby the enemy now attempts to attack and injure the prosecution of the war by the United States, by means of civilian and other agents and supporters behind the lines spreading false statements and propaganda, injuring and destroying the things and utilities prepared or adapted for the use of the land and naval forces of the United States, ... the United States [now constitutes] a part of the zone of operations

¹⁰⁴ See 57 CONG. REC. APP. pt. 5, at 528-29 (1918).

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 528.

¹⁰⁸ See *id.*

dangerous or likely to engage in espionage or sabotage.¹⁰⁹ At the outset of the war, the internments were effected under civil authority of the Attorney General, who established “prohibited areas” in which no aliens of Japanese, Italian, or German descent were permitted to enter or remain, as well as a host of other restraints on affected aliens. The President, acting under statutory authority, delegated to the Attorney General the authority to prescribe regulations for the execution of the program. Attorney General Francis Biddle created the Alien Enemy Control Unit to review the recommendations of hearing boards handling the cases of the more than 2,500 enemy aliens in the temporary custody of the Immigration and Naturalization Service (INS).¹¹⁰

In February of 1942, the President extended the program to cover certain citizens¹¹¹ as well as enemy aliens, and turned over the authority to prescribe “military areas” to the Secretary of War, who further delegated the responsibilities under the order with respect to the west coast to the Commanding General of the Western Defense Command. The new order, Executive Order 9066,¹¹² clearly amended the policy established under the earlier proclamations regarding aliens and restricted areas, but did not rely on the authority of Alien Enemy Act, as the previous proclamations had done.¹¹³ Although the Department of Justice denied that the transfer of authority to the Department of War was motivated by a desire to avoid constitutional issues with regard to the restriction or detention of citizens, the House Select Committee Investigating National Defense Migration found the shift in authority significant, as it appeared to rely on the nation’s war powers directly, and could find no support in the Alien Enemy Act with respect to citizens.¹¹⁴ The summary exercise of authority under that act to restrain aliens was thought by the

¹⁰⁹ The President issued the following proclamations under the authority of 50 U.S.C. § 21: Proc. No. 2525, Dec. 7, 1941, 55 Stat. Pt. 2, 1700 (with respect to invasion by Japan); Proc. No. 2526, Dec. 8, 1941, 55 Stat. Pt. 2, 1705 (with respect to threatened invasion by Germany); Proc. No. 2527, Dec. 8, 1941, 55 Stat. Pt. 2, 1707 (with respect to threatened invasion by Italy).

¹¹⁰ See Defense Migration Report, *supra* note 88, at 163.

¹¹¹ General De Witt’s declaration of military areas indicated that five classes of civilians were to be affected:

Class 1, all persons who are suspected of espionage, sabotage, fifth column, or other subversive activity; class 2, Japanese aliens; class 3, American-born persons of Japanese lineage; class 4, German aliens; class 5, Italian aliens.

See *id.*

¹¹² 17 Fed. Reg. 1407 (Feb. 19, 1942).

¹¹³ See Defense Migration Report, *supra* note 88, at 162-66 (recounting history of general evacuation orders issued by Lt. Gen. John De Witt, commanding general of the western defense command).

¹¹⁴ See *id.* at 166. Attorney General Francis Biddle later wrote that he had opposed the evacuation of Japanese-American citizens, and had let it be known that his Department “would have nothing to do with any interference with citizens, or recommend the suspension of the writ of habeas corpus.” See FRANCIS BIDDLE, IN BRIEF AUTHORITY 216-17 (1962); *id.* at 219 (reporting his reaffirmation to the President of his continuing opposition to the evacuation just prior to the signing of the Order).

Committee to be untenable in the case of U.S. citizens, and the War Department felt congressional authorization was necessary to provide authority for its enforcement.¹¹⁵

Congress granted the War Department's request, enacting with only minor changes the proposed legislation providing for punishment for the knowing violation of any exclusion order issued pursuant to Executive Order 9066 or similar executive order.¹¹⁶ A policy of mass evacuation from the West Coast of persons of Japanese descent — citizens as well as aliens — followed, which soon transformed into a system of compulsive internment at "relocation centers."¹¹⁷ Persons of German and Italian descent (and others) were treated more selectively, receiving prompt (though probably not full and fair) loyalty hearings¹¹⁸ to determine whether they should be interned, paroled, or released. The disparity of treatment was explained by the theory that it would be impossible or too time-consuming to attempt to distinguish the loyal from the disloyal among persons of Japanese descent.¹¹⁹

In a series of cases, the Supreme Court limited but did not explicitly strike down the internment program. In the *Hirabayashi* case, the Supreme Court found the curfew imposed upon persons of Japanese ancestry to be constitutional as a valid war-time security measure, even as implemented against U.S. citizens, emphasizing the importance of congressional ratification of the Executive Order.¹²⁰ *Hirabayashi* was also indicted for violating an order excluding him from virtually the entire west coast, but the Court did not review the constitutionality of the exclusion measure because the sentences for the two charges were to run concurrently.¹²¹ Because the restrictions affected citizens solely because of their Japanese descent, the Court framed the relevant inquiry as a question of equal protection, asking

whether in the light of all the facts and circumstances there was any substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat

¹¹⁵ See Defense Migration Report, *supra* note 88, at 167.

¹¹⁶ P.L. 77-503, *codified at* 18 U.S.C. 1383 (1970 ed.), *repealed by* P.L. 94-412, Title V, § 501(e) (1976).

¹¹⁷ See PERSONAL JUSTICE DENIED, REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 2 (1982).

¹¹⁸ See *id.* at 285 (describing impediments to full and fair hearings, including a prohibition on detainees' representation by an attorney, inability to object to questions, presumption in favor of the government, and ultimate decision falling to reviewers at the Alien Enemy Control Unit).

¹¹⁹ See *id.* at 288-89 (pointing out that there appeared to have been a greater danger of sabotage and espionage committed by German agents, substantiated by the German saboteurs case noted *supra*).

¹²⁰ *Hirabayashi v. United States*, 320 U.S. 81, 89-90 (1943) (emphasizing that the act of March 21, 1942, specifically provided for the enforcement of curfews).

¹²¹ *Id.* at 105 (also declining to address the government's contention that an order to report to the Civilian Control Station did not necessarily entail internment at a relocation center).

of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion.¹²²

In a concurring opinion, Justice Douglas added that in effect, due process considerations did not apply to ensure that only individuals who were actually disloyal were affected by the restrictions, even if it were to turn out that only a small percentage of Japanese-Americans were actually disloyal.¹²³ However, he noted that a more serious question would arise if a citizen did not have an opportunity at some point to demonstrate his loyalty in order to be reclassified and no longer subject to the restrictions.¹²⁴

In *Korematsu*,¹²⁵ the Supreme Court upheld the conviction of an American citizen for remaining in his home, despite the fact that it was located on a newly declared “Military Area” and was thus off-limits to persons of Japanese descent. Fred Korematsu also challenged the detention of Japanese-Americans in internment camps, but the Court declined to consider the constitutionality of the detention itself, as Korematsu’s conviction was for violating the exclusion order only. The Court, in effect, validated the treatment of citizens in a manner similar to that of enemy aliens by reading Executive Order 9066 together with the act of Congress ratifying it as sufficient authority under the combined war powers of the President and Congress, thus avoiding having to address the statutory scope of the Alien Enemy Act.

In *Ex parte Endo*,¹²⁶ however, decided the same day as *Korematsu*, the Supreme Court did not find adequate statutory underpinnings to support the internment of loyal citizens. The Court ruled that the authority to exclude persons of Japanese ancestry from declared military areas did not encompass the authority to detain concededly loyal Americans. Such authority, it found, could not be implied from the power to protect against espionage and sabotage during wartime.¹²⁷ The Court declined to decide the constitutional issue presented by the evacuation and internment program, instead interpreting the executive order, along with the act of March 27, 1942 (congressional ratification of the order),¹²⁸ narrowly to give it the greatest chance of surviving constitutional review.¹²⁹ Accordingly, the Court noted that detention in Relocation Centers was not mentioned in the statute or executive order, but was developed during the implementation of the program. As such, the authority to detain citizens could only be found by implication in the act, and must therefore be found to serve the ends Congress and the President had intended to reach. Since the detention of a loyal citizen did not further the campaign against espionage and sabotage, it could not be authorized by implication.

¹²² *Id.* at 95.

¹²³ *Id.* at 106 (Douglas, J., concurring).

¹²⁴ *Id.* at 109 (Douglas, J., concurring).

¹²⁵ 323 U.S. 214 (1944).

¹²⁶ 323 U.S. 283 (1944).

¹²⁷ 323 U.S. at 302.

¹²⁸ *Id.* at 298 (citing *Hirabayashi* at 87-91).

¹²⁹ *Id.* at 299.

The Court avoided the question of whether internment of citizens would be constitutionally permissible where loyalty were at issue or where Congress explicitly authorized it, but the Court's use of the term "concededly loyal" to limit the scope of the finding may be read to suggest that there is a Fifth Amendment guarantee of due process applicable to a determination of loyalty or dangerousness. While the Fifth Amendment would not require the same process that is due in a criminal case, it would likely require at least reasonable notice of the allegations and an opportunity for the detainee to be heard.

At least one American with no ethnic ties to or association with an enemy country was subjected to an exclusion order issued pursuant to Executive Order 9066. Homer Wilcox, a native of Ohio, was excluded from his home in San Diego and removed by military force to Nevada, although the exclusion board had determined that he had no association with any enemy and was more aptly described as a "harmless crackpot."¹³⁰ He was the manager of a religious publication that preached pacifism, and was indicted along with several others for fraud in connection with the publication.¹³¹ The district court awarded damages in favor of Wilcox, but the circuit court reversed, finding the exclusion within the authority of the military command under Executive Order 9066 and 18 U.S.C. § 1383, and holding that

the evidence concerning plaintiff's activities and associations provided a reasonable ground for the belief by defendant ... that plaintiff had committed acts of disloyalty and was engaged in a type of subversive activity and leadership which might instigate others to carry out activities which would facilitate the commission of espionage and sabotage and encourage them to oppose measures taken for the military security of Military Areas Nos. 1 and 2, and that plaintiff's presence in the said areas from which he had been excluded would increase the likelihood of espionage and sabotage and would constitute a danger to military security of those areas.¹³²

The court also found that the act of Congress penalizing violations of military orders under Executive Order 9066 did not preclude General De Witt from using military personnel to forcibly eject Wilcox from his home.¹³³

The Japanese internment program has since been widely discredited,¹³⁴ the convictions of some persons for violating the orders have been vacated,¹³⁵ and the victims have received compensation,¹³⁶ but the constitutionality of detention of

¹³⁰ See *Wilcox v. Emmons*, 67 F.Supp 339 (S.D. Cal.), *rev'd sub nom De Witt v. Wilcox*, 161 F.2d 785 (9th Cir. 1947).

¹³¹ *De Witt v. Wilcox*, 161 F.2d 785 (9th Cir.), *cert. denied*, 332 U.S. 763 (1947).

¹³² *Id* at 790.

¹³³ *Id.* at 788.

¹³⁴ See generally PERSONAL JUSTICE DENIED, *supra* note 115.

¹³⁵ *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985).

