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Rule of Law or Rule By Law: The Detention of Yaser Hamdi

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I.	Introduction	

Today it is said we are engaged in a war against terrorism, not a conventional war, but a war all the same. The basic rule in this war is that there are no rules. No one is safe from the danger of nuclear attack, suicide bombers, biological weapons, and other terrifying threats against American citizens at home and abroad. The terrorist attacks of September 11, 2001 that killed innocent men, women and children in New York, Virginia and Pennsylvania have also proven how vulnerable our civilization is to terrorist attacks.¹ These events have forced us to re-evaluate the

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appropriate balance between security and civil liberty to preserve our way of life and the constitutional values our ancestors fought and died for.

Even though these are perilous times, Congress has not declared war. Presumably, Congress would, if it could identify a nation state as our enemy. While President George W. Bush has focused on Iraq as the subject of military intervention, there is still no conclusive proof that country sponsored the attacks of September 11, 2001.²

Al Qaeda operatives of various nationalities infiltrated sovereign U.S. borders, organized as independent cells, and laid in wait until the right time arrived to commit criminal acts of mass destruction.³ Ostensibly, Al Qaeda consists of a relatively few number of individuals united by Islamic fundamentalism, a devotion to violent solutions and a common hatred of the United States and Israel.⁴ They are "guerillas" who ignore the conventional international laws of warfare, are willing to use weapons of mass destruction and target as their victims innocent unarmed civilians and non-combatants.⁵

Modern technology coupled with the unprecedented boldness of extremists willing to engage in suicide missions has significantly escalated both the means of destruction and the scale of catastrophes. In earlier times, successfully hijacking an airplane to Cuba for political reasons was considered a criminal act and treated as a crime. Now, hijacking jumbo jets and flying them into New York's World Trade Center are no longer considered merely criminal acts, but are thought of as calculated acts of war intended to destroy the United States, or at the very least to alter her foreign policies.

rule by law, and to Professor Peter Barton, also of Western, for without his help and encouragement over many years, I would never have entered graduate school. I also thank Professors Anita Allen-Castellitto and Seth Kreimer of the University of Pennsylvania Law School and appellate counsel Peter Goldberger, Esq. of Ardmore, Pennsylvania, for their help so I could support my family through three years of financial sacrifice. This article is dedicated to my father, Imre (Jim) Lugosi, of Brantford, Ontario, Canada, who by his example, taught me to value civil liberty, freedom, justice and democracy.

1. James Barron, *Thousands Feared Dead as World Trade Center Is Toppled*, N.Y. TIMES, Sept. 11, 2001, available at <http://www.jazztet.com/nytimes20010911>.

2. Address, President George W. Bush at Sioux Falls Convention Center (Nov. 3, 2002), Remarks by the President in South Dakota Welcome, at <http://www.whitehouse.gov/news/releases/2002/11/20021103-3.html>.

3. The United States Department of Justice has released a censored version of the Al Qaeda Training Manual seized during a search of a suspected terrorist's home in Birmingham, England. The English translation of the manual reveals a sophisticated and premeditated plan to deceive and murder unsuspecting trusting enemies of Islam. See AL QUEDA TRAINING MANUAL, available at <http://www.usdoj.gov/ag/trainingmanual.htm>.

4. See MARK JUERGENSMEYER, *TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS VIOLENCE* (Berkeley: University of California Press 2001).

5. See WALTER LAQUEUR, *THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION* (Oxford University Press 1999). Historically, guerillas were defined as "irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops, or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death." See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 783 (2d ed. Washington, D.C.: Government Printing Office 1920) (1896).

Arguably, criminal acts can be transformed into acts of war depending on the selected target, the nature, identity and number of the victims, the psychological impact, the political motivation of the enemy, the scale of the attacks, and the magnitude of the resulting devastation. The single most important factor in the President's decision to engage in a military war against terrorists and those who help them, however, is the government's perception of the present and future threat which terrorism presents to American freedom and democracy.

On September 11, President George W. Bush initially described the attacks as "deliberate and deadly terrorist acts" and "acts of mass murder."⁶ Within twenty-four hours, however, President Bush began calling the attacks "acts of war"⁷ against "freedom and democracy."⁸ In assuring the nation that the United States would prevail, Bush promised, "we will not allow this enemy to win the war by changing our way of life or restricting our freedoms."⁹

On September 20, 2001, President Bush, in a Joint Address to Congress and to the Nation, portrayed members of al Qaeda as "heirs of all the murderous ideologies of the 20th century" who "follow in the path of fascism, and Nazism, and totalitarianism."¹⁰ Again, Bush repeated his promise to defend constitutional values, stating "we are in a fight for our principles, and our first responsibility is to live by them."¹¹ He added, "this country will define our times, not be defined by them," and that "this will not be an age of terror; this will be an age of liberty."¹² On January 29, 2002, in his State of the Union Address, President Bush told the nation, "[o]ur enemies send other people's children on missions of suicide and murder. They embrace tyranny and death as a cause and a creed. We stand for a different choice, made long ago, on the day of our founding. We affirm it again today. We choose freedom and the dignity of every life."¹³

Has President Bush kept his promises to maintain freedom, human dignity, constitutional civil liberties and defeat terrorism at the same time, or have the attacks of 9-11 been used as a pretext to politically justify the potentially permanent curtailment of constitutional civil liberties? Can the

6. Address, The White House, Evening Address to the Nation (Sept. 11, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>.

7. Address, The White House, Morning Remarks (Sept. 12, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html>. Professor Peter Spiro rejects treating the attacks of 9-11 as acts of war, and argues they were criminal acts. See Peter Spiro, *Not War, Crimes*, WRIT FINDLAW'S LEGAL COMMENTARY, Sept. 19, 2001, at http://writ.news.findlaw.com/commentary/20010919_spiro.html.

8. Address, *supra* note 6.

9. *Id.*

10. Address, The White House, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

11. *Id.*

12. *Id.*

13. Address, The White House, State of the Union Address (Jan. 29, 2002) available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

United States legitimately claim the moral high ground in the war against terrorism if, in the name of national security, defending freedom and liberty, the United States government eviscerates constitutional rights, invades personal privacy, and authorizes indefinite detentions? Has the President lost moral credibility at home and in the eyes of the world community with respect to issues of civil liberties?

II. Who Are Enemy Combatants?

I wish to examine the legal treatment of an American citizen, Yaser Esam Hamdi, who is indefinitely detained under the label of an “enemy combatant,” and stripped of all constitutional rights, including the right to due process of law. An enemy combatant might theoretically be any American citizen who is designated as an enemy of the state by order of the President of the United States. Enemy combatants can be detained without charge, denied counsel, and held incommunicado.

The government argued that its ability to designate any citizen as an enemy combatant is a legitimate exercise of its executive discretion that is not subject to judicial review.¹⁴ The government has kept secret how someone is classified as an enemy combatant.¹⁵ Outside of the executive, no one knows precisely what culpable conduct attracts the government’s attention and provokes indefinite detention and relentless interrogation unchecked by the conventional norms of due process.

This unprecedented display of raw executive power comes at a time when there has been no Congressional declaration of war and when there has been no Congressional suspension of the writ of habeas corpus. Hamdi’s case is the “first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer.”¹⁶ Is Hamdi’s case, therefore, the advent of the replacement of ‘rule of law’ by ‘rule by law’?¹⁷

14. *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002) [Hamdi II]. “In its brief before this court, the government asserts that “given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military’s determination that an individual is an enemy combatant and should be detained as such. ‘The government thus submits that we may not review at all its designation of an American citizen as an enemy combatant—that its determinations on this score are the first and final word.’ *Id.*”

15. The government has refused to disclose to the courts a copy of the screening criteria of what constitutes an “enemy combatant,” even on an *ex parte* basis under seal. Judge Robert Doumar, Order, *Hamdi v. Rumsfeld*, Civil Action No. 2:02cv439 (E.D. Va. Aug. 16 2002), 2002 at 3, n. 1 *available at* <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums81602ord.pdf>.

16. *Id.* at 1.

17. I define the “rule of law” as government by laws that people of moral conscience are willing to obey because the laws are inherently just. The ideal of the “rule of law” is to live in a democratic society that places constitutional limits on the power of government, permanently protects inalienable human rights and fundamental freedoms from undue encroachment, and provides equality before laws administered by an independent judiciary. I define “rule by law” as the antithesis of the “rule of law,”

These developments are alarming and raise serious questions. Is the government's detention of Hamdi lawful? Should we trust the President and do what he wants? If today's designated enemy combatants may be a lawful exception to the rule of law, could tomorrow's enemy of the state be you or me?¹⁸

A. Facts

Yaser Hamdi was born on September 26, 1980 in Baton Rouge Louisiana.¹⁹ By sheer accident of birth, and the first article to the 14th Amendment to the US Constitution,²⁰ Hamdi is an American citizen, endowed with all the corresponding rights and privileges.²¹ When he was three years old, he returned to the home of his parents, the Kingdom of Saudi Arabia, where dual citizenship is not allowed.²² When Hamdi became an adult, he was for all practical purposes a Saudi Arabian.

The unclassified information known about Hamdi reveals that he had traveled to Pakistan and then entered Afghanistan on July 15, 2001 to do volunteer humanitarian relief work.²³ He was captured in that country at Mazur-e-Sharif two months later by armed forces led by the United States and the Northern Alliance during the Afghanistan military campaign "Enduring Freedom."²⁴

meaning to be governed in any society, including democratic societies, where the government may exercise arbitrary executive powers and may abridge at will constitutional civil liberties. The main difference between these opposite concepts is that *justice* is the defining characteristic in a society governed by "rule of law," and *deferential obedience* is the defining characteristic in a "rule by law" society.

18. Editorial, *Detaining Americans*, WASHINGTON POST, June 11, 2002 at A24. "If its positions are correct, nothing would prevent the president—even in the absence of a formal declaration of war—from designating any American as an enemy combatant. Without proving the correctness of the charge before a court, the military could then detain that person forever. And having done so, it could prevent that detainee from hiring a lawyer to argue that the government, in fact, has it all wrong. If that's the case, nobody's constitutional rights are safe." *Id.*

19. Birth Certificate of Yaser Esam Hamdi, Exhibit A to *Petition for Writ of Habeas Corpus*, Hamdi v. Rumsfeld, 243 F.Supp. 2d 527 (E.D. Va. 2002)(No. 2:02cv439) available at <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums61102pet.pdf>. [Hamdi Petition III].

20. U.S. CONST. amend XIV, § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21. The Friends of Immigration Law Enforcement (FILE) support reclassifying Hamdi as a Saudi national and sending him back to Guantanamo Bay Cuba to establish the precedent that birth alone in the United States is not sufficient to acquire and hold American citizenship. See *Citizenship, Yaser Hamdi*, at <http://www.fileus.com/dept/citizenship/hamdi> (Aug. 2002)

22. It is unknown whether Hamdi denounced his American citizenship. See John Mintz, *Qatar Lawyer Builds Case for Detainees at Guantanamo Bay; Attorney's Client's Include U.S. Born Prisoner*, WASHINGTON POST, May 13 2002, at A3.

23. See letter authored by Hamdi's father, Esam F. Hamdi, to Senator Patrick J. Leahy, August 5, 2002 at <http://www.aaiusa.org/pr/release08-08-02.htm>.

24. *Petition for Writ of Habeas Corpus*, *supra*, note 18, at paragraphs 11 and 12. See also Robyn E. Blumner, *Captured Foe Who is Likely an American Tests Rule of Law*, ST. PETERSBURG TIMES, June 9, 2002. See also Mintz, *supra*, n. 21.

On September 18, 2001, Congress authorized the President "to use all necessary and appropriate force against such nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks" or "harbored such organizations or persons."²⁵ That same day, President Bush signed Senate Joint Resolution Number 23, authorizing in self-defense the use of military force to deter and prevent terrorism, to protect the United States and its interests, anywhere in the world.²⁶

On November 13, 2001, President Bush issued a military order authorizing the Secretary of Defense, Donald Rumsfeld, to indefinitely detain any individual without constitutional due process of law who is *not* a United States citizen, if that person was suspected to be a terrorist or a terrorist sympathizer.²⁷ This move against non-citizens was predictable and in line with historical responses to threats against national security.²⁸

Around January 11, 2002, Hamdi was forcibly removed along with 384 other captives of 26 other nationalities to the United States Naval Base at Guantanamo Bay, Cuba, for imprisonment at Camp X-Ray, outside the territorial jurisdiction of federal courts.²⁹ There it was discovered that Hamdi's claims that he was an American citizen were true.³⁰ Hamdi was then transferred on April 6, 2002 to a military jail in Norfolk, Virginia. This move pre-empted a possible application by Hamdi in District Court to find jurisdiction to challenge the legality of his detention in Cuba, which could have set a precedent to encourage further legal challenges by the other detainees.³¹ Hamdi is presently indefinitely detained without charge in the Navy brig in Norfolk Virginia for possible future interrogation.³²

25. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

26. Statement, The White House, President Signs Authorization for Use of Military Force bill: Statement by the President, (Sept 18, 2001) at <http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html>. In an emergency when Congress is not in session, the President as the Commander in Chief has the legal right and the duty to provide for the common defense, even in the absence of a Congressional declaration of war. See *The Prize Cases*, 67 U.S. (2 Black) 635, 668-671 (1862).

27. Press Release, Office of the White House Press Secretary, President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (Nov. 13, 2001). See *Military Order of November 13, 2001*, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

28. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 1004 (2001-2002). Professor Cole of Georgetown University is critical of the historical political response to trade the liberty of immigrants for domestic security. He argues that the "... rights of political freedom, due process, and equal protection belong to every person subject to United States legal obligations, irrespective of citizenship." What is new in Hamdi's case is the unprecedented judicial challenge of what constitutional rights to grant when U.S. citizens, like Hamdi, are suspected of being allied with enemy terrorists, whether at home, abroad, or in a zone of military combat.

29. See Joanne Mariner, *Guantanamo: The Continuing Debate Over The Legal Status Of Guantanamo Detainees*, WRIT FINDLAW'S LEGAL COMMENTARY (Mar. 11, 2002) at <http://writ.news.findlaw.com/mariner/20020311.html> (Mar. 11, 2002). See also John Mintz, *supra*, note 21. See also *Petition for Writ of Habeas Corpus*, *supra*, note 17 at 16.

30. Katharine Q. Seelye, *A Nation Challenged: The Prisoners; Move Likely For Inmate Who May Be American*, N.Y. TIMES, Apr. 5, 2002, at A8.

31. *Id.*

32. *Petition for Writ of Habeas Corpus*, *supra*, note 18 at 19-20.

B. The Legal Proceedings

So far, three habeas corpus petitions, dated May 10, May 24, and June 11, 2002, have been filed in federal District Court seeking Hamdi's release from custody. The first two petitions were successfully opposed by the government on the basis that the persons who filed these petitions were ineligible to do so.³³ On June 11, District Court Judge Robert "Bobby" Doumar, a descendant of Arabs from Syria and Lebanon, as well as a life-long Republican and President Reagan appointee,³⁴ recognized the validity of the third petition. Judge Doumar appointed the Federal Public Defender for the Eastern District of Virginia to act as counsel for Hamdi, and ordered the government to allow Hamdi's counsel unmonitored access to his client.³⁵ This order was stayed to permit the government to be served with this latest petition filed by Hamdi's next friend, his father Esam Hamdi, and to permit an opportunity for the government to appeal.

On June 13, the government filed a motion to stay pending appeal.³⁶ The government also filed a Declaration from Colonel Woolfolk, the Deputy Commander of the Joint Task Force at Guantanamo Bay, Cuba. He stated that granting Hamdi access to legal counsel "may create substantial harm to U.S. security interests..." and that having the assistance of counsel would "disrupt the secure interrogation environment that the United States has labored to create..." and "thwart any opportunity to develop intelligence through this detainee."³⁷ The next day the Court of Appeals for the Fourth Circuit granted the stay.³⁸ On July 12, Chief Judge Harvey Wilkinson III released the Court's reserved opinion, reversing the order of Judge Doumar, and remanded the case for further proceedings.³⁹

The Fourth Circuit held that if Hamdi were an "enemy combatant, who [was] captured during hostilities in Afghanistan, his detention [was] lawful."⁴⁰ The Court cited the *Quirin* case for the proposition that "both lawful and unlawful combatants, regardless of citizenship, are subject to capture and detention as prisoners of war."⁴¹ The Court also concluded,

33. Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002). [Hamdi I].

34. Richard Leiby, *An American Justice; Free-Spoken Judge Challenges the White House Over Combatant Rights*, WASHINGTON POST, Sept. 6, 2002, at C1.

35. Order, Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002)(No. 2:02cv439)(entered June 11, 2002) available at <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums61102ord.pdf>.

36. See Emergency Motion for Temporary Stay Pending Consideration of Motion for Stay Pending Appeal, Hamdi v. Rumsfeld [Hamdi II], 296 F. 3d 278 (4th Cir. 2002) available at <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums61302estay.pdf>.

