The President's Power to Detain "Enemy Combatants": Modern Lessons From Mr. Madison's Forgotten War

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The War of 1812 seems an improbable source for answers to modern questions about the President's power as Commander in Chief.[1] James Madison was not a strong war-time President and the office of Commander in Chief did not really come into its own until Lincoln took the helm almost half a century later.[2] Modern scholarship on the President's war powers has little time for the first declared war of the new republic,[3] dubbed "Mr. Madison's war" by contemporaries who opposed it.[4]

The war on terrorism – so different from the rows of perfectly drilled British soldiers descending on America from the North during the winter of 1813 – has, however, generated a series of federal court cases that find interesting parallels in state court cases from that first war. These modern cases challenge the military detentions in the United States of those deemed "enemy combatants,"[5] confronting the courts with pressing and difficult questions about the

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[1] U.S. CONST. art. II, § 2.

[2] *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 at 263-64 (5th ed. 1984).

[3] *Id.* at 263; CLINTON ROSSITER & RICHARD LONGAKER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 14, 121 n.100 (2d ed. 1961); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 68-70, 170 (1998), LOUIS W. KOENIG, THE CHIEF EXECUTIVE 237-263 (1964).

[4] *See* ROBERT KETCHAM, JAMES MADISON: A BIOGRAPHY 537 (1973).

[5] The term "enemy combatant" refers broadly to those captured during wartime who are affiliated with the enemy. *See* Hamdi v. Rumsfeld, 316 F.3d 450, 463 n.3 (4th Cir. 2003) ("[p]ersons captured during wartime are often referred to as 'enemy combatants'"); *see also* American Bar Association Task Force on Treatment of Enemy Combatants 7

scope of the President's power as Commander in Chief.[6] So far, the courts have upheld the modern detentions, even of U.S. citizens seized in the United States, and have subjected the President's factual determination of enemy combatant status only to the most deferential review.[7]

During the War of 1812, on the other hand, courts issued writs of habeas corpus to and awarded damages against military commanders in the field who detained U.S. citizens suspected of aiding the enemy. These early cases suggest that the President may lack the constitutional authority to detain the modern enemy combatants and that courts should aggressively review the factual and legal basis for such detentions. Other cases from the War of 1812 engaged key questions left unresolved by the modern enemy combatant opinions. An 1813 U.S. Supreme Court case, for example, used international law to help interpret the scope of the President's constitutional authority during war.[8] The modern enemy combatant cases flirt with this idea, often vaguely invoking international law without explaining why.[9] Then, too, cases arising out

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(August 8, 2002), *available at* http://www.abanet.org/leadership/enemy_combatants.pdf ("[t]he term 'enemy combatant' is not a term of art which has a long established meaning"); Press Release, Department of Defense, DOD Responds to ABA Enemy Combatant Report (October 2, 2002), *available at* http://www.defenselink.mil/news/Oct2002/b10022002_bt497-02.html (describing and defending the government's policy with respect to enemy combatants).

[6] Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003); Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002); Padilla v. Bush, 233 F. Supp. 2d 564, 590, 592 (S.D.N.Y. 2002), *appeal certified by* Padilla v. Rumsfeld, 256 F. Supp. 2d 218 (S.D.N.Y. 2003).

[7] Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y 2002), *appeal certified by* Padilla v. Rumsfeld, 256 F. Supp. 2d 218 (S.D.N.Y. 2003); Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002); Hamdi v. Rumsfeld, No. 02-7338, 2003 WL 21540768, *1 (4th Cir. July 9, 2003) (Wilkinson, C.J., concurring in the denial of rehearing *en banc*); *id.* at *10 (Traxler, C.J., concurring in the denial of rehearing *en banc*); *id.* at *26 (Luttig, C.J., dissenting from the denial of rehearing *en banc*); *but see* (Motz, C.J., dissenting from the denial of rehearing *en banc*) (disagreeing with the panel's deferential review of the detentions); *see also* A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 WIS. L. REV. 309, 360 (2003) (describing the courts' roles "in scrutinizing the administration's detention decisions" as "exceedingly narrow and deferential").

[8] Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); *see infra* Part III.B.

[9] Hamdi v. Rumsfeld, No. 02-7338, 2003 WL 21540768, *1 (4th Cir. July 9, 2003) (Wilkinson, C.J., concurring in the denial of rehearing *en banc*) (reasoning that "Hamdi is being held according to the time-honored laws and customs of war"); Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 530-531, 532 (E.D.Va. 2002), *rev'd. by* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (concluding on the facts before it that the requirements of the Geneva

of General Andrew Jackson's military rule in New Orleans provide a counter-history to modern dogma about judicial restraint in the face of military authority during times of war.

Although perhaps tempting, it would be wrong to dismiss these cases as mere anachronisms. Fought on our own territory against a powerful adversary, the War of 1812 allows us to consider judicial response to military authority in a time of grave national peril. Moreover, the War of 1812 is the only declared war from which we might draw even arguably contemporaneous conclusions about the founding generation's view of the relationship between the courts and military authority.[10] As an attorney for one detainee during the War of 1812 wrote: "It is a matter of astonishment" that "in the life of the men who framed [The Declaration of Independence], it should be urged in a Court of justice, that this military power can be exercised in this country…."[11] Most importantly, these case are not obsolete; instead they engage the very themes - congressional authorization, international law, the institutional role of

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Convention Relative to the Treatment of Prisoners of War had not been met with respect to Hamdi, reasoning that "any determination of these issues would be premature," and then noting that meaningful constitutional review must involve a determination of U.S. treaty requirements, but never explaining exactly why and how U.S. treaty requirements were relevant to its analysis); Padilla v. Bush, 233 F. Supp. 2d 564, 590, 592 (S.D.N.Y. 2002) *appeal certified by* Padilla v. Rumsfeld, 256 F. Supp. 2d 218 (S.D.N.Y. 2003) (using the law of war to determine whether the President may exercise his Commander in Chief powers absent a congressional declaration of war without exploring why international law is relevant to this issue); Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002) (relying on principles of international law discussed in *Ex parte Quirin*, 317 U.S. 1, 31, 37 (1942) without identifying them as principles of international law or explaining why international law is relevant to the constitutionality of Hamdi's detention).

[10] *See* David P. Currie, *Rumors of Wars: Presidential and Congressional War Powers, 1809-1829*, 67 U. CHI. L. REV. 1, 2 (2000) (reasoning that events from President Madison's Administration can "greatly enrich our understanding of the original understanding of the division of war powers between the President and Congress").

[11] Smith v. Shaw, 12 Johns. 257, 263 (N.Y. 1815). The full quote reads "[i]t is one of the very grievances enumerated in the declaration of independence, that the king had affected to render the military independent of, and superior to, the civil power. It is a matter of astonishment, that in less than forty years, and in the life of the men who framed the instrument, it should be urged in a Court of justice, that this military power can be exercised in this country: in *England* it would not even be debated." *Id*. (emphasis in original). The Declaration of Independence itself accused the King of "render[ing] the Military independent or and superior to the Civil Power." THE DECLARATION OF INDEPENDENCE, *quoted in* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 16 (2002). Professor Turley documents in detail the concern with military power and its abuses that animated the drafters of the Declaration of Independence, the Articles of Confederation, and the Constitution. *Id.* at 15-25.

courts in times of war - that shape the courts' modern approach to the President's war powers. Yet the cases on which this Article focuses are generally neglected in modern scholarship and form no part of the contemporary canon on the scope of the President's war powers.

Part I of this Article introduces the modern enemy combatant cases, briefly summarizes the litigation in the Fourth Circuit and the Southern District of New York, and distinguishes the cases upon which these recent opinions rely. Part II demonstrates that the declaration of war in 1812 did not itself give the President the power to detain U.S. citizens captured in the United States, no matter how pressing the military justification.[12] These cases, considered with more recent precedent, suggest that the President lacks the constitutional power to detain U.S. citizens as "enemy combatants." As Part III details, the recent enemy combatant cases have sought constitutional traction from international law by reasoning that the detentions are justified because they comply with the "laws of war."[13] Where the detentions violate international law, however, the modern cases dismiss it as irrelevant. Cases from the War of 1812 call this reasoning into question by showing that international law can function both to support and to cabin the war time authority of the President, an issue of contemporary significance in other areas of constitutional interpretation as well.[14]

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[12] The detainees have argued that the current armed conflicts are not the constitutional equivalent of a declared war, *see, e.g.*, Padilla v. Bush, 233 F. Supp. 2d 564, 588-90 (S.D.N.Y 2002), *appeal certified by* Padilla v. Rumsfeld, 256 F. Supp. 2d 218 (S.D.N.Y. 2003), and some scholars agree, *see, e.g.*, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1284-85 (2002) and Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 346-50 (2002), but the courts have rejected this argument. Padilla v. Bush, 233 F. Supp. 2d 564 at 588-90. This Article assumes that these armed conflicts are the constitutional equivalent of a declared war.

[13] *See, e.g.*, Hamdi v. Rumsfeld, No. 02-7338, 2003 WL 21540768, at *1 (4th Cir. July 9, 2003) (Wilkinson C.J., concurring in denial of rehearing *en banc*); Hamdi v. Rumsfeld, 316 F.3d 450, 474 (2002); *see also infra* Part III.A. The term "laws of war" refers to a broad subset of international law that includes the rules governing the conduct of armed conflict. *See generally* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 168-182 (3d ed. 1999).

[14] *See, e.g.*, Lawrence v. Texas, 123 S.Ct. 2472, 2482 (2003) (citing a case from the European Court of Human Rights in a discussion of the 14th Amendment); *but see id.* at 2494 (Scalia, J. dissenting) (disagreeing with this use of sources from outside the United States); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (referring to foreign

Finally, Part IV considers the key remaining argument made in favor of the detentions: deference to the political branches requires that the courts permit this exercise of the President's authority. A critical weakness in this reasoning, which depends largely on functional justifications,[15] is the courts' failure to articulate its limits, while vigorously maintaining that such limits exist.[16] Ironically, the very values that the Fourth Circuit seeks to preserve by leaving such issues largely to the "political branches"[17] are ultimately undermined by its own ruling. If the courts refused to defer, the President could still take the political risk of acting counter to the courts, or he could seek the authority from Congress, in which case the political branches would work together to develop at least the initial standards governing such detentions. Instead, the courts have taken that task for themselves. Cases from the War of 1812 illustrate both the plasticity of function-based arguments and the institutional advantages of refusing to defer. This discussion, too, has broad implications for the courts' role in evaluating other uses of power by the President during war.

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practices in the Eighth Amendment context), *id*. at 321 (Rehnquist, C.J., dissenting) (arguing that such practices are irrelevant); *id*. at 345 (Scalia, J. dissenting) (same); Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (rejecting as irrelevant sentencing practices of other countries); *id.* at 389-90 (Brennan, J. dissenting) (arguing that foreign sources are relevant to the Eighth Amendment, and relying in part on treaties not ratified by the United States).

[15] The term "functionalist" or "functionalism" is used in this Article to mean flexible reasoning based on assessments of the essential function of each of the three branches and relationships among them. *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers-Questions: A Foolish Inconsistency?* 72 CORNELL L. REV. 488, 489 (1987).

[16] *See, e.g.*, Hamdi v. Rumsfeld, 316 F.3d at 464 ("judicial deference to executive decisions made in the name of war is not unlimited").

[17] Hamdi v. Rumsfeld, 296 F.3d 278, 281 (4th Cir. 2002); Hamdi v. Rumsfeld, 316 F.3d 450, 463 (4th Cir. 2003).

I. The Modern Enemy Combatant Cases

A. Background

The Department of Defense ("DOD") has made public the detention of three people in the United States as "enemy combatants."[18] Two of these, Yaser Esam Hamdi and Jose Padilla, are U.S citizens, while the third, Ali Saleh Kahlah Al Marri, is a citizen of Qatar. Hamdi, according to DOD officials, was captured in Afghanistan when his Taliban unit surrendered to Northern Alliance troops; he has since been moved to a detention facility in Virginia.[19] Justice Department officials arrested Padilla in Chicago on a material witness warrant but then, about a month later, turned him over to the DOD who transferred him to South Carolina.[20] Al Marri was also arrested in Illinois as a material witness and formally charged with lying to the FBI, but the government dropped the charges and turned him over to the DOD in June 2003, almost eighteen months after his arrest.[21] Al Marri, too, was immediately transferred by the DOD to a detention facility located within the Fourth Circuit.[22] Neither Hamdi nor Padilla has been charged with a crime and, as U.S. citizens, neither will be tried by the military commissions

[18] Thousands of people have been arrested and detained in the United States since September 11, 2001, but the Justice Department has refused to provide an exact count of or information about many detainees, particularly those who are not U.S. citizens. *See* David Cole, *The New McCarthyism: Repeating History In The War On Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 24-25 (2003).

[19] Hamdi v. Rumsfeld, 316 F.3d at 472.

[20] Padilla v. Bush, 23 F. Supp. 2d at 568-73.

[21] Susan Schmidt, *Qatari Man Designated An Enemy Combatant*, WASH. POST, JUNE 24, 2003, at A01.

[22] Al Marri is currently detained at the Consolidated Naval Brig in Charleston. Note that John Walker Lindh was also brought to Virginia for trial. Info from Padilla's Response Brief, August 1, 2003.

authorized by President Bush's order of November 13, 2001.[23] All three have challenged their detention in court through next friends.[24]

The Fourth Circuit has considered Hamdi's detention four times. In *Hamdi I* the Fourth Circuit reasoned that Hamdi's father could bring a habeas petition on his behalf but that a federal public defender and private citizen lacked standing to do so.[25] *Hamdi II* reversed the district court's order giving Hamdi access to counsel and remanded the case instructing the trial court to show greater deference to the government.[26] On remand the district court ruled that the government's affidavit, standing alone, provided insufficient grounds on which to detain Hamdi and ordered the government to produce more evidence.[27] *Hamdi III* reversed again, holding that the affidavit provided sufficient justification for detaining Hamdi as an "enemy combatant," and ordering the petition dismissed.[28] The court explicitly limited its holding to those captured in a foreign theater of war during active hostilities. In *Hamdi IV* the Fourth Circuit denied re-hearing *en banc*, and issued four separate opinions.[29]

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[23] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). As a non-U.S. citizen, Al Marri could be tried by such a commission, but the government has not suggested that it will do so.

[24] Lawyers for Al Marri have petitioned a federal district court in Illinois for a writ of habeas corpus, *see* Eric Lichtblau, *Man Held as 'Combatant' Petitions for Release*, July 9, 2003, N.Y. TIMES, at A18. On July 28, 2003, the court announced that it lacked jurisdiction over the petition and would either dismiss the case or transfer it to South Carolina where Al Marri is in military custody. Adam Jadhav, *Judge: Case of Ex-Peoria 'Enemy Combatant' Belongs in S.C.*, July 28, 2003, CHIC. TRIB. *available at* http://www.chicagotribune.com/news/nationworld/chi-030728almarri,0,5879965.story?coll=chi-news-hed. The Hamdi and Padilla litigations are discussed below.

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

[26] Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002).

[27] Hamdi v. Rumsfeld, 243 F.Supp.2d 527 (E.D.Va. 2002), *rev'd by* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

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

[29] Hamdi v. Rumsfeld, No. 02-7338, 2003 WL 21540768 (4th Cir. July 9, 2003) (Judges Wilkinson and Traxler, both on the original panel, each issued an opinion concurring in the denial of rehearing *en banc* and Judges Luttig and Motz, neither of whom were on the panel, each issued an opinion dissenting from the denial of rehearing *en banc*.)

In Padilla's case, Judge Mukasey of the Southern District of New York refused to dismiss the petition and ordered the government to provide Padilla with an attorney.[30] The first *Padilla* opinion reasoned that the President had the authority to detain U.S. citizens caught on American soil as "unlawful combatants," that the court would use the "some evidence" standard to review the government's determination as to combatant status, and that under the habeas statute Padilla had the right to an attorney.[31] The government nevertheless refused to provide Padilla access to his attorney and sought reconsideration. The District Court denied reconsideration and again ordered that Padilla have access to his lawyer,[32] but then, in April 2003, certified an interlocutory appeal to the Second Circuit.[33]

The courts have upheld the detentions against constitutional attack based in large part on a case from World War II, *Ex parte Quirin.*[34] The DOD relied heavily on *Quirin*, even citing the case by name at general press conferences on military detentions and tribunals.[35] If *Quirin* were indeed on all fours with the modern enemy combatant cases, then older cases from the War of 1812 might add little to the current debate. But as the next section details, *Quirin* is

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[30] Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

[31] *Id*. at 588-607.

[32] Padilla v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

[33] Padilla v. Rumsfeld, 256 F. Supp. 2d 218 (S.D.N.Y. 2003). That appeal is still pending.

[34] 317 U.S. 1 (1942).