¹³⁶ Through the Civil Liberties Act of 1988, Congress provided \$20,000 to each surviving (continued...)

citizens during war who are deemed dangerous has never expressly been ruled *per se* unconstitutional.¹³⁷ In the cases of citizens of other ethnic backgrounds who were interned or otherwise subject to restrictions under Executive Order 9066, courts played a role in determining whether the restrictions were justified, sometimes resulting in the removal of restrictions.¹³⁸ Because these persons were afforded a limited hearing to determine their dangerousness, a court later ruled that the Equal Protection Clause of the Constitution did not require that they receive compensation equal to that which Congress granted in 1988 to Japanese-American internees.¹³⁹

It may be argued that *Hirabayashi* and the other cases validating Executive Order 9066 (up to a point) support the constitutionality of preventive detention of citizens during war, at least insofar as the determination of dangerousness of the individual interned is supported by some evidence and some semblance of due process is accorded the internee. However, it was emphasized in these cases that Congress had specifically ratified Executive Order 9066 by enacting 18 U.S.C. § 1383, providing a penalty for violation of military orders issued under the Executive Order. Thus, even though the restrictions and internments occurred in the midst of a declared war, a presidential order coupled with specific legislation appear to have been required to validate the measures. The internment of Japanese-American citizens without individualized determination of dangerousness was found not to be authorized by the Executive Order and ratifying legislation (the Court thereby avoiding the constitutional issue), although the President had issued a separate Executive Order to set up the War Relocation Authority¹⁴⁰ and Congress had given its tacit support for the internments by appropriating funds for the effort.¹⁴¹

¹³⁶ (...continued)

individual who had been confined in the camps. P.L. 100-383, 102 Stat. 903 (1988), *codified at* 50 U.S.C. App. §§ 1989b *et seq.*

¹³⁷ *But see* Hohri v. United States, 586 F.Supp. 769 (D.D.C. 1984), *aff'd per curiam* 847 F.2d 779 (Fed. Cir.1988), *cert denied* 488 U.S. 925 (1988) (unconstitutional taking of property interests of internees was found where government officials were aware of allegations that there was no military necessity sufficient to justify internment).

¹³⁸ *See, e.g.* De Witt v. Wilcox, 161 F.2d 785 (9th Cir. 1947)(reversing award of damages to U.S. citizen who had been ordered excluded from the west coast and who was forcibly removed to Las Vegas by the military); Schueller v. Drum, 51 F.Supp. 383 (E.D. Pa. (1943)(exclusion order pertaining to naturalized citizen vacated where the facts were not found that “would justify the abridgement of petitioner’s constitutional rights”); Scherzberg v. Maderia, 57 F.Supp. 42 (E.D. Pa. 1944)(despite deference to the Congress and the President with regard to wartime actions, whether the facts of a specific case provided rational basis for individual order remained justiciable, and in the present case, “civil law [was] ample to cope with every emergency arising under the war effort”).

¹³⁹ *See* Jacobs v. Barr, 959 F.2d 313 (D.C. Cir. 1992).

¹⁴⁰ Exec. Order No. 9102 (1942) (purporting to implement Exec. Order No. 9066).

¹⁴¹ *See Ex parte* Endo, 323 U.S. 283 (1944).

The only persons who were treated as enemy combatants pursuant to Proclamation No. 2561¹⁴² were members of the German military who had been captured after landing on U.S. beaches from German submarines.¹⁴³ Collaborators and persons who harbored such saboteurs were tried in federal courts for treason or violations of other statutes.¹⁴⁴ Hans Haupt, the father of one of the saboteurs, was sentenced to death for treason, but this sentence was overturned on the ground that procedures used during the trial violated the defendant's rights.¹⁴⁵ On retrial, Haupt was sentenced to life imprisonment, but his sentence was later commuted on the condition that he leave the country. Another person charged with treason for his part in the saboteurs' conspiracy, Helmut Leiner, was acquitted of treason but then interned as an enemy alien.¹⁴⁶ Anthony Cramer, an American citizen convicted of treason for assisting one of the saboteurs to carry out financial transactions, had his conviction overturned by the Supreme Court on the grounds that the overt acts on which the charge was based were insufficient to prove treason.¹⁴⁷ Emil Krepper, a pastor living in New Jersey, came under suspicion because his name was found printed in secret ink on the saboteur's handkerchief, although he never met with any of the saboteurs. He was indicted for violating TWEA and receiving a salary from the German government without reporting his activity as a foreign agent.¹⁴⁸

These cases involving collaborators with the *Quirin* eight, as well as other unrelated cases of sabotage or collaboration with the enemy during World War II, did not result in any military determinations that those accused were enemy combatants. It is thus not clear what kind of association with Germany or with other enemy saboteurs, short of actual membership in the German armed forces, would have enabled the military to detain them as enemy combatants under the law of war.¹⁴⁹ It

¹⁴² Proclamation No. 2561, of July 2, 1942, 7 Fed. Reg. 5101, 56 Stat. 1964. Like Exec. Order No. 9066 issued earlier that same year, Proc. 2561 retained terminology from the Alien Enemy Act but did not explicitly rely on it for authority. However, during oral argument before the Supreme Court, the Attorney General placed some emphasis on the fact that the Proclamation was consistent with the Alien Enemy Act as well as the Articles of War, and was thus authorized by Congress. See LANDMARK BRIEFS, *supra* note 39, at 594-95.

¹⁴³ There were ten in all. Eight saboteurs were tried by military commission in 1942. See *Ex parte Quirin*, 317 U.S. 1 (1942). Two other saboteurs landed by submarine in 1945 and were convicted by military commission. See *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). See Military Tribunals: The *Quirin* Precedent, CRS Report RL31340.

¹⁴⁴ CRS Report RL31340 at 15.

¹⁴⁵ *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943).

¹⁴⁶ *Leiner is Interned After Acquittal Ordered by Court in Treason Case*, NY TIMES, Dec. 1, 1942, at 1. He was subsequently indicted for violating the Trading with the Enemy Act (TWEA). *Leiner Reindicted for Aiding Treason*, NY TIMES, Dec. 5, 1942, at 17.

¹⁴⁷ *Cramer v. United States*, 325 U.S. 1 (1945). He was later found guilty of violating the TWEA and censorship laws.

¹⁴⁸ See *Krepper Guilty as Spy*, NY TIMES, Mar. 15, 1945, at 25.

¹⁴⁹ See also discussion regarding proposed War Security Act, *supra* note 44, and accompanying text.

appears that *Quirin* was not interpreted at the time as having established executive authority to detain persons based on their alleged hostile intent, particularly without any kind of a trial.

After the *Quirin* decision, the Attorney General asked Congress to pass legislation to strengthen criminal law relating to internal security during wartime.¹⁵⁰ Attorney General Biddle wrote that new law was necessary to cover serious gaps and inadequacies in criminal law, which he argued did not provide sufficient punishment for hostile enemy acts perpetrated on the territory of the United States.¹⁵¹ The House Committee on the Judiciary endorsed the proposed War Security Act, pointing to the fact that it had been necessary to try the eight Nazi saboteurs by military commission due to the inadequacy of the penal code to punish the accused for acts that had not yet been carried out.¹⁵² It also suggested that military jurisdiction might be unavailable to try enemy saboteurs who had not “landed as part of a small invasion bent upon acts of illegal hostilities.”¹⁵³ The bill passed in the House of Representatives, but was not subsequently taken up in the Senate.

¹⁵⁰ H.Rept. 78-219 (1943) (describing Justice Department proposal introduced in previous Congress as H.R. 7737, then under consideration as amended in H.R. 2087). The War Security Act would have provided punishment for a list of “hostile acts against the United States” if committed with the intent to aid a country with which the United States was at war, to include sabotage, espionage, harboring or concealing an agent or member of the armed forces of an enemy state, or entering or leaving the United States with the intent of providing aid to the enemy. It also would have made it a criminal offense to fail to report information giving rise to probable cause to believe that another has committed, is committing or plans to commit a hostile act against the United States. *Id.* at 11. Title II of the act would have modified court procedure in cases involving these “hostile acts” as well as certain other statutes, that would have allowed the Attorney General to certify the importance of a case to the war effort, resulting in expedited proceedings, enhanced secrecy for such proceedings, and a requirement for the approval of a federal judge to release the accused on bail. The act was not intended to affect the jurisdiction of military tribunals and did not cover uniformed members of the enemy acting in accordance with the law of war. *Id.* at 12.

¹⁵¹ *See id.* at 1-2 (letter from Attorney General to the House of Representatives dated October 17, 1942).

¹⁵² *See id.* at 5 (stating that the maximum criminal punishment for a conspiracy to commit sabotage would have been only two years).

¹⁵³ *See id.*; *see also* 1942 ATT’Y GEN. ANN. REP. 13. This view was echoed during floor debate of the proposed act in the House of Representatives. Supporters and detractors of the bill alike seemed to agree that the military tribunal upheld in *Ex parte Quirin* was an extraordinary measure that was constitutionally permissible only because the saboteurs had come “wearing German uniforms” and thus were “subject to be prosecuted under military law.” *See* 89 Cong. Rec. 2780 - 82 (1943) (remarks by Reps. Michener, Rankin, and Kefauver). There does not appear to be any suggestion that *Quirin* could be interpreted to authorize the detention without trial of individuals suspected of hostile intent by designating them to be unlawful enemy combatants.

The Cold War

After the close of World War II, the Congress turned its attention to the threat of communism. Recognizing that the Communist Party presented a different kind of threat from that of a strictly military attack, members of Congress sought to address the internal threat with innovative legislation.¹⁵⁴ Introduced in the wake of the North Korean attack on South Korea, the Internal Security Act (ISA) of 1950¹⁵⁵ was the culmination of many legislative efforts to provide means to fight what was viewed as a foreign conspiracy to infiltrate the United States and overthrow the government by means of a combination of propaganda, espionage, sabotage, and terrorist acts.¹⁵⁶ The Attorney General presented to the Congress a draft bill that would strengthen the espionage statutes, amend the Foreign Agents Registration Act, and provide authority for U.S. intelligence agencies to intercept communications.¹⁵⁷ According to the Attorney General, the legislation was necessary because

[t]he swift and more devastating weapons of modern warfare coupled with the treacherous operations of those who would weaken our country internally, preliminary to and in conjunction with external attack, have made it imperative that we strengthen and maintain an alert and effective peacetime vigilance.¹⁵⁸

S. 4037 combined the proposed legislation with other bills related to national security, including measures to exclude and expel subversive aliens, to detain or supervise aliens awaiting deportation, and to deny members of communist organizations the right to travel on a U.S. passport. The bill also contained a requirement for Communist-controlled organizations and Communist-front organizations¹⁵⁹ to register as such. President Truman and opponents of the so-called McCarran Act thought the registration requirements and other provisions likely to

¹⁵⁴ During the initial debate of the Internal Security Act (ISA), it was urged:

As our case is new, we must think anew and act anew.

See 96 Cong. Rec. 14,296, 14,297 (1950)(remarks of Sen. Wiley, quoting Abraham Lincoln).

¹⁵⁵ 64 Stat. 987 (1950).

¹⁵⁶ *See id.* §2(1) (finding)

There exists a world Communist movement which, in its origins, its development, and its present practice is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental or otherwise), espionage, sabotage, terrorism, and any other means deemed necessary to establish a Communist totalitarian dictatorship ...

¹⁵⁷ *See* 95 CONG. REC. 440-43 (1949) (Sen. McCarran introducing S. 595).

¹⁵⁸ Letter from Attorney General Tom C. Clark to Sen. McCarran, *reprinted at* 95 CONG. REC. 441, 442 (1949).

¹⁵⁹ *See* S.Rept. 81-2369, Protecting the Internal Security of the United States 4 (1950) (defining Communist-controlled organizations based on “their domination by a foreign government or the world Communist movement”).

be either unconstitutional or ineffective, and expressed concern about possible far-reaching civil liberties implications.¹⁶⁰

Opponents of the McCarran Act sought to substitute a new bill designed to address the security concerns in what they viewed as a more tailored manner. Senator Kilgore introduced the Emergency Detention Act¹⁶¹ (Kilgore bill) to authorize the President to declare a national emergency under certain conditions, during which the Attorney General could enact regulations for the preventive incarceration of persons suspected of subversive ties. At the time of the debate, 18 U.S.C. § 1383 was still on the books and would have ostensibly supported the declaration of military areas and the enforcement of certain restrictions against aliens or citizens deemed dangerous. Proponents of the Kilgore bill argued that the proposed legislation would create a program for internment of enemies that would contain sufficient procedural safeguards to render it invulnerable to court invalidation based on *Ex parte Endo*.¹⁶²

The final version of the ISA contained both the McCarran Act and the Emergency Detention Act. President Truman vetoed the bill, voicing his continued opposition to the McCarran Act. The President did not take a firm position with regard to the Emergency Detention Act, stating that

it may be that legislation of this type should be on the statute books. But the provisions in [the ISA] would very probably prove ineffective to achieve the objective sought, since they would not suspend the writ of habeas corpus, and under our legal system to detain a man not charged with a crime would raise serious constitutional questions unless the writ of habeas corpus were suspended.¹⁶³

The President recommended further study on the matter of preventive detention for national security purposes. Congress passed the ISA over the President's veto.¹⁶⁴

The Emergency Detention Act, Title II of the ISA, authorized the President to declare an "Internal Security Emergency" in the event of an invasion of the territory of the United States or its possessions, a declaration of war by Congress, or insurrection within the United States in aid of a foreign enemy, where the President deemed implementation of the measures "essential to the preservation, protection

¹⁶⁰ See S.Rept. 81-2369 (minority views of Sen. Kilgore).