37. See Declaration of Donald D. Woolfolk, *Hamdi II*, 296 F. 3d 278, at <http://news.findlaw.com/hdocs/docs/terrorism/hamdi61302wflkdec.pdf>.

38. See Order, *Hamdi II*, 296 F. 3d 278, available at <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums61302ord.pdf>.

39. *Hamdi II*, 296 F.3d at 283.

40. *Id.*

41. *Id.*

“[s]eparation of powers principles must, moreover, shape the standard for reviewing the government’s designation of Hamdi as an enemy combatant.”⁴²

Counsel for the government offered Chief Judge Wilkinson an ex parte sealed declaration that was not proffered to Judge Doumar.⁴³ This document purported to describe how the military assesses and screens individuals to show how Hamdi fit the eligibility criteria for an enemy combatant. The Appeals Court, noting that the declaration first ought to have come before the district court judge, declined this offer.⁴⁴

The government asked the Fourth Circuit to outright dismiss Hamdi’s petition, on the basis “courts may not second-guess the military’s determination that an individual is an enemy combatant.”⁴⁵ Without judicial review, the government would have the first and last word on designating any American citizen as an enemy combatant. The Fourth Circuit found this position to be a “sweeping proposition – namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so.”⁴⁶ While the President’s wartime detention decisions were to be accorded “great deference” by the courts,⁴⁷ the appropriate standard of judicial review of the designation of Hamdi as an enemy combatant, “must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation.”⁴⁸

On August 8, the Appeals Court dissolved its stay order so that Judge Doumar could resume conduct of the *Hamdi* case, in strict compliance with the Appeal Court’s decision, suggesting that the “least drastic procedures may promptly resolve Hamdi’s case and make more intrusive measures unnecessary.”⁴⁹ On August 13, Judge Doumar heard oral argument as to whether the contents of a document signed by government lawyer Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy (hereafter the “Mobbs Declaration”), was sufficient, standing alone, to classify Hamdi as an enemy combatant and to deprive him of his constitutional rights.⁵⁰

At that hearing, the government conceded that their determination of Hamdi’s status was subject to judicial review, but that the Mobbs Declaration established a sufficient factual foundation to dismiss the

42. *Id.*

43. *Id.* at 284.

44. *Id.*

45. *Id.* at 283.

46. *Id.*

47. *Id.* at 281-282.

48. *Id.* at 283-284.

49. *Id.* at 284.

50. *Hamdi*, 243 F.Supp.2d at 528-529.

petition for habeas corpus.⁵¹ When pressed under questioning by Judge Doumar, counsel for the government admitted that, at a minimum, Hamdi was entitled to the same constitutional rights afforded to American citizen Herbert Hans Haupt in the *Quirin* case, specifically access to counsel and the opportunity to defend himself before a military tribunal.⁵²

In his decision released August 16, 2002, Judge Doumar held that Hamdi was entitled to due process of law as provided by the Fifth Amendment to the United States Constitution.⁵³ Article V of the Constitution plainly states, “No person shall . . . be deprived of . . . liberty . . . without due process of law . . .”⁵⁴ Confining someone indefinitely who has not been convicted of any offense, let alone been charged, and depriving that person of the assistance of counsel, without more evidence, appeared to Judge Doumar at face value to be a gross violation of the fundamental principles of justice and an offense against due process.

Judge Doumar then turned to the issue of whether the government’s classification of Hamdi’s status violated his due process rights.⁵⁵ He held that the Mobbs Declaration was an insufficient factual foundation upon which to engage in a meaningful judicial review and ordered the government to produce by August 21, 2002 additional information, including the screening criteria and the identities of those persons responsible for categorizing Hamdi’s status, on an *in camera*, *ex parte* basis.⁵⁶

Judge Doumar determined it was impossible to decide if the classification scheme met sufficient procedural requirements consistent with the constitutional safeguards embodied in the Fifth Amendment without having access to the screening criteria and to Hamdi’s statements.⁵⁷ Since the Mobbs Declaration amounted to little more than the government’s “say-so”, to give deference to such bare-bones assertions would “in effect be abdicating any semblance of the most minimal level of judicial review. In effect, [the] Court would be acting as little more than a rubber stamp.”⁵⁸ Judge Doumar emphasized that “[w]e must preserve the rights afforded to us by the Constitution and laws for without it we return to the chaos of a rule of men and not of laws.”⁵⁹ If we fail to protect the freedoms of those who hate us, “we will become victims of the precedents we create.”⁶⁰

51. *Id.* at 527-528.

52. *Id.* at 535.

53. *Id.*

54. U.S. CONST. amend. V. (1791).

55. *Hamdi*, 243 F.Supp.2d at 535.

56. *Id.*

57. *Id.* at 534.

58. *Id.*

59. *Id.*

60. *Id.*

On August 19, 2002, the government moved for a stay of Judge Doumar's Order so that it could be appealed.⁶¹ On October 28, 2002, the Deputy Solicitor General argued before the Fourth Circuit Court of Appeals that Judge Doumar's order to produce more material was erroneous, and that the Mobbs Declaration was an adequate basis for meaningful judicial review.⁶²

On January 8, 2003, in a unanimous opinion authored by Chief Judge Wilkinson, the Fourth Circuit Court of Appeals agreed with the government that the Mobbs Declaration was adequate for meaningful judicial review, holding that the detention of Hamdi was lawful and dismissing his petition for habeas corpus.⁶³ Given that it was "undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict,"⁶⁴ the Mobbs Declaration was a sufficient basis to conclude that Hamdi's detention was lawful pursuant to the President's war powers under the Constitution, and that therefore "no further factual inquiry [was] necessary or proper."⁶⁵

The Court of Appeals held that, since Hamdi was captured in an armed struggle during wartime, he was an enemy combatant in the sense of being an enemy soldier.⁶⁶ The detention of enemy soldiers and the designation of "enemy combatants" is a proper assertion of executive war powers under Article II, section 2, of the Constitution.⁶⁷ The standard of review of enemy combatant detentions "must be a deferential one when the detainee was captured abroad in a zone of combat operations."⁶⁸ Indeed, "if deference to the executive is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain."⁶⁹ Moreover, "[t]he judiciary is not at liberty to eviscerate detention interests directly derived from the war powers of Articles I and II."⁷⁰ Hamdi's American citizenship was irrelevant to the legality of his detention as an enemy combatant.⁷¹

The Fourth Circuit, however, served notice that judicial deference to executive decisions is not absolute.⁷² No court should lightly deprive American citizens of their constitutional rights.⁷³ Recognizing that the

61. See Respondents' Motion for Certification of Interlocutory Appeal and for Stay, *Hamdi*, 243 F. Supp. 2d 527 (filed August 19, 2002), at <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums81902gmot.pdf>.

62. See Katherine Q. Seelye, *Appeals Court Again Hears Case of American Held Without Charges or Counsel*, N.Y. TIMES, October 29, 2002, at A18.

63. *Hamdi v. Rumsfeld* [*Hamdi III*], 316 F.3d 450 (4th Cir. 2003).

64. *Hamdi III*, 316 F.3d at 459.

65. *Id.*

66. *Id.* at 463, n. 3.

67. *Id.* at 471.

68. *Id.* at 472.

69. *Id.* at 465.

70. *Id.* at 466.

71. *Id.* at 475.

72. *Id.* at 464.

73. *Id.* at 464.

power to detain without check or control anyone at the pleasure of the Executive could lead to tyranny, the Fourth Circuit held that the detention of any United States citizen must be subject to judicial review.⁷⁴ The essential function of habeas corpus is to ensure that detentions accord with the rule of law, and not merely the whim of authority.⁷⁵

These concerns led the Fourth Circuit to restrict its decision to the facts of *Hamdi III*, namely the undisputed detention of a citizen during a combat operation undertaken in a foreign country, and a determination by the executive that the citizen was allied with enemy forces.⁷⁶ The Fourth Circuit expressly left open the question of the government's claim to designate as an enemy combatant any American citizen detained on American soil and denied constitutional rights, including the assistance of counsel.⁷⁷

Hamdi was thus entitled to a "limited and deferential inquiry" of his "status" by way of habeas corpus.⁷⁸ American citizenship entitled Hamdi to file a writ of habeas corpus to challenge the military's determination that he was an enemy combatant.⁷⁹ But once the Fourth Circuit determined that Hamdi was legally detained under the constitutional war powers of the executive, his right to "limited and deferential" judicial review ceased.⁸⁰ Hamdi's presence in a zone of military combat disqualified him from "a searching review of the factual determinations underlying his seizure there."⁸¹

Judge Wilkinson's concept of "meaningful" judicial review is far less than the full judicial review contemplated by Judge Doumar, who wanted to give Hamdi equal treatment that any other criminal defendant is entitled to under the Constitution. This approach, specifically that Hamdi was equal before and under the law, was Judge Doumar's "signal flaw."⁸² The Fourth Circuit observed that there is a crucial difference between detention that is part of the law enforcement process and the detention of enemy combatants under the war powers of the Constitution.⁸³

The Fourth Circuit refused to allow Hamdi an opportunity to challenge the assertions of fact in the Mobbs Declaration.⁸⁴ It was furthermore unnecessary, even to a modest extent on a "some evidence

74. *Id.* (citing W. Blackstone, *4 Commentaries on the Laws of England* 349-350 (Cooley ed. 1899) (quoted in *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968))).

75. *Hamdi III*, 316 F.3d at 465.

76. *Id.*

77. *Id.*

78. *Id.* at 461.

79. *Id.* at 471.

80. *Id.* at 475.

81. *Id.*

82. *Id.* at 473.

83. *Id.*

84. *Id.* at 474.

standard,”⁸⁵ for the government to fill in obvious gaps in the Mobbs Declaration that had bothered Judge Doumar at the district court level.⁸⁶ No further factual inquiry was “appropriate,” since doing so entailed encroachment and possibly obstruction of the conduct of war, which is an exclusive matter for the political branches of government.⁸⁷

The constitutional implications of Hamdi’s petition were of great concern to the Fourth Circuit:

The constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels courts to assume a deferential posture in reviewing exercises of this authority. And, while the Constitution assigns courts the duty generally to review executive detentions that are alleged to be illegal, the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally.⁸⁸

If the Fourth Circuit is correct in its analysis, anytime the executive “flexes its muscles” pursuant to its constitutional war powers, the judicial branch must relinquish its role as the guardian of the rule of law and allow some amount of effective “rule by law” in the name of national security. Such a premise amounts to an unprecedented expansion of Presidential authority.

The Fourth Circuit summarily rejected arguments advanced on Hamdi’s behalf that too much deference to the President’s power to indefinitely detain designated enemy combatants amounts to a de facto unconstitutional suspension of the writ of habeas corpus and an imbalance in the system of checked and balanced power.⁸⁹ The Fourth Circuit disagreed, arguing that Hamdi had been given his day in Court, and “[t]he fact that we have not ordered the relief Hamdi requests is hardly equivalent to a suspension of the writ.”⁹⁰

Anticipating criticism, the Fourth Circuit emphasized it was not endorsing a new era of widespread executive detentions.⁹¹ The Fourth Circuit declared it would not allow the detention of any American citizen without meaningful judicial review.⁹² But Hamdi was not just “any American citizen”; he was captured and detained in a foreign country in a combat zone, and determined by the United States military to be allied with

85. *Id.* at 474. *See also* *INS v. St. Cyr*, 533 U.S. 289, 306 (2001) (discussing the historical practice that so long as there was some evidence to support a deportation order, a habeas court would not review factual determinations made by the Executive)

86. *Hamdi III*, 316 F.3d at 473.

87. *Id.* at 474, 476.

88. *Id.* at 474.

89. *See id.* at 466, n. 5. *See also* *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (discussing the system of checked and balanced powers essential to protecting against tyranny).

90. *Hamdi III*, 316 F.3d at 474.

91. *Id.* at 476.

92. *Id.*

enemy forces.⁹³ There appears, therefore, to no longer exist the principle of equality before the law for all American citizens, for depending on one's conduct and status, the privileges of citizenship may be judicially truncated in deference to the executive branch of government.

On July 9, 2003, the Fourth Circuit, en banc, reversed Judge Doumar's decision and remanded Hamdi's petition with directions that it be dismissed.⁹⁴ Judges Wilkinson, Wilkins and Traxler held that the mere undisputed fact that Hamdi was captured in a zone of active combat in a foreign theater of conflict, allied with enemy forces, was by itself sufficient to uphold the constitutional legality of Hamdi's detention pursuant to the Mobbs Declaration and the President's war powers under the Constitution.⁹⁵

The Fourth Circuit was careful to point out that it was not addressing the designation of an American citizen captured on American soil or the role that counsel might play in that proceeding, restricting its holding to the specific facts before it.⁹⁶ The "privilege of citizenship" entitled Hamdi to "a limited judicial inquiry" to determine the legality of his detention "under the war powers of the political branches," but he was not constitutionally entitled to challenge the facts presented in the Mobbs Declaration or his designation as an enemy combatant.⁹⁷

The United States Supreme Court appears destined to hear Hamdi's inevitable appeal, given the grave issues of national importance at stake, and may expedite the case since Hamdi remains detained. Another reason to expedite the hearing might be to avoid a hearing by a panel of eight, especially because Judge Harvey Wilkinson III, the Chief Justice of the nation's most conservative bench, the Fourth Circuit, has been publicly touted, even before his decision in *Hamdi III*, as a likely nomination by President Bush to fill the next vacancy on the United States Supreme Court.⁹⁸

C. Meaningful Judicial Review

Squarely before the Fourth Circuit was the jurisdictional fact doctrine attributed to the majority opinion of Chief Justice Hughes in the Supreme Court decision of *Crowell v. Benson*.⁹⁹ That doctrine recognized

93. *See id.* There is not evidence to suggest that Hamdi is a terrorist.

94. *Hamdi III*, 316 F. 3d 450.

95. *Id.* at 459, 465, 476.

96. *Id.* at 465.

97. *Id.* at 475-476.

98. Neil A. Lewis, *Expecting a Vacancy, Bush Aides Weigh Supreme Court Contenders*, N.Y. TIMES, December 27, 2002, at A1; Lyle Denniston, *Election 2002 / Judicial Impact The Courts; Bush Gets Support For Judicial Picks Retirement May Open Supreme Court Spot*, BOSTON GLOBE, November 7, 2002, at A40.

99. *Crowell v. Benson*, 285 U.S. 22 (1932). *See also* Michael C. Dorf, *Who Decides Whether Yaser Hamdi, Or Any Other Citizen, Is an Enemy Combatant?* WRIT FINDLAW'S LEGAL COMMENTARY, August 21, 2002, at <http://writ.news.findlaw.com/dorf/20020821.html>.

that, in addition to considerations of fairness in administrative determinations and due process in relation to notice and hearing, there exists an underlying question of the “appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions.”¹⁰⁰ Applying the doctrine to the *Hamdi* case, the issue is whether the President may substitute for the court’s discretion, in which resides the judicial power of the United States, the say-so of Michael Mobbs, a legal advisor to the Secretary of Defense, for the final determination of the facts upon which the enforcement of Hamdi’s constitutional rights depend.

These determinations of fact are a fundamental condition precedent to establishing the jurisdiction of the executive branch to detain Hamdi and to deny him his constitutional rights. If the courts can no longer determine which facts satisfy the criteria for an enemy combatant, the result “. . . would be to sap the judicial power as it exists under the federal constitution, and to establish a government of a bureaucratic character alien to our system, whenever fundamental rights depend . . . upon the facts, and finality as to facts becomes in effect finality in law.”¹⁰¹

Should the courts, however, jealously guard their power to determine the “jurisdictional facts” necessary to trigger executive jurisdiction or defer to the discretion of the executive branch of government? If the reviewing judge may substitute his or her own opinion for that of Michael Mobbs on the question of jurisdictional facts, it begs the question as to upon what record the determination can be made. The essential independence of the judiciary to enforce constitutional rights “requires that the federal court should determine such an issue upon its own record and the facts elicited before it.”¹⁰² Anything less, would be the surrender and abdication of independent judicial power, authority and responsibility.

Considering the Fourth Circuit’s opinion in *Hamdi*, the question remains as to whether the Fourth Circuit was willing, in a time of national crisis, to timidly discount Hamdi’s rights as an American citizen and surrender substantial judicial independence, or whether it wisely recognized that the proper role for the judiciary in a time of national emergency is to balance the individual rights of those who would betray their country against the need to save American lives.

III. An American Gulag?

Hamdi is in a “no man’s land” of uncharted legal landmines. The government has refused to classify Hamdi and the detainees at

100. *Hamdi II*, 296 F.3d 278 at 294.

101. *Id.* at 295.

102. *Id.* at 297.

