Enemy Combatants, the Courts, and the Constitution

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I. Introduction

Three days after the September 11 attacks, when al Qaeda terrorists hijacked and crashed four commercial jetliners into the World Trade Center, the Pentagon, and the Pennsylvania countryside, killing over 3100 people, Congress passed a joint resolution authorizing the use of military force against those responsible. President George W. Bush responded by sending troops to Afghanistan to fight al Qaeda and its supporter, the Taliban regime. During the military operation that ensued, thousands of prisoners were captured by allied and American forces. Many of those captured are
being held at the U.S. naval base in Guantanamo Bay, Cuba. The options faced by these prisoners include prosecution before military commissions, repatriation to their countries of origin, release if they are determined not to be law enforcement threats, or detention until the end of hostilities.

In connection with these detentions, some of the captives, described as enemy combatants, filed petitions for writs of habeas corpus in the U.S. interchangeably.


8. See Lee A. Casey et al., By the Laws of War, They Aren’t POWs, WASH. POST, Mar. 3, 2002, at B3; Seelye, Permanent U.S. Prison, supra note 5, at A1; Katharine Q. Seelye, Rumsfeld Lists Outcomes For Detainees Held In Cuba, N.Y. TIMES, Feb. 27, 2002, at A10; Joanne Mariner, Guantanamericans: The Continuing Debate over the Legal Status of Guantanamo Detainees, at http://writ.corporate.findlaw.com/mariner/20020311.html (Mar. 11, 2002). One commentator has noted that "the al Qaeda and at least some of the Taliban captives may be too dangerous ever to be released. Assuming that many or most of them will not be subject to the death penalty, that commits the United States to detaining them indefinitely." Michael C. Dorf, What Is an "Unlawful Combatant," and Why It Matters, at http://writ.corporate.findlaw.com/dorf/20020123.html (Jan. 23, 2002).

federal courts, challenging the authority of the United States to hold them without charges and deny them access to lawyers. Additionally, in April 2002, the government determined that Yaser Esam Hamdi, one of the detainees at the naval base in Guantanamo Bay, was a U.S. citizen. As a result, he was flown to the naval brig in Norfolk, Virginia, where Pentagon officials indicated he would continue to be detained as an enemy combatant. The following month, Jose Padilla, an American citizen also known as Abdullah al-Muhajir, was arrested at O'Hare International Airport in Chicago on a material witness warrant in connection with a terrorist plot to detonate a radioactive bomb in the United States. In June 2002, Padilla

v. Bush, 215 F. Supp. 2d 55, 67 n.12 (D.D.C. 2002), aff'd sub. nom. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), cert. granted, 124 S. Ct. 534 (2003) (mem.) (No. 03-334) (declining to label some of the detainees as enemy combatants and instead identifying them as aliens). The term "enemy combatant" appears to have been taken from Ex Parte Quirin, 317 U.S. 1 (1942), a case discussed infra text accompanying notes 96-112. See Gary Solis, Even a "Bad Man" Has Rights, WASH. POST., June 25, 2002, at A19 (noting that "the term [enemy combatant] appears to have been appropriated from Ex Parte Quirin"); see also Adam Roberts, The Prisoner Question, WASH. POST, Feb. 3, 2002, at B1 (noting that while the term "unlawful combatant" is not found in any treaty, "the concept of 'unlawful combatant, ' or something very like it, is implicit in the definitions of unlawful combatants that appear in the key treaties").


was designated as an enemy combatant by President Bush and transferred to the custody of the Defense Department.\textsuperscript{14} Government officials subsequently indicated that while neither Hamdi nor Padilla would be tried before military commissions,\textsuperscript{15} they could be detained until the cessation of the war on terrorism.\textsuperscript{16} Like the captives in Cuba, Hamdi and Padilla challenged their detentions by filing petitions for writs of habeas corpus.\textsuperscript{17}

This Article analyzes the various legal challenges made by citizens and

\textsuperscript{14} See John Mintz, \textit{Al Qaeda Suspect Enters Legal Limbo}, \textit{Wash. Post}, June 11, 2002, at A10. As previously noted, Jose Padilla is also known as Abdullah al-Muhajir. To aid the reader, this Article will refer to him as Padilla rather than Abdullah al-Muhajir.

\textsuperscript{15} \textit{Military Tribunal Won't Try Padilla, Justice Dept. Says}, \textit{Wash. Post}, June 15, 2002, at A10 (reporting that the Department of Justice advised lawmakers the government would not bring Padilla before a military tribunal); John Mintz, \textit{American-Born War Detainee Won't Be Prosecuted}, \textit{Miami Herald}, Apr. 9, 2002, at A13 (reporting that, as an American citizen, Hamdi could not be tried before a military tribunal). On November 13, 2001, a little more than two months after the September 11 attacks, President Bush signed a military order authorizing, at his discretion, the detention by the military and the trial of non-U.S. citizens before military commissions if they are found to be members of al Qaeda, to have engaged in acts of international terrorism aimed at the United States, or to have harbored such persons. \textit{See} Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order]. The background leading to the promulgation of this order is discussed at \textit{infra} text accompanying notes 33-36.

\textsuperscript{16} \textit{See}, e.g., Brooke A. Masters, \textit{Access to Lawyer Ordered for Detainee}, \textit{Wash. Post}, May 30, 2002, at A7 (reporting government lawyers maintained that Hamdi was “an unlawful enemy combatant who can be held indefinitely without being charged or given a lawyer”); Christopher Newton, \textit{American Terror Suspect to Be Held Indefinitely}, \textit{Associated Press}, June 13, 2002 (reporting that in a closed meeting of the Senate Judiciary Committee, the Department of Justice maintained the United States can “hold Padilla until the President decides the war against terrorism is over”). It was further reported that the administration was considering creating military detention camps for American citizens designated enemy combatants. \textit{See} Anita Ramasastry, \textit{Do Hamdi and Padilla Need Company? Why Attorney General Ashcroft's Plan to Create Internment Camps for Supposed Citizen Combatants Is Shocking and Wrong}, at http://writ.corporate.findlaw.com/ramasastry/20020821.html (Aug. 21, 2002) (noting that “Attorney General Ashcroft and the White House [were] considering creating military detention camps for all U.S. citizens deemed by the administration to be enemy combatants”).

noncitizens designated as enemy combatants. First, the Article provides the backdrop against which enemy combatant designations have been made. Next, the Article discusses the nature of the current conflict, the legal paradigms being used to respond to the terrorism threat, and the treatment of those detained during war. Because the legal challenges made to the enemy combatant designation by those detained principally have been presented through petitions for writs of habeas corpus, the Article provides a brief historical overview of the writ, together with its present statutory incarnation. A discussion follows of key U.S. Supreme Court and lower court decisions addressing the application of the writ of habeas corpus to citizens and aliens in times of war, as well as the designation of American citizens as enemy combatants during such a time. Lastly, the Article notes some trends in the jurisprudence in this area of the law.

II. Background

During the past decade, the United States has been the target of terrorist attacks to its interests and citizens abroad. In June 1996, a truck bomb exploded near the Khobar Towers military complex in Saudi Arabia, killing nineteen Americans and wounding 372 others. In August 1998, terrorists bombed the American embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing 224 — including twelve Americans — and wounding 4600. In October 2000, terrorists bombed the American destroyer U.S.S. Cole in Adan Harbor, Yemen, killing seventeen sailors.

18. On March 19, 2003, as part of Operation Iraqi Freedom, the United States launched air and ground attacks on Iraq. Rajiv Chandrasekaran & Thomas E. Ricks, U.S. Opens War with Strikes on Baghdad Aimed at Hussein, WASH. POST, Mar. 20, 2003, at A1. In connection with this war, it appears that Iraqi prisoners will be treated as prisoners of war unless the U.S. government deems them unlawful combatants, in which case the government may send them to Guantanamo Bay or other holding facilities. Peter Baker, U.S. Forces Round Up Civilian Suspects, WASH. POST, Mar. 31, 2003, at A1; Diane F. Orentlicher & Robert K. Goldman, Rules Between Guerilla Warfare and War Crimes, WASH. POST, Apr. 6, 2003, at B2. This Article focuses only on those prisoners that the government has detained or may detain in connection with the attacks by al Qaeda on September 11.

19. See Note, Responding to Terrorism: Crime, Punishment, and War, 115 HARV. L. REV. 1217, 1217 (2002) (noting that "[t]he United States, its citizens, and its interests abroad have long been targets of terrorism").


On September 11, 2001, the focus returned to the mainland when members of al Qaeda, Osama bin Laden's terrorist organization, hijacked four commercial jetliners and crashed them into the Pentagon, the World Trade Center, and the Pennsylvania countryside, killing more than 3100 people. The government's response was swift. Three days after the attacks, Congress passed a joint resolution authorizing the use of "all necessary and appropriate force against those nations, organizations, or persons [the President] determine[d] planned, authorized, committed, or aided the terrorist attacks that occurred . . . or harbored such organizations or persons." Congress also provided forty billion dollars to help cover the cost of rebuilding and military action. Additionally, as part of a broad and coordinated economic, intelligence, diplomatic, and military effort, the


23. More than eight years before, in February 1993, terrorists bombed the World Trade Center killing six people, hospitalizing more than one thousand others, and causing hundreds of millions of dollars worth of damage. See United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) (affirming convictions of defendants on various charges relating to the bombing of the World Trade Center).

24. As a government official explained:

"Al-Qaeda" ("The Base") was developed by Osama Bin Laden and others . . . to support the war effort in Afghanistan against the Soviets. The resulting "victory" in Afghanistan gave rise to the overall "Jihad" (Holy War) movement. Trained Mujahedin fighters from Afghanistan began returning to such countries as Egypt, Algeria, and Saudi Arabia, with extensive "jihad" experience and the desire to continue the "jihad". This antagonism began to be refocused against the U.S. and its allies.

*The Global Reach of Al-Qaeda: Hearing Before the Senate Subcomm. on Int'l Operations & Terrorism, Comm. on Foreign Relations*, 107th Cong. 4 (2001) (prepared statement of J.T. Caruso, Acting Assistant Director, Counterterrorism Division, FBI) [hereinafter Caruso I Statement].


https://digitalcommons.law.ou.edu/olr/vol56/iss3/3
government undertook a course of action intended to enlist the cooperation and support of other countries.\textsuperscript{28}

On the domestic front, the Bush administration implemented a number of measures. On September 20, 2001, President Bush announced the creation of the Office of Homeland Security.\textsuperscript{29} Three days later, on September 23, the President directed certain financial institutions to freeze the assets of fifteen organizations and twelve individuals suspected of funding terrorism.\textsuperscript{30} Close to a month later, on October 26, 2001, Bush signed the USA Patriot Act of 2001,\textsuperscript{31} legislation intended to help authorities "track and disrupt the operations of suspected terrorists in the United States."\textsuperscript{32}

Then, on November 13, 2001, citing the "extraordinary emergency" presented as a result of the attacks and the possibility that future attacks

\textsuperscript{28} See Ben Barber, Powell Sets Up Global Anti-Terror Coalition, WASH. TIMES, Sept. 13, 2001, at A1; Steven Mufson & Alan Sipress, Battle Called 'A War of Will and Mind,' WASH. POST, Sept. 20, 2001, at A1 ("Bush and senior administration officials spent another day lining up international support for military, financial and economic actions that the president said would be designed to locate terrorist leaders, 'get them out of their caves, get them moving, cut off their finances.'"); Bob Woodward, 50 Countries Detain 360 Suspects at CIA's Behest, WASH. POST, Nov. 22, 2001, at A1 (reporting that a "senior White House official said . . . the intelligence coalition is as important as the military and diplomatic coalitions involved in the war on terrorism"). These efforts have borne fruit. See, e.g., U.S. Dep't of State, Patterns of Global Terrorism: 2001, at iii (2002), available at http://www.state.gov/documents/organization/10286.pdf (noting that "[a]s a result of the Coalition's operations in Afghanistan, al-Qaida and Taliban leaders are now either captured, killed, or on the run"); Kawaguchi Promises Ashcroft Help with "Terrorism" Fight, MALAYSIAN NATIONAL NEWS AGENCY, Oct. 21, 2002 (reporting that Japan's foreign minister advised U.S. Attorney General John Ashcroft that "Japan will continue cooperating with the United States to fight against terrorism"); Terror Suspects Arrested Globally, WASH. TIMES, Jan. 20, 2002, at A7 (reporting that "U.S.-coalition pressed its crackdown on the al Qaeda network . . . with the arrests of suspected terrorists in Afghanistan, Spain, Britain, Malaysia and Indonesia").


could "place at risk the continuity of the operations of the United States government," and interpreting the events of September 11 as acts of war, President Bush issued a military order empowering him to detain and direct the military prosecutions of non-U.S. citizens determined to be members of al Qaeda, who had engaged in or conspired to participate in international terrorism, or had harbored such persons. Administration officials argued that because the United States was in a state of war, it was "important to give the President of the United States the maximum flexibility consistent with his constitutional authority." 

Unlike other measures taken by the administration following September 11, the issuance of this order created significant controversy, both abroad and at home. The question arose whether those detained in Guantanamo

33. Military Order, supra note 15, § 1(c)(g).
34. See Samantha A. Pitts-Kiefer, Note, Jóse Padilla: Enemy Combatant or Common Criminal, 48 VILL. L. REV. 875, 899 (2003) (noting that "Congress authorized the use of the armed forces in a Joint Declaration. Not only did the U.S. government view the conflict as a war, but the international community embraced this conflict as a war in unequivocal terms, never before invoked.") (citation omitted); Mike Allen & Susan Schmidt, Bush Defends Secret Tribunals for Terrorism Suspects, WASH. POST, Nov. 30, 2001, at A28 (quoting President Bush as saying, "The enemy has declared war on us, and we must not let foreign enemies use the forums of liberty to destroy liberty itself."). It has been noted that "if this attack were not sufficient by itself to initiate a state of war, Osama bin Laden had previously declared war against the United States; in 1998, he called for the killing of American civilians as well as soldiers, 'in any country in which it is possible to do it.'" Michael I. Meyerson, The War on Terrorism and the Constitution, 35 MD. B.J. 16, 19 (2002).
36. Military Commissions: Hearing Before the Senate Comm. on Armed Servs., 107th Cong. 1 (2001) (statement of Donald H. Rumsfeld, Secretary of Defense, and Paul D. Wolfowitz, Deputy Secretary of Defense), available at http://www.senate.gov/~armed_services/statemnt/2001/011212wolf&rums.pdf; John Ashcroft, Attorney General, Department of Justice Press Conference, Military Tribunals For Terrorists (Nov. 14, 2001), at http://jurist.law.pitt.edu/terrorism/terrorismmilash.htm. See generally William Glaberson, Closer Look at New Plan for Trying Terrorists, N.Y. TIMES, Nov. 15, 2001, at B6 (reporting how military "tribunals have a long international history" and "have been used in this country at least since 1780, when George Washington appointed a board of officers to try Maj. John Andre, a British spy who slipped behind American lines to gather information from Benedict Arnold"); Alberto R. Gonzales, Martial Justice, Full and Fair, N.Y. TIMES, Nov. 30, 2001, at A27 (arguing that "[m]ilitary commissions are consistent with American historical and constitutional traditions" and that the "use of such commissions has been consistently upheld by the Supreme Court").
37. See, e.g., Sam Dillon & Donald G. McNeil Jr., Spain Sets Hurdle for Extraditions, N.Y. TIMES, Nov. 24, 2001, at A1 (reporting that officials indicated "Spain [would] not extradite the eight men it [had] charged with complicity in the Sept. 11 attacks unless the United States
Bay were prisoners of war. Further, following the administration’s naming of Hamdi and Padilla as enemy combatants, a spirited discourse emerged regarding both the authority of the Executive Branch to make such designations, as well as the role of the courts in safeguarding the rights of American citizens. Before addressing these and other important issues raised by the detentions, a brief discussion of the nature of the current armed conflict, the legal paradigms that are being applied to it and the terrorism threat in general, and the legal principles governing the treatment of persons during such a conflict is instructive.

agree[d] that they would be tried by a civilian court and not by the military tribunals envisioned by President Bush’); Richard A. Greene, Analysis: Military Tribunals, BBC News, Jan. 11, 2002 (“Few White House proposals in the war on terror have caused as much controversy as President George W. Bush’s order to try suspected terrorists in military tribunals rather than the regular court system.”) (on file with author).