¹⁶¹ 64 Stat. 1019 (1950) (authorizing the President to declare an "Internal Security Emergency," in the event of war, invasion, or insurrection in aid of a foreign enemy, which would authorize the Attorney General to "apprehend and by order detain each person ... [where] there is reasonable ground to believe that such person may engage in acts of espionage or sabotage.").

¹⁶² See 96 CONG. REC. 14,414, 14,418 (remarks of Sen. Douglas, a co-sponsor of the Kilgore bill, discussing legal precedent for proposed internment and identifying procedural safeguards incorporated in the proposed bill).

¹⁶³ See Internal Security Act, 1950 — Veto Message from the President of the United States, 96 CONG. REC. 15,629, 15,630 (1950). (Section 116 of the Emergency Detention Act explicitly preserved the right to habeas corpus).

¹⁶⁴ See 96 CONG. REC. 15,633, 15,726 81st Cong. 2nd Sess. (1950).

and defense of the Constitution.”¹⁶⁵ The act authorized the maintenance of the internment and prisoner-of-war camps used during World War II for use during subsequent crises, and authorized the Attorney General, during national emergencies under the act, to issue warrants for the apprehension of “those persons as to whom there is a reasonable ground to believe that such persons probably will engage in, or conspire to engage in acts of sabotage or espionage.” Detainees were to be taken before a preliminary hearing officer within 48 hours of their arrest, where each detainee would be informed of the grounds for his detention and of his rights, which included the right to counsel, the privilege against self-incrimination, the right to introduce evidence and cross-examine witnesses.¹⁶⁶ The Attorney General was required to present evidence to the detainee and to the hearing officer or board “to the fullest extent possible consistent with national security.”¹⁶⁷ Evidence that could be used to determine whether a person could be detained as dangerous included evidence that a person received training from or had ever committed or conspired to commit espionage or sabotage on behalf of an entity of a foreign Communist party or the Communist Party of the United States, or any other group that seeks the overthrow of the government of the United States by force.¹⁶⁸

No internal emergencies were declared pursuant to the Emergency Detention Act, despite the United States’ involvement in active hostilities against Communist forces in Korea and Vietnam and the continued suspicion regarding the existence of revolutionary and subversive elements within the United States.¹⁶⁹ Nevertheless, the continued existence of the act aroused concern among many citizens, who believed the act could be used as an “instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views.”¹⁷⁰ Several bills were introduced to amend or repeal the act.¹⁷¹ The Justice Department supported the repeal of the act, opining

¹⁶⁵ ISA title II, § 102, 64 Stat. 1021.

¹⁶⁶ *Id.* § 104, 64 Stat. 1022.

¹⁶⁷ *Id.* § 104(f), 64 Stat. 1023 (excluding evidence of any officers or agents of the government, the revelation of which would be dangerous to the security and safety of the United States).

¹⁶⁸ *Id.* § 109(h).

¹⁶⁹ See H.Rept. 1351, at 1, (1968) entitled “Guerrilla Warfare Advocates in the United States,” in which the House Committee on Un-American Activities stated its belief that “there can be no doubt about the fact that there are mixed Communist and black nationalist elements which are planning and organizing guerrilla-type operations against the United States.” The Committee concluded that “[a]cts of overt violence by the guerrillas would mean that they had declared a ‘state of war’ within the country and, therefore, would forfeit their rights as in wartime. The McCarran Act provides for various detention centers to be operated throughout the country and these might be utilized for the temporary imprisonment of warring guerrillas.” *Id.* at 59.

¹⁷⁰ See H.Rept. 92-116, at 2, *reprinted in* 1971 U.S.C.C.A.N. 1435, 1436.

¹⁷¹ *Id.*; see also H.Rept. 91-1599, at 1-2 (Emergency Detention Act of 1950 Amendments, report accompanying H.R. 19163) (describing public concern based on misconception that the act authorized the detention of individuals based on race). According to the Justice Department, the rumors that a system of concentration camps existed was likely instigated
(continued...)

that the potential advantage offered by the statute in times of emergency was outweighed by the benefits that repealing the detention statute would have by allaying the fears and suspicions (however unfounded they might have been) of concerned citizens.¹⁷²

Congress decided to repeal the Emergency Detention Act *in toto* in 1971, and enacted in its place a prohibition on the detention of American citizens except pursuant to an act of Congress.¹⁷³ The new language was intended to prevent a return to the pre-1950 state of affairs, in which “citizens [might be] subject to arbitrary executive authority” without prior congressional action.¹⁷⁴ Executive Order 9066 was formally rescinded in 1976.¹⁷⁵ Congress repealed 18 U.S.C. § 1383 later that year.¹⁷⁶

It may be argued that Congress, in passing the Emergency Detention Act in 1950, was legislating based on its constitutional war powers, to provide for the preventive detention during national security emergencies of those who might be expected to act as enemy agents, though not technically within the definition of “alien enemies.” It does not, therefore, appear that Congress contemplated that the President already had the constitutional power to declare such individuals to be enemy combatants, subject to detention under the law of war, except under very narrow circumstances. The much earlier legislative history accompanying the passage of the Alien Enemy Act may also be interpreted to suggest that the internment of enemy spies and saboteurs in war was not ordinarily a military power that could be exercised by the President alone, or at least, not a power with which Congress could not constitutionally interfere.¹⁷⁷

¹⁷¹ (...continued)

by a pamphlet distributed by a group named Citizens Committee for Constitutional Liberties, which had been found to be a Communist-front organization that aimed to nullify the ISA. *Id.* at 9. H.R. 19163 would have amended the Emergency Detention Act to clarify persons to whom it could apply and to include procedural safeguards.

¹⁷² *Id.* at 1437.

¹⁷³ P.L. 92-128 (1971), *codified at* 18 U.S.C. § 4001(a).

¹⁷⁴ *See* H.Rept. 92-116, at 5 (1971) *reprinted in* 1971 U.S.C.C.A.N. 1435, 1438 (concluding that the legislation “will assure that no detention camps can be established without at least the acquiescence of the Congress”).

¹⁷⁵ Proc. 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976) (proclaiming retroactively the termination of Executive Order 9066 as of the date of cessation of hostilities of World War II, December 31, 1946).

¹⁷⁶ *See* National Emergencies Act § 501(e), P.L. 94-412, 90 Stat. 1255 (Sep. 14, 1976). According to the legislative history, Congress repealed the penalty for violating military orders with respect to military areas proclaimed pursuant to any executive order because the measure had been intended only for wartime, and noted the repeal was consistent with the earlier repeal of the Emergency Detention Act. *See* H.Rept. 94-238, at 9-10 (1976).

¹⁷⁷ *See* Alien Enemy Brief, *supra* note 79, at 14-15.

In this country, [the power to intern enemies] is not lodged wholly in the Executive; it is in Congress. Perhaps, if war was declared, the President might

(continued...)

The repeal of the Emergency Detention Act and the enactment of 18 U.S.C. § 4001(a) may be interpreted to preclude the detention of American citizens as enemy agents or traitors unless convicted of a crime. If the law of war traditionally supports the detention of such persons as enemy combatants or unlawful combatants, it may be questioned why such an approach has not been utilized during past conflicts, during which the internal security risk of hostile action by “fifth columnists,” spies, and saboteurs was frequently perceived to equal the danger of military clashes on the battlefield.

Recent and Current “Enemy Combatant” Cases

One U.S. citizen is known to remain in custody in the United States as an enemy combatant; the other has been released. It was reported that one Canadian citizen was being held in U.S. military custody in the United States after his arrest by the Canadian Security Intelligence Service.¹⁷⁸ It is unclear whether the man, Mohamed Mansour Jabarah, is considered an “enemy combatant,” but he reportedly was held for interrogation and not charged with any offense. A Qatari national who was lawfully present in the United States has also been declared an “enemy combatant” and turned over to military custody. The man, Ali Saleh Kahlah Al-Marri, was originally detained as a material witness on December 12, 2001, in connection with the investigation into the attacks of September 11, 2001. He was later charged with credit card fraud and scheduled to stand trial beginning July 21, 2003. However, on June 23, 2003, President Bush designated him an “enemy combatant” and directed that he be transferred to the Naval Consolidated Brig in Charleston, South Carolina, where he is currently being held. His attorneys filed a petition for *habeas corpus* on his behalf in the District Court for the Central District of Illinois, which dismissed the petition for improper venue.¹⁷⁹

¹⁷⁷ (...continued)

then, as Commander in Chief, exercise a military power over these people; but it would be best to settle these regulations by civil process.

(Quoting remarks of Mr. Sewall from 2 Annals of Congress 1790, 5th Congress (1798). Others may have believed the President had the authority to intern all enemies once war was declared:

[The discretionary power to take enemy aliens into custody] could not be looked as a dangerous or exorbitant power, since the President would have the power, the moment war was declared, to apprehend the whole of these people as enemies, and make them prisoners of war. ... This bill ought rather to be considered as an amelioration or modification of those powers which the President already possesses as Commander in Chief, and which the martial law would prove more rigorous than those proposed by this new regulation.

See id. at 15-16 (quoting remarks of Mr. Otis in Congress, 2 Annals of Congress 1790-91, 5th Congress (1798).

¹⁷⁸ *See* Allan Thompson, *Canadian Held at U.S. Military Base*, TORONTO STAR, 8/3/02, at A09, available online at 2002 WL 24326723.

¹⁷⁹ *Al-Marri v. Bush*, 274 F.Supp.2d 1003 (C.D. Ill. 2003), *aff’d* 360 F.3d 707 (7th Cir.), *cert denied* 125 S.Ct. 34 (2004).

The Case of Yaser Esam Hamdi

Hamdi's case may be likened to *Territo* in that he was captured on a field of battle and was not charged with committing any offense. In *Territo*, the court cited the 1929 Geneva Convention Relative to the Treatment of Prisoners of War as the legal authority for the detention of the petitioner as a prisoner of war, and the petitioner did not dispute that he had served as a member of the Italian armed forces, with which the United States was then at war. The sole question before the court was whether a U.S. citizen could lawfully be treated as a prisoner of war under U.S. law and the law of war. *Territo* did not contest his capture as a war prisoner or claim that his rights under the 1929 Geneva Convention had been violated.

Hamdi, however, reportedly claimed that he is not a member of Al Qaeda or the Taliban and was present in Afghanistan only to provide humanitarian assistance.¹⁸⁰ The Fourth Circuit agreed that “[i]t has long been established that if Hamdi is indeed an ‘enemy combatant’ who was captured during hostilities in Afghanistan, the government’s present detention of him is a lawful one.”¹⁸¹ The Fourth Circuit ordered the district judge to dismiss the petition, holding essentially that a determination by the military that an individual is an enemy combatant is conclusive, so long as it is supported by some evidence.¹⁸²

In the first interlocutory appeal, the Fourth Circuit vacated a district court order that the prisoner be provided immediate, unmonitored access to an attorney, urging the district court to show deference to the government in its examination of the issue, but expressly declining to embrace the “sweeping proposition” that “with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so.”¹⁸³ On remand, the district court ordered the government to provide additional information to support its conclusion that Hamdi is an enemy combatant.¹⁸⁴ The court found the petitioner to be entitled to due process of law under the Fifth Amendment, and expressed the intent to inquire into the authority of the person making the determination of Hamdi’s status, whether the screening criteria used to determine such status meet due process requirements, the national security aims served by his continued detention, and whether the relevant military regulations and international law require a different procedure.¹⁸⁵

¹⁸⁰ See *Hamdi v. Rumsfeld*, 296 F.3d 278, 281-83 (4th Cir. 2002)(“Hamdi II”).