Guantanamo Bay as prisoners of war.¹⁰³ This decision has been widely criticized around the world.¹⁰⁴ Article 5 of the Geneva Convention requires military regulars taken prisoner during armed conflict to be treated as POW's until a competent tribunal determines the detainees' status.¹⁰⁵ This has caused many to argue that the United States could gain international support by recognizing the prisoners as POW's under the Geneva Convention.¹⁰⁶

On the other hand, denying the detainees POW status from the outset exposes these non-Americans to immediate prosecution before a United States military commission created specifically to try terrorists¹⁰⁷, and denies them protections otherwise available under Article 102 of the Geneva Convention.¹⁰⁸ Nevertheless, retroactive application of the Military Order of November 13, 2001 may be unconstitutional as a violation of the Ex Post Facto Clause of the Constitution applicable to

103. See Press Release, Office of the White House Press Secretary, Status of Detainees at Guantanamo, February 7, 2002, available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> "The President has determined that the Geneva Convention applies to the Taliban detainees, but not to the al-Qaida detainees. Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status. Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs. Therefore, neither the Taliban nor al-Qaida detainees are entitled to POW status. *Id.* Cf. Katherine Q. Seelye, *A Nation Challenged: Captives; Detainees Are Not P.O.W.'s, Cheney and Rumsfeld Declare*, January 28, 2002, N.Y. TIMES, at A6. See also Michael C. Dorf, *What Is An "Unlawful Combatant," And Why It Matters: The Status Of Detained Al Qaeda And Taliban Fighters*, WRIT FINDLAW'S COMMENTARY, January 23, 2001, available at <http://writ.news.findlaw.com/dorf/20020123.html>.

104. See Katherine Q. Seelye, *A P.O.W. Tangle: What the Law Says*, N.Y. TIMES, January 29, 2002, at A14. See also Marjorie Miller, *Fairness Urged for Detainees in Cuba; Response: Red Cross and U.N. leaders call for Taliban and Al Qaeda fighters held at Guantanamo Bay to be treated as POWs*, THE TIMES MIRROR, January 18, 2002, at A1, 22; *POWs or criminals?* THE KOREA HERALD, February 1, 2002; Kenneth Roth, *Bush policy endangers American and allied troops; Prisoners of War at Guantanamo*, INTERNATIONAL HERALD TRIBUNE, March 5, 2002, at 7. But see Charles Krauthammer, *Al Qaeda prisoners of war don't deserve POW status*, CHI. TRIB., January 28, 2002, at N15.

105. "Article 5. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Geneva Convention (III) Relative to the Treatment of Prisoners of War (August 12, 1949) available at <http://www.yale.edu/lawweb/avalon/lawofwar/geneva03.htm>. See 6 U.S.T. 3316. In Hamdi III, the Fourth Circuit rejected an argument Hamdi was entitled to an Article 5 determination by a competent tribunal, for the reason that the Geneva Convention was not "self-executing," in that it failed to provide for enforcement by any sort of private petition. See generally *Hamdi III*, 316 F.3d 450.

106. See Ralph Michael Stein, *Artillery Lends Dignity to what Otherwise Would Be a Common Brawl: An Essay on Post Modern Warfare and the Classification of Captured Adversaries*, 14 PACE INT'L L. REV. 133, 151 (2002).

107. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

108. "Article 102. A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed." Geneva Convention (III) Relative to the Treatment of Prisoners of War; August 12, 1949 available at <http://www.yale.edu/lawweb/avalon/lawofwar/geneva03.htm>. See also 6 U.S.T. 3316.

criminal prosecution.¹⁰⁹ The specific prosecution of al-Qaeda foreign nationals by military commissions might also be inconsistent with U.S. treaty obligations under international law.¹¹⁰

Amnesty International (AI) has specifically criticized the treatment of Hamdi and has portrayed his indefinite detention without charge as an attempt to circumvent the criminal justice system.¹¹¹ According to AI, the denial of Hamdi's due process rights and his unequal treatment violates Articles 9 and 14 (1) of the International Covenant on Civil and Political Rights (ICCPR),¹¹² and depriving Hamdi of the assistance of counsel also contravenes certain principles of international law.¹¹³

Unlike Hamdi, in the case of John Walker Lindh (the "American Taliban"), the government acted quickly to bring Lindh to justice. Lindh, a U.S. citizen raised by parents of Caucasian ancestry, who was also captured in the same zone of active combat in Afghanistan as Hamdi, was detained and allegedly subjected to cruel, degrading and inhuman treatment before, during, and after repeated interrogation.¹¹⁴ To encourage Lindh's

109. U.S. CONST., art. 1, § 9, cl.3 ("No bill of attainder or ex post facto Law shall be passed").

110. See Christopher M. Evans, *Note: Terrorism on Trial: The President's Constitutional Authority to order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831 (2002).

111. *Beyond the Law: Update to Amnesty International's April Memorandum to the U.S. Government on the rights of detainees held in U.S. custody in Guantánamo Bay and other locations* (December 13, 2002), available at <http://www.web.amnesty.org/ai.nsf/recent/AMR511842002!Open>.

112. See OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1976), available at http://193.194.138.190/html/menu3/b/a_ccpr.htm. ("Article 9 (1): Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Article 9 (4): Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. Article 14 (1): All persons shall be equal before the courts and tribunals").

113. See OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT (1988), available at http://www.unhchr.ch/html/menu3/b/h_comp36.htm "Principle 17. 1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it. 2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay. See *id.* Principle 18. 1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel. 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel. 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order. 4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official. 5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime." See *id.*

114. See Statement of Facts, Motion for Leave to File Brief of Amici Curiae and Brief of Amici Curiae International Human Rights Organizations in Support of Defendant's Motion to Suppress Involuntary Statements and Evidence, *United States v. Lindh*, 227 F. Supp. 2d 595 (E.D. Va. 2002)(No. 02-37-A) available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh71002ammot.pdf>.

“cooperation” during interrogation, his attorneys claimed he was subjected to treatment condemned by the United States Supreme Court.¹¹⁵ Lindh was effectively represented by attorney James Brosnahan, who embarrassed and outmaneuvered the government attorneys and successfully negotiated a plea agreement.¹¹⁶ Lindh was sentenced to twenty years imprisonment.¹¹⁷

The question therefore remains why Hamdi has not been criminally charged, and whether his unequal treatment results from a lack of evidence to convict Hamdi, the need for isolation to conduct daily interrogation or from some other circumstance such as Hamdi’s ethnic or racial origin.

Hamdi is not alone in his legal limbo. On May 8, 2002, a fellow U.S. citizen of Hispanic ancestry, Brooklyn born Jose Padilla (Abdullah al-Muhajir) was arrested at the Chicago’s O’Hare airport upon a material witness warrant.¹¹⁸ Unlike Hamdi or Lindh, Padilla was not detained on the battlefield or in a zone of active combat, nor was he carrying a weapon. Intelligence reports suggested that Padilla met and associated with members of al Qaeda and was suspected of involvement in the planning stages of building and detonating a radiological dispersion device, commonly referred to as a “dirty bomb.”¹¹⁹

Padilla was transported to New York City where he appeared on May 15, 2002, before Southern New York District Court Judge Michael B. Mukasey, who assigned counsel to represent Padilla. He was then detained at the Metropolitan Correctional Center, a prison operated by the Department of Justice, Bureau of Prisons.¹²⁰ Padilla’s counsel filed motions on his behalf, asserting his detention without charge was illegal and violated Padilla’s constitutional rights.¹²¹

On June 9, 2002, two days before his hearing, Padilla was designated an enemy combatant.¹²² His material witness warrant was

115. See Defendant’s Notice of Motion And Motion to Suppress Involuntary Statements, *Lindh*, 227 F. Supp. 2d 595, available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh61702invstmot.pdf>. The alleged treatment included incommunicado detention, food, sleep and sensory deprivation; denial of clothing and proper medical care; humiliation; failure to inform of constitutional rights; and failure of timely presentation before a magistrate. *Id.*

116. See Plea Agreement, *Lindh*, 227 F. Supp. 2d 595, available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf>.

117. See *Lindh*, 227 F. Supp. 2d 595.

118. Amended Petition for Writ of Habeas Corpus, *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002)(No. 02-civ-445(MBM)), para. 15 available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush61902apet.pdf>.

119. Unclassified Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, *Padilla*, 233 F. Supp. 564, available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush82702mobbs.pdf>.

120. Amended Petition for Writ of Habeas Corpus, *Padilla*, 233 F. Supp. 564, para. 17-19, available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush61902apet.pdf>.

121. *Id.* at paragraphs 20-21.

122. *Id.* at paragraph 22. See Redacted Copy of President Bush’s Order Designating Padilla as an Enemy Combatant, *Padilla*, 233 F. Supp. 564 available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush60902det.pdf>.

vacated at the request of the government.¹²³ On June 9, Padilla was transferred from the custody of civilian authorities to military authorities at the Consolidated Naval Brig at Charleston, South Carolina.¹²⁴ He has since been denied contact with his counsel, detained indefinitely without charge, and kept incommunicado except for repeated interrogation.¹²⁵

On December 4, 2002, Judge Mukasey upheld the legality of Padilla's indefinite detention¹²⁶ and his designation as an enemy combatant,¹²⁷ but granted Padilla limited use of counsel subject to conditions protecting national security, so as to present facts bearing upon his petition for habeas corpus.¹²⁸

On March 11, 2003, Judge Mukasy reconsidered his decision and returned to his earlier ruling.¹²⁹ Judge Mukasy refused to follow the Fourth Circuit's decision in *Hamdi*, restricting that case to its facts.¹³⁰ Padilla's right to counsel was upheld despite a Declaration filed by Admiral Jacoby, Director of the Defense Intelligence Agency, which argued that allowing Padilla to consult with counsel would be harmful to psychological techniques designed to isolate him and weaken his resistance to interrogation.¹³¹ On April 9, 2003, the government's application to certify the orders in Padilla's case for interlocutory appeal was granted.¹³²

Until he negotiated a plea agreement with the government, another American citizen, James Ujaama of Seattle, who allegedly intended to set up a terrorist training camp in Oregon, was at risk to be designated an enemy combatant.¹³³ *The Wall Street Journal* reports there was annoyance in the Bush administration regarding the aggressive legal defense of Lindh, and that the administration decided to detain more U.S. citizens as enemy

123. See Statement of the Case, 8-9, in Respondents' Response to, and Motion to Dismiss, The Amended Petition for a Writ of Habeas Corpus, *Padilla*, 233 F. Supp. 564, available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush82702grsp.pdf>.

124. Amended Petition for Writ of Habeas Corpus, *Padilla*, 233 F. Supp. 564, para. 25-26 available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush61902apet.pdf>

125. *Id.* at paragraphs 28-31.

126. *Padilla*, 233 F. Supp. 564 at 71-73. The Court ruled there was no such thing as a per se ban on indefinite detention, and cited as authority for that proposition: *Kansas v. Hendricks*, 521 U.S. 346 (1997) (indefinite civil commitment is lawful for human predators who possess a mental abnormality or personality disorder); *United States v. Salerno*, 481 U.S. 739 (1987) (community safety in appropriate circumstances outweigh an individual's liberty interest); and *Moyer v. Peabody*, 212 U.S. 78 (1909) (detention without charge is an acceptable precaution to prevent the exercise of hostile power).

127. See *id.* at 74-87.

128. See *id.* at 97-116.

129. *Id.* at 42.

130. *Id.* at 56-57.

131. *Id.* at 49-50.

132. *Padilla*, 256 F. Supp. 2d 218.

133. See Anita Ramasastry, *Do Hamdi And Padilla Need Company? Why Attorney General Ashcroft's Plan To Create Internment Camps For Supposed Citizen Combatants Is Shocking And Wrong*, WRIT FINDLAW'S LEGAL COMMENTARY (August 21, 2002), available at <http://writ.news.findlaw.com/ramasastry/20020821.html> See Tod Zanker, *Why Publish StopAmerica.Org?*, *INTERNATION*, April 12, 2003, at <http://www.inter-nation.org/media/stopAmerica>.

combatants.¹³⁴ A special wing that can hold up to 20 prisoners has been prepared at the Goose Creek, Southern Carolina Naval Brig, to accommodate the expected numbers of additional future enemy combatants.¹³⁵

In the year following September 11, 2001, it was estimated that over 1,200 people were detained on material witness warrants or in connection with alleged immigration violations.¹³⁶ The American Bar Association, in a resolution dated August 13, 2002, expressed its concern over the government's refusal to release the identities and whereabouts of those who have disappeared.¹³⁷

The Preliminary Report of the American Bar Association Task Force on the Treatment of Enemy Combatants was released on August 8, 2002. It recommended (1) that the government explain the basis and scope of its authority to detain U.S. citizens as enemy combatants; (2) that Congress establish clear standards and procedures governing detentions of U.S. citizens; (3) that citizen detainees have access to judicial review to challenge their detention; (4) that citizen detainees not be denied access to counsel; and (5) that consideration be given to the international impact of our treatment of enemy combatants.¹³⁸

On October 2, 2002, William J Haynes II, general counsel to the Department of Defense, issued its Response to the Task Force's preliminary report.¹³⁹ The DND Response rejected the Task Force's suggestion that the indefinite detention of enemy combatants and denial of counsel were in any way inconsistent with the rule of law.¹⁴⁰ The ABA House of Delegates approved the final revised report of the Task Force on February 10, 2003.¹⁴¹ The final report recommended that U.S. citizens and

134. See Jess Bravin, *More Terror Suspects May Sit in Limbo*, WALL STREET JOURNAL, August 8, 2002, at A4.

135. *Why Mr. Hamdi Matters*, WASHINGTON POST, August 11, 2002, at B06; See also Clarence Page, *Rights Matter in Circus Trials*, CHI. TRIB., August 14, 2002, at N23.

136. Joanne Mariner, *Fear of Lawyers: The Cautionary Tale of a Post-September 11 Detainee*, WRIT FINDLAW'S LEGAL COMMENTARY (August 19, 2002) available at <http://writ.news.findlaw.com/mariner/20020819.html>.

137. See AMERICAN BAR ASSOCIATION, CRITICAL LEGISLATIVE PRIORITY ISSUE 51 (2003), available at <http://www.abanet.org/poladv/legiss.pdf>. "Detention by the INS. Oppose incommunicado detention by INS and urges protection of the constitutional and statutory rights of detainees by disclosing the names and locations of detainees, charges against them, and access to them by attorneys and family members, as well as specific due process protections. (O2A115B) 8/02." *Id.*

138. See AMERICAN BAR ASSOCIATION, THE PRELIMINARY REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON TREATMENT OF ENEMY COMBATANTS (August 8, 2002), available at <http://www.abanet.org/poladv/letters/exec/enemycombatantsreport.pdf>. Notably, the Task Force failed to unconditionally reject the government's claim to detain American citizens indefinitely without charges and held incommunicado without a hearing and without access to counsel. *Id.*

139. See DEPARTMENT OF DEFENSE, RESPONSE TO ABA ENEMY COMBATANT REPORT (October 2, 2002), available at http://www.defenselink.mil/news/Oct2002/b10022002_bt497-02.html.

140. *Id.*

141. See AMERICAN BAR ASSOCIATION, TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, CRIMINAL JUSTICE SECTION, SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, REPORT TO THE HOUSE OF DELEGATES (February 2003), available at <http://www.abanet.org/leadership/recommendations03/109.pdf>.

non-citizens lawfully present in the United States who are detained as “enemy combatants”: (1) be afforded the opportunity for meaningful judicial review of their status; (2) not be denied access to counsel in connection with the opportunity for judicial review; (3) that their detention be governed by clear standards and procedures; (4) and that the government’s policy regarding and treatment of enemy combatants be taken into account in considering future acts of terrorism.¹⁴²

Neil R. Sonnett, Chair of the Task Force on the Treatment of Enemy Combatants, cautioned, “indefinite detention, denial of counsel, and overly secretive proceedings could tear at the Bill of Rights, the very fabric of our great democracy. We must ensure that we do not erode our cherished Constitutional safeguards and that we strengthen the rule of law.”¹⁴³

Is there an American Gulag on the horizon? 18 U.S.C. §4001(a) states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹⁴⁴ Until the decision of the Fourth Circuit in *Hamdi III*, the plain language of this law was interpreted expansively to apply equally to all American citizens under any circumstances.¹⁴⁵ The purpose of this law was to restrict the detention of American citizens to circumstances recognized by statute, to repeal the Emergency Detention Act of 1950 that authorized the establishment of detention camps, and to calm public apprehension of a means to detain citizens who hold unpopular beliefs and views.¹⁴⁶

Despite this measure, however, there are now more detentions, not fewer. For instance, on December 18, 2002, in Southern California, as many as 1,000 males over 16 years of age from various Islamic countries, including Iraq, Iran, Syria, Libya, and Sudan, were detained without warning after being duped to visit immigration officers for the purpose of what turned out to be a phony registration scam.¹⁴⁷ The question, therefore, as to whether an “American Gulag” is possible may not be as far-fetched as it appears.

142. *Id.*

143. *Id.* at p. 13.

144. 18 U.S.C § 4001(a)(2000); see also Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347.

