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Detention of U.S. Persons as Enemy Belligerents

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Summary

The detainee provisions passed as part of the National Defense Authorization Act for FY2012, P.L. 112-81, affirm that the Authorization for Use of Military Force (AUMF), P.L. 107-40, in response to the terrorist attacks of September 11, 2001, authorizes the detention of persons captured in connection with hostilities. The act provides for the first time a statutory definition of covered persons whose detention is authorized pursuant to the AUMF. During debate of the provision, significant attention focused on the applicability of this detention authority to U.S. citizens and other persons within the United States. The Senate adopted an amendment to clarify that the provision was not intended to affect any existing law or authorities relating to the detention of U.S. citizens or lawful resident aliens, or any other persons captured or arrested in the United States. This report analyzes the existing law and authority to detain U.S. persons, including American citizens and resident aliens, as well as other persons within the United States who are suspected of being members, agents, or associates of Al Qaeda or possibly other terrorist organizations as "enemy combatants."

The Supreme Court in 2004 affirmed the President's power to detain "enemy combatants," including those who are U.S. citizens, as part of the necessary force authorized by Congress after the terrorist attacks of September 11, 2001. In *Hamdi v. Rumsfeld*, a plurality held that a U.S. citizen allegedly captured during combat in Afghanistan and incarcerated at a Navy brig in South Carolina is entitled to notice and an opportunity to be heard by a neutral decision maker regarding the government's reasons for detaining him. On the same day, the Court in *Rumsfeld v. Padilla* overturned a lower court's grant of habeas corpus to another U.S. citizen in military custody in South Carolina on jurisdictional grounds, leaving undecided whether the authority to detain also applies to U.S. citizens arrested in the United States by civilian authorities. Lower courts that have addressed the issue of wartime detention within the United States have reached conflicting conclusions. While the U.S. Court of Appeals for the Fourth Circuit ultimately confirmed the detention authority in principle in two separate cases (one of which was subsequently vacated), the government avoided taking the argument to the Supreme Court by indicting the accused detainees for federal crimes, making their habeas appeals moot and leaving the law generally unsettled. A federal judge enjoined the detention of persons on the basis of providing support to or associating with belligerent parties under one prong of the definition enacted as Section 1021 of the National Defense Authorization Act for FY2012, P.L. 112-81 (*Hedges v. Obama*), but the decision has been reversed on appeal on the basis of standing.

This report provides a background to the legal issues presented, followed by a brief introduction to the law of war pertinent to the detention of different categories of individuals. An overview of U.S. practice during wartime to detain persons deemed dangerous to the national security is presented. The report concludes by discussing Congress's role in prescribing rules for wartime detention, subsequent legislation in the 112th Congress that addresses the detention of U.S. persons, and legislative proposals in the 113th Congress to further address the issue (H.R. 1960, S. 1147, H.R. 2325, and H.R. 3304.

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The detainee provisions passed as part of the National Defense Authorization Act for FY2012 (2012 NDAA; P.L. 112-81), affirm that the Authorization for Use of Military Force (AUMF)[1] in response to the terrorist attacks of September 11, 2001, authorize the detention of persons captured in connection with hostilities. The act provides for the first time a statutory definition of covered persons whose detention is authorized pursuant to the AUMF.[2] During consideration of the detention provision, much of the debate focused on the applicability of this detention authority to U.S. citizens and other persons within the United States.[3] Congress ultimately adopted a Senate amendment to clarify that the provision is not intended to affect any existing law or authorities relating to the detention of U.S. citizens or lawful resident aliens, or any other persons captured or arrested in the United States.[4] This report analyzes the existing law and authority to detain, as "enemy combatants,"[5] U.S. persons, which,

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[1] Authorization for Use of Military Force ("the AUMF"), P.L. 107-40, 115 Stat. 224 (2001).

[2] The National Defense Authorization Act for FY2012 ("FY2012 NDAA") defines "covered persons" in Section 1021(b):

> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

[3] For more information regarding the detainee provisions in the FY2012 NDAA, see CRS Report R42143, *The National Defense Authorization Act for FY2012 and Beyond: Detainee Matters*, by Jennifer K. Elsea and Michael John Garcia.

[4] S.Amdt. 1456. The amendment added a new paragraph (e) to Section 1021 with the subhead "Authorities":

> Nothing in this section shall be construed to affect existing law or authority relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.

The language was amended slightly in conference by replacing "or" between "citizens" and "lawful resident aliens" with a comma and adding a comma before "or any other persons." It is unclear whether the language "captured or arrested in the United States" is meant to apply to all three groups or whether the place of arrest is important only with respect to "other persons." It seems more likely that the latter meaning was intended, given that there would have been no need to mention citizens or residents at all if *all* persons captured within the United States (but none captured abroad) were sufficient to describe the intended class.

[5] The term "enemy combatants" was used by the Bush Administration to define persons subject to detention under the law of war and by the Supreme Court to describe persons subject to detention under the AUMF. Under the law of war, enemy combatants are generally members of the military of the opposing party who are authorized to participate directly in battle (as opposed to noncombatants, such as military surgeons and medics). Enemy combatants may be targeted by the military or captured and detained as a wartime preventive measure. *See generally* CRS Report RL31367, *Treatment of "Battlefield Detainees" in the War on Terrorism*. In 2004, the Department of Defense established Combatant Status Review Tribunals at the Guantanamo Bay Naval Station to permit detainees to contest their detention, defining the term "enemy combatant" to mean:

> an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Department of Defense Order of July 9, 2004, *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf . The D.C. Circuit has endorsed this definition in subsequent cases. The Obama Administration has retired the term "enemy combatant," referring instead simply to persons who may be detained pursuant the AUMF, defined with reference to the law of war as follows:

> The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that

for the purpose of this report means persons who are generally understood to be subject to U.S. territorial jurisdiction or otherwise entitled to constitutional protections; that is, American citizens, resident aliens, and other persons within the United States.

Background

In June, 2004, the Supreme Court handed down a series of opinions related to wartime detention authority.[6] In *Hamdi v. Rumsfeld*,[7] a plurality of the Court held that a U.S. citizen allegedly captured during combat in Afghanistan and incarcerated at a Navy brig in South Carolina could be held as an enemy combatant as part of the necessary force authorized by Congress after the terrorist attacks of September 11, 2001, but that he was entitled to notice and an opportunity to be heard by a neutral decision maker regarding the government's reasons for detaining him. The government instead reached an agreement with the petitioner that allowed him to return to Saudi Arabia, where he also holds citizenship, subject to certain conditions. On the same day, the Court in *Rumsfeld v. Padilla*[8] overturned a lower court's grant of habeas corpus to another U.S. citizen in military custody in South Carolina on jurisdictional grounds, sending the case to a district court in the Fourth Circuit for a new trial. The vacated decision of the U.S. Court of Appeals for the Second Circuit had held that the circumstance of a U.S. citizen arrested in the United States on suspicion of planning to carry out a terrorist attack there was fundamentally different from the case of a citizen captured on the battlefield overseas,[9] and that the detention of such a citizen without trial was therefore precluded by the Non-Detention Act, 18 U.S.C. Section 4001(a),[10] which provides that no U.S. citizen may be detained except pursuant to an act of Congress. A plurality of the Court found in *Hamdi* that the President's detention of a U.S. citizen captured on the battlefield is not foreclosed by the Non-Detention Act because an act of Congress, the AUMF, explicitly authorized such detention, but emphasized the narrow limits of the authority it was approving:[11]

> The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the

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> are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

In re Guantanamo Bay Detainee Litigation, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held At Guantanamo Bay, No. 08-0442, filed March 13, 2009 (D.D.C.) (hereinafter "Detention Authority Memorandum"), *available at* http://www.justice.gov/opa/documents/memo-re-det-auth.pdf.

[6] In addition to the *Hamdi* and *Padilla* cases discussed more fully below, the Court decided in *Rasul v. Bush*, 542 U.S. 466 (2004), that aliens detained as "enemy combatants" at the detention facility at the Guantanamo Bay Naval Station had the right to challenge their detention under the habeas corpus statute, 28 U.S.C. §2241. The government had argued that U.S. courts lacked jurisdiction to hear habeas petitions filed on behalf of aliens detained abroad. For a description of these cases, see CRS Report RS21884, *The Supreme Court 2003 Term: Summary and Analysis of Opinions Related to Detainees in the War on Terrorism*, by Jennifer K. Elsea.

[7] 542 U.S. 507 (2004).

[8] 542 U.S. 426 (2004).

[9] Padilla *ex rel.* Newman v. Bush, 352 F.3d 695 (2d Cir. 2003), *rev'd sub nom.* Rumsfeld v. Padilla, 542 U.S. 426 (2004).

[10] For legislative history surrounding passage of the Non-Detention Act, see *infra* pp. 36-40.

[11] Hamdi v. Rumsfeld, 542 U.S. at 517-18 (describing AUMF as "explicit congressional authorization for the detention of individuals in the narrow category we describe").

> al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.[12]

The plurality went on to describe the kind of detention it had in mind was the traditional practice of detaining prisoners of war[13] under long-standing law of war principles:

> Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.[14]

Justice Souter, joined by Justice Ginsburg joined the plurality opinion to provide sufficient votes to vacate the decision below and remand the case to give Hamdi an opportunity to contest his detention. However, finding no explicit authority in the AUMF (or other statutes) to detain persons as enemy combatants, they would have determined that 18 U.S.C. Section 4001(a) precludes the detention of American citizens as enemy combatants altogether. They rejected the theory that the detention was authorized as a necessary incident to the use of military force because "the Government's stated legal position in its campaign against the Taliban ... is apparently at odds with its claim here to be acting in accordance with customary law of war and hence to be within the terms of the Force Resolution in its detention of Hamdi."[15] In other words, the two Justices appeared to agree in principle that the AUMF could authorize the detention of prisoners of war, but took the view that the government's failure to accord the Taliban detainees rights under the Geneva Convention vitiated that authority.

Justice Scalia, joined by Justice Stevens, dissented, arguing that "our constitutional tradition has been to prosecute [U.S. citizens accused of waging war against the government] in federal court for treason or some other crime"[16] unless Congress has suspended the Writ of Habeas Corpus pursuant to the Constitution's Suspension Clause, Art. I, Section 9, cl. 2. They viewed as "unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing." Under their view, even if

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[12] *Id*. at 518 (citations omitted).

[13] *Id*. at 518 (citing various authorities related to prisoner of war custody); *id*. at 522 (distinguishing *ex parte* Milligan, 4 Wall. (71 U.S.) 2 (1866), in which "the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. ...That fact was central to its conclusion.").

[14] *Id*. at 521. "Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States' to justify his detention in the United States for the duration of the relevant conflict." *Id*. at 526.

[15] *Id*. at 549 (Souter, J., concurring in the judgment)

[16] *Id*. at 554 (Scalia, J. dissenting).

the AUMF did authorize detention in sufficiently clear language to overcome the prohibition in 18 U.S.C. Section 4001(a) (which, in their view, clearly it did not), Hamdi's detention would have been unconstitutional without a proper suspension of the Writ. Justice Scalia described his position as pertaining only to U.S. citizens detained within the United States (regardless of where captured),[17] suggesting that only citizens who were concededly members of enemy forces may be detained as prisoners of war within the United States.[18]

Justice Thomas also dissented, essentially agreeing with the government's position that the detention of enemy combatants is an unreviewable aspect of the war powers constitutionally allocated to the political branches.[19] He agreed that the AUMF provides sufficient authority to detain enemy combatants, meaning that a majority of the Court approved that position, but he would have given utmost deference to the Executive branch and accorded little in the way of due process. Finally, he questioned whether other acts of war, such as bombings and missile strikes, would also be subject to due process inquiry.[20]

Although a bare majority of the Court, led by Chief Justice Rehnquist, declined to decide in *Padilla* whether the detention authority approved in *Hamdi* would apply to a U.S. citizen arrested in the United States, four Justices who dissented on the question of jurisdiction also indicated they would have upheld the Second Circuit's grant of the petition on the merits.[21] Apparently rejecting the Bush Administration's contention that it had the authority to detain a U.S. citizen who was alleged to be "closely associated with Al Qaeda" and to have "engaged in ... hostile and war-like acts, including ... preparation for acts of international terrorism" against the United States[22] in order to extract intelligence and prevent him from aiding Al Qaeda,[23] Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, wrote:

> Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.[24]

Given Justice Scalia's dissent in *Hamdi*, it appeared in 2004 that a majority of the Supreme Court as it was then constituted would have determined that the Non-Detention Act precludes the detention of a U.S. citizen without trial based on an alleged association with Al Qaeda and

[17] *Id.* at 577 (Scalia, J., dissenting).

[18] *Id.* at 571-72 (Scalia, J., dissenting).

[19] *Id*. at 573 (Thomas, J., dissenting).

[20] *Id*. at 597 (Thomas, J., dissenting).

[21] Rumsfeld v. Padilla, 542 U.S. 426, 464 n.8 (2004) (Stevens, J., dissenting) (agreeing that "the Non-Detention Act, 18 U.S.C. §4001(a), prohibits-and the [AUMF] does not authorize-the protracted, incommunicado detention of American citizens arrested in the United States").

[22] *Id*. at 431 n.2 (quoting presidential determination of June 9, 2002 to hold Padilla as an enemy combatant, which went on to cite Padilla's possession of intelligence that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States" and the risk he posed to U.S. national security, which was determined to make his military detention "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States.")

[23] *Id*. at 464 & n.5 (Stevens, J., dissenting) (quoting Department of Defense briefing stating that, rather than law enforcement or punishment for criminal acts, the detention was aimed at "try[ing to] find out everything he knows so that hopefully we can stop other terrorist acts").

[24] *Id*. at 465 (Stevens, J., dissenting).

participation in a terrorist plot far from any conventional battlefield, at least within the United States. A separate majority of the same Court took the view that the Non-Detention Act does not preclude the detention of a U.S. citizen picked up on the battlefield in Afghanistan, albeit apparently for different reasons.[25] There also appears to have been a majority on the Court who believed that indefinite detention solely for the purpose of interrogation would be impermissible even where they agreed the law of war supports detention.[26] Finally, a majority took the position that a U.S. citizen detained under the authority of the AUMF would have the right to a meaningful opportunity to be heard before a neutral decision maker in order to contest the factual basis for the detention, although there was disagreement as to the precise level of due process such a hearing would be constitutionally required to provide.[27]

A majority of the *Hamdi* Court appears to have accepted the view that, in principle, U.S. citizens who join an enemy armed force and engage in hostilities against the United States may be treated as enemy belligerents on the same basis that alien enemy belligerents may be so treated under the laws and usages of war.[28] It seems to follow that the same criteria and definition used to determine the status of aliens who are believed to be enemy belligerents would apply equally to U.S. citizens. Thus, there is little reason to suppose that the contours of the legal category of persons subject to detention, as it has been developed by the lower courts interpreting *Hamdi*,[29] by the executive branch, and most recently, by Congress, will differ according to citizenship. It may be the case that U.S. citizenship will entitle citizen-detainees to more procedural rights in

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[25] Justice O'Connor and the three others who joined the controlling plurality opinion did not decide whether the Non-Detention Act was applicable at all to military detentions. *Id.* at 517. Justice Thomas, in dissent, did not expressly address the application of the Non-Detention, but agreed that detention was permissible.

[26] *Padilla*, 542 U.S. at 464 (Stevens, J. dissenting); *Hamdi*, 542 U.S. at 521(O'Connor, J., plurality opinion) ("Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.").

[27] Justice O'Connor wrote in *Hamdi* that the exigencies of the circumstances may allow for a tailoring of enemy combatant proceedings "to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," possibly allowing hearsay evidence and "a presumption in favor of the Government's evidence," as long as a fair opportunity to rebut such evidence is provided. *Hamdi*, 542 U.S. at 543. Justice Souter, joined by Justice Ginsburg, agreed that Hamdi was entitled to due process, including the right to counsel, but did not agree with the suggestion that "the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas...." *Id.* at 553-54 (Souter, J., concurring in part). Justices Scalia and Stevens would have found the full trappings of a criminal trial necessary in the absence of a suspension of the Writ of Habeas Corpus, and in any event, did not believe the Court should engage in legislating alternative procedures. *Id.* at 554, 576 (Scalia, J., dissenting). Justice Thomas alone would have accepted the government's view that it need only show "some evidence" in order to establish that detention is warranted, arguing that the Federal Government's war powers can not be "balanced away by this Court" and that only Congress should be able to "provide for additional procedural protections...." *Id.* at 579 (Scalia, J., dissenting).

[28] *See id.* at 519 (O'Connor, J. plurality opinion) (citing *ex parte* Quirin, 317 U.S. 1, 20 (1943) for proposition that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant."); *id.* at 548-49 (Souter, J., concurring in part) (suggesting that *ex parte Quirin* may support the "proposition that the American citizenship of [a wartime captive] does not as such limit the Government's power to deal with him under the usages of war."); *id.* at 587 (Thomas, J., dissenting) (stating that the war power "quite obviously includes the ability to detain those (even United States citizens) who fight against our troops or those of our allies") (citations omitted). Justices Scalia, on the other hand, would have found *ex parte Milligan* controlling, suggesting that *Quirin* mischaracterized rather than distinguished *Milligan*. *Id.* at 579 (Scalia, J., dissenting). The interplay between these two cases is discussed *infra*.

[29] The *Hamdi* Court stressed the narrow nature of the category of persons whose detention it found authorized, but suggested that courts might apply a broader definition:

> Here the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant. The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.

Hamdi, 542 U.S. at 522 n.1 (O'Connor, J., plurality opinion).

contesting the factual basis for their detention than alien detainees have enjoyed. Moreover, there is no dispute that citizens detained in U.S. custody abroad may seek habeas review, and Congress has not stripped the courts of jurisdiction over non-habeas cases by U.S. citizens detained as enemy belligerents, as it has done with respect to aliens,[30] nor has it established jurisdiction in military commissions to try citizens for war crimes.[31] On the other hand, lower courts have applied the plurality opinion in *Hamdi*, which decision expressly deals with the rights of a U.S. citizen-detainee, as a baseline for determining the procedural rights due to aliens detained at Guantanamo in habeas proceedings, apparently without requiring proof of the existence of "exigent circumstance."[32] Assuming that the Supreme Court jurisprudence establishes that citizens accused of participating in hostilities against the United States may be treated the same as similarly situated aliens, the seemingly relaxed procedural rights and evidentiary burden applicable in the Guantanamo cases may also apply to any habeas cases involving citizen-detainees.[33]

The Supreme Court has not yet addressed on the merits whether an alien lawfully present in the United States can be detained under the authority of the AUMF based on activity conducted there. A noncitizen could not invoke the Non-Detention Act, but might nevertheless be able to contest whether the government's facts support an enemy combatant designation. After all, the *Hamdi* plurality suggested there may be a distinction based on the fact that that case involved a capture on a *foreign battlefield*.[34] At about the same time that it issued *Hamdi* and *Padilla*, the Court denied certiorari to review the case of Ali Saleh Kahlah al-Marri, a Qatari student who had been arrested in Peoria, IL in late 2001 but declared an "enemy combatant" prior to trial and

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[30] Section 7 of the Military Commission Act of 2006 ("MCA"), P.L. 109-366, 120 Stat. 2600, 2635 (codified at 28 U.S.C. §2241(e)), stripped courts of habeas jurisdiction over aliens detained as enemy combatants as well as any other type of claim by such persons (except for two now defunct appellate provisions passed as part of the Detainee Treatment Act, P.L. 109-148, div. A, title X, §1005, December 30, 2005, *codified as amended at* 10 U.S.C. §801 note).