¹⁸¹ *Id.* at 283.

¹⁸² See *Hamdi v. Rumsfeld*, 316 F.3d 450 (“Hamdi III”), *reh’g en banc denied*, 337 F.3d 335 (4th Cir. 2003)(where individual is designated as an enemy combatant and it is undisputed that he was captured in a combat zone, no further judicial inquiry is warranted after the government “has set forth factual assertions which would establish a legally valid basis for the petitioner’s detention”).

¹⁸³ See *Hamdi II*, 296 F.3d at 283.

¹⁸⁴ See *Hamdi v. Rumsfeld*, 243 F.Supp.2d 527, 532 (E.D. Va. 2002).

¹⁸⁵ *Id.* at 530. The court refers to the DoD Joint Service Regulation, Enemy Prisoners of (continued...)

On appeal to the Fourth Circuit, the government argued that the proof already submitted to the court, which consisted of a declaration by Michael Mobbs, a special advisor to the Under Secretary of Defense for Policy, was sufficient as a matter of law to establish the legality of the detention.¹⁸⁶ The Fourth Circuit agreed,¹⁸⁷ declaring that since the Hamdi petition conceded that Hamdi had been seized in Afghanistan during a time of military hostilities, there were no disputed facts that would necessitate the evidentiary hearing ordered by the district court, which could also involve a significant interference with the war effort.¹⁸⁸ The court also disposed of the legal arguments put forth on Hamdi's behalf, finding that 18 U.S.C. § 4001(a) does not apply and that the Geneva Conventions are non-self-executing treaties and therefore do not give individuals a right of action. The court vacated the production order issued by the district court and ordered the petition to be dismissed.

The Supreme Court vacated the Fourth Circuit decision and remanded it to allow Hamdi a meaningful opportunity to contest his status as an "enemy combatant." However, the Justices could not reach a consensus for the rationale. Justice O'Connor, joined by the Chief Justice as well as Justices Kennedy and Breyer wrote the opinion for the Court. The plurality found that although detention such as Hamdi's is an ordinary aspect of war-fighting and thus was authorized by implication by the AUMF, "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."¹⁸⁹ Declaring that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," the Court rejected the Government's view that separation of powers principles "mandate a heavily circumscribed role for the courts in such circumstances."¹⁹⁰ It also rejected the Fourth Circuit's characterization of the circumstances surrounding Hamdi's seizure as "undisputed,"¹⁹¹ and held that for Hamdi to continue to be detained as an enemy combatant,¹⁹² he would need to be found to have been "part of or supporting forces hostile to the United States or coalition partners" and "engaged

¹⁸⁵ (...continued)

War, Retained Personnel, Civilian Internees and Other Detainees (1997), and the GPW, which provide for a hearing to determine the status of those captured during hostilities. See CRS Report RL31367.

¹⁸⁶ See Government's Motion for Interlocutory Appeal and Stay, Aug. 19, 2002.

¹⁸⁷ See *Hamdi v. Rumsfeld*, 316 F.3d 450 ("Hamdi III"), *reh'g en banc denied* 337 F.3d 335 (4th Cir. 2003), *vacated and remanded* 124 S.Ct. 2633 (2004).

¹⁸⁸ *Id.* at 461.

¹⁸⁹ 124 S.Ct. at 2365.

¹⁹⁰ *Id.* at 2650.

¹⁹¹ *Id.* at 2644.

¹⁹² The plurality emphasized that "process is due only when the determination is made to continue to hold those who have been seized," and would not be required for "initial captures on the battlefield." *Id.* at 2649.

in an armed conflict against the United States,”¹⁹³ and that his detention was authorized only so long as active hostilities continue in Afghanistan.

At the same time, the plurality did not call for a hearing that would comport with all of the requirements the Constitution applies to a criminal trial. Instead, a balancing test to weigh the risk of erroneous deprivation of a detainee’s liberty interest against the government’s interest in fighting a war may suffice. Such a procedure, the plurality suggested, could eliminate certain procedures that have “questionable additional value in light of the burden on the Government,”¹⁹⁴ so that “enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”¹⁹⁵ However, at least in the case of citizens, the “some evidence” standard urged by the government would be insufficient.¹⁹⁶

The plurality emphasized that its interpretation of the AUMF’s grant of authority for the use of “necessary and appropriate force” is “based on longstanding law-of-war principles,” but that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”¹⁹⁷ Based on the conventional understanding of the conflict as limited to the hostilities in Afghanistan, the plurality stated that “indefinite detention for the purpose of interrogation is not authorized.”¹⁹⁸

The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who “engaged in an armed conflict against the United States.” If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of “necessary and appropriate force,” and therefore are authorized by the [AUMF].

Justice Souter, joined by Justice Ginsburg, agreed that Hamdi is entitled to due process, including the right to counsel (but without the qualifications suggested by Justice O’Connor), and joined the plurality to provide sufficient votes to vacate the

¹⁹³ *Id.* at 2642.

¹⁹⁴ *Id.* at 2649.

¹⁹⁵ *Id.* at 2648 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The plurality suggested some possible departures from the Due Process requirements applicable in criminal courts:

Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.

Id. at 2649.

¹⁹⁶ *Id.* at 2641.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

decision below.¹⁹⁹ However, finding no explicit authority in the AUMF (or other statutes) to detain persons as enemy combatants, they would have determined that 18 U.S.C. § 4001(a) precludes the detention of American citizens as enemy combatants altogether. Justice Scalia, joined by Justice Stevens, dissented from the plurality opinion, arguing that the detention of a U.S. citizen under the circumstances described could only occur after a trial on criminal charges or where Congress has suspended the Writ of Habeas Corpus. Only Justice Thomas would have affirmed the decision below.

The Case of Jose Padilla

The Supreme Court did not resolve the case of Jose Padilla, who was arrested in Chicago and initially alleged to be involved in a plot to detonate a “dirty bomb.” Instead, a majority of five Justices vacated the Second Circuit’s opinion favorable to Padilla based on the lack of jurisdiction.²⁰⁰ Four Justices would have found jurisdiction based on the “exceptional circumstances” of the case²⁰¹ and affirmed the holding below that detention is prohibited under 18 U.S.C. § 4001(a). The dissenters indicated they might find preventive detention to be acceptable under some circumstances:

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.²⁰²

The case is now in the Fourth Circuit. The District Court for the District of South Carolina granted Padilla’s motion for summary judgment and ordered the government to release Padilla from military detention, while suggesting Padilla could be kept in civilian custody if charged with a crime or determined to be a material witness. Padilla’s attorneys had based their argument on the dissenting opinion of four Supreme Court Justices, who would have found Padilla’s detention barred by the Non-Detention Act, and the language in *Hamdi* seemingly limiting the scope of authorization to combatants captured in Afghanistan. The government argued that Padilla’s detention is covered under the *Hamdi* decision’s interpretation of the AUMF because he is alleged to have attended an Al Qaeda training camp in Afghanistan before traveling to Pakistan and then to the United States,²⁰³ apparently

¹⁹⁹ *Id.* at 2660 (Souter, J concurring).

²⁰⁰ *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004).

²⁰¹ 124 S.Ct. at 2729 (Stevens, J., dissenting).

²⁰² *Id.* at 2735 (Stevens, J., dissenting).

²⁰³ *See* Respondents’ Answer to the Petition for a Writ of Habeas Corpus at 2, *Padilla v.* (continued...)

based on information obtained from interrogations of Padilla and other persons detained as “enemy combatants.” The judge disagreed, finding that express authority from Congress would be necessary and that the AUMF contains no such authority:

[S]ince Petitioner's alleged terrorist plans were thwarted when he was arrested on the material witness warrant, the Court finds that the President's subsequent decision to detain Petitioner as an enemy combatant was neither necessary nor appropriate.²⁰⁴

Accordingly, the court found that Padilla’s detention is barred by 18 U.S.C. § 4001(a).

The government further argued that even if Congress had not intended to permit the capture and detention of persons outside of the battlefield, the President’s interpretation and application of the AUMF is entitled to great deference because he was operating under a broad grant of authority from Congress in an area where he “possesses independent constitutional authority.”²⁰⁵ The court was not persuaded:

Certainly Respondent does not intend to argue here that, just because the President states that Petitioner's detention is “consistent with the laws of the United States, including the Authorization for Use of Military Force” that makes it so. Not only is such a statement in direct contravention to the well settled separation of powers doctrine, it is simply not the law. Moreover, such a statement is deeply troubling. If such a position were ever adopted by the courts, it would totally eviscerate the limits placed on Presidential authority to protect the citizenry's individual liberties.²⁰⁶

The court disagreed that the President has inherent authority as Commander-in-Chief of the Armed Forces to determine wartime measures, quoting the *Hamdi* Court that

[w]here the exercise of Commander-in-Chief powers, no matter how well intentioned, is challenged on the ground that it collides with the powers assigned by the Constitution to Congress, a fundamental role exists for the courts.²⁰⁷

The government has appealed the case to the Fourth Circuit Court of Appeals, and has asked for a stay of the district court’s order to release Padilla from military detention. The government argues that the facts of Padilla’s case are very similar to

²⁰³ (...continued)

Hanft, C/A No. 02:04 2221-26AJ (D.S.C. filed 2004)[hereinafter “Government Answer”] (arguing that these circumstances, “[i]f anything, [make Padilla] more, not less, of an enemy combatant”).

²⁰⁴ Padilla v. Hanft, C/A No. 02:04 2221-26AJ, slip op. at 8 (D.S.C. Feb. 28, 2005).

²⁰⁵ See Government Answer, *supra* note 203, at 20.

²⁰⁶ Padilla, slip op. at 10.

²⁰⁷ *Id.* at 11 (citing Hamdi, 352 F.3d at 713). Furthermore, the court stated, "Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy." *Id.* (citing Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 644 (Jackson, J., concurring)).

the facts behind *Ex parte Quirin*. A federal judge in the Second Circuit had agreed with this argument, finding that the allegation that Padilla traveled to the United States to detonate a “dirty bomb” on behalf of Al Qaeda, if true, would validate the government’s authority to detain him under military custody.²⁰⁸ The petitioner argued that *Quirin* is inapposite, given that the eight saboteurs in 1942 were charged and tried by military commission, and were given access to an attorney. The Court of Appeals for the Second Circuit agreed with the petitioner, reversing the district court’s finding.²⁰⁹ The district court in the Fourth Circuit followed the Second Circuit opinion.

Padilla’s attorneys argue that the case bears closer resemblance to the Civil War case *Ex parte Milligan*²¹⁰ than to either the *Quirin* or *Territo* cases. The government argues that *Milligan* is inapposite to the petition of Padilla on the grounds that Padilla, like petitioners in *Quirin*, is “a belligerent associated with the enemy who sought to enter the United States during wartime in an effort to aid the enemy’s commission of hostile acts, and who therefore is subject to the laws of war.”²¹¹ (This, presumably, is to be contrasted with the case of *Milligan*, who was a civilian and had never traveled outside the state of Indiana.)

The government does not allege that Padilla entered the country illegally or landed as part of a military offensive.²¹² In *Quirin*, the petitioners were members of the German armed forces and admitted to having entered the country surreptitiously by way of German naval submarine. The government’s argument appears to presume that there is no relevant difference between the landing of the German saboteurs and Padilla’s entry into the United States by means of a commercial flight, neither under disguise nor using false identification.²¹³ Under this theory, the relevant factor would appear to be whether the petitioner had ever left the country and traveled to “enemy territory,” regardless of how he re-entered the country.

²⁰⁸ Padilla *ex rel.* Newman v. Bush, 233 F.Supp.2d 564, 569 (S.D.N.Y. 2002)(holding that “the President is authorized under the Constitution and by law to direct the military to detain enemy combatants in the circumstances present here...”).

