U.S. Citizens as Enemy Combatants: Indication of a Roll-Back of Civil Liberties or a Sign of our Jurisprudential Evolution?

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U.S. CITIZENS AS ENEMY COMBATANTS; INDICATION OF A ROLL-BACK OF CIVIL LIBERTIES OR A SIGN OF OUR JURISPRUDENTIAL EVOLUTION?

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I. EXTRAORDINARY TIMES

Exigent circumstances require our government to cross legal boundaries beyond those that are unacceptable during normal times.\(^1\) Chief Justice Rehnquist has expressed the view that “[w]hen America is at war . . . people have to get used to having less freedom.”\(^2\) A tearful Justice Sandra Day O’Connor reinforced this view, a day after visiting Ground Zero, by saying that “we’re likely to experience more restrictions on our personal freedom than has ever been the case in our country.”\(^3\) However, extraordinary times can not eradicate our civil liberties despite their call for extraordinary measures. “Lawyers have a special duty to work to maintain the rule of law in the face of terrorism, Justice O’Connor said, adding in a quotation from Margaret

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1 See Christopher Dunn & Donna Leiberman, Security v. Civil Liberties: Don’t Subvert Nation’s Values, NYCLU DAILY NEWS, Nov. 23, 2001, available at http://www.nyclu.org/wtc00.html (exhibiting how even the starkest advocates of civil liberties recognize the need for extreme measures in light of security concerns after September 11th); see also Roberto Lovato, Big Liberty is Watching; A Century After Orwell’s Birth, Reality Overtakes His Classic, IN THESE TIMES, July 21, 2003, at 20 (commenting on the public’s response to government utilizing huge amounts of public and private data concerning U.S. citizens and foreigners in post 9/11 times); Rachel L. Swarns, Threats and Responses: Security Concerns; Immigrants Feel the Pinch of Post-9/11 Laws, N.Y. TIMES, June 25, 2003, at A14 (discussing government immigration laws which have developed as a result of post 9/11 security measures).


3 Linda Greenhouse, A Nation Challenged: The Supreme Court; In New York Visit, O’Connor Foresees Limits on Freedom, N.Y. TIMES, Sept. 29, 2001, at B5 (quoting Justice O’Connor’s speech to law school students concerning her anticipation of restrictions on civil liberties in the U.S.).
Thatcher, the former British prime minister: 'Where law ends, tyranny begins.' Justice Scalia's assurance that he will not let the "ratcheting down" of our rights "go beyond the constitutional minimum" requires us to trust that we know what that minimum is today. Preservation of civil liberty is the force pulling against the tightening of control to enhance security. These opposing forces will forever be acting on each other. It would be naive, dangerous, and counterproductive to think our government could ignore the larger interests of society when an individual's civil liberties come in conflict with broader societal interests. It becomes a balancing test in which our nation weighs civil liberties against security.

In the wake of September 11th we stand in extraordinary times that threaten to tip the scales and disturb that balance. Our definition of terrorism is completely revamped. We have a heightened sensitivity to the real threat that exists close to home. Fear motivates us to concede liberties in the areas of privacy and rationalize violations of civil liberties that would never have been accepted. Warfare and the law of war have evolved beyond

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4 Id. (repeating Justice O'Connor's brief remarks, which emphasized the need to proceed with caution after September 11th).

5 Associated Press, Justice Scalia Says War Warrants Rights' Recess, SACRAMENTO BEE, Mar. 19, 2003, available at http://www.sacbee.com/24hour/special_reports/terrorism/story/814411p5777643c.html (failing to mention how he will prevent our slipping below constitutional minimums or where these minimums are, his reassurance is uncovincing).

6 See Jan Crawford Greenburg, Justices Permit Secret Hearings; Deportation Cases Can be Closed for Now, Court Says, CHI. TRIB., June 29, 2002, at 1N (quoting David Cole, a Professor at Georgetown University Law Center, that "There is no question that the Supreme Court is going to sooner rather than later be faced with how we should balance security and civil liberties in a post-Sept. 11 era"); see also Shannon Lohrmann, BMV to Ease ID Rules at End of Month, J. & COURIER (Ind.), Sept. 17, 2002, at A1 (discussing how Indiana Civil Liberties Union filed lawsuit against Bureau of Motor Vehicles, arguing counterterrorism security measures violate individual immigrants). See generally Deb Price, Men Sue Airlines, Claim Arab Bias, DETROIT NEWS, June 5, 2002, at 01A (commenting on difficulties airlines face in trying to balance security concerns with civil liberties after September 11, 2001).

7 See Charles M. Madigan, Bush Boosts Police Powers; Legal Immigrants Could be Subject to Long Detentions, CHI. TRIB., Sept. 19, 2001, at 1N (highlighting how Bush's expansion of government's power to detain legal immigrants suspected of crime, as new weapon in his war on terrorism, has been criticized as erosion of civil liberties); see also Staff, Our View, TIMES HERALD (Port Huron, Mich.), Jan. 1, 2002, at 7A (warning "America must learn to balance security against civil liberties"). See generally Nikki Swartz, Information at a Price: Liberty vs. Security: Follow-Up Legislation Proposes to Increase the Sweeping Domestic Intelligence and Surveillance Powers Granted to the U.S. Federal Government, by the USA Patriot Act - But Will it be at the Cost of Civil Liberties? Capital Edge: Legislative and Regulatory Update, 37 INFO. MGMT. J. 14 (May 1, 2003) (exhibiting the debate over the proper balance between civil liberties and security).

8 Compare Iver Peterson, State Hearings On Profiling Are Extended, N.Y. TIMES, Mar. 23, 2001, at B5 (discussing the extension of profiling trials and anti-profiling...
declared wars and traditional combat. However, war with a multinational fluid enemy, such as Al Qaeda, has not been previously contemplated and raises questions about the application of traditional law of war to this conflict.

Our government's attempts to weigh civil liberties against security interests have almost invariably resulted in an overstepping of what would be considered constitutional. The Court's inability to resist using necessity to justify the unconstitutional, particularly in wartime, is best illustrated by Korematsu v. United States, where the Court held the detention of Japanese citizens was constitutional. American citizens of
Japanese ancestry, who committed no crime, were taken from their homes and detained in camps for fear that there were disloyal members among them. In reviewing this action, the Supreme Court applied strict scrutiny, but found that the security threat provided a compelling interest that made the ethnic round up constitutional. "There is a limit to what courts will do to help those deprived of rights... because judges have a natural 'reluctance' to rule 'against the government on an issue of national security during wartime.' Deference to the executive and other branches, the doctrine of political questions, and expansion of war powers are the tools used in such justifications. There are, however, limits and Youngstown Sheet & Tube Co. v. Sawyer stands for the proposition that deference is not limitless in times of war.


14 See Korematsu, 323 U.S. at 218-19 (giving great deference to the military, which is "charged with the primary responsibility of defending our shores" and who "concluded that curfew provided inadequate protection"); see also Hirabayashi v. United States, 320 U.S. 81, 88 (1943) (exhibiting another case with required relocation areas for civilians of Japanese ancestry); Kirk L. Davies, The Imposition of Martial Law in the United States, 49 A.F. L. REV. 67, 103-04 (2000) (discussing how actions were taken by U.S. to relocate civilians of Japanese ancestry during WWII).

15 See Korematsu, 323 U.S. at 223-24 (referring to the real military dangers that were present due to the war with the Japanese empire).

16 Cohen, supra note 2 (expressing concern over Justice Rehnquist’s “selective blindness”).

17 See id. (recognizing that this deference is often so pervasive as to give credence to justify phrase “inter arma silent legis” in time of war law is silent’); see also Safeguard Civil Liberties, U.S.A. TODAY, Nov. 22, 2002, at 20A (stating “With the court’s reluctant to second-guess the administration, the responsibility falls on Congress to make sure fundamental liberties don’t become casualties in this latest war.”). See generally Detention of U.S. Citizens Captured with the Taliban (National Public Radio broadcast Morning Edition, Oct. 29, 2002, 10:00 AM ET) (conceding that courts are bound to give deference to the executive branch in issues involving the waging of war).

18 See Cohen, supra note 2 (indicating that the political question doctrine has often served to justify the expansion of executive power); see also Ex parte Quirin, 317 U.S. 1, 25 (1942) (maintaining that the expansion of war powers has extended executive powers); Robert Higgs, In the Name of Emergency, REASON, July 1987, available at http://www.independent.org/ti/news/011017Higgs.html (Oct. 17, 2001) (positing that the political question doctrine as well as the expansion of war powers have increased executive powers).


20 See Id. at 587 (insisting that the Constitution limits the functions of the executive branch in the lawmaking process during wartime); Davies, supra note 14, at 79 (arguing that there are limits on executive authority in wartime); see also Symposium, The Constitutional Structure of National Government in the United States: Is it in a State of Crisis?, 9 ADMIN. L.J. 1, 19 (1994) (detailing the procedural limits imposed on executive authority during wartime).
We expect some constitutional protections to erode in the face of danger.\(^2\) Indeed, using the classic economics of law approach, Judge Richard A. Posner argues that "[civil liberties] should be curtailed to the extent that the benefit of greater security outweighs the cost in reduced liberty."\(^2\) \(^2\) “[I]n wartime one can expect ‘protections will be ratcheted down to the constitutional minimum,”’ said Justice Scalia.\(^2\) Certain the public sentiment is not overwhelmingly against many of these restrictions, as a survey of Harvard law students shows overwhelming support of racial profiling at airports.\(^2\) Judge Posner correctly points out that our government’s exaggerated responses in the past were considered reasonable at the time; only after a period of calm reflection could what was excessive be separated from what was necessary.\(^2\) However, after the period of calm and with the benefit of hindsight we have separated out what was proper and exaggerated and then put up procedural safeguards to protect against repeating our indiscretions.\(^2\) The real question should be, do these safeguards hold up when we are faced with the next

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21 See Greenhouse, supra note 3, at B5 (predicting the imposition of restrictions on civil liberties); see also Davies, supra note 14, at 73 (foreseeing possible limitations on civil liberties during wartime). See generally The Constitutional Structure of National Government in the United States: Is it in a State of Crisis?, supra note 20, at 20 (detailing the potential incursions on civil liberties during wartime).


23 Justice Scalia Says War Warrants Rights’ Recess, supra note 5, (speaking at Carroll University Justice Scalia expressed the view that in wartime individual rights would be scaled back to the constitutional minimum).


25 See Posner, supra note 22 (expressing the view that simple cost benefit analysis justifies reduction in civil liberties so long as we trust the government to responsibly perform the cost benefit analysis); see also Chandrasekhar, supra note 24, at 251-52 (maintaining that there is no justification for racial profiling). See generally Baker, supra note 24, at 1391 (questioning whether it is necessary to use racial profiling at airports).

threat? Under what force will the levee break? Will we revert back to McCarthyism or detention followed by a period of apology or are we witnessing the slow judicial and political evolution of constitutional protections and civil liberties our forefathers contemplated?

This author believes our government's use of enemy combatant status to detain American citizens has violated our Constitution and rolled back civil liberties beyond what is acceptable. However, our jurisprudential evolution has been brought to bear on the dynamic pull between security and civil liberty. To examine this, I will look at enemy combatant status as applied to American citizens, analyzing our legal authority to invoke such status. This paper analyzes the justifications put forth by the government for the use of enemy combatant status and explores whether this is the type of reduction in civil liberty Judge Posner advocated or whether we have slipped below even Justice Scalia's constitutional minimum. Finally, I will propose that encroachments on civil liberties are reduced both in scale and scope with every subsequent transgression and that this evolution has a positive value despite the reality that there will always be victims in our social experiment.

II. TWO AMERICAN CITIZENS IN THE PRESENT CONFLICT ARE BEING DETAINED AS ENEMY COMBATANTS

The first American born citizen to be declared an enemy combatant was Yaser Esam Hamdi. Hamdi was born in Louisiana and moved to Saudi Arabia when he was young.


28 See Hamdi v. Rumsfeld, 316 F.3d 450, 460 (4th Cir. 2003) (maintaining that Hamdi was "born in Louisiana [and] he left for Saudi Arabia when he was a small child"); Tim McGlone, Hamdi Case May Go Before Supreme Court, VIRGINIAN-PILOT, Oct. 2, 2003, at B3 (highlighting that Hamdi's birth was in Louisiana because his Saudi Arabian parents were working there at the time). See generally Bryan Bender, US Army Chaplain Held In
According to the military, Hamdi arrived in Afghanistan in July or August of 2001, received weapons training, and joined with a Taliban military unit.\textsuperscript{29} Northern Alliance forces captured Hamdi with a unit of the Taliban in late 2001.\textsuperscript{30} Though the opinion of the Fourth Circuit intimates that Hamdi’s Taliban unit was engaged in battle with the Northern Alliance before his capture\textsuperscript{31} the ACLU’s Amicus Brief indicates that the government only alleged that Hamdi was willing to fight “if necessary”\textsuperscript{32} and was carrying an AK 47 when captured.\textsuperscript{33} The Northern Alliance transferred custody of Hamdi to the U.S. in Fall 2001.\textsuperscript{34} The United States detained Hamdi in Afghanistan,\textsuperscript{35} transferred him


\textsuperscript{29} See Hamdi, 316 F.3d at 461 (indicating that “[t]he military determined that Hamdi ‘traveled to Afghanistan in approximately July or August of 2001’ and proceeded to ‘affiliate with a Taliban military unit and receive weapons training’”); Bender, supra note 28 (alleging that Hamdi fought with the Taliban); see also Tom Jackman, \textit{Judges Wary of Interference in Hamdi Case; U.S. Appeals Panel Uneasy About Judicial Review of Military Wartime Decisions}, WASH. POST, Oct. 29, 2002, at A16 (relying on the Mobbs declaration).

\textsuperscript{30} See Brief of Amici Curiae American Civil Liberties Union et al. at 2, Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (No. 02-7338) [hereinafter ACLU Brief I] (stating “[t]he northern alliance captured Hamdi in Afghanistan in late 2001”); see also Jerry Markon, \textit{High Court Urged to Review Hamdi Detention}, WASH. POST, Oct. 2, 2003, at B03 (naming November as the month of capture); Tim McGlone, \textit{Hamdi Case Appears To Be Headed For High Court}, VIRGINIAN-PILOT, July 10, 2003, at B1 (repeating the government assertion that Hamdi was holding a “Soviet-made military assault rifle” at the time of his capture).

\textsuperscript{31} See Hamdi, 316 F.3d at 461 (stating that “[w]hile serving with the Taliban in the wake of September 11, he [Hamdi] was captured when his Taliban unit surrendered to Northern Alliance forces with which it had been engaged in battle”); McGlone, supra note 30 (explaining that the government claimed Hamdi’s capture happened during a battle between the Northern Alliance and the Taliban); see also Markon, supra note 30 (stating that “While fighting with the Taliban troops in Afghanistan, Hamdi was captured by Northern Alliance forces”).

\textsuperscript{32} See ACLU Brief I, supra note 30, at 2 (alleging further that the government maintained that Hamdi was “associated” with the Taliban).

\textsuperscript{33} The ACLU’S Brief notes that “at the time of his capture he was carrying a firearm.” \textit{Id.} According to the court, “[h]e was in possession of an AK-47 rifle at the time of surrender.” Hamdi, 316 F.3d at 460; McGlone, supra note 30.