28 U.S.C. §2241(e)(2) provides:

> [N]o court, justice, or judge shall have jurisdiction to hear or consider any ... action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

While the Supreme Court in *Boumediene v. Bush*, 553 U.S. 723 (2008), struck Section 7 of the MCA as unconstitutional insofar as it stripped courts of habeas jurisdiction over the same class of aliens (28 U.S.C. §2241(e)(1)), the Court did not address the constitutionality of §2241(e)(2), and lower courts have continued to apply it to dismiss various claims by alien detainees. *See, e.g.,* Al-Janko v. Gates, Civil Case No. 10-1702 (RJL), slip op. at 14 & n.12 (D.D.C. 2011) (citing cases). While the *Boumediene* decision affirms that aliens held at Guantanamo have a constitutional right to seek habeas relief, aliens held elsewhere abroad are not necessarily guaranteed that privilege. Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010).

[31] 10 U.S.C. §948C provides that "[a]ny alien unprivileged enemy belligerent is subject to trial by military commission as set forth in [chapter 47a of title 10, U.S. Code]." 10 U.S.C. §948A(1) defines "alien" to mean "an individual who is not a citizen of the United States."

[32] For an overview of habeas cases involving Guantanamo detainees, see CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

[33] It also seems that the plurality was envisioning a process to be implemented by military officials in the field rather than procedures to apply in federal court, yet the plurality opinion also mentioned the Justices' view that the process suggested by the government for district court purposes and that affirmed by the appellate court was too little, while the process insisted upon by Judge Doumar at the district court level was too much. *Hamdi*, 542 U.S. at 532-33 (O'Connor, J., plurality opinion). The Supreme Court in *Rasul* declined to address the procedures that would be required for habeas cases brought by Guantanamo detainees. Rasul v. Bush, 542 U.S. 466, 485 (2004). The D.C. Circuit has interpreted the language to apply to habeas cases involving Guantanamo detainees.

[34] *Hamdi*, 542 U.S. at 523-24 (O'Connor, J., plurality opinion) (addressing Justice Scalia's dissent).

transferred to military custody in South Carolina. His petition for habeas corpus was dismissed for lack of jurisdiction by the U.S. Court of Appeals for the Seventh Circuit.[35]

Both al-Marri and Padilla filed new petitions for habeas corpus in the Fourth Circuit, meaning that the issue of detention authority with respect to citizens and aliens within the United States would have to be relitigated there before the Supreme Court would have another opportunity to address it. As we explain more fully below, the Fourth Circuit ultimately confirmed both detentions, but without establishing a conclusive test for determining which persons arrested within the United States are subject to detention under AUMF authority. Supreme Court review was avoided in both cases after the government filed charges against the petitioners and moved them into the civilian court system. The only opinion left standing, that which affirmed the detention of Jose Padilla on grounds very different from the original allegations that had been addressed by the Second Circuit, does little to expand the understanding of detention authority beyond that which *Hamdi* already established, that is, that detention is justified in the case of a person who fought alongside enemy forces against the United States on a foreign battlefield.

Assuming, per *Hamdi*,[36] that Congress intended in 2001 to authorize the use of force in compliance with the law of war,[37] and considering that Congress expressly incorporated the law of war into the detention authority in the 2012 NDAA,[38] a survey of international law regarding such detentions may be pertinent to a determination of the detention authority preserved under the 2012 NDAA. Accordingly, this report summarizes wartime detention under international law and surveys relevant U.S. practice before returning to the Fourth Circuit's treatment of the *Padilla* and *al-Marri* cases. The report also summarizes the case of *Hedges v. Obama*, in which plaintiffs sought an injunction against enforcement of the detention provision of the 2012 NDAA.

Status and Detention of Persons in War

The law of war divides persons in the midst of an armed conflict into two broad categories: combatants and civilians.[39] This fundamental distinction determines the international legal status of persons participating in or affected by combat, and determines the legal protections afforded to

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[35] Al-Marri v. Rumsfeld, 360 F.3d 707 (7th Cir. 2004), *cert. denied*, 543 U.S. 809 (2004).

[36] *Hamdi*, 542 U.S. at 521 (O'Connor, J., plurality opinion) ("We understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.").

[37] There is some disagreement among judges on the U.S. Court of Appeals for the D.C. Circuit regarding whether the AUMF should be interpreted in accordance with the law of war. In *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), Judge Brown denied that the law of war has any relevance to the courts' interpretation of the scope of the detention power conferred by the AUMF:

> [W]hile the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers.

Id at 871. In denying rehearing en banc, however, a majority of the active appellate court judges joined a concurring opinion suggesting that this portion of the panel opinion was essentially nonbinding dicta, Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010) (Sentelle, C.J., concurring), drawing objections from the two judges who had authored the panel opinion, *id*. at 1–9 (Brown, J., concurring in the denial of rehearing en banc); *id*. at 9–56 (Kavanaugh, J., concurring in the denial of rehearing en banc). The Supreme Court denied certiorari, 131 S. Ct. 1814 (2011).

[38] 2012 NDAA §1021(c)(1) provides that covered persons may be subject to "[d]etention *under the law of war* without trial until the end of the hostilities ... " (emphasis added).

[39] *See* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65 (Dieter Fleck, ed. 1995) (hereinafter "HANDBOOK").

such persons as well as the legal consequences of their conduct.[40] Combatants are those persons who are authorized by international law to fight in accordance with the law of war on behalf of a party to the conflict.[41] Civilians are not authorized to fight, but are protected from deliberate targeting by combatants as long as they do not take up arms. In order to protect civilians, the law of war requires combatants to conduct military operations in a manner designed to minimize civilian casualties and to limit the amount of damage and suffering to that which can be justified by military necessity. To limit exposure of civilians to military attacks, combatants are required, as a general rule, to distinguish themselves from civilians. Combatants who fail to distinguish themselves from civilians run the risk of being denied the privilege to be treated as prisoners of war if captured by the enemy.

The treatment of all persons who fall into the hands of the enemy during an international armed conflict depends upon the status of the person as determined under the four Geneva Conventions of 1949. Under these conventions, parties to an international armed conflict have the right to capture and intern enemy soldiers[42] as well as civilians who pose a danger to the security of the state,[43] at least for the duration of hostilities.[44] The right to detain enemy combatants is not based on the supposition that the prisoner is "guilty" as an enemy for any crimes against the Detaining Power, either as an individual or as an agent of the opposing state. POWs are detained for security purposes, to remove those soldiers as a threat from the battlefield. The law of war encourages capture and detention of enemy combatants as a more humane alternative to accomplish the same purpose than by wounding or killing them.

Enemy civilians may be interned for similar reasons, when found on the territory belonging to or occupied by a belligerent, although the law of war does not permit them to be treated as lawful military targets. As citizens of an enemy country, they may be presumed to owe allegiance to the enemy. The law of war traditionally allowed for their internment and the confiscation of their property, not because they are suspected of having committed a crime or even of harboring ill will toward the host or occupying power but, rather, they are held in order to prevent their acting on behalf of the enemy and to deprive the enemy of resources it might use in its war efforts.

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[40] *See id.*

[41] *See id.* at 67. *See also* OPERATIONAL LAW HANDBOOK, chapter 2 (2011) *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf. (Lawful combatants have valid combatant status and receive law of war protection; however, others who participate in combat, without valid combatant status, may be treated as criminals under domestic law.) *Id.* Members of an organized armed force, group or unit who are not medical or religious personnel are combatants. *Id.* Combatants are lawful targets during combat operations. Prisoners of war are considered noncombatants and must be protected by the Detaining Power. *See id.* The term "enemy combatant" appears most frequently in the context of military rules of engagement, which stress that only enemy combatants may lawfully be attacked during military operations.

[42] *See* The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter "GPW"). GPW art. 21 states:

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

[43] *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516 [hereinafter "GC"]. GC art. 42 states:

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

[44] *See* GPW, *supra* note 26, art. 21.

Congress has delegated to the President the authority, during a declared war or by proclamation, to provide for the restriction, internment or removal of enemy aliens deemed dangerous.[45] The Supreme Court has upheld internment programs promulgated under the Alien Enemy Act.[46] This form of detention, like the detention of POWs, is administrative rather than punitive, and thus no criminal trial is required.[47] The Detaining Power may punish enemy soldiers and civilians for crimes committed prior to their capture as well as during captivity, but only after a fair trial in accordance with the relevant convention and other applicable international law.

The foregoing describes the law that applies in the case of international armed conflict, that is, armed conflict between two states, as defined by the Geneva Conventions.[48] Non-international armed conflict is governed by Common Article 3 of the Geneva Conventions[49] and Additional Protocol II ("AP II"),[50] or at least those parts of AP II that reflect customary international law (the United States has not ratified AP II). Common Article 3 does not recognize a distinction between combatant and civilian status, and neither expressly permits nor prohibits detention. Rather, it provides minimal protections for those who fall into the hands of one of the parties to the armed conflict. Some international legal scholars believe that detention is permitted in non-international conflicts to at least the same extent that it is practiced in international armed conflicts,[51] while

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[45] 50 U.S.C. §21 (defining "enemy" as "all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized").

[46] *See* Ludecke v. Watkins, 335 U.S. 160 (1948) (upholding President's authority to order the removal of all alien enemies "who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States"). The Supreme Court declined to review the determination by the Alien Enemy Hearing Board that the petitioner was dangerous, and noted that no question as to the validity of the administrative hearings had been raised. *Id.* at 163, n.4. However, the Court also noted that an enemy alien restrained pursuant to the act did have access to the courts to challenge whether the statutory criteria were met, in other words, whether a "declared war" existed and whether the person restrained is in fact an enemy alien fourteen years or older. *Id.* at 170-72, n.17.

[47] Internees may challenge their detention in court by means of habeas corpus. *See id.*

[48] *See* GPW, *supra* note 26, art. 2

[49] The 1949 Geneva Conventions share several types of common provisions. The first three articles of each Convention are identical. Common Article 3 has been described as "a convention within a convention" to provide a general formula covering respect for intrinsic human values that would always be in force, without regard to the characterization the parties to a conflict might give it. Article 3 provides, in part, that

> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> > (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> >
> > (b) Taking of hostages;
> >
> > (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
> >
> > (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

[50] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 21, June 8, 1977, 1125 U.N.T.S. 609 (entered into force December 7, 1978) [hereinafter "AP II"].

[51] *See* Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 50 (2009) (reasoning that because international humanitarian law is "uniformly less restrictive in internal armed conflict" that states "a fortiori possess the authority to undertake those practices in non-international conflict"); Robert Chesney, *Who May be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 796 (2011) (describing debate as to detention

others argue that specific authority under domestic law is necessary to authorize and define the scope of permissible detention during a non-international armed conflict.[52] Another view might be that the rules applicable to international armed conflict, as customary international law, apply to non-international armed conflicts that meet the threshold for a belligerency under the international law of war,[53] while any sort of contention that does not rise to such a level falls outside the law of war and is governed by domestic law only (in compliance with the state's obligations under international human rights law). In any event, the survey of U.S. practice presented below appears to establish that statutory authority in addition to a declaration of war has been seen as necessary to permit wartime detention within the United States, at least insofar as the preventive detention of civilians or unprivileged belligerents are concerned.

U.S. Practice—Detention of Enemies on U.S. Territory

The following sections give a brief treatment of the history of the internment of individuals who are deemed "enemies" or determined to be too dangerous to remain at liberty during a war or national emergency. A survey of the history reveals that persons who are considered likely to act as an enemy agent on U.S. territory traditionally have been treated as alien enemies rather than prisoners of war or "enemy combatants" by the military, even when the individuals were members of the armed forces of enemy nations, although in the latter case they might also be tried by military commission or court-martial, if accused of a crime. Persons acting within the territory of the United States on behalf of an enemy government who were not part of its armed forces, including American citizens accused of spying or sabotage, have been tried in federal court. Individuals captured on the battlefield abroad have been handled in accordance with government regulations interpreting the law of war.[54]

For the most part, it appears that U.S. practice has followed a traditional understanding of international law, in which the formal relationship between states, or perhaps between a state and a breakaway portion of its territory controlled by a government that no longer recognizes its authority, plays a seemingly crucial role. During war, a person's formal association with the opposing government or armed forces was seen to have bearing on how the law applied. While

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authority in non-international armed conflict).

[52] *See* Gabor Rona, *An Appraisal of US Practice Relating to 'Enemy Combatants,'* 2007 Y.B. INT'L HUMANITARIAN L. 232, 240-41 (explaining the view that international humanitarian law does not displace domestic law with respect to detention during a non-international armed conflict). Under this view, the failure of the relevant conventions to prescribe rules for detention in internal armed conflicts is more a recognition that sovereign states have sufficient authority to regulate the conduct of persons within their territory than an indication that fewer rules are meant to apply. Even in what some view as a "transnational armed conflict," there is no clash of sovereign authority that would necessitate a displacement of domestic law by detailed agreement between states. *See id*.

[53] *See id*. at 237-38 (explaining that the threshold for non-international armed conflict is different from the rules applicable to determining the existence of an armed conflict between states); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER F. WORLD AFF. 55, 59-61 (2003) (noting that the humanitarian law "concept of a 'party' suggests a minimum level of organization required to enable the entity to carry out the obligations of law"); L. OPPENHEIM, 2 INTERNATIONAL LAW §§59-60 (7th ed., 1952) (explaining the determination whether a civil war is a war in the technical sense and noting consequences of the recognition of belligerent parties).

[54] *See* DoD Dir. 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees (1994); *see generally* CRS Report RL31367, *Treatment of "Battlefield Detainees" in the War on Terrorism* (summarizing history of U.S. treatment of battlefield captives).

alien enemies and invading armies were seen to enjoy no (or at least very little) protection under domestic law, those with merely *personal* sympathy toward the enemy or animosity toward the government continued to enjoy such protection. For that reason, persons falling into the first category could be interned as a wartime measure without any demonstration of personal hostility on their part, while the validity of restrictive measures taken against other persons were assessed in terms of necessity and adequacy of due process. At the same time, the first category of persons enjoyed some protection under international law, including, for example, privileged belligerents could not be tried as criminals for belligerent acts that did not violate the law of war.

The "Quasi War" with France and the War of 1812

During the summer of 1798, spurred by tensions involving the French Republic, Congress enacted a series of national security measures known collectively as the Alien and Sedition Acts,[55] which included the Alien Act[56] and the Sedition Act,[57] as well as the Alien Enemy Act.[58] Of these laws, only the Alien Enemy Act has survived into modern times.

The Alien Act empowered the President to order out of the country any noncitizen whom he judged to be "dangerous to the peace and safety of the United States" or suspected to be concerned in any "treasonable or secret machinations" against the government. Expelled aliens convicted of having returned to the United States without obtaining a license to do so were subject to imprisonment for such time as the President deemed necessary for the public safety.[59] Outside of such a conviction, the act did not permit summary detention, but the law was nonetheless controversial.

Part of the debate surrounding the Alien Act questioned the extent to which the Bill of Rights covers "alien friends" on U.S. territory. Opponents argued that such aliens within the United States are entitled to due process of law and the same protection from the government as citizens, and that therefore, aliens suspected of being disposed to engage in Jacobin plots to overthrow the social order or take part in other insurrectionist activities[60] should be tried in court rather than summarily deported.[61] Proponents argued that aliens within the United States owe merely temporary allegiance to the United States and are therefore not entitled to the same rights as citizens, and that all governments have the right to deport aliens who pose a danger.[62] The bill

[55] Congress also amended the Naturalization Act to extend the residency requirement from five to fourteen years, Act of June 18,1798, ch. 54, 1 Stat. 566. For the text of the Alien and Sedition Acts and historical papers documenting the debates surrounding their passage, see the Library of Congress Web Guide: Alien and Sedition Act, at http://www.loc.gov/rr/program/bib/ourdocs/Alien.html.

[56] Act of June 25, 1798, ch. 58, 1 Stat. 570 ("Alien Act") (expired 1800).

[57] Act of July 14, 1798, ch. 74, 1 Stat. 596 ("Sedition Act") (expired 1801).

[58] Act of July 6, 1798, ch. 67, §1,1 Stat. 577 ("Enemy Alien Act").

[59] Alien Act §2, 1 Stat. at 571.

[60] For a description of rumored plots that were cited in support of the legislation, see JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 61-62 (1951).

[61] The bill did not address preventive detention except on conviction of returning without permission. Some opponents of the bill nevertheless warned that its passage would inevitably lead to similar treatment of citizens who were suspected of being dangerous to national security.

[62] *See, e.g.,* Response of the State of Massachusetts to the Virginia Resolutions, 4 ELLIOT'S DEB. 533, 534 (1800) (declaring Alien and Sedition Acts to be constitutional as well as "expedient and necessary," asserting the former act "respects a description of persons whose rights were not particularly contemplated in the Constitution of the United States, who are entitled only to a temporary protection while they yield a temporary allegiance—a protection which ought to be withdrawn whenever they become 'dangerous to the public safety'").

passed along regional lines,[63] but was never enforced, although some aliens left the country under their own volition.[64] Virginia and Kentucky passed resolutions declaring the Alien Act and the Sedition Act to be unconstitutional,[65] and it is widely believed that Thomas Jefferson's opposition to these Acts helped him win the presidency.[66]

The Alien Enemy Act was the last of the laws enacted to confront the crisis. It began:

> Whenever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President of the United States shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.[67]

Unlike the Alien Act or the Sedition Act, the Alien Enemy Act was written to apply only during declared wars or invasions by the armies of foreign governments. There was never a requirement that an alien be suspected of engaging in any sort of hostile activities in order to be liable to treatment under the act, although aliens "not chargeable with actual hostility ... or other crime against the public safety" are afforded a grace period during which to arrange for "the recovery, disposal, and removal of [their] goods and effects, and for [their] departure." Also unlike its sister Acts, the Alien Enemy Act engendered practically no controversy. Neither James Madison nor Thomas Jefferson, who drafted the Virginia and Kentucky Resolutions, raised any objections;[68] and even the most vociferous opponents of the Alien Act in Congress were careful to clarify that they had no qualms with respect to the Alien Enemy Act.[69] The absence of objection to the Alien Enemy Act by the same generation that drafted the Constitution has been held to provide evidence both of the act's constitutionality and the prevailing understanding of the legal principle underlying it, that is, the fundamentally different position held by aliens on the basis of their formal allegiance to a government with which the United States is at war.[70]

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[63] *See* MILLER, *supra* footnote 60, at 53 (noting that "only two senators from states south of the Potomac favored the bill," and in the House, Southern states voted twenty-seven to eight against the bill while New England's vote of twenty-four to two in favor ensured passage).

[64] *Id.* at 188 (noting that the passage of the Alien Act coincided with the departure of a number of French refugees, but arguing that imminent war with France provides a likelier explanation for their decision to leave the country).

[65] Virginia Resolutions of 1798, 4 ELLIOT'S DEB. 528 (1800); Kentucky Resolutions of 1798 and 1799, 4 ELLIOT'S DEB. 540, 541.

[66] *See* Johnson v. Eisentrager, 339 U.S. 763, 773 (1950) (Jackson, J.); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1407 (1992).

[67] Alien Enemy Act §1, 1 Stat. 577. The provision was modified during World War I to include women. April 16, 1918, ch. 55, 40 Stat. 531.

[68] *See* Ludecke v. Watkins, 335 U.S. 160, 171 footnote 18 (1948) (citing 6 THE WRITINGS OF JAMES MADISON 360-61 (Gaillard Hunt ed., 1906) ("Much confusion and fallacy have been thrown into the question by blending the two cases of aliens members of a hostile nation and aliens members of friendly nations.... With respect to alien enemies, no doubt has been intimated as to the Federal authority over them, the Constitution having expressly delegated to Congress the power to declare war against any nation, and, of course, to treat it and all its members as enemies."); 8 THE WRITINGS OF THOMAS JEFFERSON 466 (Paul L. Ford ed., 1905)).