[35] *See* Statement by Larry Thompson, Deputy Attorney General at Press Conference Presented by Deputy Secretary of Defense Paul Wolfowitz, June 10, 2002 (justifying detentions based in part on *Quirin*), *available at* http://www.defenselink.mil/news/Jun2002/t06102002_t0610dsd.html; Press Release, U.S. Department of Defense, DOD Responds to ABA Enemy Combatant Report, Oct. 2, 2002 (same), *available at* http://www.defenselink.mil/news/Oct2002/b10022002_bt497-02.html; *see also* Prepared Statement, Secretary of Defense Donald H. Rumsfeld and Deputy Secretary of Defense Paul Wolfowitz, Senate Armed Services Committee "Military Commissions," Dec. 12, 2001 (defending military trials of enemy combatants based on *Quirin*), *available at* http://www.dod.mil/speeches/2001/s20011212-secdef.html.

distinguishable based both on the extent of congressional authorization and on how it employs international law. The tension between the enemy combatant cases and *Quirin* actually spotlights modern uncertainty about the very issues that animated the older cases.

B. Misappropriating Quirin

The *Quirin* case is as dramatic as any World War II spy thriller, and it is true. German saboteurs traveled by U-Boat to the Florida and New York coasts where they disembarked bent on destroying U.S. military and industrial installations only to be turned in by one of their own.[36] A secret trial by military commission followed, complete with accusations of an FBI cover-up.[37] The commission sentenced the saboteurs to death[38] and the Supreme Court upheld the commission's actions in a much-maligned opinion tainted by charges of improper influence and arm-twisting by the Roosevelt administration.[39] Although some scholars provide strong arguments to discredit the opinion entirely,[40] even on its face the opinion is only marginally relevant to the modern enemy combatant cases.

[36] *Quirin*, 317 U.S. at 21; Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy* 70 GEO. WASH. L. REV. 649 at 734-36 0 (2002) [hereinafter Turley, *Tribunals and Tribulations*]

[37] *See* Turley, *Tribunals and Tribulations*, *supra* note 36, at 736.

[38] *Id.* at 739. The President commuted two of the sentences to imprisonment.

[39] *Id*. at 737-43.

[40] *See, e.g,, id*. at 743; Katyal & Tribe, *supra* note 12, at 1291; Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433 (2002); G. Edward White, *Felix Frankfurter's 'Soliloquy' in Ex parte Quirin: Nazi Sabotage and Constitutional Conundrums*, 5 GREEN BAG 2d 423 (2002); Nickolas A. Kacprowski, Note, *Stacking The Deck Against Suspected Terrorists: The Dwindling Procedural Limits on the Government's Power to Indefinitely Detain United States Citizens as Enemy Combatants*, 26 SEATTLE U.L. REV. 651, 652 (2003); *see also* Bryant & Tobias, *supra* note 7, at 331 ("A number of considerations warrant restricting the opinion in *Quirin.*")

The *Quirin* defendants, at least one of whom claimed U.S. citizenship,[41] argued that their trials by military commission exceeded statutory authorization and violated the Constitution.[42] The Court rejected these arguments, reasoning that Congress, in a federal statute called the Articles of War, had explicitly "authorized trial of offenses against the law of war before such commissions."[43] The defendants, the Court reasoned, were triable by military commission under the "law of war" because they were unlawful combatants. The trials accordingly came within Congress's express authorization for such commissions. Just to make sure the point was not lost, the Court added that: "[i]t is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation."[44]

The *Hamdi* and *Padilla* opinions have misappropriated *Quirin* in two critical respects. First, the detention of enemy combatants is not specifically authorized by congressional legislation, distinguishing them from the military commissions upheld by *Quirin*.[45] Congress, on September 14, 2001, authorized the President:

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist

[41] *Quirin*, 317 U.S at 7.

[42] *Id*. at 9.

[43] *Id.* at 27. Article 15 provides that the Articles of War do not "deprive[] military commissions…of concurrent jurisdiction" over "offenders or offenses that by statute or by the law of war may be triable by such military commissions." *Id*. Although Article 15 could be read simply as a refusal to limit the use of military commissions that are based on some other source of authority, *Quirin* interpreted Article 15 as an affirmative grant of authority from Congress to the President. *Id.* at 27; *see also* Curtis Bradley & Jack Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249, 253 (2002).

[44] 317 U.S. at 29; s*ee* Bryant & Tobias, *supra* note 7, at 326-27 ("The Supreme Court purposefully resolved the appeal on the narrowest conceivable grounds.")

[45] The first *Padilla* opinion does note the limiting language from *Quirin*, but moves quickly, without analysis, to the conclusion that the detention of Padilla is constitutional based on the Joint Resolution and the President's Commander in Chief powers. 133 F. Supp. 2d at 595-6.

> attacks, or harbored such organizations or persons, in order to prevent any future attacks of international terrorism against the United States by such nations, organizations or persons.[46]

Even assuming that this authorization is the constitutional equivalent of a declaration of war for the purposes of the Commander in Chief power, it nonetheless lacks explicit provision for long-term detention of American citizens. The Court in *Quirin* could have relied on Congress's declaration of war against Germany to authorize the trials in that case, but it did not. Indeed, had the court done so, it would have avoided very difficult interpretive questions about the Articles of War.[47] Instead, almost the entire case involves a detailed interpretation of the Articles of War.[48]

Perhaps the September 13 authorization for the use of force is itself equivalent to specific legislative authorization to detain U.S. citizens as enemy combatants. The *Hamdi III* opinion reasoned, for example, that "capturing and detaining enemy combatants is an inherent part of warfare" and that the authorization for the use of "necessary and appropriate force" includes the "capture and detention" of "hostile forces."[49] But this proposition finds no support in *Quirin*,

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[46] Authorization for Use of Military Force, Pub. Law No. 107-40 § 2(a), 115 Stat. 224 (2001).

[47] *See* White, *supra* note 40, at 429-31, 436 (describing the difficulties the Court faced in reaching the decision in *Quirin*, including the problem that Roosevelt's executive order had not provided adequate review of the decisions of the commission as required under the Articles of War). As Professor White also points out, the Court did not want to rely on the President's Commander in Chief power under the declaration of war, because that would appear to permit the President to subject anyone to trial by military commission for offenses against the laws of war. *Id.* at 430-31. This Article puts aside questions about whether the *Quirin* Court correctly interpreted the Articles of War as authorizing the trials by military commission in that case; the point here is that *Quirin* relied on the specific authorization that it found in the Articles of War, rather than on the declaration of war by Congress even though this interpretation of the Articles of War presented significant problems.

[48] As the Court explained: "By the Articles of War, and especially Article 15, *Congress has explicitly provided*, so far as it may do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases." 317 U.S. at 27 (emphasis supplied).

[49] 316 F.3d at 467; *see also Hamdi II*, 296 F.3d at 281 ("where as here the President does act with statutory authorization from Congress there is all the more reason for deference"); Padilla v. Bush, 233 F. Supp. 2d 564, 606 (S.D.N.Y. 2002) ("In the decision to detain Padilla as an unlawful combatant, for the reasons set forth above, the President is operating at maximum authority, under both the Constitution and the Joint Resolution."). *Hamdi III* reasons elsewhere that "Hamdi's petition places him squarely within the zone of active combat and assures that he is

which pointedly avoided relying on the general declaration of war as providing congressional authorization for military tribunals.[50] The reasoning of *Quirin* hinged on a specific grant of authority from Congress to try people by military commissions, as well as a clear limitation on that power: it could only be exercised to try offenses against the law of war. This failure to distinguish *Quirin* is particularly serious given the long tradition of using congressional authorization in interpreting the President's war powers under the Constitution.[51]

The government and the courts have misapplied *Quirin* in a second way. Much of the *Quirin* opinion interprets the law of war.[52] Congress, after all, authorized trials by military commissions as permitted under the law of war. But the *Hamdi* and *Padilla* opinions have taken language analyzing the law of war and applied it as a direct interpretation of the scope of the

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indeed being held in accordance with the Constitution and congressional authorization for use of military force in the wake of al Qaida's attack. Quirin, 317 U.S. at 25." 316 F.3d at 474.

[50] The Fourth Circuit supported this reasoning in part with the deference-based arguments discussed *infra* Part IV, in part by citing to *Quirin*, in part with references to *in re Territo* and *Johnson v. Eisentrager* discussed *infra* at pages 14-16, and in part based on references to international law discussed *infra* at pages 29-30. *Hamdi III*, 316 F.3d at 467; *Hamdi II*, 296 F.3d at 281-282. None of these arguments provides strong support for the claim that the general use of force resolution from September 13 should be read to authorize the long-term detention of U.S. citizens, particularly when such detention violates international law. *Quirin* involved specific congressional authorization, *Territo* involved POW detention authorized by the Senate-confirmed Geneva Conventions, and *Johnson* involved only aliens captured and detained abroad.

[51] *See infra* note 135.

[52] The enemy combatant cases have thus misapplied *Quirin* by failing to acknowledge that *Quirin* was based on specific congressional authorization and by applying *Quirin's* interpretation of the law of war, even though today no statute makes the law of war relevant. These points are related in an interesting way that suggests a distinction between *Quirin* and the enemy combatant cases. The Constitution grants Congress the power to "define and punish…Offences against the Law of Nations," U.S. CONST. art. I, § 8, cl. 10, which includes the law of war. *See* In re Yamashita, 327 U.S. 1 (1946). The Supreme Court has read *Quirin* to mean that Congress exercised this specific Article I power when it authorized trials by military commission. *Id*. Congressional authorization might be specifically required under Article I for the trials at issue in *Quirin*, but not for the detention of the enemy combatants because they are not being "punished" for offenses against the Law of Nations. Thus, under this reading, specific congressional authorization was required in *Quirin*, but not in the detention cases. Note, however, that this point turns on its head the interpretation that the *Hamdi* and *Padilla* opinions gave *Quirin*: where they have read *Quirin* to support the *President's* power in times of war, this interpretation reads *Quirin* to stand for the specific power of *Congress* to define and punish offenses against the law of nations.

President's constitutional power. This does real interpretive violence to *Quirin*. For example, *Hamdi II* reasons that:

> It 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. *See, e.g., Quirin*, 317 U.S. at 31, 37, 63 S.Ct. 2 (holding that both lawful and unlawful combatants, regardless of citizenship, 'are subject to capture and detention as prisoners of war by opposing military forces').[53]

But the passage quoted from *Quirin* (pure dicta with respect to detentions) discusses *not* the constitutional power of the President to detain lawful and unlawful combatants, but whether *the law of war* permits the detention and trial of unlawful combatants by military commission. The full quote from *Quirin* makes clear that the Court is interpreting the law of war:

> By universal agreement and practice the law of war draws a distinction between ….those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[54]

The law of war was relevant in *Quirin* because the federal statute in question, the Articles of War, made it relevant as a matter of positive law. Because the conduct was a violation of the law of war, it was within the statutory authorization for military tribunals. But why is this interpretation of the law of war relevant in *Hamdi II*? The opinion provides no explanation. The *Padilla* court also quotes this language from *Quirin* and it, too, neglects to mention that here *Quirin* interprets the law of war made relevant by federal statute.[55]

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[53] *Hamdi II*, 296 F.3d at 283.

[54] 317 U.S. at 30-31. These lines are quoted in part and discussed in *Hamdi II*, 296 F.3d at 283 and cited in *Hamdi III*, 316 F. 3d at 469.

[55] 233 F. Supp. 2d at 594-96.

The Fourth Circuit made the same mistake in *Hamdi III*.[56] The opinion quotes the following from *Quirin* but fails to include the last clause:

> Citizenship in the United States of any enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful *because in violation of the law of war.*[57]

In this passage the *Quirin* opinion interprets the law of war as made applicable through a federal statute.[58] In *Hamdi III*, Hamdi argued that because he is a U.S. citizen the President cannot constitutionally detain him. In response, the Fourth Circuit reasoned that Hamdi's citizenship does not affect his detention because "he is being held as an enemy combatant pursuant to the well-established laws and customs of war" and cites *Quirin* as raising "the same issue."[59] But this reasoning fails to make clear why *Quirin*'s interpretation of the law of war applies in the absence of a federal statute that incorporates it.[60] The Constitution, the Fourth Circuit appears to reason, does not distinguish between citizens and non-citizens because the law of war does not make that distinction. This is an interesting and perhaps very powerful proposition - one that even finds some support in other parts of the *Quirin* opinion[61] - but *Quirin* was careful to

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[56] 316 F.3d at 461.

[57] 316 F.3d at 475.

[58] The *Quirin* opinion repeatedly makes clear that it is applying the law of war because Congress incorporated it by federal statute. The same discussion, for example, refers to the "nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes." 317 U.S. at 38.

[59] 316 F.3d at 475.

[60] Two paragraphs down the *Hamdi III* opinion confuses matters further by reasoning that the "*Quirin* principle applies here" so that "[o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such." Here the international law piece has dropped out entirely, making the reference all but unintelligible. *Quirin* held that a federal statute permitting trial by military against those who violated the law of war authorized such trials against U.S. citizens who had violated the law of war. *Hamdi III* appears to attempt to apply this reasoning to detentions where no statute applies and regardless of whether the law of war was violated.

[61] *See infra* text at notes 201-207.

distinguish between its use of international law as incorporated by statute and its discussion of whether the statute was constitutional; the modern enemy combatant opinions use distinctions drawn from international law without explaining why or how they are relevant.

Although *Quirin* is said to provide the key bulwark in the defense of the detentions, several other cases are pressed into service as well.[62] Two of the *Hamdi* opinions, for example, quite remarkably cite dicta in *Duncan v. Kahanamoku*[63] referring to military jurisdiction over "enemy combatants."[64] But in *Duncan* the Court *granted* habeas relief to civilians tried by military commission in 1942 and 1944 in Hawaii.[65] The Court concluded that although Congress had authorized "martial law" in Hawaii, that term did not include military trials of civilians not charged with war crimes.[66] The dissent argued in vivid detail that Hawaii was under attack and

[62] The cases also rely on *Johnson v. Eistentrager*, 339 U.S. 763 (1950), to support the President's power to detain Hamdi and Padilla. *See, e.g, Hamdi III*, 316 F.3d at 465-6; *Hamdi IV*, No. 02-7338, 2003 WL 21540768, at *3 (Wilkinson, C.J., concurring in denial of rehearing *en banc*). This is remarkable because *Johnson* considered only the right of enemy aliens captured abroad to petition the courts; it states at the outset that it is "little concerned" with "the citizen" except "to set his case apart as untouched by this decision and to take measure of the difference between his status and that of aliens." 339 U.S. at 769; *See Hamdi IV*, No. 02-7338, 2003 WL 21540768, at *29 (Motz, C.J., dissenting from denial of rehearing *en banc*) (distinguishing *Johnson* on this basis). The cases also use *Ludecke v. Watkins*, 335 U.S. 160 (1948) which involved the scope of the Alien Enemy Act. It is weak precedent here because it involved the power to deport enemy aliens pursuant to a statute dating back to 1798, but the current detentions involve mostly U.S. citizens, are unrelated to deportation, and do not involve the crucial issue in *Ludecke*—the power of the political branches to determine the dates that hostilities are over for the purposes of statutory interpretation.

[63] 327 U.S. 304 (1946).

[64] *Hamdi II*, 296 F.3d at 283; *Hamdi III*, 316 F.3d at 465. The dicta in *Duncan* states "[o]ur question does not involve the well-established power of the military to exercise authority over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war." 327 U.S. at 313-14. The cases and article cited in support of this proposition have nothing to do with the detention of enemy combatants; all deal with trials by military commission. *See* Ex parte Quirin, 317 U.S. 1 (1942); in re Yamashita, 327 U.S. 1 (1946); L.K. Underhill, *Jurisdiction of Military Tribunals in the United States Over Civilians*, 12 CAL. L. REV. 75 (1924).

[65] 327 U.S. at 307-12.

[66] *Id*. at 319-24.

part of the theater of actual military operation, putting military trials of civilians within the authority of the executive.[67] The Court rejected this view.

At first blush the government's position seems better supported by the Ninth Circuit's opinion *in re Territo*.[68] Gaetano Territo, a prisoner of war captured in a 1943 battle fighting for the Italian army, petitioned the federal courts for a writ of habeas corpus. Territo argued that as an American citizen he could not be held as a prisoner of war. The district court and the Ninth Circuit rejected this claim (and his others), reasoning that Territo's citizenship did not affect his status as "one captured on the field of battle."[69] The opinion upheld Territo's detention although it lacked specific statutory authorization, lending at least some support to the President's authority to detain enemy combatants absent statutory authorization. But the United States and Italy were both parties to the Geneva Convention and, as the Ninth Circuit noted, Territo's capture and detention as a prisoner of war by American military authorities was "valid and legal" under that Convention.[70] Congress, in other words, had authorized the capture and detention of "prisoners of war" by ratifying that Convention.

The *Territo* opinion goes on to discuss international law without explaining exactly why it is relevant. "Those who have written texts upon the subject of prisoners of war agree," the opinion concludes, that people actively opposing an army in war "may be captured" and, except for spies and other "non-uniformed plotters" may be held as prisoners of war.[71] Citing *Quirin*,

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[67] *Id*. at 342-44.