38. See, e.g., Paisley Dodds, Some Held in Cuba May Be Shipped Home, CHI. SUN-TIMES, Jan. 27, 2002, at 4 (reporting that “[s]everal governments [were] demanding the United States give the captives prisoner of war status under the Geneva Conventions, which rule[d] out trial by military tribunal”); John Mintz, On Detainees, U.S. Faces Legal Quandary, WASH. POST, Jan. 27, 2002, at A22 (reporting that according to a number of experts in international law, “[m]ost members of Osama bin Laden’s al Qaeda movement detained at the Guantanamo Bay naval base probably do not deserve to be labeled prisoners of war under the Geneva Conventions and legal precedents”).

39. Compare Philip Heyman, The Power to Imprison, WASH. POST, July 7, 2002, at B7 (noting that “the administration has not assumed the burden of showing Congress or the courts the inadequacy of familiar methods of handling dangerous people before resorting to indefinite imprisonment of citizens without a warrant, trial or judicial approval”), and John Payton, The Rule of Law, WASH. POST, Aug. 25, 2002, at B7 (arguing that “[i]f, in response to the challenge of terrorism, we transform ourselves into a society that eliminates the rule of law and concentrates in the president unchecked power to detain people without charges or judicial review, we will have become our antithesis”), and Editorial, Still No Lawyers, WASH. POST, July 9, 2002, at A20 (recognizing that “[t]here are no easy answers to the question of what rules should govern” the cases involving Messrs. Hamdi and Padilla but also maintaining that “the right answer cannot be that the president’s power to detain Americans during wartime answers to no meaningful oversight by the courts and that detainees have no chance to be heard”), with Kate O’Beirne, It’s a War, Stupid, NAT’L REVIEW, Sept. 16, 2002, at 22, available at http://www.nationalreview.com (criticizing legal analysts and editorial writers who maintain that President’s “well-established authority to detain enemy combatants in military custody poses a monumental threat to our liberties”), and Laura Sullivan, Antiterrorism’s Methodology in the Spotlight, BALT. SUN, Sept. 1, 2002, at 1F (reporting that the Department of Justice’s Assistant Attorney General for the Criminal Division has stated that in light of the war, “[t]he judicial model does not work. Judges are not able to roam around in Afghanistan and get in the middle of the battlefield and decide whether a particular enemy soldier’ should be afforded constitutional rights.”), and Minami Wade, Enemy Combatants Do Not Deserve Same Status as Criminal Defendants, NAVY TIMES, July 29, 2002 (noting that the “classification of captured personnel as enemy combatants is an executive prerogative. Attempts to subvert this prerogative through the judiciary are spurious and undermine our ability to prosecute the war.”).
III. The Nature of the Conflict, Legal Paradigms Being Used to Address It, and the Treatment of Captives During War

In broad terms, the threat to the United States from international terrorism can be partitioned into three categories: the radical international jihad movement, states that sponsor international terrorism, and terrorist organizations.\(^{40}\) The current armed conflict can be traced to the first category, the radical international jihad movement, exemplified by Sunni Islamic extremists such as bin Laden and his organization, al Qaeda.\(^{41}\) It is estimated that tens of thousands of individuals trained in al Qaeda terrorist camps in Afghanistan and that, as a result, the group can draw upon thousands of supporters when planning, raising funds, and engaging in attacks.\(^{42}\) Further, a study of al Qaeda’s operations has revealed a highly

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40. Combating Terrorism: Protecting the United States, Parts I and II: Hearings Before the House Subcomm. on Nat’l Security, Veterans Affairs and Int’l Relations, Comm. on Gov’t Reform, 107th Cong. 155 (2002) (statement of James Caruso, Deputy Executive Assistant Director for Counter Terrorism, Federal Bureau of Investigation) [hereinafter Caruso II Statement] (noting that “the international terrorist threat to U.S. interests can be divided into three categories: the radical international jihad movement, traditional, clearly defined terrorists organizations, and state sponsors of international terrorism”).


But as government officials have cautioned:

[The threat from Al-Qaeda is only a part of the overall threat from the radical international jihad movement, which is composed of individuals of varying nationalities, ethnicities, tribes, races, and terrorist group memberships who work together in support of extremist Sunni goals. One of the primary goals of Sunni extremists is the removal of U.S. military forces from the Persian Gulf area, most notably Saudi Arabia. The single common element among these diverse individuals is their commitment to the radical international jihad movement, which includes a radicalized ideology and agenda promoting the use of violence against the “enemies of Islam” in order to overthrow all governments which are not ruled by Sharia (conservative Islamic) law. A primary tactical objective of this movement has been the planning and implementation of large-scale, high-profile, high-casualty terrorist attacks against U.S. interests and citizens, and those of its allies, worldwide.

Caruso II Statement, supra note 40, at 56; see also Watson Statement, supra, at 89; Ken Guggenheim, Feds: Terror Group Members in U.S., ASSOCIATED PRESS ONLINE, Oct. 31, 2002, at 2002 WL 102133767 (reporting that the Department of Justice has advised the Senate Intelligence Committee that “FBI investigations ‘indicate the continued presence of suspected extremists of various groups who could be called to attack in the United States’”).

42. Hearings on the Intelligence Community’s Response to Past Terrorist Attacks Against
skilled, resourceful and deadly adversary that: (1) engages in long term planning; (2) can conduct simultaneous operations; (3) is concerned with operational security; (4) possesses a flexible command structure; and (5) is creative in the methods it uses to achieve its goals.\textsuperscript{43} Over time, the geographical emphasis of the war increasingly has expanded from Afghanistan to "'ungoverned' areas of the Third World where al Qaeda and its allies have regrouped for action or sought refuge."\textsuperscript{44}

Thirteen months after the September 11 attacks, and notwithstanding the compelling show of military force by the United States, the Director of the Central Intelligence Agency warned Congress: "They [(al Qaeda)] are reconstituted. They are coming after us. They are planning in multi-theaters. They are planning to strike the homeland again."\textsuperscript{45} Two months later, the United Nations issued a report stating that al Qaeda had reopened training camps in remote regions of eastern Afghanistan and that it

\textsuperscript{43} Response, supra note 42, at 9-10; Caruso II Statement, supra note 40, at 161; see Neil Doyle, \textit{Al Qaeda Nukes Are Reality, Intelligence Says}, WASH. TIMES, Oct. 28, 2002, at A1 (reporting that there exists "a working assumption in security circles now that . . . [al Qaeda] does have nuclear capabilities"); Thomas E. Ricks & Vernon Loeb, \textit{Afghan War Faltering, Military Leader Says}, WASH. POST, Nov. 8, 2002, at A1 (reporting that analysis prepared by U.S. Army War College indicated "that al Qaeda fighters have been quick to adapt to the highest weaponry the United States used in its attack on the network").

\textsuperscript{44} Jim Hoagland, \textit{3-Way War; Rumsfeld's Anti-Terrorism Balancing Act}, WASH. POST, Nov. 7, 2002, at A25; see Teresa Cerojano, \textit{U.S. Warns al-Qaida Plotting Attacks}, ASSOCIATED PRESS ONLINE, Nov. 5, 2002, at 2002 WL 102135286 (reporting that U.S. official has warned that al Qaeda "and its allies are looking for 'soft targets' for their next attack and are making widescale efforts to establish a new base after being rooted out of Afghanistan").

\textsuperscript{45} Dana Priest & Susan Schmidt, \textit{Al Qaeda Threat Has Increased, Tenet Says}, WASH. POST, Oct. 18, 2002, at A1; see also Watson Statement, supra note 41, at 123 ("Even as the Al-Qaeda command structure in Afghanistan is destroyed, Al-Qaeda cells in countries around the world will continue to pose a threat to U.S. and other western interests."); Dana Priest & DeNeen Brown, \textit{'Sleeper Cell' Contacts Revealed by Canada}, WASH. POST, Dec. 25, 2002, at A1 (reporting that "Al Qaeda 'sleeper cells' in Canada and the United States have communicated with each other as recently as [December 2002], probably to plan terrorist attacks in the United States"). Seven months earlier, CIA Director Tenet "warn[ed] Congress that Osama bin Laden's terrorist network [had] not been destroyed and [was] working on plans for new attacks against the United States." Walter Pincus, \textit{Tenet Says Al Qaeda Still Poses Threat}, WASH. POST, Feb. 7, 2002, at A1.
continued to command a broad network of well-funded terrorists in forty
countries.46

Shortly after the attacks, many questioned whether those responsible
should be tried in civilian courts.47 The issue became more pressing as
Northern Alliance forces, backed by the United States, advanced across
Afghanistan pushing back the Taliban militia.48 As American military forces
engaged the enemy in this armed conflict, the government developed an
approach that employs both application of the criminal law49 and the law of
war.50

at A27.

47. See, e.g., Karen DeYoung & Michael Dobbs, Bin Laden: Architect of New Global
Terrorism, WASH. POST, Sept. 16, 2001, at A8 (discussing in part how prosecution of terrorists
enables terrorist organization to learn how authorities investigate and pursue organization when
evidence related to those questions is presented in open court); William Glaberson, U.S. Faces
Tough Choices if Bin Laden Is Captured, N.Y. TIMES, Oct. 22, 2001, at B5 (noting that trial of
Osama bin Laden in federal court “would present problems. Among other things, American
courts give defendants access to much of the government’s evidence against them. A federal
court trial could provide terrorists with a road map to the country’s intelligence sources . . .
giving them an advantage in the continuing battle against terrorism.”); John Lancaster & Susan
(“Stunned by the magnitude of [the September 11] terrorist attacks, Congress and the White
House are reassessing an approach to fighting terrorism that . . . has favored the tools of law
enforcement over those of war.”).

48. See George Lardner Jr. & Peter Slevin, Military May Try Terrorism Cases, WASH.

49. The campaign against terrorism will continue to have a significant criminal law
component. See David Johnston & Benjamin Weiser, Ashcroft Is Centralizing Control Over
the Prosecution and Prevention of Terrorism, N.Y. TIMES, Oct. 10, 2001, at A9 (discussing
establishment of “9/11 Task Force” within the Department of Justice “to operate as the agency’s
central command structure for prosecuting terror cases and helping to prevent further acts of
violence against the United States”); David Pace, FBI Referral Rate of Terror Cases for
Prosecution Grows, WASH. POST, June 17, 2002, at A5 (reporting that the “FBI has been
seeking prosecution of international terrorism cases at six times the rate it did before Sept. 11”).
Illustrative of this point are the prosecutions of John Walker Lindh (the American citizen
arrested in an Afghan fight against the Taliban, see supra note 12), Richard Reid (the shoe
bomber) and Zacarias Moussaoui (the only person charged with conspiring in the Sept. 11
Reid’s criminal plea to attempting to blow up an airliner); Philip Shenon, U.S. Will Defy Court’s
Order in Terror Case, N.Y. TIMES, July 15, 2003, at A1 (reporting Moussaoui is “the only
person facing trial in the United States in connection with the attacks of Sept. 11, 2001”).

50. See David Luban, The War on Terrorism and the End of Human Rights, 22 PHILOSOPHY
& PUBLIC POL. Q. 9 (2002) (discussing the hybrid war-law approach); Note, supra note 19, at
1235 ("Insofar as the legal system does not guarantee [government's interests in punishment and
safety], we have rejected it in favor of the sword"). See generally Kenneth Anderson, What to
Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions
Some point out that by selectively mixing components of the criminal law model and the war model, the administration has been "able to maximize its own ability to mobilize legal force against terrorists while eliminating most traditional rights of a military adversary, as well as the rights of [T]here are terrorist organizations whose concerted design is to violently disrupt and destroy existing governments and commerce. Against these, one may have to entertain the paradigm of ongoing conflict. An idealist's desire to address the root causes will not suffice against an organization that opposes all secular regimes in the region or objects to United States protection of essential economic and political interests. And simple reaction in the face of a completed attack will often not be a wise or sufficient policy.

The defense of a nation-state in international war permits the targeting of the adversary's command and control structure, military facilities, and even his supporting economic assets. This is not a license to overrule good judgment. In limited war, the rules of engagement are carefully moderated to avoid broadening the conflict or drawing in other countries. While attending to third party interests and maintaining the stability of the larger peace, one may need to place antiterrorist actions within the international legal paradigm of war, rather than unbroken peace, with a right of ongoing offensive action against an adversary's paramilitary operations and network.

Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559, 575-76 (1999); see also Crona & Richardson, supra note 50, at 357 ("Terrorism is not a social problem susceptible to civilian intervention and law enforcement, but a military threat and menace to our civilization appropriate for military repulsion.")
innocent bystanders caught in the crossfire."\textsuperscript{52} Others maintain that America’s engagement in Afghanistan is over,\textsuperscript{53} and that, therefore, we should address its aftermath by adopting a law enforcement approach rather than continuing to employ a "war [model] that operates for an indefinite period of time, and is not ended even by the cessation of hostilities."\textsuperscript{54} The reality is that both models will be used for some time to come.\textsuperscript{55}

52. Luban, supra note 50, at 10. Professor Luban presents the criticism against the hybrid war-law model as follows:

Because the law model and war model come as conceptual packages, it is unprincipled to wretch them apart and recombine them simply because it is in America’s interest to do so. To declare that Americans can fight enemies with the latitude of warriors, but if the enemies fight back they are not warriors but criminals, amount to a kind of heads-I-win-tails-you-lose international morality in which whatever it takes to reduce American risk, no matter what the cost to others, turns out to be justified.

Id. at 12-13.

53. This proposition is certainly debatable. See General Tommy Franks, Commander, U.S. Central Command, Department of Defense News Briefing (Oct. 29, 2002), at http://www.centcom.mil/CENTCOMNEWS/transcripts/20021029.htm ("[A] lot remains to be done. It’s not over. Very, very dangerous environment. Uneven environment. We see senses of security and stability in some parts of Afghanistan, and we see ethnic and tribal issues in other parts of Afghanistan, so we just have to keep working."); Michael Buettner, Detained American’s Appeal Heard, ASSOCIATED PRESS ONLINE, Oct. 28, 2002, available at 2002 WL 102132476 (reporting that government counsel in appeal involving Hamdi, which took place more than one year after the attacks, indicated that “hostilities will continue ‘certainly at least for months and probably for years’”). Furthermore, the end of the military engagement in Afghanistan does not mean the cessation of hostilities with al Qaeda. See Watson Statement, supra note 41, at 123 (“Even as the Al-Qaeda command structure in Afghanistan is destroyed, Al-Qaeda cells in countries around the world will continue to pose a threat to U.S. and other western interests.").