\textsuperscript{34} See Hamdi, 316 F.3d at 460 (detailing Hamdi’s detention); Eric M. Freedman, \textit{Yaser Hamdi and the Great Writ’s Story}, RECORDER (San Francisco), Feb. 7, 2003, at 5 (basing his information of the declaration by Michael Mobbs, a special advisor to the undersecretary of defense); see also Bruce Fein, \textit{Judicial Squinting During War}, WASH. TIMES, Jan. 14, 2003, at A15 (claiming Hamdi was shuffled among Northern Alliance prisons).

\textsuperscript{35} See Hamdi, 316 F.3d at 460–61 (describing sequence of detentions in Afghanistan which included the prison at Mazar-e-Sharif, the prison in Sheberghan and camp X-ray); Tim McGlone, \textit{Norfolk Brig Detainee Put Taliban First, U.S. Claims; He Surrendered During Battle With N. Alliance}, VIRGINIAN-PILOT, July 26, 2002, at A1 (giving Hamdi’s statement, which was made to a U.S. military interrogation team at a prison in Sheberghan, Afghanistan, that “he went to Afghanistan to train with and, if necessary, fight for the Taliban”); see also Stewart M. Powell, \textit{Detainee’s Rights Allegedly Violated;}
to Guantanamo Bay, and eventually to the naval brig in Norfolk, Virginia. At the time, the spokeswoman for the Pentagon explained the move to Norfolk was deemed appropriate after discovering Hamdi might be a U.S. citizen. The spokesperson acknowledged the fact that U.S. citizenship would preclude the possibility of trial by military tribunal and confessed a lack of knowledge about what would be done with Hamdi.

The second American citizen deemed an enemy combatant is thirty-one year old Jose Padilla. Padilla was born in Brooklyn and moved to Chicago when he was five. Chicago police arrested him in 1985 "in connection with an armed robbery turned homicide." After three years in juvenile detention, police arrested Padilla twice for assault and battery and trespassing.

Arabian Student Born in U.S., SAN ANTONIO EXPRESS-NEWS, June 5, 2002, at 13A (stating "Hamdi was taken into U.S. custody in Afghanistan").

See Hamdi, 316 F.3d at 461 (continuing the description of Hamdi's detention); McGlone, supra note 28 (explaining that Hamdi was eventually transferred from the brig in Norfolk, Virginia to another brig in South Carolina); see also Alan Cooper, Court Refuses Review In Taliban' Case, RICHMOND-TIMES DISPATCH, July 10, 2003, at A9 (noting that the transfer to the Norfolk brig was in April 2002).

See Kozaryn, supra note 27 (noting "that Yaser Esam Hamdi was moved to Naval Station Norfolk, Va., from Guantanamo Bay, Cuba. Defense officials said Hamdi's move was deemed appropriate in light of the possibility he is a U.S. citizen."); see also Hamdi, 316 F.3d at 460 (reasoning that the transfer of Hamdi to Norfolk was appropriate since he may not have renounced his United States citizenship).

The statement was:

He is at the brig, getting good treatment, Clarke... As a captured enemy combatant, he remains under the control of the Department of Defense. If he does indeed have U.S. citizenship, then he would not be a candidate for the military commissions. Beyond that, I just can't speculate about what we might do.

Kozaryn, supra note 27.

See Karen Branch-Brioso, Man Held As "Enemy Combatant" Has Right To Attorney, Judge Rules; Ruling Also Supports Government's Authority to Detain Such Suspects, ST. LOUIS POST-DISPATCH, Dec. 5, 2002, at A12 (noting that besides Padilla, Hamdi is the only other "enemy combatant" held in the United States); see also Edmonson, supra note 37, at 1A (referring to Padilla as an "enemy combatant"); Toni Locy, Judge Says 'Dirty Bomb' Suspect Can Consult Lawyers, USA TODAY, Dec. 5, 2002, at 2A (stating that President Bush has designated Padilla as an "enemy combatant").

See Patricia Hurtado, Speaking Up for Suspect; 'Dirty Bomb' Detainee's Lawyers Want to See Client, Document, NEWSDAY (N. Y.), Oct. 30, 2002, at A24 (stating that Padilla was born in Brooklyn and later moved to Chicago); Lynn Sweet, Agents Nabbed Bomb Plot Suspect at O'Hare, CHIC. SUN-TIMES, June 11, 2002, at 6 (detailing Padilla's criminal history); Jodi Wilgoren & Jo Thomas, Traces of Terror: The Bomb Suspect from Chicago Gang to Possible Al Qaeda Ties, N.Y. TIMES, June 11, 2002, at A19 (outlining Padilla's criminal past from when he was a teenager arrested in connection with a murder).

Wilgoren & Thomas, supra note 40 (noting that Padilla spent time in juvenile detention and prison).

See Lucio Guerrero et. al., 'A Couple of Years Back, I Knew he Entered a Cult,' CHIC. SUN-TIMES, June 11, 2002, at 6 (detailing the circumstances of Padilla's assault and battery charges); see also Jose Padilla's Past, CHIC. SUN-TIMES, June 12, 2002, at 6.
He faced weapons charges for possession of an unregistered .357 magnum and eventually skipped bail. Florida police soon apprehended him for shooting at another vehicle and he was sentenced to jail. The former 'Latin Disciple' Chicago gang member, Jose Padilla, married a Muslim and adopted the name Abdullah Al Muhajir after his Florida prison term in the early 1990's. In 1994, he lived in Brentwood, New York and does not appear to have continued any criminal activity. Later he moved to Egypt. The FBI arrested him on a material witness warrant on May 8, 2002 entering the United States in O'Hare (chronicling Padilla's criminal life). See generally Wilgoren & Thomas, supra note 40 (explaining Padilla's various arrests).

43 See Guerrero, supra note 42 (articulating Padilla's 1991 arrest); Wilgoren & Thomas, supra note 40 (referring to Padilla's arrest in Chicago's West Side for possession of a .375 Magnum Smith and Wesson); see also Amanda Ripley, The Case of the Dirty Bomber: How a Chicago Street Gangster Allegedly Became a Soldier for Osama Bin Laden, TIME MAG., June 24, 2002, at 28 (listing rap sheet of Padilla's adult crimes).

44 See Guerrero, supra note 42 (giving an account of Florida incident where Padilla fired his gun at another vehicle); Ripley, supra note 43 (describing Padilla's road rage incident); Wilgoren & Thomas, supra note 40 (noting that Padilla was sentenced to 364 days in jail for firing his revolver at another car).

45 See Arian Campo-Flores & Dirk Johnson, From Taco Bell to Al Qaeda, NEWSWEEK, June 24, 2002, at 34 (referring to Padilla as a “Latin Disciples gangbanger”); Wilgoren & Thomas, supra note 40 (explaining that he identified himself with Latin Disciples gang); see also Sweet, supra note 40, at 6 (identifying Padilla as a “former Chicago gang member”).

46 Although Jose Padilla adopted the name Abdullah Al Muhajir after his prison term in the early 1990's, I will refer to him as Jose Padilla in order to be consistent with the briefs and court papers. See Transcript of the Attorney General John Ashcroft Regarding the transfer of Abdulla Al Muhajir (Born Jose Padilla) to the Department of Defense, (June 10, 2002), at http://www.usdoj.gov/ag/speeches/2002/061002agtranscripts.htm [hereinafter Ashcroft Transcript]. He married a Muslim woman and adopted his Islamic name sometime after being released in 1992. See Wilgoren & Thomas, supra note 40. Padilla officially converted to Islam in 1994. See Ripley, supra note 43.

47 See Wilgoren & Thomas, supra note 40 (relaying a neighbor's memory of him playing on the lawn with his son and expressing the shock of his Long Island and Chicago neighbors). See generally Guerrero, supra note 42 (quoting a former neighbor saying "I've got nothing bad to say about him."); Ripley, supra note 43 (reporting that a school guidance counselor remembered Padilla as a force and not a bully).

48 See Padilla v. Bush, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002) (stating that "After his release from prison on that charge, Padilla moved to Egypt, took the name Abdullah al Muhajir."); Campo-Flores & Johnson, supra note 45 (recounting that Padilla went to Egypt to pursue religious studies); Marc Parry, For Lawyer, Case is About Due Process in Peril, NAT'L CATHOLIC REP., Mar. 7, 2003, at 10 (claiming that Padilla's trips to Egypt and Pakistan were one of three reasons that merited his detention).

49 See Padilla, 233 F. Supp. 2d at 568-69 (stating that on May 8, 2002, Padilla was arrested on a material witness warrant); Branch-Brieo, supra note 39 (recounting Padilla's arrest in May); see also Robert S. Mueller, Director of the Federal Bureau of Investigation, Congressional Statement F.B.I.; Joint Intelligence Inquiry (Oct. 17, 2002) (quoting the Director of F.B.I. as saying "In May, the FBI served a material witness warrant on a US citizen ... Jose Padilla, as he entered the United States from Pakistan at Chicago's O'Hare International Airport"), at http://www.fbi.gov/congress/congress02/mu
International Airport after returning from Pakistan. The United States tracked Mr. Padilla as he traveled to Afghanistan and Pakistan, allegedly meeting with high-level Al Qaeda Officials. He is alleged to have received training in explosive devices and radiological dispersion devices in order to carry out a plot to explode a “Dirty Bomb” in the US.

50 See Ashcroft Transcript, supra note 46 (explaining he was apprehended on May 8, 2002 after arriving at Chicago O'Hare International Airport from Pakistan); see also Mueller Statement, supra note 49 (explaining the FBI made arrest of Padilla on a material witness warrant). See generally Branch-Brioso, supra note 39 (detailing the circumstances of Padilla’s May 8 arrest).

51 Without detailing the scope of each agencies responsibility, Ashcroft “commend[ed] the FBI the CIA, the Defense Department, and other federal agencies” for the investigation that resulted in the arrest of Jose Padilla. See Ashcroft Transcript, supra note 46. The Federal Bureau of Investigation and the Central Intelligence Agency worked together in the arrest and detention of Jose Padilla. See Sage, New Fear; Our Position: The 'Dirty-Bomb' Arrest is Encouraging, But Rights Can’t Be Ignored, ORLANDO SENTINEL, June 12, 2002, at A14. The Central Intelligence Agency placed Padilla under twenty-four hour a day surveillance after learning of his possible bomb plan for the United States. See generally Toby Harnden & Anton LaGuardia, We Have the Bad Guy Where He Needs to Be, Declares Bush, DAILY TELEGRAPH (London), June 12, 2002, at 15.

52 Excerpts of the Mobbs Declaration allege that Padilla did research on a dirty bomb in an Al Qaeda safe house in Lahore, Pakistan and had meetings in Karachi regarding terrorist plots in the U.S. See Padilla, 233 F. Supp. 2d at 573. Ashcroft explained he traveled to Afghanistan and Pakistan after being released from prison but did not specify dates or times. See Ashcroft Transcript, supra note 46. While overseas, Padilla allegedly met with Al Qaeda and discussed detonating a “dirty bomb.” See Loci, supra note 39.

53 See Padilla, 233 F. Supp. 2d at 573 (claiming Padilla met with Usama Bin Laden and Lieutenant Abu Zubaydeh in Afghanistan to propose the dirty bomb plot); see also Eric Lichtblau, Bin Laden Chose 9/11 Targets Al Qaeda Leader Says, N.Y. TIMES, Mar. 20, 2003, at A22 (indicating Khalid Shaikh Mohammed, a recently captured senior Al Qaeda official, met with Jose Padilla and discussed Texas as a target). See generally David Johnson, Major Catch, Critical Time, N.Y. TIMES, Mar. 2, 2003, at 1 (suggesting Khalid Shaikh Mohammed led effort to get Padilla started on the dirty bomb plot).

54 See Ashcroft Transcript, supra note 46 (outlining training in explosive devices and radiological dispersion devices); see also James Risen & Philip Shenon, U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb, N.Y. TIMES, Jun. 11, 2002, at 1 (citing intelligence officials’ statement that Padilla traveled to Pakistan and received training from Al Qaeda in the wiring of explosives). See generally Paula Span, Enemy Combatant Vanishes Into a ‘Legal Black Hole’, WASH. POST, July 30, 2003, at A01 (quoting Defense Department Advisor Michael Mobbs’ contention in a six page declaration that Padilla had trained in wiring explosives).

55 To be more exact the dirty bomb was in its early planning stages. No definite plot existed, rather Padilla is said to have been “exploring a plan to build and explode a dirty bomb.” See Ashcroft Transcript, supra note 46. In fact “Deputy Secretary of Defense Wolfowitz said, ‘I don’t think there was a plot beyond some fairly loose talk.'” Press Briefing by Ari Fleischer, James S. Brady Briefing Room (June 12, 2002), at http://www.whitehouse.gov/news/releases/2002/06/20020612-5.html#3 [hereinafter “Fleischer Briefing”]. FBI director Mueller referred to Padilla’s capture only as “an example of prevention.” Eric Lichtblau, et al., U.S. Citizen Accused of Planning an Attack Using a 'Dirty' Bomb, L.A. TIMES, June 11, 2002, at A1.

56 “[A] radioactive “dirty bomb” involves exploding a conventional bomb that not only kills victims in the immediate vicinity, but also spreads radioactive material that is highly toxic to humans and can cause mass death and injury.” Ashcroft Transcript, supra
However, other law enforcement officials questioned his involvement with Al Qaeda and his ability to carry out the dirty bomb plot. Ashcroft asserted that Jose Padilla was an Al Qaeda operative, stating: "Let me be clear: We know from multiple independent and corroborating sources that [Jose Padilla] was closely associated with Al Qaeda and that as an Al Qaeda operative he was involved in planning future terrorist attacks on innocent American civilians in the United States." 

Note 46. The idea of a dirty bomb is "to kill and terrorize with radiation alone, by packing radioactive material around an ordinary explosive and detonating it above a city." William J. Broad et al., The Threats: Assessing Risks, Chemical, Biological, Even Nuclear, N.Y. TIMES, Nov. 1, 2001, at A1. The radioactive material spreads like dust falling all over a city, perhaps killing hundreds and requiring a billion-dollar cleanup. Id. "Without a cleanup, the material would cling to surfaces and contaminate the area for decades." Id. Although dirty bombs are far less lethal than nuclear weapons, they are "attractive to terrorists because they can inflict widespread disruption for relatively little cost. With 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." Joby Warrick, Hunting a Deadly Soviet Legacy; Concerns About 'Dirty Bomb' Drive Efforts to Find Radioactive Cesium, WASH. POST, Nov. 11, 2002, at A01.

See Ashcroft Transcript, supra note 46 (proclaiming Padilla's citizenship and ability to move inconspicuously throughout the U.S. was valuable for such an operation.); see also Lichtblau, supra note 53 (regarding American officials' statements that "Al Qaeda's leadership was apparently intrigued by Mr. Padilla's being an American citizen who might have an easier time of gaining entry to the United States than other Qaeda members."). See generally Sweet, supra note 40 (pointing out Padilla as valued [al-Qaida] operative because his U.S. citizenship allowed him to travel freely and he never changed Padilla to his adopted Arab name on his passport). 