[69] *E.g.*, 8 Annals of Cong. 2034-35 (5th Cong., 1798) (remarks of Albert Gallatin); *Id.* at 2012 (remarks of William Livingston).

[70] *See Ludecke*, 335 U.S. at 171, Johnson v. Eisentrager, 339 U.S. 763, 773-775 & n. 6 (1950). While U.S. citizens and resident or sojourning noncitizens from friendly countries were considered to owe allegiance to the United States in return for the protection of the Constitution and laws of the United States, citizens and invading soldiers from enemy

Of the enactments, only the Sedition Act addressed the activities of U.S. citizens in possible aid of insurrection or foreign invaders. The act, which was also the only one of the three that was ever enforced,[71] was criticized as destructive of the newly established freedom of speech and of the press, but it did not authorize detention without trial for citizens or aliens.

The first presidential proclamation under the Enemy Alien Act did not occur until the War of 1812, when President Madison ordered that alien enemies who resided within forty miles of tide water must report to local marshals for assigned residency or other measures.[72] Aliens subject to the measures were entitled to seek habeas corpus relief to challenge the measures,[73] and at least one British subject prevailed,[74] despite the familiar canon that enemy aliens have no access to the courts.[75] One American citizen who was detained militarily on suspicion of having aided the British in preparation for their attack on Sackett's Harbor was held to be entitled to habeas corpus because there was no authority for the military to try such persons for treason.[76] It does not appear to have been asserted that U.S. citizens who aided the enemy could be detained without trial as enemy belligerents or prisoners of war, and even claims that the military could detain a citizen temporarily for investigation pending transfer to civilian authorities for trial were unavailing.[77] The Supreme Court held that enemy property within the United States could not be confiscated by the military without express statutory authority, even though the law of war permits it, based on the fact that Congress had legislated with respect to enemy aliens and prisoners of war:

> War gives an equal right over persons and property: and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war.[78]

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countries were not covered by this reciprocal arrangement because their allegiance was with an enemy government. Even so, alien enemies were not categorically barred from asserting rights in court. *See* Clarke v. Morey, 10 Johns. 69 (N.Y. 1813) (alien enemy permitted to remain within the United States after onset of War of 1812 permitted to maintain lawsuit to enforce pre-existing contractual obligation); Bagwell v. Babe, 22 Va. (1 Rand.) 272 (1823) (damages against military officer for false imprisonment of enemy alien upheld where alien had not been ordered removed).

[71] *See* Frank M. Anderson, *The Enforcement of the Alien and Sedition Laws*, *in* ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 115-26 (1912).

[72] Lockington's Case, Brightly (N.P.) 269, 271 (Pa. 1813).

[73] *Id*.

[74] *See* Gerald L. Neuman and Charles F. Hobson, *John Marshall and the Enemy Alien*, 9 GREEN BAG 2d 39 (2005) (reporting case of *United States v. Thomas Williams*, in which a British subject was ordered discharged from custody because regulations had not been followed properly).

[75] *See* Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963 (2007) (tracing history of the rule concerning enemy aliens' access to courts to conclude that judicial review has been available at least to challenge the status).

[76] *In re* Stacy, 10 Johns. 328 (N.Y. Sup. Ct. 1813). The court did not directly order the petitioner's release, but ordered the immediate attachment of the military commander who refused to produce the petitioner before the court. The Secretary of War ordered Stacy released on the basis that citizens could not be considered as spies. *See* Ingrid Brunk Weurth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 Nw. U. L. Rev. 1567 (2004) (citing 2 THE NAVAL WAR OF 1812: A DOCUMENTARY HISTORY 521 n.1. (William S. Dudley ed., 1992)).

[77] *See* Weurth, *supra* footnote 76, at 1583-85 (citing Smith v. Shaw, 12 Johns. 257 (N.Y. Sup. Ct. 1815) (damages awarded for false imprisonment against military officer); McConnell v. Hampton, 12 Johns. 234, 234 (N.Y. Sup. Ct. 1815) (same)).

[78] Brown v. United States, 8 Cranch (12 U.S.) 110, 126 (1814). This was held to be true even though the act declaring war against Great Britain authorized the President to "use the whole land and naval force of the United States to carry

The Civil War

The Civil War raised a host of novel issues regarding the application of the laws and usages of war to enemies who were also U.S. citizens. Some who found themselves subject to wartime measures argued that one could be either a citizen, entitled to all the constitutional protections that applied in peacetime, or an enemy, entitled to no constitutional protections but under no obligation to obey domestic laws; but not both.[79] The courts rejected this contention, establishing that the United States could, under the circumstances of *de facto* war, assert both belligerent rights against the seceded states and sovereign rights to hold citizens of those states accountable for treason and other crimes.[80] Key to this determination was the fact that the civil war amounted to a war within the meaning of international law (a "belligerency") rather than a mere insurrection to be dealt with using only the law enforcement capacity of the government.[81] Once it was established that the rebellion amounted to a belligerency, all citizens of seceded states were technically public enemies and their property deemed hostile, even if they were not traitors in thought or deed.[82]

At the same time, it appears that citizens of states that did not secede were not to be considered public enemies unless they actually took up residence in the South or joined the Confederate army, even if they favored the Confederacy or advocated dissolution of the Union. In the border states where anti-Union sentiments were especially high and violence was prevalent enough to make ordinary law enforcement measures insufficient or impossible, military forces governed by martial law, but only for such time as strictly necessary.[83] Although President Lincoln authorized the suspension of habeas corpus in the North, initially in order to protect troop transport lines but later more broadly[84] to enable the Secretary of State (later the War Department) to order the arrests of civilians as "prisoners of state,"[85] it is not clear that any such persons were considered

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the war into effect." *Id*. at 127 (quoting Act of June 18, 1812, ch. 102, 2 Stat. 755).

[79] For an overview of novel legal issues presented by the Civil War, see Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839 (2010).

[80] *Prize Cases*, 67 U.S. (2 Black) 635, 672-73 (1863).

[81] *See id*. at 670:

> Whether the President, in fulfilling his duties as Commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case.

[82] The Supreme Court in 1878 restated the principle it had established in earlier cases:

> The district of country declared by the constituted authorities, during the late civil war, to be in insurrection against the government of the United States, was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war and while they remained within the lines of the insurrection, as enemies, without reference to their personal sentiments and dispositions.

Ford v. Surget, 97 U.S. (7 Otto) 594, 604 (1878).

[83] *See* GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 300-07 (3d ed. 1913) (describing, in the context of the Civil War, the concept of martial law as it applies to domestic territory in war or insurrection).

[84] *See* MARK E. NEELY, JR., THE FATE OF LIBERTY 11 (1991); *id*. at 51-52.

[85] *See id.* at 19 -20 (noting that Secretary of State William Seward and his Department, ostensibly in charge of arrests for disloyalty in Union States until the War Department assumed control of them in February of 1862, actually ordered

enemies or combatants under a law of war rubric.[86] On the other hand, it was asserted by authorities in military law that certain acts in aid of the enemy violated the law of war.[87]

To address the war and the growing internal security problem, the Lincoln Administration in September of 1862 proclaimed habeas corpus suspended as to all persons in military custody, and further proclaimed that all "rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments ... or guilty of any disloyal practice, affording aid and comfort to rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by courts-martial or military commission."[88] After Congress authorized the suspension of habeas corpus wherever the President judged it necessary to public safety,[89] President Lincoln reiterated that habeas corpus was suspended as to "prisoners of war, spies, or aiders or abettors of the enemy" in military custody throughout the United States.[90] The Lincoln Administration's approach to internal security, however, was cast in considerable doubt by the Supreme Court's decision in *Ex parte Milligan.*[91]

Ex Parte Milligan

In 1866, the Supreme Court addressed the question whether a citizen of Indiana who was allegedly a senior commanding general of the Sons of Liberty,[92] an allegedly armed and organized group of conspirators with links to the Confederate States that planned to commit acts of sabotage against the North in order to foment rebellion in northwestern states (today's Mid-West),[93] could constitutionally be tried by military commission. The Court recognized military commission jurisdiction over violations of the "laws and usages of war," but stated those laws and usages "... can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[94] The Supreme Court explained its reasoning:

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few arrests and spent more energy attempting to learn why prisoners had been arrested by other authorities). The State Department did not have the personnel or apparatus to investigate disloyalty charges or conduct arrests on any scale, and there was no equivalent of today's Justice Department or FBI. *See* DANIEL FARBER, LINCOLN'S CONSTITUTION 145 (2003) (noting scarcity of federal law enforcement officers).

[86] It appears that a number of those arrested were citizens of seceded states, and might have been considered to be in the position of enemy aliens. For statistics on the residency of persons subject to military arrest in the early days of the war (when the State Department was charged with internal security), see NEELY, *supra* footnote 84, at 26-27. Some British nationals were also detained, but were typically released after intervention by their government. *See id.* at 21.

[87] In establishing martial law and military commissions in Missouri, Maj. Gen. Halleck declared that "many offenses which in time of peace are civil offenses become in time of military offenses and are to be tried by a military tribunal even in places where civil tribunals exist." Gen. Ord. No. 1, Hdqrs. Department of the Missouri, 1862, *reprinted in* OFFICIAL RECORDS OF THE REBELLION, series II vol. 1, at 247-248 (1894). Military commissions trying such offenses as bridge-burning by civilians holding correspondence with the enemy typically described them as violations of the laws of war.

[88] Proclamation of September 24, 1862, 13 Stat. 730.

[89] Act of March 3d, 1863, §1, 12 Stat. 755.

[90] Proclamation of September 15, 1863, 13 Stat. 734.

[91] 4 Wall. (71 U.S.) 2 (1866).

[92] *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 90 (1998) (reporting that Lambdin Milligan had been appointed "major general" in the Sons of Liberty).

[93] *Id*. at 83 (reporting that at least some members hoped to split the "Northwest" into a new confederacy which would ally with the seceded states against the Union).

[94] 71 U.S. at 121.

> It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection .... Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration.[95]

The government had argued in the alternative that Milligan could be held as a prisoner of war "as if he had been taken in action with arms in his hands,"[96] and thus excluded from the privileges of a proviso to the act authorizing the suspension of habeas corpus, which required courts to free other persons detained without charge.[97] The government argued:

> Finally, if the military tribunal has no jurisdiction, the petitioner may be held as a prisoner of war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates, then to be handed over by the military to the civil authorities, to be tried for his crimes under the acts of Congress, and before the courts which he has selected.[98]

Milligan, however, argued "that it had been 'wholly out of his power to have acquired belligerent rights, or to have placed himself in such relation to the government as to have enabled him to violate the laws of war,'"[99] as he was charged. The Court appears to have agreed with Milligan, replying:

> It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?[100]

Milligan was interpreted by some state courts to preclude the trial by military commission of persons accused of participating in guerrilla activities in Union territory,[101] and despite Congress's efforts to immunize executive officials for actions done under military authority during the Civil War,[102] the Supreme Court of Illinois upheld damages awarded to Madison Y. Johnson, who, accused of being "a belligerent" but never charged with any offense, had been

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[95] *Id.* at 127.

[96] *Id.* at 21 (argument for the government).

[97] Act of March 3d, 1863, §§2-3, 12 Stat. 755-56. Section 2 required the Secretary of State and the Secretary of War to furnish to the federal courts lists of all citizens of loyal states held in military custody in their jurisdictions as prisoners of state or political prisoners, or "otherwise than as prisoners of war" under the authority of the President or the named Secretaries. Section 3 required the judges to order the release of any such persons who had not been indicted by a grand jury.

[98] 71 U.S. at 21.

[99] *Id*. at 8.

[100] *Id.* at 131.

[101] Thompson v. Wharton, 70 Ky. (7 Bush) 563 (Ky. 1870); Eginton v. Brain, 7 Ky. Op. 516 (Ky. 1874).

[102] Act of March 2, 1867, 14 Stat. 432.

confined under orders issued by the Secretary of War.[103] Milligan himself was awarded nominal damages for his treatment.[104]

Other "Insurrections"—*Moyer v. Peabody*

The Supreme Court addressed executive detention of a temporary nature to address less serious insurrections in 1909 in *Moyer v. Peabody*.[105] The Supreme Court in that case declined to grant relief to the plaintiff in a civil suit against the governor of Colorado based on the former's detention without charge during a miners' strike (deemed by the governor to be an insurrection), stating: So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief."[106]

The Court based its views in part on the laws and constitution of the State of Colorado, which empowered the governor to repel or suppress insurrections by calling out the militia, which the Court noted, envisioned the "ordinary use of soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power."[107]

The Court further clarified:

> If we suppose a governor with a very long term of office, it may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the governor to revision by a jury. It is not alleged that his judgment was not honest, if that be material, or that the plaintiff was detained after fears of the insurrection were at an end.

Based on the context of the case, the holding may be limited to actual battles and situations of martial law where troops are authorized to use deadly force as necessary.[108] While the Court notes that "[p]ublic danger warrants the substitution of executive process for judicial process,"[109] it also noted that

> [t]his was admitted with regard to killing men in the actual clash of arms; and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent

[103] Johnson v. Jones, 44 Ill. 142 (Ill. 1867); *see also* Carver v. Jones, 45 Ill. 334 (Ill. 1867); Sheehan v. Jones, 44 Ill. 167 (Ill. 1867).

[104] Milligan v. Hovey, 17 F. Cas. 380 (C.C. Ind. 1871) (Case No. 9,605); *see also In re* Murphy, 17 F. Cas. 1030 (C.C.D. Mo. 1867) (Case No. 9,947); District Court v. Commandant of Fort Delaware, 25 F. Cas. 590 (D.C. Del. 1866) (Case No. 14,842); *In re* Egan, 8 F. Cas. 367 (C.C.N.Y. 1866) (Case No. 4,303); Thompson v. Wharton, 64 Ky. (1 Bush) 563 (1870).

[105] 212 U.S. 78 (1909).

[106] 212 U.S. at 85. The Court noted that "[t]he facts that we are to assume are that a state of insurrection existed and that the governor, without sufficient reason, but in good faith, in the course of putting the insurrection down, held the plaintiff until he thought that he safely could release him."

[107] *Id.* at 84-85.

[108] *See* Sterling v. Constantin, 287 U.S. 378, 400-01 (1932) (limiting *Moyer* to its facts and stating that it is well established that executive discretion to respond to emergencies does not mean that "every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat").

[109] *Id* at 85 (citing Keely v. Sanders, 99 U.S. 441, 446 (1878)).

> apprehended harm. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the governor to deprive citizens of life under such circumstances was consistent with the 14th Amendment, we are of opinion that the same is true of a law authorizing by implication what was done in this case.[110]

It may also be argued that, as a claim for civil damages rather than a direct challenge in the form of a petition for habeas corpus, the *Moyer* case does not stand for a general executive authority to detain indefinitely individuals deemed to be dangerous, but may support temporary detention during a public emergency. It may be pertinent that the decision interpreted Colorado's constitution rather than that of the United States. While some courts have concluded that those wrongfully detained by order of the President may recover damages from their captors,[111] the modern trend seems to be that damages are not available.[112]

World War I

The Alien Enemy Act saw greater use during World War I than in previous wars.[113] The statute grants the President broad authority, during a declared war or presidentially proclaimed "predatory invasion," to institute restrictions affecting alien enemies, including possible detention and deportation. On April 6, 1917, the date Congress declared war against Germany, President Wilson issued a Proclamation under the Alien Enemy Act warning alien enemies against violations of the law or hostilities against the United States.[114] Offenders would be subject not only to the applicable penalties prescribed by the domestic laws they violated, but would also be subject to restraint, required to give security, or subject to removal from the United States under regulations promulgated by the President.[115]

The government urged the courts to uphold the constitutionality of the act as a proper exercise of Congress's power over the persons and property of alien enemies found on U.S. territory during war, a power it argued derives from the power of Congress to declare war and make rules concerning captures on land and water,[116] and which was also consistent with the powers residing in sovereign nations under international law. The law was vital to national security because "[a]n

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[110] *Id.* at 85-86.

[111] *See, e.g.*, *Ex parte* Orozco, 201 F. 106 (W.D. Texas 1912) (alien held by military without charge on suspicion of organizing military expedition in violation of neutrality laws awarded damages); *ex parte* De la Fuente, 201 F. 119 (W.D. Texas 1912) (same); *see also* Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984), *aff'd per curiam*, 847 F.2d 779 (Fed. Cir.1988), *cert denied*,488 U.S. 925 (1988) (Japanese-American internees and their descendants suffered damages for unconstitutional taking based on World War II internment where government was aware that military necessity to justify the internment was unfounded, although suit was barred by statute of limitations).

[112] *See* cases cited *infra* at footnote 256.

[113] *See* Supplemental Brief for the United States in Support of the Plenary Power of Congress over Alien Enemies, and the Constitutionality of the Alien Enemy Act 20 (1918), *Ex parte* Gilroy, 257 F. 110 (S.D.N.Y. 1919), (hereinafter "Alien Enemy Brief") (observing that the cases arising under the Alien Enemy Act "contain no expression of doubt by the courts as to its constitutionality"). In *Gilroy*, the government argued that the Executive's determination that an individual is an enemy alien is final, even though it can be shown that the individual is a citizen. 257 F. at 112. The court rejected that contention, finding the petitioner was an American citizen and not subject to the Alien Enemy Act. *Id.*

[114] 40 Stat. 1650 (1917).

[115] 40 Stat. 1651 (1917).

[116] *See* Alien Enemy Brief, *supra* footnote 113, at 39. The government further argued that the issue of what was to be done with enemy persons as well as property was dictated by policy, to be determined by Congress rather than the courts, and did not flow as a necessary power as the result of a declaration of war. *See id.* at 50 (citing Brown v. United States, 8 Cranch (12 U.S.) 110, 126 (1814)).

army of spies, incendiaries, and propagandists may be more dangerous than an army of soldiers."[117] The President reported to Congress a list of 21 instances of "improper activities of German officials, agents, and sympathizers in the United States" prior to the declaration of war.[118] The government further argued that the statute did not require a hearing prior to internment, because the power and duty of the President was to act to prevent harm in the context of war, which required the ability to act based on suspicion rather than only on proven facts.[119]

While the act would permit regulations affecting all persons within the statutory definition of alien enemy,[120] it was the practice of the United States to apply restrictions only to alien enemies who were found to constitute an active danger to the state.[121] Aliens affected by orders promulgated under the act did not have recourse to the courts to object to the orders on the grounds that the determination was not made in accordance with due process of law, but could bring habeas corpus petitions to challenge their status as enemy aliens.[122]

In at least two instances, enemy spies or saboteurs entered the territory of the United States and were subsequently arrested. Pablo Waberski admitted to U.S. secret agents to being a spy sent by the Germans to "blow things up in the United States." Waberski, who was posing as a Russian national, was arrested upon crossing the border from Mexico into the United States and charged with "lurking as a spy" under article 82 of the Articles of War.[123] Attorney General T. W. Gregory opined in a letter to the President that the jurisdiction of the military to try Waberski by military tribunal was improper, noting that the prisoner had not entered any camp or fortification, did not appear to have been in Europe during the war, and thus could not have come through the fighting lines or field of military operations.[124] An ensuing disagreement between the Departments of War and Justice over the respective jurisdictions of the FBI and military counterintelligence to conduct domestic surveillance was resolved by compromise.[125]

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[117] *Id.* at 40.