55. As recognized by the American Bar Association’s Task Force on Treatment of Enemy Combatants:

The September 11 attacks were viewed as both crimes and acts of war, and the United States has responded with both military operations and law enforcement actions. Under the circumstances, legal doctrines and principles from both domestic criminal procedure and international law, including the law of war, have been applied. Because of the unique nature of the attacks and our responses to it, it is not surprising that these doctrines and principles have been applied in new
When applying the war model, how should persons caught in the conflict be treated? In general, the status of a person who is captured by the enemy during an armed conflict will be ascertained by applying the four Geneva Conventions of 1949.\textsuperscript{56} In the present conflict, and after a shift in position, the administration declared that those who fought for Afghanistan’s Taliban regime and were captured were “enemy combatants,” and thus would be covered by the 1949 Geneva Conventions but not considered prisoners of war.\textsuperscript{57} Members of al Qaeda’s terrorist network, however, are not only not

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\item ways and have, to some extent, overlapped.
\item ABA TASK FORCE on treatment of enemy combatants, preliminary report 7 (2002) [hereinafter preliminary report]. available at http://www.abanet.org/poladv/congletters/106th/enemycombatantreport.pdf; see Jennifer Elsea, treatment of “battlefield detainees” in the war on terrorism, CRS rep. for congress, at CRS-44 (2002), available at http://lfc.state.gov/documents/organization/9655.pdf (noting that given the application of elements based on a conventional war model and a law enforcement model, “the role of Congress might be seen as particularly important in providing a definition and a set of boundaries to shape how such a war is to be fought”); Charles Lane, in Terror war, 2nd track for suspects, Wash. post, Dec. 1, 2002, at A1 (reporting that administration officials maintain a “parallel system is necessary because terrorism is a form of war as well as a form of crime, and it must not only be punished after incidents occur, but also prevented and disrupted through the gathering of timely intelligence”); Jim Oliphant, Bush’s Burden: Seeking justice in terror’s wake, Legal times, Sept. 17, 2001, at 12 (“ultimately, it is likely that an extensive military campaign will exist side by side with a domestic prosecutorial effort.”).
\item 56. Elsea, supra note 55, at CRS-7. By way of a synopsis:
\begin{enumerate}
\item The Geneva Conventions of 1949 create a comprehensive legal regime for the treatment of detainees in an armed conflict. Members of a regular armed force and certain others, including militias and volunteer corps serving as part of the armed forces, are entitled to specific privileges as [prisoners of war]. Members of volunteer corps, militias, and organized resistance forces that are not part of the armed services of a party to the conflict are entitled to [prisoner of war] status if the organization (a) is commanded by a person responsible for his subordinates, (b) uses a fixed distinctive sign recognizable at a distance, (c) carries arms openly, and (d) conducts its operations in accordance with the laws of war. Groups that do not meet the standards are not entitled to [prisoner of war] status, and their members who commit belligerent acts may be treated as civilians under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War . . . .
\item Id. at CRS-3 (citations omitted).
\item 57. See John Mintz & Mike Allen, Bush Shifts Position on Detainees, Wash. post, Feb. 8, 2002, at A1; Michael C. Dorf, What Is an “Unlawful Combatant,” and Why It Matters, at http://writ.corporate.findlaw.com/dorf/20020123.html (Jan. 23, 2002) (noting that al Qaeda and Taliban members need not be treated as prisoners of war because they do not satisfy criteria governing irregular militias under article IV of the Geneva Convention) [hereinafter Dorf, Unlawful Combatant]. But see Mariner, supra note 8 (noting that under article IV, “members of the armed forces of parties to a conflict — i.e., forces such as the Taliban — are not assessed under the four criteria cited by [the] Bush administration. Instead, all captured members of a
\end{enumerate}
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considered prisoners of war, but also are not covered by the Geneva Conventions because that network was not a party to the signed accords.\textsuperscript{58} Furthermore, within the enemy combatant category, both Taliban and al Qaeda prisoners are considered unlawful combatants.\textsuperscript{59} This means that they are potentially subject to trial before military commissions, such as those established by President Bush in his November 13th order, and not courts-martial.\textsuperscript{60}

As noted previously, noncitizen enemy combatants currently detained at Guantanamo Bay by American military authorities, and American citizens who have been identified as enemy combatants but are being held in the United States, have challenged their detentions through petitions for writs of habeas corpus. Before discussing the cases where the courts have addressed the legal challenges raised by these detainees, it is instructive to obtain a general overview of the history and operation of the writ of habeas corpus.

\textbf{IV. The Writ of Habeas Corpus}

The "grand purpose" of the writ of habeas corpus is to protect "individuals against the erosion of their right to be free from wrongful restraints upon their liberty."\textsuperscript{61} Of ancient origin,\textsuperscript{62} the writ "has for party's armed forces automatically enjoy POW status.").

\textsuperscript{58} See Elsea, supra note 55, at CRS-5; Mintz & Allen, supra note 57, at A1; see also Diane F. Orentlicher & Robert Kogod Goldman, \textit{When Justice Goes to War: Prosecuting Terrorists Before Military Commissions}, 25 HARV. J.L. & PUB. POL'Y 653, 658 (2002) (noting that "[i]n the context of the armed conflict in Afghanistan, the United States could treat Al Qaeda as a paramilitary organization and its members as unprivileged combatants who do not observe the basic rules of warfare as required by Article 4A(2) of the Third Geneva Convention of 1949") (citation omitted).

\textsuperscript{59} See United States v. Lindh, 212 F. Supp. 2d 541, 554-55 (E.D. Va. 2002) (discussing Taliban militia); Dorf, \textit{Unlawful Combatant}, supra note 57 (noting that "[a]ccording to Defense Secretary Rumsfeld, the Taliban and al Qaeda fighters currently being held captive at the United States Naval Base at Guantanamo Bay, Cuba, are not prisoners of war, but 'unlawful combatants'").

\textsuperscript{60} See Geraghty, supra note 26, at 583 (noting that al Qaeda operatives who executed September 11 attacks, "if captured . . . would not be entitled to prisoner of war status and could be tried and sentenced within a military tribunal that applies the law of war") (footnote omitted); Dorf, \textit{Unlawful Combatant}, supra note 57; Michael C. Dorf, \textit{Who Decides Whether Yaser Hamdi or Any Other Citizen, Is an Enemy Combatant}, at http://writ.corporate.findlaw.com/dorf/20020821.html (Aug. 21, 2002).

\textsuperscript{61} Jones v. Cunningham, 371 U.S. 236, 243 (1963); see Harris v. Nelson, 394 U.S. 286, 290-91 (1969) ("The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.").

\textsuperscript{62} 17A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4261, at 270
centuries been esteemed the best and only sufficient defense of personal freedom." It was initially recognized in the federal system under the Judiciary Act of 1789, when the first Congress granted federal courts the "power to issue writs of . . . habeas corpus" to prisoners "in custody, under or by colour of the authority of the United States." State judgments, however, were not subject to federal habeas corpus review.

In 1833, Congress expanded the power of the federal courts by granting them the authority to issue writs "in all cases of a prisoner . . . in jail . . . by any authority or law, for any act done . . . in pursuance of a law of the United States." In 1842, Congress extended jurisdiction to citizens of foreign countries held in custody for acts performed under the authority of their countries' laws. Then, after the U.S. Civil War, Congress amended the federal habeas corpus statute, authorizing federal courts to issue the writ if the detention was at the hands of state authorities, in the case of a violation of the U.S. laws or Constitution, and also, as discussed below, by adding a jurisdictional limitation. Additionally, Congress expanded the scope of judicial review, allowing a petitioner the right to "deny any of the material

(1988) ("The writ of habeas corpus, providing a means by which the legal authority under which a person is detained can be challenged, is of immemorial antiquity."); see Issues Cognizable: Developments in the Law — Federal Habeas Corpus, 83 HARV. L. REV. 1042, 1042 (1970) [hereinafter Issues Cognizable] (recognizing that while "[t]he precise origin of the writ of habeas corpus is not certain . . . as early as 1220 A.D. the words habeat corpora are to be found in an order directing an English sheriff to produce parties to a trespass action before the Court of Common Pleas") (citation omitted).

63. Ex Parte Rosier, 133 F.2d 316, 323 (D.C. Cir. 1942), overruled by Dorsey v. Gill, 148 F.2d 857, 863 (D.C. Cir. 1945).
64. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82; see Carbo v. United States, 364 U.S. 611, 614 (1961).
66. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634; see also Carbo, 364 U.S. at 615 n.6. It has been argued that "[b]ecause the section comprised part of the 'Force Act,' enacted to deal with South Carolina's attempted nullification of [a] tariff, it clearly was intended to apply to state confinement." Lewis Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. CHI. L. REV. 31, 33 n.10 (1965); accord Graddick, supra note 65, at 7 (noting that the extension of authority "was the result of Congress' efforts to release United States officers, who were arrested and imprisoned in South Carolina for violating the nullification laws of the state for performing their duties in collecting federal revenue").
68. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385-86; see also Carbo, 364 U.S. at 615 n.6. As pointed out by the Court in Carbo, the extension of jurisdiction in 1842 "imposed a jurisdictional limitation upon [the writ's] issuance — power to grant applications by foreign citizens was given only to Justices of the Supreme Court, and to judges of the District Court in the district of confinement." Id. at 616 n.10.
facts set forth in the return or . . . allege any fact to show that the detention
[was] in contravention of the constitution or laws of the United States.” 69

The current statutory authority, “implement[ing] the constitutional
command 70 that the writ of habeas corpus be made available” 71 is found at
28 U.S.C. §§ 2241 to 2255. In pertinent part, § 2241(a) provides that
“[w]rits of habeas corpus may be granted by the Supreme Court, any justice
thereof, the district courts and any circuit judge within their respective
jurisdictions.” 72 This jurisdictional limitation was placed in the statute
because “it was thought inconvenient, potentially embarrassing, certainly
expensive and on the whole quite unnecessary to provide every judge
anywhere with authority to issue the Great Writ on behalf of applicants far
distantly removed from the courts whereon they sat.” 73

An application for a writ of habeas corpus must be signed and verified by
the detained person “or by someone acting in his behalf.” 74 Upon receipt of
such application, the court or judge entertaining it must “forthwith award the
writ or issue an order directing the respondent to show cause why the writ

69. § 1, 14 Stat. at 386; see also Carbo, 364 U.S. at 614–22 (discussing the history of
congressional delegation of the power to issue writs of habeas corpus to courts).
70. The Constitution provides that “[t]he Privilege of the Writ of Habeas Corpus shall not
be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”
U.S. Const. art I, § 9, cl. 2; see also Issues Cognizable, supra note 62, at 1263–74 (discussing
suspension clause, which it describes as “simple in appearance, [but] fraught with confusion”).
72. 28 U.S.C. § 2241(a) (2000); see Morgan v. United States, 380 F.2d 686, 693 (9th Cir.
1967) (noting that in Carbo, the Supreme Court recognized that “habeas corpus is a generic
term, embracing both habeas corpus ad subjiciendum (to inquire into the cause of the restraint)
and habeas corpus ad prosequendum (to bring the prisoner to trial)”). Under the statute, a writ
is not available to a prisoner unless:

(1) He is in custody under or by color of the authority of the United States or
is committed for trial before some court thereof; or
(2) He is in custody for an act done or omitted in pursuance of an Act of
Congress, or an order, process, judgment or decree of a court or judge of
the United States; or
(3) He is in custody in violation of the Constitution or laws or treaties of the
United States; or
(4) He, being a citizen of a foreign state and domiciled therein is in custody for
an act done or omitted under any alleged right, title, authority, privilege,
protection, or exemption claimed under the commission, order or sanction of any
foreign state, or under color thereof, the validity and effect of which depend upon
the law of nations; or
(5) It is necessary to bring him into court to testify or for trial.
28 U.S.C. § 2241(c)(1)-(5).
73. Carbo, 364 U.S. at 617.
should not be granted, unless it appears from the application that the applicant or person is not entitled thereto."\textsuperscript{75} The writ or order to show cause must "be directed to the person having custody of the person detained"\textsuperscript{76} who must "certify[] the true cause of the detention."\textsuperscript{77} A hearing must be set when the writ or order is returned\textsuperscript{78} and unless only legal issues are presented in the application or return, "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."\textsuperscript{79} Finally, the court must "summarily hear and determine the facts, and dispose of the matter as law and justice require."\textsuperscript{80}

\textbf{V. Case Precedent}

The U.S. Supreme Court and lower courts have addressed whether the writ, in times of war, should be available to citizens and aliens challenging their detentions. The cases discussed below address two pertinent issues. The first — particularly relevant to the petitions filed by the detainees in Guantanamo — concerns the jurisdiction of a federal district court to issue a writ of habeas corpus. The second pertains to the scope of judicial review of petitions for writs of habeas corpus filed by those captured in the course of armed conflict, and also, the designation of American citizens as enemy combatants.

\textsuperscript{75} Id. § 2243.

\textsuperscript{76} Id; see also Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494-95 (1973) ("The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody."); Schlanger v. Seamans, 401 U.S. 487, 491 (1971) (noting that the absence of a custodian within the territorial jurisdiction of the district court "is fatal to the jurisdiction").

\textsuperscript{77} 28 U.S.C. § 2243.

\textsuperscript{78} This hearing should be set "not more than five days after the return unless for good cause additional time is allowed." Id. The person being detained or the applicant "may, under oath, deny any of the facts set forth in the return or allege any other material facts." Id. Further, 28 U.S.C. § 2246 provides for the taking of evidence by way of interrogatories, affidavits, or depositions. Id.§ 2246.

\textsuperscript{79} Id. § 2243.

\textsuperscript{80} Id. The critical role of the judiciary in ruling on petitions for a writ of habeas corpus was summarized by the Court in \textit{Harris v. Nelson}, 394 U.S. 286 (1969), as follows:

There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.

\textit{Id.} at 292.
A. Jurisdiction

In *Johnson v. Eisentrager*, a military commission convicted twenty-one German nationals under the laws of war for hostile operations against the United States after Germany’s unconditional surrender, but before Japan’s surrender. The military commission sat in China, and after the convictions were reviewed and approved by the military authorities, the prisoners were repatriated to Germany to serve their sentences.

In their petition for habeas corpus, the prisoners alleged that their convictions and subsequent imprisonment were obtained in violation of Articles I and III of the Constitution, the Fifth Amendment, and “other provisions of the Constitution and laws of the United States and provisions of the Geneva Convention governing treatment of prisoners of war.” The district court dismissed the petition for want of jurisdiction. The United States Court of Appeals for the District of Columbia Circuit remanded the case for further proceedings, and the Supreme Court reversed.

Framing the “ultimate question” as one involving the “jurisdiction of civil courts of the United States vis-à-vis military authorities in dealing with enemy aliens overseas,” the Court first reviewed the rights and differences between citizen resident and nonresident aliens in times of war. The Court then postulated that to invest “enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts,” it would have to hold that

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82. *Id.* at 765-66. The “hostile operations consisted principally of collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces.”
83. *Id.*
84. *Id.* at 767.
86. *Id.* The court of appeals ruled that “any person who [was] deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who [could] show that his confinement [was] in violation of a prohibition of the Constitution, [had] a right to the writ.” *Id.* at 963. It remanded the case to the district court for a determination of which of the respondents had “directive power, by line of authority, over the jailer of [the] appellants.” *Id.* at 968. Those that did not possess such power were to be dismissed from the case. *Id.*
88. *Id.* at 765.
89. *Id.* at 768-77.
90. *Id.* at 777.
a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) [was] an enemy alien; (b) [had] never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and [was] at all times imprisoned outside the United States.\textsuperscript{91}

The Court declined to so hold.