²⁰⁹ See Padilla *ex rel.* Newman v. Bush, 352 F.3d 695, 717 (2d Cir. 2003)(finding that both *Milligan* and *Ex parte Quirin* support its conclusion that specific congressional authorization is necessary to support detention of persons in the United States).

²¹⁰ 71 U.S. (4 Wall.) 2 (1866).

²¹¹ See Government Answer at 15.

²¹² The government did argue that Padilla had not technically “entered” the country, since he was arrested at the airport, but the judge rejected the theory as unsupported. Slip op. at 6, fn 9.

²¹³ The government appears to interpret *Quirin* to establish a legal standard for designating persons as enemy combatants. See Gonzales, *supra* note 8, at 8.

Th[e legal] standard [for determining enemy combatant status] was articulated by the Supreme Court in *Quirin*, where the Court made clear that, at a minimum, citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance, and direction enter this country bent on hostile acts are enemy belligerents within the meaning of . . . the law of war, and thus may be detained. The important factor, therefore, is that the person has become a member or associated himself with hostile enemy forces, thereby attaining the status of enemy combatant.

However, it may be argued that under *Quirin*, the surreptitious nature of the petitioners' arrival onto the territory of the United States through coastal defenses, by means of enemy vessels that would have been lawful targets had the Navy or Coast Guard identified them as such, was a major determinant of the petitioners' status as enemy combatants.²¹⁴ Had they entered the country openly and lawfully, they might not have lost their right to be treated as prisoners of war. Padilla's arrival by apparently lawful means arguably has no bearing on whether he is subject to military jurisdiction.

The government disputes Padilla's claim that the laws of war do not apply to Al Qaeda and thus could never apply to him. The government finds support for the opposite claim in the AUMF and *The Prize Cases*.²¹⁵ Because the President has, by Executive Order, recognized a state of war against Al Qaeda, the government argues the laws of war must apply, and anyone associated with Al Qaeda may therefore properly be deemed to be an "enemy belligerent." However, it is not clear that Al Qaeda is a belligerent under the law of war, because such status would ordinarily imply belligerent rights that the Administration has been unwilling to concede.

The government argues that *Milligan* is inapposite; "whereas Milligan was not engaged in legal acts of hostility against the government, ... the President determined that Padilla engaged in hostile and war-like acts."²¹⁶ However, the quoted language from *Ex parte Quirin* may be somewhat misleading, inasmuch as Milligan was indeed alleged to have engaged in hostile and warlike acts, but these were not *legal* acts of hostility because Milligan was not a lawful combatant. Thus, whether *Milligan* applies may depend on the emphasis placed on the *legality* of the acts of hostility of which Milligan was accused, rather than whether Milligan was engaged in acts of hostility at all. The *Milligan* opinion seems to view the nature of the legality of the acts to be based on Milligan's legitimacy as a belligerent rather than the nature of the acts. It may be argued that Padilla, like Milligan, was not engaged in *legal* acts of hostility, because he is not a lawful belligerent. Milligan's membership in the Sons of Liberty did not secure his legitimacy as a belligerent, but neither did it give the government the right to detain him as a prisoner of war.²¹⁷

²¹⁴ Entering the country through coastal defenses was an explicit prohibition in Proc. 2561, and evidence of such an entry was found to be dispositive of both the crime and its amenability to military jurisdiction, regardless of the intent of the accused. *See* Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956). There is currently no published proclamation to the effect that persons who travel from overseas may be treated as unlawful enemy combatants. While President Bush issued a military order providing for the detention of persons who are associated with Al Qaeda or other terrorist organizations, it does not apply to citizens. *See* Military Order, November 13, 2001 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

²¹⁵ *See* Government Answer at 12.

²¹⁶ *Id* at 12 (citing 71 U.S. (4 Wall.) at 131).

²¹⁷ *See* 71 U.S. (4 Wall.) at 131 (suggesting that only lawful belligerents may be detained in accordance with the laws and usages of war); *see also Ex parte Quirin*, 317 U.S. 1, 45 (distinguishing *Milligan* because Milligan "was not an enemy belligerent either entitled to

(continued...)

The government further argues that *Milligan* is inapposite in this case because Milligan, “not being a part of or associated with armed forces of the enemy,” could not be held as a belligerent, while Padilla, in contrast, is alleged to be associated with the armed forces of the enemy. However, it might be recalled that the government had argued that Milligan *was* allegedly associated with the Confederate Army, a recognized belligerent, and that he was in effect accused of acting as an unlawful belligerent.²¹⁸ Therefore, it may be argued that the important distinction in *Quirin* was the nature and status of the enemy forces with whom he was associated, rather than whether he was associated with a hostile force at all. The petitioners in *Quirin* were all conceded to be working for the armed forces of an enemy State in a declared war. What association with the enemy short of membership in its armed forces might have brought the saboteurs under military jurisdiction is unclear.

The continuing validity of *Milligan* has been questioned by some scholars, even though the *Quirin* Court declined to overrule it, while others assert that the essential meaning of the case has only to do with situations of martial law or, perhaps, civil wars. Furthermore, it has been noted that the portion of the plurality in *Milligan* asserting that Congress could not constitutionally authorize the President to use the military to detain and try civilians may be considered *dicta* with correspondingly less precedential value, inasmuch as Congress had implicitly denied such authority. However, the *Hamdi* Court, in distinguishing *Milligan* from *Hamdi*, placed emphasis on the fact that Milligan was not considered a prisoner of war, suggesting that it may recognize the distinction between *Milligan* and *Quirin* as a function of combatant status.

Legal Authority to Detain “Enemy Combatants”

The law of war permits belligerents to seize the bodies and property of enemy aliens.²¹⁹ The Administration has taken the view that the authority to detain “enemy combatants” belongs to the President alone, and that any interference in that authority by Congress would thus be unconstitutional.²²⁰ However, the Constitution explicitly

²¹⁷ (...continued)

the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents”).

²¹⁸ According to the record, evidence showed that Milligan was a member of

a powerful secret association, composed of citizens and others, [that] existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.

See id. at 141 (concurring opinion, in which four Justices took the position that under the circumstances, Congress could have constitutionally authorized military tribunals to try civilians, but had “by the strongest implication” prohibited them).

²¹⁹ *See Brown v. United States*, 12 U.S. (8 Cranch) 110, 121 (1814).

²²⁰ *See Oversight of the Department of Justice: Hearing Before the Senate Judiciary* (continued...)

gives to Congress the power to make rules concerning captures on land and water,²²¹ which has long supported Congress' authority to regulate the capture and disposition of prizes of war as well as confiscation of property belonging to enemy aliens.²²²

Both sides point to the *Steel Seizure Case*²²³ to provide a framework for the courts to decide the extent of the President's authority. In that Korean War-era case, the Supreme Court declared unconstitutional a presidential order seizing control of steel mills that had ceased production due to a labor dispute, an action justified by President Truman on the basis of wartime exigencies, despite the absence of legislative authority. Justice Jackson set forth the following oft-cited formula to determine whether Presidential authority is constitutional:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim

²²⁰ (...continued)

Committee, 107th Cong. (2002) (testimony of Attorney General John Ashcroft). The government invites the courts to construe 18 U.S.C. § 4001(a) to avoid finding that it involved a congressional effort to interfere with the basic executive power to detain enemy combatants, as such a construction would render the statute unconstitutional. *See* Reply Brief for Respondents-Appellants, *Hamdi v. Rumsfeld* (02-7338); Respondents' Reply in Support of Motion to Dismiss the Amended Petition for a Writ of Habeas Corpus at fn. 5, *Padilla ex rel. Newman v. Bush*, 02 Civ. 4445 (citing *Public Citizen*, 491 U.S. 440, 482 (Kennedy, J., concurring) (Congress cannot "encroach[] upon a power that the text of the Constitution commits in explicit terms to the President"); *INS v. Chadha*, 462 U.S. 919 (1983); *Barenblatt v. United States*, 360 U.S. 109, 111-112 (1959); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1871)).

²²¹ U.S.CONST. Art. I, § 8, cl. 11.

²²² *See* *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *The Siren*, 80 U.S. (13 Wall.) 389 (1871).

²²³ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.²²⁴

The parties disagree as to where in this formula the present actions fall. Padilla and Hamdi, and their supporters generally argue that such constitutional authority, if it exists, is dependant upon specific authorization by Congress, which they argue is missing (or even explicitly denied pursuant to 18 U.S.C. § 4001(a)) in the present circumstances, placing the controversy into the second or third category above. The government, on the other hand, sees the issue as one that falls squarely into the first category, asserting that Congressional authority for the detentions clearly exists, although such authority is not strictly necessary. Congressional authority, the government argues, may be found in the Authorization to Use Force²²⁵ and a provision of title 10, U.S.C., authorizing payment for expenses related to detention of prisoners of war. Accordingly, the following sections examine the constitutional authority to take prisoners in war and, if congressional authority is required, whether Congress has provided it, or, with respect to U.S. citizens, prohibited it.

The Authorization to Use Force

The government argues, and the Supreme Court has agreed, that the identification and detention of enemy combatants is encompassed within Congress' express authorization to the President "to use force against those 'nations, organizations, or persons he determines' were responsible for the September 11, 2001 terrorist attacks." The scope of that authority, however, remains open to debate. Some argue that since Congress only authorized force and did not formally declare war, that the absence of language explicitly addressing the detention of either alien enemies or American citizens captured away from any battlefield cannot be read to imply such authority.²²⁶

The government asserts that the lack of a formal declaration of war is not relevant to the existence of a war and unnecessary to invoke the law of war. While a declaration is unnecessary for the existence of an armed conflict according to the international law of war, it may be argued that a formal declaration *is* necessary to determine what law applies domestically, whether to aliens or citizens.²²⁷ For

²²⁴ *Id.* at 637-38 (Jackson, J., concurring) (footnotes and citations omitted).

²²⁵ P.L. 107-40, 115 Stat. 224 (2001).

²²⁶ The Fourth and Second Circuits agreed that *Hamdi* and *Padilla* are inapposite cases. See *Hamdi IV*, 337 F.3d at 344; *Padilla ex rel. Newman v. Bush*, 352 F.3d 695, 717 (2d Cir. 2003). The Second Circuit noted that

While it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the Joint Resolution that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not "arrayed against our troops" in the field of battle.

Id. at 723.

²²⁷ See *Padilla*, 352 F.3d at 713 (stating that separation-of-powers concerns are "heightened (continued...)

example, the Alien Enemy Act and the Trading with the Enemy Act (TWEA),²²⁸ both of which regulate the domestic conduct of persons during a war, expressly require a declared war and are not triggered by the authorization to use force.²²⁹ The Emergency Detention Act, in effect from 1950 to 1971, had similar requirements prior to the invocation of its measures.

At least one statutory provision in the Uniform Code of Military Justice (UCMJ) that might authorize the military to detain certain civilians “in time of war” has been interpreted to mean only a war declared by Congress.²³⁰ There is also military jurisdiction to try any person “caught lurking as a spy” during time of war,²³¹ including citizens,²³² or anyone suspected of aiding or abetting the enemy.²³³ It has not been decided whether the phrase “in time of war” or reference to “the enemy” in the these articles of the UCMJ also require a declaration of war by Congress; however, the same reasoning applied in *Averette*²³⁴ and followed in *Robb* could be found to apply here, at least with respect to persons who may not claim combatant status:

A recognition [that the conflict in Vietnam qualifies as a war in the ordinary sense of the word] should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction

On the other hand, the Manual for Courts Martial (MCM) defines “time of war” to include declared war as well as “a factual determination by the President that the existence of hostilities warrants a finding that a ‘time of war’” exists for the punitive portions of the MCM.²³⁵ Likewise, with respect to conduct on the part of military members, the MCM does not restrict references to “enemy” to mean an enemy

²²⁷ (...continued)

when the Commander-in-Chief’s powers are exercised in the domestic sphere”)(citing *Youngstown*, 343 U.S. at 645(Jackson, J., concurring).

