

Presidential Authority to Detain “Enemy Combatants”

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The Bush administration claims that the law of war and Supreme Court precedent support the President’s authority to detain U.S. citizens, incommunicado and without filing a criminal charge, as “enemy combatants.” The administration views this power as inherent in the president’s commander-in-chief authority, and that congressional authorization, while unnecessary, is implied in statute. This paper surveys the history of presidential efforts to deal with threats to the national security through preventive detention measures, and concludes that congressional authorization has always been necessary to validate such measures within the United States.

President Bush claims the power, as Commander in Chief of the Armed Forces, to determine that any person, including an American citizen, who is suspected of being a member, agent, or associate of Al Qaeda, the Taliban, or possibly any other terrorist organization, is an “enemy combatant” who can be detained in U.S. military custody until hostilities end, pursuant to the international law of war (Dworkin 2002). Attorney General John Ashcroft has taken the view that the authority to detain “enemy combatants” belongs to the President alone, and that any interference in that authority by Congress would thus be unconstitutional (U.S. Senate 2002). Even if congressional authority were necessary, the government argues, such permission can be found in the Authorization to Use Force (“AUF”) (Pub. L. No. 107-40, 115 Stat. 224 (2001)). So far, the courts have agreed that Congress has authorized the detention of “enemy combatants.”

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The definition of “enemy combatant,”² however, appears to be much broader than that which has historically applied during armed conflict, and, as applied in the particular case of suspected “dirty bomber” Jose Padilla, appears to be without precedent. The detention of Yaser Hamdi seems to be more defensible in terms of the law of war, since he was allegedly captured during combat, yet he is not being held as a prisoner of war. Both men are held incommunicado in the custody of the military, neither has been charged with a crime, and the government is seeking to deny them access to counsel, saying that enemy combatants have no right to counsel, and that allowing such access would interfere with wartime intelligence efforts.

Traditionally, the only persons treated as enemy combatants were those captured during actual battle, with the exception of the German saboteurs who landed on U.S. beaches from military submarines.³ “Fifth Columnists,” or those agents of the enemy who infiltrate the domestic territory of a belligerent to commit acts of sabotage or terror in furtherance of the enemy’s war efforts, have been arrested and tried as criminals in civil courts, or, if the accused were members of the enemy’s armed forces, tried for violation of the law of war in military court. Citizens from enemy foreign countries who were thought to present a danger, but who could not be charged with a crime have been interned as enemy aliens under the Alien Enemy Act, 50 U.S.C. §§ 21 *et seq.*, even if they were *bona fide* members of the armed forces of an enemy state.⁴ The only other circumstances in which courts have explicitly upheld the

² The Department of Defense defines “enemy combatant” as “an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict.” (Haynes 2002, 2). In the context of the war on terrorism, this includes, “for example ... a member, agent, or associate of al Qaida or the Taliban” (ibid.).

³ These cases operated on the theory that the defendants had mounted a small invasion, crossing national lines of defense within the meaning of the traditional law of war. For an examination of the reliability these cases as legal precedent, see Louis Fisher [in this issue].

⁴The Army’s manual on the Law of Land Warfare (FM 27-10) notes with respect to enemy aliens resident on U.S. territory in time of war that “[m]easures of control are normally taken with respect to at least persons known to be active or reserve members of a hostile army, persons who would be liable to service in the enemy forces, and persons who it is expected would furnish information or other aid to a hostile State” (FM 27-10, para. 26).

preventive detention of citizens for security reasons, without charge or any kind of hearing, have involved instances of martial law (*Moyer v. Peabody*, 212 U.S. 78 (1909); *Zimmerman v. United States* 132 F.2d 442 (9th Cir. 1943)).

The distinction between enemy aliens and enemy combatants may prove critical. While Congress has traditionally declined to regulate the conduct of the military in its treatment of prisoners taken during battle, Congress has taken a more active role regarding the treatment of enemy aliens, setting down a more precise definition for who may be treated as such and under what conditions. Under the Alien Enemy Act, 50 U.S.C. §§ 21 *et seq.*, alien enemies include “all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized.” This designation is further limited to times of declared war or presidentially proclaimed “predatory invasion,” and the statute broadly prescribes the types of restrictions the President may place, by proclamation, on alien enemies, including possible detention and deportation, and the denial of access to U.S. courts. Where U.S. citizens not subject to treatment as prisoners of war have been interned as possible threats to the national security, additional statutory authority to at least ratify the presidentially claimed power to intern them was crucial if the detentions were to be validated by the courts, and even then it appears that due process considerations played a role.

The Department of Justice cites primarily two cases to support its contention that the Constitution permits the detention without criminal charge of American citizens under certain circumstances. (Department of Justice 2002). The government argues that the 1942 Supreme Court decision in *Ex parte Quirin*, 317 U.S. 1, 26-28 (1942) (the German saboteurs case), and the 9th Circuit case *In re Territo*, 156 F.2d 142 (9th Cir. 1946), read together, permit the government to hold American citizens as “enemy combatants” without trial, regardless of their

membership in any legitimate military organization. In light of the administration's assertion that the current detentions are supported by the law of war and U.S. precedent, it may be helpful to evaluate the claim in the historical context of preventive detention of enemies during war or national emergency. This paper seeks to provide such context.

The Law of War and Detention of Enemies

The law of war divides persons in the midst of an armed conflict into two broad categories: combatants and civilians (Fleck 1995, 65). This fundamental distinction determines the international legal status of persons participating in or affected by combat, and determines the legal protections afforded to such persons, as well as the legal consequences of their conduct. Combatants are those persons who are authorized by international law to fight in accordance with the law of war on behalf of a party to the conflict (*ibid.*, 67; McCoubrey 1998, 133-34). Civilians are not authorized to fight, but are protected from deliberate targeting by combatants as long as they do not take up arms (Detter 2000, 285-88). In order to protect civilians, the law of war requires combatants to conduct military operations in a manner designed to minimize civilian casualties and to limit the amount of damage and suffering to that which can be justified by military necessity (Pictet 1975, 31). To limit exposure of civilians to military attacks, combatants are required, as a general rule, to distinguish themselves from civilians (Detter 2000, 135). Combatants who fail to do so run the risk of being denied the privilege to be treated as prisoners of war if captured by the enemy (Baxter 1951, 343).

The treatment of all persons who fall into the hands of the enemy during an international armed conflict depends upon the status of the person as determined under the four Geneva Conventions of 1949 for the protection of victims of war. Under these conventions, parties to an

armed conflict have the right to capture and intern enemy soldiers,⁵ as well as civilians who pose a danger to the security of the state,⁶ at least for the duration of hostilities (GPW art. 118). The right to detain enemy combatants is not based on the supposition that the prisoner is “guilty” as an enemy for any crimes against the Detaining Power, either as an individual or as an agent of the opposing state (Pictet 1975, 46). POWs are detained for security purposes, to remove those soldiers as a threat from the battlefield. The law of war encourages capture and detention of enemy combatants as a more humane alternative to accomplishing the same purpose by wounding or killing them (Oppenheim 1952, 338).

The internment of enemy civilians is based on a similar rationale, although the law of war does not permit them to be treated as lawful military targets (FM 27-10, para. 25). As citizens of an enemy country, they may be presumed to owe allegiance to the enemy. The law of war traditionally allowed for their internment and the confiscation of their property, not because they are suspected of having committed a crime or even of harboring ill will toward the host or occupying power; but rather, to prevent their acting on behalf of the enemy and to deprive the enemy of resources it might use in its war efforts.

Thus, the law of war permits belligerents to seize the bodies and property of enemy aliens (*Brown v. United States*, 12 U.S. (8 Cranch) 110, 121 (1814)). The Constitution explicitly gives to Congress the power to make rules concerning captures on land and water (Art. I, § 8, cl. 11). This power has long been used to support Congress’ authority to regulate the capture and

⁵ The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter “GPW”). GPW art. 21 states:

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

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

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

disposition of prizes of war, as well as confiscation of property belonging to enemy aliens. Congress has delegated to the President the authority, during a declared war or by proclamation, to provide for the restriction, internment, or removal of enemy aliens deemed dangerous (50 U.S.C. § 21). The Supreme Court has upheld internment programs promulgated pursuant to this statute (*Ludecke v. Watkins*, 335 U.S. 160 (1948)). This form of detention, like the detention of POWs, is administrative rather than punitive, and thus no criminal trial is required.

U.S. Practice: Treatment of Enemies in War

The following sections provide a background to show how, during past conflicts, the United States has treated enemy persons who are found on the territory of the United States. It is beyond the scope of this paper to provide an analysis of the U.S. treatment of enemy soldiers captured on the battlefield. These soldiers generally have been treated by the military according to its interpretation of the law of war (e.g., FM 27-10), with little guidance from Congress. (This is not to say that Congress is without the power to legislate with regard to the treatment of prisoners of war, but only that it has not done so in the past). Although there are some cases prior to the Civil War that dealt with the detention of individuals based on the claim that their freedom posed a danger to the national security, this paper presumes that the seminal case *Ex Parte Milligan* either incorporates or overrules the prior practice.

The Civil War

At the outset of the Civil War, while Congress was not in session, President Lincoln suspended the writ of *habeas corpus* (13 Stat. 730 (1862)), an act that was subsequently ratified by Congress in an Act of March 3d, 1863. The statute authorized the President, “during the ... Rebellion, to suspend the writ of *habeas corpus* in any case throughout the United States, or any part thereof” (12 Stat. 755). The act further directed the Secretary of War and the Secretary of

State to furnish courts with lists of “all persons held in any fort, arsenal, or other place, as state or political prisoners, or otherwise than as prisoners of war” (ibid.). If the courts terminated their sessions without proceeding by grand jury indictment or otherwise against any prisoner named in the list, the judge was to make an order that such prisoner be brought before the court to be discharged (ibid.).