The Court reasoned that the presence of an alien in the United States, whether enemy or friendly, "implied protection" and that no such protection could be invoked under the circumstances presented because the "prisoners at no relevant time were within any territory over which the United States [was] sovereign and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."\textsuperscript{92} The Court also recognized that "[e]xecutive power over enemy aliens, undelayed and unhampered by litigation ha[d] been deemed, throughout our history, essential to war-time security."\textsuperscript{93} That security, the Court noted, would be jeopardized if field commanders were called to account for their actions by their enemies in their own civil courts, thereby diverting their attention from their military mission.\textsuperscript{94}

\textbf{B. Scope of Judicial Review and Designation of American Citizens as Combatants}

In \textit{Ex Parte Quirin},\textsuperscript{95} petitioners, eight German saboteurs, surreptitiously entered the United States after disembarking from two submarines off the

\begin{itemize}
  \item \textsuperscript{91} \textit{Id}.
  \item \textsuperscript{92} \textit{Id}. at 777-78.
  \item \textsuperscript{93} \textit{Id}. at 774.
  \item \textsuperscript{94} \textit{Id}. at 779. In that vein, the Court observed that such enemy driven litigation would likely result in conflicts of opinion between the military and the judiciary. \textit{Id}. The Court also rejected petitioners' argument that its prior rulings in \textit{Ex Parte Quirin}, 317 U.S. 1 (1942), and \textit{In re Yamashita}, 327 U.S. 1 (1945), both of which are discussed in the text below, supported the contention that a writ of habeas corpus was legally available to challenge the detentions. \textit{Johnson}, 339 U.S. at 779-80. It distinguished \textit{Quirin} on the grounds that the petitioners in that case were in custody in the District of Columbia. \textit{Id}. at 779. As to \textit{Yamashita}, the Court pointed out that by reason of the United States' sovereignty over the Philippines, the petitioner in that case not only committed offenses within U.S. territory, he had also been tried in U.S. insular courts and imprisoned in U.S. territory. \textit{Id}. at 780. None of those bases of jurisdiction, the Court determined, could be invoked by the \textit{Johnson} petitioners. \textit{Id}.
  \item \textsuperscript{95} 317 U.S. 1 (1942).
\end{itemize}
Atlantic coast. 96 One of the saboteurs, Herbert Haupt, arguably was an American citizen. 97 After burying their uniforms and supplies of explosives, fuses, and incendiary devices, they proceeded in civilian dress to Jacksonville, Florida, and New York City with instructions to destroy war facilities and industries. 98 Subsequently, the FBI apprehended all eight saboteurs in New York and Chicago. 99

President Franklin Roosevelt "appointed a military commission and directed it to try petitioners for offenses against the law of war and the Articles of War." 100 The FBI turned them over to the Provost Marshal of the Military District of Washington for trial before the commission. 101 Thereafter, petitioners challenged the legality of their detentions in applications for writs of habeas corpus on the grounds that the President lacked both constitutional and statutory authority to order trial before a military tribunal rather than a civilian court. 102 The Court rejected petitioners' arguments. 103

The Court began its analysis by noting that the writs did not raise the issue of guilt or innocence, but rather, the military commission's lawful authority to try petitioners. 104 It then rejected the government's arguments that (1) because petitioners were either enemy aliens or belligerents, and (2) because the President's proclamation establishing a military commission to try them undertook to deny judicial access to such persons, the Court should decline any review. 105 The Court reasoned that nothing in the proclamation

96. Id. at 20-21.
97. Id. at 20. While Haupt maintained that he was a citizen "by virtue of the naturalization of his parents during his minority," the government argued that by his conduct, Haupt denounced and abandoned his citizenship. Id. The Court declined to address this dispute because its resolution of this question was immaterial to the ultimate ruling. Id.
98. Id. at 21.
99. Id.
100. Id. at 22.
101. Id. at 23.
102. Id. at 24.
103. Id. at 48.
104. Id. at 25.
105. Id. The same day that President Roosevelt issued the order directing that a military commission try the petitioners, he issued a Proclamation declaring that all 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.

Id. at 22-23 (quoting Proclamation 2561, 7 Fed. Reg. 5101 (July 2, 1942)). The Proclamation
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supported a construction "preclud[ing] access to the courts for determining its applicability to [a] particular case."' Furthermore, the Court determined that neither the petitioners' status nor the proclamation "foreclosed consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."

The Court then found that the President, with the support of Congress, had the power to establish military tribunals to prosecute offenses against the laws of war, and that he had appropriately exercised that power in Quirin. As to whether petitioners fell within the category of persons triable before military tribunals, the Court noted the distinction between lawful and unlawful combatants and how, in the case of unlawful combatants, they were "subject to capture and detention, but in addition . . . trial and punishment by military tribunals for acts which render[ed] their belligerency unlawful." Having drawn the distinction, the Court determined that petitioners' conduct constituted unlawful belligerency.

As to Haupt's contention that his American citizenship insulated him from the consequences of his unlawful belligerency, the Court ruled:

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who

further stated that those affected would not have access to the courts. Id. at 23.

106. Id. at 25.
107. Id.; see Orentlicher & Goldman, supra note 58, at 659 (noting that the Court in Quirin "had no trouble concluding that the saboteurs could have recourse to federal court to challenge the lawfulness of their prosecution before a military commission").

108. Quirin, 317 U.S. at 26-30. The Court considered it unnecessary "to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress [had] authorized trial of offenses against the law of war before such commissions." Id. at 29.

109. Id. at 31. As the Court explained:

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Id; see also id. at 35 (recognizing that "those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission").

110. Id. at 36-39.
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.\textsuperscript{111}

Put another way, Haupt was charged with entering the United States as an
enemy belligerent and "unlawful belligerency [was] the gravamen of the
offense of which he [was] accused."\textsuperscript{112}

A similar case from the period discussing the treatment of American
citizens in wartime is \textit{In re Territo}.\textsuperscript{113} American armed forces captured
Gaetano Territo, a soldier in the Italian Army, on the field of battle.\textsuperscript{114} The
military held him as a prisoner of war in Italy and then transferred him to the
United States.\textsuperscript{115} After arriving, Territo, who had been born in West
Virginia, filed a petition for a writ of habeas corpus, alleging that his
restraint was unlawful because he had been born in the United States and at
all times had remained a citizen.\textsuperscript{116} The district court ruled that his detention
was lawful and the United States Court of Appeals for the Ninth Circuit
affirmed.\textsuperscript{117}

In rejecting the petitioner's contention that his citizenship rendered
classification as a prisoner of war improper, the court of appeals found no
support in precedent for the proposition "that citizenship in the country of
either army in collision necessarily affect[ed] the status of one captured on
the field of battle."\textsuperscript{118} The court explained that the object of capture was to
prevent the person who was apprehended from assisting the enemy, an end
which was accomplished by removing that person from the field of battle,

\textsuperscript{111} Id. at 37-38; see Mudd v. Caldera, 134 F. Supp. 2d 138, 145-46 (D.D.C. 2001)
(recognizing that "[u]nder \textit{Quirin}, citizens and non-citizens alike — whether or not members
of the military, or under its direction or control, may be subject to the jurisdiction of a military
commission for violations of the law of war").

\textsuperscript{112} \textit{Quirin}, 317 U.S. at 38. With respect to Haupt's argument that under \textit{Ex Parte Milligan},
71 U.S. (4 Wall.) 2 (1866), he was not subject to prosecution before a military tribunal because
the civil courts were open, the Court distinguished \textit{Milligan} on the ground that the petitioner
there was not an enemy belligerent. \textit{Quirin}, 317 U.S. at 45.

\textsuperscript{113} 156 F.2d 142 (9th Cir. 1946).

\textsuperscript{114} Id. at 143.

\textsuperscript{115} Id.

\textsuperscript{116} Id. at 142. The petition was filed "[t]hrough the interposition of Frances Territo Di
Maria." \textit{Id.}

\textsuperscript{117} Id. at 144, 148.

\textsuperscript{118} Id. at 145; see 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.").

https://digitalcommons.law.ou.edu/olr/vol56/iss3/3
treated him humanely, and at some point repatriating or releasing him.\textsuperscript{119}

Regarding the scope of judicial review of a petition for a writ of habeas corpus in the war context, the U.S. Supreme Court’s ruling in \textit{In re Yamashita}\textsuperscript{120} is instructive.\textsuperscript{121} There, General Tomoyuki Yamashita, the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, was charged with violations of the laws of war by permitting troops under his command to commit high crimes and brutal atrocities against Americans and their allies.\textsuperscript{122} A military commission tried and convicted General Yamashita of violations of the laws of war and sentenced him to death by hanging.\textsuperscript{123}

In petitions for habeas corpus, General Yamashita raised various challenges to the authority and jurisdiction of the military commission to try him for violations of the laws of war.\textsuperscript{124} Before rejecting these challenges, the Court generally identified three “governing principles” relating to the scope of its review.\textsuperscript{125} First, the Court noted that the issue on habeas corpus was not guilt or innocence, but “only the lawful power of the commission to try the petitioner for the offense charged.”\textsuperscript{126} Second, the Court observed

\textsuperscript{119} Territo, 156 F.2d at 145. While Quirin and Territo certainly are relevant to the question of the executive’s authority to designate American citizens as enemy combatants, it has been pointed out that Quirin and Territo arose in World War II. Little question existed about who the enemy was or whether the Quirin defendants or Territo were members of the enemy armed forces. Thus, these decisions turned not on whether the detainees were enemy combatants, but on whether enemy combatants — even if U.S. citizens — could be detained and tried by the military. In the current situation, these lines are less clear, both in general and in application in specific cases.

\textsuperscript{120} 327 U.S. 1 (1945).
\textsuperscript{121} See id. at 25-26.
\textsuperscript{122} Id. at 14.
\textsuperscript{123} Id. at 5.
\textsuperscript{124} Id. at 6.
\textsuperscript{125} Id. at 9.
\textsuperscript{126} Id. at 8. Specifically, addressing military commissions or tribunals, the Court held: [I]t must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power “to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty.” The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and
that Congress’ sanction of the trial of enemy aliens before military tribunals did not “foreclose[,] their right to contend that the Constitution or laws of the United States withh[ed] [the government’s] authority to proceed with the trial.” 127 Finally, Congress had not taken back, “and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.” 128

VI. The Challenges by the Guantanamo Bay Detainees

As previously noted, some of the detainees held at the naval base in Guantanamo filed petitions for writs of habeas corpus in federal court, challenging the authority of the government to hold them without charges and deny them the right of access to lawyers. 129 These cases are now examined.

A. Coalition of Clergy v. Bush

In Coalition of Clergy v. Bush, 130 petitioners, a group including ten lawyers, three rabbis, a Christian pastor, and several journalists, filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California on behalf of all captives held in Guantanamo. 131 The petition alleged that the government held the prisoners in violation of both the Constitution and the laws and treaties of the United States because the government: (1) failed to inform them of the nature of the accusations against them; (2) denied them the right to the assistance of

condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.

 barring

Id. (citations omitted) (quoting 28 U.S.C. §§ 451, 452 (1934)).

127. Id. at 9.

128. Id; see Johnson v. Eisentrager, 339 U.S. 763, 775 (1950) (limiting review “only to ascertain the existence of a state of war and whether [petitioner] is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.”).


130. 189 F. Supp. 2d 1036 (C.D. Cal. 2002), aff’d in part, vacated in part, 310 F.3d 1153 (9th Cir. 2002), and cert. denied, 123 S. Ct. 2073 (2003) (mem.) (Coalition of Clergy I).

131. Id. at 1037.
counsel; and (3) deprived them of their liberty without due process of law.\textsuperscript{132} The respondents, including President Bush and Secretary of Defense Donald H. Rumsfeld,\textsuperscript{133} argued that petitioners lacked standing to bring the petition but even if they could, no federal court had jurisdiction to entertain it.\textsuperscript{134} The district court agreed.\textsuperscript{135}

First, the court found that petitioners lacked standing to assert any claims on behalf of the detainees.\textsuperscript{136} The court determined that under the governing Ninth Circuit test for "next friend" standing,\textsuperscript{137} petitioners lacked the required relationship with the detainees to bring the cause of action.\textsuperscript{138} Recognizing that petitioners might attempt to remedy this problem by seeking leave to file an amended petition buttressing the standing question, the court ruled that such a request would be denied because an amended petition could not satisfy the writ's jurisdictional requirements.\textsuperscript{139}

The court initially noted that because none of the named respondents was found within its district, it lacked jurisdiction to issue the writ.\textsuperscript{140} The court recognized, however, that jurisdiction could lie in a district court where anyone in the "chain of command" with control over the prisoners was present and that at least some of the respondents identified in the petition were present within the jurisdiction of the United States District Court for the District of Columbia.\textsuperscript{141} Accordingly, the court went on to consider

\begin{itemize}
\item \textsuperscript{132} Id. at 1038.
\item \textsuperscript{133} Additional respondents included "Richard B. Myers, the Chairman of the Joint Chiefs of Staff; Gordon R. England, the Secretary of [the] Navy; and five other named individuals and '1000 Unknown Named United States Military Personnel,' all of whom [were] alleged to be military officers responsible for the operations at the Guantanamo Naval Base." \textit{Id.}
\item \textsuperscript{134} \textit{Id.} at 1039-40.
\item \textsuperscript{135} \textit{Id.} at 1039.
\item \textsuperscript{136} \textit{Id.} at 1040-44.
\item \textsuperscript{137} As previously noted, 28 U.S.C. § 2242 provides that an "[a]pplication for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. § 2242 (2000) (emphasis added); see supra text accompanying note 74. Applying the test set forth by the Supreme Court in \textit{Whitmore v. Arkansas}, 495 U.S. 149 (1990), the United States Court of Appeals for the Ninth Circuit ruled in \textit{Massie ex rel. Kroll v. Woodford}, 244 F.3d 1192 (9th Cir. 2001), that
\begin{quote}
[i]n order to establish next friend standing, the putative next friend must show: (1) that the petitioner is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability; and (2) the next friend has some significant relationship with, and is truly dedicated to the bests interests of, the petitioner.
\end{quote}

\textit{Massie}, 244 F.3d at 1194.
\item \textsuperscript{138} \textit{Coalition of Clergy I}, 189 F. Supp. 2d at 1045.
\item \textsuperscript{139} \textit{Id.} at 1044.
\item \textsuperscript{140} \textit{Id.} at 1045.
\item \textsuperscript{141} \textit{Id.}
\end{itemize}
whether a transfer of the petition to that district court under 28 U.S.C. § 1631 would be appropriate and concluded that such was not the case because that district court likewise lacked jurisdiction.

In reaching its conclusion, the court relied on Johnson, finding it controlling. The court found no meaningful distinction between the petitioners in Johnson and the detainees in Guantanamo because both were aliens, had been captured abroad in combat, were identified as enemy combatants, were held under the exclusive control of the military, and had never set foot on American soil. The court then turned to the remaining question of whether the detainees were “present” in the United States by virtue of their detention at the Guantanamo Naval Base.

The court began its analysis by noting that “there [was] a difference between territorial jurisdiction and sovereignty, and it [was] the latter concept that [was] key.” To ascertain whether the United States exercised jurisdiction or sovereignty over the naval base, the court examined the lease agreement entered into by both countries in 1903. The court found Article III of the agreement particularly illuminating on the question of sovereignty. It stated:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.

142. 28 U.S.C. § 1631 provides in relevant part: Whenever a civil action is filed in a court ... and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action ... to any other such court in which the action ... could have been brought at the time it was filed ....

144. Id. at 1046.
145. Id. at 1048.
146. Id.
147. Id. at 1049.
148. Id.; see Agreement on Lease of Land for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418 [hereinafter U.S.-Cuba Lease]. A subsequent treaty between the United States and Cuba provides that the lease shall “continue in effect” until the parties elect to abrogate or modify it. Treaty Between United States of America and Cuba Defining Their Relations, May 29, 1934, art. III, 48 Stat. 1682, 1683.
149. U.S.-Cuba Lease, supra note 148, art. III, T.S. No. 418 (quoted in Coalition of Clergy
Concluding that it lacked the authority to ignore the parties’ distinction between jurisdiction and sovereignty, the court rejected petitioners’ contention that the concepts were interchangeable.\(^{150}\) Moreover, the court found that in analogous contexts, other federal courts had held that the naval base at Guantanamo Bay was outside the sovereign territory of the United States, and thus not the functional equivalent of U.S. territory.\(^{151}\) Finding that Cuba retained sovereignty over the naval base, the court applied Johnson and ruled that petitioners were not entitled to a writ of habeas corpus.\(^{152}\)

On appeal, the Ninth Circuit affirmed the district court’s ruling that petitioners lacked standing to file suit on behalf of the detainees as next friends.\(^{153}\) The court of appeals also vacated the portion of the ruling below addressing the absence of federal jurisdiction under Johnson.\(^{154}\)

**B. Rasul v. Bush**

The United States District Court for the District of Columbia also has confronted a legal challenge to the detentions at the naval base in Guantanamo. In Rasul v. Bush,\(^{155}\) two British citizens, an Australian citizen, and certain of their parents filed a petition for a writ of habeas corpus requesting access to counsel, the cessation of interrogations while litigation

\(^{150}\) *Coalition of Clergy I, 189 F. Supp. 2d at 1049*; *see* Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380 (1948) ("[T]he determination of sovereignty over an area is for the legislative and executive departments . . . ").