[68] 156 F.2d 142 (9th Cir. 1946); *see also Hamdi III*, 316 F.3d at 465 (citing *Territo*); *Hamdi II*, 296 F.3d at 283 (same); Padilla v. Bush, 233 F.Supp.2d 564, 595 (S.D.N.Y. 2002) (same).

[69] *Id*. at 145.

[70] *Id*. at 144.

[71] *Id*. at 145.

the opinion also reasons that under the law of war citizenship in the United States does not "relieve" a prisoner of the "consequences" of an unlawful belligerency.[72] The Ninth Circuit appears to reason that international law is directly relevant in interpreting the scope of the President's power to detain U.S. citizens, but does not make this connection explicitly.[73]

In short, neither *Quirin*, nor *Territo*, nor *Duncan*, supports the long-term detention of "enemy combatants" in the United States absent *both* specific congressional authorization *and* compliance with international law. The following two Parts take up these issues in turn, while the final Part considers deference-based arguments.

II. Military Detention of U.S. Citizens During the War of 1812

A. Samuel Stacy

On the 21st of July, 1813, a commissioner of the Supreme Court of New York issued a writ of habeas corpus to Commodore Issac Chauncey and Major General Morgan Lewis at Sackets Harbor on Lake Ontario, directing them to produce the body of Samuel Stacy.[74] Britain and the United States each viewed the Great Lakes as critical to the success of the war.[75] On the American side, although Sackets Harbor was inconveniently located far from Oswego and the

[72] *Id.*

[73] The opinion could also have intended to use international law to interpret the Geneva Convention (and, perhaps, the scope of Congress' intent), but this seems less plausible. The opinion also discusses international law in the context of seizures of alien property by the United States, and these discussions are not obviously linked to the opinion's conclusions about the Geneva Conventions. *Id.* at 145.

[74] In re. Samuel Stacy, Jun., 10 Johns. 328 (N.Y. Sup. Ct. 1813).

[75] As John Armstrong, a Revolutionary War hero who would become Secretary of War explained, "[r]esting, as the line of Canadian defence does, in its whole extent on navigable lakes and rivers, no time should be lost in getting a naval ascendancy on both for….the belligerent who is first to obtain this advantage will (miracles excepted) win the game." ROBERT MALCOMSON, LORDS OF THE LAKES: THE NAVAL WAR ON LAKE ONTARIO, 1812-1814 at 16 (1998); *see also* THEODORE ROOSEVELT, THE NAVAL WAR OF 1812 at 146-47 (1987 ed.). The Madison Administration also had political reasons for pushing hard for a victory in western New York during the winter and spring of 1813, because they hoped for a Republican victory in the April election of a governor in New York. J.C.A. STAGG, MR. MADISON'S WAR: POLITICS, DIPLOMACY, AND WARFARE IN THE EARLY AMERICAN REPUBLIC, 1783-1830 at 285-88 (1983).

interior river systems, it had a deep harbor and excellent topography for a shipyard.[76] Beginning in the fall of 1812, Sackets Harbor became a center of shipbuilding for the Great Lakes and from here Commodore Chauncey oversaw naval operations for Lakes Ontario and Erie[77] and Lewis commanded the American troops on the Niagara front.[78]

The capture of Samuel Stacy on July 1, 1813 as a spy and traitor came just over a month after the British landed troops, attacked, and nearly captured Sackets Harbor on May 29.[79] The British attack found the base vulnerable because both Chauncey and Lewis were engaged in an assault on Fort George.[80] Commodore Chauncey lay the blame for the attack on Sackets Harbor at the feet of Samuel Stacy. As Chauncey wrote to Secretary of the Navy William Jones:

> I have the most positive information that [Stacy] has been in the habit of conveying information to the Enemy for many Months. He visited this place a few days before the British made the attack on the 29th of May, and I have no doubt but that he is the person that gave them information that most of the Troops had been sent to Niagara.[81]

Commodore Chauncey outlined other evidence against Stacy in his letter to Secretary Jones before concluding that the arrest of Stacy would "at any rate" deprive "the Enemy of the

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[76] JOHN K. MAHON, THE WAR OF 1812 at 86-87 (1972).

[77] 2 THE NAVAL WAR OF 1812: A DOCUMENTARY HISTORY 403-06 (William S. Dudley, ed. 1992) [*hereinafter* THE NAVAL WAR OF 1812: A DOCUMENTARY HISTORY].

[78] *Id*. at 452.

[79] MALCOMSON, *supra* note 75, at 127-29 (recounting the battle).

[80] *Id.* According to one estimate the British attack cost the Americans 22 lives during combat, with 85 wounded, 150 taken prisoner, and many naval supplies lost. *Id*. at 138-39.

[81] Letter from Commodore Issac Chauncey to Secretary of the Navy Jones, July 4, 1813, *reprinted in* 2 THE NAVAL WAR OF 1812: A DOCUMENTARY HISTORY *supra* note 77, at 521; *see also* Letter from Commodore Issac Chauncey to Secretary of the Navy Jones, July 3, 1813, *reprinted i*n 2 THE NAVAL WAR OF 1812: A DOCUMENTARY HISTORY, *supra* note 77, at 499.

information which [Stacy] would have conveyed to him which is all important at this time."[82] The Commodore closed the letter by hoping to see Stacy hung as a traitor to his country in part as an example to other "base" and "degenerate" Americans who might become spies and informers.[83]

Secretary Jones wrote back immediately, emphasizing the danger to Sackets Harbor ("the moment is critical") and the "vast importance" of Chauncey gaining control of Lake Erie.[84] As to Stacy, Secretary Jones wrote:

> You were perfectly correct in arresting Mr. Saml. Stacy, as a spy; and you will hold him, until the President shall direct the course to be pursued with him, which I will ascertain tomorrow. It is indeed time that traitors were brought to punishment.[85]

Stacy, however, petitioned the Supreme Court of New York for the writ of habeas corpus that issued on July 21. Stacy submitted affidavits attesting that he was a "natural born citizen of the United States," and on this basis the commissioner issued the writ.[86] When served, Lewis refused to produce Stacy, stating instead that Stacy was not in his custody, that he believed

[82] *Id.*

[83] *Id.* Indeed, as Chauncey suggested, espionage on the northern frontier may have been both relatively widespread and difficult to detect. 2 THE NAVAL WAR OF 1812: A DOCUMENTARY HISTORY, *supra* note 77, at 520-21; *see also* ISAAC MALTBY, A TREATISE ON COURTS MARTIAL AND MILITARY LAW 37-9 (1815) (describing a Jan. 5, 1813 order from the Colonel commanding west Lake Champlain condemning "members of the community" who were "found so void of all sense of honour or love of country" as to "give intelligence to our enemies"); Letter from Peter Hogeboom to Major General Francis de Rottenburg, British Army, Niagara Falls, July 23, 1813, *reprinted* in 2 THE NAVAL WAR OF 1812: A DOCUMENTARY HISTORY, *supra* note 77, at 522-533 (offering to sell intelligence information to the British through a person near Sackets Harbor).

[84] Letter from Secretary of the Navy Jones to Commodore Issac Chauncey, July 14, 1813, *reprinted in* 2 THE NAVAL WAR OF 1812: A DOCUMENTARY HISTORY, *supra* note 77, at 499-501.

[85] *Id.*

[86] 10 Johns. at 329.

Stacey to be guilty of "carrying information to the enemy," and that Stacy should be tried by a court-martial.[87]

The Supreme Court of New York did not take kindly to this response from Major Lewis. Concluding that Lewis had intentionally disregarded the writ and committed a contempt of process,[88] Chief Judge Kent reasoned that if any case called for "the most prompt interposition of the court to enforce obedience to its process, this is one."[89] Stacy, the opinion continued, is held in "closest confinement": by "a military commander" who is "assuming criminal jurisdiction over a private citizen."[90] Any delay would render "the remedy alarmingly impotent."[91]

Major Lewis's allegation that Stacy was a traitor for giving information to the enemy, Kent reasoned, was "only aggravation of the oppression of the confinement" because the military lacked "any color of authority" to try a citizen for that crime.[92] Although not mentioned in the opinion, the military also lacked the authority to try U.S. citizens by court-martial for

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[87] *Id*. at 330. Court-martialing authority is regulated by federal statute and extends to people who actually serve in or alongside the armed forces, although its jurisdiction does include some civilians. S*ee generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 86 (2nd ed. 1920); 10 U.S.C § 802 (defining persons subject to this Chapter of the U.S. Code); 10 U.S.C. § 817 (defining jurisdiction of the court-martial in general); 10 U.S.C. § 104 (extending court-martial jurisdiction to include some charges against people not in the armed forces). Military commissions originally developed to try civilians in occupied territory and certain offenses against the laws of war that could not be tried by court-martial, although now there is some overlapping jurisdiction. WINTHROP, *supra* note 87 at 831-32; *see also* Michael J. Nardotti, Jr., *Military Commissions*, 2002-MAR ARMY LAW. 1 (2002). This article uses "military commission" and "military tribunal" interchangeably.

[88] 10 Johns. at 340.

[89] *Id*. at 334. The Court considered whether to issue a rule to show cause against Lewis, or a writ of attachment to force Lewis into court. Although an attachment would normally issue only after a rule to show cause, the Court issued an attachment due to these concerns about abuse of military authority and potential delay.

[90] *Id.* at 334.

[91] *Id.*

[92] *See* Smith v. Shaw, 12 Johns. 257 (Sup. Ct. N.Y. 1815) (concluding that U.S. citizens accused of spying and treason were not triable by court martial); *see also* WINTHROP, *supra* note 87, 629-30 (2nd ed. 1920).

spying.[93] The opinion concludes by ordering the attachment of General Lewis unless Stacy was released or brought before the court's commissioner. Apparently the President reached the same conclusion: on July 26, 1813, Secretary of War Armstrong ordered Stacy released "on the ground that a citizen cannot be considered as a spy."[94]

The case of Samuel Stacy bears importantly on today's military detentions. Commodore Chauncey and Major Lewis were situated at the critically important northern front of a declared war on the very doorstep of U.S. territory. They considered Stacy a spy and a traitor, they believed that his perfidy contributed to a deadly and destructive attack on American soil, and they wanted him detained in part to prevent him from providing more information to the British. Yet apparently both the court and the President reasoned that the military lacked the power to detain him.

B. Other Detention Cases 1812-1815

Other cases confirm that during the War of 1812 the President and the courts agreed that the military lacked the power to detain U.S. citizens, no matter how compelling the military justification for the detentions, at least absent statutory authorization to try them by court martial. In the case of Elijah Clark, an American citizen living with his wife in Canada, a Court Martial

[93] The American Articles of War (1806) provided that "in time of war, all persons not citizens of, or owing allegiance to, the United States of America, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court-martial." American Articles of War of 1806, enacted April 10, 1806, *reprinted in* WINTHROP, *supra* note 87, at 976, 985. The statue thus excluded American citizens from those who might be tried by court-martial for spying. *Id.* at 766 (reading the 1806 enactment law as making citizens "unamenable for the crime of the spy"). An August 21, 1776 Resolution of the Continental Congress also excluded citizens from those triable by court-martial as spies. *Id*. at 765. This limitation was lifted by Congress during the Civil War so that confederate soldiers and sympathizers could be tried. The March 3, 1863 Act also made the crime triable by military commission. *Id*. at 766.

[94] 2 THE NAVAL WAR OF 1812: A DOCUMENTARY HISTORY, *supra* note 77, at 521 n.1. Note that this resolution means that the government did not argue its side of the case before the court. We know from the historical evidence outlined above that the military had a strong interest in detaining Stacy, so the decision not to justify his detention in court appears to have been based on the consensus view that the government lacked such authority. The cases of Clark, Shaw, and others described below confirm that conclusion.

in Buffalo found him guilty of spying in August of 1812.[95] They ordered Clark to be "hung by the neck until he be dead."[96] But Major General Hall, at the direction of the President, ordered that as a citizen Clark was "not liable to be tried by a court martial as a spy."[97] Significantly, Hall's order also provided that unless Clark "should be arraigned by the civil courts for treason" or some other crime under the law of New York he "must be *discharged*."[98]

Moreover, courts held military personnel personally liable for assault, battery, and false imprisonment if they *detained* U.S. citizens not triable by court-martial. Shaw, a naturalized citizen was held at Sackets Harbor in January 1814 on allegations of spying, inciting mutiny, and trading with the enemy.[99] After his release he sued Smith, the officer who kept him in detention. Smith argued that Shaw, a native of Scotland and only a naturalized citizen of the U.S., could be tried by court martial, or at least the question of his citizenship could be decided by military authority.[100] Or, the defendant submitted, at the very least he had the authority to detain Shaw, investigate the facts, and turn him over to the civil authorities on the charge of treason.[101] The defendant justified the measures as "essential to public safety."[102]

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[95] "Case of Clark the Spy" 1 THE MILITARY MONITOR AND AMERICAN REGISTER 121-22 (Feb. 1, 1813).

[96] *Id.* at 122.

[97] *Id.*

[98] *Id.* (emphasis supplied).

[99] Smith v. Shaw, 12 Johns. 257 (Sup. Ct. N.Y. 1815).

[100] *Id.* at 260.

[101] Counsel for Smith argued, for example, that "it was necessary to detain, until the fact of his being a spy, or not, could be ascertained. It is impossible for the commanding officer to know whether the person arrested is a spy without investigation" and "had not the defendant a right to detain the plaintiff, or order to deliver him over to the civil power, there being a charge of treason against him?" *Id*. at 261.

[102] *Id.*

The court rejected all these arguments. None of these offences, the court reasoned, were triable by court-martial except for spying, and as a U.S. citizen Shaw could not be charged with that offense. He might, the court reasoned, "be amenable to the civil authority" but not to military authority,[103] because the military lacked the power to try him by court-martial for his offenses. Although the defendant was not "harsh and oppressive," the "principle involved" made the case important because "if the defendant was justified in doing what he did, every citizen of the *United States* would, in time of war, be equally exposed to a like exercise of military power and authority."[104] The jury awarded Shaw $779.25 for a military detention that seems to have lasted about two weeks.[105] In a similar case against Commander Hampton, a plaintiff won $9,000 for six days of confinement followed by a trial by court martial.[106]

The importance of these cases might be discounted on the grounds that state courts no longer have the authority to issue writs of habeas corpus to federal officials,[107] and Congress eradicated the authority to sue federal officials personally for damages in cases like these during the Civil War.[108] Cases could not arise today in the same procedural posture. In addition, some

[103] *Id*. at 265.

[104] *Id.* at 265 (emphasis in original).

[105] *Id.*

[106] McConnell v. Hampton, 12 Johns. 234 (Sup. Ct. N.Y. 1815). The Supreme Court of New York granted a new trial on the issue of damages, emphasizing the "critical and delicate" situation of the "commander-in-chief of a division of the army," close to enemy forces, guarding himself from attack. This situation, the court reasoned, provided *no justification* for the detention but did make the damages "enormously disproportioned to the case proved." *Id.* (emphasis supplied).

[107] In re. Tarble, 80 U.S. 397 (1871).

[108] *See* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 27 (1993) ("[t]he Indemnity Act of 1863, as amended in 1866 and 1867, provided retrospective defenses in damage actions brought against federal officials for alleged misconduct based upon presidential directives").

states were notably hostile to the war,[109] and western New York lacked enthusiasm for a conflict with British forces in Canada.[110] But although Connecticut, Rhode Island and Delaware refused to send their citizen soldiers to fight under federal officers,[111] New York, on the other hand, provided more militiamen than any other state in 1812 - 14,866.[112] Indeed, some of these very men fought alongside federal troops when the British attacked Sackets Harbor.[113] New York courts and juries would, it seems, have had every incentive to favor the detention of alleged spies and traitors who threatened the lives of troops that included large numbers of New York residents. No less a legal heavyweight than Chancellor Kent wrote the *Stacy* opinion, undermining any argument that inferior jurists issued these decisions.[114] Thus despite the procedural and other differences, the cases from the War of 1812 demonstrate a remarkably consistent view that the military lacked any power to detain U.S. citizens except in anticipation of a trial by a congressionally authorized court-martial.

C. Modern Relevance

These examples from the War of 1812 show the extraordinary caution with which the courts and President Madison viewed the detention of U.S. citizens, even in a declared war, and even on evidence that the detainee traveled abroad, met with the enemy, and might divulge

[109] MAHON, *supra* note 76, at 31-42.

[110] *See* STAGG, *supra* note 75, at 232-43, 251-52 (detailing western New York's very significant opposition to the war, in part because it would disrupt trade with the Canadian provinces).

[111] MAHON, *supra* note 76, at 31-33, 100-101.

[112] *Id*. at 101, n.1. Many of these militia groups were poorly trained, poorly disciplined and under-equipped. *See* STAGG, *supra* note 75, at 242-3, 247. Their participation in the war may have engendered even more anti-war sentiment in western New York. *Id*.