President Lincoln issued a proclamation pursuant to that statute authorizing military, naval, and civil officers of the United States to “hold persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy, . . . or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services, by authority of the President, . . . or for any other offence against the military or naval service.” (13 Stat. 734 (1863)).

Ex Parte Milligan.

In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Supreme Court interpreted the above authorities to address whether a civilian citizen of Indiana who was allegedly a leader of the Sons of Liberty, an organized group of conspirators with alleged links to the Confederate States and who planned to commit acts of sabotage against the Union, could constitutionally be tried by military commission. The Court recognized military commission jurisdiction over violations of the “laws and usages of war,” but stated that those laws and usages “. . . 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” (71 U.S. at 121). The Supreme Court explained its reasoning:

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on

states in rebellion to cripple their resources and quell the insurrection Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration (ibid., 126).

The government had argued in the alternative that Milligan could be held as a prisoner of war “as if he had been taken in action with arms in his hands,” and thus excluded from the privileges of the statute requiring courts to free persons detained without charge (ibid. at 21 (government’s submission)).

The government argued:

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

Milligan, however, argued “that it had been ‘wholly out of his power to have acquired belligerent rights, or to have placed himself in such relation to the government as to have enabled him to violate the laws of war,’” as he was charged (ibid. at 8 (petitioner’s argument)).

The Court appears to have agreed with Milligan, replying:

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

enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties? (ibid., 131).

Thus, although Lincoln's proclamation provided that "aiders and abettors" and others deemed subject to military law were to be detained by the military without the privilege of *habeas corpus*, the Court construed the Act of March 3d, 1863, to mandate that Milligan be set free. The Court was divided 5-4 as to whether Congress had the authority to provide by statute for trial by military commission for Milligan and his confederates, but was unanimous in finding that Congress had not done so, and that Milligan could not be held as a prisoner of war.

Would the government have fared better had it designated Milligan an "enemy combatant" rather than claiming he could be held as a sort of a "prisoner of war"? As the Department of Justice has acknowledged, there was during that time no distinction between those terms.⁷ Although the Court used neither the term "enemy combatant" nor "unlawful combatant" to describe Milligan, the offenses with which he was charged included "violation of the laws of war" as well as "affording aid and comfort to rebels against the United States" (71 U.S. at 6). It seems clear that the government sought to treat Milligan, one of four "major generals" in the Sons of Liberty (Rehnquist 1999, 44), as an unlawful combatant.

In fact, Milligan was a leader of an unlawful militia accused of planning to commit "hostile and warlike acts."⁸ The record in the case disclosed that the Order of the Sons of Liberty "was a

⁷ The Department of Justice clarified to members of Congress that "[t]he term 'prisoner of war,' which in its historical usage accurately describes captured enemy combatants, has not been used by the Government to describe such persons in the current conflict because it also has acquired a technical meaning under the Geneva Convention Relative to the Treatment of Prisoners of War (citation omitted), and might be understood to suggest a particular legal status under that convention to which the Taliban and al Qaida are not entitled, with certain attendant rights and privileges." (Department of Justice 2002, A-1).

⁸ Hostile acts that, under the law of war, might cause participants to lose protected status if conducted in or behind enemy lines "include, but are not limited to, sabotage, destruction of communications facilities, intentional misleading of troops by guides, liberation of prisoners of war, and other acts not falling within Articles 104 [aiding the enemy] and 106 [spying] of the Uniform Code of Military Justice and Article 29 of the Hague Regulations" (FM 27-10, para. 81.).

powerful secret association, composed of citizens and others, [that] existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government” (71 U.S. at 140). In his concurring opinion, the Chief Justice argued essentially that Indiana was in the theater of battle and that Congress could authorize military commissions to try Milligan and his co-conspirators without offending the Constitution. Yet even against this chaotic backdrop, the Court declined to read into the statute at issue, or any other statute authorizing the President to take action to put down the rebellion, congressional authority to detain dangerous civilians, even those who might be considered “unlawful belligerents,” without trial.

Internment of Enemy Aliens during World War I

The Alien Enemy Act, originally enacted in 1798 as part of the Alien and Sedition Act (“Act”) (1 Stat. 577), saw greater use during World War I than in previous wars. On April 6, 1917, the date Congress declared war against Germany, President Wilson issued a proclamation under the Act warning alien enemies against violations of the law or hostilities against the United States (40 Stat. 1650). Offenders would be subject not only to the applicable penalties prescribed by the domestic laws they violated, but would also be subject to restraint, required to give security, or subject to removal from the United States under regulations promulgated by the President (*ibid.*).

Ex Parte Gilroy. Pursuant to the Alien Enemy Act and the presidential proclamation, a warrant was issued for the arrest of one Walter Alexander as a German alien (*Ex parte Gilroy*, 257 F. 110 (S.D.N.Y. 1919)). Alexander protested his detention on the basis that he had been a citizen of the United States since birth, his father having been a naturalized citizen of the United

States, and that his detention thus violated his constitutional rights as a citizen. The government argued that the court did not have jurisdiction to review the Executive's determination, made without benefit of a hearing, that Alexander was an alien enemy. The court agreed with the government that no hearing was required, as such a requirement would defeat the purpose of the Act, but did not agree that it had no jurisdiction to inquire into the application of the statute to Alexander. The court stated, "[i]f a hearing had been provided, and the executive, after a hearing in accordance with law, had decided as a fact that a person was an enemy alien, then, of course, under abundant authority, the court would not have power to oppose its own conclusion as to the fact against that of the executive. The decisions in which the courts have declined to review the determination of executive officials have been in cases where the executive or administrative act followed as the result of some hearing, sometimes formal, sometimes informal, but nevertheless a hearing" (257 F. at 111-12). The court upheld the statute, but determined that Alexander was a citizen and thus could not be an alien enemy as defined in the statute. Thus, the government was not at liberty to detain him without a hearing based on the executive's determination that he was an alien enemy merely because it thought him dangerous because of his association with Germany.

What is most interesting about the *Gilroy* case is what the government did and did not argue. The government submitted a supplemental brief supporting Congress' authority to regulate alien enemies (U.S. Department of Justice 1918), urging the court to uphold the constitutionality of the Act as a proper exercise of Congress' power over the persons and property of alien enemies found on U.S. territory during war, a power it recognized to derive from the power of Congress to declare war and to make rules concerning captures on land and water, consistent with the powers residing in sovereign nations under international law. The law

was vital to national security because “[a]n army of spies, incendiaries, and propagandists may be more dangerous than an army of soldiers.” (U.S. Department of Justice 1918, 74).

The government’s brief drew support for its argument that the statute was vital to national security from the legislative history under the declaration of war against Germany, in which the President had reported to Congress a list of 21 instances of “improper activities of German officials, agents, and sympathizers in the United States” prior to the declaration of war. (ibid., 20). The report listed 21 incidents “chosen at random” to demonstrate the dangerousness of German agents and the need to intern them. (U.S. Senate 1917, 6-9). The list included both civilians and military members. One incident described a group of German reservists who organized an expedition to go into Canada and carry out hostile acts, including the use of explosives against ships and other targets, and the recruitment of spies and insurrectionists (U.S. Department of Justice 1918, 71). Yet there was no suggestion that, once war was declared, the President had the authority as Commander-in-Chief to intern these persons without trial as “enemy combatants.” In fact, case law quoted in the government’s supplemental brief suggested that the law of war permitted the holding of such persons in a status similar to prisoners of war, although it would be improper to call them prisoners of war because they were not “taken in battle” and could not be exchanged (ibid., 33). If at that time there had existed a precedent for declaring persons to be “enemy combatants” subject to detention solely on the President’s determination, one wonders why that authority was not invoked, and why the Department of Justice felt it necessary to defend the Alien Enemy Act as a proper exercise of Congress’ war powers. Instead, these incidents were considered a matter of internal security in which the Congress was deeply involved.

Waberski and Wessels.

In at least two instances, enemy spies or saboteurs entered the territory of the United States and were subsequently arrested. Pablo Waberski admitted to U.S. secret agents to being a spy sent by the Germans to “blow things up in the United States” (31 Op. Att’y Gen. 356 (1918)). Waberski, who was posing as a Russian national, was arrested upon crossing the border from Mexico into the United States and charged with “lurking as a spy” under article 82 of the Articles of War (37 Stat. 663). Attorney General T. W. Gregory opined in a letter to the President that the jurisdiction of the military to try Waberski by military tribunal was improper, noting that martial law had not been declared and the prisoner had not entered any camp or fortification, did not appear to have been in Europe during the war, and thus could not have come through the fighting lines or field of military operations (31 Op. Att’y Gen. 356, 357 (1918)). An ensuing disagreement between the Departments of War and Justice over the respective jurisdictions of the FBI and military counterintelligence to conduct domestic surveillance was resolved by compromise (Rafalko 1998).

Waberski, who turned out to be an officer of the German armed forces named Lothar Witzke, was sentenced to death by a military commission (Rafalko 1998). Subsequently, the new Attorney General, A. Mitchell Palmer, reversed the earlier AG opinion based on a new understanding of the facts of the case, including proof that the prisoner was a German citizen and that there were military encampments close to the area where he was arrested (40 Op. Att’y Gen. 561 (1919)). President Wilson commuted Witzke’s sentence to life imprisonment at hard labor in Fort Leavenworth and later pardoned him, possibly due to lingering doubts about the propriety of the military tribunal's jurisdiction to try the accused spy (Rafalko 1998), even though Congress had defined the crime of spying and provided by statute that it was an offense triable by military commission.