\(^{152}\) *Coalition of Clergy I, 189 F. Supp. 2d at 1050.*

\(^{153}\) *See* Coalition of Clergy v. Bush, 310 F.3d 1153, 1156 (9th Cir. 2002) (*Coalition of Clergy II*).

\(^{154}\) *Id.* at 1164. The Ninth Circuit criticized the portion of the district court’s ruling addressing the question of jurisdiction because the Coalition lacked standing to bring the petition in the first place. *Id.* The court pointed out that

[i]f the Supreme Court has stated that federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. Such a concern cuts to the heart of the case-and-controversy requirement of Article III. Courts should not adjudicate rights unnecessarily; the real parties in interest in an adversarial system are usually the best proponents of their own rights.

*Id.* (citation omitted).

was pending, and their release. In a companion case, also assigned to the court because of the similarity of the issues presented, twelve Kuwaiti nationals and members of their families brought an action seeking preliminary and permanent injunctive relief, requesting that they be advised of the charges against them and be granted access to their families, legal counsel, and the courts or other impartial tribunal. The Kuwaiti plaintiffs alleged that the defendants' conduct deprived them of due process under the Fifth Amendment and violated their rights under the Alien Tort Claims Act and the Administrative Procedure Act. In both cases, the U.S. government moved for dismissal on jurisdictional grounds.

The court first distinguished two circumstances where the writ had been found to apply — aliens seeking to prove their citizenship and aliens seeking to be admitted into the United States while being held in a port — and which were not at issue in petitioners' case. The court then rejected petitioners' contention that Johnson was inapplicable because the government had not determined that they were enemy aliens, reasoning that the lack of jurisdiction in Johnson had not "hinge[d] on the fact that the petitioners were enemy aliens, but on the fact that they were aliens outside territory over which the United States was sovereign." To support its

156. Id. at 57. The court noted that while petitioners' amended petition sought to "invoke . . . jurisdiction under a host of separate [statutory, constitutional and international law] provisions, the suit [was] brought explicitly as a petition for writs of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2242." Id. at 62.

157. Id. at 58. Notwithstanding plaintiffs' efforts to avoid having the court construe their case as a petition for a writ of habeas corpus, the court interpreted their request for access to the courts or some other tribunal as "nothing more than a frontal assault on their confinement," a species of claim recognized to fall "within the exclusive province of the writ of habeas corpus." Id. at 63. Accordingly, the court treated the jurisdictional request as if it had been styled as a petition for a writ of habeas corpus. Id.; see Chatman-Bey v. Thornburgh, 864 F.2d 804, 809 (D.C. Cir. 1988) (en banc) (noting that "the modern habeas cases teach, broadly, that habeas is designed to test the lawfulness of the government's asserted right to detain an individual").


159. Id. at 61.

160. See Chin Chow v. United States, 208 U.S. 8, 13 (1908) (permitting habeas action for person seeking admission into the country to assure hearing on citizenship claim).

161. See Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (noting that "[a]n alien immigrant, prevented from landing by any . . . officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful").


163. Id. at 67. In support of this proposition, the court relied on the Johnson passage in which the court stated:

We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country
interpretation, the court cited Justice Douglas's observation in his dissent that ""the Court's opinion inescapably denie[d] courts power to afford the least bit of protection for any alien who [was] subject to our occupation government abroad, even if he [was] neither enemy nor belligerent and even after peace [was] officially declared.""\textsuperscript{164}

Finally, the court addressed the remaining question, namely whether under a de facto theory of sovereignty, the naval base at Guantanamo Bay should be considered within the territorial jurisdiction of the United States.\textsuperscript{165} Finding petitioners' reliance on cases involving the rights of aliens residing in sovereign territories of the United States misplaced,\textsuperscript{166} and recognizing that courts had rejected in other contexts a de facto sovereignty test for claims involving aliens at the naval base in Guantanamo, the court concluded that the base was outside the sovereign territory of the United States.\textsuperscript{167} Thus, applying \textit{Johnson}, the court ruled that it lacked jurisdiction to entertain the petitions.\textsuperscript{168}

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed.\textsuperscript{169} Adopting the district court's reading of \textit{Johnson}, the appellate court held that no court had jurisdiction to entertain

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\textsuperscript{164} \textit{Rasul}, 215 F. Supp. 2d at 68 (alteration in original) (quoting \textit{Johnson}, 339 U.S. at 795-96 (Douglas, J., dissenting)).

\textsuperscript{165} \textit{Id.} When framing this question, the court noted that ""if it was"" undisputed, even by the parties, that Guantanamo Bay is not part of the sovereign territory of the United States."" \textit{Id.} at 69.

\textsuperscript{166} \textit{Id.} at 69; see, e.g., Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977). The \textit{Rasul} court found, contrary to petitioners' contentions, that Ralpho did not hold ""that a court [could] grant constitutional rights over a geographical area where de facto sovereignty [was] present. Rather, Ralpho [stood] for a limited extension of the uncontested proposition that aliens residing in the sovereign territories of the United States are entitled to certain basic constitutional rights."" \textit{Rasul}, 215 F. Supp. 2d at 70.

\textsuperscript{167} \textit{Id.} at 69-72.

\textsuperscript{168} \textit{Id.} at 72-73.

the petitions, "even if they ha[d] not been adjudicated enemies of the United States." The Supreme Court granted cert in this case and has agreed to consider whether federal courts lack jurisdiction to entertain challenges by foreign nationals to the legality of their detention at Guantanamo Bay.

C. Discussion

Unless the Court abandons Johnson, it appears that a federal court may not exercise jurisdiction over the petition of an alien detained at Guantanamo Bay. Preliminarily, one should note that although the November 13th order stated that any individual subject to it "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on [his] behalf in . . . any court of the United States," if a federal court can exercise jurisdiction, detainees under the order will enjoy access to limited judicial review. That being said, as was the case with the petitioners in Johnson, the detainees in Guantanamo Bay are aliens who have been and continue to be held abroad. Further, a compelling argument exists that since at least September 11, the United States and al Qaeda and its supporters have been actively engaged in war — a war declared and initiated by al Qaeda — and that these prisoners fall within the category of enemy aliens as identified in

170. Id. at 1141.
171. Military Order, supra note 15, § 7(b)(2).
172. See Johnson v. Eisentrager, 339 U.S. 763, 775 (1950) ("The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act."); see also Gonzales, supra note 36, at A27 ("The order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court.").
173. Al Odah, 321 F.3d at 1140 (noting that like the German prisoners, the Guantanamo detainees "are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States"); see also Johnson, 339 U.S. at 777-78 (noting that "the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection").
174. See Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary, 107th Cong. 63 (2001) (testimony of William P. Barr, Former Attorney General of the United States) ("It is clear that a state of war exists between the United States and al Qaeda. Al Qaeda has openly proclaimed a war against the United States and has repeatedly carried out attacks against us."). But see Peter Spiro, Not War, Crimes, at http://writ.corporate.findlaw.com/commentary/20010919_spiro.html (Sept. 19, 2002) (arguing that "the ultimate nature of the attacks is more akin to crime than to war, and should to the maximum extent possible be addressed as such").
Additionally, it does not appear that the United States has sovereignty over its naval base in Guantanamo Bay, a prerequisite for jurisdiction. Finally, it may be argued that entertaining petitions from

175. The district court in *Rasul* implicitly accepted petitioners' contentions that before they could be considered "enemy aliens," a competent military tribunal had to make that determination. *Rasul v. Bush*, 215 F. Supp. 2d 55, 66 (D.D.C. 2002), aff'd sub. nom. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), cert. granted, 124 S. Ct. 534 (Nov. 10, 2003) (No. 03-334). It further held that *Johnson* did "not apply only to those aliens deemed to be 'enemies' by a competent tribunal." *Id.* at 67. The court of appeals in *Al Odah* similarly found that the *Johnson* holding was not limited to enemy aliens. *Al Odah*, 321 F.3d at 1139-40. In the section of *Coalition of Clergy* vacated on appeal, the district court found that, in addition to being aliens, the detainees were enemy combatants. *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1048 (C.D. Cal. 2002), aff'd in part, vacated in part, 310 F.3d 1153 (9th Cir. 2002), and cert. denied, 123 S. Ct. 2073 (2003) (mem.) (*Coalition of Clergy* I).

Some have noted that in *Johnson* "the Court took great pains to dwell on the differences between the rights of enemy and friendly aliens," and that "'[i]t was the existence of war between the United States and the alien's homeland, not their alienage, which reduced the enemy alien's rights. This reduction was justified because of the need to ensure war time security.'" Bryan W. Horn, *Note, The Extraterritorial Application of the Fifth Amendment Protection Against Coerced Self-Incrimination*, 2 DUKE J. COMP. & INT'L L. 367, 378 (1992) (citations omitted); see Leigh-Ann Patterson, *Comment, The Extraterritorial Application of the Fourth Amendment—United States v. Verdugo-Urquidez*, 110 S.Ct. 1056 (1990), 25 SUFFOLK U. L. REV. 289, 294 (1991) (noting the Court in *Johnson* "focused extensively on the special national security dangers posed by an enemy alien, narrowing its holding by noting that 'enemy' status, not 'alien' status, deprived aliens of both interterritorial and extraterritorial protections during war"). In this vein, it is argued that while *Johnson* "stands for the proposition that the courts may deny habeas corpus to enemy aliens in occupied territories during a declared war, the decision does not apply to the general treatment of non-enemy aliens abroad."

John A. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Actions*, 17 N.Y.U. J. INT'L L. & POL. 287, 302-03 (1985) (citation omitted). A forceful contrary view, however, also exists. *See Al Odah*, 321 F.3d at 1141 (interpreting *Johnson* and subsequent Supreme Court cases to hold that basic constitutional protections are not available to aliens abroad); *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) (arguing while *Johnson* concerned the rights of enemy aliens during wartime, "the Supreme Court's extended and approving citation of [Johnson in Verdugo-Urquidez] suggests that its conclusions regarding extraterritorial application of the Fifth Amendment are not so limited"), *rev'd on other grounds*, 536 U.S. 403 (2002); Paul B. Stephan, III, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. A. INT'L L. 777, 781 n.14 (1980) ("[Johnson] involved enemy aliens who had borne arms against the United States. Although the Court regarded this fact as important, its opinion did not stress the distinction and much of the argument advanced therein applies with equal force to foreign nationals other than enemy aliens.").

176. *See Johnson*, 339 U.S. at 778 ("[P]risoners at no relevant time were within any territory over which the United States [was] sovereign."); *Al Odah*, 321 F.3d at 1143-44 ("Sovereignty ... means ... supreme dominion exercised by a nation. The United States has sovereignty over the geographic area of the States and ... over insular possessions. Guantanamo Bay falls within neither category."). *But see Anupam Chander, Guantanamo and the Rule of Law: Why We Should Not Use Guantanamo Bay to Avoid the Constitution*, at
Guantanamo prisoners interferes with the prosecution of the war by the Executive Branch. As aptly noted by the Court in *Johnson*, it is difficult to envision a more efficient restraint on "a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."177 Whether the Court will depart from *Johnson* or distinguish it in any meaningful way remains to be seen.178

**VII. The Designations of Hamdi and Padilla as Enemy Combatants**

Commentators suggest that the designation of American citizens as enemy combatants is taking place against a background of relatively unchartered legal territory.179 Some maintain that designating American citizens as enemy combatants calls for a balancing of "civil liberties principles of the highest order — the right of American citizens to be free of indefinite detention without charge — against the military’s legitimate need to conduct war overseas without answering every step of the way to the judiciary."180 Others contend that the issue is not whether the government can detain enemy combatants outside the scope of criminal procedure, but rather

http://www.writ.corporate.findlaw.com/commentary/20020307_chander.html (Mar. 7, 2002) (arguing that "'[f]or over a century, we have had complete control over Guantanamo Bay. We should not now argue that — despite this longstanding and thoroughgoing control — we still do not have sovereignty, because Guantanamo is technically Cuban soil.").

177. *Johnson*, 339 U.S. at 779. This is not to say, however, that these detainees may not "have some form of rights under international law." *Rasul*, 215 F. Supp. 2d at 73.

178. One editorial noted:

> It is often a mistake to read too much into a decision merely to hear a case; the justices could simply have taken the matter because the case is of sufficient importance that they felt obliged to resolve it from the top. But it’s also possible that some of the justices, like many other Americans are alarmed by the administration’s obstinate refusal to be governed by reasonable rules at Guantanamo, where it is holding about 660 people.

Editorial, *Justices at Guantanamo*, WASH. POST, Nov. 11, 2003, at A24; see Linda Greenhouse, *It’s a Question of Federal Turf*, N.Y. TIMES, Nov. 12, 2003, at A1 ("[T]he question of jurisdiction — whether the courthouse doors are open to various categories of cases and claimants — goes to the heart of the Supreme Court’s role, as the court’s critics as well as its friends have always understood.").

179. See Editorial, *Legal Limbo: ‘Enemy Combatants’ in Uncharted Territory*, DALLAS MORNING NEWS, Aug. 16, 2002, at 26A (commenting that "we are treading on new ground" in connection with Hamdi’s detention); Mitch Frank & Joe Pappalardo, *Uncharted Legal Territory*, 159 TIME ATLANTIC 54 (2002) (noting that with respect to rules governing the detention of combatants, prosecutors concede that "'[w]e are in uncharted legal territory’").


https://digitalcommons.law.ou.edu/olr/vol56/iss3/3
whether it should deny those so designated "any opportunity, ever, to tell their side of the story to any court, any lawyer, or the public, and can instead keep them in solitary confinement for months, years, perhaps decades — even if they are U.S. citizens, and even if they were arrested in this country in civilian clothes."\textsuperscript{181} Before discussing Hamdi and Padilla’s arguments in the courts, a brief summary of the government’s facts in support of their respective designations is warranted.

\textbf{A. Yaser Esam Hamdi}

In 2002, the U.S. government determined that Yaser Esam Hamdi, one of the Guantanamo detainees, was an American citizen,\textsuperscript{182} and transferred him to a naval brig in Norfolk, Virginia, where officials indicated he would be held as an enemy combatant.\textsuperscript{183} To support its decision designating Hamdi as an enemy combatant,\textsuperscript{184} the government maintained that in the summer of 2001, Hamdi traveled to Afghanistan where he joined a military unit and obtained weapons training.\textsuperscript{185} Later that year, he surrendered with his unit to Northern Alliance forces, handing over a Kalashnikov rifle.\textsuperscript{186} In interviews, Hamdi also admitted that he traveled to Afghanistan "to train with and, if necessary, to fight for the Taliban."\textsuperscript{187}

\textbf{B. Jose Padilla}

Unlike Hamdi, who was captured in Afghanistan, Jose Padilla was arrested in May 2002 at O’Hare International Airport on a material witness

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\footnotesize
\textsuperscript{181} Stuart J. Taylor, \textit{Detain ‘Enemy Combatants’ — But Give Them Hearings}, 34 NAT’L J. 2528, 2528 (2002); see Charles Lane, \textit{In Terror War, 2nd Rack for Suspects}, WASH. POST, Dec. 1, 2002, at A1 (reporting that “[b]roadly speaking, the debate between the administration and its critics is not so much about the methods the government seeks to employ as it is about who should act as a check against potential abuses”).

\textsuperscript{182} See supra note 11.

\textsuperscript{183} See supra note 12.