145. See *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) per Burger, C.J. The Fourth Circuit in *Hamdi III* rejected an argument based on § 4001(a), ruling that *Quirin* was still good law. See *Hamdi III*, 316 F.3d 450.

146. House Report No. 92-116, p. 1435-1436, April 6, 1971, Cong. Record Vol. 117 (1971).

147. *Hundreds Of Immigrants Rounded Up*, TORONTO STAR, December 19, 2002, at A14; Megan Garvey, Martha Groves and Henry Weinstein, *Hundreds Are Detained After Visits to INS; Thousands protest arrests of Mideast boys and men who complied with order to register*, LOS ANGELES TIMES, December 19, 2002, at 1.

A. Civil Liberties During the Civil War

As Commander in Chief of the military, the President has the executive power and the duty to preserve the integrity of this nation.¹⁴⁸ But can the President, in furtherance of that goal, violate core values of the Constitution when his oath of office requires him to the best of his ability to “preserve, protect, and defend” that same Constitution?¹⁴⁹ Does the President have the power to designate any person an enemy combatant and detain that person indefinitely without charge, trial or the assistance of counsel, or are there precedents which limit executive authority even in times of profound national crisis?

Supreme Court Chief Justice William H. Rehnquist broadly hinted that the President indeed has the sole authority to suspend civil liberties in order to preserve the nation from mortal danger.¹⁵⁰ In a speech delivered on May 3, 2000 to members of the Norfolk Virginia Bar (where he thanked Judge Doumar for his kind introduction), Chief Justice Rehnquist spoke about civil liberty in times of war. Referring to President Lincoln as “the greatest of American Presidents,” Chief Justice Rehnquist approved of Lincoln’s choice to disobey the Constitution by unilaterally suspending the writ of habeas corpus as part of his strategy to save the Union.¹⁵¹

Section 9 of Article I of the Constitution gives only Congress the power to suspend the privilege of the writ of habeas corpus in cases of rebellion or invasion when the public safety may require it.¹⁵² Chief Justice Rehnquist, however, implied that the President also possesses this power, noting that “[t]he question of whether only Congress may suspend [the writ of habeas corpus] has never been authoritatively answered to this day. . . .”¹⁵³ This is a surprising remark, especially considering that Chief Justice Taney expressly rejected in *Ex Parte Merryman* the proposition that the President had the unilateral power to suspend the writ of habeas corpus while sitting as a Circuit Court judge in Baltimore.¹⁵⁴ A closer look at this decision is therefore merited to determine if this issue indeed remains an “open question.”

When the Civil War broke out in 1861, President Lincoln asked 75,000 volunteers to travel to Washington D.C. to defend the city from a feared Confederate attack. Most Union soldiers traveled by rail from the Northeast, which meant that they would converge on Baltimore, the

148. U.S. CONST. art. II, § 2.

149. U.S. CONST. art. II, § 1.

150. See Remarks of Chief Justice William H. Rehnquist, 100th Anniversary Celebration of the Norfolk and Portsmouth Bar Association, Norfolk, Virginia, May 3, 2000, available at http://www.supremecourtus.gov/publicinfo/speeches/sp_05-03-00.html.

151. *Id.* at p. 7.

152. U.S. CONST. art. I, § 9 (“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it”).

153. Remarks of Chief Justice William H. Rehnquist, *supra*, note 150, at p. 3.

154. *Ex parte Merryman*, 17 F. Cas. 144 (Cir. Court, D. Maryland 1861).

transportation hub, where rail transfers were required to travel on to Washington. Confederate sympathizers, including the Mayor of Baltimore, the Chief of Police, and an individual named John Merryman, were suspected of dynamiting the railroad bridges that connected Baltimore to Philadelphia. These acts of sabotage delayed the arrival of Union troops, as they were forced to travel by sea to Annapolis, and then by land on to Washington.¹⁵⁵

President Lincoln responded by authorizing General Winfield Scott, commander in chief of the army, to suspend the writ of habeas corpus.¹⁵⁶ Scott's job was to detain anyone who was in effect an enemy combatant that threatened the security of the transportation link between Washington and Philadelphia. Acting on these orders, General Keim of Pennsylvania sent soldiers in the middle of the night to break into the residence of John Merryman as he and his family slept.¹⁵⁷

Merryman was arrested without warrant upon general charges of treason and rebellion and detained in military custody at Fort McHenry. Merryman filed a petition of habeas corpus to obtain his release. General George Cadwalader, the commanding officer, conceded the facts in the petition, but refused to produce the prisoner, and disobeyed the writ, on the basis that the President delegated the authority to military officers to suspend the writ of habeas corpus at will.

Chief Justice Taney expressed surprise at this action, as it was "admitted on all hands" that the privilege of the writ could not be suspended, except by act of Congress.¹⁵⁸ Taney recalled that when it was debated whether Congress would suspend the writ to deal with the crisis brought on by the conspiracy of Aaron Burr, it was never suggested that President Jefferson had the constitutional authority to suspend the writ. Unlike Rehnquist, Taney viewed the question as "too plain and too well-settled to be open to dispute."¹⁵⁹

After an extensive review of the powers possessed by the President under Article Two of the Constitution, Chief Justice Taney determined that the only power the President had pertaining to the liberty of a private citizen was "to take care that the laws shall be faithfully executed."¹⁶⁰ This included a duty for the President to act in subordination to judicial authority and assist it to execute its process and enforce its judgments.¹⁶¹

For Taney, there was no ambiguity on this point. The President would be in breach of his constitutional duty to faithfully execute the laws were he to authorize the arrest and detention of a person without due

155. Remarks of Chief Justice William H. Rehnquist, *supra*, note 150, at p. 2.

156. *Id.* at 3.

157. *Ex parte Merryman*, 17 F. Cas. 144 at 147.

158. *Id.* at 148.

159. *Id.*

160. *Id.* at 149.

161. *Id.*

process of law.¹⁶² Taney rejected any excuse to disobey the law and act unconstitutionally, even if the action promoted self-defense in times of “tumult and danger”,¹⁶³ because the government of the United States is one of delegated and limited powers, derived from the Constitution, and because the Tenth Amendment expressly provides that “the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.”¹⁶⁴

In Taney’s era, arbitrary imprisonment by executive authority was unthinkable, for any President who conferred such power upon himself would be a greater tyrant than any English monarch since the time of the Magna Charta and the passage of the great Habeas Corpus Act, the statute of 31 Car. II.¹⁶⁵ In recalling that one of the motivating grievances in the Declaration of Independence was King George’s elevation of the military power over civilian authority,¹⁶⁶ Chief Justice Taney stated:

If the president of the United States may suspend the writ [of habeas corpus], then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the Crown; a power which the Queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.¹⁶⁷

In support of his conclusion that President Lincoln had acted unconstitutionally, Chief Justice Taney cited Mr. Justice Joseph Story’s *Commentaries*, which states that the power to suspend the writ of habeas corpus belongs exclusively to Congress.¹⁶⁸ Taney also followed the decision of Chief Justice Marshall in *Ex parte Bollman and Swartwout*,¹⁶⁹ which said “it is for the legislature to decide” if the public safety required the suspension of the writ of habeas corpus.¹⁷⁰

Chief Justice Taney observed that in Merryman’s case the military had not only suspended the writ of habeas corpus, but had assumed the power to decide what constituted the crime of treason or rebellion, and what evidence, if any, was needed to meet the criteria to justify indefinite detention; thereby depriving persons of liberty without due process of law.¹⁷¹ What Congress itself could not legally do was achieved by a

162. *See id.*

163. *Id.*

164. *Id.* at 149-150.

165. *Id.* at 150.

166. *Id.* at 152, n.3.

167. *Id.* at 151.

168. *See id.* at 151-152. See also Story, 3 Comm. Const. §1336.

169. *Ex parte Bollman and Swartwout*, 4 Cranch [8 U.S.] 75, 2 L.Ed. 554 (1807)

170. *Ex parte Merryman*, 17 F. Cas. 144 at 152.

171. *See id.*

military order accompanied by force of arms.¹⁷² The rule of law was thus usurped by rule by military law.

Without the cooperation of the President, Chief Justice Taney was powerless to enforce the writ of habeas corpus and to release Merryman from illegal imprisonment.¹⁷³ Lincoln's response was not just to ignore the decision of the Chief Justice of the United States Supreme Court, but also to continue the illegal detentions of other citizens, including the Mayor of Baltimore and the Chief of Police.¹⁷⁴

The writ of habeas corpus was eventually legally suspended by legislation passed by Congress on March 3, 1863 in the midst of the "rebellion."¹⁷⁵ The legislation, however, tempered the suspension of civil liberties by containing provisions for the release of detainees upon certain conditions. Prisoners who were detained gained their release if no indictment was returned against them by a grand jury.¹⁷⁶ Persons in custody were also permitted, with the assistance of counsel, to petition for their release 20 days after the date of their arrest.¹⁷⁷ Even in a time of national civil war, Congress did not sanction indefinite detention.¹⁷⁸

On September 15, 1863, the President proclaimed the new law into force.¹⁷⁹ On October 5, 1864, Lamdin P. Milligan, a lawyer and citizen of the state of Indiana, was arrested for conspiracy to aid the rebellion and overthrow the government.¹⁸⁰ Milligan was associated with a secret society known as the Order of American Knights, an organization devoted to the overthrow of the government of the United States.¹⁸¹ The federal government decided to circumvent the civil courts and put Milligan before a military commission, where he was tried, convicted and sentenced to death.¹⁸² Milligan filed a petition for habeas corpus, complaining that the military tribunal lacked jurisdiction to try and punish him.¹⁸³

The Supreme Court agreed, finding that "martial rule can never exist where the courts are open. . ."¹⁸⁴ and "[i]t is also confined to the locality of actual war."¹⁸⁵ Justice Davis declared that "it is the birthright of every American citizen when charged with crime, to be tried and punished according to law."¹⁸⁶ He added, "[t]he Constitution of the United States is

172. *See id.*

173. Rehnquist, *supra*, note 150, at p. 3.

174. *Id.*

175. *Ex Parte Milligan*, 71 U.S. 2 (1866) at 114-115.

176. *See id.* at 116.

177. *See id.*

178. *See id.* at 115.

179. *Id.*

180. William H. Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 *IND. L.J.* 927, 932 (1997).

181. *Id.*

182. *Id.* at 932-933.

183. *Ex Parte Milligan*, 71 U.S. 2 (1866) at 107-108.

184. *Id.* at 127.

185. *Id.*

186. *Id.* at 119.

a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”¹⁸⁷ In circumstances when the military commander-in-chief suspends civil rights and subjects citizens as well as soldiers to the “rule of *his will*,” without fixed or certain rules, there is “an end to liberty regulated by law” rendering republican government a failure.¹⁸⁸ The end of liberty regulated by law “destroys every guarantee of the Constitution,” and effectively makes the “military independent of and superior to the civil power,” which was what King George III attempted to do in 1776.¹⁸⁹ This is an irreconcilable conflict between civil liberty and executive rule.¹⁹⁰

The Court held the military commission had no jurisdiction over Milligan.¹⁹¹ Since the civil courts were open for business, Milligan’s military trial was illegal and the proceedings were a nullity. Milligan was entitled to be discharged from custody.¹⁹²

Chief Justice Chase, concurring in the result, warned that “[t]he laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice.”¹⁹³

The Supreme Court praised those who drafted the Constitution for their foresight to incorporate written safeguards to preserve liberty that may not be disturbed by the President, Congress or the Judiciary, except for the limited power of Congress to suspend the writ of habeas corpus.¹⁹⁴ The Court predicted, however, that a future time could arise when an emergency imperiled the nation and an immediate public investigation guarantying due process might not then be possible.¹⁹⁵ In this exigent circumstance, Congress may deny a person who has been arrested the privilege of the writ in order to obtain his or her liberty.¹⁹⁶ The detained person, however, must then be put on trial before “an established court, assisted by an impartial jury,” as the “only sure way of protecting the citizen against oppression and wrong.”¹⁹⁷ Otherwise, “it could well be said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.”¹⁹⁸

187. *Id.* at 120-121.

188. *Id.* at 124.

189. *Id.*

190. *Id.* at 124-125.

191. *Id.* at 130.

192. *Id.* at 131.

193. *Milligan*, 71 U.S. at 132.

194. *See id.* at 125.

195. *Id.* at 125-126.

196. *Id.* at 115,125.

197. *Id.* at 126.

198. *Id.*

B. Civil Liberty During the Second World War

During World War Two, the Supreme Court revisited *Ex parte Milligan* in the case of *Ex parte Quirin*¹⁹⁹ and held that the Fifth Amendment did not apply to enemies of the state. After the declaration of war between the German Reich and the United States, in June of 1942, eight trained enemy saboteurs who were members of the German armed forces arrived in teams of four by submarine and landed on the shores of Ponte Verde Beach in Florida and Amagansett Beach in Long Island, New York.²⁰⁰ Their mission was to destroy war industries and war facilities within the continental United States.²⁰¹ Before any harm was done, the soldiers, who had buried their uniforms on the beaches where they landed and donned civilian dress, were arrested and tried for crimes against the laws of war before a military tribunal and sentenced to death.²⁰²

With the assistance of their counsel, the enemy soldiers challenged by way of habeas corpus the jurisdiction of the military tribunal, claiming pursuant to the authority of *Ex parte Milligan* that they were entitled to due process under the constitution, a trial before a civil court, and the right to trial by jury.²⁰³ One of the petitioners, Herman Hans Haupt, was a naturalized American citizen.²⁰⁴

Chief Justice Stone gave great deference to the President's authority in time of war and grave public danger.²⁰⁵ To succeed, therefore, the petitioners had to meet the test of "clear conviction" that the detention and trial of the petitioners were in conflict with the Constitution or with constitutionally enacted laws of Congress.²⁰⁶ The Court confined its decision to the constitutional authority of the government to place the petitioners on trial before a military commission.²⁰⁷

In holding that the government had acted legally, Chief Justice Stone found that the German soldiers were not entitled to the privileged status of prisoners of war²⁰⁸ because they offended against the laws of war, and were therefore subject to trial and punishment by a military commission.²⁰⁹ The Court held that the defendants were like spies, and could therefore be categorized as "unlawful enemy combatants," or "unlawful enemy belligerents," especially because they did not carry arms

199. *Ex parte Quirin*, 317 U.S. 1 (1942). See also *Colepaugh v. Looney*, 235 F. 2d. 429 (10th Cir. 1956).

200. *Quirin*, 317 U.S. 1 at 20-21.

201. *Id.* at 21.

202. *Id.* at 21-23; See also Rehnquist, *supra*, note 165, at 936.

203. *Quirin*, 317 U.S. 1 at 24.

204. See *id.* at 20.

205. See *id.* at 25.

206. *Id.*

207. *Id.* at 29.

208. *Id.* at 31.

209. See *id.* at 35.

openly or display a fixed distinctive emblem.²¹⁰ Their offense was complete once they entered U.S. territory outside the zone of military combat in civilian dress, with a hostile purpose, and without identifying themselves as enemy soldiers.²¹¹

The applications for leave to file petitions for habeas corpus were denied on that basis.²¹² It made no difference that one of the petitioners was an American citizen, because:

“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 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 and the law of war.”²¹³

American citizen Haupt was therefore not entitled to the constitutional guarantee of trial by jury, or to the safeguards of the Fifth and Sixth Amendments, because he had violated the law of war.²¹⁴

Ex parte Milligan, which held that the law of war “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed,” was distinguished on its facts.²¹⁵ Unlike Haupt, Milligan had never been an enemy belligerent, either lawful or unlawful.²¹⁶

Significantly, the Supreme Court declined to define the jurisdictional limits of military commissions to try persons according to the law of war.²¹⁷ The German saboteurs were obviously within those limits when they engaged in offenses that were well-known violations of the law of war, so there was no need to answer this question.²¹⁸

On July 23, 1943, Private Gaetano Territo, a manual laborer in the Italian corps of army engineers, was captured on the battlefield at Cotrano, Italy.²¹⁹ At the time of his capture by U.S. forces, he wore part of an Italian Army uniform, and was running away, trying to escape.²²⁰ Territo was held as a prisoner of war and transported as a war measure to Camp Ross Figueroa at Wilmington, California.²²¹ Once there, he disclosed he was a U.S. citizen who had been born on April 20, 1915 in Welch, West

210. *Id.* at 37.

211. *Id.* at 37-38.

212. *Id.* at 48.

213. *Id.* at 37-38.

214. *Id.* at 45.

215. *See id.* at 45.

216. *See id.*

217. *See id.* at 45-46.

218. *See id.*

219. *In re Territo*, 156 F.2d 142 (9th Cir. 1946).

220. *See id.* at 143.