[118] *See id.* at 41. The list was excerpted from H.Rept. 65-1 (1917) and listed 21 incidents "chosen at random" to demonstrate the dangerousness of German agents and the need to intern them. The list included both civilians and military members. One incident described a group of German reservists who organized an expedition to go into Canada and carry out hostile acts. *See id.* at 71(reporting indictments had been returned against the conspirators in federal court). The report of the Attorney General for the year ending 1917 contained another list of federal court cases involving German agents, some of whom were military officers. *See id* at Appendix C. Some of the cases cited involved hostile acts, such as using explosives against ships and other targets, conducting military expeditions, and recruiting spies and insurrectionists. *See id.*

[119] *See id.* at 43.

[120] *See* 50 U.S.C. §21 (including all natives, citizens, denizens, or subjects of the hostile nation or government over the age of 18 within the United States, excepting those who had been naturalized). The act was broadened in 1918 to include women. Act of April 16, 1918, P.L. 65-131, 40 Stat. 531 (1918).

[121] *See* National Defense Migration, Fourth Interim Report of the House Select Committee Investigating Migration, Findings and Recommendations on Problems of Evacuation of Enemy Aliens and Others from Prohibited Military Zones, H.Rept. 77-2124, at153 n.4 (1942) (hereinafter "Defense Migration Report") (contrasting U.S. practice against history of indiscriminate internment of enemy aliens applied during World War I in the United Kingdom, France and Germany). International law now provides protection for enemy aliens, including those definitely suspected of hostile activity against the state. *See* GC, *supra* footnote 43, art. 5.

[122] *See* Minotto v. Bradley, 252 F. 600 (N.D. Ill. 1918); *Ex parte* Fronklin, 253 F. 984 (N.D. Miss. 1918).

[123] Now article 106, UCMJ, *codified at* 10 U.S.C. §906.

[124] *See* 31 Op. Att'y Gen. 356 (1918) (citing article 29 of the Hague Convention of 1917, Respecting the Laws and Customs of War on Land).

[125] *See* National Counterintelligence Center, Counterintelligence Reader: American Revolution to World War II, a*vailable at* http://www.fas.org/irp/ops/ci/docs/ci1/ch3e.htm.

Waberski, an officer of the German armed forces whose real name turned out to be Lothar Witzke, was sentenced to death by a military commission. Subsequently, the new Attorney General, A. Mitchell Palmer, reversed the earlier AG opinion based on a new understanding of the facts of the case, including proof that the prisoner was a German citizen and that there were military encampments close to the area where he was arrested.[126] President Wilson commuted Witzke's sentence to life imprisonment at hard labor in Fort Leavenworth and later pardoned him, possibly due to lingering doubts about the propriety of the military tribunal's jurisdiction to try the accused spy,[127] even though Congress had defined the crime of spying and provided by statute that it was an offense triable by military commission.[128]

The question of military jurisdiction over accused enemy spies arose again in the case of *United States ex rel. Wessels v. McDonald*,[129] a habeas corpus proceeding brought by Herman Wessels to challenge his detention by military authorities while he was awaiting court-martial for spying. The accused was an officer in the German Imperial Navy who used a forged Swiss passport to enter the United States and operated as an enemy agent in New York City. He was initially detained as an alien enemy pursuant to a warrant issued in accordance with statute. He contested his detention on the basis that the port of New York was not in the theater of battle and courts in New York were open and functioning, arguing *Milligan* required that he be tried by an Article III court.[130] The court found that its inquiry was confined to determining whether jurisdiction by court martial was valid, which it answered affirmatively after examining relevant statutes and finding that, under international law, the act of spying was not technically a crime.[131] The court concluded that the constitutional safeguards available to criminal defendants did not apply, noting that whoever "joins the forces of an enemy alien surrenders th[e] right to constitutional protections." The Supreme Court did not have the opportunity to address the merits of the case, having dismissed the appeal per stipulation of the parties.[132] However, two American citizens who were alleged to have conspired to commit espionage with Wessels were tried and acquitted of treason in federal court,[133] and subsequently released.

In 1918, a bill was introduced in the Senate to provide for trial by court-martial of persons not in the military who were accused of espionage, sabotage, or other conduct that could hurt the war effort.[134] The bill had been drafted by Assistant Attorney General Charles Warren, but was apparently submitted without the approval of the Justice Department.[135] The bill asserted that changes in modern warfare, including use of "civilian and other agents and supporters behind the lines spreading false statements and propaganda, injuring and destroying the things and utilities"

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[126] *See* 40 Op. Att'y Gen. 561 (1919). The opinion was not published until July 29, 1942, during the trial of the eight Nazi saboteurs.

[127] *See* National Counterintelligence Center, *supra* footnote 125.

[128] Article of War 82 provided that those caught lurking as spies near military facilities "or elsewhere" could be tried by military tribunal.

[129] 265 F. 754 (E.D.N.Y. 1920).

[130] *Id.* at 758.

[131] *Id.* at 762 (noting that a spy may not be tried under international law when he returns to his own lines, and that spying is a military offense only).

[132] Wessels v. McDonald, 256 U.S. 705 (1921).

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

[134] S. 4364, 65th Cong. (1918).

[135] *See* Letter from Charles Warren to Senator L.S. Overman, April 8, 1918, Papers of Charles Warren, Library of Congress.

needed by the Armed Forces, meant that "the United States [now constitutes] a part of the zone of operations ..."[136]

In a letter to Representative John E. Raker explaining his opposition to the idea, Attorney General T.W. Gregory provided statistics about war-related arrests and prosecutions.[137] According to the letter, of 508 espionage cases that had reached a disposition, 335 had resulted in convictions, 31 persons were acquitted, and 125 cases were dismissed.[138] Sedition and disloyalty charges had yielded 110 convictions and 90 dismissals or acquittals.[139] Acknowledging that the statistics were incomplete, the Attorney General concluded that the statistics did not show a cause for concern.[140] He also reiterated his position that trial of civilians for offenses committed outside of military territory by court-martial would be unconstitutional, and attributed the complaints about the inadequacies of the laws or their enforcement to "the fact that people, under the emotional stress of the war, easily magnify rumor into fact, or treat an accusation of disloyalty as though it were equal to proof of disloyalty. No reason, however, has as yet developed which would justify punishing men for crime without trying them in accordance with the time-honored American method of arriving at the truth."[141]

The record does not disclose any mention of the option of deeming suspects to be unlawful combatants based on their alleged association with the enemy, detaining them without any kind of trial.

Treatment of Enemies During World War II

Ex Parte Quirin

After eight Nazi saboteurs were caught by the Federal Bureau of Investigation (FBI), the President issued a proclamation declaring that "the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the law of war."[142] The eight German saboteurs (one of whom claimed U.S. citizenship) were tried by military commission for entering the United States by submarine, shedding their military uniforms, and conspiring to use explosives on certain war industries and war utilities. In the case of *Ex parte Quirin*, the Supreme Court denied their writs of habeas corpus (although upholding their right to petition for the writ, despite language in the Presidential proclamation purporting to bar judicial review), holding that trial by such a commission did not offend the Constitution and was authorized by statute.[143] It also found the citizenship of the saboteurs irrelevant to the determination of whether the saboteurs were "enemy belligerents" within the meaning of the Hague Convention and the law of war.[144]

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[136] S. 4364, 65th Cong.

[137] *See* 57 CONG. REC. APP. pt. 5, at 528-29 (1918).

[138] *See id.*

[139] *See id.*

[140] *See id*. at 528.

[141] *See id.*

[142] Proclamation No. 2561, of July 2, 1942, 7 *Federal Register* 5101, 56 Stat. 1964.

[143] *See Ex parte* Quirin, 317 U.S. 1, 26-28 (1942) (finding authority for military commissions in the Articles of War, *codified at* 10 U.S.C. §§1471-1593 (1940).

[144] *See id.* at 37-38 ("Citizens who associate themselves with the military arm of the enemy government, and with its

To reach its decision, the Court applied the international common law of war, as Congress had incorporated it by reference through Article 15 of the Articles of War,[145] and the President's proclamation that

> [A]ll persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States ... through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.[146]

Whether the accused could have been detained as "enemy combatants" without any intent to try them before a military tribunal was not a question before the Court,[147] but the Court suggested the possibility. It stated:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those 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.[148]

In its discussion of the status of "unlawful combatant," the Court did not distinguish between enemy soldiers who forfeit the right to be treated as prisoners of war by failing to distinguish themselves as belligerents, as the petitioners had done, and civilians who commit hostile acts during war without having the right to participate in combat. Both types of individuals have been called "unlawful combatants," yet the circumstances that give rise to their status differ in ways that may be legally significant.[149] However, the Court did recognize that the petitioners fit into the first category,[150] and expressly limited its opinion to the facts of the case:

> We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. We hold only that

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aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war."); *see also* Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) ("[T]he petitioner's citizenship in the United States does not ... confer upon him any constitutional rights not accorded any other belligerent under the laws of war."), *cert. denied*, 352 U.S. 1014 (1957).

[145] Similar language is now part of the UCMJ. *See* 10 U.S.C. §821 (providing jurisdiction for courts-martial does not deprive military commissions of concurrent jurisdiction in relevant cases).

[146] 317 U.S. at 22-23 (citing Proclamation No. 2561, 7 *Federal Register* 5101(1942)).

[147] At oral argument before the Supreme Court, Attorney General Biddle suggested that had the prisoners been captured by the military rather than arrested by the FBI, the military could have detained them "in any way they wanted," without any arraignment or any sort of legal proceeding. *See* 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 597 (Philip B. Kurland and Gerhard Casper, eds. 1975).

[148] 317 U.S. at 30-31 (emphasis added; footnote omitted).

[149] Combatants, also called "privileged belligerents," are bound by all of the laws of war regulating conduct during combat, while civilians are not privileged combatants at all, and are thus prohibited from participating in combat, regardless of whether they follow generally applicable combat rules. *See generally* CRS Report RL31367, *Treatment of "Battlefield Detainees" in the War on Terrorism*.

[150] *See supra* footnote 144.

> those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.[151]

The Supreme Court distinguished its holding from *Milligan,* finding that the *Quirin* petitioners were enemy belligerents and that the charge made out a valid allegation of an offense against the law of war for which the President was authorized to order trial by a military commission.[152]

It seems clear that the *Quirin* Court did not intend to overrule *Milligan*, but the distinction between the two cases may seem puzzling to those familiar with Civil War history.[153] The *Quirin* Court characterized *Milligan* in a way that seemed to minimize the nature of the allegations involved, calling Milligan a civilian who "was not engaged in legal acts of hostility against the government."[154] Yet Milligan *was* in fact alleged to have engaged in hostile and warlike acts. The *Quirin* Court also noted the distinction that Milligan, "not being a part of or associated with armed forces of the enemy," was a civilian rather than an enemy combatant, without mentioning that the government had argued that Milligan *was* allegedly part of a group that was associated with the Confederate Army.[155]

Reconciling the facts of *Milligan* with the *Quirin* Court's description of them is possible by applying a formal understanding of the concept of war as distinguished from a lesser insurrection. Under this view, the key distinction appears to be that Milligan's activity could not be characterized as *legal* acts of hostility because Milligan was not a lawful combatant belonging to Confederate forces.[156] Any contention between the Sons of Liberty and the Union apparently did not amount to "hostilities" in the legal sense. The *Quirin* opinion, read together with *Milligan*, appears to regard the "legal" nature of the acts to be based on the petitioner's association with a legitimate belligerent party rather than the nature of the acts. Milligan's membership in the Sons of Liberty did not secure his legitimacy as a belligerent, but neither did it give the government the right to detain him as a prisoner of war.[157] The Sons of Liberty, it seems, did not qualify as a

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[151] 317 U.S. at 45-46.

[152] *Id.* at 45.

[153] *See* Curtis A. Bradley, *The Story of Ex Parte Milligan*, in PRESIDENTIAL POWER STORIES 93, 122 (Christopher H. Schroeder and Curtis A. Bradley ed. 2009) (calling the *Quirin* Court's distinction of *Milligan* "problematic").

[154] *See* 4 Wall. (71 U.S.) at 131.

[155] According to the record, evidence showed that Milligan was a member of

> a powerful secret association, composed of citizens and others, [that] existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.

4 Wall. (71 U.S.) at 141 (Chase, C.J., concurring). Four Justices concurred in the decision but took the position that under the circumstances, Congress could have constitutionally authorized military tribunals to try civilians, but had "by the strongest implication" prohibited them.

[156] For a discussion that may shed light on the understanding of the term "legal hostilities," see HENRY W. HALLECK, INTERNATIONAL LAW, OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 411-12 (1878):

> [A] war ... is not confined to the governments or authorities of the belligerent state, but that it makes all the subjects of the one state the legal enemies of each and every subject of the other. This hostile character results from political ties, and not from personal feelings or personal antipathies; their *status* is that of legal hostility, and not of personal enmity. So long as these political ties continue, or so long as the individual continues to be the citizen or subject of one of the belligerent states, just so long does he continue in legal hostility toward all the citizens and subjects of the opposing belligerent.

[157] *See* 4 Wall. (71 U.S.) at 131 (suggesting that only lawful belligerents may be detained in accordance with the laws and usages of war); *see also Ex parte* Quirin, 317 U.S. 1, 45 (distinguishing *Milligan* because Milligan "was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful

belligerent for the purposes of the law of war, even though it was alleged to be plotting hostile acts on behalf of the Confederacy and it communicated with Confederate agents.[158] The *Quirin* Court noted with apparent approval several Civil War cases in which enemy belligerents were tried by military commission for hostile acts conducted in the North, but the Court was careful to mention in each case that the defendant held a Confederate commission or was otherwise enrolled in or employed by Confederate forces.[159] Omitted from the Court's survey of cases were those suggested by the government in its brief that involved nonmembers of Confederate forces, including Milligan and his co-defendants as well as the persons tried for Lincoln's assassination in 1865.[160]

Although the opinion is cryptic on this point, the important distinction in *Quirin* seems to be the nature and status of the enemy forces of which Milligan was allegedly a member, rather than whether he was associated with any hostile force at all. The petitioners in *Quirin* were all conceded to be engaging in hostilities under the direction of the armed forces of an enemy State in a declared war (although perhaps not formally enrolled in its military). What association with the enemy short of this might have brought the saboteurs under military jurisdiction is unclear. The fact that Milligan's membership in an organization with ties to the Confederate government (although not claimed to be operating under Confederate direction) was ruled insufficient to make him a belligerent within the meaning of the law of war might have some bearing on the interpretation of the term "associated forces" in the NDAA definition of persons susceptible to detention without trial under the law of war.

Another point of distinction was that Milligan had not traveled from enemy territory into friendly territory, while the *Quirin* petitioners were described as having crossed military lines of defense to enter the country surreptitiously.[161] This apparently stems from the long-standing concept under the law of war that permits the armed forces of a belligerent to punish those who cross defensive lines and act as spies,[162] whereas the same activity conducted in contested territory would not deprive the accused of prisoner of war status.

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belligerents").

[158] REHNQUIST, *supra* footnote 92, at 83 (stating that Confederate officials sent money to ringleaders to "stir up trouble and possibly foment an uprising").

[159] 317 U.S. at 13 n.10.

[160] *See* Brief for the Respondent, Appendix II at 72, 73-74, *Ex parte* Quirin, 317 U.S. 1 (1942) (citing notable Civil War military commissions, including among other cases the trial of Lincoln's assassins, the trial of Milligan and his associates, the trial of Clement Vallandigham for expressing sympathies with the Confederacy, and the case of George St. Leger Grenfel and other civilians who were convicted of conspiring to free rebel prisoners of war from a prison in Chicago and then burn the city as a part of an alleged plot with the Sons of Liberty). St. Leger Grenfel was a British-born former colonel in the Confederate army, but was apparently retired and therefore considered a civilian. He made a jurisdictional argument similar to the one that ultimately prevailed in *Milligan*, but did not challenge the authority of the military to arrest him. H.EXEC.DOC. NO. 50, 39th Cong, 2nd Sess. (1867).

[161] *See* Bradley, *supra* footnote 153, at 123 & n.141 (reporting that noted military law expert Frederick Bernays Wiener had emphasized the fact of travel from enemy country as distinguishing *Milligan*, stating that Milligan would today be considered a "Fifth Columnist" rather than an "invader").

[162] 317 U.S. at 31:

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

(Citations omitted). *See* DAVIS, *supra* footnote 83, at 563-64.

The continuing validity of *Milligan* has been questioned by some scholars, even though the *Quirin* Court declined to overrule it, while others assert that the essential meaning of the case has only to do with situations of martial law or, perhaps, civil wars. Furthermore, it has been noted that the portion of the plurality in *Milligan* asserting that Congress could not constitutionally authorize the President to use the military to detain and try civilians may be considered *dicta* with correspondingly less precedential value, inasmuch as Congress had implicitly denied such authority. However, the *Hamdi* Court, in distinguishing *Milligan* from *Hamdi*, placed emphasis on the fact that Milligan was not considered a prisoner of war, suggesting that it may recognize the distinction between *Milligan* and *Quirin* as a function of combatant status.

The *Hamdi* Court found that *Milligan* did not apply to a U.S. citizen captured in Afghanistan. Justice O'Connor wrote that *Milligan*:

> does not undermine our holding about the Government's authority to seize enemy combatants, as we define that term today. In that case, the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.[163]

In Re Territo

In the case *In re Territo*,[164] an American citizen who had been inducted into the Italian army was captured during battle in Italy and transferred to a detention center for prisoners of war in the United States. He petitioned for a writ of habeas corpus, arguing that his U.S. citizenship foreclosed his being held as a POW. The court disagreed, finding that citizenship does not necessarily "affect[] the status of one captured on the field of battle."[165] The court stated: "Those who have written texts upon the subject of prisoners of war agree that *all* persons *who are active in opposing an army in war* may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war."[166]

The petitioner argued that the Geneva Convention did not apply in cases such as his. The court found no authority in support of that contention, noting that "[i]n war, all residents of the enemy country are enemies."[167] The court also cited approvingly the following passage: "A neutral, or a citizen of the United States, domiciled in the enemy country, not only in respect to his property but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation."[168]

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[163] 542 U.S. at 522 (citations omitted). Justice Scalia, in dissent, argued that "this seeks to revise *Milligan* rather than describe it." *Id*. at 570 (Scalia, J., dissenting). In his view, the *Milligan* Court emphasized prisoner of war status because it was necessary to determine whether Milligan came within the statutory provision requiring all those not held as prisoners of war to be released unless charged. He would have found that there is no exception to the right to trial by jury even for citizens who could be called "belligerents" or "prisoners of war." *Id*.

[164] 156 F.2d 142 (9th Cir. 1946).

[165] *Id*. at 145.

[166] *Id.* (emphasis added; citations omitted).

[167] *Id.* (citing Lamar's Executor v. Browne, 92 U.S. 187, 194 (1875)).

[168] *Id.* (citing WHITING, WAR POWERS UNDER THE CONST., 340-42 (1862)).

While recognizing that *Quirin* was not directly in point, it found the discussion of U.S. citizenship to be "indicative of the proper conclusion": "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war."[169]

The court had no occasion to consider whether a citizen who becomes associated with an armed group not affiliated with an enemy government and not otherwise covered under the terms of the Hague Convention could be detained without charge pursuant to the law of war,[170] particularly those not captured by the military during battle.

Confining the *Territo* and *Quirin* opinions to their facts, they may not provide a solid foundation for the detention of U.S. citizens captured within the United States as enemy combatants. It may be argued that the language referring to the capture and detention of unlawful combatants—seemingly without indictment on criminal charges—is *dicta*; the petitioners in those cases did not challenge the contention that they served in the armed forces of an enemy state with which the United States was engaged in a declared war. We are unaware of any U.S. precedent confirming the constitutional power of the President to detain indefinitely a person accused of being an unlawful combatant due to mere membership in or association with a group that does not qualify as a legitimate belligerent, with or without the authorization of Congress.[171] The Supreme Court rejected a similar contention in *Milligan*, where Congress had limited the authority to detain persons in military custody.