Even law enforcement officials and counter terrorism experts were skeptical about whether he was even an officially sanctioned Qaeda terrorist." Maureen Dowd, Summer of All Fears, N.Y. TIMES, June 12, 2002, at A29. In fact, one of the government's own confidential witnesses in the Mobbs declaration "said he did not believe Padilla was actually a member of Al Qaeda." Padilla, 233 F. Supp. 2d at 573. Additionally, a U.S. official speaking on condition of anonymity confided to the Washington Post that when Padilla was visiting Pakistan, he "was not found to be suspicious, nor was he on any watch list that U.S. agents shared with Pakistan... On the shadow scale Pakistan security services employ to rank people they have investigated—white, gray and black—al Muhajir [Padilla] was designated the lowest level of white." Susan Schmidt & Kamran Khan, Lawmakers Question CIA on Dirty-Bomb Suspect; Administration Officials Wonder if Ashcroft Was Unduly Alarmist in Arrest Announcement, WASH. POST, Jun. 13, 2002, at A11.

Officials said it was uncertain if Mr. Padilla had the skills to build a bomb or acquire radiological material." David Johnston et al., Qaeda's New Links Increase Threats From Far Flung Sites, N.Y. TIMES, June 16, 2002, at 1. The New York Times had already acknowledged that "the details of the alleged plot were especially sparse on whether the suspect had any prospect of carrying out a mission that depended on something he conspicuously did not have: access to radioactive material." Patrick E. Tyler, A Message In An Arrest, N.Y. TIMES, Jun. 11, 2002, at A1. Additionally, the Mobbs declaration admits that other intelligence shows Padilla was not a member of Al Qaeda and that there was no timetable for an attack. See Christopher Newton, Padilla Tied to Al Qaeda, CHI. TRIB., Aug. 28, 2002, at 9.

Ashcroft Transcript, supra note 46 (giving his position forcefully); see also Director of Central Intelligence's Threat Briefing, The Worldwide Threat in 2003: Evolving Dangers in a Complex World (Feb. 11, 2003) at http://www.cia.gov/cia/public_affairs/speec
III. DESIGNATION AS ENEMY COMBATANTS

Status as an enemy combatant is a product of the laws of war.\textsuperscript{61} “The so called law of war is a species of international law analogous to common law.”\textsuperscript{62} The treatment of those captured in war is a central issue in the law of war.\textsuperscript{63} The Fourth Circuit suggested two basic rationales for detaining an enemy combatant.\textsuperscript{64} First is the need to disarm the captured enemy and prevent him from rejoining the enemy forces, essentially immobilizing him as a “simple war measure.”\textsuperscript{65} Secondly, it

\textsuperscript{61} See Johnson v. Eisentrager, 339 U.S. 763, 774 (1950) (emphasizing that “executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security”). See generally Tom Brune, \textit{Battle Brews Over Detainees Rights}, NEWSDAY (N.Y.), Aug. 6, 2003, at A18 (discussing Padilla’s status in particular as an enemy combatant as a product of the war on terror); Toni Locy, \textit{Fates Unsure at U.S. Base in Cuba}, USA TODAY, Sept. 22, 2003, at 9A (explaining that by labeling them enemy combatants, U.S. officials say the detainees are not entitled to legal rights and can be held as long as the war on terrorism lasts—or, indefinitely).

\textsuperscript{62} Ex Parte Quirin, 317 U.S. 1, 7 (1942) (argument for petitioners).


\textsuperscript{64} See Hamdi v. Rumsfeld, 316 F.3d 450, 465 (4th Cir. 2003) (stating that detaining enemy combatants has at least two vital purposes); Toni Locy, \textit{Fates Unsure at U.S. Base in Cuba}, USA TODAY, Sept. 22, 2003, at 9A (citing military officials who say their purpose [at Camp Delta] is to develop intelligence and detain terrorist operatives who could threaten the USA); see also David Rennie, \textit{Camp Delta Leaves Detainees in Legal Limbo}, DAILY TELEGRAPH (London), July 5, 2003, at 4 (suggesting that to America, the primary purpose of Camp Delta is extracting intelligence from enemy combatants seized in the worldwide war on terrorism and preventing them from attacking the United States).

\textsuperscript{65} See Hamdi, 316 F.3d at 465 (explaining the need to detain the enemy once captured to prevent the combatant from rejoining the fight); Sarah Laitner, \textit{Court Rules on U.S. "Enemy Citizens"}, FIN. TIMES (London), Jan. 9, 2003, at 2 (quoting Attorney General Ashcroft’s rationale that “[d]etention of enemy combatants prevents them from rejoining the enemy and continuing to fight against America and its allies, and has long been upheld by our nation’s courts, regardless of the citizenship of the enemy combatant.”); see also Benjamin Weiser, \textit{Enemy Combatant Fights to Obtain Counsel}, N.Y. TIMES, Oct. 30, 2002, at A17 (examining the government’s assertion that “[Padilla’s] detention as an enemy combatant is in no sense ‘criminal,’ and it has no penal consequences whatsoever.”).
would be unreasonable to require trials on the battlefield.66 Ex Parte Quirin, the seminal case on enemy combatants, described differing treatment of captured members of the enemy depending upon whether they had violated the laws of war or not.67

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.68

The federal government deemed Hamdi an enemy combatant sometime after he was captured in Afghanistan.69 It is not

66 See Hamdi, 316 F.3d at 465-66 (describing how it would be impractical to require trial during battle); see also Johnson, 339 U.S. at 779 (declaring that "it would be difficult to devise more effective fettering of 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."); Associated Press, U.S. Courts Closed to Taliban Held in Cuba, TORONTO STAR, Mar. 12, 2003, at A14 (quoting John Ashcroft's assertion that "this nation's enemies may not enlist America's courts to 'divert efforts and attention from the military offensive abroad to the legal defensive at home.'").


69 As the Court stated:

"[A]n affidavit from the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs, ... confirms ... that Hamdi was seized in Afghanistan by allied military forces during the course of the sanctioned military campaign, designated an "enemy combatant" by our Government, and ultimately transferred to the Norfolk Naval Brig for detention. Thus, it is undisputed that Hamdi was captured in Afghanistan during a time of armed hostilities there. It is further undisputed that the executive branch has classified him as an enemy combatant." Hamdi, 316 F.3d at 461. For a contrast with a defendant not given "enemy combatant status" and some of the consequences of imputing a defendant with "enemy combatant status," see M.K.B. Darmer, Lessons From the Lindh Case, 68 BROOK. L. REV. 241, 253-54
completely clear when Hamdi was deemed an enemy combatant. However, the Mobbs Declaration states that he was captured on the battlefield in Afghanistan, and classified as an enemy combatant by the executive branch before it was discovered that he was a US citizen. Only after it was discovered that he was an American citizen was his status as an enemy combatant an issue. The conflict between his U.S. citizenship and enemy status resulted in his transfer from Guantanamo Bay with questions in the Pentagon about how the government would handle his situation.


See Hamdi, 316 F.3d at 461 (stating that "Hamdi was seized in Afghanistan by allied military forces during the course of the sanctioned military campaign"); see also Hentoff, supra note 27 (explaining that Hamdi was captured by the Northern Alliance); Tom Jackman, Judges Uphold U.S. Detention of Hamdi; Courts Must Yield to Military on 'Enemy Combatants,' 4th Circuit Rules, WASH. POST, Jan. 9, 2003, at A1 (noting that Hamdi was captured with Taliban forces in Afghanistan).

See Hamdi, 316 F.3d at 461 (noting that "it is further undisputed that the executive branch has classified him as an enemy combatant"). See generally Lawrence Hurley, Citizens Can Be Kept in Brig Without Counsel, DAILY REC. (Baltimore), Jan. 9, 2003 (explaining that Hamdi's enemy combatant status justifies his detention); Tom Jackman, Court Denies Lawyer Access to Man in Brig; Hamdi Attorney Said to Lack Key Status, WASH. POST, June 27, 2002, at B07 (quoting the Fourth Circuit's analysis that Hamdi is an "enemy combatant").

See Alan Cooper, Who Speaks for This Man?, RICHMOND TIMES DISPATCH, June 5, 2002 at A6 (acknowledging that Hamdi has not renounced his U.S. citizenship); Kozaryn, supra note 27, (explaining that after discovering Hamdi was an American citizen they decided to move him to the brig in North Carolina); see also Tim McGlone, U.S. Must Explain Why Man is Being Held in Brig, VIRGINIAN-PILOT, May 15, 2002, at A1 (stating that Hamdi was born in Louisiana to Saudi parents).

See generally Nat Hentoff, George W. Bush's Constitution, VILLAGE VOICE (N.Y.), Jan. 14, 2003, at 27 (arguing that Hamdi is protected by the Bill of Rights, therefore his detention is unconstitutional); Matthew Roy, Judge Rules Hamdi Entitled to Rights, Not Freedom, VIRGINIAN-PILOT, Aug. 17, 2002, at A4 (suggesting that Hamdi's enemy combatant status is at odds with his American citizenship); Katherine Q. Seelye, Threats and Responses: the Detainee; Court to Hear Arguments in Groundbreaking Case of U.S. Citizen Seized With Taliban, N.Y. TIMES, Oct. 28, 2002, at A13 (examining the tension between Hamdi's status as both an American citizen and a government-declared enemy combatant).

See Terry Joyce, Suspected Taliban Fighter Held in Brig, POST AND COURIER (Charleston), Aug. 23, 2003, at 1A (refuting contention that Hamdi move to Norfolk was "surreptitious"); Associated Press, U.S.-born Prisoner Flown From Navy Base in Cuba to Military Jail in Virginia, GUELPH MERCURY (Ontario), Apr. 6, 2002, at D7 (stating that Hamdi was the first to be flown out of Guantanamo Bay due to his citizenship status); Staff, Justice Won't Charge Second U.S-Born Taliban Fighter; Man Faces Indefinite Stay in Norfolk Brig, VIRGINIAN-PILOT, Apr. 9, 2002, at A1 (noting that Hamdi's status as an American citizen prompted his move to the Norfolk brig).
consulted with the acting Secretary of Defense and recommended that the President label Jose Padilla as an enemy combatant.\textsuperscript{75} The government kept silent about Jose Padilla until after the President made that determination\textsuperscript{76} and transferred Padilla to the Department of Defense, ostensibly because additional information was being developed about Padilla's activities and the Justice Department wanted time to make decisions about how to handle the case before the information became public.\textsuperscript{77} After being designated as an enemy combatant "he was transferred from the Justice Department to the custody of the Defense Department."\textsuperscript{78} Donna Newman, Padilla's lawyer, was going to work when she received a cellular phone call telling her that Padilla was declared an enemy combatant, removed to a brig in North Carolina, and would no longer have access to a lawyer.\textsuperscript{79} Unlike Hamdi, Padilla had no weapons, and was not involved in

\textsuperscript{75} See Ashcroft Transcript, supra note 46 (recommending that Padilla be deemed an enemy combatant); see also The White House To The Secretary Of Defense (June 9, 2002), available at http://news.findlaw.com/cnn/docs/terrorism/padillabush60902det.pdf [hereinafter Presidential Order] (instructing, at the orders of President George W. Bush, that Padilla be held as an enemy combatant). See generally Benjamin Weiser, \textit{Traces of Terror: The Courts; U.S. Defends Decision to Move Suspect in "Dirty Bomb" Case}, N.Y. TIMES, July 19, 2002, at A15 (noting that Padilla's enemy combatant status was determined by defense officials).


\textsuperscript{77} See Padilla v. Bush, 233 F. Supp. 2d 564, 573 (S.D.N.Y. 2002) (stating that although the government had Padilla in custody since May 8, his arrest was announced on June 10 after he was taken into Defense Department custody); \textit{Fleischer Briefing I}, supra note 55 (explaining the government failed to release any information about Padilla for a month while they developed information and tried to determine what course of action to take). See generally Schmidt & Khan, supra note 58, (suggesting that the government disclosed the Padilla arrest at a strategic time to defray criticism of U.S. intelligence blunders before the World Trade Center Attacks).

\textsuperscript{78} See Ashcroft Transcript, supra note 46 (detailing Padilla's transfer). See generally Patricia Hurtado, \textit{Civil Liberties Groups Sue Bush in Padilla Case}, NEWSDAY (N.Y.), Sept. 27, 2002, at A47 (pointing out that Padilla was transferred in secret); Greg B. Smith, \textit{American Held in D.C. Nuke Plot; Former Street Thug Eyed Dirty Bomb Hit}, DAILY NEWS (N.Y.), June 11, 2002, at 3 (calling the move "unusual").

any battle with the U.S. or its allies. He entered the U.S. with a valid passport.

IV. JUDICIAL SUPPORT OF THEIR DESIGNATIONS AS ENEMY COMBATANTS IS BEGINNING TO ERODE

The government claims detaining Padilla as an enemy combatant is constitutional despite the fact that he is an American citizen. Attorney General Ashcroft erroneously asserted "determining that [Jose Padilla] is an enemy combatant who legally can be detained by the United States military, we have acted with legal authority both under the laws of war and clear Supreme Court precedent, which establish that the military may detain a United States citizen who has joined the enemy and has entered our country to carry out hostile acts." But, in fact, there is no such clear precedent for holding American citizens as enemy combatants, nor has there been a case where citizens charged with violating the laws of war were denied a trial, and

80 See Lyle Denniston, Conflict Builds Over Court's Ruling on Citizen's Wartime Detention, Critics Say President Got Too Much Leeway, BOSTON GLOBE, Jan. 10, 2003, at A3 (noting that Padilla was captured on U.S. soil); Nat Hentoff, Bush Accused By Lords of the Bar, VILLAGE VOICE (N.Y.), Sept. 30, 2003, at 24 (pointing out that Padilla was unarmed and carrying valid identification at the time of his arrest); John Riley, Court OK to Hold Citizen-Combatants, NEWSDAY (N.Y.), Jan. 9, 2003, at A20 (reiterating that Padilla and Hamdi were captured under different circumstances).

81 See Bob Drogin, Dirty Bomb Probe Widens, L.A. TIMES, June 12, 2002, at 1 (noting that Padilla got his new passport about two months before his arrest); Chisun Lee, Sticking Up For The Dirty Bomber, VILLAGE VOICE (N.Y.), Oct. 15, 2002, at 25 (remarking that Padilla's lawyer asserts that his valid passport evidences his innocent intention to visit his son); Stewart M. Powell, Terror Recruits in U.S. a Danger; FBI Says al-Qaida's Enlisting of Americans Poses Logistic Problems, TIMES UNION (Albany), June 15, 2002, at A1 (opining that Padilla's possession of a valid passport would make him valuable, undetectable asset to Al Qaeda).

82 See Lyle Denniston, Fighting Terror; Court OK's Jailing Illegal Combatant, But Allows Counsel, BOSTON GLOBE, Dec. 5, 2002, at A1 (noting that the President's order to detain Padilla was an exercise of "maximum authority"); George Edmonson, When Bad Guy is a Citizen, ATLANTA J. & CONST., June 13, 2002, at 1A (suggesting that the United States Supreme Court may eventually have to decide on the constitutionality of Padilla's detention); Dan Radmacher, Bush Oversteps Bounds in Padilla Case, CHARLESTON GAZETTE (West Virginia), Dec. 13, 2002, at 4A (questioning the propriety of the court ruling that allowed George W. Bush to detain Padilla under enemy combatant status).

there certainly is no precedent for denying such citizens access to counsel.84

Federal District Judge Michael Mukasey affirmed Ashcroft’s assertion, in part, by holding that “the President is authorized under the Constitution and by law to direct the military to detain enemy combatants in the circumstances present here, such that Padilla’s detention is not per se unlawful.”85 Judge Mukasey did not however approve unfettered power to declare citizens enemy combatants and ruled that Padilla had a right to counsel in order to submit evidence supporting his petition, though he would only review whether the President had “some evidence”.86 The Department of Justice attempted to transfer the case to North Carolina where it would have the luxury of Fourth Circuit jurisprudence.87 However, Judge Mukasey88 denied the transfer

84 See generally Edward Epstein, Dirty Bomb Case Raises Legal Concerns, Questions Over Consistency of Policy in Terror War, S.F. CHRON., June 11, 2002, at A15 (calling the Bush administration’s policy decisions on terror suspect detention “inconsistent”); John Hendren, Alleged Bomb Plotter to Be Held Indefinitely, Pentagon Says, L.A. TIMES, June 11, 2002, at A18 (asserting that Ashcroft relied on World War II – related cases as precedent for holding Padilla); Staff, Editorial, They Caught Him, Now What?, HARTFORD COURANT, June 13, 2002, at A12 (suggesting that the laws relevant to this matter are unclear).