²²⁸ 50 U.S. App. § 1 *et seq.*

²²⁹ *See generally* Declarations of War and Authorizations for the Use of Military Force: Background and Legal Implications, CRS Report RL31133 (identifying statutes effective only during declared wars or during hostilities).

²³⁰ *See Robb v. United States*, 456 F.2d 768 (Ct. Cl. 1972) (finding Vietnam conflict, while considered a war as that term is ordinarily used, was not a war for the purposes of 10 U.S.C. § 802(a)(10), applying to trial by court-martial of persons accompanying the armed forces in the field).

²³¹ 10 U.S.C. § 906.

²³² *United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y.), *appeal dismissed*, 256 U.S. 705 (1920).

²³³ 10 U.S.C. § 904.

²³⁴ *United States v. Averette*, 41 C.M.R. 363 (1970).

²³⁵ Rule 103(19), Rules for Courts-Martial. *See also* *United States v. Monday*, 36 C.M.R. 711 (1966) (finding the term “enemy” as used in Article 99, UCMJ, includes not only organized armed forces of the enemy in time of war but any hostile party which forcibly seeks to defeat U.S. forces).

government or its armed forces.²³⁶ For example, the offense of “misbehavior before the enemy” does not require a declaration of war.²³⁷ It should be noted that these offenses are associated with conduct on the battlefield.

The government notes that its military practice has long been to detain enemy combatants in conflicts where war was not formally declared and Congress did not expressly authorize the capture of enemies. However, we are not aware of any modern court ruling as to whether and under what circumstances citizens may be held as “enemy combatants,” where no formal declaration of war has been enacted. *Hamdi* confirms that the authorization to employ ground troops against an enemy army necessarily encompasses the authority to capture battlefield enemies, because it is an essential aspect of fighting a battle. International law does not permit the intentional killing of civilians or soldiers who are *hors de combat*, preferring capture as the method of neutralizing enemies on the battlefield.²³⁸ However, the war powers involving conduct off the battlefield, such as those authorizing the detention of alien enemies or regulating commerce with the enemy, are not necessarily a vital aspect of the use of the military, and have traditionally been subject to legislation and not implied by circumstance. For example, the Supreme Court held that the President has no implied authority to promulgate regulations permitting the capture of enemy property during hostilities short of a declared war, even where Congress had authorized a “limited” war.²³⁹

It may be argued that, because the internment of enemy aliens as potential spies and saboteurs pursuant to the Alien Enemy Act²⁴⁰ requires a declaration of war or a presidential proclamation, it would seem reasonable to infer that the express permission of Congress is necessary for other forms of military detention of non-military persons within the United States, especially those who are U.S. citizens.²⁴¹ To conclude otherwise would appear to require an assumption that Congress intended in this instance to authorize the President to detain American citizens under fewer restrictions than apply in the case of enemy aliens during a declared war.²⁴²

However, it might also be argued that the United States is a battlefield in the war against terrorism in more than just a metaphorical sense. The AUMF appears to

²³⁶ See *supra* note 1.

²³⁷ Art. 99, UCMJ; see *United States v. Monday*, 36 C.M.R. 711 (1966).

²³⁸ See generally Department of the Army, FM 27-10, *The Law of Land Warfare* (1956).

²³⁹ See *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

²⁴⁰ See discussion about Alien Enemy Act, *supra* note 79 *et seq.*, and accompanying text.

²⁴¹ See *supra* discussion of Emergency Detention Act, which contained similar requirements.

²⁴² The Second Circuit in *Padilla* noted that the AUMF expressly provides that it is “intended to constitute specific statutory authorization within the meaning of ... the War Powers Resolution.” 352 F.3d at 724. The court viewed it as

...unlikely — indeed, inconceivable — that Congress would expressly provide in the Joint Resolution an authorization required by the War Powers Resolution [50 U.S.C. § 1544(b)] but, at the same time, leave unstated and to inference something so significant and unprecedented as authorization to detain American citizens under [18 U.S.C. § 4001(a)].

Id.

authorize the use of force anywhere in the world, including the territory of the United States, against any persons determined by the President to have “planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons.” Under this view, the United States is under actual and continuing enemy attack, and Congress delegated to the President the authority to declare those persons he determined to be subject to the AUMF to be wartime enemies. The U.S. military would be authorized to use force to kill or capture persons it identifies as “enemy combatants,” even within the United States.²⁴³ However, those seeking a less expansive interpretation of the AUMF might argue that it must be read, if possible, to conform to international law and the Constitution. Under this view, for example, it might be questioned whether those sources of law provide adequate basis for a war against alleged members of a criminal organization and those who harbor them.²⁴⁴

Title 10, U.S.C

Before the Second Circuit, the government argued that Congress also authorized the detention of enemy combatants in 10 U.S.C. § 956(5), which authorizes the use of appropriated funds for “expenses incident to the maintenance, pay, and allowance of prisoners of war” as well as “other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war.” The Administration interprets the phrase “similar to prisoners of war” to include “enemy combatants” who are not treated as prisoners of war. The Supreme Court plurality did not address this contention, having found the AUMF to provide the necessary authority. The Second Circuit in *Padilla* rejected it based on its interpretation of *Ex parte Endo* requiring that language authorizing funds must “clearly” and “unmistakably” authorize the detention of American citizens.²⁴⁵ The government appears to have dropped the argument in the Fourth Circuit, although that court found it persuasive.²⁴⁶

²⁴³ The missile attack of alleged Al Qaeda operatives in Yemen in November, 2002, by an unmanned aerial vehicle belonging to the Central Intelligence Agency appears to be based on this concept of the war against terrorism. See Dworkin, *supra* note 1. According to one DoD official:

[T]he President has defined our current campaign against Al-Qaeda and similar terrorists of global reach as a “war.” This accurately portrays the state of armed conflict that exists and the resulting military actions to combat the continuing threat of terrorist acts against the United States and our friends and allies.

[T]he United States is involved in an armed conflict with al-Qaeda and other global terrorists and those who harbor and support such terrorists. As such, the law of armed conflict with regards to targeting and “hors de combat” applies in this conflict as it would in any other.

See *id.* (excerpts from interview with Charles Allen, Deputy General Counsel for International Affairs at the Department of Defense).

²⁴⁴ See *id.*; Paust, *supra* note 58, at 8; Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 23-24 (2002)(arguing U.S. policy on terrorism is blurring law enforcement, military intervention, and the killing of suspected enemies).

²⁴⁵ 352 F.3d at 723 (citing 323 U.S. at 303 n.24).

²⁴⁶ 316 F.3d at 468 (“It is difficult if not impossible to understand how Congress could make (continued...)”) (continued...)

It is not clear from the legislative history of 10 U.S.C. § 956(5) that Congress accepted the notion that there is a category of wartime detainees separate from prisoners of war and interned alien enemies. The language was first codified into title 10, U.S.C. in 1984, but has long been included in appropriations bills for the Department of Defense. It first appeared in the Third Supplemental National Defense Appropriation Act of 1942,²⁴⁷ when the Army requested an addition to the defense appropriations bill to provide the authority for the Secretary of War to

utilize any appropriation available for the Military Establishment under such regulation as the Secretary of War may prescribe for all expenses incident to the maintenance, pay and allowances of prisoners of war, other persons in Army custody whose status is determined by the Secretary of War to be similar to prisoners of war, and persons detained in Army custody, pursuant to Presidential proclamation.²⁴⁸

It was explained that the expenses were in connection with keeping and maintaining prisoners of war and others in military custody not provided for by any appropriation; the example given was the construction of stockade authorized to be built in Honolulu and water supply for prisoners on Oahu.²⁴⁹ The following colloquy took place during Senate debate on the bill:

Mr. DANAHER. Mr. President, will the Senator from Tennessee permit me to invite his attention to page 9 of the bill before he starts on a new title?

Mr. McKELLAR. Certainly.

Mr. DANAHER. In lines 2 and 3 on page 9, we find that the committee has amended the bill to provide ‘for all expenses incident to the maintenance, pay, and allowances of prisoners of war,’ and notably, ‘other persons in Army custody whose status is determined by the Secretary of War to be similar to prisoners of war.’ That is new language, apparently, and I should like to have the Senator explain what other class of persons there may be in Army custody whose status is similar to that of prisoners of war.

Mr. McKELLAR. Enemies who are found in this country are taken up by the Army, and they have to be provided for. It was testified that at times it was very necessary to arrest civilians and to provide for their care.

Mr. DANAHER. I have not the slightest doubt that it is necessary, Is there existing law under which they are at present being taken up by the Army?

Mr. McKELLAR. The Army did not want to take a chance about it.

Mr. DANAHER. Is there an existing law under which such persons are today being taken up by the Army and being held as prisoners?

Mr. McKELLAR. The advice to the Committee was that there is not, and in order to make it absolutely sure the committee thought there should be such a provision, and this provision was inserted. I am quite sure the Senator will, under the circumstances, agree that it should be included in the bill.

²⁴⁶ (...continued)

appropriations for the detention of persons ‘similar to prisoners of war’ without also authorizing their detention in the first instance.”)

²⁴⁷ P.L. 77-353, title III § 103, 55 Stat. 810, 813 (1941).

²⁴⁸ *Third Supplemental National Defense Appropriation Act of 1942: Hearing on H.R. 6159 before the Subcomm. of the Senate Comm. on Appropriations, 77th Cong., at 78-79 (1941).*

²⁴⁹ *See id.*

Mr. DANAHER. I have not the slightest question that it is absolutely necessary that certain classes of persons be taken up, not allowed to roam at large to our detriment. There is no question as to that. All I wish to know is where authority to do that is found in the law. Is their status defined? Under what circumstances may they be taken up? If there be no such authority anywhere, then I think we should very promptly and properly direct our attention to such a field. We certainly are not going to authorize it merely by providing in an appropriation bill for an allotment of money to be paid after they are taken up.

Mr. McKELLAR. The Senator misunderstands me. The appropriation is not to pay for their being taken up, but it is to maintain them and to keep them safely after they are taken up by whatever authority, that this appropriation is recommended.

Mr. DANAHER. The Senator feels he is quite correct in saying that up to now there is no authorization provided by statute for their being taken up by the Army?

Mr. McKELLAR. There is no authorization for taking care of them and feeding them and imprisoning them, and no place to imprison them, as I understand.

Mr. DANAHER. I thank the Senator.²⁵⁰

Prior to the amendment coming up for a vote, Senator Danaher took the occasion to look up which sections of law provided authority for the Army to detain persons, and concluded the authority was to be found in the Alien Enemy Act, 50 U.S.C. § 21, which he read into the Record in its entirety and explained:

I understand that since the first of the week the President has in fact issued proclamations under the authority of the section just quoted, and that so much of this section as applies to prisoners of war and those whom the Secretary of War may deem to be similar in status to prisoners of war, is comprehended within the terms of the proclamations that are applicable outside the immediate territorial limits of the United States. In view of the fact that that important section does implement both the statute and the proclamations issued pursuant thereto, I feel that it is important that the Record should show what the situation is.²⁵¹

The amendment was agreed to. Similar language has appeared in subsequent defense appropriations until 1983, when it was added to title 10 as a note to section 138,²⁵² and then codified in 1984 in its present form.²⁵³ The Senate debate did not question the President's authority to detain prisoners of war, despite the absence of express statutory authority, but only questioned the meaning of "other persons similar to prisoners of war." The legislative history could be interpreted to demonstrate that the language was meant only to pay for the exercise of authority found elsewhere, in particular the provisions of 50 U.S.C. § 21. It is unlikely that 10 U.S.C. § 956(5) would be interpreted as amending 50 U.S.C. § 21 with respect to the requirement for a declared war or Presidential proclamation. As an appropriations measure, it probably could not be interpreted to authorize by implication what Congress has not

²⁵⁰ 87 CONG. REC. 9707-08 (1941).

²⁵¹ 87 CONG. REC. 9724-25 (1941). The proclamations to which he was referring are those listed *supra* at note 107.