221. *See id.*

Virginia.²²² Territo then filed a writ of habeas corpus seeking his release from custody.²²³

The Ninth Circuit Court of Appeals affirmed that Territo was legally detained as a prisoner of war despite his U.S. citizenship because he was an enemy combatant.²²⁴ Since he did not commit any war crimes, Territo was a lawful belligerent, unlike Herbert Haupt. Once a peace treaty was negotiated with Italy, Territo was eligible for release without trial or punishment.²²⁵ His continued detention, however, was necessary to prevent him from rejoining and serving the enemy.²²⁶

U.S. citizenship did not help Territo to gain release, as he was still subject to the law of war.²²⁷ Furthermore, the Court held that it did not matter that Territo was impressed against his will into the Italian army.²²⁸ Thus, Territo, the lawful enemy belligerent and Haupt, the unlawful enemy belligerent, were both denied their constitutional rights as American citizens.

This is consistent with Hamdi's denial of his constitutional rights. The facts of *Hamdi* come closest to *Territo*, since there is no evidence that Hamdi violated the law of war. In all likelihood, he was a lawful belligerent and should be treated as a prisoner of war, and Hamdi's U.S. citizenship is irrelevant in this assessment. There are, however, significant differences between the cases of *Territo* and *Hamdi*.

Congress declared war on Italy, but it did not declare war on Afghanistan. When captured in a combat zone, Territo was unarmed, whereas Hamdi was carrying a Kalishnikov rifle. Territo was enlisted as a private in the regular Italian Army, but Hamdi was not a uniformed soldier, and might arguably be an al Qaeda terrorist. As the war on terror does not progress with Congress' formal declaration of war, Hamdi's indefinite detention could turn into life imprisonment, whether he is a terrorist or not, because there may never be an end to hostilities during his lifetime.

In 1944, the United States Supreme Court approved the constitutionality of a civilian exclusion order that directed the removal of American citizens of Japanese ancestry from their homes in the interests of national security.²²⁹ The petitioner, a citizen of unquestioned loyalty, Korematsu, disobeyed the order, and refused to report to a concentration camp as required by law.²³⁰ The majority of the Court upheld the legality of the exclusion order.²³¹ Justice Black reminded Korematsu that

222. *See id.*

223. *See id.*

224. *Id.* at 145-48.

225. *Id.*

226. *Id.* at 145.

227. *Id.* at 145-46.

228. *Id.* at 146.

229. *Korematsu v. United States*, 323 U.S. 214 (1944).

230. *See id.* at 215, 226, 230, 232-33.

231. *Id.* at 219.

“hardships are part of war,” and that “citizenship has its responsibilities as well as its privileges, and in time of war the burden is heavier.”²³² When a society is threatened by hostile forces, “the power to protect must be commensurate with the threatened danger.”²³³

Having found nothing in the Constitution denies Congress the war power to detain American citizens in concentration camps, Justice Frankfurter washed his hands of the matter, and placed the responsibility on Congress and the Executive, arguing “[t]hat is their business, not ours.”²³⁴ Dissenting Justice Roberts, however, found that there was a clear violation of Korematsu’s constitutional rights,²³⁵ and that U.S. citizens should not be punished for refusing to submit to imprisonment in a concentration camp solely on the suspicion that one could not be trusted because of one’s ancestry.²³⁶

In his dissent, Justice Murphy argued that there are limits to military discretion when martial law has not been declared.²³⁷ Citing *Sterling v. Constantin*,²³⁸ Justice Murphy stated that the “allowable limits of military discretion” were “judicial questions.”²³⁹ As there was no “immediate, imminent, and impending” public danger, it was wrong to deprive Korematsu of his constitutional rights under the Fifth Amendment and his right to procedural due process.²⁴⁰ Moreover, the treatment of Korematsu was blatantly racist, since U.S. citizens of German and Italian ancestry were granted individual due process.²⁴¹

Justice Jackson dissented on the ground that a civil court cannot be made to enforce an order that violates constitutional limitations, even if it is a reasonable exercise of military authority.²⁴² If the courts did not abide by the constitution, they would cease to be courts and become instruments of military policy.²⁴³ Justice Jackson did not agree with the proposition that a military officer, in this case, General DeWitt, could promulgate an order “on reasonable military grounds,” that the Court was required to enforce, even where it was said that the order was constitutional and lawful.²⁴⁴

Jackson rejected the assumption that a military order was on its face constitutional for several reasons. The Court had no way of knowing if a military order had a reasonable basis in necessity, without evidence on

232. *Id.*

233. *Id.* at 220.

234. *Id.* at 225.

235. *See id.* (Roberts, J., dissenting).

236. *Id.* at 226 (Roberts, J., dissenting).

237. *Id.* at 234 (Murphy, J. dissenting).

238. *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

239. *Korematsu v. United States*, 323 U.S. at 234 (Murphy, J. dissenting).

240. *Id.* at 234-235.

241. *Id.* at 241. *See also* *Schertzberg v. Maderia*, 57 F.Supp. 42 (E.D.Penn. 1944).

242. *Korematsu v. United States*, 323 U.S. at 247 (Murphy, J. dissenting).

243. *Id.*

244. *Id.* at 244.

the record,²⁴⁵ and should therefore not trust and accept an unsworn, self-serving statement, untested by any cross-examination, that the decision of a government official was reasonable.

Despite his reservations, however, Justice Jackson saw no alternative but to accept General DeWitt's "unsworn self-serving statement, untested by any cross-examination, that his actions were reasonable."²⁴⁶ Military decisions by their nature are not susceptible to intelligent judicial appraisal, he argued, as courts cannot act on communications made in confidence, unproven assumptions, and inadmissible evidence.²⁴⁷

At least in principle, there is no difference between the role of the Mobbs Declarations in *Hamdi* and *Padilla* and the order of General DeWitt justifying the indefinite detention of citizens like Korematsu in concentration camps during World War Two. Justice Jackson's opinion, therefore, is still relevant in the context of the present detention orders. The great threat to liberty, said Justice Jackson, is not an unconstitutional military order that does not outlast the emergency, but the establishment of a judicial precedent that sanctions the detention of U.S. citizens based on racial discrimination and, over time, becomes judicial doctrine.²⁴⁸

Korematsu thus "lies about like a loaded weapon,"²⁴⁹ citable as authority for the proposition that U.S. citizens of Arab ancestry, regardless of their patriotism, may be lawfully detained in Navy Brigs once they have been designated as "enemy combatants" by future Mobbs-type Declarations.

In 1950, the Supreme Court in *Johnson v. Eisentrager* denied the writ of habeas corpus to enemy aliens not within the territorial jurisdiction of the United States.²⁵⁰ Non-resident German enemy aliens in the military service of Japan, who after the surrender of Germany had been captured in China and put on trial before a military commission for violations of the law of war, were ruled to have no standing to demand relief in American civil courts by way of habeas corpus.²⁵¹

At no time were these aliens within the territorial jurisdiction of any American civil court, including the District Court for the District of Columbia, even though while serving their sentences they were under the control and custody of American soldiers in the American occupied part of Germany.²⁵² For this reason, the court ruled that these non-resident enemy aliens did not have constitutional protection from military trial and

245. *Id.* at 245.

246. *Id.*

247. *Id.*

248. *See id.* at 246.

249. *Id.*

250. *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950).

251. *See id.* at 765-67, 777-78.

252. *See id.* at 778.

punishment.²⁵³ Justice Jackson, writing on this occasion for the majority, excluded U.S. citizens from this decision, who were protected by the ancient “high privilege” of citizenship, recognized as a ground for protection that was already old when Paul invoked his Roman citizenship in his appeal to Caesar.²⁵⁴

In dissent, Justice Black, joined by Justices Douglas and Burton, asserted that equal justice under law was not just equal justice for citizens, but extended to “all persons coming within the ambit of our power.”²⁵⁵ It was this ideal that had created “an independent judiciary with authority to check abuses of executive power and to issue writs of habeas corpus liberating persons illegally imprisoned.”²⁵⁶ Moreover, it was a “broad and dangerous principle” for the Court to deprive the petitioners of the privilege of habeas corpus solely because they were captured, convicted and imprisoned in occupied countries outside of the territory of the United States.²⁵⁷

Even though the petitioners were unsuccessful in *Ex parte Quirin*, Justice Black noted that the petitioners in that case were enemy belligerents who had standing to contest their war crime convictions by habeas corpus proceedings.²⁵⁸ Black firmly rejected the notion that a prisoner’s right to determine the legality of a sentence depends on where the government chooses to incarcerate that person.²⁵⁹

Justice Black admonished the other members of the court for “fashioning a wholly indefensible doctrine [that] permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive’s illegal incarcerations.”²⁶⁰ Black also suggested citizenship might be a sufficient substitute for territorial jurisdiction to permit courts to protect Americans from illegal sentences.²⁶¹

Justice Black’s fear that the majority’s decision would allow the government to illegally imprison individuals in a geographical location not within the jurisdiction of a federal Court, such as Camp X-Ray in Cuba, has come true. Yet, even Justice Black did not foresee the day when U.S. citizenship would be irrelevant in the determination of enemy combatant status of someone like Hamdi or Padilla, and thereby further limit the

253. *Id.* at 785. This may be why the Taliban and al Qaeda prisoners are detained in Cuba, outside of the jurisdiction of the American judiciary.

254. *Id.* at 769-770. As an American citizen, Hamdi may have sought to exercise his constitutional rights in Cuba, and in order to avoid this, a decision was made to remove him to American territory to avoid jeopardizing the loophole in the law that permitted the continued detention of enemy aliens in Cuba.

255. *Id.* at 791.

256. *Id.*

257. *Id.* at 795.

258. *Id.* at 794.

259. *See id.* at 795.

260. *Id.*

261. *See id.* at 796.

power of the judiciary to prevent injustice and supervise the power of the executive branch of government.

In his closing remarks, Justice Black eloquently summarized his reasons why the courts must never abdicate the “loftiest” power endowed by the Constitution—habeas corpus.²⁶² Unlike other countries in the world, the Constitution of the United States mandates judicial scrutiny of the executive and the military, which cannot act with impunity.²⁶³ The world looks to the United States for the ideal expression of equal justice under law.²⁶⁴ Justice is the goal that defines the nation’s greatness.²⁶⁵ Neither the Congress nor the Executive may constitutionally abridge the use of habeas corpus, because “[o]ur courts can exercise it whenever any United States official illegally imprisons any person in any land we govern.”²⁶⁶

These eloquent words went unheeded during the Cold War, especially as combat proceeded in Korea, and McCarthyism and the fear of communism flourished domestically. Unfortunately, Justice Jackson’s words may also pass unheeded now, in the present climate of fear caused by the imminent threat of international and domestic terrorism.

C. Indefinite Detention

For twenty-five years, a Hungarian carpenter born in Gibraltar named Ignatz Mezei lived peaceably as a resident alien in Buffalo, New York, where he married a U.S. citizen with four children and fathered a child.²⁶⁷ During World War Two, Mezei sold war bonds and served as an air raid warden.²⁶⁸ He was also a member of the Hungarian Lodge of the International Workers Order (IWO), and served terms as its Secretary and President.²⁶⁹

In 1948, Mezei traveled to Europe in the hopes of visiting his dying mother.²⁷⁰ He was refused entry into Romania and waited many months in Hungary for a quota immigration visa from the American Consul in Budapest, and then returned home to the United States after a 19-month absence behind the Iron Curtain.²⁷¹ At the Port of New York, he was refused entry on February 9, 1950 by an immigration inspector under the authority of the Passport Act.²⁷² He was temporarily excluded and detained

262. *Id.* at 798.

263. *Id.* at 797-98.

264. *See id.* at 798.

265. *Id.*

266. *Id.*

267. Charles D. Weisselberg, *The Exclusion And Detention Of Aliens: Lessons From The Lives Of Ellen Knauff And Ignatz Mezei*, 143 U. PA. L. REV. 933, 964, 976 (1995).

268. *Id.* at 964.

269. *Id.* at 973-74. The IWO was listed as a communist organization by the INS.

270. *Shaughnessy v. Mezei*, 345 U.S. 206, 208 (1953).

271. *See id.*

272. *See id.*

without charge at Ellis Island.²⁷³ On May 10, 1950, without a hearing, the Attorney General ordered Mezei's permanent exclusion on the basis of confidential information received from unidentified secret informers, "the disclosure of which would be prejudicial to the public interest."²⁷⁴

For the next two years, Mezei was held as a prisoner at Ellis Island.²⁷⁵ Every country in the world he applied to live in refused to take him in.²⁷⁶ Mezei brought successive applications for habeas corpus, claiming his indefinite detention was unlawful.²⁷⁷ On his fifth attempt, Mezei was successful. The District Court judge observed that 21 months of imprisonment was excessive, and for his detention to continue the government needed to supply proof that Mezei was a danger to public safety.²⁷⁸ The government refused to provide any such evidence to the court, even on an *ex parte in camera* basis.²⁷⁹

In response, the District Court ordered Mezei's release on conditions, which order was affirmed by the Court of Appeals, Judge Learned Hand dissenting.²⁸⁰ In a split 5:4 decision, the United States Supreme Court reversed the lower courts, finding that harborage on Ellis Island was not entry into the United States and that Mezei was properly excludable, despite his prior residence, as he was unqualified for admission under existing immigration laws.²⁸¹

Justice Clark argued that the decision of the Attorney General was final and conclusive.²⁸² The Attorney General could not be compelled to disclose the evidence upon which he based his reasons for denying Mezei re-entry.²⁸³ Applying *Knauff v. Shaughnessy*,²⁸⁴ Clark ruled "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government."²⁸⁵ Justice Clark was careful to add that the case of a lawful resident alien could "not captiously be deprived of his constitutional rights to procedural due process."²⁸⁶

Dissenting, Justices Black and Douglas argued that the Court was setting a dangerous precedent by holding that the Attorney General's discretion was unreviewable.²⁸⁷ Justice Black might have well been

273. *See id.*

274. *Id.*

275. *See id.* at 217.

276. *See id.* at 209.

277. *Id.*

278. *Id.*

279. *See id.*

280. *Id.*

281. *Id.* at 213.

282. *Id.* at 212.

283. *Id.*

284. *See Knauff v. Shaughnessy*, 338 U.S. 357 (1950).

285. *Shaughnessy v. Mezei*, 345 U.S. at 212.

286. *Id.* at 213.

287. *Id.* at 217. In Hamdi's case, the government also argued that its designation of Hamdi as an enemy combatant was unreviewable.

writing the opinion of Judge Doumar when he penned these words fifty years ago in *Mezei*:

*No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now. Russian laws of 1934 authorized the People's Commissariat to imprison, banish and exile Russian citizens as well as 'foreign subjects who are socially dangerous.' Hitler's secret police were given like powers. German courts were forbidden to make any inquiry whatever as to the information on which the police acted. Our Bill of Rights was written to prevent such oppressive practices. Under it this Nation has fostered and protected individual freedom. The Founders abhorred arbitrary one-man imprisonments. Their belief was – our constitutional principles are – that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken 'without due process of law.' This means to me that neither the federal police nor federal prosecutors nor any other governmental official, whatever his title, can put or keep people in prison without accountability to courts of justice. It means that individual liberty is too highly prized in this country to allow executive officials to imprison and hold people on the basis of information kept secret from courts. It means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor.'*²⁸⁸ [Emphasis added.]

Justice Jackson, joined by Justice Frankfurter, also dissented, claiming that it was oppressive and lawless to detain indefinitely a person by executive order without charge or trial²⁸⁹ and that courts will not deny the writ of habeas corpus to an unconvicted prisoner just because he is an alien.²⁹⁰

Mezei was denied due process of law. If indefinite detention becomes the means to keep society safe from attack, due process still requires that the detainee be informed of the grounds of detention and receive a fair chance to overcome them.²⁹¹ Simple justice and fair dealing pose no threat to national security.²⁹² A system of summary executive detention without disclosure to the detainee of charges, evidence, informers or reason, is no different from the "protective custody" procedures administered by Stalin's Communist and Hitler's Nazi regimes.²⁹³

288. *Id.* at 217-18.

289. *Id.* at 218.

290. *Id.* at 219 (citing *Sommersett's Case*, 20 How. St. Tr. 1).

291. *Id.* at 227.

292. *Id.* at 228.

293. *Id.* at 225-26.

Even with the best of intentions, a system of depriving people of their liberty without due process, warned Justice Jackson, would inevitably lead to oppression.²⁹⁴ Detention is justified when it is one step in a process, not when it is an end in itself.²⁹⁵ Detention of an alien was compatible with substantive due process, as long as procedural due process was not denied.²⁹⁶ Relying on *Korematsu*, Jackson postulated that substantive due process accommodates “all reasonable measures to insure the national safety, and it leaves a large, at times a potentially dangerous, latitude for executive judgment as to policies and means.”²⁹⁷ A “high degree of deference” is paid to executive judgment “as to what is reasonable policy under conditions of particular times and circumstances.”²⁹⁸ “Close to the maximum of respect is due from the judiciary to the political departments in policies affecting security and alien exclusion.”²⁹⁹

Justice Jackson’s reasons that expounded upon the doctrine of substantial due process under the Fifth Amendment in regard to aliens could also apply to any “person,” including hostile citizens who might be terrorists and pose security threats to our nation and government:

Due process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will. Nothing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government. Nor do I doubt that *due process of law will tolerate some impounding of an alien [or citizen] where it is deemed essential to the safety of the state. . . . I should suppose one personally at war with our institutions might be confined, even though his state is not at war with us. . . . [T]he underlying consideration is the power of our system of government to defend itself, and changing strategy of attack by infiltration may be met with changed tactics of defense. Nor do I think the concept of due process so paralyzing that it forbids all detention of an alien [or citizen] as a preventive measure against threatened dangers and makes confinement lawful only after the injuries have been suffered. . . . [D]etention of an alien [or citizen] would not be inconsistent with substantive due process, provided . . . he is accorded procedural due process of law.*³⁰⁰
[Emphasis added.]