86 See Padilla, 233 F. Supp. 2d at 610 (giving a summary of the legal findings); Mark Hamblett, Fallout From Terrorism, N.Y.L.J., Feb. 24, 2003, at 30 (noting that while the government initially denied judicial review of an enemy combatant declaration, this position was eventually relaxed); see also Mark Hamblett, Government Insists Alleged Dirty Bomber Has Few Rights, N.Y.L.J., July 29, 2003, at 1 (stating that “the ‘some evidence’ standard presupposes a predicate set of procedural protections of which Padilla received none, the district court had no basis for employing the ‘some evidence’ standard”).

87 The court has been described as “not only conservative but also bold and muscular in its conservatism.” Deborah Sontag, The Power of the Fourth, N.Y. TIMES, March 9, 2003, § 6 (Magazine), at 40. “It pushes the envelope of conservative doctrine.” Padilla, 233 F. Supp 2d at 610. Perhaps even more pertinent to the government’s attempt to transfer the case to the Fourth Circuit was the extreme deference the Fourth Circuit showed the Bush administration in deciding whether Yaser Hamdi could be deemed an enemy combatant. Id. Padilla’s fate would be a foregone conclusion at the mercy of the Fourth Circuit. See Hamdi v. Rumsfeld, 296 F.3d 278, 282 (4th Cir. 2002).

88 The Honorable Michael B. Mukasey contact information is available at http://www.nysd.uscourts.gov/judges/USDJ/mukasey.htm. Judge Mukasey is a Chief Judge in the Southern District of New York and on New York Senator Chuck Schumer’s list of acceptable candidates to be recommended to President Bush if there is a United States Supreme Court vacancy. See They Have A Little List, N.Y. POST, June 22, 2003, at 024; see also Neil
motion and required the government to comply with his order to allow Padilla to meet with counsel. The government's reluctance to comply with Judge Mukasey's order frustrated him and prevented him from rendering a decision. However, "[h]e suggested that he was ready to approve the detention if only the government would allow [Padilla to meet with counsel]." The government has refused to comply with two orders to allow defense counsel to meet with Padilla and was certified for interlocutory appeal on his final order.

The Second Circuit recently held "that the President does not have the power Under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat." This reversed that portion of Judge Mukasey's opinion upholding the legality of detaining Enemy combatants. Specifically they reversed the portions of Mukasey's

A. Lewis, Democrat Urges Bush to Consult on Supreme Court Choice, INT'L HERALD TRIB., June 17, 2003, at 5.

See Padilla, 233 F. Supp. 2d at 569 (denying the government's transfer motion and allowing Padilla to meet with counsel only under circumstances which would prevent Padilla from using counsel to convey messages to outside parties); see also Hamdi, 296 F.3d at 283 (accepting the Government's argument that the detainee had no general right under the laws of war nor the Constitution to meet with counsel without military supervision); Alejandra Rodriguez, Comment, Is the War on Terrorism Compromising Civil Liberties? A Discussion of Hamdi and Padilla, 39 CAL. W. L. REV 379 (2003) (noting "an enemy combatant is afforded none of the guarantees provided for in the Constitution").

Exasperated by new arguments presented against Padilla's meeting with counsel, Judge Mukasey said "What I want to know [is] if I decide this motion now am I going to get another submission that says, 'Gee Judge, we've got some additional facts, to add to our additional facts'"? Benjamin Wieser, Judge is Angered by U.S. Stance in Case of Dirty Bomber, N.Y. TIMES, Jan 16, 2003, at A16. Judge Mukasey's recent ruling made clear that he expected his order to be followed: "Lest any confusion remain, this is not a suggestion or a request that Padilla be permitted to consult with counsel, and it is certainly not an invitation to conduct a further 'dialogue' about whether he will be permitted to do so. It is a ruling—a determination—that he will be permitted to do so." Padilla v. Rumsfeld, 243 F. Supp. 2d 42, 57 (S.D.N.Y. 2003); see also Thomas J. Lepri, Note, Safeguarding The Enemy Within: The Need For Procedural Protections For U.S. Citizens Detained As Enemy Combatants Under Ex Parte Quirin, 71 FORDHAM L. REV. 2565, 2583-85 (2003).

Benjamin Wieser, Judge Affirms Terror Suspect Must Meet with Lawyers, N.Y. TIMES, Mar. 12, 2003, at A17 (reporting Judge Mukasey's efforts to arrange for Padilla's meeting with counsel despite government obfuscation).


opinion finding statutory support for holding Jose Padilla as an enemy combatant. However, they limited their review only to American citizens capture in the United States and not those captured in a zone of combat or on the battlefield. This distinguishes Padilla's case from that of Yaser Hamdi.

Chief Judge Wilkinson, writing for the Fourth Circuit along with Judge Wilkins and Judge Traxler, supported the government's detention of Yaser Hamdi as an enemy combatant. The court held that the Mobbs Declaration alone was sufficient, under the circumstances, to justify Yaser Hamdi's detention as an enemy combatant. Previously, the Fourth Circuit reversed the district court's order to allow appointed public defender Frank Dunham unmonitored access to Hamdi as defense counsel. The judges added that "[n]o further factual inquiry is necessary or proper, and ... remand[ed] the case with

94 Id. at 78-79.
95 Id. at 44.
96 In a review by Judicature that evaluated possible Supreme Court nominees Judge Wilkinson was found to be the most conservative out of the six reviewed and is viewed as "exceptionally conservative." See Sontag, supra note 87, at 40; see also Robert Levy, Editorial, A Federal Statute and the U.S. Constitution Prohibit What the Executive Branch is Doing to Jose Padilla, CHI. SUN-TIMES, Aug. 11, 2003, at 39; Robin Toner & Neil A. Lewis, Lobbying Starts As Groups Foresee Vacancy On Court, N.Y. TIMES, June 8, 2003, at 1.
97 See Hamdi v. Rumsfeld, 316 F.3d 450, 477 (4th Cir. 2003). In my view it is odd that a case of this magnitude was not heard en banc. See HM Holdings, Inc. v. Rankin, 72 F.3d 562, 563 (7th Cir. 1995) for a discussion of the standard for en banc review of a matter, in which the Court held that en banc review is reserved for matters of "exceptional importance." For additional commentary, see Roberts v. Sears, Roebuck & Co., where Judge Posner notes that en banc hearings are rarely granted because they impose "a heavy burden on an already overburdened court." 723 F.2d 1324, 1348 (7th Cir. 1983) (en banc) (Posner, J., concurring).
98 See Hamdi, 316 F.3d at 460-61(discussing the decision to reverse the order a as a matter of national security and deference to the executive branch); Bob Franken & Laura Bernardini, Second American Taliban' to Get Lawyer, CNN.com Law Center (May 30, 2002) at http://www.cnn.com/2002/LAW/05/29/hamdi.hearing (reporting the district court's decision to allow counsel to have unfettered access to Hamdi which was quickly overturned); see also Kacprowski, supra note 92, at 651-52 (noting that in reviewing District Court decisions, both the Hamdi and Padilla Courts applied Ex Parte Quirin to allow detention of U.S. citizens as "enemy combatants" without access to counsel).
directions to dismiss" Hamdi's writ of habeas corpus. The Department of Justice applauded the decision as a victory supported by precedent.

V. EX PARTE QUIRIN

The courts have looked to Ex Parte Quirin to analyze this conflict. During the Second World War four members of Germany's Third Reich received training in sabotage school and entered the U.S. on Long Island in the cover of darkness. A German submarine dropped them off on or around June 13, 1942 with explosives and orders from the German High Command to destroy war facilities and industries. They then discarded their military uniforms, buried them and continued on in civilian clothing to New York City. Five days later, four of their compatriots landed on Ponta Verda Beach, Florida with the

100 See Hamdi, 316 F.3d at 459 (holding that "the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution").

101 See 28 U.S.C. § 2241 (2003) for an outlining of the requirements and procedure for the use of a writ of habeas corpus. For a caselaw discussion of the denial of habeas corpus to detainees being held in the Guantanamo Bay Naval Base in Cuba, see Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), and Coalition of Clergy v. Bush, 310 F.3d 1153 (9th Cir. 2003).

102 The Attorney General stated:

I applaud today's decision which reaffirms the President's authority to capture and detain individuals, such as Hamdi, who join our enemies on the battlefield to fight against America and its allies. Today's ruling is an important victory for the President's ability to protect the American people in times of war. Preserving the President's authority is crucial to protect our nation from the unprincipled, unconventional, and savage enemy we face. Detention of enemy combatants prevents them from rejoining the enemy and continuing to fight against America and its allies, and has long been upheld by our nation's courts, regardless of the citizenship of the enemy combatant.


103 317 U.S. 1 (1942).

104 See id. at 21 (describing Nazi sabotage school in Berlin where saboteurs received training in explosives and methods of secret writing).

105 See id. at 21 (describing the Nazi saboteurs entry in to the U.S.).

106 See id. (noting that the officers had explosives and were following orders to attack military targets in the United States).

107 See id. (describing how officers discarded their uniforms and continued on in civilian clothing, violating the laws of war).
same mission and equipment.\textsuperscript{108} The F.B.I. apprehended all of the individuals in New York and Chicago.\textsuperscript{109} Subsequently, the President directed that they be tried by military commission.\textsuperscript{110} The saboteurs challenged the President's power to make such a declaration and assert jurisdiction by a military tribunal.\textsuperscript{111}

Chief Justice Stone, writing for the Court, upheld the government's decision to try the saboteurs by military tribunal even though two claimed American citizenship.\textsuperscript{112} The court determined that trying Nazi saboteurs by military tribunal was within the President's War Powers because the U.S. was engaged in a declared war,\textsuperscript{113} the saboteurs were members of the enemy,\textsuperscript{114} and they had violated the laws of war by attempting to carry out attacks in the United States.\textsuperscript{115} The Court held, "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."\textsuperscript{116} Haupt, one of the defendants, argued that as a United States naturalized citizen he could not be tried by a military tribunal.\textsuperscript{117} The Court, without deciding

\textsuperscript{108} See id. (noting these saboteurs also carried explosives, fuses, incendiary and timing devices and upon landing ashore, buried their uniform caps and continued on to other parts of United States).

\textsuperscript{109} See id. (commenting that when arrested, officers possessed large amounts of U.S. currency that was given to them by the German Government in Sabotage School).

\textsuperscript{110} See id. at 22 (stating that the President "appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War").

\textsuperscript{111} See id. at 24 (discussing petitioners' main contention that President lacked statutory or constitutional authority to order a military tribunal for offenses charged).

\textsuperscript{112} It is interesting to note that five of the nine justices that decided this case also approved Japanese detention in \textit{Korematsu} two years later; perhaps not the civil libertarian's jurists of choice. For a comparison see, \textit{Korematsu v. United States}, 323 U.S. 214 (1944), where Justices Stone, Black, Reed, Frankfurter, Douglas approved detention camps in the United States, and \textit{Ex Parte Quirin}, 317 U.S. at 1-48, where Justices Stone, Roberts, Black, Reed, Frankfurter, Douglas, Byrnes, and Jackson upheld military tribunals for a U.S. Citizen.

\textsuperscript{113} See \textit{Quirin}, 317 U.S at 21 (emphasizing that petitioner's acts were carried out after declaration of war between United States and Germany).

\textsuperscript{114} See id. at 21 (describing the saboteurs as members of the German military who entered the United States wearing German uniforms under orders from the German military).

\textsuperscript{115} See id. at 30-31 (exemplifying an unlawful combatant as "[a]n enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property").

\textsuperscript{116} Id. at 35 (justifying this precept of the law of war based on its recognition in the U.S. and abroad).

\textsuperscript{117} Petitioners relied on the argument that the law of war can never be applied to a United States citizen who upholds the authority of the government. See id. at 45.
whether he was a citizen, upheld his trial by military tribunal because he violated the laws of war.

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 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.118

Thus, U.S. citizens violating the laws of war will be considered enemy combatants.119 However, the Court did not address the treatment of citizens that were lawful enemy combatants. Instead, the Court stated that lawful combatants could be detained as prisoners of war without considering the treatment of U.S. Citizens held as lawful combatants.120

VI. THE NATURE OF OUR CONFLICT WITH AL QAEDA MAKES QUIRIN INAPPLICABLE

The initial challenge in declaring enemy combatant status for an individual is identifying the enemy the United States is in conflict with, which warrants applying the laws of war.121 A

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Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship, or in any case that he has by his conduct renounced or abandoned his United States citizenship. Id. at 20.

118 Id. at 37-38 (concluding the petitioner was charged with entering the United States as an enemy belligerent).

119 See id. at 37 (stating “citizenship in the United States of an enemy belligerent does not relieve him from consequences of a belligerency which is unlawful”); see also Hamdi v. Rumsfeld, 316 F.3d 450, 475 (4th Cir. 2003) (holding that American citizen who took “up arms against the United States in a foreign theater of war” was an enemy combatant).

120 See Quirin, 317 U.S. at 31 (basing jurisdiction on the saboteurs allegiance to NAZI Germany and their violations of their violation of the laws of war); Hamdi, 316 F.3d at 475 (stating “the privilege of citizenship entitles [petitioner] to a limited judicial inquiry into his detention”); Padilla v. Bush, 233 F. Supp. 2d 564, 592 (S.D.N.Y 2002) (noting “[l]awful combatants may be held as prisoners of war, but are immune from criminal prosecution by their captors for belligerent acts that do not constitute war crimes”).

121 See Quirin, 317 U.S. at 46 (deferring to rule on jurisdictional issues and finding it is sufficient petitioners were within boundaries and charged with being enemies and violated law against war); Hamdi, 316 F.3d at 476 (holding that a finding enemy combatant status coupled with capture in zone of active combat operations was sufficient to refuse habeas relief). See generally Al Odah v. United States, 321 F.3d 1134, 1136 (D.C.
formal declaration of war is not necessary to apply the laws of war, but there must at the very least be a state of war and an appropriate enemy. September 11th and the other acts of terrorism attributed to Al Qaeda constitute acts of war. However, Al Qaeda is not a state actor nor a “dissident force” under protocol II of the Geneva Convention so there is a question

Cir. 2003) (defining enemy in response to attacks on September 11, 2001, as “those nations, organizations, or persons he determines planned, authorized, committed, or aided the attacks”).

122 See Talbot v. Seeman, 5 U.S. 1, 28 (1801) (stating the application of the laws of war do not require an explicit act by Congress); Evans, supra note 26, at 10 (stating “The Supreme Court and Congress have recognized that a state of war may exist without a formal declaration”). See generally WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 668 (2d ed. 1920) (discussing authority of President to resist attack prior to Congress declaring war “and in this armed meeting and resistance there is war”).