At most, arguably, the two cases above may be read to demonstrate that, at least in the context of a declared war against a recognized state, U.S. citizenship is not constitutionally relevant to the treatment of members of enemy forces under the law of war.[172] Given that the Hague convention applies only to conflicts where belligerents meet the same qualifications that were later

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[169] *Id.* (citing *Quirin* at 37-38).

[170] Hague Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277. Article 1 states:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions:
>
> To be commanded by a person responsible for his subordinates;
>
> To have a fixed distinctive emblem recognizable at a distance;
>
> To carry arms openly; and
>
> To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

[171] In that regard, *cf. Ex parte* Toscano, 208 F. 938 (S.D. Cal. 1913) (applying Hague Convention to authorize holding of Mexican federalist troops, who had crossed the border into the United States and surrendered to U.S. forces, as prisoners of war although the United States was neutral in the conflict and the belligerent parties were not recognized as nations).

[172] A majority of the Supreme Court in *Hamdi* appears to have agreed that *Quirin* establishes that U.S. citizenship is irrelevant in the treatment of captured enemies, at least those captured overseas in a conflict to which the Geneva Conventions apply. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (O'Connor, J., plurality opinion) ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of ... the law of war.") (citing *Quirin*, 317 U.S. at 37-38); *id.* at 548-49 (Souter, J., concurring in part) (while noting that "[*Quirin*] may perhaps be claimed for the proposition that the American citizenship of such a captive does not as such limit the Government's power to deal with him under the usages of war," arguing that Hamdi, having been captured with the Taliban, was entitled to protection under the Geneva Convention).

incorporated into Article 4 of the Third Geneva Convention for prisoner of war status, it seems clear that the Hague Convention would not apply to the conflict with Al Qaeda or perhaps the Taliban for the same reasons that were given to preclude their treatment as prisoners of war.[173] Because the status of the relevant armed conflict under international law appears to have been important to the resolution of the Civil War and World War II detainee cases, it is perhaps unwarranted to presume that *Territo* and *Quirin* are apposite to a conflict that does not amount to an international armed conflict.[174]

Internment of Enemy Civilians

During the Second World War, President Roosevelt made numerous proclamations under the Alien Enemy Act for the purpose of interning aliens from enemy countries deemed dangerous or likely to engage in espionage or sabotage.[175] At the outset of the war, the internments were effected under civil authority of the Attorney General, who established "prohibited areas" in which no aliens of Japanese, Italian, or German descent were permitted to enter or remain, as well as a host of other restraints on affected aliens. The President, acting under statutory authority, delegated to the Attorney General the authority to prescribe regulations for the execution of the program. Attorney General Francis Biddle created the Alien Enemy Control Unit to review the recommendations of hearing boards handling the cases of the more than 2,500 enemy aliens in the temporary custody of the Immigration and Naturalization Service (INS).[176]

In February of 1942, the President extended the program to cover certain citizens[177] as well as enemy aliens, and turned over the authority to prescribe "military areas" to the Secretary of War, who further delegated the responsibilities under the order with respect to the west coast to the Commanding General of the Western Defense Command. The new order, Executive Order 9066,[178] clearly amended the policy established under the earlier proclamations regarding aliens and restricted areas, but did not rely on the authority of Alien Enemy Act, as the previous proclamations had done.[179] Although the Department of Justice denied that the transfer of authority to the Department of War was motivated by a desire to avoid constitutional issues with regard to the restriction or detention of citizens, the House Select Committee Investigating National Defense Migration found the shift in authority significant, as it appeared to rely on the nation's war powers directly, and could find no support in the Alien Enemy Act with respect to

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[173] *See* Fact Sheet, White House, Status of Detainees at Guantanamo (February 7, 2002) *available at* http://www.presidency.ucsb.edu/ws/?pid=79402#axzz1jupEAeG5.

[174] The Supreme Court has stated that the conflict with Al Qaeda is a non-international armed conflict covered by Common Article 3 of the Geneva Conventions. Hamdan v. Rumsfeld, 548 U.S. 557, 631 (2006).

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

[176] *See* Defense Migration Report, *supra* footnote 121, at 163.

[177] General De Witt's declaration of military areas indicated that five classes of civilians were to be affected:

> Class 1, all persons who are suspected of espionage, sabotage, fifth column, or other subversive activity; class 2, Japanese aliens; class 3, American-born persons of Japanese lineage; class 4, German aliens; class 5, Italian aliens.

Id.

[178] 17 *Federal Register* 1407 (February 19, 1942).

[179] *See* Defense Migration Report, *supra* footnote 121, at 162-66 (recounting history of general evacuation orders issued by Lt. Gen. John De Witt, commanding general of the western defense command).

citizens.[180] The summary exercise of authority under that act to restrain aliens was thought by the Committee to be untenable in the case of U.S. citizens, and the War Department felt congressional authorization was necessary to provide authority for its enforcement.[181]

Congress granted the War Department's request, enacting with only minor changes the proposed legislation providing for punishment for the knowing violation of any exclusion order issued pursuant to Executive Order 9066 or similar executive order.[182] A policy of mass evacuation from the West Coast of persons of Japanese descent—citizens as well as aliens—followed, which soon transformed into a system of compulsive internment at "relocation centers."[183] Persons of German and Italian descent (and others) were treated more selectively, receiving prompt (though probably not full and fair) loyalty hearings[184] to determine whether they should be interned, paroled, or released. The disparity of treatment was explained by the theory that it would be impossible or too time-consuming to attempt to distinguish the loyal from the disloyal among persons of Japanese descent.[185]

In a series of cases, the Supreme Court limited, but did not explicitly strike down the internment program. In the *Hirabayashi* case, the Supreme Court found the curfew imposed upon persons of Japanese ancestry to be constitutional as a valid war-time security measure, even as implemented against U.S. citizens, emphasizing the importance of congressional ratification of the Executive Order.[186] Hirabayashi was also indicted for violating an order excluding him from virtually the entire west coast, but the Court did not review the constitutionality of the exclusion measure because the sentences for the two charges were to run concurrently.[187] Because the restrictions affected citizens solely because of their Japanese descent, the Court framed the relevant inquiry as a question of equal protection, asking

> whether in the light of all the facts and circumstances there was any substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion.[188]

In a concurring opinion, Justice Douglas added that in effect, due process considerations did not apply to ensure that only individuals who were actually disloyal were affected by the restrictions,

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[180] *See id.* at 166. Attorney General Francis Biddle later wrote that he had opposed the evacuation of Japanese-American citizens, and had let it be known that his Department "would have nothing to do with any interference with citizens, or recommend the suspension of the writ of habeas corpus." *See* FRANCIS BIDDLE, IN BRIEF AUTHORITY 216-17 (1962); *id.* at 219 (reporting his reaffirmation to the President of his continuing opposition to the evacuation just prior to the signing of the Order).

[181] *See* Defense Migration Report, *supra* footnote 121, at 167.

[182] P.L. 77-503, *codified at* 18 U.S.C. 1383 (1970 ed.), *repealed by* P.L. 94-412, Title V, §501(e) (1976).

[183] *See* PERSONAL JUSTICE DENIED, REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 2 (1982).

[184] *See id.* at 285 (describing impediments to full and fair hearings, including a prohibition on detainees' representation by an attorney, inability to object to questions, presumption in favor of the government, and ultimate decision falling to reviewers at the Alien Enemy Control Unit).

[185] *See id*. at 288-89 (pointing out that there appeared to have been a greater danger of sabotage and espionage committed by German agents, substantiated by the German saboteurs case noted *supra*).

[186] Hirabayashi v. United States, 320 U.S. 81, 89-90 (1943) (emphasizing that the Act of March 21, 1942, specifically provided for the enforcement of curfews).

[187] *Id.* at 105 (also declining to address the government's contention that an order to report to the Civilian Control Station did not necessarily entail internment at a relocation center).

[188] *Id.* at 95.

even if it were to turn out that only a small percentage of Japanese-Americans were actually disloyal.[189] However, he noted that a more serious question would arise if a citizen did not have an opportunity at some point to demonstrate his loyalty in order to be reclassified and no longer subject to the restrictions.[190]

In *Korematsu*,[191] the Supreme Court upheld the conviction of an American citizen for remaining in his home despite the fact that it was located on a newly declared "Military Area" and was thus off-limits to persons of Japanese descent. Fred Korematsu also challenged the detention of Japanese-Americans in internment camps, but the Court declined to consider the constitutionality of the detention itself, as Korematsu's conviction was for violating the exclusion order only. The Court, in effect, validated the treatment of citizens in a manner similar to that of enemy aliens by reading Executive Order 9066 together with the act of Congress ratifying it as sufficient authority under the combined war powers of the President and Congress, thus avoiding having to address the statutory scope of the Alien Enemy Act.

In *Ex parte Endo*,[192] however, decided the same day as *Korematsu*, the Supreme Court did not find adequate statutory underpinnings to support the internment of loyal citizens. The Court ruled that the authority to exclude persons of Japanese ancestry from declared military areas did not encompass the authority to detain concededly loyal Americans. Such authority, it found, could not be implied from the power to protect against espionage and sabotage during wartime.[193] The Court declined to decide the constitutional issue presented by the evacuation and internment program, instead interpreting the executive order, along with the Act of March 27, 1942 (congressional ratification of the order),[194] narrowly to give it the greatest chance of surviving constitutional review.[195] Accordingly, the Court noted that detention in Relocation Centers was not mentioned in the statute or executive order, but was developed during the implementation of the program. As such, the authority to detain citizens could only be found by implication in the act, and must therefore be found to serve the ends Congress and the President had intended to reach. The Court declared its obligation to interpret the wartime measure to allow for the "greatest possible accommodation between ... liberties and the exigencies of war," which in turn required an assumption that Congress "intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."[196]

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

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

[189] *Id.* at 106 (Douglas, J., concurring).

[190] *Id.* at 109 (Douglas, J., concurring).

[191] 323 U.S. 214 (1944).

[192] 323 U.S. 283 (1944).

[193] 323 U.S. at 302.

[194] *Id*. at 298 (citing *Hirabayashi* at 87-91).

[195] *Id*. at 299.

[196] *Id*. at 300.

was excluded from his home in San Diego and removed by military force to Nevada, although the exclusion board had determined that he had no association with any enemy and was more aptly described as a "harmless crackpot."[197] He was the manager of a religious publication that preached pacifism, and was indicted along with several others for fraud in connection with the publication.[198] The district court awarded damages in favor of Wilcox, but the circuit court reversed, finding the exclusion within the authority of the military command under Executive Order 9066 and 18 U.S.C. Section 1383, and holding that

> the evidence concerning plaintiff's activities and associations provided a reasonable ground for the belief by defendant ... that plaintiff had committed acts of disloyalty and was engaged in a type of subversive activity and leadership which might instigate others to carry out activities which would facilitate the commission of espionage and sabotage and encourage them to oppose measures taken for the military security of Military Areas Nos. 1 and 2, and that plaintiff's presence in the said areas from which he had been excluded would increase the likelihood of espionage and sabotage and would constitute a danger to military security of those areas.[199]

The court also found that the act of Congress penalizing violations of military orders under Executive Order 9066 did not preclude General De Witt from using military personnel to forcibly eject Wilcox from his home.[200]

The Japanese internment program has since been widely discredited,[201] the convictions of some persons for violating the orders have been vacated,[202] and the victims have received compensation,[203] but the constitutionality of detention of citizens during war who are deemed dangerous has never expressly been ruled *per se* unconstitutional.[204] In the cases of citizens of other ethnic backgrounds who were interned or otherwise subject to restrictions under Executive Order 9066, courts played a role in determining whether the restrictions were justified, sometimes resulting in the removal of restrictions.[205] Because these persons were afforded a limited hearing to determine their dangerousness, a court later ruled that the Equal Protection Clause of the Constitution did not require that they receive compensation equal to that which Congress granted in 1988 to Japanese-American internees.[206]

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[197] *See* Wilcox v. Emmons, 67 F. Supp 339 (S.D. Cal.), *rev'd sub nom.* De Witt v. Wilcox, 161 F.2d 785 (9th Cir. 1947).

[198] De Witt v. Wilcox, 161 F.2d 785 (9th Cir.), *cert. denied*, 332 U.S. 763 (1947).

[199] *Id.* at 790.

[200] *Id.* at 788.

[201] *See generally* PERSONAL JUSTICE DENIED, *supra* footnote 183.

[202] Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985).

[203] Through the Civil Liberties Act of 1988, Congress provided $20,000 to each surviving individual who had been confined in the camps. P.L. 100-383, 102 Stat. 903 (1988), *codified at* 50 U.S.C. App. §§1989b *et seq*.

[204] *But see* Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984), *aff'd per curiam*, 847 F.2d 779 (Fed. Cir.1988), *cert. denied*, 488 U.S. 925 (1988) (unconstitutional taking of property interests of internees was found where government officials were aware of allegations that there was no military necessity sufficient to justify internment).

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

[206] *See* Jacobs v. Barr, 959 F.2d 313 (D.C. Cir. 1992).

It may be argued that *Hirabayashi* and the other cases validating Executive Order 9066 (up to a point) support the constitutionality of preventive detention of citizens during war, at least insofar as the determination of dangerousness of the individual interned is supported by some evidence and some semblance of due process is accorded the internee. However, it may bear emphasis that a congressional declaration of war alone was not enough to support the President's actions. Instead, it was emphasized in these cases that Congress had specifically ratified Executive Order 9066 by enacting 18 U.S.C. Section 1383, providing a penalty for violation of military orders issued under the Executive Order. Thus, even though the restrictions and internments occurred in the midst of a declared war, a presidential order coupled with specific legislation appears to have been required to validate the measures. The internment of Japanese-American citizens without individualized determination of dangerousness was found not to be authorized by the Executive Order and ratifying legislation (the Court thereby avoiding the constitutional issue), although the President had issued a separate Executive Order to set up the War Relocation Authority[207] and Congress had given its tacit support for the internments by appropriating funds for the effort.[208]

The only persons who were treated as enemy combatants pursuant to Proclamation No. 2561[209] were members of the German military who had been captured after landing on U.S. beaches from German submarines.[210] Collaborators and persons who harbored such saboteurs were tried in federal courts for treason or violations of other statutes.[211] Hans Haupt, the father of one of the saboteurs, was sentenced to death for treason, but this sentence was overturned on the ground that procedures used during the trial violated the defendant's rights.[212] On retrial, Haupt was sentenced to life imprisonment, but his sentence was later commuted on the condition that he leave the country. Another person charged with treason for his part in the saboteurs' conspiracy, Helmut Leiner, was acquitted of treason but then interned as an enemy alien.[213] Anthony Cramer, an American citizen convicted of treason for assisting one of the saboteurs to carry out financial transactions, had his conviction overturned by the Supreme Court on the grounds that the overt acts on which the charge was based were insufficient to prove treason.[214] Emil Krepper, a pastor living in New Jersey, came under suspicion because his name was found printed in secret ink on the saboteur's handkerchief, although he never met with any of the saboteurs. He was indicted for

[207] Exec. Order No. 9102 (1942) (purporting to implement Exec. Order No. 9066).

[208] *See Ex parte* Endo, 323 U.S. 283 (1944).

[209] Proclamation No. 2561, of July 2, 1942, 7 *Federal Register* 5101, 56 Stat. 1964. Like Exec. Order No. 9066 issued earlier that same year, Proc. 2561 retained terminology from the Alien Enemy Act but did not explicitly rely on it for authority. However, during oral argument before the Supreme Court, the Attorney General placed some emphasis on the fact that the Proclamation was consistent with the Alien Enemy Act as well as the Articles of War, and was thus authorized by Congress. *See* LANDMARK BRIEFS, *supra* note 39, at 594-95.

[210] There were ten in all. Eight saboteurs were tried by military commission in 1942. *See Ex parte* Quirin, 317 U.S. 1 (1942). Two other saboteurs landed by submarine in 1945 and were convicted by military commission. *See* Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956). *See* out-of-print CRS Report RL31340, *Military Tribunals: The Quirin Precedent* (available to congressional clients from author upon request).

[211] LOUIS FISHER, NAZI SABOTEURS ON TRIAL 68-71(2d ed. 2005) (documenting the fate of the saboteurs' confederates in the United States).

[212] United States v. Haupt, 136 F.2d 661 (7th Cir. 1943).

[213] *Leiner is Interned After Acquittal Ordered by Court in Treason Case*, NY TIMES, December 1, 1942, at 1. He was subsequently indicted for violating the Trading with the Enemy Act (TWEA). *Leiner Reindicted for Aiding Treason*, NY TIMES, December 5, 1942, at 17.

[214] Cramer v. United States, 325 U.S. 1 (1945). He was later found guilty of violating the TWEA and censorship laws.

violating TWEA and receiving a salary from the German government without reporting his activity as a foreign agent.[215]

These cases involving collaborators with the *Quirin* eight, as well as other unrelated cases of sabotage or collaboration with the enemy during World War II, did not result in any military determinations that those accused were enemy combatants or could be subjected to military detention until the end of hostilities.[216] It is thus not clear what kind of association with Germany or with other enemy saboteurs, short of actually belonging to the German armed forces, might have enabled the military to detain any of them as enemy combatants under the law of war.[217] It appears that *Quirin* was not interpreted at the time as having established executive authority to detain persons based solely on their alleged hostile intent, particularly without any kind of a trial.

After the *Quirin* decision, the Attorney General asked Congress to pass legislation to strengthen criminal law relating to internal security during wartime.[218] Attorney General Biddle wrote that new law was necessary to cover serious gaps and inadequacies in criminal law, which he argued did not provide sufficient punishment for hostile enemy acts perpetrated on the territory of the

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[215] *See Krepper Guilty as Spy*, NY TIMES, March 15, 1945, at 25.

[216] Other Americans who were employed by enemy governments overseas were also tried for treason in federal court; there is nothing in the cases to indicate that the courts or the prosecutors believed that the defendants could be treated as enemy combatants under the law of war. *See* Kawakita v. United States, 343 U. S. 717 (1952) (civilian interpreter with private munitions company in Japan who mistreated prisoners of war employed in munitions production); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U. S. 918 (1949) (American engaged by German government radio to produce and disseminate anti-American propaganda); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950) (same); Best v. United States, 184 F.2d 131 (1st Cir.), *cert. denied*, 340 U. S. 939 (1951) (same); Burgman v. United States, 188 F.2d 637 (D.C. Cir.), *cert. denied*, 342 U. S. 838 (1951) (same); D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U. S. 935 (1952) (radio broadcasting for Japanese government under the name "Tokyo Rose"). Those who were arrested and detained by the military overseas were apparently considered to have the status of civilians who pose a danger to the occupying armed forces rather than combatants or prisoners of war. *See D'Aquino*, 192 F.2d at 355:

> While open warfare had ceased, the security of the occupation forces was a continuing problem confronting the military commanders. Appellant was a suspected traitor. That she might be capable of fomenting disorder among the Japanese population then being subjected to the yoke of military occupation, and of inciting discontent among the troops of the occupying powers was a sufficient basis for the military to take the precautionary measure of interning appellant. The paramount interest of the occupation force is its own security. We see no abuse of military discretion in the protection of that interest. We hold that the confinement was within the constitutional sanction of the war power; the restraint was legal.

Although the war power was invoked to validate detention by military forces overseas, the cases do not appear to establish that military detention outside of a situation of military occupation is an authority implicit in a declaration of war.

[217] H.R. 7737, 77th Cong. (1942).