[113] MALCOMSON, *supra* note 75, at 133-36.

[114] *See* G. Edward White, *The Chancellor's Ghost*, 74 CHI.-KENT L. REV. 229 (1998) (describing Kent's intellect and influence).

future intelligence information. Their modern relevance is two-fold. First, they should force us to reconsider the extremely deferential review that the modern courts use to evaluate the detentions, an issue considered at greater length in Part IV of this Article.[115] They also suggest that the President lacks the authority to detain U.S. citizens as enemy combatants at all.

The *Padilla* case is factually comparable to the War of 1812 cases. Padilla is a U.S. citizen who was arrested in Chicago and is detained based on his alleged ties to the enemy and the danger he poses to the nation. Although Hamdi was captured abroad,[116] and his case might be distinguished on those grounds, the reasoning in the early cases depended on citizenship and statutory authorization, not on place of capture.[117] The older cases do not formally apply to non-

[115] *See infra* Part IV.

[116] It is unclear exactly what significance the modern cases assign to Hamdi's place of capture. They refer at times to "foreign theater of war" or "zone of active combat operations," *Hamdi III*, 316 F.3d at 475, or as one Judge on the Fourth Circuit subsequently described it, a "hostile country," or, finally, just "Afghanistan." *Hamdi IV*, No. 02-7338, 2003 WL 21540768, at *9 (4th Cir. July 9, 2003) (Traxler C.J., concurring in denial of rehearing *en banc*). The *Hamdi* opinions appear to use place of capture largely to support the factual claim that Hamdi *is* an enemy combatant. *Hamdi III*, 316 F.3d at 475-76. Judge Traxler later justifies the distinction based on "the time-honored rule of law in wartime - that all persons residing in an enemy country during hostilities are deemed to be enemies regardless of nationality," *Hamdi IV*, No. 02-7338, 2003 WL 21540768, at *9 (4th Cir. July 9, 2003) (Traxler, C.J., concurring in denial of rehearing *en banc*), citing to *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909), but he goes on to say that not all persons in enemy country are "*in fact* enemies." *Id.* (emphasis in original). Here, the reasoning seems proffered to justify the factual classification of Hamdi's as an enemy combatant, not in support of the President's power to detain such combatants. *Cf. id.* at *16-18 (Luttig, C.J. dissenting from denial of rehearing *en banc*) (criticizing this reasoning). The citation to *Juragua* also suggests that the location of capture was relevant largely to the factual question of whether Hamdi is an enemy combatant. In that case the Court reasoned that property located in Cuba but owned by U.S. citizens was "enemy property" and Judge Traxler cites the case for this proposition. But the Court did not reason that the military could do whatever it wanted with such property, reasoning instead that the military could seize property consistent with the law of nations and military necessity. 212 U.S. at 306, 309-10. Where the panel does offer the overseas capture to justify the constitutional power to detain Hamdi, it cites functional reasoning in support. *Hamdi III*, 316 F.3d at 463 ("the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not"). *See infra* Part IV.

[117] Stacy's assistance to the British forces apparently occurred "within the territory of the King of Great Britain." In re Stacy, 10 Johns. 328, 329 (1813). *See also* Mitchell v. Harmony, 54 U.S. 115, 134 (1851) (upholding a jury verdict against a U.S. army officer in the Mexican American war for trespass against American property located in Mexico and reasoning that army officer's "distance from home, and the duties in which he is engaged, cannot enlarge his power over the property of a citizen, nor give to him, in that respect, any authority which he would not, under similar circumstances, posses at home").

citizens in the United States[118] such as Al Marri, but modern equal protection and due process analysis might prevent the President from making some distinctions based on citizenship.[119] Like the War of 1812 cases, none of the modern detainees are held in anticipation of a military trial. The modern cases conclude that during war[120] the President nonetheless has the power to detain as enemy combatants those U.S. citizens who aid or assist the enemy. The War of 1812 cases reasoned to the contrary.

The modern cases might seem distinguishable in several respects, but the distinctions do not withstand careful scrutiny. First, the military today does enjoy more extensive statutory authorization to court-martial and try people by military commission than it did during the War of 1812.[121] But it is not clear that modern enemy combatants detained in the United States come

[118] Courts have held that non-citizens captured and detained outside the United States do not have the right to sue for their release. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

[119] Katyal & Tribe, *supra* note 12, at 1298; David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002). Full treatment of this issue is beyond the scope of this Article, but it bears noting that the distinction is very much alive and well in cases that deny rights to non-citizens. S*ee, e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); Al Odah v. U.S., 321 F.3d 1134 (D.C.Cir. 2003). It would seem wrong, therefore, to deny protections to citizens on the grounds that citizens and non-citizens must be treated equally.

[120] This Article accepts that the modern conflict is the constitutional equivalent of a declared war. *See infra* note 13.

[121] Examples include 10 U.S.C. §§ 821, 904 and 906. First, 10 U.S.C. § 821 is the current codification of Article 15 of the Articles of War, which provided part of the statutory support for the trials by military commission in *Ex parte Quirin*, *see supra* note 42. Second, 10 US.C. § 904 provides that "[a]ny person who - (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or (2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct." This section has obvious antecedents in the 1806 Articles of war which provided that "[w]hosoever shall be convicted of holding correspondence with, or giving intelligence to the enemy" shall "suffer death" or other punishment ordered by the court-martial. American Articles of War of 1806, *reprinted in* WINTHROP, *supra* note 87, at 981 (articles 55 and 56). These sections appear to apply to anyone, including U.S. civilians. *Id.* (reading the sections this way). Some contemporary commentators argued that they could not apply to American civilians because that would make civil authority subject to military power, signaling "a complete military despotism." MALTBY, *supra* note 83, at 37-40. The defendants in the War of 1812 cases did not rely on these sections of the Articles of War, apparently because they apply only in a very narrowly defined theater of war and the detentions took place outside that theater. WINTHROP, *supra* note 87, at 104 n.30; *see also* Edmund Morgan, *Court-Martial Jurisdiction over Non-Military Persons Under the Articles of War*, 4 MINN. L. REV. 79, 97-107 (1920) (reading the statute to include the same limitation). Finally, *See* 10 U.S.C. § 906 (providing that "[a]ny person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any

within such authorization,[122] and even if the military *does* have the statutory authorization to try the enemy combatants, here they are not detained in anticipation of such trials. Second, although the military's practice of trying people by military commission even absent statutory authorization has grown since the War of 1812, this practice apparently extends only to occupied territory.[123] As a third possible distinction, the current detainees are not formally suspected of

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other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death").

[122] The argument that 10 U.S.C. § 821 (Article 15) authorizes trials by military commission for the modern enemy combatants detained in the U.S. is difficult for several reasons. First, the President himself has *excluded* U.S. citizens such as Padilla and Hamdi from his authorization for the use military tribunals. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Second, particularly with respect to Padilla and Al Marri, it is unclear whether the laws of war apply at all to their alleged conduct. *See* Bradley & Goldsmith, *supra* note 43, at n.37 (putting aside the "complicated legal arguments that might support or deny military commission jurisdiction" over those, like Padilla, who were "not responsible for the September 11 attacks"); *see generally* Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003) (arguing that the laws of war reach those responsible for the September 11 but also noting the difficulties with this argument, and not explicitly analyzing the arguments for such treatment outside the specific context of September 11). Third, it is unclear whether the statute is intended to apply in conflicts short of declared wars. *See* Katyal & Tribe, *supra* note 12, at 1287-88 (arguing that Article 15 does not apply). The arguments that 10 U.S.C. §§ 904 or 906 would provide the authority to try the modern enemy combatants by court-martial have similar difficulties. Section 906 is limited, for example, to the "time of war," and it is unclear whether Congress intended to include undeclared wars in that language. Section 906 also applies only to a limited set of places, such as those found "within the control or jurisdiction of any of the armed forces," it is unclear the when arrested at O'Hara airport, for example, that Padilla was "found" in a place that comes within the language of Section 906. *But cf.* United States v. Wessels McDonald, 265 F. 754 (E.D.N.Y. 1920) (reasoning that the "theater of war" during World War I included the city of New York). Section 904, too, may only apply in declared wars and/or to a limited "theater of war." *See infra* note 122; *but cf.* 1871, 13 Op. Atty. Gen. 470 (reasoning that an earlier version of this statute applied when Indians attacked settlers and the U.S. military responded, but Congress had not declared war). Although the petitioners in *Quirin* were charged with violating both § 906 and § 904, *see* 317 U.S at 23, the Court explicitly refused to decide whether their alleged conduct came within those provisions and if so whether the statute so applied was constitutional. *Id.* at 20; *see also supra* note 123 (discussing § 904 and noting that the early commentators apparently interpreted it very narrowly).

[123] The World War II cases upheld military trials that were explicitly authorized by federal statute. *See* in re Yamashita, 327 U.S. 1 (1946) (upholding trials by military commissions authorized by federal statute); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) (invalidating military trials that lacked congressional authorization); Duncan v. Kahanamoku, 327 U.S. 304 (1946) (same); *cf.* Madsen v. Kinsella, 343 U.S. 341, 348, 354 (1952) (reasoning that in the absence of limits imposed by Congress, the President can create military commissions in territory "occupied by the Armed Forces of the United States," but also suggesting that the statutory authorization for military commissions extended to the commissions formed in occupied territory); Katyal & Tribe, *supra* note 12, at 1266-1293 (arguing that military commissions for citizens and non-citizens alike depend on congressional authorization with the possible exception of trials in occupied territory); *but cf.* Bradley & Goldsmith, *supra* note 43, at 251-254 (maintaining that a "strong argument can be made" that the President has the authority "to establish military commissions to try war crimes violations, even in the absence of affirmative congressional authorization," based in part on dicta from *Quirin* and on language from cases involving occupied territory). This is consistent with the use military tribunals throughout the nation's history, including the Mexican American and Civil Wars: those that

"spying." The reasoning from the War of 1812 cases was not limited to spying, however. It depended instead on the military's lack of authority to try the detainees for any of their conduct, including trading with the enemy and other activity detrimental to the war effort.[124] Finally, perhaps the modern detainees qualify as "combatants" in some sense that the War of 1812 detainees did not. The modern cases suggest, for example, that the "laws of war" enhance the President's authority - an issue discussed in greater detail below.[125] But spies *are* the paradigmatic example of "unlawful combatants," along with guerillas and saboteurs.[126] Thus whether detention is based on status as "unlawful combatants"[127] or just as "enemy combatants,"[128] the War of 1812 detainees appear to qualify as either.[129]

The intervening 190 years have created striking differences in the courts' approach to military detentions of U.S. citizens. The War of 1812 cases reasoned that military necessity did not and could not give the military authority over U.S. citizens where none existed. In the recent cases, on the other hand, the courts have cobbled together deference and function-based

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lacked statutory authorization occurred only in occupied territory. *See* David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 825, 837-849 (1993).

[124] Shaw, for example, was detained for exciting mutiny, engaging in illicit trade, furnishing the enemy with necessities, and "being an enemy's spy in time of war." Smith v. Shaw, 12 Johns. 257, 265 (Sup. Ct. N.Y. 1815).

[125] *Id.*

[126] *Quirin*, 317 U.S. at 30-39.

[127] Padilla v. Bush, 233 F. Supp. 2d 564, 593-96 (S.D.N.Y 2002), *appeal certified by* Padilla v. Rumsfeld, 256 F. Supp. 2d 218 (S.D.N.Y. 2003) (justifying Padilla's detention on the grounds that he is an "unlawful combatant.")

[128] *Hamdi III*, 316 F.3d at 469 (justifying Hamdi's detention on the grounds that he is an "enemy combatant," and rejecting the distinction between lawful and unlawful combatants for the purposes of detention).

[129] *See Quirin* at 30-39 (reasoning that spies violate the laws of war and are unlawful combatants); *see generally*, Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, THE BRITISH Y.B. OF INT'L L. 323 (H. Lauterpacht, Ed. 1951) (disagreeing with Quirin that spies, guerrillas and saboteurs violate international law, but reasoning that international law provides no protection for such combatants).

arguments resting on military necessity,[130] along with vague references to international law,[131] to justify the modern detentions. Such reasoning has led the modern courts to uphold detentions that expand the power of the President in war-time well beyond that approved by the courts in World War II.[132]

The War of 1812 cases show that the President lacks the power to use military detentions of U.S. citizens on his own authority, and that a general authorization for the use of force does not confer such power on the President.[133] The early cases focused in part on the limits of the

[130] *See infra* Part IV.A.

[131] *See infra* Part III.A.

[132] See *supra* Part I.B. and note ___.

[133] One might argue that as a matter of legislative intent, courts today should read a general use of force resolution as authorizing the detention of U.S. citizens as "enemy combatants," even if courts did not do so during the war of 1812. But the cases that the courts appear to cite in support of this reading of the September 13 resolution, do not support this conclusion. As discussed above, *see infra* text at notes ___, *Territo* and *Quirin* involved specific, not general, grants of power by Congress, and *Duncan* struck down the President's actions as lacking specific congressional authorization. Moreover, Congress has continued to display particular concern with respect to the detention of U.S. citizens by passing a statute in 1971 that reads: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001.
The purpose of the legislation was (1) to "restrict imprisonment or other detention of citizens of the United States to situations in which statutory authority for their incarceration exists" and (2) to "repeal the Emergency Detention Act of 1950 which both authorized the establishment of detention camps and imposes certain conditions on their use." House Rep. No. 92-116, April 6, 1971. The *Hamdi* and *Padilla* opinions concluded that the 2001 Joint Resolution was an "Act of Congress" within the meaning of § 4001. The legislative history of § 4001 seriously undermines this conclusion. An early version of the bill would have provided that "no citizen of the United State may be detained in any facility except in conformity with the procedures and provisions of title 18."[133] The Committee replaced the phrase "in conformity with the procedures of title 18" with the phrase "pursuant to an Act of Congress" because the former phrasing failed to take into account the provisions of title 21 (narcotics crimes), title 26 (IRS violations), title 50 (Secret Service violations), title 49 (aircraft hijacking, carrying explosives aboard aircraft and related crimes) and "other title involving confinement of persons convicted of Federal crimes." Thus, although the Committee was specifically concerned with national security and wartime security (proponents of § 4001 cited to the interment of the Japanese during World War II), the purpose of the phrase "Act of Congress" was to permit detention pursuant to ***criminal statutes other than those included in title 18*** or other similar *specific* authorization. It had nothing to do with general declarations of war or authorization for the use of force. Notice, too, that the word "in any facility" which apparently modified the word "detained" in the early version, did not make it into the final bill. Section 4001 was meant, therefore, to apply broadly to *any detention* by the United States, not just any criminal detention or any detention in a "facility." The *Hamdi* court reasoned, however, that with § 4001, Congress could not have intended to overrule "the longstanding rule that an armed and hostile American citizen capture on the battlefield during wartime may be treated like the enemy combatant that he is." The opinion provides no authority for this "longstanding rule" save an earlier citation to *Quirin*. As we have seen, however, *Quirin* held only that where Congress has authorized a military tribunal to try those who violate the "law of war" and a U.S. citizen has violated the "law of war," the citizen may be tried by a military tribunal. *Quirin* made no holding with respect to presidential

military's power to court-martial as limiting its power to detain U.S. citizens.[134] Because the power to court martial was regulated by federal statute, this reasoning at least suggests that *specific* congressional authorization might have legitimated the detentions, although the declaration of war itself did not. Requiring, as a constitutional minimum[135], specific authorization by Congress for the detention of enemy combatants would be consistent not only with Justice Jackson's famous concurring opinion in *Youngstown*[136] over a century later, which emphasized the importance of congressional authorization in determining the scope of the President's powers, but also with the other major Supreme Court cases from both before and after the War of 1812.[137] For all these reasons, modern courts should refuse to permit the long-

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actions not authorized by Congress, and no holding with respect to detention outside the context of military tribunals.

[134] *See, e.g.*, Smith v. Shaw, 12 Johns. 257, 266-67 (1815) (reasoning that the military officials were trespassers because Shaw was not triable by court-martial); *id*. at 268-69 (Spencer, J. dissenting) (arguing in part that the Articles of War required Smith to detain Shaw and that Smith lacked the power under those Articles to dismiss Shaw).

[135] There may be other constitutional problems with military detentions, even if they were authorized by federal statute. The point here is not that all such detentions are constitutional, but instead that these detentions are unconstitutional in part because they lack congressional authorization, and they violate and/or lack sanction from international law.

[136] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J. concurring).