The question of military jurisdiction over accused enemy spies arose again in the case of *United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y.1920), a *habeas corpus* proceeding brought by Herman Wessels to challenge his detention by military authorities while he awaited court-martial for spying. The accused was an officer in the German Imperial Navy who used a forged Swiss passport to enter the United States and operated as an enemy agent in New York City. He was initially detained as an alien enemy pursuant to a warrant issued under the authority of the alien enemy statute (265 F. at 767). He contested his trial by court-martial on the basis that the port of New York was not in the theater of battle and courts in New York were open and functioning, arguing the *Milligan* decision required that he be tried by an Article III court. The court found that its inquiry was confined to determining whether jurisdiction by court martial was valid, which it answered affirmatively after concluding that Congress had made spying punishable by court-martial or military commission under article 5 of the articles for the government of the Navy. The court validated the statute as fully consistent with Congress' war powers under the Constitution. The court concluded that the constitutional safeguards available to criminal defendants did not apply because, under international law, the act of spying was not technically a crime (265 F. at 762-63). The court opined that “[i]n this great World War through which we have just passed, the field of operations which existed after the United States entered the war, and, especially in regard to naval operations, brought the port of New York within the field of active operations ” (265 F. at 763), and that whoever “joins the forces of an enemy alien surrenders th[e] right to constitutional protections” (265 F. at 764).

The Supreme Court did not have the opportunity to address the merits of the case, having dismissed the appeal per stipulation of the parties (256 U.S. 705 (1921)). However, two American citizens who were alleged to have conspired to commit espionage with Wessels were tried and acquitted of treason in federal court, and subsequently released (*United States v.*

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

Again, it does not appear to have been suggested that any of the accused could be held without trial as “enemy combatants” or “unlawful combatants” due to their association with the armed forces of the enemy.

Proposal to Expand Military Jurisdiction over Unlawful Combatants.

In 1918, a bill was introduced in the Senate to provide for trial by court-martial of persons not in the military who were accused of espionage, sabotage, or other conduct that could hurt the war effort (S. 4364, 65th Cong. (1918)). The bill, drafted by Assistant Attorney General Charles Warren,⁹ would have found that “owing to changes in the conditions of modern warfare, whereby the enemy now attempts to attack and injure the prosecution of the war by the United States, by means of civilian and other agents and supporters behind the lines spreading false statements and propaganda, injuring and destroying the things and utilities prepared or adapted for the use of the land and naval forces of the United States, ... the United States [now constitutes] a part of the zone of operations”

In a letter to Rep. John E. Raker explaining his opposition to the bill, Attorney General T.W. Gregory provided statistics about war-related arrests and prosecutions (57 Cong. Rec. App. pt. 5, at 528-29 (1918)). According to the letter, of 508 espionage cases that had reached a disposition, 335 had resulted in convictions, 31 in acquittal, and 125 cases were dismissed. Sedition and disloyalty charges had yielded 110 convictions and 90 dismissals or acquittals. Acknowledging that the statistics were incomplete, the Attorney General concluded that the

⁹ Charles Warren had suggested the idea to Congress and submitted to certain members a paper he had written on the subject for a law review article (Papers of Charles Warren, letter to Senator L.S. Overman, April 8, 1918), without the approval of the Attorney General, who objected strongly to the idea (56 Cong. Rec. App. 307-08). Gregory asked for and received Warren’s resignation (ibid., letter of April 22, 1918). In 1919, Warren published a law review article setting out his theory that Congress could enact legislation to allow military trial of certain civilians (Warren 1919, 195).

statistics did not show a cause for concern (ibid. 528). Gregory also reiterated his position that trial of civilians for offenses committed outside of an actual zone of military operations by court-martial would be unconstitutional, and attributed the complaints about the inadequacies of the laws or their enforcement to “the fact that people, under the emotional stress of the war, easily magnify rumor into fact, or treat an accusation of disloyalty as though it were equal to proof of disloyalty. No reason, however, has as yet developed which would justify punishing men for crime without trying them in accordance with the time-honored American method of arriving at the truth” (ibid.). The record does not disclose any mention of the President’s option to deem those suspects to be unlawful combatants based on their alleged association with the enemy or their hostile and warlike acts, to allow their detention without any kind of trial or hearing. However, it does show that the idea of subjecting to military jurisdiction citizens accused of associating with the enemy to commit hostile acts was introduced and soundly rejected.¹⁰

World War II

Internment of Enemies

At the outset of the Second World War, President Roosevelt made numerous proclamations under the Alien Enemy Act to place restrictions on aliens deemed dangerous or likely to engage in espionage or sabotage.¹¹ Initially, the restrictions were effected under the civil authority of the Attorney General, who established “prohibited areas” in which no aliens of Japanese, Italian, or

¹⁰ After the bill was introduced, Senator Brandegee introduced S. Res. 228 to direct the Committee on the Judiciary to give its opinion as to whether S. 4364 would violate the Constitution (56 Cong. Rec. 5401). The bill did not reach a vote, having been abandoned after President Wilson made it clear he would not support it (ibid., 5471). President Wilson reportedly declared that the bill “place the United States on a level with its enemies” (Papers of Charles Warren 1918, newspaper clipping dated April 22, 1918).

¹¹ The President issued the following proclamations under the authority of 50 U.S.C. § 21: Proc. No. 2525, Dec. 7, 1941, 55 Stat. Pt. 2, 1700 (with respect to invasion by Japan); Proc. No. 2526, Dec. 8, 1941, 55 Stat. Pt. 2, 1705 (with respect to threatened invasion by Germany); Proc. No. 2527, Dec. 8, 1941, 55 Stat. Pt. 2, 1707 (with respect to threatened invasion by Italy).

German descent were permitted to enter or remain, as well as a host of other restraints on affected aliens, including curfews and internment after a hearing. The President, acting under statutory authority, delegated to the Attorney General the authority to prescribe regulations for the execution of the program. Attorney General Francis Biddle created the Alien Enemy Control Unit to review the recommendations of hearing boards handling the cases of the more than 2,500 enemy aliens in the temporary custody of the Immigration and Naturalization Service (INS) (U.S. House of Representatives 1942, 163).

In February of 1942, the President extended the program to cover certain citizens as well as enemy aliens, and turned over the authority to prescribe “military areas” to the Secretary of War, who further delegated the responsibilities under the order with respect to the west coast to the Commanding General of the Western Defense Command.¹² The new order, Executive Order 9066 (17 Fed. Reg. 1407), clearly amended the policy established under the earlier proclamations regarding aliens and restricted areas, but did not explicitly rely on the authority of Alien Enemy Act, as the previous proclamations had. Although the Department of Justice denied that the transfer of authority to the Department of War was motivated by a desire to avoid constitutional issues with regard to the restriction or detention of citizens, the House Select Committee Investigating National Defense Migration found the shift in authority significant, as it appeared to rely on the nation’s war powers directly, and could find no support in the Alien Enemy Act with respect to citizens (ibid., 166). The summary exercise of authority under that Act to restrain aliens was thought to be untenable if stretched to reach U.S. citizens, and the War

¹² General De Witt’s declaration of military areas indicated that five classes of civilians were to be affected: Class 1, all persons who are suspected of espionage, sabotage, fifth column, or other subversive activity; class 2, Japanese aliens; class 3, American-born persons of Japanese lineage; class 4, German aliens; class 5, Italian aliens. (House Select Committee Investigating Migration 1942, 163).

Department felt congressional authorization was necessary to provide authority for its enforcement, (ibid. 167; Biddle 1962, 216-17).

Congress granted the War Department's request, enacting with only minor changes the proposed legislation providing criminal penalties for the knowing violation of any exclusion order issued pursuant to Executive Order 9066 or similar executive order (Pub. L. 77-503, *codified at* 18 U.S.C. 1383 (1970 ed.), *repealed by* Pub. L. 94-412, Title V, § 501(e) (1976)). A policy of mass evacuation from the West Coast of persons of Japanese descent – citizens as well as aliens – followed, which soon transformed into a system of compulsory internment at “relocation centers” (Commission on Wartime Relocation and Internment of Civilians 1982, 2). Persons of German and Italian descent (and others) were treated more selectively, receiving prompt (though probably not full and fair¹³) loyalty hearings to determine whether they should be interned, paroled, or released (ibid., 285). The disparity of treatment was explained by the theory that it would be impossible or too time-consuming to attempt to distinguish the loyal from the disloyal among persons of Japanese descent (ibid., 288-89).

In a series of cases, the Supreme Court limited but did not strike down the internment program. In *Hirabayashi v. United States*, 320 U.S. 81, 89-90 (1943), the Supreme Court found the curfew imposed upon persons of Japanese ancestry to be constitutional as a valid war-time security measure, even as implemented against U.S. citizens, emphasizing the importance of congressional ratification of the Executive Order. *Hirabayashi* had also been indicted for violating an order excluding him from virtually the entire west coast, but the Court did not review the constitutionality of the exclusion measure because the sentences for the two charges were to run concurrently. Because the restrictions affected citizens solely because of their

¹³ The impediments to full and fair hearings included a prohibition on detainees' representation by an attorney, inability to object to questions, a presumption in favor of the government, and the fact that the ultimate decision fell to reviewers at the Alien Enemy Control Unit (Commission on Wartime Relocation and Internment of Civilians, 285).