[218] H.Rept. 78-219 (1943) (describing Justice Department proposal introduced in previous Congress as H.R. 7737, then under consideration as amended in H.R. 2087). The War Security Act would have provided punishment for a list of "hostile acts against the United States" if committed with the intent to aid a country with which the United States was at war, to include sabotage, espionage, harboring or concealing an agent or member of the armed forces of an enemy state, or entering or leaving the United States with the intent of providing aid to the enemy. It also would have made it a criminal offense to fail to report information giving rise to probable cause to believe that another has committed, is committing or plans to commit a hostile act against the United States. *Id.* at 11. Title II of the act would have modified court procedure in cases involving these "hostile acts" as well as certain other statutes, that would have allowed the Attorney General to certify the importance of a case to the war effort, resulting in expedited proceedings, enhanced secrecy for such proceedings, and a requirement for the approval of a federal judge to release the accused on bail. The act was not intended to affect the jurisdiction of military tribunals and did not cover uniformed members of the enemy acting in accordance with the law of war. *Id.* at 12.

United States.[219] The House Committee on the Judiciary endorsed the proposed War Security Act, pointing to the fact that it had been necessary to try the eight Nazi saboteurs by military commission due to the inadequacy of the penal code to punish the accused for acts that had not yet been carried out.[220] It also suggested that military jurisdiction might be unavailable to try enemy saboteurs who had not "landed as part of a small invasion bent upon acts of illegal hostilities."[221] The bill passed in the House of Representatives, but was not subsequently taken up in the Senate.

The Cold War

After the close of World War II, Congress turned its attention to the threat of communism. Recognizing that the Communist Party presented a different kind of threat from that of a strictly military attack, Members of Congress sought to address the internal threat with innovative legislation.[222]

The Emergency Detention Act

Introduced in the wake of the North Korean attack on South Korea, the Internal Security Act (ISA) of 1950[223] was the culmination of many legislative efforts to provide means to fight what was viewed as a foreign conspiracy to infiltrate the United States and overthrow the government by means of a combination of propaganda, espionage, sabotage, and terrorist acts.[224] The Attorney General presented to the Congress a draft bill that would strengthen the espionage statutes, amend the Foreign Agents Registration Act, and provide authority for U.S. intelligence agencies to intercept communications.[225] According to the Attorney General, the legislation was necessary because "[t]he swift and more devastating weapons of modern warfare coupled with the treacherous operations of those who would weaken our country internally, preliminary to and in conjunction with external attack, have made it imperative that we strengthen and maintain an alert and effective peacetime vigilance."[226]

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[219] *See id.* at 1-2 (letter from Attorney General to the House of Representatives dated October 17, 1942).

[220] *See id.* at 5 (stating that the maximum criminal punishment for a conspiracy to commit sabotage would have been only two years).

[221] *See id*; *see also* 1942 ATT'Y GEN. ANN. REP. 13. This view was echoed during floor debate of the proposed act in the House of Representatives. Supporters and detractors of the bill alike seemed to agree that the military tribunal upheld in *Ex parte Quirin* was an extraordinary measure that was constitutionally permissible only because the saboteurs had come "wearing German uniforms" and thus were "subject to be prosecuted under military law." *See* 89 CONG. REC. 2780 - 82 (1943) (remarks by Reps. Michener, Rankin, and Kefauver). There does not appear to be any suggestion that *Quirin* could be interpreted to authorize the detention without trial of individuals suspected of hostile intent by designating them to be unlawful enemy combatants.

[222] During the initial debate of the Internal Security Act (ISA), it was urged:

> As our case is new, we must think anew and act anew.

[223] 64 Stat. 987 (1950).

[224] *See id*. §2(1) finding:

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

[225] *See* 95 CONG. REC. 440-43 (1949) (Sen. McCarran introducing S. 595).

[226] Letter from Attorney General Tom C. Clark to Sen. McCarran, *reprinted at* 95 CONG. REC. 441, 442 (1949).

S. 4037 combined the proposed legislation with other bills related to national security, including measures to exclude and expel subversive aliens, detain or supervise aliens awaiting deportation, and deny members of communist organizations the right to travel on a U.S. passport. The bill also contained a requirement for Communist-controlled organizations and Communist-front organizations to register as such.[227] President Truman and opponents of the so-called McCarran Act thought the registration requirements and other provisions likely to be either unconstitutional or ineffective, and expressed concern about possible far-reaching civil liberties implications.[228]

Opponents of the McCarran Act sought to substitute a new bill designed to address the security concerns in what they viewed as a more tailored manner. Senator Kilgore introduced the Emergency Detention Act[229] (Kilgore bill) to authorize the President to declare a national emergency under certain conditions, during which the Attorney General could adopt regulations for the preventive incarceration of persons suspected of subversive ties. At the time of the debate, 18 U.S.C. Section 1383 was still on the books and would have ostensibly supported the declaration of military areas and the enforcement of certain restrictions against aliens or citizens deemed dangerous. Proponents of the Kilgore bill argued that the proposed legislation would create a program for internment of enemies that would contain sufficient procedural safeguards to render it invulnerable to court invalidation based on *Ex parte Endo*.[230]

The final version of the ISA contained both the McCarran Act and the Emergency Detention Act. President Truman vetoed the bill, voicing his continued opposition to the McCarran Act. The President did not take a firm position with regard to the Emergency Detention Act, stating that

> it may be that legislation of this type should be on the statute books. But the provisions in [the ISA] would very probably prove ineffective to achieve the objective sought, since they would not suspend the writ of habeas corpus, and under our legal system to detain a man not charged with a crime would raise serious constitutional questions unless the writ of habeas corpus were suspended.[231]

The President recommended further study on the matter of preventive detention for national security purposes. Congress passed the ISA over the President's veto.[232]

The Emergency Detention Act, Title II of the ISA, authorized the President to declare an "Internal Security Emergency" in the event of an invasion of the territory of the United States or its

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[227] *See* S.Rept. 81-2369, Protecting the Internal Security of the United States 4 (1950) (defining Communist-controlled organizations based on "their domination by a foreign government or the world Communist movement").

[228] *See* S.Rept. 81-2369 (minority views of Sen. Kilgore).

[229] 64 Stat. 1019 (1950) (authorizing the President to declare an "Internal Security Emergency," in the event of war, invasion, or insurrection in aid of a foreign enemy, which would authorize the Attorney General to "apprehend and by order detain each person ... [where] there is reasonable ground to believe that such person may engage in acts of espionage or sabotage").

[230] *See* 96 CONG. REC. 14,414, 14,418 (remarks of Sen. Douglas, a co-sponsor of the Kilgore bill, discussing legal precedent for proposed internment and identifying procedural safeguards incorporated in the proposed bill).

[231] *See* Internal Security Act, 1950—Veto Message from the President of the United States, 96 CONG. REC. 15,629, 15,630 (1950). (Section 116 of the Emergency Detention Act explicitly preserved the right to habeas corpus). At the same time, it appears that the FBI had compiled a list of dangerous persons whom it planned to detain in the event of a national security, in which case the Administration hoped to obtain congressional ratification and a suspension of the Writ of Habeas Corpus. *See* Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities 436-38, S.Rept. 94-755, 94th Cong., 2d Sess. (1976). President Truman's staff advised him that he could safely veto the act and use separate authority to effect a detention plan. *Id*. at 442. After passage of the Emergency Detention Act, the FBI and the Justice Department did not make any changes to bring their detention plan into conformance with the statute. *Id*.

[232] *See* 96 CONG. REC. 15,633, 15,726 (1950).

possessions, a declaration of war by Congress, or insurrection within the United States in aid of a foreign enemy, where the President deemed implementation of the measures "essential to the preservation, protection and defense of the Constitution."[233] The act authorized the maintenance of the internment and prisoner-of-war camps used during World War II for use during subsequent crises, and authorized the Attorney General, during national emergencies under the act, to issue warrants for the apprehension of "those persons as to whom there is a reasonable ground to believe that such persons probably will engage in, or conspire to engage in acts of sabotage or espionage." Detainees were to be taken before a preliminary hearing officer within 48 hours of their arrest, where each detainee would be informed of the grounds for his detention and of his rights, which included the right to counsel, the privilege against self-incrimination, the right to introduce evidence and cross-examine witnesses.[234] The Attorney General was required to present evidence to the detainee and to the hearing officer or board "to the fullest extent possible consistent with national security."[235] Evidence that could be used to determine whether a person could be detained as dangerous included evidence that a person received training from or had ever committed or conspired to commit espionage or sabotage on behalf of an entity of a foreign Communist party or the Communist Party of the United States, or any other group that seeks the overthrow of the government of the United States by force.[236]

The Non-Detention Act

No internal emergencies were declared pursuant to the Emergency Detention Act, despite the United States' involvement in active hostilities against Communist forces in Korea and Vietnam and the continued suspicion regarding the existence of revolutionary and subversive elements within the United States.[237] Nevertheless, the continued existence of the act aroused concern among many citizens, who believed the act could be used as an "instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views."[238] Several bills were introduced to amend or repeal the act.[239] The Justice Department supported the repeal of the act, opining that the potential advantage offered by the statute in times of emergency was outweighed by the

[233] ISA title II, §102, 64 Stat. 1021.

[234] *Id.* §104, 64 Stat. 1022.

[235] *Id.* §104(f), 64 Stat. 1023 (excluding evidence of any officers or agents of the government, the revelation of which would be dangerous to the security and safety of the United States).

[236] *Id.* §109(h).

[237] *See* H.Rept. 1351, at 1, (1968) entitled "Guerrilla Warfare Advocates in the United States," in which the House Committee on Un-American Activities stated its belief that "there can be no doubt about the fact that there are mixed Communist and black nationalist elements which are planning and organizing guerrilla-type operations against the United States." The Committee concluded that "[a]cts of overt violence by the guerrillas would mean that they had declared a 'state of war' within the country and, therefore, would forfeit their rights as in wartime. The McCarran Act provides for various detention centers to be operated throughout the country and these might be utilized for the temporary imprisonment of warring guerrillas." *Id.* at 59.

[238] *See* H.Rept. 92-116, at 2, *reprinted in* 1971 U.S.C.C.A.N. 1435, 1436.

[239] *Id; see also* H.Rept. 91-1599, at 1-2 (Emergency Detention Act of 1950 Amendments, Report Accompanying H.R. 19163) (describing public concern based on misconception that the act authorized the detention of individuals based on race). According to the Justice Department, the rumors that a system of concentration camps existed was likely instigated by a pamphlet distributed by a group named Citizens Committee for Constitutional Liberties, which had been found to be a Communist-front organization that aimed to nullify the ISA. *Id.* at 9. H.R. 19163 would have amended the Emergency Detention Act to clarify persons to whom it could apply and to include procedural safeguards.

benefits that repealing the detention statute would have by allaying the fears and suspicions (however unfounded they might have been) of concerned citizens.[240]

Congress decided to repeal the Emergency Detention Act in 1971, and enacted in its place a prohibition on the detention of American citizens except pursuant to an act of Congress.[241] Now commonly called the Non-Detention Act, the legislation was intended to prevent a return to the pre-1950 state of affairs, in which "citizens [might be] subject to arbitrary executive authority" without prior congressional action.[242] Executive Order 9066 was formally rescinded in 1976.[243] Congress repealed 18 U.S.C. Section 1383 later that year.[244]

It may be argued that Congress, in passing the Emergency Detention Act in 1950, was legislating based on its constitutional war powers, to provide for the preventive detention during national security emergencies of those who might be expected to act as enemy agents, though not technically within the definition of "alien enemies." It does not, therefore, appear that Congress contemplated that the President already had the constitutional power to declare such individuals to be enemy combatants subject to detention under the law of war on the basis of an authorization to use force or declaration of war, except perhaps under very narrow circumstances. The much earlier legislative history accompanying the passage of the Alien Enemy Act may also be interpreted to suggest that the internment of enemy spies and saboteurs in war was not ordinarily a military power that could be exercised without express congressional authority.[245] Moreover, the repeal of the Emergency Detention Act and the enactment of the Non-Detention Act, 18 U.S.C. Section 4001(a), may be interpreted to preclude the detention of American citizens without charge or trial as enemy agents or traitors, as was contemplated in the Emergency Detention Act.

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[240] *Id.* at 3, 1971 U.S.C.C.A.N. 1437.

[241] P.L. 92-128 (1971), *codified at* 18 U.S.C. §4001(a).

[242] *See* H.Rept. 92-116, at 5 (1971) *reprinted in* 1971 U.S.C.C.A.N. 1435, 1438 (concluding that the legislation "will assure that no detention camps can be established without at least the acquiescence of the Congress").

[243] Proc. 4417, 41 *Federal Register* 7741 (February 20, 1976) (proclaiming retroactively the termination of Executive Order 9066 as of the date of cessation of hostilities of World War II, December 31, 1946).

[244] *See* National Emergencies Act §501(e), P.L. 94-412, 90 Stat. 1255 (September 14, 1976). According to the legislative history, Congress repealed the penalty for violating military orders with respect to military areas proclaimed pursuant to any executive order because the measure had been intended only for wartime, and noted the repeal was consistent with the earlier repeal of the Emergency Detention Act. *See* H.Rept. 94-238, at 9-10 (1976).

[245] *See* Alien Enemy Brief, *supra* note 79, at 14-15.

> In this country, [the power to intern enemies] is not lodged wholly in the Executive; it is in Congress. Perhaps, if war was declared, the President might then, as Commander in Chief, exercise a military power over these people; but it would be best to settle these regulations by civil process.

(Quoting remarks of Mr. Sewall from 2 Annals of Congress 1790, 5th Congress (1798). Others may have believed the President had the authority to intern all enemies once war was declared:

> [The discretionary power to take enemy aliens into custody] could not be looked as a dangerous or exorbitant power, since the President would have the power, the moment war was declared, to apprehend the whole of these people as enemies, and make them prisoners of war. ... This bill ought rather to be considered as an amelioration or modification of those powers which the President already possesses as Commander in Chief, and which the martial law would prove more rigorous than those proposed by this new regulation.

See id. at 15-16 (quoting remarks of Mr. Otis in Congress, 2 Annals of Congress 1790-91, 5th Congress (1798).

Recent "Enemy Combatant" Cases Continued

Hamdi establishes that the AUMF authorizes the detention of persons captured during the course of hostilities, including those who are U.S. citizens, but left to lower courts to decide the scope of detention authority. The Supreme Court has not since the *Hamdi* decision elaborated on the scope of detention authority. After the Supreme Court declined to resolve the case of Jose Padilla on the merits and denied certiorari with respect to Ali Saleh al-Marri, an alien whose case had been rejected by the Seventh Circuit, both cases headed to the Fourth Circuit to begin litigation anew.

The *Padilla* Case

The district judge there initially granted Padilla's motion for summary judgment and ordered the government to release Padilla, a U.S. citizen, from military detention, while suggesting Padilla could be kept in civilian custody if charged with a crime or determined to be a material witness. Padilla's attorneys had based their argument on the dissenting opinion of four Supreme Court Justices, who would have found Padilla's detention barred by the Non-Detention Act, and the language in *Hamdi* seemingly limiting the scope of authorization to combatants captured in Afghanistan. The government argued that Padilla's detention was covered under the *Hamdi* decision's interpretation of the AUMF because he allegedly attended an Al Qaeda training camp in Afghanistan before traveling to Pakistan and then to the United States,[246] apparently based on information obtained from interrogations of Padilla and other persons detained as "enemy combatants." The allegation differed from the original justification offered in the Second Circuit, in which it was alleged that Padilla had planned to detonate a radioactive "dirty bomb" somewhere in the United States. Even based on the new rationale, the judge disagreed, finding that express authority from Congress would be necessary and that the AUMF contains no such authority: "[S]ince Petitioner's alleged terrorist plans were thwarted when he was arrested on the material witness warrant, the Court finds that the President's subsequent decision to detain Petitioner as an enemy combatant was neither necessary nor appropriate."[247]

Accordingly, the district court found that Padilla's detention was barred by 18 U.S.C. Section 4001(a).

The government then appealed the case to the United States Court of Appeals for the Fourth Circuit, where Padilla's attorneys argued that the case bears closer resemblance to the Civil War case *Ex parte Milligan*[248] than to either the *Quirin* or *Territo* cases. The government argued that *Milligan* is inapposite to the petition of Padilla on the grounds that Padilla, like petitioners in *Quirin*, is "a belligerent associated with the enemy who sought to enter the United States during wartime in an effort to aid the enemy's commission of hostile acts, and who therefore is subject to the laws of war."[249]

The Fourth Circuit Court of Appeals reversed, finding that Padilla, although captured in the United States, could be detained pursuant to the AUMF because he had been, prior to returning to the United States, "'armed and present in a combat zone' in Afghanistan as part of Taliban forces

[246] *See* Respondents' Answer to the Petition for a Writ of Habeas Corpus at 2, Padilla v. Hanft, C/A No. 02:04 2221-26AJ (D.S.C. filed 2004)[hereinafter "Government Answer"] (arguing that these circumstances, "[i]f anything, [make Padilla] more, not less, of an enemy combatant").

[247] Padilla v. Hanft, 389 F. Supp. 2d 678, 686 (D.S.C. 2005).

[248] 4 Wall. (71 U.S.) 2 (1866).

[249] *See* Government Answer at 15.

during the conflict there with the United States."[250] As the Supreme Court again considered whether to grant review, the government charged Padilla with conspiracy based on evidence unrelated to the original "dirty bomb" plot allegations and asked the Fourth Circuit to approve Padilla's transfer, suggesting its earlier opinion should be vacated. The appellate judges preferred to defer to the Supreme Court to make that determination. In rejecting the government's application, Circuit Judge Luttig issued a harsh opinion expressing disappointment at the government's decision abruptly to abandon its position that national security imperatives demanded Padilla's continued military detention:

> [A]s the government surely must understand, although the various facts it has asserted are not necessarily inconsistent or without basis, its actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake—an impression we would have thought the government could ill afford to leave extant. They have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time, that the President possesses the authority to detain enemy combatants who enter into this country for the purpose of attacking America and its citizens from within, can, in the end, yield to expediency with little or no cost to its conduct of the war against terror—an impression we would have thought the government likewise could ill afford to leave extant.[251]

The government then petitioned the Supreme Court for leave to transfer him from military custody to a federal prison for civilian trial. The Court granted the government permission to transfer Padilla[252] and later denied certiorari.[253] Concurring with the denial of certiorari, Justice Kennedy cited prudential reasons for declining to hear the case despite the assertion that the government could reverse course and again place Padilla in military custody.[254] In his view, the danger of repetition would be mitigated by the fact that the district court in Florida would be in a position to act quickly to respond in the event the government sought to change Padilla's status or conditions of detention. He also pointed out that Padilla could petition directly to the Supreme Court for habeas review.

Justice Ginsburg dissented from the denial of certiorari, pointing out that the government had not retracted the assertion of executive power to which Padilla was objecting and was not prevented from returning to its previous course. She wrote that "[a] party's voluntary cessation does not make a case less capable of repetition or less evasive of review."[255]

After a trial, Padilla was found guilty and sentenced to 17 years and three months' imprisonment, the trial court having rejected his motion to dismiss charges against him due to his alleged

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[250] 423 F.3d 386, 390-91 (4th Cir. 2005).

[251] Padilla v. Hanft, 432 F.3d 582, 587 (4th Cir. 2005) (order).

[252] Padilla v. Hanft, 546 U.S. 1084 (2006).

[253] 547 U.S. 1062 (2006).

[254] *Id*. (Kennedy, J., joined by Roberts, C.J., and Stevens, J., concurring). Justice Kennedy wrote:

> That Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts, also counsels against addressing those claims when the course of legal proceedings has made them, at least for now, hypothetical. This is especially true given that Padilla's current custody is part of the relief he sought, and that its lawfulness is uncontested.