\textsuperscript{184} These facts are derived from a sworn declaration by Michael H. Mobbs, a Special Advisor to the Under Secretary of Defense for Policy, which was filed by the government in connection with litigation that ensued (and which is discussed in more detail below). See Respondents’ Motion for Certification of Interlocutory Appeal and For Stay at 3, Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002) (No. 2:02cv439), available at http://news.findlaw.com/hdocs/docs/hamdi/hamdirums81902gмот.pdf.


\textsuperscript{186} See The Case Against Mr. Hamdi, supra note 185, at B6; Tom Jackman, \textit{Father Says ‘Combatant’ Was Doing Relief Work}, WASH. POST, Aug. 9, 2002, at A2.

\textsuperscript{187} The Case Against Mr. Hamdi, supra note 185, at B6; Prosecutors Detail Enemy Combatant Case, N.Y. TIMES, July 26, 2002, at A19.
\end{flushleft}
warrant. In June 2002, President Bush issued an order designating Padilla as an enemy combatant and directed his transfer to the custody of the U.S. military.

In support of Padilla’s designation the government asserted the following facts. After Padilla was released from prison in the early 1990s, he traveled to Egypt, Pakistan, Saudi Arabia, and Afghanistan and became associated with the al Qaeda network. During 2001 and 2002, while in Pakistan and Afghanistan, Padilla met with senior al Qaeda leaders on several occasions and received training that included the wiring of explosive devices. In addition, he discussed participation and involvement in terrorist operations targeting the United States with al Qaeda members, including a plan to detonate a “radiological dispersal device” or dirty bomb, and the detonation of explosive devices in gas stations and hotel rooms. Multiple intelligence sources confirmed Padilla’s involvement in the planning of future terrorist attacks in the United States, including an attack involving a dirty bomb.

President Bush concluded that Padilla’s designation as an enemy combatant was “necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, or other governmental personnel, or citizens.” As noted by the President in his order designating

189. Id. at 571.
190. These facts also are derived from another sworn declaration by Mobbs, which was filed by the government in connection with litigation that ensued (and which is discussed in more detail below). See Declaration of Michael H. Mobbs, Special Advisor To the Undersecretary of Defense For Policy (Aug. 27, 2002) [hereinafter Mobbs Declaration], http://news.findlaw.com/htdocs/docs/padilla/padillabush82702mobbs.pdf.
191. Mobbs Declaration, supra note 190, ¶ 4-5.
192. Id. ¶ 6, 9-10.
193. Dirty bombs “consist of radioactive material packed next to conventional explosives. They do not produce the catastrophic destruction characteristic of nuclear explosions, but they can contaminate areas enough to force a prolonged evacuation.” Mitchel Maddux, Heading Off Terror on the Waterfront, N.J. RECORD, Apr. 23, 2002, at A1; see Joby Warrick, Hunting a Deadly Soviet Legacy, WASH. POST, Nov. 11, 2002, at A1 (reporting that “[w]ith conventional explosives and a few ounces of cesium 137 or strontium 90, a dirty bomb could contaminate large swaths of real estate with dangerous radiation, unleashing panic and rendering some areas uninhabitable for decades”).
194. Mobbs Declaration, supra note 190, ¶ 8-9.
195. Id. ¶ 3.
Padilla as an enemy combatant, Padilla had “engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States,” he “possesse[d] intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda,” and he “represent[ed] a continuing, present and grave danger to the national security of the United States.”

VIII. Hamdi’s and Padilla’s Legal Challenges to Their Detentions

Hamdi and Padilla challenged their detentions by filing petitions for writs of habeas corpus. The arguments presented in their petitions and the courts’ responses to these arguments are discussed below.

A. Hamdi v. Rumsfeld

In June 2002, Esam Fouad Hamdi, Hamdi’s father, filed a petition for a writ of habeas corpus on behalf of Hamdi as next friend in the United States District Court for the Eastern District of Virginia, naming as respondents Secretary of Defense Donald Rumsfeld and Commander W.R. Paulette. The petition alleged that Hamdi’s detention violated the Fifth and Fourteenth Amendments, and that, to the extent the President’s order of November 13th sought to foreclose any legal challenge to Hamdi’s detention by way of a writ of habeas corpus, it violated Article I of the U.S. Constitution. In the prayer for relief, the petition requested, in part, that counsel be appointed to represent Hamdi, that all interrogations cease while the litigation was pending, and that he be released from custody.

197. See supra note 74.


199. See supra note 74.

200. Petition for Writ of Habeas Corpus at 1, Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (No. 2:02cv439) [hereinafter Petition], available at http://news.findlaw.com/hdocs/docs/hamdi/hamdirums61102pet.pdf. This was the third petition filed on Hamdi’s behalf. Two earlier petitions, one filed by Frank Dunham, the Federal Public Defender for the Eastern District of Virginia and a second by Christian Peregrim, a private citizen from New Jersey, were dismissed because neither party had a significant relationship with Hamdi so as to possess “next friend” standing to bring the suit. See Hamdi, 296 F.3d at 281.

201. Petition, supra note 200, at 6.

202. Id. at 7.
The same day the petition was filed, the district court entered an order appointing the Federal Public Defender to represent Hamdi and granting him private access to his client.\footnote{203} Two days later, the government filed a motion for a stay of the district court’s order with the United States Court of Appeals for the Fourth Circuit.\footnote{204}

In reversing the district court’s order, the Fourth Circuit noted that “the Supreme Court ha[di] shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs.”\footnote{205} This deference, the court pointed out, “extend[ed] to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle.”\footnote{206}

Having acknowledged the Supreme Court’s jurisprudence, the court found that the order appointing counsel for Hamdi and providing counsel with unmonitored access failed to address serious questions without the benefit of full briefing and argument.\footnote{207} For example, the order failed to consider the effect to the government’s intelligence gathering efforts by granting Hamdi unrestricted access to counsel and the extent to which courts were authorized to review combatant status designations.\footnote{208} Rather, the order appeared to assume that Hamdi was not an enemy combatant or, if he was, that he had the right to counsel with unfettered access.\footnote{209} In either case, the

\footnote{203.  Hamdi v. Rumsfeld, No. 2:02cv439 (E.D. Va. June 11, 2002) (order granting Hamdi access to public defender), available at http://news.findlaw.com/hdocs/docs/hamdi/hamdirums61102ord.pdf. The order provided that the “meeting [was] to be private between Hamdi, the attorney, and the interpreter, without military personnel present, and without any listening or recording devices of any kind being employed in any way.” \textit{Id.} at 3.}

\footnote{204.  \textit{See Hamdi}, 296 F.3d at 281.}

\footnote{205.  \textit{Id.}}

\footnote{206.  \textit{Id.}}

\footnote{207.  \textit{Id.} at 282. To illustrate this point, the court noted:}

\begin{quote}
[I]t has been the government’s contention that Hamdi is an “enemy combatant” and as such “may be detained at least for the duration of the hostilities.” The government has asserted that “enemy combatants who are captured and detained on the battlefield in a foreign land” have “no general right under the laws and customs of war, or the Constitution . . . to meet with counsel concerning their detention, much less to meet with counsel in private, without military authorities present.” The Public Defender for his part has contended that “no evidence has been submitted to support” Hamdi’s status as an enemy combatant and that “unlike aliens located outside the United States, Petitioner Hamdi [as an American citizen detained in the United States] is entitled to constitutional protections” including unmonitored access to counsel.
\end{quote}

\footnote{208.  \textit{Id.}}

\footnote{209.  \textit{Id.}}
court reasoned that each of these alternative theories in support of the district court's ruling had "sweeping implications for the posture of the judicial branch during a time of international conflict, and neither [could] rest on a procedurally flawed foundation that denied both petitioner[] and the government a chance to properly present their arguments, or to lay even a modest foundation for meaningful appellate review."\(210\) Accordingly, the appellate court reversed the district court's order.\(211\)

The government, however, further urged that the petition should be dismissed altogether because "'given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such.'\(212\) The Fourth Circuit rejected this contention, finding that if it dismissed the petition, it "would be summarily embracing a sweeping proposition — namely, 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."\(213\) Declining that invitation, the appellate court opted to remand the case to the district court.\(214\)

In the context of the remand, the Fourth Circuit cautioned that the executive branch, rather than the legislative or judicial branches of government, was "best prepared to exercise ... military judgment attending the capture of alleged combatants" and that "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan [needed to] reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack."\(215\) Further, while the court insisted that the procedures and standards governing the case on remand were not presently at issue, it stressed that, under separation-of-power principles, the standard of review governing the designation of Hamdi as an enemy combatant "must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation."\(216\) To that end, the district

\(210\) Id. at 282-83.

\(211\) Id. at 283.


\(213\) Id.

\(214\) Id. at 283-84.

\(215\) Id. at 283.

\(216\) Id. at 283-84. As the court explained, "allowing alleged combatants to call American commanders to account in federal courtrooms would stand the warmaking powers of Articles I and II on their heads." Id. at 284.
court was directed to "consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary."217 The court also cautioned that the role of counsel was a question which needed careful consideration.218

Upon remand, the government filed a two-page declaration by Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, explaining why it was holding Hamdi.219 Finding the proffer in Mobbs' declaration insufficient, the district court sought copies of all statements made by Hamdi, including those "conducted solely for intelligence purposes," the names and addresses of those who interrogated him, statements by members of the Northern Alliance regarding the circumstances of Hamdi's capture, and other sensitive material.220 The government declined to provide the information, and following an appeal, the Fourth Circuit directed the district court to consider whether the declaration alone contained sufficient information to label Hamdi an enemy combatant.221 The district court held the declaration insufficient and reinstated its earlier demand for additional information leading to another appeal to the Fourth Circuit.222

The Fourth Circuit ruled that the government did not need to provide the materials requested by the district court because doing so risked "'stand[ing] the warmaking powers of Articles I and II on their heads.'"223 As to whether

217. Id. at 284.
218. Id.
219. See Jackman, supra note 186, at A2. The essential facts in that declaration are discussed at supra text accompanying notes 184-87.
223. Hamdi v. Rumsfeld, 316 F.3d 450, 470 (4th Cir. 2003), cert. granted No. 03-6696, 2004 WL 42546 (U.S. Jan. 9, 2004) (alteration in original) (quoting Hamdi, 296 F.3d at 284). For example, the court found the production of all of Hamdi's statements and any notes from his interviews problematic because "it [was] precisely such statements, relating to a detainee's activities in Afghanistan, that may contain the most sensitive and the most valuable information for our forces in the field." Id.
Hamdi’s petition should be dismissed or remanded for further proceedings, the court ruled that no further factual inquiry or evidentiary hearing was necessary in connection with the enemy combatant designation because Hamdi indisputably had been apprehended abroad in an active combat operations zone and further inquiry on this question would interfere with the conduct of military affairs. Applying the principles of Quirin, the court reasoned that “[t]he privilege of citizenship entitle[d] Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches.”

In December 2003, eleven months after the court’s ruling in Hamdi effectively barring counsel from a habeas corpus proceeding involving a citizen designated as an enemy combatant and captured abroad, the government announced that Hamdi would be permitted access to a lawyer. Government officials indicated that the military had completed its intelligence collection efforts regarding Hamdi and that national security interests would not be compromised by affording him access to counsel at this time. Officials further emphasized “that the decision was a matter of policy, not law.”

224. Id. at 473.
225. Id. at 475. The court also rejected Hamdi’s contention that his detention was barred by 18 U.S.C. § 4001(a) and Article 5 of the Geneva Convention. As to § 4001(a), which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,” the court ruled that, even assuming this provision applied in the present circumstances, the joint resolution authorized such detention. Id. at 467–68 (quoting 18 U.S.C. § 4001 (2000)). Additionally, the court found support for Hamdi’s detention in 10 U.S.C. § 956(5) which authorized “expenditure of funds for ‘the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined . . . to be similar to prisoners of war.’” Id. at 467 (alterations in original) (quoting 10 U.S.C. § 956(5) (2000)). As to Article 5 of the Geneva Convention, which requires the determination of status as an enemy belligerent to be made “by a competent tribunal,” the court ruled that the Geneva Convention did not create a private right of action. Id. at 468 (quoting Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 3324, 75 U.N.T.S. 135, 142). But even if it did, it was not at all clear that an Article III court was the appropriate tribunal to make such a determination. Id. at 469. One critic of this ruling has argued that the court’s “diluted level of judicial review is tantamount to an abdication” and that “[t]he court valorizes separation of powers principles, including its grandiose construction of the President’s war powers, at the expense of checks and balances.” Susan Herman, Yasser Hamdi and the Fourth Circuit’s Legal No-Man’s Land, JURIST ¶ 4 (Jan. 13, 2003), at http://jurist.law.pitt.edu/forum/forumn ew84.php.
228. Dan Eggen, Decision to Allow Lawyer for ‘Enemy Combatant’ Is New Policy, WASH. POST, Dec. 4, 2003, at A10. As noted earlier, the U.S. Supreme Court granted certiorari in the

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B. Padilla v. Bush

In June 2002, attorney Donna R. Newman filed a petition for a writ of habeas corpus on Jose Padilla's behalf in the United States District Court for the Southern District of New York, naming as respondents President Bush, Attorney General John Ashcroft, Secretary of Defense Donald Rumsfeld, and Commander M.A. Marr.229 Later that same month, as next friend, Newman filed an amended petition alleging that (1) Padilla's detention violated the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution; (2) to the extent the President's order foreclosed a legal challenge to the detention by way of the writ of habeas corpus, it constituted an "unlawful Suspension of the Writ, in violation of Article I of the United States Constitution;" and (3) Padilla's detention violated the Posse Comitatus Act.230

The government moved to dismiss the amended petition on a number of grounds, arguing, in part, that Padilla's counsel lacked standing to bring the petition as "next friend" and that the court lacked jurisdiction over any properly named respondent.231 Alternatively, the government argued that the court should transfer the case to South Carolina where Padilla was detained.232 Regarding the lawfulness of the detention, the government argued that it had been established by a sealed declaration filed with the court.233

The district court ruled that Padilla's counsel had standing as "next friend" to file the petition on his behalf and that it had jurisdiction over one of the respondents named in the petition (Secretary Rumsfeld), thereby

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232. Id.

233. Id. at 572; see supra note 188. In the event the court found that declaration deficient, the government also submitted another sealed declaration by the same affiant. Padilla, 233 F. Supp. 2d at 572.
obviating the need to transfer the case to South Carolina.\textsuperscript{234} Having resolved these procedural and jurisdictional questions, the court then addressed the lawfulness of Padilla’s detention, his right to consult with counsel, and the standard of review governing the executive branch’s designation of an American citizen as an enemy combatant who is not captured abroad in the field of battle.\textsuperscript{235}

1. The President’s Authority to Designate American Citizens as Enemy Combatants

Padilla and amici\textsuperscript{236} argued that because the United States was not engaged in a conventional war, the President could “not use his powers as Commander in Chief or apply the laws of war to Padilla.”\textsuperscript{237} Additionally, they argued that because Padilla was an American citizen, and the civilian courts were available, indefinite detention was unconstitutional.\textsuperscript{238} The court rejected both contentions.

First, the court held that legal precedent established that the President may exercise his powers as Commander in Chief even when Congress has not issued a formal declaration of war.\textsuperscript{239} Moreover, assuming that congressional authorization was necessary to declare war, the joint

\textsuperscript{234} Padilla, 233 F. Supp. 2d at 575-87.

\textsuperscript{235} Id. at 587-610. In a footnote, the court summarily dismissed Padilla’s argument that his detention violated the Posse Comitatus Act, finding that even assuming the statute was enforceable in a habeas corpus proceeding, he was not being detained for violating a civilian law or to execute such a law. Id. at 588 n.9.

\textsuperscript{236} The New York State and the National Association of Criminal Defense Lawyers, the American and New York Civil Liberties Union Foundations, and the Center for National Security Studies filed briefs arguing that Padilla’s detention was unlawful. Id. at 569 n.2.

\textsuperscript{237} Id. at 588.

\textsuperscript{238} Id.