[137] *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 178-9 (1804) (holding that the President exceeded his statutory authority to make maritime captures); Brown v. The United States, 12 U.S. 110, 121 (1814) (holding that the President lacked the power to confiscate certain property absent specific congressional authorization); The Prize Cases, 67 U.S. 635, 671 (1862) (reasoning that because Congress had retroactively blessed the forfeitures the Court did not have to decide whether such act was "necessary under the circumstances"); Ex parte Milligan, 71 U.S. 2 (1866) (granting habeas relief to petitioner whose trial by military commission during the Civil War violated an Act of Congress); The Paquete Habana, 175 U.S. 677 (1900) (invalidating President's seizure of property where seizure lacked explicit statutory authorization and violated the law of nations); Ex parte Quirin, 317 U.S. 1 (1942) (denying habeas relief where trial by military commission was specifically authorized by federal statute); Hirabayashi v. U.S., 320 U.S. 81 (1943) (upholding conviction of American citizen of Japanese ancestry of violating an Act of Congress that made it a misdemeanor knowingly to disregard restrictions authorized by an Executive Order of the President); Korematsu v. U.S., 323 U.S. 214, 217-218 (1944) (reasoning that "we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did"); Duncan v. Kahanamoku, 327 U.S. 304 (1946) (granting habeas relief to civilians tried by military commissions that exceeded congressional authorization); In re Yamashita, 327 U.S. 1 (1946) (denying habeas relief where trial by military commission was specifically authorized by federal statute); Madsen v. Kinsella, 343 U.S. 341 (1952) (denying habeas relief where statute arguably failed to specifically authorize trial by military commission but President's authority was supported by legislative history and law of nations); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (needing no explanatory note).

term detention of U.S. citizens, except perhaps with explicit authorization from Congress, and, as the next section details, when such detentions comport with international law.

III. Enemy Combatants, International Law, and *The Emulous*

The War of 1812 jurisprudence also sheds light on the role that international law can play in constitutional interpretation. The modern enemy combatant cases all rely on international law in evaluating the constitutionality of the detentions, but only as an argument to justify the President's exercise of power. As discussed above, for example, the courts have relied on *Quirin's* analysis of international law to conclude both that enemy combatants may be detained and that citizenship is irrelevant to such detentions.[138] Thus when Padilla and Hamdi claimed that as U.S. citizens they could not be detained, the courts rejected this distinction by relying on international law.[139] Two of the opinions use international law to verify the purposes of the detention as military rather than criminal,[140] although the Fourth Circuit sometimes appears hesitant to acknowledge its reliance on international law.[141] In *Hamdi III*, this analysis helped

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[138] *See supra* Part I.B. The district court in *Padilla* relied in part on international law to conclude that the no formal declaration of war was necessary to trigger the President's Commander in Chief powers. 233 F. Supp. 2d at 594. The *Padilla* opinion also includes a long discussion of the distinction between lawful and unlawful combatants. *Id.* at 590-93. Although not entirely clear, the opinion appears to reason that because Padilla is an unlawful combatant the protections of the Geneva Conventions do not apply to him. *Id.* at 592-3, 596. This analysis therefore appears to construe a Treaty, not the Constitution itself.

[139] *See supra* Part I.B.

[140] *Hamdi III*, 316 F.3d at 465; Padilla v. Bush, 233 F. Supp. 2d at 592 (using this reasoning to interpret the scope of the Geneva Convention); *see also* In re Territo, 156 F.2d 142, 145 (9th Cir. 1946).

[141] *Hamdi III* cites two sources for proposition that detaining enemy combatants serves "vital purposes." 316 F.3d at 465. First, it cites a statement from *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) for which the *Territo* opinion gives no direct authority, although the same paragraph cites to *Quirin's* interpretation of international law and to several works of international law. Second, *Hamdi III* quotes from Winthrop, s*upra* note 87. In the quoted passage, Winthrop discusses the modern law of war. *Hamdi III* fails to note the language it *quotes* from Winthrop is itself a direct quote from the writing of Francis Lieber, one of the most important figures in the development of the modern law of war. S*ee* Theodor Meron, *Francis Lieber's Code And Principles Of Humanity*, 36 COLUM. J. TRANSNAT'L L.

the Fourth Circuit reach its conclusion that Hamdi's detention "bears the closest imaginable connection to the President's constitutional responsibilities during the actual conduct of hostilities."[142] Judge Traxler relied on international law to justify the distinction between American citizens captured at home and those captured in the territory of a hostile country.[143] Judge Wilkinson even offered international law as the lead argument in his most recent defense of the detentions in *Hamdi IV*: "Hamdi is being held according to the time-honored laws and customs of war."[144]

But Hamdi's detention actually violates international law. The Fourth Circuit acknowledged this point in *Hamdi III*, but then dismissed it as irrelevant.[145] Hamdi was, according to the government, captured while fighting for the Taliban[146] and might qualify as a Prisoner of War ("POW").[147] The U.S. government has acknowledged that the Geneva

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269, 279-80 (1997). Immediately following this sentence, Winthrop includes a long quotation in French to make the same point.

[142] 316 F.3d at 466.

[143] *Hamdi IV*, No. 02-7338, 2003 WL 21540768, at *9 (4th Cir. July 9, 2003) (Traxler, C.J., concurring in denial of rehearing *en banc*).

[144] *Hamdi IV*, No. 02-7338, 2003 WL 21540768, at *1 (4th Cir. July 9, 2003) (Wilkinson C.J., concurring in denial of rehearing *en banc*); *see also Hamdi III*, 316 F.3d at 474 ("He is being held as an enemy combatant pursuant to the well-established laws and customs of war.") The district court opinion in *Hamdi* discussed international law, but the purpose of that discussion is not clear. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 530-531, 532 (E.D.Va. 2002), *rev'd by* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

[145] 316 F.3d at 468-69.

[146] *Hamdi III*, 316 F.3d at 461 ("While serving with the Taliban in the wake of September 11, he was captured when his Taliban unit surrendered to Northern Alliance forces with which it had been engaged in battle.") The opinions of the Judges who dissented from the denial of rehearing *en banc* challenged the panel's characterization of the evidence. *Hamdi IV*, No. 02-7338, 2003 WL 21540768, *15-20 (July 9, 2003, 4th Cir.) (Luttig, J., dissenting from denial of rehearing *en banc*); *id* at *30-33 (Motz, C.J., dissenting from denial of rehearing *en banc*).

[147] *Hamdi III*, 316 F.3d at 468-9. The Third Geneva Convention provides extensive protections to prisoners of war, but limits that status to those who meet certain well-known criteria, such as "members of the armed forces of a Party to the conflict," or those who carry arms openly, wear a "fixed distinctive sign recognizable at a distance," and meet other requirements. *See* Ruth Wedgwood, *Agora: Military Commissions: Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328 (2002) (discussing whether Taliban and al-Qaeda detainees are prisoners of

Conventions apply to the conflict against Afghanistan in which Hamdi was allegedly engaged.[148] As Hamdi pointed out to the Fourth Circuit, the Third Geneva Convention[149] provides for a status determination "by a competent tribunal" when "any doubt arises" as to whether a prisoner qualifies for protected status, and further provides that prisoner of war protections apply until such status determination takes place.[150] Although it is true that as a POW (if he so qualified) Hamdi could still be detained, the terms of that detention would be regulated by the detailed prescriptions of the Conventions; indeed, to provide such protections to POWs is the point of the Convention.

The Fourth Circuit did not even suggest that the "competent tribunal" requirement of the Third Geneva Convention had been satisfied.[151] Instead it reasoned that this aspect of the

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war); Sean D. Murphy, *Decision not to Regard Persons Detained in Afghanistan as POWS*, 96 AM. J. INT'L L. 475 (2002) (same).

[148] The Bush Administration maintains that the Geneva Conventions apply to the conflict against Afghanistan and the Taliban, but not to "armed conflict in Afghanistan and elsewhere between al Qaeda and the United States." *See* George H. Aldrich, *Editorial Comment: The Taliban, al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 891-92 (2002) (quoting Ari Fleischer, Special White House Announcement, Feb. 7, 2002). Both Afghanistan and the United States are High Contracting Parties to the Geneva Conventions, so the conflict against Afghanistan and the Taliban appears to come within Common Article 2 of the Geneva Conventions. *Id*.

[149] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

[150] Geneva Convention III, *supra* note 148, art. 5; *Hamdi III*, 316 F.3d at 468-69.

[151] The Fourth Circuit could have reasoned that the U.S. complied with Article 5 of the Third Geneva Convention because there is no doubt as to Hamdi's status - but it did not even suggest such compliance. Moreover, this conclusion seems implausible. The U.S. armed forces have traditionally construed Article 5 broadly. *See* Murphy, *supra* note 146, at 476-7 (2002). The Inter-American Human Rights Commission ("Commission") and the International Committee of the Red Cross ("ICRC") have both concluded that all those detained whether affiliated with the Taliban or al-Qaida must be considered prisoners of war until a competent tribunal decides otherwise. *See* Letter from Juan E. Mendez, President, Inter-American Human Rights Commission, Re "Detainees In Guantanamo Bay, Cuba, Request For Precautionary Measures" (March 13, 2002), *available at* <http:// www.humanrightsnow.org>; Murphy, *supra* note 146, at 479 (quoting ICRC spokesperson and press release); *see also* Richard J. Wilson, *United States Detainees at Guantanamo Bay: the Inter-American Commission on Human Rights Responds to a "Legal Black Hol*e," 10-Spg. HUM. RTS. 2 (2003) (characterizing as the "core" of the Commission's ruling the conclusion that the U.S. executive branch is "not entitled to unilateral and unreviewable designation" of detainees as "unlawful combatants under international humanitarian law," and arguing that detainees such as Hamdi and Padilla "must be designated as civilians, combatants, or criminals rather than lumped into a single composite group of unlawful combatants by presidential fiat"); *see* Aldrich, *supra* note 148, at 891-92

Convention is not self-executing.[152] Non self-executing treaties are not domestic law until Congress passes legislation implementing them; self-executing treaties, on the other hand, are the "law of the United States" and thus preempt state law and give rise to the jurisdiction of the federal courts, even absent implementing legislation.[153]

The interesting question from *Hamdi III*, however, is not whether this section of the Third Geneva Convention is directly incorporated into U.S domestic law, but whether the terms of that Convention are potentially relevant to a court's interpretation of the Constitution and the power it grants to the President.[154] The *Hamdi* opinions used international law as a source of constitutional interpretation without regard to its formal status as federal law when such reliance

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(explaining why the Taliban do not categorically lack entitlement to POW status); Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War: The Law and Politics of Labels*, 36 CORNELL INT'L L. J. 59, 67-8, 87-88 (2003) (reasoning that both al Qaeda and Taliban detainees are entitled to such a tribunal); *cf.* United States v. Lindh, 212 F. Supp. 2d 541, 552-58 (2002) (rejecting the argument that combatant status was a political question but affording the President deference in the interpretation of the Geneva Conventions and concluding that the Taliban did not meet the criteria for lawful combatant immunity).

[152] 316 F.3d at 467; *contra* Jordan Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 514-16 (2003) (arguing that *Hamdi III* erred in concluding that the Third Geneva Convention was not self-executing). One might argue that the Geneva Conventions do not regulate the government's conduct with respect to its own citizens, *see generally* Christopher Greenwood, *Historical Development and Legal Basis, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT § 103, 11 (Dieter Fleck, ed. 1995) ("For the most part, humanitarian law does not attempt to regulate a state's treatment of its own citizens"), but our courts have held Geneva Conventions relevant to the government's treatment of our own citizens---this was, after all, the core holding of *in re Territo*, a case much ballyhooed by the government in support of the detentions. *In re Territo* 156 F.2d at 145 (reasoning that an American citizen caught fighting for Italy could be detained as a prisoner of war under the Geneva Conventions); *see also* Ex parte Quirin, 317 U.S. 1, 34-5 (1942) (holding citizenship irrelevant to determining whether the petitioner's conduct violated the laws of war); United States v. Lindh, 212 F. Supp. 2d 541, 552-58 (2002).

[153] REST. 3RD, RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111(3) ("a non-self-executing agreement will not be given effect as law in the absence of necessary implementation.")

[154] In other words, this section explores the use of international law as a tool of constitutional interpretation. *See* Ralph G. Steinhardt, *The Role Of International Law as a Canon Of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1130-33 (1990) (distinguishing between international law as a rule of decision and as an interpretive device); Curtis A. Bradley, *The Charming Betsy Canon And Separation Of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L. J. 479, 482 (1998) (same)[hereinafter Bradley, *The Charming Betsy Canon*] (same). Although many authors have explored whether the President is bound by international law, particularly customary international law, *see, e.g.*, David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U.J. INT'L L. & POL. 363, 366-67. 378-94 (2003), the question here is whether the courts should use international law to decide whether the Constitution gives the President the power in question.

supported the government's exercise of power. So, for example, when *Hamdi III* reasoned that Hamdi is held "as an enemy combatant pursuant to the well-established laws and customs of wars," it cited nothing but *Quirin*,[155] which relied on a diverse set of international sources, including Great Britain's Manual of Military Law issued by its War Office, a German military manual from 1902, French scholars, Italian military manuals, the 1907 Hague Conventions, and the Rules of Land Warfare issued by the United States Army and others.[156] But these sources are not domestic law in the United States. Why do they serve to strengthen the President's constitutional authority, while violations of international law, even of treaties signed and ratified by the United States, do not weaken that authority?

The *Padilla* litigation raises a similar issue.

A. International law and Constitutional Interpretation: Brown v. United States

The Supreme Court's analysis in a property case from the War of 1812 suggests that international law should not have this heads-I-win-tails-you-lose quality with respect to the President's power under the Constitution.[157] During the spring of 1812, a British company charted *The Emulous*, an American vessel, to transport cargo out of Savannah, Georgia.[158] *The Emulous* landed in New Bedford where the cargo of pine timber was unloaded and secured in a salt water creek and where the ends of the timber may or may not have "rested on the mud" at

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[155] 316 F.3d 450, 475 (4th Cir. 2003).

[156] *Ex parte Quirin*, 317 U.S. 1, 30-34 (1942).

[157] *Cf.* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (asking, in the context of immigration, occupied territory and Indian law, whether "if the government's constitutional *authority* derives from customary international law, should not the authority likewise be limited by customary international law *constraints*?").

[158] Brown v. United States, 12 U.S. 110, 121 (1814).

low tide.[159] After the war began, the cargo was seized by a local U.S. attorney who libeled the property as a prize of war.[160] The owners contested the libel.

The key question for the Court was whether the declaration of war alone gave the Executive Branch the constitutional power to seize this property, or whether Congress had to specifically authorize such seizures.[161] To answer this question, Justice Marshall looked at several factors beginning with a lengthy consideration of international law, apparently including treaties not formally binding on the United States.[162] War, the Court finally concluded based on these sources, "gives the right to confiscate" under international law but does not "of itself vest the property in the belligerent government."[163] The Constitution, Justice Marshall went on, "ought not lightly" be construed "to [give] a declaration of war an effect in this country that it does not possess elsewhere."[164] Justice Marshall also reasoned that the Constitution's grant of

[159] Chief Justice Marshall described the timber as resting on mud at low tide and views it like "other British property found on land." *Id.* at 121-2. Justice Story, however, viewed the property as "afloat" in a U.S. port. The case is unusual in part because Justice Story decided the case when he sat on the Circuit Court and then heard the case again at the Supreme Court. *Id*. at 147 (Story, J. dissenting). The evidence before the Circuit Court agreed that the timber "had always been afloat on tide waters;" the affidavit to the contrary was submitted only after the Circuit Court proceedings. *Id*. at 154. (Story, J. dissenting). The law of nations appears to have permitted immediate confiscation of property at sea as a prize, but not property on land. *Id*. at 119-21; *see also* The Paquete Habana, 175 U.S. 677, 712 (1899).

[160] 12 U.S. at 121.

[161] *Id*. at 122.

[162] Justice Marshall reasoned: "The modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not be immediately confiscated, and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property." *Id.* at 125. Although this passage is without citation, Justice Marshall seems to be referring to a set of treaties cited by the claimant for the same proposition. The first part of the published opinion reproduces arguments for the claimant, including the following: "Articles for the protection and removal of the property of enemies found in this country at the breaking out of a war, are found in our treaties with France, Spain, Holland, Sweden, Prussia, Morocco, England and Algiers. It will not be contended, that the provisions of these treaties, especially that with England, can be binding when the treaties themselves are not in force." *Id.* at 115 (argument of claimant).

[163] *Id.* at 125.

[164] *Id.*; *see also* Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1118 (1985) (discussing *Brown* as holding that "the scope of the President's constitutional war powers should be construed consistently with the law of nations.")

some specific war powers to Congress,[165] in addition to the general power to declare war, shows that the declaration of war itself vests only certain rights in the executive branch, while others depend on congressional authorization. Acts of Congress authorizing proceedings against people and property confirmed this reasoning, the opinion continued.[166] Indeed, Justice Marshall even relied on acts of Congress dealing with prisoners of war to show that the confiscation of property required specific authorization.[167]

This role of international law in the *Brown* opinion effectively flips the logic of *Hamdi III*: in *Brown* the declaration of war gave the executive no power to seize the property unless international law itself acted to transfer ownership; in *Hamdi III*, however, the use of force authorization gave the executive the power to detain unless international law itself formally acted as domestic law to *restrain* the government. In general, *Brown* seems to affirm the use of international law as one consideration in determining the scope of the President's war powers[168] but undermine the view that international law can only function to support the President's power if it is formally incorporated as domestic law.