123 See Talbot, 5 U.S. at 28 (noting that laws of war apply when Congress authorizes “partial hostilities”); El-Shifa Pharm. Indus. Co. v. United States, 55 Fed. Cl. 751, 771 (2003) (clarifying that courts generally “look to both the fact of actual hostilities and the recognition of such a state, not necessarily through a declaration of war, by the executive and legislative branches”).

124 See Evans, supra note 26, at 12 n.28; see also Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (June 8, 1977) available at http://www.unhchr.ch/html/menu3/b/94.htm [hereinafter Protocol II]. Protocol II provides for applying law of war protections to conflicts between a state’s “armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Id. at Art. 1(1); see also William A. Schabas, Punishment of Non-State Actors In Non-International Armed Conflict, 26 FORDHAM INTL L.J. 907, 915 (2003). However, even “in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.” Protocol II, supra, at pmbl.

125 See Evans, supra note 26, at 12 n.29. September 11th was one attack in a series of continued escalating attacks attributable to Al Qaeda. Id. Hence, even before September 11th the United States was in armed conflict with Al Qaeda. Id. The following attacks, which are attributable to Al Qaeda, evidence that Al Qaeda is an organized enemy: the World Trade Center bombing in 1993, the U.S. military barracks at Khobar, Saudi Arabia in 1996, U.S. embassy bombings in Kenya and Tanzania in 1998, and the USS Cole explosion in 2000. Id. See David Johnston, U.S. Says Evidence Possibly Ties Al Qaeda to the Attack in Kenya, N.Y.TIMES, Dec. 3, 2002, at A1, for an explanation of some of the evidence linking Al Qaeda to the attacks in Kenya, specifically the discovery of closely sequenced serial numbers on missile launchers. For a description of the current and new threats against the U.S. by Al Qaeda as a pattern of behavior by Al Qaeda, see Philip Shenon, Ridge Takes to TV to Describe Terror Threats as 'Nothing New', N.Y. TIMES, Nov. 18, 2002, at A12.

about applying the laws of war here at all. Al Qaeda is a criminal network and those associating with them could be dealt with in federal district court as they have been before. Whether or not the law of war may be applied to some of the acts committed by Al Qaeda, Quirin's application is limited to the enemy combatants captured during a war with an enemy state. The Court in Quirin emphasized that the saboteurs' acts followed a declaration of war with Germany and focused on their membership in the German military. The government has attempted to decree Padilla is an enemy combatant for his association with Al Qaeda, an international terrorist organization, by stretching Quirin's holding beyond its logical limit.

Expanding Quirin's applicability to encompass terrorism is imprudent for two reasons. First, affiliating individuals with a nation in order to determine that they were enemy combatants


128 See Evans, supra note 26, at 12 n.28 (stating that states have preferred to treat terrorists as criminals instead of affording them the protections of the Geneva Conventions); see also United States v. Lindh, 227 F. Supp. 2d 565, 566 (E.D.Va. 2002) (charging John Phillip Walker Lindh with carrying an explosive during the commission of a felony); United States v. Bin Laden, 160 F. Supp. 2d 670, 672 (S.D.N.Y. 2001) (trying a terrorist for conspiring, while outside the United States, to kill U.S. nationals, conspiracy to murder, conspiracy to destroy, by means of fire or explosive, buildings and property of the United States and conspiracy to attack national defense utilities).

129 See Ex parte Quirin, 317 U.S. 1, 37-38 (1942) (setting the rules for how and when enemy combatants can apply for writs of habeas corpus). See generally Kacprowski, supra note 92, at 654-58 (discussing Ex Parte Quirin); Leperi, supra note 90, at 2568-75 (stating that “the doctrine produced by Quirin itself is hazy and highly fact-specific”).

130 See Quirin, 317 U.S. at 21 (noting saboteurs’ acts were “after the declaration of war between the United States and the German Reich”). See generally Kacprowski, supra note 92, at 655-56 (classifying Ex Parte Quirin as a primary case); Leperi, supra note 90, at 2568-69 (recounting the facts of Ex Parte Quirin).

131 See Quirin, 317 U.S. at 21 (noting that the individuals were dropped of by a German military vessel, were wearing German military uniforms when they landed and were carrying orders from the German High Command). See generally Kacprowski, supra note 92, at 655-56 (positing that the saboteurs were “under instructions from the Third Reich”); Leperi, supra note 90, at 2568-69 (describing the judicial origins of enemy combatants).

132 See Padilla v. Bush, 233 F.Supp. 2d 564, 571 (S.D.N.Y. 2002) (disclosing that the President designated Padilla an enemy combatant). See generally Kacprowski, supra note 92, at 653 n.13 (discussing the expansion of Quirin); Leperi, supra note 90, at 2584-88 (detailing how Quirin offers little guidance in the current conflict).
had certain indicia of reliability not present here.\textsuperscript{133} Membership within a nation's military is easily verifiable, unlike any terrorist affiliation.\textsuperscript{134} The danger of individuals being misidentified as enemy combatants involved with terrorist organizations is very real, especially with the low "some evidence standard."\textsuperscript{135}

Abdallah Higazy, the Egyptian student accused of coordinating the attack on September 11th with a pilot radio found in his room, would have been detained as an enemy combatant if the President had issued such a decree.\textsuperscript{136} With physical evidence planted in his room, his close proximity to the attack, his race, and his coerced confession, a designation as an enemy combatant would pass "some evidence" with flying colors.\textsuperscript{137} Innocent individuals such as Higazy, if deemed a combatant, detained

\textsuperscript{133} See Jerry Bitts, \textit{Letters, Beware of Ashcroft and His Big Brother}, \textit{Las Vegas Rev.-J.}, Aug. 27, 2003, at 8B (warning people to watch out for John Ashcroft, in part, because of the government's ability to indefinitely detain U.S. citizens, without counsel, "based on non-reviewable executive determinations that the individuals" are enemy combatants, when the term "enemy combatants" is so broad "that even demonstrators might be considered 'terrorists'"); see also Miguel Angel Gutierrez, \textit{The Two Post WTC Scenarios}, World Future Society (2001), at http://www.wfs.org/mmgutengl.htm (stating that "the lack of clarity regarding enemy identification is demonstrated by the difficulty in determining the targets"). But see George Lardner Jr., \textit{Legal Scholars Criticize Wording of Bush Order; Accused Can Be Detained Indefinitely}, \textit{Wash. Post}, Dec. 3, 2001, at A10 (reporting a November 13 Presidential Order grants the President the authority to determine himself who is to be brought before a military tribunal).

\textsuperscript{134} See Quirin, 317 U.S. at 21 (noting that wearing German uniforms, while not conclusive, is very telling of your affiliation in a military organization); Gutierrez, supra note 130 (stating there is a lack of clarity for enemy identification). See generally David Costello, \textit{Iraq Blows Up In U.S. Face}, \textit{Courier Mail} (Australia), Aug. 21, 2003, at 17 (arguing Iraq is an identifiable magnet for terrorists because "[t]he place is a chaotic mess where terrorists can melt into the population with little fear of discovery").

\textsuperscript{135} See Padilla v. Rumsfeld, 243 F.Supp.2d 42, 54 (S.D.N.Y. 2003) (stating that only a "some evidence standard," i.e., that "the record is not so devoid of evidence that the findings [are] without support or otherwise arbitrary," is required to find enemy combatant status); see also Superintendent v. Hill, 472 U.S. 445, 457 (1985) (holding that the Due Process Clause requires a some evidence standard for certain prison disciplinary board decisions); United States ex. rel. Vajtauer v. Comm'r of Immigration, 273 U.S. 103, 106 (1927) (holding that deportation on charges unsupported by any evidence is a denial of due process).

\textsuperscript{136} See Robert Gearty, \textit{Suspect Held Over 9/11 Radio Is Suing the FBI}, \textit{Daily News} (N.Y.), Dec. 13, 2002, at 36 (reporting that he was suing for $20 million because the FBI polygrapher "coerced him into making a false confession"); see also Patricia Hurtado, \textit{Lawsuit in Pilot-Radio Case; Man Sues Hotel, Worker, FBI Agent Over Wrongful Terror Charge}, \textit{Newsday} (N.Y.), Dec. 13, 2002, at A19 (stating Higazy was arrested because "Ronald Ferry, a former hotel security guard, claimed to have found the radio in a locked safe in Higazy's 51st-floor [hotel] room"); Greg Smith, \textit{Judge Rips Gov't Over FBI Botch}, \textit{Daily News} (N.Y.), Nov. 26 2002, at 25 (noting that the pilot's radio was capable of communicating with commercial airplanes).

\textsuperscript{137} See \textit{id.} (stating that "his Manhattan hotel room overlook[ed] the World Trade Center"); see also Gearty, supra note 136 (naming Michael Templeton as the person who coerced the confession); Hurtado, supra note 136 (adding that Higazy was 32 years old).
incommunicado, and denied access to counsel, would be hopeless. Who among us would be safe?

The second troubling aspect of this expansion is the indefinite nature of the conflict.138 Enemy combatants can be held until the end of the conflict.139 A normal war has a marked end, such as a treaty, withdrawal, or surrender. If our conflict is to be with terrorism, a method of warfare rather than a conflict, there will never be any resolution.140 The federal district court reviewing Hamdi’s detention asked, “Will the war never be over as long as there is any member or any person who might feel that they want to attack the United States of America or the citizens of the United States of America?”141 The ACLU in briefs for both Hamdi and Padilla argues that the indefinite detention is unjustified.142

Both these concerns bear directly on Padilla’s status as an enemy combatant. As noted previously, the government’s own confidential witness in the Mobbs declaration “said he did not believe Padilla was actually a member of Al Qaeda.”143 There is

138 See Staff, Our View, TIMES HERALD (MI), May 26, 2003, at 11A (commenting on how the “war on terrorism is fluid with new fronts emerging”); see also Trophy Terrorism, TIMES (London), May 17, 2003, at 27 (asking whether “the West [is] now facing an indefinite war on terrorism for which it has formulated no strategy”). See generally Nat Hentoff, Ashcroft Out of Control, VILLAGE VOICE (N.Y.), Mar. 11, 2003, at 29 (characterizing the war on terrorism as indefinite).

139 See News Release No. 497-02, U.S. Dept. of Defense, DOD Responds to ABA Enemy Combatant Report (Oct. 2, 2002) available at http://www.defenselink.mil/news/Oct2002b10022002_bt 497-02.html (responding to the ABA’s accusation that Hamdi and Padilla are being indefinitely detained, the Department of Defense argued that the Geneva Convention allows for their detention until the end of the conflict, that any concern for holding them too long is premature and the government has no interest in holding them longer than necessary). See generally ACLU Brief I, supra note 30, at 2, 6-9 (arguing that the indefinite detention is unlawful); Brief of Amici Curiae American Civil Liberties Union et al. at 6-10, Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02 Civ. 4445) (arguing that the indefinite detention is unlawful) [hereinafter ACLU Brief II].

140 See Bruce Felmingham, Understanding Islam the Key to Peace, SUNDAY TASMANIAN (Australia), Mar. 23, 2003 (appealing to the West’s unwillingness to understand terrorism and “[m]isunderstanding number one is that terrorism is not an enemy, but a method of warfare employed by an enemy”). See generally Mike Allen, Bush To Seek Slower Growth In Spending As Costs Of War Rise, WASH. POST, Sept. 25, 2002, at A08 (referring to the war on terrorism as indefinite).

141 Hamdi v. Rumsfeld, 316 F.3d 450, 461 (4th Cir. 2003) (questioning ongoing hostilities between United States and foreign nations).

142 See Hamdi, 316 F.3d at 469 (illustrating ACLU’s arguments regarding Hamdi’s detention); Padilla v. Bush, 233 F.Supp.2d 564, 569 (S.D.N.Y. 2002) (describing ACLU’s argument that Padilla’s detention was unlawful); see also supra notes 30, 32-33, 136 and accompanying text (citing and discussing both briefs).

143 Padilla, 233 F. Supp. 2d at 573 (specifying that government’s confidential witness did not believe Padilla was a terrorist).
no clear indication Padilla is associated with Al Qaeda,\footnote{144} unlike the soldiers in \textit{Quirin}.\footnote{145} Any initial determination as to whether Padilla is in fact a member of Al Qaeda has been rendered impossible by the government's refusal to allow Padilla to meet with counsel in order to submit evidence to the contrary.\footnote{146} Additionally, defining him as a member of Al Qaeda would mean that he could be detained indefinitely.\footnote{147} Al Qaeda is an organization with no clear hierarchal structure, a fluid membership, and a lack of geographic boundaries.\footnote{148}

The second circuit found \textit{Quirin} inapplicable to Padilla's detention for two main reasons. First they found congressional authority supported the \textit{Quirin} court's decision regarding military jurisdiction unlike the detention of Padilla.\footnote{149} In fact current legislation, not enacted during the \textit{Quirin} decision, specifically prohibits the detention of citizens without

\footnote{144} "Even law enforcement officials and counter terrorism experts were skeptical about whether . . . he was even an officially sanctioned Qaeda terrorist." Dowd, \textit{supra} note 58. "Without some reality check, there is no way to have confidence that Mr. Padilla is what the government claims." Editorial, \textit{Alleged But Not Proven}, WASH. POST, Sept. 1, 2002, at B06. \textit{But see} James D. Zirin, \textit{When States Turn Assassin}, TIMES (London), Feb. 11, 2003, at 10, for an claims that "[w]hile [Padilla is] not a member of al-Qaeda, he had extended contacts with al-Qaeda operatives and acted under the direction of Abu Zubaydah, bin Laden's second in command" when, while he was in an Al Qaeda safe house in Pakistan, he researched dropping a "dirty atomic bomb" on the United States.

\footnote{145} See \textit{Ex parte Quirin}, 317 U.S. 1, 21 (1942) (holding that petitioners clearly were allies of German Reich despite American citizenship); Kacprowski, \textit{supra} note 92, at 655-56 (stating that the defendants were "under instructions from the Third Reich"); see also Lepri, \textit{supra} note 90, at 2568-69 (discussing the facts of \textit{Quirin}).

\footnote{146} \textit{See Padilla}, 233 F. Supp. 2d at 600 (noting that the government prohibited communication between Padilla and his counsel during detention); Levy, \textit{supra} note 93 (contrasting the treatment of Nazis with Padilla). \textit{See generally} Radmacher, \textit{supra} note 82 (noting that Padilla's attorney has not seen or spoken with him since he has been in the custody of the military).

\footnote{147} \textit{See Helm}, \textit{supra} note 83 (giving Deputy Attorney General Larry Thompson's view that as an enemy soldier Padilla can be held indefinitely); Locy, \textit{supra} note 61 (explaining the government's position that a detainee's label of enemy combatant means that the detainee has no legal rights); see also Fleischer Briefing I, \textit{supra} note 55 (responding to the question of whether the President believed that an American citizen could be declared an enemy combatant and held indefinitely, Ari Fleischer, the White House spokesperson, stated "According to the lawyers, under the statute, this can last for the duration of the war.").

\footnote{148} \textit{See Cass R. Sunstein}, \textit{Why They Hate Us: The Role of Social Dynamics}, 25 HARV. J.L. & PUB. POL'Y 429, 437 (2003) (delving into the psyche of terrorists based upon Bin Laden's cult-like indoctrination that extends to Muslim countries all over the world); Michael Evans, \textit{Al-Qaeda Is Now 'As Great a Threat as it Was Before September 11'.} TIMES (London), May 14, 2003, at 16 (discussing how the al-Qaeda network extends to countries all over the world); see also Jason Burke, \textit{What is Al-Qaeda?}, OBSERVER, July 13, 2003 (explaining the structure and organization of al-Qaeda network), available at http://observer.guardian.co.uk/worldview/story/0,11581,996509,00.html.

congressional authorization. Second, as previously mentioned, the petitioners in *Quirin* admitted their affiliation with a declared enemy but in Padilla's case there is no such admission.