\textsuperscript{239} Relying on The Prize Cases, 67 U.S. (2 Black) 635 (1862), the court determined that “a formal declaration of war is not necessary in order for the executive . . . to prosecute an armed conflict — particularly when, as on September 11, the United States is attacked.” Padilla, 233 F. Supp. 2d at 589; see Campbell v. Clinton, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) (“I read the Prize Cases to stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected.”). As to formally declared wars, the court observed:

Taking into account only the modern era, the last declared war was World War II. Since then, this country has fought the Korean War, the Viet Nam War, the Persian Gulf War, and the Kosovo bombing campaign, as well as other military engagements in Lebanon, Haiti, Grenada and Somalia, to cite a random and by no means exhaustive list, with no appellate authority holding that a declaration of war was necessary.

Padilla, 233 F. Supp. 2d at 590.
resolution authorizing the use of force "engage[d] the President’s full powers as Commander in Chief." As to Padilla’s American citizenship and the fact that officials captured him on American soil when the civilian courts were in operation, the court preliminarily noted that (1) the laws of war drew a distinction between unlawful and lawful combatants, and (2) "when the President designated Padilla an 'enemy combatant,' he necessarily meant that Padilla was an unlawful combatant, acting as an associate of a terrorist organization whose operations d[id] not meet the four criteria necessary to confer lawful combatant status on its members and adherents." Accordingly, the court deemed it immaterial that Padilla was an American citizen and that the civilian courts were in operation. The court also found support for its determination that the President had the authority to order the detention of an American citizen as an unlawful combatant in the Supreme Court’s ruling in Quirin recognizing that unlawful combatants were "subject to capture and detention." Having

240. Padilla, 233 F. Supp. 2d at 590; see supra note 2.
242. Id. at 593. The court distinguished Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866), upon which Padilla relied, on the grounds that the Milligan petitioner was not an enemy belligerent. Padilla, 233 F. Supp. 2d at 593.
243. The court also rejected the contentions that Padilla’s seemingly indefinite detention was illegal and also barred by 18 U.S.C. § 4001(a) which, as noted previously, provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” 18 U.S.C. § 4001 (2000). With respect to the former, the court determined that “[a]t some point in the future, when operations against al Qaeda fighters end, or the operational capacity of al Qaeda is effectively destroyed, there may be occasion to debate the legality of continuing to hold prisoners based on their connection to al Qaeda, assuming such prisoners continue to be held at that time.” Padilla, 233 F. Supp. 2d at 590. As to the latter, the court held that the joint resolution was for all intents and purposes an “Act of Congress”; therefore, the statute was not violated. Id. at 598.
244. Padilla, 233 F. Supp. 2d at 595 (quoting Ex parte Quirin, 317 U.S. 1, 31 (1942)). The Padilla court reasoned:

[It] appears that the [Supreme] Court touched directly on the subject at issue in this case when it said that “[u]nlawful combatants are likewise subject to capture and detention.” Although the issue of detention alone was not before the Court in Quirin, I read the quoted sentence to mean that as between detention alone, and trial by a military tribunal with exposure to the penalty actually meted out to petitioners in Quirin — death — or, at the least, exposure to a sentence of imprisonment intended to punish and deter, the Court regarded detention alone, with the sole aim of preventing the detainee from rejoining hostile forces — a consequence visited upon captured lawful combatants — as certainly the lesser of the consequences an unlawful combatant could face. If, as seems obvious, the Court in fact regarded detention alone as a lesser consequence than the one it was considering — trial by military tribunal — and it approved even that greater consequence, then our case is a fortiori from Quirin as regards the lawfulness of
concluded that Padilla’s detention was not per se unlawful, the court next addressed the role of counsel.

2. The Role of Counsel

The court found that Padilla had no right to counsel under the Sixth Amendment because he was not detained pursuant to any criminal proceeding. Regarding the Fifth Amendment, the court held that the self-incrimination clause did not support a right to counsel because Padilla did not confront the prospect of a criminal trial. The court found it unnecessary to determine whether the due process clause of the Fifth Amendment provided Padilla with such a right because there were nonconstitutional alternatives: the All Writs Act and the habeas corpus statute.

With respect to the habeas corpus statute, the court found that it was “clear that Congress intended habeas corpus petitioners to have an opportunity to present and contest facts, and courts to have the flexibility to permit them to do so under proper safeguards.” As to the All Writs Act, the court determined that Supreme Court jurisprudence suggested a broad interpretation of the “power of a court hearing a habeas corpus petition to fashion remedies.” In light of these statutes, the court held that Padilla should be permitted to consult with counsel in connection with his petition, and in particular, the declaration submitted by the government in support of

detention under the law of war.

Id. (alteration in original) (citation omitted) (quoting Quirin, 317 U.S. at 31).

245. The Sixth Amendment provides in part that “[i]n all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI.


247. The Fifth Amendment provides in part that “[n]o person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.


249. 28 U.S.C. § 1651 (2000). The All Writs Act provides that “all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” Id. § 1651(a).


251. Id. at 601-02.

252. Id.; see also Harris v. Nelson, 394 U.S. 286, 299 (1969) (“[T]he habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by [any] analogy to existing rules or otherwise in conformity with judicial usage. ... Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651.”)
his detention. Further, as to the government’s concern that Padilla might use his lawyer to pass messages to others, the court found this concern to be conjectural and noted that military personnel could “monitor Padilla’s contacts with counsel, so long as those who participate[d] in the monitoring [were] insulated from any activity in connection with [the] petition, or in connection with a future criminal prosecution of Padilla, if there should ever be one.” The court left it to the parties to determine the conditions under which counsel could confer with Padilla.

3. The Standard of Review

In setting forth the standard that would govern the review of the petition, the court recognized that when, as in the case before it, political branches exercised war power judgments under Articles I and II, those judgments were not so much subject to review by Article III courts as they were “to the perhaps less didactic but nonetheless searching audit of the democratic process.” Accordingly, the court limited judicial review of the President’s enemy combatant designation to two questions. First, was there “some

253. Padilla, 233 F. Supp. 2d at 603; see Nicholas A. Kacprowski, Note, Stacking the Deck Against Suspected Terrorists: The Dwindling Procedural Limits on the Government’s Power to Indefinitely Detain United States Citizens as Enemy Combatants, 26 SEATTLE U. L. REV. 651, 669 (2003) (“One notable effect of the Padilla court’s finding that there was a statutory, as opposed to constitutional, right to counsel, is that it allows courts greater flexibility in denying enemy combatants the right to counsel, rather than establishing an immutable right.”).

254. Padilla, 233 F. Supp. 2d. at 603-04. The court found that employing the government’s logic, no member of al Qaeda facing prosecution in an Article III court would have access to counsel, a result barred by the Sixth Amendment. Id. Further, the sealed and unsealed declarations filed by the government did not support the contention that Padilla was trained to transmit information in the way the government feared, and in any event, any damage had already taken place because Padilla had met with counsel before being designated an enemy combatant. Id. at 604. Lastly, Padilla’s lawyers were officers of the court and nothing in their past conduct suggested that they would act as conduits for Padilla. Id.

255. Id. at 605. Contrasting the ruling in Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002), cert. granted No. 03-6696, 2004 WL 42546 (U.S. Jan. 9, 2004), where the Fourth Circuit reversed the order of a district court directing the government to permit unmonitored access by counsel to Hamdi, the Padilla court pointed out that “[n]o such access is to be granted here.” Padilla, 233 F. Supp. 2d at 604.

256. Padilla, 233 F. Supp. 2d at 604. Article I, Section 8 of the U.S. Constitution grants Congress the power to “provide for the common Defence and general Welfare of the United States . . . [t]o Declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . [t]o raise and support armies . . . [a]nd [t]o provide and maintain a Navy.” U.S. CONST. art. I, § 8. Article II, Section 2 provides that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” U.S. CONST. art. II, § 2, cl. 1.
evidence" that Padilla participated in a wartime mission against the United States with an enemy of the United States? Second, was that evidence "mooted by subsequent events?" The government responded by filing a more detailed submission, explaining the potentially adverse consequences of granting Padilla access to counsel. The court again ruled that Padilla had the right to consult with a lawyer before he responded to the government’s claim that he was an enemy combatant, and the government appealed the ruling.

4. The Second Circuit’s Ruling

On appeal, in a split decision, the Second Circuit ruled that the President did not have the inherent authority under the Constitution to detain American citizens as enemy combatants when they were "seized on American soil outside a zone of combat." The majority reasoned that the

257. In a subsequent ruling, the court explained that the application of the "some evidence" standard assured that the executive branch did not deprive a person of his liberty arbitrarily. Padilla ex rel. Newman v. Bush, 243 F. Supp. 2d 42 (opinion and order granting motion to reconsider, at 27), available at http://news.findlaw.com/hdocs/docs/padilla/padillarums31103 opn.pdf. Thus, Padilla was entitled to present evidence that undermine[d] the reliability of the Mobbs Declaration. Furthermore, inasmuch as Padilla ha[d] not yet been heard at all on the subject, he [was] entitled to present evidence that conflict[ed] with what [was] set forth in the Mobbs Declaration, and to have that evidence considered alongside the Mobbs Declaration.

Id. at 31.

258. Padilla, 233 F. Supp. 2d at 608; see Kacprowski, supra note 253, at 694-95 (noting that the most significant innovation of the court's ruling "was allowing . . . enemy combatants to present facts and evidence of their own in support of their challenge to their classification, and holding that it would evaluate the evidence presented by the government supporting the classification and not just the legal sufficiency of the changes.").


261. Padilla ex rel. Newman v. Bush, 352 F.3d 695, 698 (2d Cir. 2003). The majority stressed that its ruling was "limited to the case of an American citizen arrested in the United States, not on a foreign battlefield or while actively engaged in armed conflict against the United States." Id. at 711; id. at 713 ("[W]e do not concern ourselves with the Executive's inherent wartime power, generally, to detain enemy combatants on the battlefield. Rather, we are called on to decide whether the Constitution gives the President the power to detain an American citizen seized in this country until the war with al Qaeda ends."); id. at 715 n.24 ("We only hold that the President's Commander-in-Chief powers do not encompass the detention of a United
Constitution's explicit grant of powers to Congress to define and punish offenses under the Offenses Clause, \(^{262}\) to suspend the writ of habeas corpus under the Suspension Clause, \(^{263}\) and to allow for the quartering of troops under the Third Amendment, but only as permitted by law, \(^{264}\) demonstrated "a powerful indication that, absent express congressional authorization, the President's Commander-in-Chief powers [did] not support Padilla's confinement."\(^{265}\) The majority further rejected the contention that Quirin supported the argument that the President has inherent authority as Commander-in-Chief to detain American citizens domestically as enemy combatants because in Quirin, there had been an express congressional authorization to establish military commissions to try combatants who had violated the laws of war.\(^{266}\)

Having concluded that the President possessed no inherent constitutional authority to detain Padilla, the majority then turned to the question of specific congressional authorization.\(^{267}\) The answer to this question, the majority found, was framed by the specific prohibition in the Non-Detention Act\(^{268}\) against the detention of citizens "except pursuant to an Act of Congress."\(^{269}\) And with respect to this prohibition, the majority concluded that neither the joint resolution authorizing the use of force, nor 10 U.S.C. § 956(5) which provides for the funding of military detentions, authorized Padilla's detention.\(^{270}\) As to the resolution, the majority determined that it lacked specific language "authorizing the detention of American citizens captured on United States soil, much less the express authorization required by section 4001 [of the Non-Detention Act]."\(^{271}\) With respect to § 956(5),

States citizen as an enemy combatant taken into custody on United States soil outside a zone of combat."

\(^{262}\) U.S. CONST. art. II, § 8, cl. 10.

\(^{263}\) U.S. CONST. art. I, § 9, cl. 2.; see supra note 70.

\(^{264}\) U.S. CONST. amend. III. The full text of that amendment states: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Id.

\(^{265}\) Padilla, 352 F.3d at 715.

\(^{266}\) Id. at 715-16. The majority also found that the precedential value of Quirin was "sharply attenuated" by the fact that "the Quirin Court did not have to contend with" 18 U.S.C. § 4001, which prohibits the detention of Americans "except pursuant to an Act of Congress." Id. at 716.

\(^{267}\) Id. at 718.

\(^{268}\) 18 U.S.C. § 4001(a); see discussion supra note 243.

\(^{269}\) Padilla, 352 F.3d at 718 (quoting 18 U.S.C. § 4001(a) (2000)). The majority rejected the government's contention that § 4001(a) applied only to detentions by the Attorney General and not the military. Id. at 720-22.

\(^{270}\) Id. at 724.

\(^{271}\) Id. at 723. In support of its reasoning, the majority relied in part on Ex parte Endo, 323
the majority found that, regarding American citizens captured away from the battlefield, the general authorization for expenditure of money contained in § 956(5) was insufficient to support their detention.272

In a forceful partial dissent,273 Judge Wesley argued that the majority's reasoning was deficient on two major points. First, Judge Wesley maintained that the President's inherent powers as Commander in Chief — in a time of recognized armed conflict — authorized the order calling for the detention and interrogation of Padilla.274 He found that even though Congress can utilize war powers in the domestic policy context, for example, in defining and punishing offenses committed on American soil, suspending the writ of habeas corpus, and determining whether and if soldiers will be quartered in private homes in times of war, none of those powers were at issue in the case involving Padilla.275 More significantly, Judge Wesley noted, the majority's opinion failed to "cite a specific constitutional provision in which Congress [was] given exclusive constitutional authority to determine how our military forces will deal with the acts of a belligerent on American soil."276 Further, and relying on the teaching of The Prize Cases,277 Judge Wesley concluded that congressional authorization was not necessary for the President to prosecute an armed conflict in response to an

U.S. 283 (1944) where, in discussing the exercise of war powers, the Supreme Court observed that "when asked to find implied powers in a grant of legislative or executive authority [the Court would assume] that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." Id. at 300. Applying Endo, the majority found that

[w]hile 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 [was] 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.

Padilla, 352 F.3d at 723.

272. Id. at 724.

273. Judge Wesley concurred with aspects of the majority's opinion relating to Padilla's counsel's standing as "next friend" with respect to the petition that was filed and the exercise of personal jurisdiction over the Secretary of Defense. Id. at 726 n.1 (Wesley, J., concurring in part, dissenting in part). He would have affirmed the ruling of the district court that Padilla was entitled to the assistance of counsel in challenging the lawfulness of his continued detention through a writ of habeas corpus. Id. (Wesley, J., concurring in part, dissenting in part).

274. Id. at 727.

275. Id.

276. Id.

277. 67 U.S. (2 Black) 635 (1862); see supra note 239.
attack on the United States.\textsuperscript{278}

In addition to the President’s inherent powers under Article II, Judge Wesley observed that the joint resolution authorizing the use of force provided ample support for the President’s action.\textsuperscript{279} Judge Wesley found that the plain language of the resolution authorized the President to use all appropriate and necessary force to prevent future terrorist attacks against the United States and that Padilla, who was “alleged to be closely associated with an al Qaeda plan to carry out an attack in the United States,” fell within its sweep.\textsuperscript{280} As to the majority’s contention that the resolution lacked the specificity required to authorize detentions, and therefore, did not qualify under the exception to 18 U.S.C. § 4001(a)’s prohibition against the detention of citizens (i.e., other than through an act of Congress), Judge Wesley found that it would be anomalous to read the resolution as “authoriz[ing] the interdiction and shooting of an al Qaeda operative but not the detention of that person.”\textsuperscript{281} Judge Wesley also made the point that there was nothing in the resolution limiting its scope or suggesting that the President’s response to the attacks was limited to foreign theaters.\textsuperscript{282}

\textsuperscript{278} Padilla, 352 F.3d at 727-28. Judge Wesley found the majority’s “zone of combat” analysis flawed. As he explained:

My colleagues . . . conclude that somehow the President has no power to deal with acts of a belligerent on U.S. soil “away from a zone of combat” absent express authorization from Congress. That would seem to imply that the President does have some war power authority to detain a citizen on U.S. soil if the “zone of combat” was the United States. The majority does not tell us who has the authority to define a “zone of combat” or to designate a geopolitical area as such. Given the majority’s view that “the Constitution lodges . . . [inherent national emergency powers] with Congress, not the President,” it would seem that the majority views this responsibility as also the singular province of Congress. That produces a startling conclusion. The President would be without any authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat or authorized the detention.