If Justice Jackson is right, Hamdi may be lawfully detained as an enemy combatant provided procedural due process is guaranteed and his detention is not potentially indefinite, but one step in a process. However, mere procedural fairness will not shield against wrongful and oppressive

294. *Id.*

295. *See id.* at 227.

296. *Id.* at 224.

297. *Id.* at 222.

298. *Id.*

299. *Id.*

300. *Id.* at 222-24.

government conduct.³⁰¹ As for Mezei, his indefinite detention ended in 1954, when he was released on immigration parole.³⁰²

In 2001, the United States Supreme Court revisited the issue of indefinite detentions in the cases of *Kestutis Zadvydas* and *Kim Ho Ma*.³⁰³ Both these individuals were born abroad, raised in the United States, convicted of serious felonies, and ordered deported.³⁰⁴ No country was willing to take either person, and at the end of the statutory 90-day removal period, both *Zadvydas* and *Ma* challenged by way of habeas corpus the government's plan to indefinitely detain them.³⁰⁵ The narrow issue before the court was whether the Attorney General could detain a removable person indefinitely beyond the statutory removal period or only for a reasonably necessary time to secure removal.³⁰⁶

Justice Breyer, writing for the majority, held that the government did not have the legal right to indefinitely and possibly permanently detain resident criminal aliens. Once an alien has entered the United States, the Fifth Amendment and the Due Process Clause apply to all citizens and lawful residents, including aliens, irrespective of whether that person's presence was "lawful, unlawful, temporary, or permanent."³⁰⁷ "[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute."³⁰⁸

The Court's solution was to invent a six month limitation period to detention following a final deportation order and the extinguishment of all legal rights to remain in the United States, after which time release from custody was possible if it was determined that "there is no significant likelihood of removal in the reasonably foreseeable future."³⁰⁹ The onus of proof to justify further detention then falls on the government to prove that there is a significant likelihood of removal.³¹⁰

301. See *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (holding that "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them'"). See also *United States v. Salerno*, 481 U.S. 739,746 (1987); *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

302. After losing in the Supreme Court, the Attorney General granted Mezei an exclusion hearing before a special Board of Inquiry composed of civilian law professors. He was found to be permanently excludable, because of a single prior conviction of petty larceny and a sentence of \$10 for receiving seven stolen bags of flour. Although the Board found that Mezei had lied about his birth and prior criminal conviction on immigration documents, the Board made an off the record recommendation to the Attorney General to release Mezei on immigration parole. On August 9, 1954, Mezei was discharged from the "communist wing" of Ellis Island so he could rejoin his family in Buffalo, but he was never admitted to the United States as citizen or permanent resident. See *Weisselberg*, *supra* note 267, at 971-984.

303. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

304. See *id.* at 684-85.

305. See *id.* at 684-86.

306. See *id.* at 682.

307. *Id.* at 693.

308. *Id.* at 699-700. See 1 E. Coke, *Institutes* *70b ("*Cessante racione legis cessat ipse lex*") (the rationale of a legal rule no longer being applicable, that rule itself no longer applies).

309. *Zadvydas v. Davis*, 533 U.S. at 701.

310. *Id.*

Justice Breyer was reluctant to concede that Congress had clearly intended to allow the indefinite detention of aliens whom the government was unable to remove by deportation. Assuming even that the government had the discretion to indefinitely detain by the statute's word "may," the statute did not automatically confer unlimited discretion.³¹¹ A federal court holding a habeas corpus hearing was under no obligation to accept the government's position and was entitled to conduct its own independent review.³¹² The Constitution "may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'"³¹³

The case of *Mezei* was held not to apply on the basis of the legal fiction that, since Mezei was detained on Ellis Island and therefore had never technically set foot on the territory of the United States, he had not legally entered the United States.³¹⁴

In a stinging dissent, Justice Scalia, joined by Justice Thomas, rejected a claimed right to release by criminal aliens who had no legal right to be in this country.³¹⁵ Aliens under a final order of deportation are on an equal footing with the inadmissible alien at the threshold of entry.³¹⁶ The case of *Mezei*, they argued, is controlling and is still good law.³¹⁷

Justice Kennedy also dissented, noting, "other countries can use the fact of judicially mandated release to their strategic advantage, refusing the return of their nationals to force dangerous aliens upon us."³¹⁸ Justice Kennedy lamented that the decision might result in the release of the Mariel boatlift Cubans and other illegal inadmissible aliens who have been indefinitely detained.³¹⁹

Justice Breyer was careful to say "terrorism or other special circumstances" can allow for special arguments for "forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security",³²⁰ suggesting that indefinite detention is still an open question for Hamdi and other designated enemy combatants.

311. *Id.* at 697.

312. *Id.* at 699.

313. *Id.* at 692 (citing *Walpole v. Hill*, 472 U.S. 445, 450 (1985)).

314. *Zadvydass v. Davis*, 533 U.S. at 693.

315. *See id.* at 702-03 (Scalia, J. dissenting).

316. *Id.* at 703.

317. *Id.* at 705.

318. *Id.* at 711-12 (Kennedy, J. dissenting).

319. *Id.* at 716-17. *See also* *Rosales-Garcia v. Holland*, 238 F.3d 704 (C.A. 6 2001). For a history of the indefinite detentions of Cuban immigrants, *see* Sarah Town, *Seventeen Years and Counting*, IN MOTION MAGAZINE, at <http://www.inmotionmagazine.com/mariel.html> (Dec. 7, 1997).

320. *Zadvydass v. Davis*, 533 U.S. at 695-96.

IV. The Denial of Legal Assistance

Will the government continue to be successful in opposing Judge Doumar's attempts to appoint counsel to represent Hamdi? Due process is denied when there is a failure of the trial court to appoint effective counsel. The right to the effective assistance of counsel is a fundamental principle of liberty and justice. In Virginia, where Hamdi is detained, as early as 1734 there was legislation that allowed any prisoner in a capital case to obtain the assistance of counsel upon his petition to the court.³²¹

The constitutional right to the assistance of counsel under the Sixth Amendment³²² is restricted to those persons who have been charged with a crime, unlike the Fifth Amendment,³²³ where the right to due process is not conditioned upon a criminal charge. This may be why Hamdi, an American citizen who is not charged, is thereby denied the assistance of counsel on the theory that he is not in any legal jeopardy, even though he may be permanently detained for the rest of his life. In contrast, when foreign nationals of enemy armed forces were captured during the Second World War, they were charged, assigned counsel, and expeditiously tried for their crimes. One such case was *In re Yamashita*.³²⁴

On September 3, 1945, General Yamashita, Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, surrendered and became a prisoner of war of the United States.³²⁵ On September 25, 1945, by order of Lieutenant General Wilhelm Styer, Yamashita was charged with a violation of the law of war for failing to control troops under his command from committing atrocities against the enemy, even though there was no evidence that he had any knowledge of these atrocities, ordered their commission, or personally committed any such acts.³²⁶ At his arraignment on October 8, 1945, six Army officers were appointed to act as his defense counsel.³²⁷ Yamashita's trial was held

321. *Powell v. Alabama*, 287 U.S. 45, 62 (1932). See c. VII, § III, Laws of Va., 8th Geo. II, Hening's Stat. at Large, vol. 4, p. 404.

322. U.S. CONST. amend. VI ("Amendment VI. *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*") (emphasis added).

323. U.S. CONST. amend. V ("Amendment V. *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*") (emphasis added).

324. *In re Yamashita*, 327 U.S. 1 (1946).

325. See *id.* at 5.

326. See *id.* at 5, 34.

327. See *id.* at 5.

on sovereign American territory in the Philippines³²⁸ and began on October 29 before an American military court.³²⁹ He was found guilty on December 7, 1945 and sentenced to death.³³⁰ Yamashita filed a petition for writ of habeas corpus that was denied by the United States Supreme Court on February 4, 1946.³³¹

Chief Justice Stone complemented the defense counsel for their efforts, professional skill, resourcefulness, and zeal.³³² Enemy aliens put on trial before military commissions for offenses against the law of war had the right to make a defense.³³³ “The trial and punishment of enemy combatants who have committed violations of the law of war” is the proper business of military commissions sanctioned by Congress from the time war is declared and peace is proclaimed.³³⁴ As an enemy combatant, Yamashita was denied the benefit of rules of evidence that would have excluded ordinarily inadmissible evidence.³³⁵ Relying on *Quirin*, the Court therefore denied the application of the Fifth Amendment to Yamashita and held that the military commission was lawfully constituted, that the commission had the lawful authority to try the petitioner for offenses against the law of war, and that the trial was conducted in accordance with the law.³³⁶

Justice Murphy dissented, severely criticizing the gross and open violations of Yamashita’s rights under the Fifth Amendment, citing his unfair trial, lack of due process, and the denial of a continuance to the defense counsel, who were given inadequate time to prepare a defense.³³⁷ Even enemy combatants were entitled to the Fifth Amendment’s guarantee of due process when accused of a crime by the Federal Government or one of its agencies;³³⁸ especially as only 14 years earlier, the Supreme Court had decided that a denial of due process included the failure of the trial court to make an effective appointment of counsel.³³⁹

Justice Rutledge also dissented, and agreed that Yamashita’s constitutional rights were violated and that he did not have a fair trial.³⁴⁰ The single protection Yamashita was given, the assistance of able counsel, was vastly diminished by the numerous denials of a reasonable opportunity

328. *See id.* at 27.

329. *See id.* at 5.

330. *Id.*

331. *Id.* at 25.

332. *See id.* at 5.

333. *Id.* at 9.

334. *Id.* at 11-12.

335. *Id.* at 18.

336. *Id.* at 7 (Murphy, J. dissenting).

337. *Id.* at 27-29, 33, 40.

338. *Id.* at 26.

339. *See id.* (citing *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (“...the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment”).

340. *Yamashita*, 327 U.S. at 42, 45 (Murphy, J. dissenting).

for counsel to act in an effective manner.³⁴¹ Enemy combatants need the protection of the Constitution away from the combat zone before hostilities cease to ensure fairness.³⁴² It is one thing if an enemy combatant is killed in the field of combat, for that is when “the maxim about the law becoming silent in the noise of arms applies.”³⁴³ It is a quite different matter when the enemy combatant is on trial for his life, after capture or surrender, whether the trial is before or after hostilities end, for in the courtroom, the law applies and the noise of arms is silenced.³⁴⁴

It is dangerous to deny enemy combatants (non-citizens like Yamashita) their rights under the Fifth Amendment, for once the door has been opened and left ajar, it may swing wide open,³⁴⁵ perhaps to include American citizens like Hamdi. Unfortunately, having ineffective counsel in certain circumstances may amount to no counsel at all, but that will not mean proceedings before a military commission will be declared a nullity.

In *Ex parte Benton*, the petitioner claimed that the military court that tried and sentenced him did not have jurisdiction because “he did not have the effective assistance of counsel for his defense as guaranteed by the Constitution. . . .”³⁴⁶ The District Court in San Francisco ruled in 1945 that Benton, an American soldier who was convicted of murder by a military court, could not rely on habeas corpus to set aside his conviction.³⁴⁷ The question of the competency of counsel was not relevant unless the hearing was so unfair that it amounted to a denial of due process under military law.³⁴⁸ The Fifth Amendment did not extend to Benton because his case involved military justice.³⁴⁹

More recently, the government took steps to control the independence of the public defender appointed in assisting Richard Reid, the foreign national who attempted to ignite explosives concealed in his shoes during American Airlines Flight 63 en route from Paris to Miami on December 22, 2001.³⁵⁰ On March 4, 2002, Reid’s attorneys from the Federal Public Defender’s Office refused to sign a document pursuant to Special Administrative Measures (SAMs) that had the effect of restricting counsel’s independence and ability to conduct their client’s defense.³⁵¹ In

341. *Id.* at 44-45. See also *id.* at 53 (arguing that “. . .the greatest prejudice arose from the admission of untrustworthy, unverified, unauthenticated evidence which could not be probed by cross-examination or other means of testing credibility, probative value or authenticity”).

342. *Id.* at 46.

343. *Id.* at 47.

344. *Id.*

345. See *id.* at 79.

346. *Ex parte Benton*, 63 F. Supp. 808, 810 (N.D. Cal. 1945).

347. *Id.*

348. *Id.*

349. *Id.*

350. *U.S. v. Reid*, 214 F. Supp. 2d 84 (D. Mass. 2002).

351. *Id.* at 87. “Attorney General [Ashcroft] promulgated emergency regulations which allow the imposition of ‘Special Administrative Measures’ (“SAMs”) upon any federal prisoner as to whom he finds that ‘there is a substantial risk that a prisoner’s communications or contacts with persons could result in death or serious bodily injury to persons . . .’ 28 C.F.R. § 501.3(a) (“Prevention of acts of

retaliation, the government cut off all communications between Reid and his attorneys.³⁵² “On March 25, 2002, defense counsel filed an emergency motion to enjoin the Attorney General and the United States Attorney from barring their communication with Reid.”³⁵³

Eventually the government modified the SAMs applicable to Reid to conform to a court order³⁵⁴ and “backed off” the affirmation requirement of counsel.³⁵⁵ The looming constitutional issue under the Sixth Amendment “evaporated.”³⁵⁶ Chief Judge William G. Young exercised his discretion and issued a memorandum criticizing the government’s attempt to fundamentally and impermissibly intrude on the role of defense counsel and unlawfully regulate the independence of the bar.³⁵⁷ Judge Young recalled what John Adams said when he agreed, when no one else would, to defend the British soldiers who had allegedly committed the Boston massacre: “[n]o man in a free country should be denied the right to counsel and a fair trial.”³⁵⁸ “Right of access” by a citizen to an “independent private bar,” as the “guardian of our freedom,” is vital to the existence of democracy and rule of law.³⁵⁹

Given the crucial importance of independent counsel in a free and democratic society governed by the rule of law, what is the government’s motivation for depriving Hamdi of counsel? Is it because lawyers cannot be trusted? Without a lawyer, suspects under interrogation may not provide trustworthy evidence, in an atmosphere of intimidation and threats, as the recent case of Abdullah Higazy demonstrates.³⁶⁰ Is the government seeking to avoid exposure to embarrassing conduct, such as coercion and torture? Are the government’s historical actions to appoint incompetent

violence and terrorism.”)(1996).” *Reid*, 214 F. Supp. at 86. “SAMs are prisoner-specific.” *Id.* at 87. “The Attorney General . . . issued SAMs against . . . Reid . . . under the authority of section 501.3. [On] February 19, 2002, the Marshals Service unilaterally . . . imposed . . . SAMs on the detention of Reid” *Id.* at 87 including those concerning Reid’s attorney-client communications: “Defense Counsel May Disseminate Inmate Conversations—The inmate’s attorney may disseminate the contents of the inmate’s communications to third parties for the sole purpose of preparing the inmate’s defense—and not for any other reason—on the understanding that any such dissemination shall be made solely by the inmate’s counsel, and not by the counsel’s staff.” *Id.* at 87.

352. *See id.* at 88.

353. *Id.*

354. *Id.* at 91.

355. *Id.* at 92.

356. *Id.*

357. *Id.* at 94.

358. *Id.* at 95 (citing Hiller B. Zobel, *The Boston Massacre* 220 (1970)).

359. *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 371 (1985) (Stevens J. dissenting).

360. *See United States v. Sattar*, 272 F. Supp. 2d 248 (S.D.N.Y. 2003). Defense attorney Lynne Stewart faces charges of violating SAMs by facilitating and concealing communications from Sheikh Abdel Rahman in jail to his terrorist confederates around the world. *See also* Joanne Mariner, *Fear of Lawyers: The Cautionary Tale of a Post-September 11 Detainee*, WRIT FIND LAW LEGAL COMMENTARY, at <http://writ.news.findlaw.com/mariner/20020819.html> (Aug. 19, 2002); Jane Fritsch, *A Nation Challenged: The Egyptian Student; Grateful Egyptian Is Freed As U.S. Terror Case Fizzles*, N. Y. TIMES, January 18, 2002 at A01; Mark Hamblett, *FBI Examiner Sued Over False 9/11 Confession*, 228 N.Y.L.J. 1 (2002).

counsel, hamstringing counsel and to block the effective assistance of counsel a prelude to imposing rule by law, without the formal declaration of martial rule?