Hamdi's affiliation with a Taliban military unit raises a different set of issues. Like the combatants in *Quirin*, his membership in a Taliban unit appears uncontested. However, the government and the court blur the line as to who is the enemy. The federal district court asked, "With whom is the war I should suggest we're fighting?" The government stated that Hamdi was captured with Taliban forces, and yet the Fourth Circuit's opinion speaks at length about terrorist acts committed by Al Qaeda. If in fact Al Qaeda is the entity the United States is supposedly at war with, there is little evidence that Hamdi had any involvement with them. He has only been accused of being in a Taliban military unit. There has been no link between him and Al Qaeda, even on the level of the bare assertions that hold Padilla. If Hamdi is to be held until the end of the conflict he should at least be informed which conflict he is waiting out.

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150 *Id.* at 60-61.

151 *See* Hamdi v. Rumsfeld, 316 F.3d 450, 475 (4th Cir. 2003) (concluding that principle applied in *Quirin* regarding enemy combatants also applies to Hamdi); Bender, *supra* note 28 (noting that Hamdi fought with the Taliban); *see also* Markon, *supra* note 30 (claiming that Hamdi fought with the Taliban troops in Afghanistan and was caught by the Northern Alliance).

152 *Hamdi*, 316 F.3d at 461 (questioning the underpinnings of the government's allegations that Hamdi is an enemy combatant).

153 *See id.* at 459-60 (detailing the attacks of September 11th which were Al Qaeda acts not those of the Taliban); Markon, *supra* note 30 (noting the government's objection); *see also* Span, *supra* note 54 (saying that the government said Hamdi was captured while fighting with the Taliban).

154 *See Hamdi*, 316 F.3d at 472 (finding that Hamdi undoubtedly trained to be in the Taliban military, but nothing was noted regarding training for al-Qaeda as well); Markon, *supra* note 30 (justifying Hamdi's detention on the grounds that he joined, trained with, and pledged his loyalty to the Taliban); *see also* Span, *supra* note 54 (explaining that Hamdi was carrying an AK-47 when he surrendered).

155 *See Hamdi*, 316 F.3d at 476 (concluding that Hamdi is being detained because he allied with an enemy military during wartime hostilities, not necessarily because of relations with the al-Qaeda terrorist network); Padilla v. Bush, 233 F.Supp.2d 564, 608 (S.D.N.Y. 2002) (clarifying that there is insufficient evidence to find that Padilla was specifically a member of al-Qaeda); Editorial, *Hear From Both Sides*, WASH. POST, Jan. 10, 2003, at A20 (juxtaposing Hamdi with Padilla).
VII. YASER HAMDI AND JOSE PADILLA HAVE BEEN DEPRIVED OF THEIR RIGHT TO COUNSEL

"Assuming he was an enemy combatant, he would not be entitled to counsel?" The judge asked.

"No he would not be entitled to counsel to challenge his detention." [U.S. Attny.] Garre answered.

"That sounds idiotic" [judge] Doumar said.¹⁵⁶

The Department of Defense has violated Jose Padilla's and Yaser Hamdi's right to counsel.¹⁵⁷ The Sixth Amendment states, "In all criminal prosecutions, the accused shall... have the Assistance of Counsel for his defense."¹⁵⁸ The government correctly points out that the right to counsel does not attach until an individual has been charged,¹⁵⁹ and neither Padilla nor Hamdi have been charged with any crime.¹⁶⁰ However, that fails to address the issue that Jose Padilla was arrested as a material witness, which afforded him a statutory right to counsel¹⁶¹ under

¹⁵⁶ Franken & Bernardini, supra note 99 (quoting questions presented by Doumar to U.S. Attorney at Hamdi's trial).
¹⁵⁷ See Padilla, 233 F.Supp.2d at 602-04 (concluding that there is an obvious need for Padilla to consult with counsel); Kacprowski, supra note 92, at 694 (noting that the Padilla court, decided after Hamdi, acknowledged the presumptive right to counsel in situations like Hamdi and Padilla); Andrew P. Napolitano, 'Enemy Combatants' Cast into a Constitutional Hell, L.A. TIMES, June 27, 2003, at 17 (describing the government's argument that Hamdi and Padilla should not be allowed counsel as "ludicrous").
¹⁵⁸ U.S. CONST. amend. VI (stating that all citizens of the United States have a right to an attorney in criminal proceedings).
¹⁵⁹ See State v. Luton, 927 P.2d. 844, 849 (Haw. 1996) (explaining the right to counsel under the sixth amendment is triggered after judicial proceeding becomes adversarial or reaches "critical stages of criminal prosecution"); see also Commonwealth v. Arroyo, 723 A.2d. 162, 169 (Pa. 1999) (holding that state right to counsel attaches at same time Sixth Amendment right to counsel at time of adversarial proceedings); 21A AM. JUR.2D Criminal Law § 1208 (2003) (explaining Sixth Amendment right of counsel does not attach unless he is formally charged at the time of arrest).
¹⁶⁰ See Hamdi, 316 F.3d at 475 (stating that because Hamdi is not charged with any crime he has no constitutional right to counsel); McGlone, supra note 28 (announcing the Pentagon's plans not to charge Hamdi with a crime); see also Hentoff, supra note 80 (expressing disgust with President Bush's "arrogance of power" in detaining both Padilla and Hamdi without charging them with a crime or allowing them access to counsel).
§ 3006A. Adequate representation of defendants (a) Choice of plan. Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate
18 U.S.C.A § 3006A.162 While it is true that "the Sixth Amendment right to counsel is said to be 'case specific',163 it has been held that if the right has attached with respect to a charged offense, it may also have been triggered for an uncharged but closely related offense."164 In other words, the Sixth Amendment right carries over if the two events are similar and share the same underlying facts, intent, and conduct.165 The FBI held Padilla in custody as a material witness based on his alleged involvement with Al Qaeda and a plot to detonate a dirty bomb in


Class Action Application for Habeus Corpus ex rel. All Material Witnesses also expresses this idea. 612 F. Supp. 940, 942 (W.D. Tex. 1985). The case held that material witnesses were entitled to representation appointed by the government as required by the Fifth Amendment because the risk of mistakenly depriving private interests, the probable value of additional or substitute procedural safeguards, as well as the government's interest, all weigh in favor of appointing counsel for material witnesses who could not afford to hire counsel. Id. at 942.

162 Since the purpose of 18 U.S.C.A. § 3006A is to guarantee individuals Sixth Amendment rights, Jose Padilla's Sixth Amendment right to counsel was triggered when he was arrested at O'Hare. See 18 U.S.C.A. § 3006A, Interpretive Notes and Decisions I(2). Padilla was in fact granted the right to counsel when originally arrested "pursuant to a material witness warrant." American Bar Association Report, supra note 161, at 3 n.7. See Padilla, 233 F. Supp. 2d at 569.

163 See Hendricks v. Vasquez, 974 F.2d 1099, 1104 (9th Cir. 1992) (stating that the Sixth Amendment right to counsel only attaches to those crimes an individual is charged with and not to other uncharged offenses); see also United States v. Hines, 963 F.2d 255, 258 (9th Cir. 1992) (explaining the exception of when two charges are "so inextricably intertwined... that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense when the Sixth Amendment right to counsel is triggered"). See generally 21A AM. JUR. 2D Criminal Law § 1187 (2003) (stating sixth amendment right to assistance of counsel applies only to offenses with which defendant has actually been charged).

164 See 21A AM. JUR. 2D Criminal Law § 1187 (2003) (noting if the right has attached with respect to a charged offense, it may also have been triggered for an uncharged but closely related offense); see also Hendricks, 974 F.2d at 1104 (explaining when the Sixth Amendment right to counsel triggered it will carry over to other crimes with the same operative facts).

165 See U.S. v. Arnold, 106 F.3d 37, 42 (3d Cir. 1997) (holding that an individual's Sixth Amendment right carried over from witness intimidation to attempted murder because the underlying facts and intent were the same); see also U.S. v. Doherty, 126 F.3d 769, 776 (6th Cir. 1997) (stating the right to counsel extends if the investigations are "so inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense"). But see People v. Spivey, 615 N.E.2d 852, 854 (Ill. App. Ct. 2d Dist. 1993) (holding occurrence of two crimes in same apartment building over a year apart was not enough to constitute extremely close relation as for right to counsel to attach).
the United States, at which point his right to counsel attached.\(^{166}\) The government now holds him as an enemy combatant for the very same reasons; therefore, his right to counsel should carry over.\(^{167}\) Additionally, both Padilla and Hamdi may have the right to request the presence of an attorney during their interrogation.\(^{168}\) Interrogation itself would not trigger the Sixth Amendment right to counsel,\(^{169}\) but Padilla and Hamdi could assert their right to the presence of counsel during a custodial investigation\(^{170}\) under the Fifth Amendment.\(^{171}\)

\(^{166}\) See Padilla, 233 F. Supp. 2d at 571 (stating Padilla’s original arrest by the Department of Justice was due to findings that he had knowledge of facts relevant to a grand jury investigation into the Sept. 11th attacks and that an attorney was appointed at that time); Josh Meyer, FBI Issues Global Alert for Suspected Al Qaeda Terrorists, L.A. TIMES, Sept. 6, 2003, at 9 (linking Padilla to another suspected Al Qaeda terrorist named Adnan G. El Shukrijunah who is a 28 year old Saudi native); see also Span, supra note 54 (reiterating facts contained in the Mobbs declaration, specifically that Padilla was trained in wiring explosives and that his plans to detonate a dirty bomb did not develop further than the initial planning stages).

\(^{167}\) See Texas v. Cobb, 532 U.S. 162, 172 (2001) (noting that “Although it is clear that the Sixth Amendment right to counsel attaches only to charged offenses, we have recognized in other contexts that the definition of an “offense” is not necessarily limited to the four corners of a charging instrument”); see also Blockburger v. United States, 284 U.S. 299, 304 (1932) (stating that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not”); United States v. Medrano, 208 F. Supp. 2d 681, 686 (W.D. Tex. 2002) (explaining that “Sixth Amendment right to counsel attaches only to a charged offense, as well as to uncharged offenses that may be said to be the “same offense” under the so-called Blockburger test”).

\(^{168}\) See Kirby v. Illinois, 406 U.S. 682, 689 (1972) (holding “It is well established that a person is entitled to the service of a lawyer at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment”); see also Brewer v. Williams, 430 U.S. 387, 398 (1977) (noting that confessions elicited from the accused after the right to counsel has attached violates the sixth and fourteenth amendments if elicited outside the presence of counsel); United States v. Carrasco, 887 F.2d 794, 817-18 (7th Cir. 1989) (citing Brewer).

\(^{169}\) See Carrasco, 887 F.2d at 817-18 (holding custodial interrogation alone is not enough to trigger Sixth Amendment right to counsel); State v. Potter, 478 S.E.2d 742, 750 (W. Va. 1996) (holding that Sixth Amendment is not implicated in custodial interrogation unless criminal charges have already been filed); see also 21A AM. JUR. 2D Criminal Law § 1208 (2003) (stating “A custodial interrogation does not trigger the Sixth Amendment right to assistance of counsel, unless criminal charges have already been filed”).


\(^{171}\) See Colorado v. Spring, 479 U.S. 564, 572 (1987) (noting that Fifth Amendment protections apply to custodial interrogations); Lamp v. Farrier, 763 F.2d 994, 996 (8th Cir. 1985) (outlining the Fifth Amendment right to request presence of an attorney during custodial interrogation); see also 21A AM. JUR. 2D Criminal Law § 1208 (stating that “The fact that custodial interrogation does not of itself cause the Sixth Amendment right to assistance of counsel to attach does not prevent a suspect in custody from asserting,
Jose Padilla and Yaser Hamdi should have the right to counsel at least in order to aid in the habeas corpus relief and argue against the initial determinations naming them enemy combatants.\(^{172}\) The ABA report on enemy combatants called for the courts to allow Padilla and Hamdi the right to consult with counsel to request relief.\(^{173}\) Judge Michael Mukasey recognized this right as fundamental, and on December 4, 2002 held that Jose Padilla should be permitted to consult with counsel "in aid of his petition and in particular, in aid of responding to the Mobbs Declaration which described the factual basis of his detention..."\(^{174}\) Instead of complying with the orders, the government made untimely motions for reconsideration.\(^{175}\) This exasperated Judge Mukasey,\(^{176}\) who grudgingly reconsidered his

under the Fifth Amendment, his right to the presence of counsel during custodial interrogation").

\(^{172}\) See Michigan v. Jackson, 475 U.S. 625, 639 (1986) (noting the importance of counsel after a suspect has become formally accused); Class Action Application for Habeus Corpus ex rel. All Material Witnesses, 612 F. Supp. 940, 946 (W.D. Tex. 1985) (stating "the due process requirement of a meaningful opportunity to be heard cannot be met unless counsel is appointed"); see also American Bar Association Report, supra note 161, at 10 (stating "[a] citizen or other person lawfully within the United States who is detained within the United States should not be denied access to the courts for the purpose of seeking habeas corpus relief").

\(^{173}\) See id. (stating that "he should, at the very least, have the right to contact counsel and communicate with an attorney in order to facilitate a request for relief"); see also Tim McGlone, Sudden Move of Hamdi to S.C. Brig Clouds Future; Pentagon Says Action Meant To Be “Low Key”, VIRGINIAN-PILOT, Aug. 29, 2003, at B1 (exhibiting public outcry by numerous groups including the ABA 18 civil liberties groups and 139 legal scholars who filed court briefs for Hamdi); Henry Weinstein, ABA Opposes Bush 'Enemy Combatants Policy'; U.S. Citizen-Detainees Have A Right To Meet With Lawyers, Bar Group Says. They Also Should Be Allowed 'Judicial Review' of Their Status, It Adds, L.A. TIMES, Feb. 11, 2003, at 18 (dealing with the passage of an ABA resolution to oppose President Bush's terrorism policy).


\(^{175}\) See id. at 48 (stating "I entered a separate order simply permitting the government to make a 'written submission,' presumably—again—one that set forth the facts the government wanted me to consider in determining how it would comply with the previous determination, not whether it would comply with that determination"); see also Stuart Taylor Jr., Get Them Their Lawyers Falsely Accused “Enemies” Deserve Due Process, LEGAL TIMES, Mar. 17, 2003, at 52 (describing Judge Mukasey's March 11th opinion, where the government “pressed Mukasey to reverse himself,” as "sternly worded"). See generally Hurtado, supra note 79 (talking about Judge Mukasey's March 11th order).