²⁵² P.L. 98-212, Title VII, § 706, 97 Stat. 1437 (1983).

²⁵³ P.L. 98-525, Title XIV, §§ 1403(a)(1) & 1404, 98 Stat. 2621 (1984).

provided for elsewhere, nor is it likely that the language would be interpreted to repeal by implication express language contradicting the interpretation.

Legislation regarding prisoners of war and enemy aliens subsequent to the Defense Authorization Act arguably supports the understanding that, at least on the territory of the United States, Congress did not contemplate that any persons would be interned in any status other than that of prisoner of war or enemy alien. In 1945, at the request of the Attorney General Biddle, Congress enacted a provision making it a criminal offense to procure or aid in the escape of persons interned as prisoners of war or alien enemies.²⁵⁴ The provision was recommended to fill a gap in the law, which provided for the punishment of persons who procure or aid the escape of prisoners properly in the custody of the Attorney General or confined in any penal or correctional institution.²⁵⁵

18 U.S.C. § 4001(a)

The petitioners in both *Hamdi* and *Padilla* asserted that Congress expressly has forbidden the detention of U.S. citizens without statutory authority, and that no statutory support for the detention of U.S. citizens as “enemy combatants” can be found. They cite 18 U.S.C. § 4001(a), which provides:

No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

This language originated with the repeal of the Emergency Detention Act²⁵⁶ in 1971. The legislative history demonstrates that Congress intended to prevent recurrence of internments in detention camps such as those that had occurred during the Second World War with respect to Japanese-Americans.²⁵⁷ The language “imprisoned or otherwise detained” in 18 U.S.C. § 4001(a) has been construed literally by the Supreme Court to proscribe “detention *of any kind* by the United States absent a congressional grant of authority to detain.”²⁵⁸ The four Justices of the *Hamdi* plurality and presumably Justice Thomas in his dissent agreed that it does not prohibit detention pursuant to the law of war. Justices Souter and Ginsburg agreed with that as a general principle, but would not have applied it to *Hamdi* because they argued that the government was not following the customary law of war with respect

²⁵⁴ P.L. 79-47, *codified at* 18 U.S.C. § 757.

²⁵⁵ *See* H.Rept. 79-59, at 1-2 (1945).

²⁵⁶ 64 Stat. 1019 (1950)(authorizing the President to declare an “Internal Security Emergency,” in the event of war, invasion, or insurrection in aid of a foreign enemy, which would authorize the Attorney General to “apprehend and by order detain each person ... [where] there is reasonable ground to believe that such person may engage in acts of espionage or sabotage.”).

²⁵⁷ P.L. 92-128, *codified at* 18 U.S.C. § 4001(a) (2001). The legislative history suggests that the main purpose of the act was to prevent detention, without due process of law, of citizens during internal security emergencies. *See* H.Rept. 92-116 (1971) *reprinted in* 1971 U.S.C.C.A.N. 1435-1439; discussion of detention during the Cold War, *supra*.

²⁵⁸ *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981).

to persons captured in Afghanistan. Justices Stevens and Scalia, in dissent, would have found the AUMF insufficiently clear to override the prohibition.²⁵⁹

Petitioners for Padilla argue that the authorization found under the AUMF in *Hamdi* does not apply to Padilla's case. The Department of Justice takes the opposite view. Further, it notes that 18 U.S.C. § 4001(b) refers to federal penal and correctional institutions, except for military or naval institutions, and thus concludes that § 4001(a) likewise refers only to federal penitentiaries.²⁶⁰ The Fourth Circuit previously found in *Hamdi III* that § 4001(a) was not intended to apply to enemy combatants, since there was no evidence in the legislative record that Congress had intended to "overturn the long-standing rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is."²⁶¹ The Fourth Circuit distinguished the facts of *Hamdi's* case from those in Padilla's, however.²⁶² The District Court for the District of South Carolina found, as the Second Circuit had, that § 4001(a) does apply to U.S. prisoners in Padilla's situation.

The Role of Congress

Congress has ample authority under Article I of the Constitution to regulate the capture and detention of enemy combatants.²⁶³ One bill has been introduced in the 109th Congress, the Detention of Enemy Combatants Act, H.R. 1076, that would assert congressional authority to limit the detention of U.S. persons as enemy combatants to defined circumstances, as well as address some of the due process concerns that have been raised. While it appears that express statutory authorization to detain persons arrested away from any battlefield would clarify constitutional separation of powers issues, some constitutional questions may remain. The Supreme Court has never expressly upheld the administrative detention or internment of U.S. citizens and non-alien enemies during war as a preventive measure.

The Proposed Detention of Enemy Combatants Act

The Detention of Enemy Combatants Act, H.R. 1076, would assert congressional authority to limit the detention of U.S. persons as enemy combatants to defined circumstances and address some of the due process concerns that have been raised with respect to the designation of enemy combatants. H.R. 1076 would authorize the President to detain U.S. citizens and residents who are determined to

²⁵⁹ *Hamdi* at 2671 (Scalia, J., dissenting).

²⁶⁰ The 2d Circuit rejected this reasoning. 352 F.3d 695, 721-22.

²⁶¹ *Hamdi III*, 316 F.3d at 468.

²⁶² *Hamdi IV*, 337 F.3d at 344.

²⁶³ U.S. Const. art. I, § 8, cl. 10-14 (power to define and punish "Offenses against the Law of Nations"; war powers); *Id.* § 8, cl. 18 (power to make necessary and proper laws).

be “enemy combatants” in accordance with procedures established by the Secretary of Defense in consultation with the Secretary of State and the Attorney General. The bill would permit detainees to have access to attorneys to challenge the basis for their detention, and would not suspend the writ of *habeas corpus*. The bill would not apply to combatants captured on a battlefield overseas or suspected criminals arrested abroad who are not U.S. citizens or residents.

Section-by-section Analysis.

Section 2. Findings. H.R. 1076 would find that the United States and its allies are engaged in an armed conflict with Al Qaeda as justified under international law for certain terrorist attacks. Paras. 1-6. The bill would take note of the difficulties inherent in determining who is an enemy combatant in the context of the present war, but reaffirm the need to detain enemy combatants as appropriate “to protect the safety of the public and those involved in the investigation and prosecution of terrorism, to facilitate the use of classified evidence without compromising intelligence or military efforts, to gather unimpeded vital information from the detainee, and otherwise to protect national security interests.” Para. 8-9. Further, the bill would find that the Executive must be allowed broad latitude to establish regulations for determining which U.S. citizens and residents may be detained, and that courts must give broad deference to military judgment in such matters. Para. 10. It would verify that section 4001(a) of title 18, U.S. Code “proscribes detention of any kind ... absent a congressional grant of authority to detain.” Para. 11. The bill would find that Congress has authorized the President to detain U.S. persons “who are members of al Qaeda, or knowingly cooperated with members of al Qaeda in the planning, authorizing, committing, aiding or abetting of one or more terrorist acts against the United States.” Para. 12. The bill would find that constitutional protection does not cease during wartime, para. 13, and declare that it does not authorize the detention of U.S. persons as enemy combatants “indefinitely without charges and hold them incommunicado without a hearing and without access to counsel on the basis of a unilateral determination that the person may be connected with an organization that intends harm to the United States.” Para. 14. It would reaffirm the right to habeas corpus, para. 15, and declare that Congress “has a responsibility for maintaining vigorous oversight of detention of [U.S. persons] to assure ... due process.” Para. 16.

Section 3. Detention of Enemy Combatants. Section 3 authorizes the detention of enemy combatants, which it defines as U.S. persons or residents “who are members of Al Qaeda or knowingly cooperated with a member of al Qaeda in the planning, authorizing, committing, aiding or abetting of one or more terrorist acts against the United States,” but who are not entitled to prisoner-of-war status. The authority to establish the standards, process, and criteria to be used for the “enemy combatant” designation would be delegated to the Secretary of Defense, in consultation with the Secretary of State and the Attorney General. It would not require different procedures depending on the circumstances of capture or arrest of the designee, but, assuming the act would apply extraterritorially, presumably the military would continue using rules of engagement developed for a particular military operation to identify enemy combatants during battle, at least until it could be determined whether a captured person is a U.S. person.

Section 4. Procedural Requirements. The procedural rules established under section 3 would be required to establish clear standards and procedures that would preserve the Government's ability to detain U.S. persons or residents who may threaten the United States or who might be able to furnish valuable intelligence. The rules would also be required to contain procedures for the protection of classified information or information that, if released, could impede the investigation of terrorism. Lastly, the rules would also have to provide detainees with timely access to judicial review (in the U.S. District Court for the District of Columbia, according to sec. 5(b)) and access to counsel.

Section 5. Detention. Section 5 would limit the duration of detention under the act to a period in which the President certifies that the war against Al Qaeda is ongoing and that there is "an investigation with a view toward prosecution, a prosecution, or a post-trial proceeding" in the case of the detainee. Because it does not expressly limit the latter requirement to proceedings before Article III courts, the condition might arguably be satisfied by trial by military commission or some other administrative tribunal.²⁶⁴ The President would also have to certify that detention is warranted to prevent the detainee "from aiding persons attempting to commit terrorist acts against the United States." The certification would have to be renewed after 180 days, with no limit on the number of successive certifications. Subsection (c) would authorize the Secretary of Defense to designate an appropriate location for the detentions authorized under the act, and would list minimal requirements for the condition of detention to ensure humane treatment.

Section 6. Reports to Congress. Section 6 would require an annual report to Congress identifying each individual "subject to, or detained pursuant to the authority of [the] Act." It is unclear who would be "subject to" the provisions of H.R. 1076 but not detained pursuant to them. Perhaps the phrase "subject to ... the Act" is meant to cover those who are detained within the regular criminal justice system or pursuant to the authority of immigration laws, but who fit the criteria to be deemed enemy combatants.

Section 7. United States Person or Resident Defined. Section 7 borrows the definition of "U.S. person" from section 101(i) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(i)), which currently covers

a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

²⁶⁴ The President's Military Order authorizing the detention and possible trial by military commission of persons involved in terrorism excludes U.S. citizens from its purview. *See* Military Order, November 13, 2001 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001). The President may have the authority to issue a new order to authorize military commissions to try enemy combatants who are U.S. citizens. *See Ex parte Quirin*, 317 U.S. 1 (1942).

“Lawfully admitted for permanent residence” is defined under 8 U.S.C. § 1101(a)(20) to mean “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” Section 7 of H.R. 1076 also includes a separate subsection that defines “U.S. person or resident” to include “an alien lawfully admitted to the United States for permanent residence.” It is unclear whether this language is intended to cover a broader category of persons than the definition already referenced in subsection (1). It appears that H.R. 1076 would not reach aliens lawfully admitted to the United States on a temporary basis or who are awaiting final approval of their applications for permanent residence, nor would it reach aliens present in the United States unlawfully. This omission could be read either to imply that the President has the inherent authority under the Constitution to detain persons not covered under the definition in section 7, or unless Congress has provided such authority elsewhere, it could be read to preclude the detention of such persons as enemy combatants.

Section 8. Termination of Authority. Section 8 is a sunset provision terminating the above authority as of December 31, 2007. The authority would effectively terminate earlier if the armed conflict with Al Qaeda were to end prior to that date.

Possible Legal Issues

Petitioners on behalf of U.S. citizens held in military custody argue that 18 U.S.C. § 4001(a), which prohibits the detention of U.S. citizens except as authorized by an act of Congress, prohibits the military’s detention of U.S. citizens as enemy combatants. While H.R. 1076 would appear to resolve the question of whether statutory law prohibits the detention of U.S. citizens as enemy combatants, it leaves open some legal questions pertaining to the detention of persons as enemy combatants that may arise under the Constitution and international law.

Some Constitutional Questions. The Supreme Court has never expressly upheld the administrative detention or internment of U.S. citizens and non-alien enemies during war as a preventive measure.