\textsuperscript{279} Id. at 728 (citations omitted).

\textsuperscript{280} Id. at 729.

\textsuperscript{281} Id. at 730-31; see supra notes 225, 243.

\textsuperscript{282} Id. at 731-32. As Judge Wesley aptly reasoned:

The resolution was a congressional confirmation that the nation was in crisis. Congress called upon the President to utilize his Article II war powers to deal with the emergency. By authorizing the President to use necessary and appropriate force against al Qaeda and its operatives, Congress had to know the President might detain someone who fell within the categories of identified belligerents in carrying out his charge. A different view requires a strained reading of the plain language of the resolution and cabins the theater of the President’s powers as

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IX. Analysis of the President’s Authority to Designate American Citizens as Enemy Combatants and the Role of the Courts and Counsel

Article II of the U.S. Constitution provides that all "executive Power" is vested in the President.\textsuperscript{283} The President also is the Commander in Chief of the armed forces.\textsuperscript{284} By their terms, "these provisions vest full control of the United States military forces in the President."\textsuperscript{285} In times of war, decisions by the Executive Branch "are generally political and military in nature, and neither judicially manageable nor reviewable."\textsuperscript{286} Further, "[w]hen 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."\textsuperscript{287}

The military's capture and detention of enemy combatants involves a fundamental executive decision under Article II of the Constitution,\textsuperscript{288}

\begin{quote}
Commander in Chief to foreign soil. If that was the intent of Congress it was masked by the strong and direct language of the Joint Resolution.
\end{quote}

\textit{Id.} at 732.

\textsuperscript{283} U.S. CONST. art. II, § 1, cl. 1.

\textsuperscript{284} Id. art. II, § 2, cl. 1.


\textsuperscript{286} Dreyfus v. Von Finck, 534 F.2d 24, 29 (2d Cir. 1976); see Hamdi v. Rumsfeld, 296 F.3d 278, 281 (4th Cir. 2002) ("In accordance with [the] constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs.")., cert. granted, No. 03-6696, 2004 WL 42546 (U.S. Jan. 9, 2004); Able v. United States, 155 F.3d 628, 633 (2d Cir. 1988) (recognizing that "[d]eference by the courts to military-related judgments . . . is deeply recurrent in Supreme Court caselaw and repeatedly has been the basis for rejections to a variety of challenges to . . . decisions in the military domain"); Padilla \textit{ex rel.} Newman v. Bush, 233 F. Supp. 2d 564, 607 (S.D.N.Y. 2002) ("The 'political branches,' when they make judgments on the exercise of war powers under Articles I and II, as both branches have here, need not submit those judgments to review by Article III courts. Rather, they are subject to the perhaps less didactic but nonetheless searching audit of the democratic process.")., aff'd in part, rev'd in part sub nom. Padilla v. Rumsfeld, 352 F. 3d 695 (2d Cir. 2003).

\textsuperscript{287} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (Jackson, J., concurring); accord Dames & Moore v. Regan, 453 U.S. 654, 668-69 (1981); \textit{Hamdi}, 296 F.3d at 281.

\textsuperscript{288} See Duncan v. Kahanamoku, 327 U.S. 304, 313-14 (1946) (recognizing "the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war") (citations omitted); \textit{Hamdi}, 296 F.3d at 281 (noting that "deference extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle").
regardless of whether the combatants are American citizens or whether their capture and detention occurs outside a zone of active military operations. Additionally, the Joint Resolution authorizing the use of "all necessary and appropriate force against those nations, organizations, or persons [the President] determine[d] planned, authorized, committed, or aided the terrorist attacks that occurred . . . or harbored such organizations or persons," contemplates the use of such lesser force as may be required to capture and detain enemy combatants so as to prevent them from engaging in further hostile acts against the United States. Lastly, the detention of enemy combatants finds support in 10 U.S.C. § 956(5), which provides for the expenditure of funds for the detention of prisoners of war and others the government determines to be "similar to prisoners of war." But what

289. See Ex parte Quirin, 317 U.S. 1, 37 (1942) ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful . . . ."); Hamdi, 296 F.3d at 283 ("[B]oth lawful and unlawful combatants, regardless of citizenship, 'are subject to capture and detention as prisoners of war by opposing military forces.'"); (quoting Quirin, 317 U.S. at 31); 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."); In re Territo, 156 F.2d 142, 144 (9th Cir. 1946) ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America.").

290. See Quirin, 317 U.S. at 38 (recognizing that petitioners were not "any the less belligerents if, as they argue[d], they ha[d] not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations"); Territo, 156 F.2d at 145 (making the point that "all persons who are active in opposing an army in war may be captured"); Padilla, 233 F. Supp. 2d at 610 ("[T]he President is authorized under the Constitution and by law to direct the military to detain enemy combatants . . . .").


The Joint Resolution's authorization to use force is limited only to those individuals, groups, or states that planned, authorized, committed, or aided the attacks, and those nations that harbored them. It does not, therefore, reach other terrorist individuals, groups, or states that cannot be determined to have links to the September 11 attacks. Nonetheless, the President's broad constitutional power to use military force to defend the nation, recognized by the Joint Resolution itself, would allow the President to take whatever actions he deemed appropriate to preempt or respond to terrorist threats from new quarters.

Delahunty & Yoo, supra note 285, at 516.


precisely is or should be the role of the judiciary when American citizens that the government designates enemy combatants in the war against terrorism attempt to challenge their detention? What about the role of counsel in that process? From the discussion above, several principles emerge.

First, American citizens designated as enemy combatants have a right to challenge the deprivation of their liberty based on that designation by filing a petition for a writ of habeas corpus. In responding to the petitions filed by Hamdi and Padilla, the government has acknowledged that point.

Second, and contrary to the Second Circuit’s ruling, the designation and detention of an individual as an enemy combatant, a procedure that finds its origins in the laws of war, involves the exercise of the President’s powers as Commander in Chief to provide for the national security and defense.

Combatants and to Try Those Enemy Combatants by Military Commission, 30 FORDHAM URB. L.J. 1465, 1479 (2003) (“The provisions of 10 U.S.C. (§) 956(5) support the ‘expenditure of funds for the detention of “prisoners of war” and persons — such as enemy combatants — “similar to prisoners of war,”’ indicating that Congress’ understanding that the military can capture and hold enemy combatants, including citizens, during wartime.”).

294. One commentator has observed:

The correct balance to be struck in reviewing combatant status decisions will be difficult. While strong deference must be given to the executive branch in this area, care must also be taken to protect innocent persons wrongfully detained as enemy combatants. Too deferential a review may equate to no review at all. While no one wants to compromise our nation’s security and intelligence interests, neither should fundamental constitutional protections be compromised.


295. See Hamdi, 316 F.3d at 464 (“The detention of United States citizens must be subject to judicial review.”); see also Meyerson, supra note 34, at 20 (arguing that “it is indisputable that the Supreme Court has jurisdiction to review Government claims as to who is a combatant properly subject to military tribunals”).

296. See Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002) (“The government has not disputed Padilla’s right to challenge his detention by means of a habeas corpus petition.”), aff’d in part, rev’d in part sub nom. Padilla v. Rumsfeld, 352 F. 3d 695 (2d Cir. 2003); see also Press Release, supra note 292 (noting that “[a]s part of its Returns in Hamdi and Padilla, the government submitted ample factual evidence supporting its determinations that Hamdi and Padilla [were] enemy combatants. These executive branch submissions to the judiciary are literally unprecedented in our nation’s long history of wartime detentions of enemy combatants, and demonstrate [the government’s] commitment to judicial review in this context.”).

297. See Ex parte Quirin, 317 U.S. 1, 27-28 (1942). See generally United States v. Salerno, 481 U.S. 739, 748 (1987) (“[I]n times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous.”).

298. See Hamdi v. Rumsfeld, 296 F.3d 278, 281-82 (4th Cir. 2002) (recognizing that “[t]he authority to capture those who take up arms against America belongs to the Commander in
The exercise of such power against the backdrop of the joint resolution, when coupled with the concerns identified in Johnson regarding judicial interference with ongoing military operations, point to a very narrow and deferential judicial review. Thus, an American citizen identified as an enemy combatant because he was indisputably captured abroad in a zone of combat operations will obtain “highly deferential” judicial review in connection with a petition for a writ of habeas corpus challenging the legality of his detention. Indeed, in such circumstances, if the government responds “to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner’s detention,” then “further judicial inquiry is unwarranted.” When a citizen is captured on American soil and designated as an enemy combatant, the designation should withstand judicial scrutiny if there is “some evidence” supporting it.

Finally, the role of counsel in habeas corpus proceedings to assist a citizen challenging his enemy combatant designation is circumscribed by constitutional and national security considerations. When a designation is brought about by a capture in an active zone of combat operations abroad, there does not appear to be any role for counsel. If the capture takes place on American soil, however, a compelling argument has been made that a citizen should be permitted to confer with counsel so as to be able to present facts related to the petition.

Chief under Article II, Section 2”), cert. granted, No. 03-6696, 2004 WL 42546 (U.S. Jan. 9, 2004).

299. Dames & Moore v. Regan, 453 U.S. 654, 660-61 (1981); Hamdi, 316 F.3d at 465 (“[If] deference to the executive is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain.”); Tiffany v. United States, 931 F.2d 271, 275 (4th Cir. 1991) (“Because providing for the national security is both a duty and a power explicitly reserved by the Constitution to the executive and legislative branches, . . . the judiciary must proceed . . . with circumspection.”).

300. Hamdi, 316 F.3d at 477; see United States v. Lindh, 212 F. Supp. 2d 541, 557 (E.D. Va. 2002) (“[T]he appropriate deference is to accord substantial or great weight to the President’s decision . . .”).

301. Hamdi, 316 F.3d at 476.

302. See Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 608 (S.D.N.Y. 2002), aff’d in part, rev’d in part sub nom. Padilla v. Rumsfeld, 352 F. 3d 695 (2d Cir. 2003); cf. Hamdi, 316 F.3d at 474 (“It is not necessary . . . to decide whether the ‘some evidence’ standard is the correct one to be applied . . . because we are persuaded for other reasons that a factual inquiry into the circumstances of Hamdi’s capture would be inappropriate.”).


304. Padilla, 233 F. Supp. 2d at 603; see Alejandra Rodriguez, Is the War on Terrorism Compromising Civil Liberties? A Discussion of Hamdi and Padilla, 39 CAL. W. L. REV. 379,
X. Conclusion

Notwithstanding the nature of the current "asymmetric war," the detention of enemy combatants is necessary both to prevent them from engaging in belligerent acts and to attempt to gain intelligence about the enemy and its plans. In these times of armed conflict, it has been persuasively noted that "[i]t is a military imperative and an integral part of the President’s constitutional duty to defend our country." Further, the joint resolution plainly authorizes the President to "use all necessary and appropriate force against those nations, organizations, and persons he determines" to be responsible for the attacks in order to "prevent any future acts of international terrorism" against our country. Whether in the field of active military operations or in the larger zone of combat which includes our mainland, the President has the authority to detain a person the government believes is planning an attack against the United States on al Qaeda’s behalf.

The caselaw in the war on terrorism is developing. Noncitizens captured and held in an area where the United States does not possess sovereignty — at least as of now — do not have access to Article III courts to challenge the legality of their detentions. American citizens captured in an active zone

393 (2003) ("If, in fact, the detention of an enemy combatant who is a United States citizen is lawful, then certain procedural safeguards must be delineated. Namely, the right to judicial review and access to counsel should be granted to all individuals the government labels enemy combatants."); Kacprowski, supra note 253, at 692 ("Allowing enemy combatants the right to counsel to challenge their classification on habeas review can only help to develop the law of war and answer the question of what constitutes a violation in the context of terrorism. It may also give some constitutional protection to those accused of being enemy combatants.").

305. Barton Gellman, In U.S., Terrorism’s Peril Undiminished, Nation Struggles on Offense and Defense, and Officials Still Expect New Attacks, WASH. POST, Dec. 24, 2002, at A1 (noting how "[t]errorism in its latest form has brought home the paradox of ‘asymmetric war,’ in which even a powerful nation may be badly hurt by an antagonist of incomparably lesser strength").

306. In re Territo, 156 F.2d 142, 145 (9th Cir. 1946) ("The object of capture is to prevent the captured individual from serving the enemy.").


308. See supra note 26.

309. See Editorial, Fairness for Detainees, WASH. POST, Dec. 21, 2003, at B6 ("It’s hard to see how [the joint resolution] would not cover a person the government believed to be planning an attack on al Qaeda’s behalf. The laws of war and American constitutional law alike recognize that part of fighting wars is catching and holding the other side’s fighters.").

310. One respected commentator has argued:

The legal black hole in which this leaves any and all innocent detainees held
of military operations have the right to seek judicial review of their detentions in Article III courts but that review is "a highly deferential one." 311 The Second Circuit's ruling that the President has no authority to detain American citizens in the United States who may be planning an attack on al Qaeda's behalf absent congressional authorization beyond the joint resolution is not likely to be sustained on appeal. 312 Rather, the holding of the district court that citizens captured in the United States enjoy the right to judicial review of their detentions and such detentions will be upheld if there is "some evidence" supporting them is likely to prevail. 313 This, then, leaves the question of access to counsel. In the case of a citizen captured abroad, while there does not appear to be any role for counsel in challenging an enemy combatant designation under Fourth Circuit precedent, after the intelligence collection efforts regarding such combatant have been completed and national security concerns are no longer present, and as a matter of policy, it appears that he may be afforded access to counsel. 314 In the case of a citizen captured in the United States, counsel should be made available to such a person in presenting facts contesting the designation. 315 As the cases percolate, the Supreme Court is likely to, and in fact it may be said that it has a duty to, address some of the important issues raised by the detentions of enemy combatants at home and abroad and provide further guidance regarding the application of the law in this area. 316

by U.S. forces abroad is both unjust and insulting to the international community. If this is the law, then the law needs amending.

Fundamental American values and international norms require some kind of due process for all prisoners, no matter where detained. Congress should now force the administration to do what it should have done long ago: assign military tribunals to interview every detainee and to provide all those who plausibly claim that they are not enemy combatants with a fair opportunity to prove it. Stuart Taylor, Jr., Opening Argument — Falsey Accused 'Enemies' Deserve Due Process, 35 NAT'L J. 785, 786 (2003) (emphasis added). The Supreme Court will rule on this issue next year.


312. See Statement of Mark Corallo, Director of Public Affairs, Department of Justice, on the Padilla decision (Dec. 18, 2003) (announcing that the Department of Justice will seek a stay and further judicial review for the Second Circuit's ruling), http://www.us.doj.gov/opa/pr/2003/december/03_opa_711.htm.


314. See supra notes 226-28 and accompanying text.

315. See supra note 304.

316. See Editorial, The Supreme Court and Sept. 11, N.Y. TIMES, Nov. 5, 2003, at A24 ("The court will soon have a chance . . . to consider several cases posing the question of how much, if any, our constitutional rights have changed as a result of Sept. 11. It has a duty to step
in and stand up for civil liberties."); Linda Greenhouse, Post-9/11 Detainee Cases on Supreme Court Docket, N.Y. Times, Nov. 3, 2003, at A16 (reporting that with cases flowing from the September 11 attacks “now reaching the Supreme Court in substantial numbers, the court faces a basic decision apart from the merits of any individual case: whether to become a player in the debate over whether to set the balance between individual liberty and national security”).

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