\(^{176}\) Judge Michael Mukasey is a Chief Judge in the United States District Court in Manhattan. See Taylor, supra note 170. Judge Mukasey is doing "about as well as could be done under the current law," id., and is the same judge who presided over the 1993 World Trade Center Bombing case. See Risky Business: Padilla Case Shows Need To Protect U.S. Citizens _ and Their Civil Rights, PHILA. INQUIRER, Jan. 10, 2003, at Commentary. See supra note 88 for more information regarding Judge Mukasey.
holding\textsuperscript{177} despite the impropriety of the government's tactics,\textsuperscript{178} and rendered an opinion on March 11, 2003 adhering to his order that Padilla be permitted to meet with counsel.\textsuperscript{179} In his opinion, Judge Mukasey explained that in order for the government to meet its burden of providing "some evidence" that Padilla is an enemy combatant, Padilla needs the opportunity to meet with counsel to submit evidence to the contrary.\textsuperscript{180} However, the Fourth Circuit denied Hamdi the limited right to counsel to assure that the enemy combatant designation was proper; it held that the mere two-page, nine-paragraph, Mobbs Declaration\textsuperscript{181} was sufficient evidence to justify holding Hamdi as an enemy combatant because Hamdi had no right to rebut the factual assertions in the Mobbs declaration.\textsuperscript{182} The Fourth Circuit

\textsuperscript{177} See Padilla, 243 F. Supp. 2d at 48-49 (noting the prudential nature of rule 6.3 and granting reconsideration despite the violation of that rule); Editorial, Get the Message, WASH. POST, Mar. 12, 2003, at A20 (mentioning the tone of Judge Mukasey's opinion in granting reconsideration to government despite its stall tactics); see also Benjamin Weiser, Judge Affirms Terror Suspect Must Meet with Lawyers, N.Y. TIMES, Mar. 12, 2003, at A17 (illustrating Judge Mukasey's annoyance at revisiting the issue).

\textsuperscript{178} See Padilla, 243 F. Supp. 2d at 48-49 (describing the government's conduct as violative of local rule 6.3 and noting the government may be stalling to benefit from a ruling in Hamdi); Dan Mihalopoulos, U.S. Rebuked over Padilla; Judge Says "Dirty Bomb" Suspect Entitled to Lawyer, CHI. TRIB., Mar. 12, 2003, at 1C (branding Judge Mukasey's opinion a "sharply worded rebuke"); Weiser, supra note 172, at A17 (emphasizing the opinion's impatient tone with the government's failure to comply with the order to let Padilla meet with his lawyer).

\textsuperscript{179} See Padilla, 243 F. Supp. 2d at 43 (holding Padilla must be permitted to meet with counsel as the original ruling provided for); Angie Cannon, Taking Liberties, U.S. NEWS & WORLD REP., May 12, 2003, at 44 (relating that Mukasey has twice ruled that Padilla should be allowed to meet with attorney); Mark Hamblett, Judge Sticks by Ruling on Access of "Dirty Bomber" to His Attorneys, N.Y.L.J., Mar. 12, 2003, at 1 (reporting that Mukasey refused to reverse his earlier decision).

\textsuperscript{180} See Padilla, 243 F. Supp. 2d at 54 (explaining there is no other way for Padilla to submit his petition and that the "some evidence" standard requires he be given an opportunity to refute the claims so that the judge can assure his detention is not arbitrary); Mihalopoulos, supra note 178, at 1C (presenting the argument that Padilla needs a lawyer to be able to challenge his status); Weiser, supra note 177, at A17 (noting the opinion allows Padilla to meet with his attorney in order to challenge his detention).

\textsuperscript{181} See Hamdi v. Rumsfeld, 316 F.3d 450, 472 (4th Cir. 2003) (discussing that the "declaration" presented by Michael Mobbs that outlines all of the allegations against Yaser Hamdi is not even three pages long); Jackman, supra note 70 (noting that a two-page "declaration of facts" signed by Mobbs justified the detention of Hamdi); Katharine Q. Seelye, Appeals Court Again Hears Case of American Held Without Charges or Counsel, N.Y. TIMES, Oct. 29, 2002, at A18 (stating that "two page, nine paragraph declaration" by Michael Mobbs was before the court for determining its sufficiency to support the holding of Hamdi).

\textsuperscript{182} See Hamdi, 316 F.3d at 473 (stating that he should not be able to rebut the government's assertions "because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch"); Richard Willing, Court Rules Against American Taliban Fighter, USA TODAY, Jan. 9, 2003, at 6A (quoting Chief Judge Wilkinson that "the review of battlefield captures
expressly limited its holding to cover only cases where citizens were captured in a combat zone abroad and not to include citizens captured on American soil.\textsuperscript{183}

The Fourth Circuit’s deference goes too far by ignoring any distinction between whether Hamdi was a legal or illegal combatant.\textsuperscript{184} More importantly, despite the fact that Hamdi was captured with the Taliban,\textsuperscript{185} there has been no factual determination as to whether he was connected with Al Qaeda. The district court’s question, “with whom is the war I should suggest we’re fighting”\textsuperscript{186} remains unanswered\textsuperscript{187} and vital to Hamdi’s status. \textit{Hamdi v. Rumsfeld}\textsuperscript{188} is peppered with descriptions of September 11th and the U.S.’s continued conflict with Al Qaeda. But, Al Qaeda and the Taliban are not coextensive.\textsuperscript{189} To hold Hamdi as an enemy combatant using a

in overseas conflicts is a highly deferential one”); see also Lyle Denniston, \textit{Court Says Military May Hold Citizens; Panel Finds Broad Powers for President During Warfare}, BOSTON GLOBE, Jan. 9, 2003, at A1 (specifying the portion of the Court’s ruling that Hamdi is not entitled to challenge the facts supporting his detainment).

\textsuperscript{183} See \textit{Hamdi}, 31 F.3d at 465 (limiting holding so as not to cover Americans captured in this country); Jackman, \textit{supra} note 70 (revealing that holding in Hamdi was limited to U.S. citizens captured abroad); Willing, \textit{supra} note 182 (connecting the fact that Hamdi was captured overseas with ruling that American citizen could be held as “enemy combatant” without trial).

\textsuperscript{184} See \textit{Ex Parte Quirin}, 317 U.S. 1, 31 (1942) (holding that the distinction between lawful and unlawful combatants is that lawful combatants are entitled to a prisoner of war status, which means they cannot be punished for their participation in war, while unlawful combatants are given trials by military tribunals to determine whether their acts were indeed unlawful before they can be punished); \textit{Hamdi}, 316 F.3d at 469 (recognizing the distinction but stating that it fails to make a difference in the case); Padilla v. Bush, 233 F. Supp. 2d 564, 594-95 (S.D.N.Y. 2002) (observing that the distinction between lawful and unlawful combatants raises the issue of whether both can be detained for the remainder of the hostilities).

\textsuperscript{185} See \textit{Hamdi}, 316 F.3d at 459 (justifying the holding because Hamdi was caught in the field of battle); George Edmonson, “\textit{Enemy Combatant} Issue Murky; Court Ruling Keeps One U.S. Citizen Locked Up Incommunicado, but It May Not Necessarily Apply to Others, ATLANTA JOURNAL AND CONSTITUTION, Jan. 10, 2003, at 9A (comparing Hamdi and Padilla, noting that Hamdi was captured in a combat zone unlike Padilla, who was captured in the U.S.); Richard A. Serrano, \textit{U.S. Born Talib Can Be Denied Trial, Court Says}, L.A. TIMES, Jan. 9, 2003, at 1 (presenting that Hamdi was apprehended in Afghanistan during conflict).

\textsuperscript{186} \textit{Hamdi}, 316 F.3d at 461 (questioning underpinnings of the government’s allegations that Hamdi is an enemy combatant).

\textsuperscript{187} The government’s answer was that Hamdi was a member of the Taliban and yet the justification for detaining him appears to be the conflict with Al Qaeda, \textit{see id.} at 462, 474, which leaves one wondering whether the Fourth Circuit is unable to distinguish the two, or whether they are trying to obfuscate the issues so that no one else can. See generally Serrano, \textit{supra} note 185; Willing, \textit{supra} note 182.

\textsuperscript{188} 316 F.3d 450 (4th Cir. 2003).

\textsuperscript{189} See Faye Bowers, \textit{How Lindh Is Now Aiding U.S. Terror Fight}, CHRISTIAN SCI. MONITOR, Oct. 4, 2002, at 02 (imparding the importance of the distinction of John Walker Lindh as being associated with the Taliban and not Al Qaeda); see also Tom Bowman &
warped agency theory because Al Qaeda was located in Afghanistan at the time leads to ludicrous results. For these reasons, it is clear that in order to determine whether the executive branch properly designated Hamdi as an enemy combatant further inquiry was necessary; and, as Judge Mukasey stated, the only effective way for such inquiry to occur is to allow the individual to meet with counsel at least to verify the initial determination.\textsuperscript{190}

The right to consult with counsel to refute assertions that establish military jurisdiction or that one is an enemy combatant is clearly established by the laws of war,\textsuperscript{191} which are an amalgam of past precedent.\textsuperscript{192} As the ACLU’s amicus brief points out, every previous similar case permitted counsel to assist the alleged “enemy combatant” in contesting his detention.\textsuperscript{193} This

Gail Gibson, \textit{Uncertainty Clouds Fate of Taliban Fighters}, ORLANDO SENTINEL, Dec. 8, 2001, at A14 (reporting that not all members of the Taliban fighters are members of the Al Qaeda terrorist network); Katharine Q. Seelye & Bernard Weil, \textit{U.S. Shifts Stand on War Captives}, TORONTO STAR, Feb. 8, 2002, at A01 (announcing the decision of the Bush administration to treat the captured Taliban fighters under the Geneva Convention but not to extend that treatment to captured Al Qaeda operatives).

\textsuperscript{190} See Padilla v. Rumsfeld, 243 F. Supp. 2d 42, 54 (S.D.N.Y. 2002) (maintaining that the right to present facts to tribunal necessarily implies a right to meet with counsel); Jackman, \textit{supra} note 29 (linking the issue of right to counsel with the issue of challenging enemy combatant status); David G. Savage, “Enemy” Citizen Jailing Criticized; \textit{Terrorism: Americans As “Combatants” Are Entitled to Counsel, Lawyers Panel Said}, L.A. TIMES, Aug. 10, 2002, at 11 (noting the ABA argues enemy combatants should have the right to meet with their attorneys in order to challenge their classification).

\textsuperscript{191} Jordan J. Paust, \textit{Essay: Judicial Power To Determine the Status and Rights of Persons Detained Without Trial}, 44 HARV. INT’L L.J. 503, 514 (2003) (stating that detained combatants have the right to judicial review as to their status); Lepri, \textit{supra} note 90, at 2572-75 (explicating the origin of the term “enemy combatant” from the term “unlawful combatant” under international law and observing that there have always been procedures used to allow those classified as “unlawful combatants” to challenge this classification through use of an attorney); see also Erwin Chemerinsky, \textit{Commentary; By Flouting War Laws, U.S. Invites Tragedy}, L.A. TIMES, March 25, 2003, at 13 (arguing the Geneva Convention mandates a determination by a tribunal is necessary to determine a detainee’s status).


\textsuperscript{193} See ACLU Brief I, \textit{supra} note 30, at 18 (stating that in every case where an individual was alleged to be an enemy combatant he was afforded counsel to contest that fact); \textit{see also Quirin}, 317 U.S. at 31 (commenting that unlawful combatants are entitled to trials to determine whether their acts were unlawful, implying that a right to the legal process and to counsel as a guide through that process); \textit{Padilla}, 243 F. Supp. 2d at 54 (highlighting that there is no other practical way to challenge the enemy combatant status than allowing them to meet with counsel).
right is more firmly rooted in the law of war than the enemy combatant status itself. In fact, the Quirin Court expressly held that such individuals had a right to judicial review of their status:

[The Government] insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force, no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case.

VIII. CONGRESS SPECIFICALLY PROSCRIBED SUCH DETENTION OF U.S. CITIZENS


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194 Individuals facing trial by military tribunal have been afforded counsel 100% of the time. See Quirin, 317 U.S. at 5; see also In Re Yamashita, 327 U.S. 1, 5 (1942); Ex Parte Milligan, 71 U.S. 2, 41 (1866); Colepaugh v. Looney, 235 F.2d 429, 431 (10th Cir. 1956); In Re Territo, 156 F.2d 142, 142 (9th Cir. 1946). This is not the case with individuals receiving an "enemy combatant status," a term which "appeared nowhere in U.S. criminal law, international law or in the law of war...[but] appears to have been appropriated from Ex Parte Quirin." American Bar Association Report, supra note 161; see also Gary Solis, Even a "Bad Man" Has Rights, WASH. POST, June 25, 2002, at A19.

195 Quirin, 317 U.S. at 11.

196 See 18 U.S.C. § 4001 (2003) (stating "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."); Robyn Blumner, Did President Overstep in Detaining Suspects?, ST. PETERSBURG TIMES, July 22, 2002, at 11A (explaining that 18 U.S.C. § 4001 was passed to ensure the executive branch was not able to hold citizens without charge during national emergencies); see also Beverley Lumpkin, Detention Law: "Enemy Combatants" and 18 U.S.C. 4001(a) (July 20, 2002) at http://more.abcnews.go.com/sections/us/hallsofjustice/hallsofjustice131.html (noting the legislative history of 18 U.S.C. § 4001(a) indicates Congress's goal was to ensure the detainment of citizens only would occur only in conformity with the laws they enact).

197 See ACLU Brief I, supra note 30, at 17-18 (explaining that the Emergency Detention Act was passed at the height of the "Red Scare"); see also Karen Brandon & Vincent J. Schodolski, Safety's Price May Include Freedom, CHI. TRIB., Oct. 7, 2001, at 1 (remarking that Congress passed the Emergency Detention Act amid the heat of the
haunting similarities to the government's present use of the enemy combatant status. Enacted in the name of national security, it allowed detention of U.S. citizens, permitted detention without a person being charged, and allowed the government to withhold information essential to a defense. Even the evidentiary standard was similar to the "some evidence" standard, only requiring reasonable grounds to believe the person was likely to conspire or engage in espionage or sabotage. Realizing how offensive the Emergency Detention Act was to Americans and the Constitution, Congress repealed the act. However, Congress concluded they needed to do more

Communist scare of the 1950s); Vladeck, supra note 26, at 961 (noting the Emergency Detention Act was passed as a part of the Internal Security Act of 1950).

198 See Blumner, supra note 196 (explaining the Emergency Detention Act allowed the president, through the attorney general, to hold without charge for the duration of a war or emergency, any Americans who would probably engage in acts of espionage or terrorism); see also Brandon & Schodolski, supra note 197 (explaining that the Emergency Detention Act gave the Department of Justice and the president power to indefinitely detain communists and suspected communist sympathizers and allocated money to build detention camps); Lawyers Committee For Human Rights, A Year of Loss: Reexamining Civil Liberties Since 9/11, Chpt. 4 (2002) (explaining that Title II of the Emergency Detention Act authorized relocation of "alleged subversives" into detention centers during wartime and detention without charge or trial at the behest of federal officials), available at http://www.lchr.org/uslaw/loss/loss_ch4b.htm (last visited Oct. 28, 2003) [hereinafter Lawyers Committee].

199 See ACLU Brief I, supra note 30, at 13 (describing the nature of the Emergency Detention Act); see also Brandon & Schodolski, supra note 197 (outlining government powers under the Emergency Detention Act); Memorandum from Timothy H. Edgar, ACLU Legislative Counsel, to Interested Persons (Sept. 13, 2002) at http://archive.aclu.org/congress/1091302d.html [hereinafter Edgar Memo] (discussing the scope of and reaction to the Emergency Detention Act).