Japanese descent, the Court framed the relevant inquiry as a question of equal protection, asking “whether in the light of all the facts and circumstances there was any substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion” (ibid., 95).

In a concurring opinion, Justice Douglas added that in effect, due process considerations were unnecessary to ensure that only individuals who were actually disloyal were affected by the restrictions, even if it were to turn out that only a small percentage of Japanese-Americans were actually disloyal (ibid., 106). However, he noted that a more serious question would arise if a citizen did not have an opportunity at some point to demonstrate his loyalty in order to be reclassified and no longer subject to the restrictions (ibid., 109).

In *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court upheld the conviction of an American citizen for remaining in his home, despite the fact that it was located in a newly declared “Military Area” and was thus off-limits to persons of Japanese descent. Fred Korematsu challenged the detention of Japanese-Americans in internment camps, but the Court majority declined to consider the constitutionality of the detention itself, as Korematsu’s conviction was for violating the exclusion order only. The Court, in effect, validated the treatment of citizens in a manner similar to that of enemy aliens by reading Executive Order 9066, together with the act of Congress ratifying it, as sufficient authority under the combined war powers of the President and Congress. It did not address the statutory scope of the Alien Enemy Act.

In *Ex parte Endo*, 323 U.S. 283 (1944), however, decided the same day as *Korematsu*, the Supreme Court did not find adequate statutory underpinnings to support the internment of loyal

citizens. The Court ruled that the authority to exclude persons of Japanese ancestry from declared military areas did not encompass the authority to detain concededly loyal Americans. Such authority, it found, could not be implied from the power to protect against espionage and sabotage during wartime. The Court declined to decide the constitutional issue presented by the evacuation and internment program, instead, narrowly interpreting the executive order, along with the Act of March 27, 1942 ratifying it, to give the internment program the greatest chance of surviving constitutional review (323 U.S. at 299). Accordingly, the Court noted that detention in Relocation Centers was not mentioned in the statute or executive order, but was developed during the implementation of the program (*ibid.*). As such, the authority to detain citizens could only be found by implication in the Act, and would survive only if it were found to serve the ends Congress and the President had intended to reach. Because the detention of a loyal citizen did not further the campaign against espionage and sabotage, the Court found it impossible to infer the authority from the sources cited, even though the President had issued a new Executive Order, No. 9102 (7 Fed. Reg 2165), to set up the War Relocation Authority, and Congress had given its tacit support for the internments by appropriating funds for the effort (57 Stat. 533).

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

At least one American with no ethnic ties to or association with an enemy country was subjected to an exclusion order issued pursuant to Executive Order 9066. Homer Wilcox, a

native of Ohio, was excluded from his home in San Diego and removed by military force to Nevada, although an exclusion hearing board had determined that he had no association with any enemy and was more aptly described as a “harmless crackpot” (*Wilcox v. Emmons*, 67 F.Supp 339 (S.D. Cal. 1947)). He brought suit against the military commander challenging the validity of his exclusion order. The district court awarded damages in favor of Wilcox, but the circuit court reversed (*De Witt v. Wilcox*, 161 F.2d 785 (9th Cir.), *cert. denied*, 332 U.S. 763 (1947)), finding the exclusion within the authority of the military command under Executive Order 9066 and 18 U.S.C. § 1383, and holding that “the evidence concerning plaintiff’s activities and associations provided a reasonable ground for the belief by defendant ... that plaintiff had committed acts of disloyalty and was engaged in a type of subversive activity and leadership which might instigate others to carry out activities which would facilitate the commission of espionage and sabotage and encourage them to oppose measures taken for the military security of Military Areas Nos. 1 and 2, and that plaintiff’s presence in the said areas from which he had been excluded would increase the likelihood of espionage and sabotage and would constitute a danger to military security of those areas” (161 F.2d at 790). The court also found that the Act of Congress penalizing violations of military orders under Executive Order 9066 did not preclude General De Witt from using military personnel to forcibly eject Wilcox from his home. (161 F.2d at 788).

The Japanese internment program has since been widely discredited, the convictions of some persons for violating the orders have been vacated (*Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985)), and the surviving victims have received compensation,¹⁴ but the detention of citizens during war who are deemed dangerous has never

¹⁴ Through the Civil Liberties Act of 1988, Congress provided \$20,000 to each surviving individual who had been confined in the camps (Pub. L. No. 100-383, 102 Stat. 903 (1988), *codified at* 50 U.S.C. App. §§

expressly been ruled *per se* unconstitutional. In the cases of citizens of other ethnic backgrounds who were interned or otherwise subject to restrictions under Executive Order 9066, courts played a role in determining whether the restrictions were justified, sometimes resulting in the removal of restrictions.¹⁵ Because these persons were afforded a limited hearing to determine their dangerousness, a court later ruled that the Equal Protection Clause of the Constitution did not require that they receive compensation equal to that which Congress granted in 1988 to Japanese-American internees (*Jacobs v. Barr*, 959 F.2d 313 (D.C. Cir. 1992)).

Enemy Saboteurs. After eight Nazi saboteurs were caught by the Federal Bureau of Investigation (FBI), President Franklin D. Roosevelt issued a proclamation declaring that “the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the law of war” (Proclamation No. 2561, of July 2, 1942, 7 Fed. Reg. 5101, 56 Stat. 1964). This proclamation, like Exec. Order 9066, seems to be based on the Alien Enemy Act, but does not explicitly invoke its authority.¹⁶

The eight German saboteurs (one of whom claimed U.S. citizenship) were tried by military commission for entering the United States clandestinely by submarine, shedding their military

1989b *et seq.*).

¹⁵ See, e.g. *De Witt v. Wilcox*, 161 F.2d 785 (9th Cir. 1947)(reversing award of damages to U.S. citizen who had been ordered excluded from the west coast and who was forcibly removed to Las Vegas by the military); *Schueler v. Drum*, 51 F.Supp. 383 (E.D. Pa. (1943)(exclusion order pertaining to naturalized citizen vacated where the facts were not found that “would justify the abridgement of petitioner’s constitutional rights”); *Scherzberg v. Maderia*, 57 F.Supp. 42 (E.D. Pa. 1944)(despite deference to the Congress and the President with regard to wartime actions, whether the facts of a specific case provided rational basis for individual order remained justiciable, and in the present case, “civil law [was] ample to cope with every emergency arising under the war effort”).

¹⁶ During oral argument before the Supreme Court, Attorney General Francis Biddle emphasized the fact that the Proclamation was consistent with the Alien Enemy Act as well as the Articles of War, and was thus authorized by Congress (Landmark Briefs, 594-95).

uniforms, and conspiring to use explosives on certain war industries and war utilities. In *Ex parte Quirin*, 317 U.S. 1, 26-28 (1942), the Supreme Court denied their writs of *habeas corpus* (although upholding their right to petition for the writ, despite language in the Presidential proclamation purporting to bar judicial review), holding that trial by such a commission did not offend the Constitution and was authorized by statute. It also found the citizenship of the saboteurs irrelevant to the determination of whether the saboteurs were “enemy belligerents” within the meaning of the Hague Convention and the law of war (317 U.S. at 37-38).

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

[A]ll persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States ... through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals” (317 U.S. at 22-23).

Whether the accused could have been detained as “enemy combatants” without any intent to try them before a military tribunal was not a question before the Court,¹⁷ but the Court suggested the possibility. It stated:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those

¹⁷ At oral argument before the Supreme Court, Attorney General Biddle suggested that had the prisoners been captured by the military rather than arrested by the FBI, the military could have detained them “in any way they wanted,” without any arraignment or any sort of legal proceeding. (Landmark Briefs 1975, 597)

who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful (317 U.S. at 30-31).

In its discussion of the status of “unlawful combatant,” the Court did not distinguish between enemy soldiers who forfeit the right to be treated as prisoners of war by failing to distinguish themselves as belligerents, as the petitioners had done, and civilians who commit hostile acts during war without having the right to participate in combat. Both types of individuals may be called “unlawful combatants,” yet the circumstances that give rise to their status differ in ways that may be legally significant. *Milligan* may be read to hold at least that, unless Congress has authorized it, a civilian citizen may not be detained as a wartime preventive measure. The Court did, however, recognize that the petitioners were “enemy belligerents within the meaning of the Hague Convention,” and expressly limited its opinion to the facts of the case:

We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform – an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission (317 U.S. at 45-46).

In *Quirin*, the Supreme Court distinguished its holding from *Milligan*, finding that the eight Germans were enemy belligerents under international law and that the charge made out a valid allegation of an offense against the law of war for which the President was authorized by statute to order trial by a military commission. The Court noted that Milligan had not been a part of nor associated with the armed forces of the enemy, and therefore was a non-belligerent, not subject to the law of war. Thus, the implication in *Quirin* that “unlawful combatants” may be held without trial may apply only to members of enemy forces recognized as such under the Hague and Geneva Conventions. Under modern international law, these combatants may be interned as prisoners of war without trial, but may be imprisoned for punitive purposes only after a full and fair tribunal.