[255] *Id*. (Ginsburg, J., dissenting from denial of certiorari). Justice Souter and Justice Breyer voted to grant certiorari, but did not join the dissent.

mistreatment at the hands of the military.[256] The government subsequently won an appeal on the basis that Padilla's sentence was too lenient, but he has not as of yet been resentenced.[257]

The *Al-Marri* Case

In March 2005, Judge Floyd agreed with the government that al-Marri's detention was authorized by the AUMF and transferred the case to a federal magistrate to examine the factual allegations supporting the government's detention of the petitioner as an enemy combatant.[258] The government provided a declaration asserting that al-Marri, a Qatari student in Illinois, is closely associated with Al Qaeda and had been sent to the United States prior to September 11, 2001, to serve as a "sleeper agent" for Al Qaeda in order to "facilitate terrorist activities and explore disrupting this country's financial system through computer hacking."[259] The magistrate judge recommended the dismissal of the petition on the basis of information the government provided, which al-Marri did not attempt to rebut and which the magistrate judge concluded was sufficient for due process purposes in line with the *Hamdi* decision.[260] The district judge adopted the magistrate judge's report and recommendations in full, rejecting the petitioner's argument that his capture away from a foreign battlefield precluded his designation as an "enemy combatant."[261]

Al-Marri appealed, and the government moved to dismiss on the basis that Section 7 of the 2006 MCA stripped the court of jurisdiction. The petitioner asserted that Congress did not intend to deprive him of his right to habeas or that, alternatively, the MCA is unconstitutional. The majority of the appellate panel avoided the constitutional question by finding that al-Marri did not meet the statutory definition as an alien who "has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination," and was thus not barred from seeking habeas relief.[262]

Turning to the merits, the panel majority found that al-Marri does not fall within the legal category of "enemy combatant" within the meaning of *Hamdi*, and that the government could continue to hold him only if it charged him with a crime, commenced deportation proceedings,

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[256] United States v. Padilla, 2007 WL 1079090 (S.D. Fla. 2007) (unreported opinion). While one district court held Padilla can pursue civil damages against a former government official for his treatment in military detention, Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), another has rejected a civil suit on the basis of qualified immunity for the government officials involved, Lebron v. Rumsfeld, 764 F. Supp. 2d 787 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir. 2012).

[257] United States v. Jayyousi, 657 F.3d 1085 (11TH Cir. 2011).

[258] Al-Marri v. Hanft, 378 F. Supp. 2d 673 (D.S.C. 2005) (order denying summary judgment).

[259] Al-Marri v. Pucciarelli, 534 F.3d 213, 220 (4th Cir. 2008) (Motz, J., concurring) (citing declaration Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism).

[260] Al-Marri v. Wright, 443 F. Supp. 2d 774 (D. S.C. 2006) (citing Hamdi v. Rumsfeld, 542 U.S. 507 (2004)).

[261] *Id*. at 778-80.

[262] The court held that the 2006 MCA requires a two-step process for determining whether persons are properly detained as enemy combatants, but that the President's determination of the petitioner's "enemy combatant" status fulfilled only the first step. The court next found that al-Marri could not be said to be awaiting such a determination within the meaning of the MCA, inasmuch as the government was arguing on the merits that the presidential determination had provided all of the process that was due, and the government had offered the possibility of bringing al-Marri before a CSRT only as an alternative course of action in the event the petition were dismissed. Further, the majority looked to the legislative history of the MCA, from which it divined that Congress did not intend to replace *habeas* review with the truncated review available under the amended DTA in the case of aliens within the United States, who it understood to have a constitutional as opposed to merely statutory entitlement to seek habeas review. Al-Marri v. Wright, 487 F.3d 160, 172 (4th Cir. 2007), *vacated sub nom.* al-Marri v. Pucciarelli, 534 F.3d 213 (2008) (*per curiam*).

obtained a material witness warrant in connection with grand jury proceedings, or detained him for a limited time pursuant to the USA PATRIOT Act.[263] In so holding, the majority rejected the government's contention that the AUMF authorizes the President to order the military to seize and detain persons within the United States under the facts asserted by the government, or that, alternatively, the President has inherent constitutional authority to order the detention.

The government cited the *Hamdi* decision and the Fourth Circuit's decision in *Padilla v. Hanft*[264] to support its contention that al-Marri is an enemy combatant within the meaning of the AUMF and the law of war. The court, however, interpreted *Hamdi* as confirming only that "the AUMF is explicit congressional authorization for the detention of individuals in the *narrow category* ... [of] individuals who were 'part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.'"[265] Likewise, Padilla, although captured in the United States, could be detained pursuant to the AUMF only because he had been, prior to returning to the United States, "'armed and present in a combat zone' in Afghanistan as part of Taliban forces during the conflict there with the United States."[266] The court explained that the two cases cited by the government, *Hamdi* and *Padilla*, involved situations similar to the World War II case *Ex parte Quirin*,[267] in which the Supreme Court agreed that eight German saboteurs could be tried by military commission because they were enemy belligerents within the meaning of the law of war.[268] In contrast, al-Marri's situation was to be likened to *Ex parte Milligan*,[269] the Civil War case in which the Supreme Court held that a citizen of Indiana accused of conspiring to commit hostile acts against the Union was nevertheless a civilian who was not amenable to military jurisdiction.[270] The court concluded that enemy combatant status rests, in accordance with the law of war, on affiliation with the military arm of an enemy government in an international armed conflict.

Judge Hudson dissented, arguing that the broad language of the AUMF, which authorized the President "to use all necessary and appropriate force against those nations, *organizations, or persons* he determines" were involved in the terrorist attacks of September 11, 2001, "would certainly seem to embrace surreptitious al Qaeda agents operating within the continental United States."[271] He would have found no meaningful distinction between the present case and *Padilla*.

The government petitioned for and was granted a rehearing *en banc*.[272] On rehearing, the narrowly divided Fourth Circuit full bench rejected the earlier panel's decision in favor of the government's position that al-Marri fit the legal definition of "enemy combatant," but also reversed the district court's decision that al-Marri was not entitled to present any more evidence to refute the government's case against him. Four of the judges on the panel would have retained

[263] *Id*. at 196.

[264] 423 F.3d 386 (4th Cir. 2005). The government is no longer holding Jose Padilla as an enemy combatant, having turned him over to civil authorities for trial on charges associated with terrorism.

[265] *Al-Marri*, 487 F.3d at 180 (citing *Hamdi*, 542 U.S. at 516-17) (emphasis in original).

[266] *Id*. (citing *Padilla*, 423 F.3d at 390-91).

[267] 317 U.S. 1 (1942).

[268] *Al-Marri*, 487 F.3d at 179 (citing *Quirin*, 317 U.S. at 37-38; *Hamdi*, 542 U.S. at 519; *Padilla*, 423 F.3d at 391).

[269] 4 Wall. (71 U.S.) 2 (1866).

[270] *Al-Marri*, 487 F.3d at 189.

[271] *Id*. at 196 (Hudson, J., dissenting).

[272] Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (*per curiam*). The intervening Supreme Court decision in *Boumediene* led the court to reject the government's contention that the 2006 MCA had divested the court of jurisdiction.

the earlier decision, arguing that it was not within the court's power to expand the definition of "enemy combatant" beyond the law-of-war principles at the heart of the Supreme Court's *Hamdi* decision.[273] However, these four judges joined in Judge Traxler's opinion to remand for evidentiary proceedings in order "at least [to] place the burden on the Government to make an initial showing that normal due process protections are unduly burdensome and that the Rapp declaration is 'the most reliable available evidence,' supporting the Government's allegations before it may order al-Marri's military detention."[274]

Judge Traxler, whose opinion was controlling for the case although not joined in full by any of the other judges, agreed with the four dissenting judges that the AUMF "grants the President the power to detain enemy combatants in the war against al Qaeda, including belligerents who enter our country for the purpose of committing hostile and war-like acts such as those carried out by the al Qaeda operatives on 9/11."[275] Accordingly, he would define "enemy combatant" in the present terrorism-related hostilities to include persons who "associate themselves with al Qaeda" and travel to the United States "for the avowed purpose of further prosecuting that war on American soil, ... even though the government cannot establish that the combatant also 'took up arms on behalf of that enemy and against our country in a foreign combat zone of that war.'"[276] Under this definition, American citizens arrested in the United States could also be treated as enemy combatants under similar allegations,[277] at least if they had traveled abroad and returned for the purpose of engaging in activity related to terrorism on behalf of Al Qaeda.

However, Judge Traxler did not agree that al-Marri had been afforded due process by the district court to challenge the factual basis for his designation as an enemy combatant. While recognizing that the *Hamdi* plurality had suggested that hearsay evidence might be adequate to satisfy due process requirements for proving enemy combatant status, Judge Traxler did not agree that such relaxed evidentiary standards are necessarily appropriate when dealing with a person arrested in the United States:

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[273] *Id*. at 227-232 (Motz, J. concurring) (citing *Hamdi*, 542 U.S. at 518). Judge Motz, joined by three other judges, characterized leading precedents as sharing two characteristics:

> (1) they look to law-of-war principles to determine who fits within the "legal category" of enemy combatant; and (2) following the law of war, they rest enemy combatant status on affiliation with the military arm of an enemy nation.

Under their interpretation of the law of war, there is no combatant status in non-international armed conflict, where detention is controlled by domestic law.

[274] *Al-Marri*, 534 F.3d at 253 (Motz, J. concurring).

[275] *Id*. at 253-254 (Traxler, J., concurring).

[276] *Id*. at 258-259 (Traxler, J., concurring). Judge Traxler further suggested that the types of activities that would distinguish a combatant from a civilian enemy would include violent activities. *See id*. at 261 (describing the allegations that al-Marri "directly allied himself with al Qaeda abroad, volunteered for assignments (including a martyr mission), received training and funding from al Qaeda abroad, was dispatched by al Qaeda to the United States as an al Qaeda operative with orders to serve as a sleeper agent, and was tasked with facilitating and ultimately committing terrorist attacks against the United States within this country"). The dissenting judges suggested similar definitions for determining who may be treated as an "enemy combatant." *See id*. at 285 (Williams, J., concurring in part and dissenting in part) (defining enemy combatant covered by the AUMF as "an individual who meets two criteria: (1) he attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone; (2) on behalf of an enemy force"); *id*. at 323-324 (Wilkinson, J., concurring in part and dissenting in part) (proposing two-part test in which "an 'enemy' is any individual who is (1) a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force" and a combatant is "a person who knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of an enemy nation or organization").

[277] *See id*. at 279-80 (Gregory, J., concurring).

> Because al-Marri was seized and detained in this country,... he is entitled to habeas review by a civilian judicial court and to the due process protections granted by our Constitution, interpreted and applied in the context of the facts, interests, and burdens at hand. To determine what constitutional process al-Marri is due, the court must weigh the competing interests, and the burden-shifting scheme and relaxed evidentiary standards discussed in *Hamdi* serve as important guides in this endeavor. *Hamdi* does not, however, provide a cookie-cutter procedure appropriate for every alleged enemy-combatant, regardless of the circumstances of the alleged combatant's seizure or the actual burdens the government might face in defending the habeas petition in the normal way.[278]

In December 2008, the Supreme Court agreed to hear an appeal of the *al-Marri* ruling,[279] potentially setting the stage for the Court to make a definitive pronouncement regarding the President's authority to militarily detain terrorist suspects apprehended away from the Afghan battlefield. However, on January 22, 2009, President Obama instructed the Attorney General, Secretary of Defense, and other designated officials to review the factual and legal basis for al-Marri's continued detention as an enemy combatant, and "identify and thoroughly evaluate alternative dispositions."[280] This review culminated in criminal charges being brought against al-Marri in the U.S. District Court for the Central District of Illinois, alleging that al-Marri provided material support to Al Qaeda and had conspired with others to provide material support to Al Qaeda.[281] The United States thereafter moved for the Supreme Court to dismiss al-Marri's appeal as moot and authorize his transfer from military to civilian custody pending his criminal trial. On March 6, 2009, the Court granted the government's application concerning the transfer of al-Marri to civilian custody. It vacated the Fourth Circuit's judgment and remanded the case to the appellate court with instructions to dismiss the case as moot.[282] Accordingly, the appellate court's earlier decision regarding the President's authority to detain terrorist suspects captured within the United States is no longer binding precedent in the Fourth Circuit. Al-Marri thereafter pled guilty in federal court to one count of conspiracy to provide material support to Al Qaeda,[283] and was sentenced to eight and a half years in prison.

The dismissal of al-Marri's habeas case means that the President's legal authority to militarily detain terrorist suspects apprehended in the United States has not been definitively settled. The transfer of both Padilla and al-Marri to civilian custody to face trial in federal court means that the United States no longer holds any terrorist suspect in military detention who was apprehended in the United States.

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[278] *Id*. at 272. Judge Traxler formulated a general rule under which such enemy combatants "would be entitled to the normal due process protections available to all within this country, including an opportunity to confront and question witnesses against him[, unless] the government can demonstrate to the satisfaction of the district court that this is impractical, outweighed by national security interests, or otherwise unduly burdensome because of the nature of the capture and the potential burdens imposed on the government to produce non-hearsay evidence and accede to discovery requests, [in which case] alternatives should be considered and employed." *Id*. at 273.

[279] 555 U.S. 1066 (2008).

[280] Memorandum from President Barack Obama to the Attorney General and Other Officials, "Review of the Detention of Ali Saleh Kahlah al-Marri," January 22, 2009, available at http://www.whitehouse.gov/the_press_office/ReviewoftheDetentionofAliSalehKahlah/ (hereinafter "al-Marri Memo").

[281] Department of Justice, "Ali Al-Marri Indicted for Providing Material Support to Al-Qaeda," press release, February 27, 2009, http://www.usdoj.gov/opa/pr/2009/February/09-ag-177.html.

[282] Al-Marri v. Spagone, 555 U.S. 1220 (2009).

[283] Department of Justice, "Ali Al-Marri Pleads Guilty to Conspiracy to Provide Material Support to Al-Qaeda," press release, April 30, 2009, http://www.usdoj.gov/opa/pr/2009/April/09-nsd-415.html.

Hedges v. Obama

Although there are currently no persons detained in the United States under AUMF authority, plaintiffs in *Hedges v. Obama*[284] were able to persuade a federal judge to issue an injunction enjoining enforcement of Section 1021(b)(2) of the 2012 NDAA, which includes among "covered persons" subject to detention under the authority of the AUMF: "A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."

The *Hedges* plaintiffs are a group of activists and journalists who sued the government arguing that the provision caused them to alter their lawful conduct in order to avoid being subject to military detention without trial under the provision. Plaintiff Christopher Hedges, a reporter who has published articles in the *New York Times* and *Harper*, among other publications, stated that his work in the past involved coverage of Al Qaeda and the Taliban and other groups that might be considered to be engaged in hostilities against the United States or its coalition partners. For instance, he told the court that he was traveling with members of the PKK when they were attacked by Turkish war planes, that he had had occasion to meet with members of Hamas's leadership, and that his work was sometimes posted on jihadist websites. Another journalist, Alexa O'Brien, testified that she feared that her work reporting in particular on Guantanamo detainees and WikiLeaks disclosures of U.S. government documents could lead to her detention under Section 1021, suggesting that the detention of Al Jazeera cameraman Sami Al-Hajj at Guantanamo led her to believe that journalistic pursuits might constitute "substantial support" within the meaning of the statute. Two foreign plaintiffs also provided testimony, both basing their concerns in part on their past activities in support of WikiLeaks. One of them, Icelandic parliament member Birgitta Jonsdottir, noted her participation in the release by WikiLeaks of a leaked video depicting a U.S. Apache helicopter attack on a group of men who turned out to be civilians, pointing out that the accused leaker, Bradley Manning, is being tried by court-martial for having aided terrorists.

The Obama Administration sought to deflect the lawsuit on the basis that Section 1021 of the NDAA does "nothing new," but merely reaffirms detention authority conferred by the AUMF as it has been practiced by the executive branch and affirmed by the U.S. Court of Appeals for the D.C. Circuit. Read in this light, the government argued in essence, Section 1021 cannot give rise to reasonable fears of imminent detention for the conduct the plaintiffs cited because these activities did not result in detention during the time that passed between enactment of the AUMF and the 2012 NDAA, and the plaintiffs did not report similar fears under the AUMF standing alone. Accordingly, the government urged the court to declare the plaintiffs to be without standing and to dismiss the action.

District Judge Katherine B. Forrest rejected the argument that Section 1021 is merely an affirmation of the AUMF that does not change the law regarding detention. To hold otherwise, she wrote, "would be contrary to basic principles of legislative interpretation that require Congressional enactments to be given independent meaning."[285] She also noted differences in language describing the scope of application in the two statutes that make the NDAA language seem broader, including the addition of "substantial support" of Al Qaeda and the Taliban and the inclusion of "associated forces" (who might not have had direct involvement in the 2001 terrorist

[284] Hedges v. Obama, No. 12-CV-331, 2012 WL 1721124 (S.D.N.Y. May 16, 2012).

[285] *Id*. at *2.

attacks), as well as mention of "direct support of hostilities" engaged in by any such groups against the United States or its coalition partners. While the court noted that the NDAA language was consistent with a government filing in the D.C. Circuit describing detention authority under the AUMF,[286] it also agreed that the government filing did not itself have the force of law, and that cases from the D.C. Circuit upholding the standard have not yet construed the meaning of substantial support. The court also took note of the fact that the Obama Administration has stated that it will not indefinitely detain U.S. citizens under the authority conferred by either the AUMF or the NDAA, but found the promise insufficient to cure the vagueness of the statutory language.

Each of the plaintiffs gave testimony demonstrating how Section 1021 had produced a chilling effect over their professional activities. The government, however, told the court in each case that it was unprepared to state whether the activities in question constitute "substantial support" to Al Qaeda or associated forces of the type that could subject the plaintiffs to military detention. Largely in light of the government's responses, the court credited the plaintiffs' fears as reasonable and concluded that the statute must also be too vague to satisfy the Fifth Amendment's requirement that a statute provide adequate notice regarding the nature of conduct to be avoided. Given the government's representations that Section 1021 does not add anything to previous law, the court presumed that a preliminary injunction would not cause the government undue burdens.

The government moved for reconsideration of the court's opinion with respect to the plaintiffs' standing, stating that "law of war detention" does not apply to persons solely on the basis of independent journalistic activities or independent public advocacy as described by the plaintiffs. The court issued an order clarifying that the injunction was not limited to the detention of the plaintiffs named in the case, but, rather, because the judge treated the lawsuit as a facial challenge and found the provision constitutionally infirm on the basis of the First Amendment and the Due Process Clause of the Fifth Amendment, the injunction was to apply nationwide.[287] The court made the injunction permanent in September 2012.[288]

The government immediately appealed. The Court of Appeals for the Second Circuit granted the government's motion for a stay of the injunction pending appeal, and, in July 2013, reversed the decision due to lack of standing on the part of citizen and noncitizen plaintiffs for different reasons.[289] The appellate court set forth its interpretation of Section 1021 and concluded that the provision has no bearing on whether U.S. citizens may lawfully be detained pursuant to the AUMF. While the provision was found to have an effect with respect to noncitizens outside the United States, the court held that the noncitizen plaintiffs had failed to establish a sufficient reason to fear that the government would in fact apprehend them and subject them to detention.

The court first gave a historical overview of the relevant case law interpreting the AUMF and then examined the legislative history of Section 1021. In particular, the court explained how paragraph (e), which states that nothing in Section 1021 is to be construed as affecting existing laws with respect to U.S. citizens, lawful permanent residents, and other persons within the United States, came into being. The measure was adopted as a floor amendment and represented a truce between Members who believed that the AUMF permits such persons to be detained and those who believed it does not. The court did not attempt to resolve the issue on the merits.