200 Compare ACLU Brief I, supra note 30, at 23 (explaining the government's contention that the petitioner can be confined indefinitely as long as the government presents "some evidence" in support of its claims), with Foucha v. Louisiana, 504 U.S. 71, 86 (1992) (holding that in order to commit an individual to a mental institution in a civil proceeding, the government is required to prove by clear and convincing evidence that the individual is mentally ill and requires hospitalization for his own welfare and for the protection of others), and U.S. v. Salerno, 481 U.S. 739, 750 (1987) (explaining that the Bail Reform Act of 1984 requires the government to offer clear and convincing evidence why "no conditions of release can reasonably assure the safety of the community or of any person" from criminal suspects).

201 See ACLU Brief II, supra note 139, at 13 (quoting a letter from Deputy Attorney General Kleindienst to Chairman Celler of the House Judiciary Committee of 12/17/69 that "[i]n 1969 the Justice Department acknowledged that the continuation of the Emergency Detention Act is extremely offensive to many Americans"); Lumpkin, supra note 196 (describing the Justice Department's hopes that repeal of the Emergency Detention Act would allay the fears and suspicions it aroused in many Americans); see also Edgar Memo, supra note 199 (noting that although the Emergency Detention Act was never used, its existence provoked fear in many Americans).

202 See ACLU Brief II, supra note 139, at 13 (noting that Congress repealed the Emergency Detention Act in 1971); Lumpkin, supra note 196 (explaining that in enacting 18 U.S.C. §4001, Congress also repealed the Emergency Detention Act); see also Edgar
to protect Americans from arbitrary executive action in the future and passed 18 U.S.C. § 4001 to limit the detention of citizens to only those situations authorized by an act of Congress.\(^{203}\)

The present detention of Hamdi and Padilla violates 18 U.S.C. § 4001.\(^{204}\) The statute states, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."\(^{205}\) The Supreme Court in *Howe v. Smith* affirmed reading the statute broadly enough to prevent the federal government from detaining a citizen even though he was properly convicted in state court.\(^{206}\) Though Robert Howe was convicted of first-degree murder for raping and strangling an elderly woman in Vermont, the Court held he could not be transferred to federal prison for security reasons or any other reason unless the federal government had authorization from Congress.\(^{207}\) In a footnote, Justice Burger rejected the government’s argument that the statute should not be applied to

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\(^{203}\) See ACLU Brief II, supra note 139, at 13 (explaining 18 U.S.C. § 4001 clearly reflects Congress’s intent to limit imprisonment or other detention of citizens to situations in which statutory authorization exists); see also Blumner, supra note 196 (beginning by stating that “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress”); Vladeck, supra note 26, at 961 (explaining that Congress’s concern that mere repeal of the Emergency Detention Act would send an ambiguous message about presidential power prompted it to add §4001 to 18 U.S.C., which limits imprisonment and other detention of citizens to situations authorized by statute).

\(^{204}\) See ACLU Brief II, supra note 139, at 13 (explaining that neither 18 U.S.C. § 4001 nor the USA Patriot Act provide statutory authority for the detention of Jose Padilla); see also ACLU Brief I, supra note 30, at 13 (asserting that 18 U.S.C. § 4001 is not limited to the detention of citizens in civilian prisons and detention facilities, but rather in any facility of the U.S. government). See generally Vladeck, supra note 26, at 968 (concluding that detention of “enemy combatants” cannot be based upon a unilateral decision by the executive branch).


\(^{206}\) See Howe v. Smith, 452 U.S. 473, 480 n.3 (1981) (stating that the plain language of 18 U.S.C. § 4001(a) prescribes detention of any kind by the United States, absent a congressional grant of authority to detain); ACLU Brief I, supra note 30, at 13-14 (stating that contrary to the government’s assertion, 18 U.S.C. § 4001(a) applies to detention or imprisonment in any facility); see also Vladeck supra note 26, at 963 (explaining that the standard set by the Supreme Court in *Howe v. Smith* indicates that 18 U.S.C. § 4001(a) applies to any federal detention of a U.S. citizen).

\(^{207}\) See Howe, 452 U.S. at 476 (explaining how Vermont attempted to move prisoners to federal prisons after closing a state facility); Ramirez, supra note 92, at 231 (describing the Court’s interpretation of Section 4001(a) “to mean that persons protected by the Constitution shall not be detained indefinitely without congressional authority”); see also Vladeck, supra note 26, at 963 (calling this aspect of the Court’s case dicta).
state prisoners by emphasizing "the need to give adequate weight to the plain language of section 4001(a) proscribing detention of any kind by the United States absent a congressional grant of authority to detain."\textsuperscript{208} The court made clear that both the period of time for which the individual was being detained and the state's complicity is irrelevant.\textsuperscript{209} In short the statute requires congressional authority for the detention of any citizen by the federal government.\textsuperscript{210} Yet the Fourth Circuit ignored the plain language of 18 U.S.C. § 4001 and construed the statute so as not to apply to Hamdi.\textsuperscript{211} Judge Mukasey recognized the statute's applicability to Padilla; but held Congressional authorization to use force against those responsible for the attacks on September 11\textsuperscript{th} justified Padilla's detention.\textsuperscript{212} The Second Circuit specifically "disagree[d] with the district court which held [the joint resolution] must be read to confer authority for Padilla's

\textsuperscript{208} See Howe, 452 U.S. at 480 n.3 (emphasis added) (explaining that the plain language of the statute proscribes federal detention of citizens without congressional authority and that state complicity is irrelevant).

\textsuperscript{209} See id. (stating temporary detention, even at a state's request, offends the purpose of 42 U.S.C. § 4001). See generally Ramirez, supra note 92, at 231-32 (analyzing § 4001(a)); Vladeck, supra note 26, at 963 (examining the Howe rationale).

\textsuperscript{210} See 18 U.S.C. § 4001(a) (stating that "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress"); ACLU Brief I, supra note 30, at 13-14 (noting that 18 U.S.C. §4001 plainly reflects Congress's intent to limit detention and imprisonment of citizens to situations authorized by statute); see also Lawyers Committee, supra note 198 (stating that the purpose of 18 U.S.C. §4001 was to the restrict the imprisonment or detention of U.S. citizens to situations in which statutory authority for their incarceration exists).

\textsuperscript{211} See Hamdi v. Rumsfeld, 316 F.3d 450, 468 (4th Cir. 2003) (concluding that the statute was not "intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like [an] enemy combatant"); Citizen Detained as 'Enemy Combatant' Has Limited Right to Consult With Counsel, 72 CRIM. L. REPORTER 11, at ¶ 7 (Dec. 11, 2002) (explaining that the Fourth Circuit concluded that the Joint Resolution qualifies as an "Act of Congress" and that its broad language covers the petitioner's argument that his detention was barred by 18 U.S.C. § 4001), at http://litigationcenter.bna.com/pic2/lit.nsf/id/BNAP-5GQJPQ?OpenDocument (last visited Oct. 12, 2003). See generally Susan Herman, Yaser Hamdi and the Fourth Circuit's Legal No-Man's Land, JURIST (Jan. 13, 2003) (explaining the court's conclusion that Congress's Use of Force resolution provided sufficient authorization for the President to make any decisions regarding the conduct of the "war," including detentions and therefore 18 U.S.C. § 4001 was not applicable to Hamdi), at http://jurist.law.pitt.edu/forum/index.htm.

The government violated both Padilla’s and Hamdi’s Fifth Amendment right to due process of law by detaining them with no meaningful judicial review. \(^{215}\) “The Fifth Amendment guarantees, ‘[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.’”\(^{216}\) Hamdi’s and Padilla’s procedural due process rights were violated by the denial of an opportunity to be heard. \(^{217}\) Specifically, the Fourth Circuit violated Hamdi’s procedural due process by denying him the opportunity to respond to the allegations in the Mobbs Declaration; \(^{218}\) thereby, stripping him of his liberty without the


\(^{214}\) See Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (stating that “freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects”); see also U.S. CONST. amend. V, §1 (providing that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law”). See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (affirming that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection”).

\(^{215}\) See Kacprowski, supra note 92, at 696 (concluding that the courts used the Enemy Combatant Laws to avoid the accused’s Fifth and Sixth Amendment criminal procedure protections). See generally Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (noting that “the requirement of ‘due process’ is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble”); Sam Stanton & Emily Bazar, Security Collides With Civil Rights War On Terrorism Has Unforeseen Results, MODESTO BEE, Sept. 28, 2003, at A1 (noting Padilla’s and Hamdi’s conditions of detention).

\(^{216}\) ACLU Brief I, supra note 30, at 4 (citing U.S. CONST. amend. V, § 1).

\(^{217}\) See Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (quoting Gronniss v. Ordean, 234 U.S. 385, 394 (1914), which held that “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner’”); McGrath, 341 U.S. at 168 (stating that the “right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society”); see also Stanton and Bazar, supra note 215 (chastising the Bush administration for creating “a new category that allows U.S. citizens to be classified as “enemy combatants” who can be held without charges and denied access to lawyers”).

\(^{218}\) See Hamdi, 316 F.3d at 461 (discussing how Fourth Circuit denied Hamdi access to counsel by reversing a district court order giving him the right to meet with his lawyer Frank Dunham); Tom Jackman, Judge Skewers U.S. Curbs on Detainee, WASH. POST, Aug. 14, 2002, at A10 (quoting U.S. District Judge Robert G Doumar, “I do think that due process requires something other than a basic assertion by someone named Mobbs that
opportunity to put forth any evidence to the contrary violates his due process rights.219

Moreover, Judge Mukasey's efforts to afford Padilla procedural due process were repeatedly frustrated by the government's refusal to comply with his orders.220 He has explained that finding Padilla was an enemy combatant with no opportunity to rebut the assertions in Mobbs declaration would be an arbitrary exercise of government power.221 Depriving an individual of the right to be heard not only violates procedural due process but also arbitrarily takes away liberty constituting a violation of substantive due process.222 Judge Mukasey recognizes declaring Padilla an enemy combatant before he has met with counsel would violate these Constitutional guarantees and this has
prevented him from making any final determination on Jose Padilla's status as an enemy combatant.\textsuperscript{223}

\textbf{CONCLUSION}

Detaining American citizens as enemy combatants exemplifies our government's overreaction to legitimate security threats in time of war. We have crossed the line and invaded the rights of these individuals by stripping them of their liberty without due process of law. They have been denied their right to counsel, denied their right to be heard, denied the statutory protection of 18 U.S.C. § 4001, and detained based on an imprudent, unjustified expansion of \textit{Ex Parte Quirin}. The courts have shown the government undue deference, they have emphasized the need for security, and rationalize the denial of fundamental rights with the laws of war. In my view our liberties have been ratcheted down below what our constitutional minimum is and can not be justified by any cost benefit analysis.

However, our jurisprudential evolution has been brought to bear on the dynamic pull between security and civil liberty. Judge Mukasey felt the need to temper extreme views in this volatile controversy by mentioning the limits of the case in his opinion of March 12, 2003. The government boldly cautioned him against sacrificing security and risking future attacks by going too far to protect individual rights.\textsuperscript{224} With equal severity amicus curiae submissions spoke of reverting to \textit{Korematsu}, repudiating the Magna Carta, and suggesting dictatorship is around the corner.\textsuperscript{225}

\textsuperscript{223} See Padilla v. Bush, 243 F. Supp. 2d 42, 53 ("At a minimum, if the government had permitted Padilla to consult with counsel at the outset, this matter would have been long since decided in this court...") (S.D.N.Y. 2003); Kacprowski, \textit{supra} note 92, at 694 (noting that "the Padilla court carefully crafted its holding to provide alleged enemy combatants with the protection of right to counsel and also to provide courts with flexibility in applying that right"). See generally Weiser, \textit{supra} note 177 (reporting Judge Mukasey's impatience and irritation with the government).

\textsuperscript{224} See Padilla v. Bush, 243 F. Supp. 2d 42, 57; see also Ctr. for Nat'l Sec. v. U.S. Dep't of Justice, 331 F.3d 918, 932 (D.C. Cir. 2003) (explaining that "several federal courts... have wisely respected the executive's judgment in prosecuting the national response to terrorism" and it "is not within the role of the courts to second-guess executive judgments made... exercis[ing] the expertise of protecting national security"). See generally Karen Branch-Brioso, \textit{Fight Over Rights Rages On}, ST. LOUIS POST-DISPATCH, Sept. 8, 2002, at B1 (reporting that the Justice Department says that "some erosion of individual liberty is acceptable in the name of national security").

\textsuperscript{225} See Padilla, 243 F. Supp. 2d at 57 (equating these assertions with the opposite assertion that denying Padilla consultation with counsel will increase the chances that
Those to whom images of catastrophe come that easily might take comfort in recalling that it is a year and a half since September 11, 2001, and Padilla's is not only the first, but also the only case of its kind. There is every reason not only to hope, but also to expect that this case will be just another of the isolated cases, like *Quirin*, that deal with isolated events and have limited application.226

For the individuals involved this may seem like a small comfort but there is truth to the statements. Judge Mukasey has been insistent in demanding Padilla be afforded his due process. Presently there are two Americans unjustly held but there has not been the detention of an entire race. In *Korematsu* liberty was removed without even the requirement of suspicion and the Court upheld the detention. Here, the US attorneys have had to ignore court orders to deny Padilla access to counsel.

This does not diminish the gravity of the constitutional implications of detaining citizens as enemy combatants. The need to speak out against the infringement of civil liberties is in no way diminished by the strides civil libertarians have made. In fact challenging infringements of our civil liberties is a necessary component of our jurisprudential evolution. Safeguards such as 18 U.S.C. § 4001 will only be put in place if government attempts to restrict our liberty are met with resistance. History supports the view that this resistance will continue and we will recognize our indiscretions and erect safeguards for the future once the immediate crisis has passed.

The view that terrorism is a threat of such a magnitude never before encountered by our country, so that historical comparisons of constitutional challenges are inappropriate, is flawed. A global power, an "Evil Empire", with a nuclear arsenal and a manifesto calling for world dominance was attempting to overthrow governments around the world and had planted sympathizers in America dedicated to the overthrow of our government. People built fallout shelters in schools, learned to "duck and cover", and future attacks "will go undetected"). See generally M. Cheriff Bassiouni, *Don't Tread On Me; Is The War On Terror Really A War On Rights?*, CHI. TRIB., Aug. 24, 2003, at 1C (illustrating the exaggerated import of Padilla's fate noted by Judge Mukasey); Mihalopoulos, supra note 178 (quoting Judge Mukasey's sarcastic comment that if Padilla does not get all the legal protections he is entitled to then "the tanks will have rolled").

226 Padilla, 243 F. Supp. 2d at 57 (noting the court's view this holding is of extremely narrow application).
watched as nuclear missiles headed to Cuba just off our shores. Those who argue the threat posed by terrorism is larger than any faced before suffer from temporal arrogance or ignorance of the past. The United States has been threatened with apocalypse and after overreacting to that threat we restored constitutional rights and built additional protections into our law. These protections operate to limit government restriction of our civil liberties today and will be improved upon after the immediate crisis is over. This is the jurisprudential evolution our forefathers contemplated in operation.

REASSURANCE FROM THE SECOND CIRCUIT

The Second Circuit’s recent opinion regarding Padilla restored my confidence in our judiciary and the rule of law in America. The court held that judicial deference is limited, that the Non-Detention Act prohibits detention of an American citizen as an enemy combatant absent congressional authority. The order to release of Jose Padilla will be stayed until the Supreme Court hears it. Nonetheless the opinion affirmed my belief that our jurisprudence has evolved for the better and with each crisis the protection of our civil liberties grows stronger.

228 Id. at 84.