The only persons who were treated as enemy combatants pursuant to Proclamation No. 2561 were members of the German military who had been captured after landing on U.S. beaches as part of an invasion or predatory incursion from German submarines.¹⁸ Collaborators and persons who harbored such saboteurs were tried in federal courts for treason or violations of other statutes (Fisher 2003, 80-84). Hans Haupt, the father of one of the saboteurs, was sentenced to death for treason, but his sentence was overturned on the ground that procedures used during the trial violated the defendants’ rights (*United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943)). On retrial, Haupt was sentenced to life imprisonment, but his sentence was later commuted on the condition that he leave the country. Another person charged with treason for his part in the saboteurs’ conspiracy, Helmut Leiner, was acquitted, but then interned as an enemy alien (Fisher 2003, 82-83). Anthony Cramer, an American citizen convicted of treason for assisting one of the saboteurs to carry out financial transactions, had his conviction

¹⁸ There were ten in all. Eight saboteurs were tried by military commission in 1942 (*Ex parte Quirin*, 317 U.S. 1 (1942)). Two other saboteurs landed by submarine in 1944 and were convicted by military commission (*Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956)).

overturned by the Supreme Court on the ground that the overt acts on which the charge was based were insufficient to prove treason (*Cramer v. United States*, 325 U.S. 1 (1945); Fisher 2003, 83). Emil Krepper, a pastor living in New Jersey, came under suspicion because his name was found printed in secret ink on one of the saboteur's handkerchief, although he had never met with any of the saboteurs. He was indicted for violating the Trading with the Enemy Act (TWEA) and receiving a salary from the German government without reporting his activity as a foreign agent (Fisher 2003, 84).

The cases involving collaborators with the Quirin eight, as well as other unrelated cases of sabotage or collaboration with the enemy during World War II, did not result in any military determinations that those accused were enemy combatants based on their association with the enemy or their hostile acts. It is thus not clear what kind of association with Germany or with other enemy saboteurs, short of actual membership in the German armed forces, would have enabled the military to detain them without trial as enemy combatants under the law of war.

Post-Quirin Legislation. After the *Quirin* decision, Attorney General Biddle asked Congress to pass legislation to strengthen criminal law relating to internal security during wartime.¹⁹ He regarded the new law as necessary to cover serious gaps and inadequacies in criminal law that resulted in insufficient punishment being available for hostile enemy acts

¹⁹ The War Security Act would have provided punishment for a list of "hostile acts against the United States" if committed with the intent to aid a country with which the United States was at war, to include sabotage, espionage, harboring or concealing an agent or member of the armed forces of an enemy state, or entering or leaving the United States with the intent of providing aid to the enemy (House of Representatives 1943). It also would have made it a criminal offense to fail to report information giving rise to probable cause to believe that another has committed, is committing or plans to commit a hostile act against the United States. (ibid., 11). Title II of the Act would have modified court procedure in cases involving these "hostile acts" as well as certain other statutes, that would have allowed the Attorney General to certify the importance of a case to the war effort, resulting in expedited proceedings, enhanced secrecy for such proceedings, and a requirement for the approval of a federal judge to release the accused on bail. The Act was not intended to affect the jurisdiction of military tribunals and did not cover uniformed members of the enemy acting in accordance with the law of war (ibid., 12).

perpetrated on the territory of the United States. The House Committee on the Judiciary endorsed the proposed War Security Act, pointing to the fact that it had been necessary to try the eight Nazi saboteurs by military commission due to the inadequacy of the penal code to punish the accused for acts that had not yet been carried out. It also noted that military jurisdiction would likely be unavailable to try enemy saboteurs who had not “landed as part of a small invasion bent upon acts of illegal hostilities” (U.S. House of Representatives 1943, 5). The bill passed the House of Representatives, but was not subsequently taken up in the Senate.

Prisoners of War. In the case *In re Territo*, 156 F.2d 142 (9th Cir. 1946), an American citizen who had been inducted into the Italian army was captured during battle in Italy and transferred to a detention center for prisoners of war in the United States. He petitioned for a writ of *habeas corpus*, arguing that his U.S. citizenship foreclosed his being held as a POW. The court disagreed, finding that citizenship does not necessarily “affect[] the status of one captured on the field of battle” (156 F.2d at 145). The court noted that “[t]hose who have written texts upon the subject of prisoners of war agree that all persons who are active in opposing an army in war may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war” (ibid.).

The petitioner argued that the Geneva Convention did not apply in cases such as his. The court found no authority in support of that contention, noting that “[i]n war, all residents of the enemy country are enemies” (ibid.). While recognizing that *Quirin* was not directly on point, it found the discussion of U.S. citizenship in that case to be “indicative of the proper conclusion,” and held that Territo’s restraint as a prisoner of war under international law was proper (ibid.). The court had no occasion to consider whether a citizen who becomes associated with an armed group not affiliated with an enemy government and not otherwise covered under the terms of the

Hague Convention could be detained without charge pursuant to the law of war, particularly those not captured by the military during battle.

Conclusions. Confining the *Territo* and *Quirin* opinions to their facts, they may not provide as solid a foundation for the President's designation and detention of Padilla and Hamdi as enemy combatants as Attorney General Ashcroft believes. The language referring to the capture and detention of unlawful combatants – seemingly without indictment on criminal charges – is *dicta*; the petitioners in those cases did not challenge the contention that they served in the armed forces of an enemy state with which the United States was engaged in a declared war. The language in *Territo* affirming the government's authority to detain as prisoners of war those who are “active in opposing an army” implies that it covers only persons captured on the battlefield, and does not indicate what happens to persons captured there who are “spies and other non-uniformed plotters”; the custom is to try them by military tribunal (FM 27-10, para. 81). There is no U.S. precedent confirming the constitutional power of the President, with or without the authorization of Congress, to detain indefinitely a person accused of being an unlawful combatant due to mere membership in or association with a group that does not qualify as a legitimate belligerent. The Supreme Court rejected a similar contention in the Civil War case of *Ex parte Milligan*.

At most, the *Quirin* and *Territo* cases may arguably be read to demonstrate that, at least in the context of a declared war against a recognized state, U.S. citizenship is not constitutionally relevant to the treatment of members of enemy forces under the law of war. Neither case addresses the constitutionality of the process used to determine who is a member of an enemy force and whether a detainee qualifies for POW privileges. Because the President has determined that Al Qaeda is not a state but a criminal organization to which the Geneva Convention does not apply (White House 2002b), it may be argued that Al Qaeda is not directly

subject to the law of war (Paust 2001, 8 n.16) and therefore its members may not be detained as “enemy combatants” pursuant to it solely on the basis of their association with Al Qaeda.

Taliban fighters captured in Afghanistan are a closer fit within the traditional understanding of who may be treated as an enemy combatant, but may be able to contest the determination, made without benefit of a tribunal pursuant to article 5 of the Fourth Geneva Convention, that they are not entitled to POW status.

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

The Cold War

After the close of World War II, the Congress turned its attention to the threat of communism. Recognizing that the Communist Party presented a different kind of threat from that of a strictly military attack, members of Congress sought to address the internal threat with

innovative legislation.²⁰ Introduced in the wake of the North Korean attack on South Korea, the Internal Security Act (ISA) of 1950 (64 Stat. 987) marked the culmination of many legislative efforts to provide tools to fight what was viewed as a foreign conspiracy to infiltrate the United States and overthrow the government by means of a combination of propaganda, espionage, sabotage, and terrorist acts.²¹ Attorney General Tom C. Clark presented to the Congress a draft bill that would strengthen the espionage statutes, amend the Foreign Agents Registration Act, and provide authority for U.S. intelligence agencies to intercept communications (95 Cong. Rec. 440-43 (1949)). According to Clark, the legislation was necessary because “[t]he swift and more devastating weapons of modern warfare coupled with the treacherous operations of those who would weaken our country internally, preliminary to and in conjunction with external attack, have made it imperative that we strengthen and maintain an alert and effective peacetime vigilance” (ibid., 442).

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

²⁰ During the initial debate of the Internal Security Act (ISA), Senator Wiley quoted Abraham Lincoln in arguing, “[a]s our case is new, we must think anew and act anew” (96 Cong. Rec. 14,296, 14,297 (1950)).

²¹ ISA §2(1) (finding)

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

civil liberties implications (Public Papers of the President 1950, 571-76; U.S. Senate 1950 (minority views of Sen. Kilgore)).

Opponents of the McCarran Act sought to substitute a new bill designed to address the security concerns in what they viewed as a more tailored manner. Senator Kilgore introduced the Emergency Detention Act (Kilgore bill) to authorize the President to declare a national emergency under certain conditions, during which the Attorney General could enact regulations for the preventive incarceration of persons suspected of subversive ties. At the time of the debate, 18 U.S.C. § 1383 was still on the books and would have ostensibly supported the declaration of military areas and the enforcement of certain restrictions against aliens or citizens deemed dangerous, pursuant to an executive order. Proponents of the Kilgore bill argued that the proposed legislation would create a program for internment of enemies that would contain sufficient procedural safeguards to render it invulnerable to court invalidation based on *Ex parte Endo* (96 Cong. Rec. 14,414; 14,418 (remarks of Sen. Douglas)).

The final version of the ISA contained both the McCarran Act and the Emergency Detention Act. President Truman vetoed the bill, voicing his continued opposition to the McCarran Act (Truman 645). The President did not, however, take a firm position with regard to the Emergency Detention Act, stating that “it may be that legislation of this type should be on the statute books. But the provisions in [the ISA] would very probably prove ineffective to achieve the objective sought, since they would not suspend the writ of *habeas corpus*, and under our legal system to detain a man not charged with a crime would raise serious constitutional questions unless the writ of *habeas corpus* were suspended” (ibid., 647). The President recommended further study on the matter of preventive detention for national security purposes.²² Congress passed the ISA over his veto.