The dissenting opinion by Justice Story agreed with the majority's analysis in a number of key respects. Most significantly, Story also used international law to construe the scope of the President's constitutional power to confiscate the property. The declaration of war did not itself

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[165] These include the power to grant letters of marque and reprisal and the power to make rules concerning captures on land and water. U.S. CONST. art. 1, § 8.

[166] 12 U.S. at 126.

[167] *Id.*

[168] *Brown* could be read narrowly to justify international law in constitutional interpretation only to the extent that it helps explain what the framer's meant by the text. Part of the opinion supports this reading: "the constitution [sic] of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world." *Id.* at 125.

operate to confiscate the property, Justice Story concurred.[169] But, he reasoned, the President has the power to seize the property after Congress declares war, even absent specific congressional authorization:

> The act of 18th June, 1812, ch 102, is in very general terms, declaring war against Great Britain, and authorizing the president to employ the public forces to carry it into effect. Independent of such express authority, I think that, as the executive of the nation, he must, as an incident of the office, have a right to employ all the usual and customary means acknowledged in war, to carry it into effect. And there being no limitation in the act, it seems to follow that the executive may authorize the capture of all enemies' property, wherever, by the law of nations, it may be lawfully seized.[170]

The majority disagreed that the President could execute the law of war in this way. International law, Justice Marshall repeated, does not act automatically to effect the confiscations, so the declaration of war does not have this effect.[171] Justice Story apparently based his argument on the "take Care"[172] Clause as well as the President's war powers.[173]

Emphasizing the political importance of the confiscation of enemy property, the *Brown* Court concluded that the question is "proper for the consideration of the legislature, not of the

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[169] *Id.* at 149 (Story, J., dissenting).

[170] *Id*. at 145 (Story, J., dissenting). As Professor Henkin notes, it is unclear whether Story uses international law as a direct limitation on executive authority or whether he construes the scope of congressional authorization as consistent with international law. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 387 n.51 (2d ed. 1996).

[171] *Id.* at 128.

[172] U.S. Const. art II., § 3 (giving the President the duty to "take Care that the Laws be faithfully executed").

[173] *Id*. at 149 (Story, J., dissenting) ("[a]ll that I contend for is, that a declaration of war gives a right to confiscate enemies' property and enables the power to whom the execution of the laws and the prosecution of the war are confided, to enforce [the right to confiscate enemy property.") Prof. Glennon correctly notes that *Brown* is not largely about whether the President could violate international law, but he reads the case principally about the President's power under the 'take Care' clause. Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional*?, 80 NW. U. L. REV. 320-23 (1985). In fact, the opinion largely concerns the President's war powers, particularly the war powers that result from a congressional declaration of war. 12 U.S. at 123, 127; *id.* at 145-47 (Story, J., dissenting); *see also* HENKIN, *supra* note 170, at 104 (at "issue was the President's power as Commander in Chief during war").

executive or judiciary."[174] This stands modern functional reasoning on its head. In our day the need for flexibility and concern about international reprisals are advanced to support the power of the President, not Congress. In *Brown*, Justice Marshall's reasoning may have been related to the initiation of the proceedings by a local district attorney and the potential for abuse that this created,[175] but the Attorney General litigated the case through the Supreme Court, and both the dissent and majority reason with respect to executive power as a whole.[176]

B. Brown*: Still Relevant?*

Courts continue to cite *Brown*,[177] but some scholars have questioned the modern relevance of the case,[178] other scholars rely on it,[179] and still others try to relate the case to the

[174] *Id*. at 129.

[175] *Id.* at 117.

[176] The opinion is confusing in several respects. Justice Story, *see infra* note 159, considered the property "afloat" while Justice Marshal views it as "on land." 12 U.S. at 122; *id.* at 150 (Story, J. dissenting). The law of nations apparently forbid seizure of enemy property found in the country at the beginning of the war, but permitted seizure of enemy property coming into the country, and at least according to some British precedent, permitted seizure of enemy vessels found in port at the outbreak of war. Because the dissent viewed the property as afloat, its seizure was therefore permissible under international law. The majority did not reason, however, that the seizure was unconstitutional because it violated international law. Instead, it began with the premise that the seizure must be authorized by law, and then asked if the declaration itself was such a law. Answering no, the court thus concluded that Congress had to make such a law to effect the seizures. Justice Story asks in response, however, why the executive has any power under Justice Marshall's approach to make any seizures absent congressional authorization. That is, the majority appears to concede the executive has the power to seize enemy property abroad or coming into the country after the outset of war, yet there is no statutory authorization for such seizures. *Id.* at 148, 154. Justice Story argues that such seizures are constitutional because they comport with the law of war, a conclusion that Justice Marshall appears to reject, *id.* at 128, but without offering a direct answer to Justice Story's question. Justice Marshall does insist that acts of Congress frequently authorize the President to take actions with respect to persons or property of the enemy found in the U.S., perhaps this reasoning means that with respect to other property not in the U.S., the declaration of war by itself acts to confiscate the property.

[177] *See, e.g.*, Campbell v. Clinton, 203 F.3d 19, 30 (2000); Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 47 F. Supp. 2d 678, (E.D.Va. 1999).

[178] HENKIN, *supra* note 170, at 141; Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 724-25 (1986); David M. Golove, *Against Free-From Formalism*, 73 N.Y.U. L. Rev. 1791, 1942 n.210 (1998).

[179] *See, e.g.*, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1395 (2001); Sean D. Murphy, *Ownership of Sunken Warships*, 94 AM J. INT'L L. 678, 681 (2000); Jordan J. Paust, *The President is Bound by International Law*, 81 AM. J. INT'L L. 377, 379 (1987); Michael J. Glennon, *May the President do no Wrong*?, 80 AM J. INT'L L. 923 (1986).

question of whether the President is bound by international law.[180] Professor Henkin writes that during the Civil War the Supreme Court "in effect" rejected much of Justice Marshall's opinion in *Brown*.[181] Moreover, Henkin notes, the law of war has changed. Far more property is subject to confiscation under modern international law, and several federal statutes now authorize extensive confiscations by the President during war.[182] Courts would probably not interfere today, Henkin argues, if the President seized alien enemy property even absent specific congressional authorization.[183] But none of this undermines *Brown's* use of international law as tool of constitutional interpretation.

More important, perhaps, are possible claims that cases since *Brown* call into question the value of international law in modern constitutional interpretation. Scholars have argued that courts should not apply customary international law[184] as domestic law after *Erie Railroad v.*

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[180] *See, e.g*, REST. 3RD, RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, n.3 (noting that *Brown* is sometimes erroneously cited in the debate about the President's power to supersede international law).

[181] HENKIN, *supra* note 170, at 104. Henkin points to *The Prize Cases*, 67 U.S. 635, 670 (1862) but these cases required the President to comply with international law. *See infra* note 196. He also maintains that a pre-Civil War case, *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851) undermines *Brown* by recognizing the power of military authorities to seize property of U.S. citizens. But *Mitchell*, a fascinating case for functional reasons, involved the extraterritorial seizure of U.S. property in Chihauaha during the Mexican-American war. It does not undermine the holding of *Brown*, which related to enemy property in the United States, and like *Brown* supports a strong role for the *courts* in scrutinizing executive war powers when they impinge on individual rights. The seizure of property was justified in part on the grounds that it was taken out of military necessity in an emergency; this question went to the jury, which rejected the defense. 54 U.S. at 133. The officer argued that he needed to be "intrusted with some discretionary power as to the measures he should adopt," a position the Court rejected, at least with respect to civilian property. *Id*. at 134.

[182] *Id*. (citing The Trading With the Enemy Act of 1917, ch. 106, 40 Stat. 411 and the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 (1988 & Supp. V. 1993)).

[183] *Id*.

[184] Customary international law results from "a general and consistent practice of states followed by them from a sense of legal obligation." REST. 3RD, RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2). International agreements such as treaties are the other principle source of international law.

Tompkins.[185] By rejecting "general common law," some argue, *Erie* prevents courts from applying customary international law as domestic law.[186] Much of that debate is irrelevant here because, as an interpretive norm, international law does not stand alone as federal law, and neither has the power to preempt state or prior inconsistent federal law, nor the power to provide federal court jurisdiction.[187] And even if some criticisms of customary international law might apply to its use in interpretation,[188] the detention of Hamdi violates the Third Geneva Convention, which is not customary international law but instead a treaty. Thus although application of customary international law by the courts is sometimes criticized as anti-democratic[189] or irrelevant to the U.S. Constitution,[190] the treaty at issue here was signed by the

[185] 304 U.S. 64 (1938).

[186] The current debate centers on whether customary international can be applied by courts as some species of modern federal common law. *See* Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 366-463 (2002) (describing and evaluating this debate).

[187] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law is not federal common law and thus does not preempt state law under the Supremacy Clause, does not provide a basis for the jurisdiction of the federal courts, and cannot bind the President or Congress). Although critics object when federal courts engage in lawmaking by applying customary international law, *id.* 855-59, here it is the President that seeks to have domestic legal effect outside the constitutional procedures for making federal law (either by treaty or through legislation).

[188] *See* Bradley, *The Charming Betsy Canon supra* note 154, at 520-24 (arguing that changes in the nature of customary international law undermine its traditional usefulness as a tool of statutory interpretation).

[189] *See* Young, *supra* note 186, at 398-400 (describing this view, based in part on the argument that because customary international law is diffuse and its sources somewhat unclear, judges have a great deal of discretion in applying it, leading to claims that they use it to advance their own preferences); *see also* Bradley, *The Charming Betsy Canon*, *supra* note 154, at 524 (applying similar argument to certain uses of customary international law as an interpretive norm); *but see* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 384 (1997) (countering in part that the federal government participates in the formation of customary international law).

[190] *See, e.g.*, Stanford v. Kennedy, 492 U.S. 361, 370 n.1 (1989) (reasoning with respect to the Eighth Amendment that it is "American conceptions of decency that are dispositive"); Foster v. Florida, 123 S.Ct. 470 (2002) (Thomas, J., concurring in denial of certiorari) ("This Court ... should not impose foreign moods, fads, or fashions on Americans"); *contra* Lawrence v. Texas, 2003 WL 21467086 (June 26, 2003) (overruling *Bowers v. Hardwick* and noting that "to the extent Bowers relied on values shared with a wider civilization, the case's reasoning and holding have been rejected by the European Court of Human Rights" and "that other nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct"); *see generally*, Young *supra* note 186, at 398-99.

President and ratified by the Senate.[191] The Executive Branch continues to affirm its commitment to international humanitarian law,[192] answering any potential claim that the Conventions as a general matter no longer reflect the views of the United States.[193] Finally, using the treaty provisions as interpretive norms does not make them into freestanding federal law; the fact that the political branches may not have intended the Treaties as self-executing thus does not prevent the courts from using them as an interpretive norm.[194]

The continuing vitality of at least some aspects of *Brown* is also confirmed by the courts' ongoing use of international law in determining the President's constitutional authority during

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[191] U.S. CONST. art. 2, § 2.

[192] As W. Hays Parks, Special Assistant to the Army JAG, commented at a DOD briefing on April 7, 2003: "Let me talk a little bit about DOD policies and the conflict in Iraq. The United States and coalition forces conduct all operations in compliance with the law of war. No nation devotes more resources to training and compliance with the laws of war than the United States. U.S. and coalition forces have planned for the protection and proper treatment of Iraqi prisoners of war under each of the Geneva conventions I have identified. These plans are integrated into current operations." http://www.defenselink.mil/news/Apr2003/t04072003_t407genv.html. The term "international humanitarian law" denotes the laws of war particularly geared toward limiting human suffering after war has already begun. *See* JANIS, *supra* note 14, at 180-182.

[193] *See* Bradley, *The Charming Betsy Canon, supra* note 154, at 520-23 (arguing that "the empirical claims that the political branches wish to comply with international law may be particularly suspect in this context of the new customary international law"). This point has the most importance when courts use international law as tool for gauging congressional intent, the traditional basis for applying *The Charming Betsy* canon to the interpretation of statutes. Congressional intent is of course also relevant to constitutional interpretation. *See infra* note 135.

[194] Issues of treaty interpretation may complicate this analysis. If the President has "unilateral freedom to interpret and reinterpret treaties," *see* John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 868 (2001), then how could courts interpret treaties to counter the President's exercise of war powers? Even critics of Professor Yoo's position argue that it may have some force with respect to treaties that are not self-executing, Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1267, 1271 (2002), in part because "their essential nature involved sovereign actors defining their own obligations to entities external to their own legal systems." *Id*. at 1270; *see also* Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998). Here, however it is important to distinguish between two issues 1) the substantive content of treaty terms; and 2) the extent to which courts can use that substantive content to construe the President's war powers. This article is primarily directed at the second issue, although if the President has the sole power to determine the first issue, that power limits the importance of the second issue. But even if, as Professor Yoo argues, the courts are limited by Article II in their interpretation of treaties, Article III nevertheless empowers courts to consider the constitutionality of President's detentions, and question here is what deference to afford the President's interpretation of the Treaty in this context.

war. In the *Prize Cases*,[195] a major victory for the President Lincoln at the outset of the Civil War, the Court upheld the President's power to institute a blockade even without a formal declaration of war by Congress, but ordered property relinquished that was seized in violation of international law.[196] After the Civil War the Supreme Court relied in part on international law to determine the authority of federal military officials in occupied New Orleans to lease city property for ten years - a period extending far longer than military rule itself.[197] The plurality opinion reasoned that as the "conquering power" the U.S. military had enjoyed all the powers that sovereign nations generally enjoy in conquered territory, limited only by the "laws and

[195] 67 U.S. 635, 670.

[196] *Id*. at 674-82. The Court carefully evaluated each vessel and its cargo to determine whether its seizure was authorized by the law of war. With respect to certain cargo -- thirty tierces of tobacco strips -- the Court ordered the property restored to its owner. A tierce is a cask larger than a barrel and smaller than puncheon. WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913). In one respect, however, the case was not really about constitutional power. The President appears to have agreed with the claimants that the law of war governed the seizures; the April 19, 1861 Proclamation authorizing the blockade did so "in pursuance of the laws of the United States, and the law of Nations." Abraham Lincoln, Proclamation of Blockade Against Southern Ports, April 19, 1861, *id*. at 684; *see also id.* at 650 (reproducing parts of the argument for the United States, in which counsel discusses law of prize as applying to the case). The laws of war to this extent just supplied the rules that the parties agreed applied to the capture. Nevertheless, the majority and dissent both rely on international law to determine whether the President had the constitutional power to initiate the blockades at all. 67 U.S. at 667–70; *id* at 687-90 (Nelson, J., dissenting). One could argue that even the constitutional question depended on international law in a way that is not true of other constitutional issues. That is, the only relevant question in a narrow sense was whether a state of war existed that made the blockade permissible under international law. Thus the Court's resort to international law might be *sui genesis*—or at least confined to cases in which "war" as understood in *international law*, is conceded to trigger certain powers of the President cognizable in U.S. courts. But the parties and the Court used international law to decide whether the President or Congress had the power trigger this type of "war." The dissent, for example, reasoned that war in a "legal" sense under both the law of nations and the Constitution is more than "organized hostilities," and that some formal act or announcement was necessary to convert an insurrection into a civil war, in part because of the legal consequences in international law that result from a formal war. *Id.* at 687-9 (Nelson, J., dissenting). The majority rejected this argument on the grounds that the law of nations "contains no such anomalous doctrine" that "a war levied on the Government by traitors, in order to dismember and destroy it, is not a *war* because it is an 'insurrection.'" *Id*. at 670.

[197] New Orleans v. The Steamship Co., 87 U.S. 387 (1874); s*ee also* Cross v. Harrison, 57 U.S. (16 How.) 164 (1854) (using international law to construe the scope of the President's war powers in occupied territory); *cf.* Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 NW. U. L. REV. 581, 58 (2001) (discussing *Cross* and reasoning that "[u]nder universally established principles of international law, the successful occupation entitled the United States to set up a provisional military government in California" and that "the Commander-in-Chief power clearly entails the power to wage war in accordance with governing international norms").

usages of war,"[198] and both the concurring and dissenting opinions countered that under the laws of war, lease of property belonging to the conquered state had no validity beyond the occupation itself.[199] During the Spanish American War, the Court relied on international law to invalidate the government's capture of Cuban fishing vessels. The case raised difficult questions about the scope of presidential and congressional authorizations for the seizures,[200] and the Court relied on international law to hold for the claimants.