V. Usurping the Rule of Law

Until Usama Bin Laden's attack on September 11, 2001, the Imperial Japanese Navy's attack on Pearl Harbor on December 7, 1941 set the precedent for the invocation of martial rule and the suspension of the privilege of habeas corpus in the face of "invasion, or imminent danger thereof, when the public safety requires it."³⁶¹ Rule of law was replaced by rule by law in the U.S. Territory of Hawaii on December 7, 1941, immediately after the attack on Pearl Harbor by order of Governor Joseph Poindexter pursuant to section 67 of the Hawaiian Organic Act.³⁶² Commanding General Walter C. Short, assumed the position of Military Governor of Hawaii and "all powers normally exercised by judicial officers . . . of this territory . . . during the . . . emergency and until the danger of invasion [was] removed."³⁶³

That same day, a system of military courts was established to try civilians.³⁶⁴ The next day, December 8, the civil and criminal courts were closed.³⁶⁵ On December 9, 1941, President Franklin D. Roosevelt approved the suspension of the writ of habeas corpus and the imposition of martial law.³⁶⁶ Relaxation of the closing of the courts began on December 16, 1941, as some civil courts were re-opened.³⁶⁷

On January 27, 1942 the criminal courts were re-opened, with the restrictions that there would be no grand juries summoned, no jury trials, or writs of habeas corpus.³⁶⁸ On August 31, 1942, "experimental" jury trials were allowed. On October 24, 1944, "the privilege of the writ of habeas corpus [was] restored and martial law [was] terminated."³⁶⁹

During the period of martial law, two citizens committed unrelated crimes, and both were tried and convicted by a military commission without benefit of their constitutional rights under the Fifth and Sixth Amendments. On August 20, 1942, military police arrested stockbroker White for embezzlement.³⁷⁰ His requests for a jury trial and for a

361. *Duncan v. Kahanamoku*, 327 U.S. 304, 307-308 (1946).

362. *Id.* at 307-08, n.1.

363. *Id.* at 354 n.6.

364. *See id.*

365. *See id.*

366. *See id.*

367. *See id.*

368. *See id.*

369. *Id.* The Chief Justice of the Hawaii Supreme Court testified he knew of no sound reason why after April of 1942 jury trials were not restored for civilians charged with criminal offenses, as the courts were capable of functioning just as peaceably as saloons serving liquor and places of amusement that were open at that time by military order. *See id.* at 336-37, 327-28.

370. *See id.* at 309.

continuance to allow time to prepare his defense were denied.³⁷¹ White was convicted and sentenced by a military tribunal, which overruled his motion objecting to jurisdiction.³⁷²

On February 24, 1941, Duncan was arrested for assaulting two Marines who guarded the main gate to Pearl Harbor.³⁷³ He was tried and convicted by a military court, even though assault was a crime under the general laws of Hawaii.³⁷⁴

In 1944, White filed a petition for habeas corpus on March 14; Duncan filed his petition for habeas corpus on April 14.³⁷⁵ Each challenged the constitutionality of their trials alleging those proceedings were void, and sought their release.³⁷⁶ The Supreme Court of the United States heard their case on December 7, 1945, after the war was over. On February 25, 1946, the Supreme Court granted both of their petitions and ordered their release, but not without a vigorous dissent from Justices Burton and Frankfurter.

Justices Black, Murphy and Chief Justice Stone all wrote opinions for the majority. Justice Black noted that when these petitioners committed their crimes, the courts were open for business, albeit with restrictions.³⁷⁷ The circumstances of these cases were distinguishable from the facts of other cases, where the military had obvious jurisdiction to “try enemy belligerents, prisoners of war, or others charged with violating the laws of war.”³⁷⁸ Rather, these petitioners were tried before military tribunals that had replaced the civil courts of law.³⁷⁹ The term “martial law” was found to have “no precise meaning,” and was consistent with what the military commander “consider[ed] the imperious necessity of the moment.”³⁸⁰ Whatever extraordinary measures necessary to repel actual or threatened invasion did not support the premise that Hawaiian inhabitants were less entitled to constitutional protection than others.³⁸¹

The people of the Territory of Hawaii were entitled to the full protection of the United States Constitution.³⁸² Justice Black stated, “Our system of government is clearly the antithesis of total military rule and the founders of this country. . . were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws.”³⁸³ Citing *Dow v. Johnson*, Black wrote, “The established principle of every

371. *See id.*

372. *Id.* at 310.

373. *See id.* at 310, 356

374. *Id.* at 311.

375. *Id.*

376. *Id.* at 307, 311.

377. *Id.* at 313.

378. *Id.* at 313-14.

379. *Id.* at 314.

380. *Id.* at 315.

381. *Id.* at 318.

382. *Id.* at 319.

383. *Id.* at 322

free people is, that the law shall alone govern; and to it the military must always yield.”³⁸⁴ Applying *Ex parte Milligan*, Black held that “martial law” was not intended to supplant civil courts with military tribunals.³⁸⁵ The petitioners were entitled to be released from custody.³⁸⁶

Justice Murphy agreed. As the courts were open for business, the *Milligan* case applied.³⁸⁷ Murphy defended the “open-court rule” and rejected arguments that the rule was unsuited to modern warfare conditions, where technology made it possible for all of the United States to be in the combat zone or imminently threatened with long-range attacks.³⁸⁸ It was untenable to justify the usurpation of the rule of law by rule by military law.³⁸⁹ Justice Murphy repudiated the invitation to abandon civil liberties to the will of professional military commanders who would trample on the Constitution.³⁹⁰

Justice Murphy accepted the evidence of Admiral Nimitz and General Richardson that throughout the time of martial law martial law was justified because “there was at all times a danger of invasion, at least in the nature of commando raids or submarine attacks, and that public safety required the imposition of martial law.”³⁹¹ Justice Murphy refused to sanction the sacrifice of constitutional rights out of fear of further attacks, arguing “[b]ut it does not follow from these assumptions that the military was free under the Constitution to close the civil courts or to strip them of their criminal jurisdiction, especially after the initial shock of the sudden Japanese attack had been dissipated.”³⁹²

When considering the terrorist attacks on the World Trade Center and the Pentagon, and Americans’ constant fear and heightened anxiety of further attacks in the homeland and upon Americans abroad, should the open-court rule prevail? Should we sacrifice the security we gain from due process in favor of military security provided by rule by executive will? Justice Murphy believed:

From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised. The right to jury trial and the other constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military [or terrorist] assault. There must be some overpowering factor that makes a

384. *Id.* at 323.

385. *Id.* at 324.

386. *Id.*

387. *Id.* at 326, 328.

388. *Id.* at 329.

389. *See id.*

390. *See id.*

391. *Id.* at 329.

392. *Id.* at 330.

recognition of those rights incompatible with the public safety before we should consent to their temporary suspension. If those rights may safely be respected in the face of a threatened invasion no valid reason exists for disregarding them. In other words, *the civil courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended.*³⁹³ [Emphasis supplied.]

In perilous times, therefore, vigilance against overzealous militarism and careful balancing of interests are steady guides.³⁹⁴

Chief Justice Stone concurred in the result, and warned that not every executive action was proof of its own necessity, nor was every executive action justifiable simply because it was authorized by executive authority.³⁹⁵ There are limits to military discretion, and the courts have the final say what those limits are and whether the government has gone too far.³⁹⁶

In dissent, Justices Burton and Frankfurter argued for tipping the balance in favor of government discretion and expertise when the United States faced savage attacks, including acts of terrorism.³⁹⁷ There needs to be a “zone of executive discretion” respected by the courts, who have a responsibility to refrain from substituting their judgment based on limited knowledge, inapplicable standards, and outdated precedents in a evolving war that defies the traditional tests of what is a war and what is a battlefield.³⁹⁸ The Court exceeds its constitutional authority when it intrudes into the sphere of executive discretion vested in the President who has the ultimate responsibility for the preservation of the nation.³⁹⁹

The relaxation of martial rule in Hawaii, a place in the line of fire, over time and in stages, was a matter of executive discretion and should not have been interfered with by the courts.⁴⁰⁰ By claiming the final say in matters of national security, the Court has set a precedent that may disable the executive branch of the government in the performance of its duties in the event of future hostile attacks.⁴⁰¹

A. Is there a ‘Plan’ to Circumvent the Rule of Law?

Chief Justice Rehnquist observed that whenever possible, the courts have generally reserved decisions favoring civil liberties in warfare

393. *Id.* (emphasis added).

394. *Id.* at 335.

395. *Id.* at 336.

396. *Id.*

397. *Id.* at 341-42 (Burton, J. dissenting).

398. *Id.* at 342-43.

399. *See id.* at 343.

400. *See id.* at 344, 351.

401. *Id.* at 357.

to be handed down after hostilities between enemy states had ceased.⁴⁰² The Chief Justice used Justice Black's seemingly irreconcilable opinions in *Korematsu* and *Duncan* to illustrate the truth of the Latin maxim *inter arma silent leges* – in time of war, the laws fall silent and the guns speak.⁴⁰³

In the cases of *Ex parte Milligan* and *Duncan v. Kahanamoku*, both of which favored civil liberties, the opinions were held back until peacetime, unlike *Quirin* which was decided during the Second World War.⁴⁰⁴ While it might not be desirable for the laws to be totally silent during wartime, Chief Justice Rehnquist suggests it might be best for the laws to speak with a “muted voice.”⁴⁰⁵

As early as October 28, 1996, when Chief Justice Rehnquist spoke to the law faculty at the Indiana School of Law in Bloomington, he stated, “a major war effort necessarily results in the curtailment of some civil liberties.”⁴⁰⁶ Given these firmly held views, it would not be surprising for the current Chief Justice to defer to President Bush's military authority to detain American citizens as enemy combatants and apply *Korematsu* if, as expected, *Hamdi III* reaches the United States Supreme Court.

In recognition of the singular importance of *Hamdi*, the National Association of Criminal Defense Lawyers (NACDL), the American Civil Liberties Union (ACLU), and the Center for Constitutional Rights (CCR) have intervened on behalf of the defense and have filed amicus curiae briefs with the Fourth Circuit. Each of these briefs submits that the government's position in *Hamdi* threatens the rule of law.

The NACDL argues the term “enemy combatant” is an undefined expression created for the sole purpose of establishing unconstitutional de facto martial rule on an individual ad hoc basis over suspected enemies of the state, designed to circumvent the rule of law as protected in the Constitution and guarded by the Judiciary.⁴⁰⁷ In judicial matters such as habeas corpus, the President must defer to the Judiciary.⁴⁰⁸ “No deference is due to an Executive who ignores the law.”⁴⁰⁹

The ACLU describes *Hamdi* as a new category of prisoner who is wrongfully denied due process, including access to a lawyer, and indefinitely detained and kept incommunicado in violation of his

402. Rehnquist, *supra*, note 150, at 7.

403. *Id.*

404. Chief Justice Rehnquist does not offer an explanation as to how cases like *Yamashita* and *Merryman* fit into his theory.

405. Rehnquist, *supra*, note 150, at 7.

406. *Id.* at 1.

407. See Brief of Amicus Curiae Nat'l Ass'n of Criminal Def. Lawyers, at 21-22, 28, *Hamdi III*, 316 F.3d 450, available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/terrorism1/\\$FILE/HamdiAmicus.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/terrorism1/$FILE/HamdiAmicus.pdf).

408. *Id.* at 14 (citing *Ex parte Bollman v. Swartwout*, 8 U.S. 75 (1807)).

409. *Id.* at 13 (citing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952)).

constitutional rights as an American citizen.⁴¹⁰ This measure is not authorized by Congress and is prohibited by the Due Process clause and 18 U.S.C. § 4001.⁴¹¹ Hamdi's detention would be lawful only if he were an enemy combatant and detained as a prisoner of war, or if he were an unlawful enemy combatant who had violated the law of war and was detained for trial as a war criminal.⁴¹²

The CCR brief, supported by 19 human rights organizations and 140 distinguished law professors, headed by Yale's Bruce Ackerman, Michigan's Yale Kasimir, and Erwin Chemerinsky of the University of Southern California, similarly criticizes the label of enemy combatant and its use to strip a citizen of his or her Constitutional rights acquired at birth.⁴¹³

The President has offended the separation of powers doctrine and violated the Constitution by unlawfully suspending the writ of habeas corpus on a case-by-case basis, thereby usurping the sole constitutional authority of Congress to suspend the writ of habeas corpus, thus circumventing the rule of law.⁴¹⁴ This executive action threatens to curtail the independence of courts to judicially review executive administrative action and must therefore be resisted by the courts.⁴¹⁵

On the other side, four law professors from Yale, Catholic, George Mason and New York universities and three attorneys with the Washington firm Baker & Hostetler, led by Yale's Ruth Wedgwood, submitted a brief in support of the government's position, arguing that the indefinite detention and unlimited interrogation of Hamdi may save lives by thwarting future terrorist attacks.⁴¹⁶

The media has given Hamdi much publicity, and many leading law professors have spoke out on behalf of Hamdi. Professor Jonathan Turley at George Washington School of Law said, "Americans should be shocked. The way Hamdi and Padilla are being treated is an affront to the rule of law."⁴¹⁷ Michael Ramsay, professor at the University of San Diego School of Law, wonders if we will "end up with a legal regime that totally sacrifices judicial protection of individual rights because the courts are too

410. See Brief Submitted on Behalf of the American Civil Liberties Union and American Civil Liberties Union of Virginia as Amici Curiae, *Hamdi III*, 316 F.3d 450, available at <http://www.aclu.org/Files/OpenFile.cfm?id=11067> (last visited July 22, 2003).

411. *Id.* at 4, 6.

412. *Id.* at 21.

413. Brief Submitted on Behalf of the Center for Constitutional Rights, 140 Law Professors and 19 Interested Organizations As Amici Curiae Supporting Yaser Esam Hamdi's Request for Affirmance at 23, *Hamdi III*, 316 F.3d 450 at http://www.ccr-ny.org/v2/legal/september_11th/docs/Hamdi_Amicus_1.pdf (last visited July 22, 2003).

414. *Id.* at 24.

415. *Id.* at 14-15.

416. Tim McGlone, *Detainee's Future May Depend On The Past; Hamdi's Attorney Looks Back 200 Years For Possible Argument*, VIRGINIAN PILOT, Oct. 28, 2002, at A1.

417. Warren Richey, *Terror on trial: Citizen Detentions in the Spotlight*, CHRISTIAN SCIENCE MONITOR, Sept 26, 2002, at USA2.

nervous about interfering with the war on terrorism.”⁴¹⁸ Georgetown University professor David Cole suggests that if the government’s position prevails, “there is really no limit to the president’s power to label U.S. citizens as bad people and then have them held in military custody indefinitely.”⁴¹⁹

Cole’s debating opponent, Yale Law Professor Ruth Wedgwood believes the courts will defer to the President’s authority.⁴²⁰ She argues, “I think the first duty of government is to protect innocent lives,”⁴²¹ and “the Constitution is not a suicide pact.”⁴²²

The practical aspects of Hamdi’s detention cannot be ignored. To let Hamdi go free deprives his interrogators of a source of intelligence that may save American lives and allows Hamdi to resume his role as an enemy belligerent of the United States. Permitting Hamdi to exercise his constitutional rights, such as having the assistance of counsel, might provide Hamdi with a means of communicating with the enemy and result in Hamdi exercising his right to remain silent. Detaining Hamdi indefinitely and coercing him to disclose future terrorist operations makes us feel a little safer with one less potential terrorist and one less possible attack to worry about. Our lives may depend on detaining citizens like Hamdi.⁴²³

University of Chicago Law School Professor Cass Sunstein acknowledges some of the actions of President Bush in the war against terrorism as “aggressive,” but defends them as “pretty cautious by historical standards.”⁴²⁴ “The sacrifice of checks and balances,” says Professor Lawrence Tribe of Harvard Law School, “has to be weighed not as a temporary expedient, but assessed as a proposed permanent change.”⁴²⁵ His remark brings to mind the comments of Benjamin Franklin, which are inscribed on the pedestal of the Statue of Liberty, “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”⁴²⁶

John Whitehead of the Rutherford Institute puts the *Hamdi* case into perspective as part of a total government plan that has sacrificed

418. *See id.*

419. Tom Jackman & Dan Eggen, ‘Combatants’ Lack Rights, U.S. Argues: Brief Defends Detainees’ Rights, WASHINGTON POST, June 20, 2002, at A1.

420. *See id.*

421. Richey, *supra*, note 417.

422. *Legal Limbo*, Hosted by Ray Suarez, PBS Online News Hour, at http://www.pbs.org/newshour/bb/law/jan-june02/limbo_6-12.html (June 12, 2002).

423. *See* Kate O’Beirne, *It’s a War, Stupid: Understanding and Misunderstanding the Detainees*, NATIONAL REVIEW ONLINE, Sept. 4, 2002, at <http://www.nationalreview.com/kob/kob090402.asp>.