²²It has been suggested that President Truman’s reaction to the Emergency Detention Act was disingenuous in light of the fact that the Justice Department had already formulated an emergency

The Emergency Detention Act, Title II of the ISA, 64 Stat. 1019, authorized the President to declare an “Internal Security Emergency” in the event of an invasion of the territory of the United States or its possessions, a declaration of war by Congress, or insurrection within the United States in aid of a foreign enemy, where the President deemed implementation of the measures “essential to the preservation, protection and defense of the Constitution”(§ 102). The Act authorized the maintenance of the internment and prisoner-of-war camps used during World War II for use during subsequent crises, and authorized the Attorney General, during national emergencies declared under the Act, to issue warrants for the apprehension of “those persons as to whom there is a reasonable ground to believe that such persons probably will engage in, or conspire to engage in acts of sabotage or espionage” (§ 104).

To bolster the constitutional validity of the internments, Congress provided numerous procedural safeguards. Detainees were to be taken before a preliminary hearing officer within 48 hours of their arrest, where each detainee would be informed of the grounds for his detention and of his rights, which included the right to counsel, the privilege against self-incrimination, the right to introduce evidence and cross-examine witnesses (§ 104). The Attorney General was required to present evidence to the detainee and to the hearing officer or board “to the fullest extent possible consistent with national security”(§ 104(f)). Evidence that could be used to determine whether a person could be detained as dangerous included evidence that a person received training from or had committed or conspired to commit espionage or sabotage on behalf of an entity of a foreign Communist party or the Communist Party of the United States, or any

detention plan, known as “Portfolio,” that would have allowed the President to suspend the writ of *habeas corpus* during an emergency and detain a broader category of persons under fewer due process guarantees than would have been available under the Act (Goldstein 1978-79, 562-63). Apparently, the plan had called for an attempt to obtain post-operative ratification from Congress once an emergency was declared and the plan implemented (*ibid.*, 559).

other group that sought the overthrow of the government of the United States by force (§ 109(h)).

No internal emergencies were declared pursuant to the Emergency Detention Act, despite the United States' involvement in active hostilities against Communist forces in Korea and Vietnam and the continued suspicion that there were revolutionary and subversive elements within the United States.²³ Nevertheless, the continued existence of the Act aroused concern among many citizens, who believed the Act could be used as an “instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views.” (H.R. Rep. No. 92-116, at 2). Several bills were introduced to amend or repeal the Act. The Justice Department supported the repeal of the Act, opining that the potential advantage offered by the statute in times of emergency was outweighed by the benefits that repealing the detention statute would have by allaying the fears and suspicions (however unfounded they might have been) of concerned citizens (ibid.).

Congress decided to repeal the Emergency Detention Act *in toto* in 1971, and enacted in its place a prohibition on the detention of American citizens except pursuant to an act of Congress (Pub. L. 92-128 (1971), *codified at* 18 U.S.C. § 4001(a)). The new language was intended to prevent a return to the pre-1950 state of affairs, in which “citizens [might be] subject to arbitrary executive authority” without prior congressional action.²⁴ Executive Order 9066 was formally

²³ The House Committee on Un-American Activities believed that “there can be no doubt about the fact that there are mixed Communist and black nationalist elements which are planning and organizing guerrilla-type operations against the United States” (U.S. House of Representatives 1968, 1). The Committee concluded that “[a]cts of overt violence by the guerrillas would mean that they had declared a ‘state of war’ within the country and, therefore, would forfeit their rights as in wartime. The McCarran Act provides for various detention centers to be operated throughout the country and these might be utilized for the temporary imprisonment of warring guerrillas”(ibid., 59).

²⁴ The House Judiciary Committee concluded that the legislation “will assure that no detention camps can be established without at least the acquiescence of the Congress” (U.S. House of Representatives 1971, 5).

rescinded in 1976 (41 Fed. Reg. 7741). Later that year, Congress repealed 18 U.S.C. §1383, the statute providing enforcement authority for that and similar executive orders (90 Stat. 1255).

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

The repeal of the Emergency Detention Act and the enactment of 18 U.S.C. § 4001(a) may be interpreted to preclude the detention of American citizens as enemy agents or traitors unless convicted of a crime under the same constitutional safeguards that apply in all criminal cases. Furthermore, if the law of war has traditionally supported the detention of such persons as enemy combatants or unlawful combatants, one might ask why such an approach has not been pursued during past conflicts (even during formally declared wars), during which the internal security risk of hostile action by fifth columnists, spies, and saboteurs was frequently perceived to equal the danger of military clashes on the battlefield.

The War Against Terrorism

In response to the attacks of September 11, 2001, and in the exercise of its constitutional war powers, Congress authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” the attacks and recognized the President’s “authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States” (115 Stat. 224). The President declared a national emergency, Proclamation No. 7453, Declaration of a National Emergency by Reason of Certain Terrorist Attacks (66 Fed. Reg. 48,199).

In the aftermath of the attacks, Congress passed the USA PATRIOT Act (115 Stat. 272 (2001)), giving the Attorney General many of the law enforcement tools he sought in order to prevent another attack.²⁵ However, the measures regarding terrorism clearly treat terrorist acts as criminal in nature rather than violations of the law of war. Congress expanded the provision of the Immigration and Naturalization Act (INA) provision imposing mandatory detention on aliens certified by the Attorney General to pose a threat to the national security, as the Justice Department had requested, to cover aliens who may be eligible for or have been granted relief from removal (U.S. House of Representatives 2001, 59; *ibid.*, 80). However, Congress limited the amount of time aliens may be detained before being charged with a crime or immigration violation to seven days (USA PATRIOT Act § 412). Shortly thereafter, the President issued the Military Order of November 13, 2001 (66 Fed. Reg. 57,833), which appeared aimed at suspending the privilege of habeas corpus with respect to certain non-citizens deemed subject to

²⁵Attorney General Ashcroft told the Senate Judiciary Committee these changes were necessary because the “unprecedented assault brought us face to face with a new enemy, and demanded that we think anew and act anew in order to protect our citizens and our values” (U.S. Senate 2002).

the Order.²⁶ While the Order appears to allow detention without charge of persons determined by the President to be a terrorist or have an association with terrorists, it has not yet been invoked against any person, and, according to its terms, it does not apply to U.S. citizens.

The President's determination that persons captured in the war against terrorism are not entitled to prisoner of war status was made public through the unusual device of posting a fact sheet on the White House website (White House 2002). It does not cite any legal authority, but explains that the Taliban captives are deemed to be covered by the Geneva Conventions, while Al Qaeda detainees are not. None of the detainees will be accorded POW status, but all will be treated "in a manner consistent with the principles of the Geneva Conventions" (ibid.). The sheet does not explain why tribunals have not been set up to determine individual entitlements to POW status, in accordance with article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War and Army regulations providing for such tribunals (AR 190-8). However, the courts may be willing to accord the determination great deference, if not giving the fact sheet legal effect (*United States v. Lindh*, 212 F.Supp.2d 541, 554-55).

Perhaps the war against terrorism presents a special case, as the Administration suggests, and requires a new set of rules. It may be that the law of war really is obsolete, distinguishing as it often does on the basis of such concepts as citizenship, sovereignty, and the inviolability of States' borders. Perhaps there are also sound reasons to determine that Al Qaeda, consisting

²⁶Section 7(b)(2) of the Order provides that "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal." However, according to White House Counsel Alberto Gonzales, "[t]he order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court. The language of the order is similar to the language of a military tribunal order issued by President Franklin Roosevelt that was construed by the Supreme Court to permit habeas corpus review" (Gonzales 2001). It may be more accurate to say that the Supreme Court, in *Quirin* and again in *Colepaugh*, rejected as unconstitutional the government's assertion that Roosevelt's Proclamation foreclosed *habeas corpus* review (*Colepaugh v. Looney*, 235 F.2d 429, 431 (10th Cir. 1956)).

almost entirely of “fifth columnists,” must be fought using unconventional rules. Perhaps it is correct to view the battlefield in the war against terrorism as covering the entire globe, in which case terrorists might validly be thought of as combatants, making them lawful targets and subject to capture no matter where their activity takes place. Yet there seems to be something fundamentally inconsistent with the argument that, on the one hand, the old rules and conventions regulating armed conflict are obsolete and can no longer be applied, but on the other hand, that clear precedent supports their application in apparently unprecedented ways. At any rate, the precedent for treating those associated with terrorist groups as “enemy combatants” is far from clear, and there is no obvious reason to leave Congress out of the process of determining whether and which new rules apply.

Current “Enemy Combatant” Cases

Yaser Eser Hamdi.

Yaser Hamdi, captured in Afghanistan, was initially detained at the U.S. Naval Station in Guantánamo Bay, Cuba with other detainees captured in Afghanistan and other countries, until it was discovered that he was born in Baton Rouge and thus had a colorable claim to U.S. citizenship (*Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002)). He was then transferred to a high-security naval brig in South Carolina, where he continues to be held in military custody without criminal charge. An attorney and a relative filed a petition for *habeas corpus* on his behalf. The government asserts it has the unreviewable prerogative to detain him without trial and without providing him access to an attorney, as a necessary exercise of the President’s authority as Commander-in-Chief to provide for national security and defense.

Hamdi’s case may be likened to *Territo* in that he was captured on a field of battle and was not charged with committing any offense. In *Territo*, the court cited the 1929 Geneva

Convention Relative to the Treatment of Prisoners of War as the legal authority for the detention of the petitioner as a prisoner of war, and the petitioner did not dispute that he had served as a member of the Italian armed forces, with which the United States was then at war. The sole question before the court was whether a U.S. citizen could lawfully be treated as a prisoner of war under U.S. law and the law of war. Territo did not contest his capture as a war prisoner or claim that his rights under the 1929 Geneva Convention had not been observed. Hamdi, however, reportedly claims that he is not a member of Al Qaeda or the Taliban and was present in Afghanistan only to provide humanitarian assistance.