Finally, in *Quirin* itself the Court used international law both because the Articles of War incorporated it and to test the outer limits of the federal government's war powers. The Court, as we have seen, first concluded that the charges against the petitioners came within the laws of war, meeting the requirements of the statute.[201] But was the statute, so applied, constitutional?[202] The Court reasoned that the petitioners were charged with violating the laws of war and that legislation dating back to the Continental Congress permitted trial by military commissions of *alien spies* "according to the law and usage of nations."[203] Reading this statutory enactment as a

[198] 87 U.S. at 393-94 (Wayne, J. plurality opinion).

[199] *Id.* at 396-398 (Hunt, J. concurring) (citing Halleck and other international law authorities for the proposition that "contracts or agreements" concluded by the occupying power "continue only so long as he retains control of them"); *id.* at 401-03 (Field, J. dissenting) (same). The concurrence concluded that although the military authority lacked the power to make such a lease, the City had ratified the lease after civilian authority was restored.

[200] The Paquete Habana, 175 U.S. 677 (1900). Although the *Paquete Habana* is frequently cited in the long-standing debate about whether the President is formally bound by international law, *see e.g.*, Glennon, *supra* note 174, at 322, the issue here is not whether courts should force the Executive Branch to comply with international law, but is instead whether the courts should use international law to determine the limits of the President's constitutional authority. In the *Paquete Habana*, Congress had specifically recognized that the people of Cuba were "free and independent" only five days before declaring war and the claimants appear to have argued that Congress had not contemplated the seizure of *Cuban* vessels when it authorized war against Spain. The President pointed out that the vessels flew the Spanish flag, while the claimants argued that this was not "determinative." The President also argued that "a constitutionally-based power of the executive was at stake." Jordan J. Paust, *Paquete and The President: Rediscovering The Brief For The United States*, 34 VA. J. INT'L L. 987 n.22, n.24 (1994).

[201] 317 U.S. 1, 29-37 (1942).

[202] *Id.* at 29, 38-46.

[203] 317 U.S. at 41 (emphasis added).

"contemporary construction" of the Constitution, the Court reasoned that under "the original statute authorizing trial of alien spies by military tribunals" the offenders "were outside the constitutional guaranty of trial by jury, *not because they were aliens but because they had violated the laws of war*…."[204] The Court did not cite any support for this proposition, but went on to hold the trials by military commission, including those of U.S. citizens, constitutional, because they charged the petitioners with violating the laws of war.[205] Although the Court apparently did not view the government's authority under the war powers to try by military commission as entirely coextensive with the laws of war,[206] it held the trials in question constitutional in large part because they involved offenses against these laws.[207]

These cases suggest that international law has some role in interpreting the Constitution's war powers,[208] although they obviously do not fully explain why and how. Some forms of

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[204] *Id.* (emphasis added).

[205] *Id*. at 41-44. An August 21, 1776 Resolution of the Continental Congress provided that "all persons, not member of, nor owing allegiance to, any of the United States of American * * * who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a court-martial, or such other punishment as such court-martial shall direct." WINTHROP, *supra* note 87, at 765 (2nd ed. 1920).

[206] *Id.* at 29, 46 (assuming that there are acts regarded by some as offenses against the law of war which would not be triable by military commission here and concluding that "[w]e hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission").

[207] George Rutherglen, *Structural Uncertainty over Habeas Corpus & the Jurisdiction of Military Tribunals*, 5 GREEN BAG 2D 397, 401 (2002) (pointing out that "[t]he single fact that distinguishes *Quirin* from *Milligan* concerns the evidence that the prisoners had violated the laws of war"). In *Ex parte Milligan*, 71 U.S. 2 (1866) the Court had struck down the trial of civilians by military commission.

[208] Commentators have argued that international law may help interpret the Constitution in other contexts, *see, e.g*, Edward Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 463, 468-493 (2003) (international law and the Treaty power); Tobias Barrington Wolff, *The Thirteenth Amendment And Slavery In The Global Economy*, 102 COLUM. L. REV. 973, 1043 (2002) (considering whether a proposed application of the Thirteenth Amendment is consistent with international law); Jordan J. Paust, *Rereading The First Amendment in Light of Treaties Proscribing Incitement to Racial Discrimination or Hostility*, 43 RUTGERS L. REV. 565 (1991) (international law and the First Amendment); Gordon Christenson, *Using International Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983) (international law and Due Process and Equal Protection); Student Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751 (2003) (international law and Indian law), and some have suggested such a role in war powers context.

international law might be relevant as a tool for interpreting the scope of a general authorization for the use of force by Congress,[209] or as a more general tool of constitutional interpretation.[210] At a minimum, however, if the *Hamdi* opinions were correct to rely on compliance with "time-honored laws and customs of war" to bolster the President's constitutional authority, it seems that violations of those very same laws and customs of war detract from his constitutional authority, at least (as here) when those laws and customs are incorporated into the Geneva Conventions. International law, as the cases above illustrate, serves not just to sanction an expansion of federal authority and not just as general support for the powers inherent in sovereignty,[211] but as one tool to limit the President's war powers. This reasoning is relevant in

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Professor Quincy wrote in 1969 that the fields "such as seizures of private property and problems dealt with by prize courts and military commissions" the judiciary has "been able to limit presidential discretion by international law." Quincy Wright, *The Power of the Executive to use Military Forces Abroad*, 10 VA. J. INT'L L. 43, 56 (1969). Professors Katyal and Tribe recently noted without much discussion that as Commander in Chief the President has the power to detain enemy combatants "in the theater of war" at least "within the laws of war and other applicable rules of international law." Katyal & Tribe, *supra* note 12, at 1270; *see also* Lawson & Seidman, *supra* note 197, at 58 (2001) (noting that "the Commander-in-Chief power clearly entails the power to wage war in accordance with governing international norms").

[209] This interpretive method might find support in *The Charming Betsy* canon, based on Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804), which provides that where "fairly possible" courts will construe statutes so as to avoid conflict with "international law or with an international agreement of the United States." REST. 3RD, RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114. Some commentators have mentioned application of *The Charming Betsy* canon to constitutional interpretation. *See* Jules Lobel, *supra* note 164, at 1120 (reasoning that *The Charming Betsy* canon applies to judicial construction of the President's power in the face of congressional silence and that "[c]ongressional approval is implicit where the executive actions conform to international law"); *contra* Curtis A. Bradley, *The Juvenile Death Penalty*, 52 DUKE L.J. 485, 555-6 (2002) (noting that *The Charming Betsy* canon should not apply to constitutional interpretation, particularly in the Eighth Amendment context).

[210] Apparently the term "declare War" as used in the Constitution was "a term of art from the law of nations" with a "well-established meaning" when the framers used it. Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903, 907 (1994); *see also* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1569-90 (2002) (examining uses of the phrase "declare war" in eighteenth century international law); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L. J. 231, 269-72 (2001) (relying on European authors on the laws of nations to construe the scope of the "executive Power" vested in the President).

[211] Other cases do at times use international law to advance a theory of extra-constitutional powers over occupied territory. In *Dooley v. United States*, 182 U.S. 222 (1901), for example, the Court reasoned the actions of the military prior to ratification of the peace treaty were "fully justified by the laws of war" and "[w]e therefore do not look to the Constitution or political institutions of the conqueror for authority to establish a government for the territory of the enemy in his possession." *Id.* at 230-231. The case held that the President as Commander in Chief

a number of other war powers contexts,[212] including the President's proposal to try some detainees by military commission.[213]

To summarize briefly, cases from the War of 1812 have helped make several vitally important points about the modern detention of enemy combatants. First, the early cases reasoned that the military simply lacked the authority to detain U.S. citizens like Padilla, and they did so for reasons that find affirmation even in *Ex parte Quirin*, the very case proffered as proof-certain that the detentions are constitutional. Second, the *Brown* case shows international law playing an interpretive role with respect to executive war powers under the Constitution, a

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did not have the power to tax imports from the U.S. into Puerto Rico after ratification of the peace treaty but before the Foker Act took effect. *See generally*, Cleveland, *supra* note 157, at 163-250 (discussing congressional and presidential authority over territories, including the role of international law in these cases).

[212] Commentators have argued that the detentions may violate international law in many other ways as well. *See, e.g.*, Laura Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002) (arguing that the detentions may violate the International Covenant on Civil and Political Rights and other provisions of the Geneva Conventions); Paust, *supra* note 152, at 505-14 (same).

[213] Although some may take place abroad, outside the current scope of federal habeas review, the government has often suggested that if the criminal trial against Zacarias Moussaoui does not go well for prosecutors, the Bush administration may move the trial from a civilian court to a military tribunal. "Government Wants Ruling on Moussaoui," Washington Post.com, July 1, 2003, *available at* www.washingtonpost.com/wp-dyn/ articles/A60127-2003Jul1.html. If so, questions about the constitutionality of the trial by military commission could depend at least in part on the status of such trials under international law. The scholarship on the proposed military tribunals is already extensive. *See, e.g.,* Turley, *Tribunals and Tribulations*, *supra* note 36, at 749-65 (considering proposed tribunals under both the Constitution and international law); Bradley & Goldsmith, *supra* note 43 (defending legality of the commissions); Kenneth Anderson, *What To Do With Bin Laden And Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591 (2002) (offering a limited defense of commissions under the Constitution and international law); Katyal & Tribe, *supra* note 12, at 1266-1308 (arguing that military commissions need specific statutory approval outside of occupied territory); Alfred P. Rubin, *Applying the Geneva Conventions: Military Commissions, Armed Conflict, and Al-Qaeda*, 26 FLETCHER F. WORLD AFF. 79 (2002) (noting constitutional difficulties with the military commissions and arguing that the prisoners ought to be detained as prisoners of war instead); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002) (arguing that military commissions undermine separation of powers); Christopher Bryant & Carl Tobias, Youngstown *Revisited*, 29 HAST. CONST. L.Q. 373 (2002) (arguing that the Executive Order authorizing military commissions is unconstitutional to the extent that it purports to preclude access to the federal courts); Gerald Clark, *Military Tribunals and the Separation of Powers*, 63 U. PITT. L. REV. 837 (2002) (describing separation of powers problems raised by the tribunals); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001) (discussing limitations on the use of military tribunals under constitutional and international law); Christopher Evans, Note, *Terrorism on Trial: The President's Constitutional Authority To Order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831 (2002) (arguing that military commissions are constitutional but violate international law).

point confirmed once again by *Ex parte Quirin* and indeed even in the enemy combatant opinions themselves. Because Hamdi's current detention violates international law, courts should treat with greater suspicion the claim that his detention comes within the President's war powers. Finally, these cases show that at least during the War of 1812, deference and function-based arguments did not prevent judicial review of the President's war time actions. Part IV takes up this issue in the context of General Andrew Jackson's military rule in New Orleans at the tail end of the war.

IV. Institutional Role of Courts

Cases from the War of 1812 also provide a counterpoint to the deference-based reasoning that permeates the modern enemy combatant opinions. First, these early cases show both that such reasoning is pliable and that it is not an inevitable concomitant to judicial evaluation of the President's war time authority. Second, cases generated by General Jackson's military rule in New Orleans show that by denying the President the military power he seeks, the courts actually return the issue back to the "political branches." The courts' denial of authority does not prevent the military from acting, but it does impose greater political costs on the President by forcing him to either seek explicit authorization from Congress or to defy the ruling of the courts.[214]

A. Enemy Combatant Cases

The recent enemy combatant cases rely heavily on deference-based arguments, grounded nominally on constitutional text and, to a greater degree, on functional reasoning. This deference extends to the constitutional question of whether the President has the power to detain U.S.

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[214] *Cf.* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1058-64, 1096-1102 (2003) (criticizing legal accommodation in times of violent crises and proposing as an alternative an "Extra Legal Measures Model" in which actors act outside legal norms and then seek political validation of their actions).

citizens as "enemy combatants" and also to the factual question of whether the detainees actually are such combatants.[215]

Textual arguments play a decidedly secondary role in the enemy combatant cases. The *Padilla* opinions rarely mention the text of the Constitution at all, relying instead on *Quirin*.[216] The *Hamdi* opinions list seriatim the war-related powers conferred on Congress by Article I and on the President by Article II of the Constitution,[217] and then state that these powers include "the authority to detain those captured in armed struggle."[218] *Hamdi III* further reasons that Article III, which governs the judicial power of United States, contains "nothing analogous" to these Article I and II powers, and therefore the courts must give "great deference" to the "political branches" "in accordance with this constitutional text."[219] This textual reasoning is strikingly weak. Article III mentions nothing about taxes, bankruptcy, or commerce among the several states, yet the courts are not required to give "great deference" in cases raising these issues.[220]

[215] *Hamdi II*, 296 F.3d at 281-82 (deference on constitutional question); *id.* at 283 (deference on factual question of combatant status); Padilla v. Bush, 233 F. Supp. 2d at 606-08 (same); *Hamdi III*, 316 F.3d at 462-64 (deference on constitutional question); *id.* at 473 (deference on factual question of combatant status); *Hamdi IV*, No. 02-7338, 2003 WL 21540768, *11 (4th Cir. July 9, 2003) (Traxler, C.J., concurring in the denial of rehearing *en banc*) (same).

[216] 233 F. Supp. 2d at 593-96; 243 F. Supp. 2d at 53 (describing *Quirin* as the case "that provided principal support for the central holding" in the court's first opinion and not discussing the text of the Constitution).

[217] *Hamdi II*, 296 U.S. at 281; *Hamdi III*, 316 F.3d at 462-63.

[218] 316 F.3d at 463 (citing *Hamdi II*, 296 U.S. at 281).

[219] *Id.* (quoting *Hamdi II*, 296 U.S. at 281). The term "political branches" refers to the Executive and Legislative branches of government. *Id.*

[220] Indeed in construing the Commerce Clause, the Court recently refused to afford deference to Congress at all, striking down the Violence Against Women Act despite substantial congressional fact-finding in support of the legislation. U.S. v. Morrison, 529 U.S. 598, 628-37 (2000) (Souter, J., dissenting). Moreover, if anything, Article III seems to contemplate a substantial role for the federal judiciary in cases that may raise foreign policy questions, by explicitly mentioning cases involving Ambassadors, admiralty and maritime jurisdiction, and "foreign States, Citizens or Subjects." U.S. CONST. art. 3, § 2.

More fundamentally, however, this sort of deference which lacks strong textual antecedents does little to help the courts determine the outer boundaries of presidential power.[221]

Functional reasoning plays a more important role in the enemy combatant cases, both to confine the role of judiciary and to support the President's authority to designate enemy combatants for military detention. For example, *Hamdi III* reasoned that courts lack expertise and experience to supervise armed conflict.[222] Similarly, the court's conclusion that Hamdi's detention "bears the closest imaginable connection to the President's constitutional responsibilities" was based largely on the "two vital purposes" served by the detention:

[221] Another difficulty with deference is the courts' tendency to lump different kinds of cases together. *Hamdi II*, for example, cites several cases for the proposition that "in accordance with" constitutional text "great deference" is appropriate with respect to military and foreign affairs. 296 F.3d at 281; *see also Hamdi III*, 316 F.3d at 463. But the block citation in *Hamdi II* fails to distinguish among various kinds of deference. In *United States v. The Three Friends*, 166 U.S. 1 (1897), one of the cases cited by *Hamdi II*, the Court deferred to the President's interpretation of a statute authorizing the forfeiture of certain vessels. *Id*. at 51, 53; *see also* Stewart v. Kahn 78 U.S. 493 (1870) (construing a federal statute that tolled statutes of limitations during the Civil War). The enemy combatant cases involve deference of a different sort because the courts are not interpreting a statute, instead they are determining the constitutionality of the President's action. *See* Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 661-3 (2000) (distinguishing among different kinds of deference). In this sense, the cases are closer to *Dames & Moore v. Regan*, 453 U.S. 654 (1981) in which the Court upheld an executive order nullifying claims pending in federal court against the Iranian government; such claims could be submitted to the U.S.-Iran Claims Tribunal for resolution pursuant to an international agreement concluded by the President with Iran. *See also* American Ins. Assoc. v. Garamendi, No. 02-722, 2003 WL 214334477 (U.S. June 23, 2003) (holding that executive agreements with other countries preempted state laws that conflicted with the foreign policy expressed in those agreements). But *Dames & Moore* considered an executive agreement concluded with Iran pursuant to the President's "foreign affairs" power, had nothing to do with the President's war time authority, and did not (at least in the Court's view) present a Fifth Amendment or other Bill of Rights issue. 453 U.S. at 688; *see also* Garamendi, No. 02-722, 2003 WL 21433477, *12 n.9 (2003) (reasoning that executive agreements can preempt state law but only subject to "the Constitution's guarantees of individual rights"). *The Prize Cases*, as we have seen, held the President to international law, *see supra* text at note 195-19, and depended in part on retroactive authorization by Congress. *The Prize Cases*, 67 U.S. 635, 671 (1862). The *Curtiss-Wright* case, also listed in *Hamdi II*'s block citation, involved an explicit and detailed grant of authority by Congress to the President. United States v. Curtiss-Wright Export Corp. 299 U.S. 304, 311-13 (1936).