424. *See* Charles Lane, *Debate Crystallizes on War, Rights: Courts Struggle Over Fighting Terror vs. Defending Liberties*, WASHINGTON POST, Sept. 2, 2002, at A1.

425. *Id.*

426. *See* John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” For “Homeland Security”: A Constitutional Analysis Of The USA Patriot Act And The Justice Department’s Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1083 (2002).

constitutional freedoms on the altar of national security. In a war against terrorism, no peace treaty will ever be signed to signal an end to hostilities.⁴²⁷ Once lost, fundamental freedoms may never be regained.⁴²⁸ Civil liberties that have been paid for by the blood of our ancestors have been traded away for rule by law.

Whitehead worries that, in the name of fighting terrorism, legal foundations have been established for the future oppression of American citizens who oppose the government, and that we are operating under “a new paradigm”.⁴²⁹ Examples of the expansion of government powers include “the search of homes and offices without prior notice; the use of roving wiretaps to listen in on telephone conversations and monitor computers and e-mail messages, and . . . eavesdropping on attorney/client conversations,” as well as the use of military commissions to prosecute terrorists; and future plans for the “tagging” of all Americans as part of a national identification system.⁴³⁰ Some in the Justice Department unofficially admit the government utilizes the Patriot Act as an essential tool to protect Americans from “garden-variety criminals” as well as terrorists.⁴³¹

Preventive detention of enemy combatants may be easily expanded to preventative detention of all future enemies of the state.⁴³² Section 802 of the USA Patriot Act amends the Federal Criminal Code, 18 U.S.C. § 2331, to define domestic terrorism to include domestic political groups or individuals that engage or promote criminal acts that are dangerous to human life, that appear to be intended to intimidate or coerce a civilian population, by violence to bring about a change in government policy.⁴³³

Why imperil the rule of law when the federal justice system works? In the prosecution of domestic terrorists, due process was not sacrificed. In federal criminal proceedings, national security concerns are protected, the Constitution is given its proper place, and attention is given to the achieving just outcomes. For example, the criminal bombing of the Murrah federal building in Oklahoma was an act of terrorism. The known perpetrators of these crimes were U.S. citizens. They were more than deviant criminals: they were politically motivated enemies of the state and of humanity who deserved the severest of punishment. Criminal

427. *Id.* at 1085.

428. *Id.*

429. *Id.*

430. *Id.* at 1083-84.

431. Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling*, N.Y. TIMES, September 28, 2003, at A1.

432. See Whitehead, *supra*, 426 at 1092-93.

433. See *id.* See also *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act)*, Pub. L. No. 107-56, 115 Stat. 272 (2001).

prosecution in the federal court system accomplished its purpose and justice was done, without sacrificing the Constitution.⁴³⁴

There is no need to create a new way to deal with international terrorists when domestic terrorist cases prove that the successful prosecution of U.S. citizens in Federal District Courts is possible,⁴³⁵ even though arguments have been made to create a special class of court to punish enemies of the state.⁴³⁶

The current case of alleged al Qaeda terrorist, thirty-four-year-old French citizen Zacarias Moussaoui, in the United States District Court for Eastern Virginia, is further evidence that the Constitution is compatible with the successful prosecution of international terrorists. Judge Wilkins of the Fourth Circuit Court of Appeals views this case as “one of extraordinary importance,” pitting the criminal defendant’s sixth amendment right to have “compulsory process for obtaining witnesses in his favor”⁴³⁷ and the federal government’s interests in protecting national security.⁴³⁸

Moussaoui (the suspected 20th hijacker) was arrested August 16, 2001 and charged with various conspiracy offenses in connection with the attacks of September 11, 2001.⁴³⁹ He has remained in custody throughout that time. The government contends that Moussaoui deserves the death penalty for intentionally participating or engaging in the attacks of September 11, 2001.⁴⁴⁰ Moussaoui, who is defending himself, claimed he was only a minor participant and that a captured al Qaeda terrorist and designated enemy combatant, Ramzi bin al-Shibh, could offer material evidence in Moussaoui’s favor.⁴⁴¹ The trial judge granted the discovery orders sought by the defense thereby permitting contact between Moussaoui and his intended witness. The trial judge reasoned since the government decided to try Moussaoui before a civil court, the government could not now complain that Moussaoui was entitled to due process and to his sixth amendment right to have compulsory process for obtaining witnesses in his favor.⁴⁴²

434. See *United States v. McVeigh*, 9 Fed. Appx. 980 (10th Cir. 2001); *cert. denied McVeigh v. United States*, 526 U.S. 1007 (1999).

435. Diane F. Orentlicher & Robert Kogod Goldman, *The Military Tribunal Order: When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL’Y 653, 663 (2002). “To renounce federal court jurisdiction over crimes of terror is to concede a powerful victory to those bent on destroying cherished symbols of our national life.” *Id.*

436. Kenneth Anderson, *The Military Tribunal Order: What to do with Bin Laden and the Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J. L. & PUBLIC POL’Y 591, 611 (2002).

437. U.S. CONST. amend. VI.

438. See *United States v. Moussaoui*, 333 F.3d 509 (4th Cir. 2003).

439. See Superceding Indictment, filed July -16, 2002, at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss71602spind.pdf>.

440. See *United States v. Moussaoui*, 2003 U.S. Dist. LEXIS 17253 (4th Cir. 2003) at 14.

441. See *id.*

442. See Philip Shenon, *Setback for Government in Bid for 9/11 Trial*, N.Y. TIMES, June 3, 2003, at A19.

According to Attorney General John Ashcroft, who refused to interrupt the continued interrogation of Ramzi bin al-Shibh and denied contact with Moussaoui, it was not fundamentally unfair to use information obtained from interrogations of enemy combatants to help convict Moussaoui, while opposing the admission of evidence obtained from the same series of interrogations if it might assist Moussaoui.⁴⁴³ The government, therefore, refused to obey the trial judge's orders of January 31 and August 29, 2003 that permitted discovery of enemy combatants on the grounds of national security.⁴⁴⁴ Its appeals of those orders failed.⁴⁴⁵

On October 2, 2003 Judge Leonie Brinkema imposed sanctions in response to the government's adamant refusal to permit Moussaoui to fully defend himself.⁴⁴⁶ She resisted the invitation of government lawyers to dismiss the case against Moussaoui in federal court and thereby thwarted the government from instituting new proceedings before a military court that in effect would have circumvented her orders.⁴⁴⁷ Judge Brinkema let the case proceed, but threw out most of the government's case, barring the government at trial "from making any argument, or offering any evidence, suggesting that the defendant had any involvement in, or knowledge of, the September 11 attacks."⁴⁴⁸ She also ruled that the government could not seek the death penalty against Moussaoui,⁴⁴⁹ and also blocked the government from introducing at trial the cockpit voice recordings of the hijacked airliners, the video footage of the collapse of the World Trade Towers, and photographs of the victims of the September 11 attacks, on the basis that the probative value of this evidence was substantially outweighed by unfair prejudice to the defendant.⁴⁵⁰

443. See Philip Shenon, *U.S. Will Defy Court's Order in Terror Case*, N.Y. TIMES, July 15, 2003, at A1.

444. The public has not been told why Moussaoui has been denied contact with his witnesses. However, Admiral Jacoby's Declaration suggests the government's goal is to isolate subjects from the outside world for years to create "an atmosphere of dependency and trust between the subject and the interrogator." See 233 F. Supp. 2d 564 (S.D.N.Y.2002). A temporary disruption, such as testifying as a witness in court, is thought to "undo months of work and may permanently shut down the interrogation process." Australian barrister Richard Bourke, has alleged that the detainees at Guantanamo Bay in Cuba, including Australians David Hicks and Mamdouh Habib are being subjected to "old fashioned torture. . . just like in the Dark Ages." See radio interview with Ben Knight, *Claims of Torture in Guantanamo Bay*, ABC Online, October 8, 2003 at <http://www.abc.net.au/am/content/2003/s962052.htm>. It is not publicly known where Ramzi bin al-Shibh is being detained or how he is being interrogated.

445. See *United States v. Moussaoui*, 333 F. 3d 509 (4th Cir. 2003); *United States v. Moussaoui*, 336 F. 3d 279 (4th Cir. 2003).

446. See *Moussaoui*, 336 F.3d 279.

447. See Philip Shenon, *In Maneuver, U.S. Will Let Terror Charges Drop*, N.Y. TIMES, September 26, 2001, A 1.

448. See *Moussaoui*, 336 F.3d 279.

449. See *id.* at 15-16.

450. See Philip Shenon, *Judge Rules Out Death Penalty for 9/11 Suspect*, N.Y. TIMES, October 3, 2003, at A1.

Whether the federal government will accept this latest setback remains to be seen. The government has appealed Judge Brinkema's rulings.⁴⁵¹

Any future prosecution of Hamdi and other enemy combatants in the civil courts hinges on whether the government will accept the fact that prosecution in the civil courts requires adherence to the rule of law, trust in the judiciary, and respect for the Constitution. The possible future removal of Moussaoui to trial before a military tribunal may mean that Hamdi and other enemy combatants will never be tried in civil courts, lest their defense tactics extend to what the Bush administration views as "greymail"—the constitutional right of defendants to access to federally detained suspected al Qaeda terrorists who may be potential material witnesses for the defense.⁴⁵²

B. Reviewing the Erosion of the Rule of Law

This brief survey reveals that there has been a steady encroachment upon the rule of law by the executive branch of government in times of war or perceived threats to national security. So far, the effect of the government's actions has been to undermine the rule of law, rather than to defend it. One consequence has been the indefinite detention of U.S. citizens, like Hamdi and Padilla, in Naval brigs and reports of plans for the creation of concentration camps.⁴⁵³

In *Hamdi III*, the government relied upon the 1909 case of *Moyer v. Peabody*, authored by Justice Oliver Wendell Holmes, for the proposition that "what is due process of law depends on circumstances" and "varies with the subject-matter and the necessities of the situation."⁴⁵⁴ In *Moyer*, the Supreme Court upheld the Governor of Colorado's 1904 indefinite detention of the President of the Western Federation of Miners without probable cause and without charge, when the civil courts were open.⁴⁵⁵ "Great weight" was accorded to the Governor's discretion in exercising his judgment as Commander in Chief.⁴⁵⁶ The life and liberty of citizens was required to yield when it was necessary to preserve the life of

451. See Notice of Appeal, *Maussaoui*, 336 F.3d 279, available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss100703noa.pdf>.

452. See Philip Shenon, *Government Lawyers Fear 9/11 Ruling Threatens Qaeda Cases*, N.Y. TIMES, October 4, 2003, A11.

453. Jonathan Turley, *Commentary: Camps for Citizens: Ashcroft's Hellish Vision; Attorney General Shows Himself as a Menace to Liberty*, LOS ANGELES TIMES, Aug 14, 2002, at P. 2, 11.

454. *Moyer v. Peabody*, 212 U.S. 78, 84 (1909). See also Joanne Mariner, *Indefinite Detention: Using Outdated Precedents To Defend Unjust Policies*, WRIT FINDLAW'S LEGAL COMMENTARY, Sept. 17, 2002 at <http://writ.news.findlaw.com/mariner/20020917.html>.

455. *Moyer v. Peabody*, 212 U.S. at 83.

456. *Id.* at 85. Under the Constitution of Colorado, the Governor is commander-in-chief of the state forces, giving him power to call them out to execute laws, suppress insurrection and repel invasion. See *id.* at 82.

the state.⁴⁵⁷ “Public danger warrants the substitution of executive process for judicial process.”⁴⁵⁸ Is this the ultimate intention of the present federal government?

Some individual judges have on occasion bravely resisted the growing power of the President, refusing to abdicate their responsibility to judicially review the executive action of government officials, and have vigorously defended the rule of law. These judges choose to put the nation’s security in the Constitution rather than entrusting justice to the unchecked will of the executive.

In my view, judges like Bobby Doumar are correct. The writ of habeas corpus is “the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”⁴⁵⁹ Furthermore, “[t]here is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus.”⁴⁶⁰

Will the United States “go to pieces” if Hamdi is granted his constitutional rights?⁴⁶¹ I doubt it. On the other hand, I believe that destroying the rule of law is the greater danger and will cause this nation to crumble from within. To indefinitely detain a citizen without charge and thereby effectively suspend the privilege of the writ of habeas corpus, even on an ad hoc basis as was done in the case of Hamdi, is an unprecedented, unilateral exercise of the power of martial law by the President that is plainly unconstitutional.⁴⁶²

Until the *Hamdi* case, there has been no attempt by the government to deny the full availability of habeas corpus and the assistance of counsel to detained persons. Even Moyer was permitted to file an application for habeas corpus with assistance of counsel.⁴⁶³ Will Hamdi be denied the full scope of judicial review by way of a habeas corpus hearing if Hamdi’s status as an enemy combatant is held to be unreviewable? The United States Supreme Court may soon provide the answer to that question when the final *Hamdi* decision comes down.

457. *Id.* at 85.

458. *Id.*

459. *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).

460. *Id.* at 292.

461. President Lincoln justified his disobedience to Chief Justice Taney’s decision in *Merryman* in these words: “To state the question more directly, are all the laws *but one* to go unexecuted, and the government itself go to pieces lest that one be violated?” See Rehnquist, *supra*, note 167, at 929; Rehnquist, *supra*, note 150, at p. 3. [Emphasis in original].

462. See Winthrop, *supra*, note 5, at 828 “The most considerable and important part of the exercise of martial law is the making of arrests of civilians charged with offenses against the laws of war. But to arrest and hold at will, . . . is practically to suspend the citizen’s privilege of the writ of *habeas corpus*. On the other hand, the suspending of the writ by military authority is essentially an exercise of the power of martial law. . . it becomes material to inquire whether, under the provision of the Constitution . . . the President . . . is authorized to order or effect such suspension.” *Id.*

463. *Ex parte Moyer*, 35 Colo. 154 (1905).

VI. Conclusion

Can a balance be struck that preserves the rule of law without losing the war on terrorism? Thomas Paine said, "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."⁴⁶⁴ If the denial of due process to Hamdi constitutes oppression, we will reap what we sow. What is at stake is the rule of law.⁴⁶⁵

In the war against terrorism, we must not start a new war against the Constitution. Homeland security should not be confined to preventing future terrorist attacks. Homeland security is, at its root, about protecting and defending the Constitution and means that it is incumbent on government to make sure that the rule of law is just as strong in times of war as it is in times of peace, and not to recede with the ebb and flow of the political tide.

While the Constitution authorizes the suspension of the privilege of the writ of habeas corpus in times of rebellion or invasion and when the public safety requires it, the Bill of Rights may never be lawfully suspended under any conditions or circumstances, even in times of grave public danger. Our enemies would delight in the failure of constitutional democracy and the abdication of the rule of law in the United States as proof of this country's disregard for human rights and standards of international law. It would be both tragic and ironic, if in response to the challenge of terrorism, we severely weaken the rule of law.⁴⁶⁶

The United States was founded upon the rule of law. Rule by law is its antithesis. There is no middle ground. The true measure of a President's greatness is not how he governs by rule of law in time of peace; it is to be measured by how he governs by rule of law in times of war.⁴⁶⁷

464. PHILIP S. FONER, ED., *THE COMPLETE WRITINGS OF THOMAS PAINE*, VOL.2, 588 (1945).

465. At no time may the President exceed his constitutional authority and override the rule of law. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589, n. 3 (1952). Justice Douglas suggested there might be a "zone of twilight" in which the President might, in the absence of Congressional action, exercise power to suspend the writ of habeas corpus. *Youngstown*, 343 U.S. at 637 n.3. In the case of enemy combatants, their indefinite detention is contrary to the express action of Congress. See 18 U.S.C. §4001(a)(2000).

466. John Payton, Editorial, *The Rule of Law*, WASHINGTON POST, Aug. 25, 2002, at B1.

467. On October 1, 2003, Hamdi's counsel, Frank W. Dunham, Jr., filed a Petition for a Writ of Certiorari with the United States Supreme Court. See *Hamdi III*, 316 F.3d 450, available at <http://news.findlaw.com/hdocs/docs/hamdi/hamdirums100103pet.pdf>. On December 18, 2003, the Bush administration lost two crucial court decisions that helped the Supreme Court to decide to hear Hamdi's appeal. *Hamdi v. Rumsfeld*, 2004 WL 42546, 2004 U.S. LEXIS 12 (January 9, 2004). The Second Circuit Federal Court of Appeals held that Padilla's detention was not authorized by Congress and that the President did not have the power to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat. *Padilla v. Rumsfeld*, 2003 WL 22965085, 2003 U.S. App. LEXIS 25616 (2nd Cir. Dec. 18, 2003). The Ninth Circuit Court of Appeals ruled that uncharged aliens detained at Guantanamo Bay were within the territorial jurisdiction of the United States and were entitled to petition for habeas corpus. *Gheribi v. Bush*, 2003 WL 22965085, 2003 U.S. App. LEXIS 25625 (9th Cir. Dec. 18, 2003).