The Fourth Circuit agreed that “[i]t has long been established that if Hamdi is indeed an ‘enemy combatant’ who was captured during hostilities in Afghanistan, the government’s present detention of him is a lawful one” (296 F.3d at 283). The court has largely agreed with the government’s argument, declaring that because Hamdi’s petition conceded that Hamdi had been seized in Afghanistan during a time of military hostilities, there are no disputed facts that would necessitate the evidentiary hearing ordered by the district court, which the Fourth Circuit believed could interfere with the war effort (*Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003)). The court also disposed of the legal arguments put forth on Hamdi’s behalf, finding that 18 U.S.C. §4001(a), prohibiting detention of citizens except pursuant to an act of Congress, does not apply to enemy combatants captured on the battlefield, and that the Geneva Conventions are non-self-executing treaties and therefore do not give individuals a right of action. The court vacated the district court’s order and ordered the petition to be dismissed, holding essentially that a determination by the military that an individual is an enemy combatant is conclusive, so long as it is supported by some evidence.

The Case of Jose Padilla.

Attorney General Ashcroft announced on June 10, 2002 that an American citizen, Jose Padilla, also known as Abdullah Muhajir, was arrested May 8, 2002 upon his return from Pakistan, allegedly with the intent of participating in a plot to use a radiological bomb against unknown targets within the United States (*Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y. 2002)). Padilla was detained under a court order as a material witness until the Department of Justice faced a court deadline to either bring charges or release him (Brune and Gordon 2002). After prosecutors reportedly either lacked the physical evidence or were unwilling to disclose classified evidence necessary to bring charges against Padilla, President Bush signed an unspecified order declaring him to be an “enemy combatant,” and transferred him to the custody of the Department of Defense (*ibid.*). His court-appointed attorney filed a writ of *habeas corpus* on his behalf.

The government argues that Padilla’s circumstances are very similar to those in *Ex parte Quirin*. So far the judge appears to have agreed, noting that the facts alleged by the government would, if true, validate the government’s authority to detain him under military custody (233 F.Supp at 569). However, others argue that *Quirin* is inapposite, given that the eight saboteurs in 1942 were charged and tried by military commission, and were given access to an attorney (American Bar Association 2002). The *Padilla* case bears closer resemblance to the Civil War case *Ex parte Milligan* than to either the *Quirin* or *Territo* cases.

The government argues that *Milligan* is inapposite to the petition of Padilla on the ground that Padilla, like petitioners in *Quirin*, is “a belligerent associated with the enemy who sought to enter the United States during wartime in an effort to aid the enemy’s commission of hostile acts, and who therefore is subject to the laws of war.” (This, presumably, is to be contrasted with the case of *Milligan*, who was a civilian and had never traveled outside the state of Indiana.)

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

Under *Quirin*, however, it seems that the surreptitious nature of the petitioners' arrival onto the territory of the United States through coastal defenses, by means of enemy vessels that would have been lawful targets had the Navy or Coast Guard identified them as such, was a major determinant of the petitioners' status as enemy combatants. Had they entered the country openly and lawfully, they might have been interned as enemy aliens. Had they not shed their uniforms in carrying out their mission, they might have been detained as prisoners of war. Padilla's arrival from Pakistan by apparently lawful means should have no legal bearing on whether he is subject to military jurisdiction,²⁷ especially in the absence of a presidential proclamation or statute similar to the one relied upon in *Quirin* that sets forth the criteria for determining who may be treated as an enemy combatant.

The government disputes Padilla's claim that the laws of war do not apply to Al Qaeda and thus could never apply to him. Because the President has, by Executive Order, recognized a state of war against Al Qaeda, the government argues that the laws of war must apply, and that anyone associated with Al Qaeda may therefore properly be deemed to be "enemy belligerents."

²⁷The Supreme Court has held that "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law" (*Kent v. Dulles*, 357 U.S. 116, 125 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500, 517 (1964); *Zemel v. Rusk*, 381 U.S. 1 (1965)).

However, it is not clear that Al Qaeda is a belligerent under the law of war, because it does not qualify (Paust 2001, 8; Aldrich 2002, 898) and because such status would ordinarily imply belligerent rights that the Administration has been unwilling to concede. The nature of the “association” with “enemy forces” necessary to garner a classification as an enemy combatant is also not entirely clear.

The government argues that *Milligan* is inapposite, asserting that “whereas Milligan ‘was not engaged in legal acts of hostility against the government,’ ... the President determined that Padilla engaged in hostile and war-like acts.” However, the account of *Milligan* provided in *Ex parte Quirin* is somewhat misleading. Milligan was alleged to have engaged in hostile and warlike acts, but these were not *legal* acts of hostility because Milligan was not a lawful combatant. Whether *Milligan* applies may depend on the emphasis placed on the *legality* of the acts of hostility of which Milligan was accused, rather than whether Milligan was engaged in acts of hostility at all. Padilla can argue that he, like Milligan, was not engaged in legal acts of hostility.

The government further argues that *Milligan* is inapposite to Padilla’s case because Milligan, “not being a part of or associated with armed forces of the enemy,” could not be held as a belligerent, while Padilla, in contrast, is alleged to be associated with the armed forces of the enemy (U.S. Department of Justice 2002, A-1). However, it might be recalled that the government had argued that Milligan was a member of a paramilitary organization associated with the Confederate Army, a recognized belligerent, and that he was in effect accused of acting as an unlawful belligerent. In *Quirin*, the important distinction from *Milligan* was the nature and status of the enemy forces with whom the saboteurs were associated. The petitioners in *Quirin* were all actual members of the armed forces of an enemy state in a declared war. What association with the enemy short of membership in its armed forces might have brought the

saboteurs under military jurisdiction is unclear, but it must be something more than Milligan's link to the Confederate States.

The continuing validity of *Milligan* has been questioned by some scholars, even though the *Quirin* Court declined to overrule it, while others assert that the essential meaning of the case has only to do with situations of martial law or, perhaps, civil wars. Furthermore, it has been noted that the portion of the plurality in *Milligan* asserting that Congress could not constitutionally authorize the President to use the military to detain and try civilians may be considered *dicta* with correspondingly less precedential value; Congress had implicitly denied the authority the government sought to exercise. At any rate, modern courts have seemed less inclined to challenge the Executive's authority in war or its interpretation of the law of war. Courts may treat the question of whether belligerents are legitimate – or whether that matters – as non-justiciable. Otherwise, it is difficult to see how the courts can approve Padilla's detention without overruling *Milligan* altogether.

Constitutional Authority to Detain "Enemy Combatants"

The Bush administration has taken the view that the authority to detain "enemy combatants" during hostilities belongs to the President alone, and that any interference in that authority by Congress might therefore be unconstitutional (U.S. Senate 2002). However, the Constitution explicitly gives to Congress enumerated war powers, including the powers to make rules regarding captures on land and water and to make rules for the regulations of the armed forces. Why the authority to detain "enemy combatants" would be excepted from Congress' war powers is not immediately obvious.

The government and the petitioners all point to the *Steel Seizure Case* to provide a framework for the courts to decide the extent of the President's authority. In that Korean War-

era case (*Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952)), the Supreme Court declared unconstitutional a presidential order seizing control of steel mills that had ceased production due to a labor dispute, an act justified by President Truman on the basis of wartime exigencies, despite the absence of legislative authority. Justice Jackson set forth the following oft-cited formula to determine whether presidential authority is constitutional:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so

conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system (ibid., 637-38 (Jackson, J., concurring)).

The parties disagree as to where in this formula the present actions fall. Padilla, Hamdi, and their supporters generally argue that such constitutional authority, if it exists, is dependant upon specific authorization by Congress, which they argue is missing (or even explicitly denied through 18 U.S.C. § 4001) in the present circumstances, placing the controversy into the second or third category. The government, on the other hand, sees the issue as one that falls squarely into the first category, asserting that congressional authority for the detentions clearly exists, although such authority is not strictly necessary. Congressional authority, the government argues, may be found in the Authorization to Use Force of September 18, 2001, and a provision of title 10, U.S.C., authorizing payment for expenses related to detention of prisoners of war. Accordingly, the following sections examine the constitutional authority to take prisoners in war and, if congressional authority is required, whether Congress has provided it.

The Authorization to Use Force.

The government argues, and two federal courts have agreed, that the identification and detention of enemy combatants is encompassed within Congress' express authorization to the President "to use force against those 'nations, organizations, or persons he determines' were responsible for the September 11, 2001 terrorist attacks" (115 Stat. 224). However, because Congress authorized force and did not formally declare war, the absence of language explicitly addressing the detention of either alien enemies or American citizens could be read to preclude such authority, at least with respect to persons captured away from the battlefield. By not formally declaring war, Congress may be seen as limiting the President's authority (Sidak 1991).

The interpretation that the AUF implies powers that have required additional legal authorities in past conflicts would expand the President's authority, making the AUF essentially a blank check.

The government asserts that the lack of a formal declaration of war is not relevant to the existence of a war and is unnecessary to invoke the law of war. While a declaration is unnecessary for the existence of an armed conflict according to the international law of war, a formal declaration *is* often necessary to determine what law applies domestically, whether to aliens or citizens. For example, the Alien Enemy Act (50 U.S.C. § 21 *et seq.*) and the Trading with the Enemy Act (TWEA)(50 U.S. App. § 1 *et seq.*), both of which regulate the domestic conduct of persons during a war, expressly require a declared war and are not triggered by the authorization to use force. The Emergency Detention Act, in effect from 1950 to 1971, had similar requirements prior to the invocation of its measures. Because of the constitutional sensitivity associated with the assertion of military jurisdiction over civilians, statutory language allowing such jurisdiction "in time of war" has been found to be limited to wars declared by Congress (*United States v. Averette*, 41 C.M.R. 363 (1970); *Robb v. United States*, 456 F.2d 768 (Ct. Cl. 1972)).