[222] 316 F.3d at 463, 469-473; *see also Hamdi IV*, No. 02-7338, 2003 WL 21540768, at *2 (Wilkinson, C.J. concurring in denial of rehearing *en banc*) ("[t]he ingredients essential to military success - its planning, tactics, and intelligence – are beyond our ken….").

preventing detainees from rejoining the enemy and "relieving the burden on military commanders of litigating the circumstances" of the capture.[223]

These lines of reasoning leave courts in something of a quandary. If indeed courts are ill-suited to make determinations about the conduct of war,[224] how are they to evaluate the claims by the executive about the nature of combat and its "vital purposes?" This functional argument, although sound enough in one sense, almost invariably leaves the courts entirely at the mercy of the executive's representations of what warfare involves. This reasoning has no clear endpoint, making it difficult for the courts to generate the standards by which to evaluate the detentions.[225]

An alternative approach would have the courts grant habeas relief in these cases. Courts, as we have seen, might grant relief by applying a relatively bright line rule: detentions of U.S. citizens that violate the Geneva Conventions (or perhaps other international law)[226] or that lack specific congressional authorization, exceed the President's constitutional authority under a general use of force authorization or a general declaration of war. This approach would force the political branches to consider and perhaps resolve many issues that the courts must now decide themselves. Note, for example, that had the government heeded the Third Geneva Convention and afforded Hamdi a determination of his status by a "competent tribunal" (which could be a

[223] *Id.* at 465-6; *see also* Johnson v. Eisentrager, 339 U.S. 763, 778-9 (discussing the burdens of producing enemy aliens capture abroad for habeas hearings in the United States).

[224] *Hamdi IV*, No. 02-7338, 2003 WL 21540768, at *3-4 (Wilkinson, C.J., concurring in denial of rehearing *en banc*).

[225] This is an issue that has divided the Fourth Circuit. *See Hamdi IV*, No. 02-7338, 2003 WL 21540768, *2-4 (4th Cir. July 9, 2003) (Wilkinson, C.J. concurring in denial of rehearing *en banc*); *id*. at *9 (Traxler, C.J., concurring in denial of rehearing *en banc*); *id.* at *16-17, *25-26 (Luttig, C.J., dissenting from denial of rehearing *en banc*); *id.* at *27-28 (Motz, C.J., dissenting from denial of rehearing *en banc*).

[226] *See infra* Part II.B.

military or judicial court),[227] federal courts subsequently reviewing the detention might have much of the information they currently lack - such as where and under what circumstances he was captured.[228] Specific congressional authorization would require Congress to take the first cut at fashioning the standards that govern detentions.[229] The power of the President and Congress together is not unlimited,[230] so courts also eventually would have to review even these detentions. But at least they would work initially with parameters set by Congress and international law.[231]

The War of 1812 cases support this reasoning in two ways. First, they show that deference and function-based reasoning are not an inevitable part of judicial interpretation of the President's war powers under the Constitution. Both before and after the War of 1812, courts held officers making military command decisions in the field liable for any actions that exceeded

[227] THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY OF INTERNATIONAL COMMITTEE OF THE RED CROSS, Convention III. art. 5 at 77-78 (Jean S. Pictet, ed. 1958); *see also* Thomas J. Lepri, Note, *Safeguarding The Enemy Within: The Need for Procedural Protections for U.S. Citizens Detained as Enemy Combatants under* Ex Parte Quirin, 71 FORDHAM L. REV. 2565 (2003) (describing Article 5 tribunals used during the Vietnam conflict).

[228] The Fourth Circuit has struggled with this question. *See infra* note 116 .

[229] As an example, California Congressman Adam Schiff introduced the Detention of Enemy Combatants Act, which would explicitly authorize the detention of U.S. citizens as enemy combatants if they are members of al Qaeda or have "willingly cooperated with a terrorist network in the planning of an attack against the United States," as well as require access to counsel and the right to petition for release. Vladeck at 968 (citing H.R. 5684, 107th Cong. (2002)). A judicial decision that permits such detention and/or that requires access to counsel endures as largely indelible precedent; denying the right to detain absent congressional authorization forces the other two branches to reach agreement on this issue or the President to take the political risks of defying the courts. *See infra* text at note 261.

[230] *See* Turley, *Tribunals and Tribulations*, *supra* note 36, at 750 n.642.

[231] This approach also partially avoids the potential functional costs of the courts' current approach, including the government's incentives to manipulate court proceedings by threatening to turn the defendant over to military authorities. The government switched Al Marri from the criminal system to military detention as his trial approached, *see infra* text at note 22, and has threatened to transfer Moussaoui to the military justice system if his trial does not go well for the government. *See infra* note 209. Similarly, it is difficult to explain why Hamdi is detained as an enemy combatant while John Walker Lindh was tried in federal court. *See* Melysa H. Sperber, Note, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting With Enemy Forces*, 40 AM. CRIM. L. REV. 159, 160-65 (2003).

their authority, with no defense for good faith. In other words, there was no official immunity.[232] No lack of "expertise and experience"[233] or concern with the "vital purposes" [234] of detention prevented courts and juries from awarding damages against military officers during the War of 1812. Chauncey, as we have seen, unsuccessfully sought to detain Stacy to prevent him from revealing more information to the enemy.[235] Smith argued that military necessity justified the detention of Shaw, at least to investigate the charge of spying, but the court disagreed.[236] Similarly, after the Mexican-American war, a jury considered whether the confiscation of property during hostilities in Mexico was really warranted; the officer unsuccessfully argued for "some discretionary power as to the measures he should adopt."[237] These cases show that functional reasoning is neither a textual imperative nor a set of self-evident, immutable principles.

Second, the War of 1812 also supports this approach with a sterling example of judicial resistance to the military power exercised by General Jackson in New Orleans at the close of war.[238] As discussed below, this example shows that the Executive Branch can act even in the

[232] *See* Cross v. Harrison, 57 U.S. (16 How.) 164 (1854) (considering but not imposing such liability); Little v. Barreme, 6 U.S. (2 Cranch) 170, 178-9 (1804). In *Little*, Justice Marshall writing for a unanimous Court upheld an award of damages against U.S. naval captain who acted under instructions to seize a vessel traveling from France. The seizure exceeded the authority conferred by a federal statute, and although Justice Marshall confessed that he first thought that military officers acting under orders ought be immune from personal liability, he ultimately reasoned that the instructions of a superior officer could not "legalize an act that without those instructions would have been a plain trespass." *See generally*, Lawson & Seidman, *supra* note 197, at 591-594.

[233] *Hamdi* III, 316 F.3d at 463.

[234] *Hamdi III*, 316 F.3d at 465 (quoting *Hamdi II*, 296 F.3d at 283-84).

[235] *See supra* Part II.A.

[236] Smith v. Shaw, 12 Johns. 257 (Sup. Ct. N.Y. 1815).

[237] Mitchell v. Harmony, 54 U.S. 115, 134 (1851).

[238] History provides other examples too, of course, including *Ex parte Merryman*, 17 F.Cas. 144 (D. Mary. 1861); *Ex parte Milligan*, 71 U.S. 2 (1866) from the Civil War, *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) and *Ex parte White*, 66 F. Supp. 992 (1944) from World War II, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 937 (1952)

teeth of judicial opinion denying his authority, but that the political risks to that branch are then far higher. The question thus is not whether the courts should leave these questions up to the President or to the "political branches"; the question is whether the President's action is given judicial imprimatur, or whether he must seek specific congressional authorization or take the political risk of acting counter to the courts. Observers have maintained that the President is bound more by politics than by law when he takes emergency action during war,[239] but even if this is true it does not mean that courts should necessarily sanction the President's use of such authority.[240] A decision by the courts denying the President the power he seeks remains vitally important because it changes the political stakes and meaning of the President's actions, and because it prevents constitutional entrenchment of expanding presidential power.

B. The Battle of New Orleans

When Theodore Roosevelt issued the third edition of his definitive work on the naval War of 1812, he added a final chapter on the battle of New Orleans despite the battle's lack of naval significance.[241] As the "crowning event of the war," it was a battle Roosevelt could not

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from the Korean War, and *New York Times v. United States*, 403 U.S. 713 (1971) from the Vietnam War. Two of these decisions, *Milligan* and *Duncan*, are criticized as largely irrelevant because the courts handed them down only after the end of hostilities. *See* ROSSITER & LONGAKER, *supra* note 3, at 34 ("It cannot be emphasized too strongly that the decision in [*Milligan*] followed the close of the rebellion by a full year, altered not in the slightest degree the extraordinary methods through which that rebellion had been suppressed, and did nothing more than deliver from jail a handful of rascals who in any event would have probably gained their freedom in short order."); REHNQUIST, *supra* note 3, at 224 (noting that a decision made "after hostilities have ceased" is "more likely to favor civil liberty than if made while hostilities continue").

[239] Korematsu v. United States, 323 U.S. 214, 248 (Jackson, J. dissenting); Gross, *supra* note 214, at 1125; Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233, 253 (1981); *cf.* Rehnquist, *supra* note 3, at 223-24 (quoting Attorney General Biddle's comment about President Roosevelt: "Nor do I think that the Constitutional difficulty plagued him. The Constitution has not greatly bothered any wartime President").

[240] *Hamdi III* reasoned to the contrary. The Fourth Circuit concluded that it must defer to the political branches because "those branches more accountable to the people should be the ones to undertake the ultimate protections and to ask the ultimate sacrifice from them." *Hamdi III*, 316 U.S. at 463.

[241] ROOSEVELT, *supra* note 75, at 5-15.

resist describing.[242] In Roosevelt's colorful prose, the city faced a "mighty and cruel foe" in the British anchored just off the coast, but "nothing save fierce defiance reigned in the Creole hearts of the Crescent City," for Andrew Jackson "master-spirit" was in their midst. Whether one credits Jackson's "implacable fury" at the British or his upbringing among the "lawless characters" of the Tennessee frontier,[243] Jackson emerged from the January 8, 1815 battle an unmistakable hero. He decisively defeated the British with relatively few American casualties despite being greatly outnumbered by British forces.[244]

General Jackson kept New Orleans under martial law until March 13, 1815, fearing renewed attack from the British.[245] When an unsigned letter in the newspaper challenged his military rule, Jackson compelled the disclosure of the author's identity and then had the author, a state legislator named Louaillier, arrested as a "spy."[246] A local judge issued a writ of habeas corpus and Jackson had him arrested for "exciting mutiny" along with a district attorney who sought a writ of habeas corpus to free the judge.[247] In the end the court martial dismissed the charges against Louaillier, and Jackson released all three prisoners when he received official word of the Treaty of Ghent.[248]

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[242] *Id.* at 15.

[243] *Id*.

[244] *Id*. Sofaer estimates the British forces at 12,000-15,000 men. Jackson commanded about 1,000 regular troops and "several thousand" poorly trained and partially unarmed militiamen. *See* Sofaer, *supra* note 239, at 239; *cf.* STAGG, *supra* note 75, at 496-97 (estimating that some "4,000 Tennessee and Mississippi militia" were part of Jackson's forces).

[245] *See* Turley, *supra* note 36, at 726-27 (detailing the strained relationship between General Jackson and some of the people of New Orleans during the period of military rule).

[246] *See* Sofaer *supra* note 239, at 242.

[247] *Id*. at 243.

[248] *Id*. at 244.

After his release, the district attorney immediately brought a contempt proceeding against Jackson before the formerly imprisoned federal judge. General Jackson hired an attorney, appeared in court accompanied by an unruly crowd of supporters, and defended his actions as both a military necessity and a lawful exercise of executive authority under martial law. The judge rejected Jackson's argument and imposed a $1,000 fine which Jackson promptly paid.[249] Jackson made a dramatic speech justifying his actions even if they departed from civil authority, and pointed out that since the danger had passed he would "submit cheerfully to the operation of the laws, even when they punished action which were done to preserve them."[250]

In one sense the entire Louaillier incident has little to do with the detentions of Hamdi and Padilla. With the exception of the "spying" charge against Louailler (which was dismissed for lack of evidence), none of General Jackson's detainees had even purported ties to the enemy, hence they ill-fit the "enemy combatant" category.[251] One might, however, draw some institutional lessons from the Louaillier incident. President Madison viewed Jackson's actions as justified, but not necessarily lawful.[252] Madison emphasized that the "law of necessity" should not be confused with "ordinary rules of military services," and that even if justified by necessity, a commander cannot "resort to the established law of the land, for the means of vindication."[253] And the courts, by issuing the initial writ (and later the sanctions) forced Jackson to defend the necessity of his actions in the face of judicial opinions to the contrary, markedly raising the political stakes of his actions. In a sense, the outcome would be the same except for the token

[249] *Id*. at 245-48.

[250] Sofaer, *supra* note 239, at 248 (quoting Charles Gayarre, 4 HISTORY OF LOUISIANA 625 (1885)).

[251] Notice that Jackson did not defend the detention of Louaillier based on his purported ties to the enemy.

[252] Sofaer, *supra* note 239, at 249.

[253] *Id.* at 249 (quoting 2 CORRESPONDENCE OF ANDREW JACKSON 203-04 (J. Bassett ed. 1927)).

$1,000 fine. But in another way, the outcome would have been entirely different, for Jackson would not have had to justify his actions to the public, and the next President or General would have had a solid legal basis for such detentions.

These observations about the Louaillier incident are useful in considering the precedent established by the Civil War. President Lincoln arrested and detained many U.S. citizens both for speaking out against his wartime policies (including those who hindered conscription) and for aiding enemy forces.[254] But he did so largely without judicial confirmation of his authority from the Supreme Court.[255] In *Ex parte Merryman*,[256] Chief Justice Taney issued a writ of attachment concluding that the President lacked the authority to detain John Merryman, who was accused of aiding the enemy forces by assisting in the destruction of railway bridges in Maryland.[257] Lincoln ignored Taney's ruling, but the judiciary did not give its imprimatur to Lincoln's actions. In *Ex parte Vallidigham*,[258] the Court upheld the trial by military commission of an outspoken politician who virulently opposed Lincoln, but did so on a technical point of appellate jurisdiction[259] that provided no strong judicial precedent on which future Presidents could rely

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[254] *See* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 113-138 (1991) (extensively analyzing the different types and numbers of prisoners).

[255] *See* ROSSITER & LONGAKER, *supra* note 3, at 5 (noting that Lincoln's "breath-taking estimate[] of [his] own war powers" has "earned no blessing under the hands of the judiciary").

[256] 17 F.Cas. 144.

[257] *See* REHNQUIST, *supra* note 3, at 11-45.

[258] 68 U.S. 243 (1863).

[259] *See* ROSSITER & LONGAKER, *supra* note 3, at 29 (describing the Court as beating "a unanimous retreat to the fortress of technicality").

for such authority. The U.S. courts said nothing more about the legality of military commissions until after the Civil War when the Supreme Court invalidated the trial of Lambdin Milligan.[260]

The War of 1812 thus provides two grounds on which to criticize the courts' use of deference-based reasoning. The early cases refused to employ such reasoning, undermining the argument that courts must defer as a constitutional or functional imperative. Second, when courts refuse to defer, the President may still seek congressional authorization for his actions or, in extreme situations, defy the courts. This entails greater political risks for the President, to be sure. But it has the advantages of keeping the judicial inquiry to relatively bright line rules, of forcing the President and Congress to engage many questions that the courts have taken for themselves, and it avoids creating precedent that constantly expands the President's power. Justice Jackson echoed this point in his famous dissent in *Korematsu*, when he reasoned that a military order "is not apt to last longer than the military emergency" but that a judicial opinion sanctioning such an order creates precedent that "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[261]

V. Conclusion

One irony of the enemy combatant opinions is that for all their rhetoric about leaving the conduct of war to the political branches, they have given themselves the task of generating the standards that govern military detentions of "enemy combatants." The standards have proven

[260] *Id.* at 30-31. Perhaps the government's victory in the *Prize Cases* discouraged other potential litigants from challenging Lincoln's war time actions. *See* ROSSITER & LONGAKER, *supra* note 3, at 75. In any event, however sweeping Lincoln's victory was in the *Prize Cases*, the courts still held him to the standards set by international law. S*ee* NEELY *supra* note 254, at 39-159 (describing the Lincoln administration's efforts to run the Union blockade in compliance with international law, even when such compliance had no foreign policy benefits.)

[261] Korematsu v. U.S., 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

difficult to define, a key weakness in relying so heavily on deference based arguments. The limits of those argument appear to rest largely on the intuition of judges, a deep irony indeed.

The cases from the War of 1812 suggest an alternative approach. Denying the President the long-term authority to detain U.S. citizens unless Congress specifically authorizes such detentions would create a relatively bright line rule for the courts and really *would* return part of the question to the political branches. Denying the President the authority to detain people in violation of our Treaty obligations similarly provides one relatively well-established, clear way of limiting some detentions in a manner consistent with historical practice and cases. In the end, Mr. Madison's forgotten war gives us much to contemplate. Let us hope the courts will heed its lessons.