Congressional Authority. In *Ex parte Milligan*,²⁶⁵ the Supreme Court invalidated a military detention and sentence of a civilian for violations of the law of war, despite accusations that Milligan conspired and committed hostile acts against the United States.²⁶⁶ A plurality of the *Milligan* Court agreed that Congress was not empowered to authorize the President to assert military jurisdiction in areas not subject to martial law, but scholars disagree as to whether that portion of the opinion is binding as law or is merely *dicta*. The Administration may take the view that only the President, and not Congress, has the constitutional authority to detain enemy combatants, but it appears from the historical survey above that the contention lacks any solid legal precedent.

²⁶⁵ 71 U.S. (4 Wall.) 2 (1866).

²⁶⁶ *Id.* at 131.

The *Korematsu*²⁶⁷ decision is frequently cited as upholding the internment of Japanese-Americans during World War II, but the Supreme Court expressly limited its decision to the legality of excluding these citizens from declared military areas. *Ex parte Endo*²⁶⁸ invalidated the detention of a U.S. citizen who was “concededly loyal” to the United States, possibly implying that the detention of *disloyal* citizens may be permissible under some circumstances, but leaving open the question of what constitutional due process is required to determine the loyalty of persons the government sought to intern. In 1950, Congress passed the Emergency Detention Act (EDA),²⁶⁹ which authorized the President to declare an “Internal Security Emergency,” during which the President could authorize the apprehension and detention of any person deemed reasonably likely to engage in acts of espionage or sabotage. However, this authority was never exercised, and the EDA was repealed without any court having had the opportunity to evaluate its constitutionality.²⁷⁰ H.R. 1076 would guarantee access to counsel and the right to challenge detention by petitioning for a writ of habeas corpus, but gives the executive little other guidance as to what due process the act requires.

Bill of Attainder. H.R. 1076 may be subject to criticism for possibly violating the constitutional prohibition of bills of attainder.²⁷¹ The Constitution prohibits Congress from enacting legislation to punish specific persons or easily identifiable groups of persons.²⁷² Section 3 of H.R. 1076 would authorize the President to detain persons based on their membership in Al Qaeda or knowing cooperation with a member of Al Qaeda. Although the stated purpose for the detention appears to be preventive rather than punitive, the nature of the restraint and the requirement that non-members of Al Qaeda act “knowingly” probably make it punitive for the purpose of finding a bill of attainder.²⁷³ However, section 5 would require a certification that there is “an ongoing investigation with a view toward prosecution, a prosecution, or a post-trial proceeding” and that the detention is warranted to prevent the person from contributing to terrorist acts against the United States. The requirement for an

²⁶⁷ 323 U.S. 214 (1944).

²⁶⁸ 323 U.S. 283 (1944).

²⁶⁹ 64 Stat. 1019 (1950).

²⁷⁰ P.L. 92-128, 85 Stat. 347 (1971).

²⁷¹ U.S. CONST. art. I, § 9, cl. 3.

²⁷² *See* United States v. Lovett, 328 U.S. 303, 315 (1946)(stating the clause prohibits all legislative acts, “no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial ...”).

²⁷³ Relevant factors for determining the punitive nature of a law include whether a sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it requires a finding of scienter, whether it promotes the traditional aims of punishment, whether behavior to which it applies is already a crime, whether an alternative purpose is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. *See* Kennedy v. Mendoza-Martinez 372 U.S. 144, 168 (1963).

individualized finding of dangerousness would likely defeat any challenges that the act amounts to a legislative determination of guilt.²⁷⁴

Ex Post Facto Law. Similarly, H.R. 1076 could be subject to challenge as an impermissible *ex post facto* law.²⁷⁵ Every law that makes criminal an act that was innocent at the time it was committed, or that increases the punishment to a crime already committed, is an *ex post facto* law prohibited by the Constitution.²⁷⁶ The prohibition does not apply to laws of a non-criminal or non-punitive nature,²⁷⁷ but cannot be evaded by clothing a punitive law in civil guise.²⁷⁸ If a U.S. person were detained pursuant to the Detention of Enemy Combatants Act for past membership in Al Qaeda, for example, or for cooperation with terrorists that took place prior to the enactment of the act, such detainee might challenge the act as imposing new burdens for past conduct, in violation of the *Ex Post Facto* Clause of the Constitution. However, detention under the act could continue only for so long as “an investigation with a view toward prosecution, a prosecution, or a post-trial proceeding” with respect to a particular detainee were ongoing, and only if the President certifies that detention is warranted to prevent further acts of terrorism, in which case detention could be permissible under ordinary penal statutes. The legality of the detention will likely depend on the extent to which the procedures put in place by the executive satisfy the constitutional requirements for a temporary deprivation of liberty.

Due Process for Non-Resident Aliens. H.R. 1076 does not apply to non-resident aliens and other non-citizens not lawfully admitted for permanent residence in the United States. Although *Hamdi* may be read to apply due process rights only in the case of U.S. citizens, legislation that applies in a different way to non-resident aliens, for example without mandating any sort of hearing at all, may raise constitutional issues. Aliens in the United States, whatever their immigration status, are “persons” whose liberty interests are protected by the Fifth Amendment.²⁷⁹ While the standards for administrative decisions relating to immigration status are not as extensive as due process requirements for criminal procedures, other types of proceedings do not treat aliens as having fewer rights under the Constitution. Of course, the existence of a state of war might work as an exception to this general rule. During a declared war, enemy aliens are by statute subject to detention and deportation based on their nationality,²⁸⁰ in accordance with procedures set up by the

²⁷⁴ See *United States v. Brown*, 381 U.S. 437, 450 (1965) (distinguishing from bills of attainder provisions that “leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics”).

²⁷⁵ U.S. CONST. art. I, § 9, cl. 3.

²⁷⁶ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

²⁷⁷ *Id.* at 393.

²⁷⁸ *Burgess v. Salmon*, 97 U.S. 381 (1878).

²⁷⁹ See, eg, *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Mathews v. Diaz*, 426 U.S. 67 (1976).

²⁸⁰ Alien Enemy Act, 50 U.S.C. § 21 (defining as enemy aliens “all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years
(continued...)”)

executive branch. The Supreme Court validated such a program during World War II.²⁸¹ It may thus be permissible for Congress, in the exercise of its war powers, to enact specific legislation defining who may be interned as an enemy based on factors other than nationality, but it is not clear that the President has the authority to intern persons as enemies without specific authorization from Congress. If non-permanent resident aliens are intended to be subject to detention as enemy combatants, it may be advisable to include them under the same authority that applies to citizens and aliens lawfully admitted for permanent residence in the United States.

International Legal Issues. Because the detention of enemy combatants is a means of conducting war, it is subject to the international law of war.²⁸² H.R. 1076 would not authorize the detention of enemy combatants who are entitled to prisoner of war status under the Third Geneva Convention,²⁸³ but it could be read to authorize the detention of civilian persons protected by the Fourth Geneva Convention²⁸⁴ under conditions that do not meet the requirements of that treaty. It is not clear whether the 1949 Geneva Conventions apply in their entirety during the war against terrorism as they would in the case of an international war, or whether the war should be categorized as an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,” in which case only

²⁸⁰ (...continued)

and upward, who shall be within the United States and not actually naturalized”).

²⁸¹ See *Ludecke v. Watkins*, 335 U.S. 160 (1948). The Court noted that an enemy alien restrained pursuant to 50 U.S.C. § 21 has access to the courts to challenge whether the statutory criteria were met, in other words, whether a “declared war” existed and whether the person restrained is in fact an enemy alien. *Id.* at 170-72, n.17.

²⁸² See generally CRS Report RL31367, *Treatment of “Battlefield Detainees” in the War on Terrorism*, (overview of the 1949 Geneva Conventions relating to prisoners and other victims of war).

²⁸³ See GPW, *supra* note 26.

²⁸⁴ See GC, *supra* note 27.

common article 3 of the Geneva Conventions would apply.²⁸⁵ H.R. 1076 may satisfy U.S. obligations under common article 3.

H.R. 1076 may come under criticism for failing to define “enemy combatant” as that term is ordinarily understood in the context of the law of war. As a general rule, combatants are soldiers and others who engage in combat. Combatants are lawful military targets during combat operations, but the law of war prefers capture and detention as a more humane alternative to killing or wounding them. Aiders and abettors of the enemy (and terrorists) traditionally have been treated as criminal civilians rather than enemy combatants, and are not ordinarily treated as lawful military targets except perhaps in the extreme circumstances where the use of deadly force would be warranted against a person committing or about to commit a hostile act.²⁸⁶ The use of the phrase “enemy combatant” to describe both battlefield combatants and criminals arrested in areas where law and order appear to prevail suggests that the use of military force is authorized as if a global battle were taking place.

²⁸⁵ The 1949 Geneva Conventions share several types of common provisions. The first three articles of each Convention are identical. Common Article 3 has been described as “a convention within a convention” to provide a general formula covering respect for intrinsic human values that would always be in force, without regard to the characterization the parties to a conflict might give it. Article 3 provides, in part, that:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

²⁸⁶ Israel’s targeted killings of terrorist leaders might serve as precedent for the targeting of persons deemed to be enemy combatants, but the practice has generated controversy. *See Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, Report of the Special Rapporteur of the Commission on Human Rights 10-12, U.N. Doc. E/CN.4/2004/6 (2003); *see also* Emanuel Gross, *Democracy in the War Against Terrorism — the Israeli Experience*, 35 LOY. L.A. L. REV. 1161, 1194 (2003) (noting that preemptive killings of terrorists “are only permitted as a last resort where there is no possibility of capturing the terrorist alive”).

Conclusion

It appears likely that the Supreme Court has not issued its last word on “enemy combatants” and executive detention as a means to prosecute the war on terrorism.²⁸⁷ Lower courts that have addressed questions the Supreme Court left unanswered have not achieved a consensus, although it appears that the trend does not favor the expansive view of executive power urged by the government. As a consequence, the extent to which the Congress has authorized the detention without trial of American citizens as “enemy combatants” will likely remain an important issue for determining the validity of the Administration’s tactics. While the broad language of the Authorization for the Use of Military Force (“AUMF”)²⁸⁸ authorizes the use of such military force as the President deems appropriate in order to prevent future acts of terrorism, it remains possible to argue that the AUMF was not intended to authorize the President to assert *all* of the war powers usually reserved for formal declarations of war.²⁸⁹

History shows that even during declared wars, additional statutory authority has been seen as necessary to validate the detention of citizens not members of any armed forces. Courts, however, have not explicitly ruled on the point with respect to circumstances like these. Congressional activity since the *Quirin* decision suggests that Congress did not interpret *Quirin* as a significant departure from prior practice with regard to restriction of civil liberties during war. If that is the case, it may be that Congress intended to authorize the capture and detention of individuals like Hamdi — persons captured on the battlefield during actual hostilities — for so long as military operations remain necessary, while withholding the authority to detain individuals like Padilla — an accused enemy agent operating domestically — except in accordance with regular due process of law. If Congress were to pass legislation authorizing the detention of persons as enemy combatants, future detentions would

²⁸⁷ Former Attorney General John Ashcroft clarified that the detention of suspicious aliens, as well as some citizens, is one facet of the government’s strategy for preventing future acts of terrorism. See Phil Hirschhorn, *Feds to Appeal Ruling on Post-Sept. 11 Tactics*, CNN, May 5, 2002, available at [<http://www.cnn.com/2002/LAW/05/03/material.witnesses/>] (citing quotation attributed to Attorney General John Ashcroft, that “[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks”).

²⁸⁸ See *supra* note 27, and accompanying text.

²⁸⁹ See generally J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991); *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, CRS Report RL31133.

likely face fewer hurdles in court.²⁹⁰ However, even with the express authorization of Congress, constitutional due process issues seem likely to arise.

²⁹⁰ *See Padilla*, 352 F.3d at 699.

As this Court sits only a short distance from where the World Trade Center once stood, we are as keenly aware as anyone of the threat al Qaeda poses to our country and of the responsibilities the President and law enforcement officials bear for protecting the nation. But presidential authority does not exist in a vacuum, and this case involves not whether those responsibilities should be aggressively pursued, but whether the President is obligated, in the circumstances presented here, to share them with Congress.