The government notes that its military practice has long been to detain enemy combatants in conflicts where war was not formally declared and Congress did not expressly authorize the capture of enemies. It seems fair to argue that any authorization to employ ground troops against an enemy army implies the authority to capture enemies on the battlefield (unless the authority is specifically denied), because the capture of enemies is an essential aspect of fighting a battle. However, the war powers involving conduct off the battlefield, such as those authorizing the detention of alien enemies or regulating commerce with the enemy, are not necessarily a vital aspect of the use of the military, and have traditionally been subject to legislation rather than

implied by circumstance. For instance, the Supreme Court held that the President has no implied authority to promulgate regulations permitting the capture of enemy property during hostilities short of a declared war, even where Congress had authorized a “limited” war (*Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814)).

In light of the fact that the internment of enemy aliens as potential spies and saboteurs pursuant to the Alien Enemy Act requires a declaration of war or a presidential proclamation, or both, it seems reasonable to infer that the express permission of Congress is necessary for other forms of military detention of non-military persons within the United States, especially those who are U.S. citizens. To conclude otherwise would require an assumption that Congress intended in this instance to authorize the President to detain American citizens under fewer restrictions than apply in the case of enemy aliens during a declared war. In light of the USA PATRIOT Act’s seven-day limitation on the detention of aliens thought to be associated with terrorists, it is difficult to imagine that Congress would have meant to give the President authority to detain indefinitely similarly situated U.S. citizens, without trial, as “enemy combatants.”

Of course, the administration stresses that the war against terrorism is a war in more than just a metaphorical sense. The Authorization to Use Force (AUF) is broad; it can be read to authorize the use of force anywhere in the world, including the territory of the United States, against any persons determined by the President to have “planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons” (115 Stat. 224). Under this view, the United States is under actual and continuing enemy attack, and Congress delegated to the President the authority to declare those persons he determined to be subject to the AUF to be wartime enemies, and to authorize the U.S. military to use force to kill or capture persons it identifies as “enemy combatants,” even within the United States. However, those seeking a less

expansive interpretation of the AUF might argue that it must be read, if possible, to conform to international law and the Constitution. Under this view, it might be questioned whether those sources of law provide adequate basis for a war against alleged members of a criminal organization and those who harbor them.

Funding for Detentions

The government argues that, even if Congress did not explicitly authorize the detention of enemy combatants in its resolution authorizing force, “Congress has otherwise made clear its acceptance and assumption that the President’s Commander-in-Chief powers in a time of war encompasses [*sic*] the detention of enemy belligerents” (*Padilla ex rel. Newman v. Bush* (02 Civ. 4445), Respondents’ Reply, 26). This authority, it argues, is to be found in 10 U.S.C. § 956(5), which authorizes the use of appropriated funds for “expenses incident to the maintenance, pay, and allowance of prisoners of war” as well as “other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war.” The administration interprets the phrase “similar to prisoners of war” to include “enemy combatants” who are not accorded POW status. The Fourth Circuit agreed, with respect to Hamdi, stating, “[i]t is difficult if not impossible to understand how Congress could make appropriations for the detention of persons “similar to prisoners of war” without also authorizing their detention in the first instance” (316 F.3d 450, 468-69).

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

“utilize any appropriation available for the Military Establishment under such regulation as the Secretary of War may prescribe for all expenses incident to the maintenance, pay and allowances of prisoners of war, other persons in Army custody whose status is determined by the Secretary of War to be similar to prisoners of war, and persons detained in Army custody, pursuant to Presidential proclamation” (55 Stat. 810, 813).

The Department of War explained that the expenses were in connection with keeping and maintaining prisoners of war and others in military custody not provided for by any appropriation; the example it gave was the construction of stockades authorized to be built in Honolulu and the provision of a water supply for prisoners on Oahu (U.S. Senate 1941, 78-79). During Senate debate on the bill, Senator Danaher clarified that the phrase “other persons in Army custody whose status is determined by the Secretary of War to be similar to prisoners of war” did not authorize military detention of a separate class of persons from those already authorized by law (87 Cong. Rec. 9707-08 (1941)). Instead, he said the language was meant to refer to enemy aliens detained pursuant to 50 U.S.C. § 21, as invoked by presidential proclamation (*ibid.* at 9724-25).

The language was agreed to, and similar provisions appeared in subsequent defense appropriations until 1983, when it was added to title 10, U.S. Code as a note to section 138, and then codified in 1984 in its present form. During the Senate debate, the President’s authority to detain prisoners of war was not raised, despite the absence of express statutory authority. It appears from the legislative history that Congress understood that the language authorized payment for the exercise of authority found elsewhere.

Legislation regarding prisoners of war and enemy aliens subsequent to the Defense Authorization Act offers support to the understanding that, at least on the territory of the United States, Congress did not contemplate that any persons would be interned in any status other than

as a prisoner of war or enemy alien. In 1945, at the request of the Attorney General Biddle, Congress enacted a provision making it a criminal offense to procure or aid in the escape of persons interned as prisoners of war or alien enemies (Pub. L. 79-47, codified at 18 U.S.C. § 757), but did not include a catch-all phrase to cover those detained in any similar status. The provision was recommended to fill a gap in the law, which provided for the punishment of persons who procure or aid the escape of prisoners properly in the custody of the Attorney General or confined in any penal or correctional institution (U.S. House of Representatives 1945, 1-2).

Section 4001(a).

Hamdi and Padilla both assert that Congress has expressly forbidden the detention of U.S. citizens without statutory authority, and that no statutory support for the detention of U.S. citizens as “enemy combatants” can be found. They cite 18 U.S.C. § 4001(a), which provides “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”

This language originated with the repeal of the Emergency Detention Act in 1971. The legislative history demonstrates that Congress intended to prevent recurrence of internments in detention camps such as those that had occurred during the Second World War with respect to Japanese-Americans. The language “imprisoned or otherwise detained” appears broad enough to include detention pursuant to the law of war, and has been construed literally by the Supreme Court to proscribe “detention of any kind by the United States absent a congressional grant of authority to detain” (*Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981)).

Attorney General Ashcroft argues that Section 4001(a) does not apply to enemy combatants detained by the President under his authority as Commander-in-Chief, expressing doubt that Congress has the constitutional authority to interfere with the President’s authority to detain

enemy combatants. The Department of Justice notes that Section 4001(b) refers to federal penal and correctional institutions, except for military or naval institutions, and therefore concludes that Section 4001(a) likewise refers only to federal penitentiaries. Further, Ashcroft points to statements made by Rep. Abner Mikva and others during floor debate on the act repealing the Emergency Detention Act, to the effect that the legislation would not affect any inherent authority the President might have to detain citizens for national security reasons.²⁸

The judge in the *Padilla* case declined to employ the suggested canons of statutory interpretation or to address the constitutionality of Section 4001(a), finding the language unambiguous on its face (233 F.Supp.2d 564, 598). The judge found that Section 4001(a) clearly applies to the present case, but that Padilla's detention conforms to Section 4001(a) because it is carried out pursuant to an act of Congress (*ibid.*, 599). The Fourth Circuit found in *Hamdi* that Section 4001(a) was not intended to apply to enemy combatants, surmising that if Congress had intended to "override th[e] well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit" (*Hamdi*, 468). Finding no evidence in the legislative record to show that Congress meant to "overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is," (*Hamdi* at 468) the judge determined that Section 4001(a) does not apply.

²⁸ Rep. Mikva argued, "[i]f there is any inherent power of the President of the United States, either as the Chief Executive or as Commander in Chief, under the Constitution of the United States, to authorize the detention of any citizen of the United States, nothing in the House bill that is currently before this Committee interferes with that power, because obviously no act of Congress can derogate the constitutional power of a President. (117 Cong. Rec. 31,555 (1971)).

Conclusion

The two “enemy combatant” cases currently making their way through the federal courts may have an impact on the means used to prosecute the war on terrorism. Attorney General Ashcroft has clarified that the detention of suspicious aliens, and now some citizens as well, is one facet of the government’s strategy for preventing future acts of terrorism.²⁹ As a consequence, the extent to which the Congress has authorized the detention without trial of American citizens as “enemy combatants” may become an important issue in determining the validity of the administration’s tactics. While the broad language of the AUF authorizes the use of such military force as the President deems appropriate in order to prevent future acts of terrorism, it is possible to argue that the AUF was not intended to authorize the President to assert *all* of the war powers usually reserved for formal declarations of war. History shows that even during declared wars, additional statutory authority has been seen as necessary to validate the detention of citizens not members of any armed forces.

Congressional activity since the *Quirin* decision suggests that Congress did not interpret *Quirin* as a significant departure from prior practice with regard to restriction of civil liberties during war. Assuming that is the case, Congress may have intended to authorize the capture and detention of individuals like Hamdi (persons captured on the battlefield during actual hostilities) for so long as military operations remain necessary, but surely Congress never intended to empower the President to detain individuals like Padilla (an accused enemy agent operating domestically) except in accordance with regular due process of law.

²⁹ Attorney General Ashcroft told news reporters that “aggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks” (Department of Justice 2001).

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