[286] *See* Detention Authority Memorandum, *supra* footnote 5.

[287] Hedges v. Obama, No. 12-CV-331 (S.D.N.Y. June 6, 2012).

[288] Hedges v. Obama, 890 F. Supp. 2d 424 (S.D.N.Y. 2012).

[289] Hedges v. Obama,724 F.3d 170 (2d Cir. 2013).

In interpreting Section 1021, the court noted its duty to construe it "[to give effect] to all its provisions, so that no part will be inoperative, superfluous, void or insignificant."[290] It noted, however, that its first duty was to presume that "a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."[291] The court viewed the provision at hand as entirely unambiguous. The apparent contradiction in the fact that the provision purports to reaffirm the AUMF while adding new criteria not found in the original was deemed to be a clarification as to how the AUMF applies to *organizations* and not just *persons* deemed responsible for 9/11.[292]

The court did not agree that its interpretation meant that Section 1021 did nothing at all. Rather, it explained that:

> there are perfectly sensible and legitimate reasons for Congress to have affirmed the nature of AUMF authority in this way. To the extent that reasonable minds might have differed—and in fact very much did differ—over whether the administration could detain those who were part of or substantially supported al-Qaeda, the Taliban, and associated forces under the AUMF authority to use force against the "organizations" responsible for 9/11, Section 1021(b)(2) eliminates any confusion on that particular point. At the same time, Section 1021(d) ensures that Congress' clarification may not properly be read to suggest that the President did not have this authority previously—a suggestion that might have called into question prior detentions. This does not necessarily make the section a "'legislative attempt at an ex post facto "fix" ... to try to ratify past detentions which may have occurred under an overly-broad interpretation of the AUMF,'" as plaintiffs contend. Rather, it is simply the 112th Congress' express resolution of a previously debated question about the scope of AUMF authority.[293]

The court further clarified why Sections 1021(d) and 1021(e) are not duplicative. Section 1021(d) states that the provision does not expand or limit the President's authority to detain under the AUMF, and accordingly is meant to clarify that the authority to detain those who were part of or who substantially supported the enumerated forces already existed under the AUMF. By contrast, Section 1021(e) "disclaims any statement about existing authority," whatever that may be. The court concluded that:

> Section 1021 means this: With respect to individuals who are not citizens, are not lawful resident aliens, and are not captured or arrested within the United States, the President's AUMF authority includes the authority to detain those responsible for 9/11 as well as those who were a part of, or substantially supported, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners—a detention authority that Section 1021 concludes was granted by the original AUMF. But with respect to citizens, lawful resident aliens, or individuals captured or arrested in the United States, Section 1021 simply says nothing at all.[294]

With this understanding of Section 1021, the court found that the American citizen plaintiffs had no standing to challenge Section 1021 because if they were to find themselves detained, that would be due to "existing laws and authorities," which the plaintiffs had not challenged.

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[290] *Id*. at 189 (quoting Corley v. United States, 556 U.S. 303, 314 (2009)).

[291] *Id*. at 191 (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)).

[292] *Id*. at 190.

[293] *Id*. at 190-91.

[294] *Id.* at 192.

Section 1021(b), however, did have meaning for noncitizens captured abroad; it codified what previously had been implicit and subject to reasonable dispute. The court assumed without deciding that the noncitizen plaintiffs may assert First and Fifth Amendment rights.[295] To obtain standing to challenge a law that has not actually been enforced against the plaintiffs, they must be able to demonstrate that there is a sufficiently imminent chance it will be enforced.[296] The government in this case disputed that the plaintiffs are subject to the statute, while the plaintiffs feared their work for WikiLeaks might indirectly provide support to Al Qaeda.[297] The court declined to decide whether the plaintiffs could lawfully be detained, but held that even assuming their detention would be permitted, they must show more. Neither of the noncitizen plaintiffs adduced any evidence that the government had threatened to place them in military detention or intends to do so, nor had they shown that persons similarly situated to them had been subjected to military detention.[298] The court vacated the injunction. The plaintiffs have asked the Supreme Court to review the decision.[299]

The Role of Congress

Congressional Authority

Congress has ample authority under Article I of the Constitution to regulate the capture and detention of enemy combatants.[300] While it appears that the existence of a state of war has generally sufficed to authorize the executive branch to capture and detain prisoners of war, history shows that even during declared wars, additional statutory authority has been seen as necessary to validate the domestic detention of persons who were not members of any armed forces, at least in the absence of a suspension of the writ of habeas corpus.

In *Ex parte Milligan*,[301] the Supreme Court invalidated a military detention and sentence of a civilian for violations of the law of war, despite accusations that Milligan conspired and committed hostile acts against the United States, in part on the basis that it found the law of war inapplicable to persons who were not part of the armed forces of a belligerent in what constituted an international armed conflict for the purposes of the law of war.[302] A majority of the *Milligan* Court agreed that Congress was not empowered to authorize the President to assert military jurisdiction in areas not subject to martial law, but scholars disagree as to whether that portion of the opinion is binding as law or is merely *dicta*. Still, the Court did not object to the part of the statute that authorized temporary military detention of persons until a grand jury had met. It is not

[295] *Id*. at 193 n.140.

[296] The court found the standard to be higher than the threshold applicable in challenges to criminal laws, in which case it may be generally presumed that the government will make an effort to enforce them. Section 1021 together with the AUMF authorizes but does not mandate detention. *See id*. at 196 and 201.

[297] The court rejected the plaintiffs' contention that they could be detained for supporting WikiLeaks or other organizations that are considered terrorist by some governments but do not fit the definition for the use of force under the AUMF.

[298] *Id* at 202. The court noted that the secrecy surrounding the reasons for holding Guantanamo detainees did not relieve the plaintiffs' burden or permit speculation, *Id*. n.188 (citing Clapper v. Amnesty Int'l, 133 S. Ct. 1138 (2013)).

[299] *Id., petition for cert filed*, (U.S. December 16, 2013) (No. 13-758).

[300] U.S. CONST. art. I, §8, cl. 10-14 (power to define and punish "Offenses against the Law of Nations"; war powers); *Id*. §8, cl. 18 (power to make necessary and proper laws).

[301] 4 Wall. (71 U.S.) 2 (1866).

[302] *Id.* at 131.

clear that the *Milligan* Court would have rejected a statute that authorized the suspension of habeas corpus with respect to "aiders and abettors" of the enemy, which might well have included the Sons of Liberty, although five of the justices thought their trial by military commission with or without congressional authority would be unconstitutional.

The *Korematsu*[303] decision is frequently cited as upholding the internment of Japanese-Americans during World War II, but the Supreme Court expressly limited its decision to the legality of excluding these citizens from declared military areas. *Ex parte Endo*[304] invalidated the detention of a U.S. citizen who was "concededly loyal" to the United States, possibly implying that the detention of *disloyal* citizens may be permissible, at least if "clearly and unmistakably" authorized by Congress, but leaving open the question of what constitutional due process is required to determine the loyalty of persons the government sought to intern. In 1950, Congress passed the Emergency Detention Act (EDA),[305] which authorized the President to declare an "Internal Security Emergency," during which the President could authorize the apprehension and detention of any person deemed reasonably likely to engage in acts of espionage or sabotage. However, this authority was never exercised, and the EDA was repealed without any court having had the opportunity to evaluate its constitutionality.[306]

It has been argued that *Ex parte Quirin* stands for the proposition that citizens and other persons caught aiding the enemy within the United States are effectively part of the enemy and may be treated as enemy combatants under the law of war. It may be that the law of war has evolved so that it applies in the same way to armed conflicts that do not meet the traditional requirements for a belligerency as it applies in wars between states (while traditional distinctions that now seem anachronistic may be discarded or embraced as deemed appropriate), but there seems to be little evidence that a majority of states have adopted this view. Supreme Court cases through *Quirin* seem to be based on a traditional view of international law, in which an individual's belligerent status was a function of his employment in the armed forces of an opposing government. *Milligan* appears to have rejected the contention that a person who was part of a militant group that did not qualify as a belligerent party under international law gained belligerent status. Under this view, military force (and military jurisdiction) might have been permissible with respect to a group like the Sons of Liberty only if military force or martial law became absolutely necessary. The *Quirin* opinion did not overturn this understanding, but may be understood to have clarified that it did not apply in the case of persons who had belligerent status (although not entitled to prisoner of war protections). The *Hamdi* Court does not appear to have marked a clear departure from the traditional practices in this regard, either, although the circumstances of the case did not require an analysis of the domestic impact of the AUMF. On the other hand, it may be argued that *Milligan* does not mean what it apparently says with respect to belligerent status,[307] or has since been limited to the facts as later described in *Quirin* to stand merely for the proposition that civilians not accused of engaging in belligerent activity at all may not be tried by military

[303] 323 U.S. 214 (1944).

[304] 323 U.S. 283 (1944).

[305] 64 Stat. 1019 (1950).

[306] P.L. 92-128, 85 Stat. 347 (1971).

[307] *See* NEELY, *supra* footnote 84, ch. 8 (describing "irrelevance of the *Milligan* decision" to national security policy and military doctrine); Bradley, *supra* footnote 153, at 115-16 (noting "puzzling aspects" to the decision that made it unclear whether the majority opinion applies to military commissions as used to try violations of the law of war or to administer justice under martial law). Still, the *Hamdi* plurality's description of the difference between *Milligan* and *Quirin* as turning on whether a detainee could be held as a prisoner of war suggests that belligerent status is a key factor.

commission,[308] or that it is no longer good law in light of changes in the law of war[309] or enactment of the AUMF.[310]

Congressional activity since the *Quirin* decision suggests that Congress did not previously interpret *Quirin* as a significant departure from prior practice with regard to restriction of civil liberties during war, and would not likely have presumed that an authorization to use military force implies the authority to detain without trial persons in the United States who were neither captured on an active battlefield nor arrested while participating in an enemy invasion. If that is the case, it may be that Congress, in enacting the AUMF, intended to authorize the capture and detention of persons captured on the battlefield during actual hostilities, as the *Hamdi* Court confirmed, while withholding the authority to detain accused enemy agents or aiders and abettors operating domestically.

Until enactment of the detainee provisions in the 2012, Congress did not expressly clarify the scope of detention authority under the AUMF.[311] In affirming the detention authority under the AUMF in the 2012 NDAA, Congress declined to clarify whether the detention authority extends to U.S. citizens and other persons within the United States, providing instead that the law and authority with respect to such persons remains unchanged.[312] The statute does not require that any citizens be detained in military custody, but if such a detention occurs, it will be up to a court to determine Congress's intent when it enacted the AUMF, or alternatively, to decide whether the law as it was subsequently developed by the courts and executive branch sufficiently established that authority for such detention already exists. The issue could also arise in the event a noncitizen is detained pursuant to the mandatory detention requirement in Section 1022.

While the Supreme Court has never expressly upheld the administrative detention or internment of U.S. citizens and non-alien enemies during war as a preventive measure, the *Hirabayashi* and *Korematsu* line of cases suggests that courts may show deference to a congressional finding that restrictions on civil liberties are necessary to counter the threat of sabotage and espionage during war. On the other hand, if it is established that the authority to detain citizens must be conferred by Congress in clear and unmistakable terms, the NDAA detention provisions may, by leaving the question to the courts, demonstrate a lack of clear intent that would be necessary to support such a detention.

Any U.S. citizens who may be held in military custody in the future can be expected to argue that the Non-Detention Act,18 U.S.C. Section 4001(a), continues to control and that the AUMF, even

[308] *See*, *e.g.*, Duncan v. Kahanamoku, 327 U.S. 304 (1946) (invoking *Milligan* to disapprove of military commission trials of civilians for ordinary crimes in Hawaii under martial law because, although Congress had provided for martial law in the Hawaiian Organic Act, Congress had not meant to exceed the boundaries between military and civilian power).

[309] It may be argued that Common Article 3 of the Geneva Conventions regulating non-international armed conflict, by establishing protections for persons captured during such conflicts without establishing their right to belligerent status has eviscerated the traditional ties between rights and obligations of participants in war.

[310] Under this view, perhaps, the majority opinion of *Milligan* denying congressional authority to establish military commissions under such circumstances is dicta, and that Congress, by authorizing the use of force against persons or organizations, should be understood to have created a state of armed conflict in which the distinction between belligerent and civilian status of those deemed enemies is unimportant.

[311] One bill was introduced in the 109th Congress, the Detention of Enemy Combatants Act, H.R. 1076, that would have asserted congressional authority to limit the detention of U.S. persons as enemy combatants to defined circumstances. Executive comment was requested from the Department of Defense, but no action was taken on the bill.

[312] 2012 NDAA §1021(e).

as affirmed by the 2012 NDAA, provides an exception only in the narrow circumstances addressed in the *Hamdi* case.

Legislation in the 112th Congress

A number of bills were introduced in the 112th Congress that would have amended the detainee provisions in the 2012 NDAA or otherwise clarify detention authority under the AUMF.[313] On February 29, 2012, the Senate Judiciary Committee held a hearing entitled "The Due Process Guarantee Act: Banning Indefinite Detention of Americans," in relation to S. 2003, 112th Congress. No Obama Administration officials testified on either of the two panels.

The House version of the National Defense Authorization Act for FY2013 (2013 NDAA; H.R. 4310) was passed in May 2012. The Senate passed its version, S. 3254, as a substitute for the House bill on December 4, 2012. The bills addressed the issue of detention of U.S. persons inside the United States in different ways. The detainee measures from the House version were largely adopted in conference. P.L. 112-239 was enacted into law on January 2, 2013.

The Senate had adopted a measure that would have modified 18 U.S.C. Section 4001 to clarify that authorizations to use force are not to be construed to permit detention of U.S. citizens or lawful permanent residents in the United States unless Congress passes a law expressly authorizing such detention.[314] This measure was eliminated from the bill reported out of conference. An amendment to remove military detention as an optional "disposition under the law of war" for persons in the United States was proposed during floor debates in the House, but failed to garner sufficient votes for adoption.[315]

Instead, Section 1029 of P.L. 112-239 adopted a modified version of the House provision on habeas corpus rights. It provides that nothing in the AUMF or 2012 NDAA is to be construed as

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[313] H.R. 3676, 112th Cong. would have amended Section 1021(e) of the 2012 NDAA to provide that no "United States citizen may be detained against his or her will without all the rights of due process afforded to the citizen in a court ordained or established by or under Article III of the Constitution of the United States." H.R. 4092, 112th Cong., would have amended Sections 1021 and 1022 of the 2012 NDAA by adding a subsection to each to clarify that access to habeas corpus remains available to all individuals detained within the United States and that "American citizens and lawful residents" may not be detained without due process rights. H.R. 4192 and a companion bill, S. 2175, 112th Cong., would have added a new subsection to Section 1021 to provide that, with respect to covered persons detained within the United States pursuant to AUMF authority, disposition under the law of war means only transfer for "trial and proceedings" by a federal or state court in accordance with constitutional due process. S. 2003 and a companion bill, H.R. 3702, entitled the Due Process Guarantee Act of 2011, would have amended the Non-Detention Act so that an authorization to use military force would not be construed as an act of Congress authorizing the detention of U.S. citizens or lawful permanent resident aliens arrested in the United States unless express authority for such detention is given, similar to language adopted by the Senate (see below). H.R. 3785 would have repealed Section 1021 of the 2012 NDAA altogether.

[314] The Senate version would have added a new paragraph to 18 U.S.C. Section 4001:

> (b)(1) An authorization to use military force, a declaration of war, or any similar authority shall not authorize the detention without charge or trial of a citizen or lawful permanent resident of the United States apprehended in the United States, unless an Act of Congress expressly authorizes such detention.
>
> (2) Paragraph (1) applies to an authorization to use military force, a declaration of war, or any similar authority enacted before, on, or after the date of the enactment of the National Defense Authorization Act For Fiscal Year 2013.
>
> (3) Paragraph (1) shall not be construed to authorize the detention of a citizen of the United States, a lawful permanent resident of the United States, or any other person who is apprehended in the United States.

[315] H.Amdt. 1127 to H.R. 4310, 112th Cong.

denying "the availability of the writ of habeas corpus" or denying "any Constitutional rights in a court ordained or established by or under Article III of the Constitution" with respect to persons who are inside the United States who would be "entitled to the availability of such writ or to such rights in the absence of such laws." The original provision from the House-passed bill, as amended on the floor,[316] would have covered only persons who are lawfully present in the United States when detained pursuant to the AUMF. Under the floor amendment, the provision would also have required the President to notify Congress within 48 hours of the detention of such a person, and established a requirement that such persons be permitted to file for habeas corpus "not later than 30 days after the person is placed in military custody."

The 2013 NDAA does not contain substantive clarification of which U.S. persons are lawfully subject to detention under the AUMF. Sections from the House bill setting forth congressional findings with respect to detention authority under the AUMF and 2012 NDAA and with respect to habeas corpus were omitted from the final version. Consequently, ambiguity with respect to who can be lawfully detained in the United States appears to have been preserved, but the 2013 NDAA provides reassurance that access to a court to petition for habeas corpus will remain available to those who are detained in the United States pursuant to the AUMF.

Proposed Legislation

The House passed its original version of the National Defense Authorization Act for FY2014, H.R. 1960, on June 14, 2013. It contained a provision similar to that in the 2013 NDAA providing reassurance that those apprehended pursuant to the AUMF in the United States may seek habeas relief, except that this provision would apply only to U.S. citizens (§1040B(a)). The section further provided that in cases in which such citizens petition for habeas corpus, the "government shall have the burden of proving by clear and convincing evidence that such citizen is an unprivileged enemy belligerent and there shall be no presumption that any evidence presented by the government as justification for the apprehension and subsequent detention is accurate and authentic" (§1040B(b)). This evidentiary standard appears to be higher than that which the courts of the D.C. Circuit have applied to cases involving Guantanamo detainees. In those cases, the government need only prove detention is lawful by a preponderance of the evidence,[317] and there is a presumption that official government records submitted as evidence are authentic.[318] The provision was not included in the final version of the 2014 NDAA, H.R. 3304 (P.L. 113-66).

H.R. 2325 and a companion bill, S. 1147, both captioned the Due Process and Military Detention Amendments Act, would add a new subsection to Section 1021 of the 2012 NDAA to provide that, with respect to covered persons detained within the United States pursuant to AUMF authority, disposition under the law of war must take place immediately, and means only transfer for "trial and proceedings" by a federal or state court in accordance with constitutional due process. The bills would also prohibit the transfer of any person detained, captured, or arrested in the United States, or a territory or possession of the United States, into military custody. The

[316] H.Amdt. 1126 to H.R. 4310, 112th Cong.

[317] *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, *en banc rehearing denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011). The D.C. Circuit has suggested that a lower standard may be constitutionally permissible. *See* Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011). For an overview of habeas cases involving detainees at Guantanamo, see CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

[318] *See* Latif v. Obama, 666 F.3d 746 (D.C. Cir. 2011), 677 F.3d 1175 (reissued), *cert. denied*, 132 S. Ct. 2741 (2012).

amendment would apply to all persons detained within the United States irrespective of citizenship, immigration status, or place of capture.

Conclusion

In signing the 2012 NDAA into law, President Obama stated that his Administration does not intend to detain indefinitely U.S. citizens pursuant to the detention authority in Section 1021.[319] However, given that the conflict may last beyond his term and that the 2012 NDAA appears to mandate at least temporary military detention for some non-U.S. citizens, it is possible that the Supreme Court has not issued its last word on "enemy combatants" and preventive detention as a means to prosecute hostilities authorized by the AUMF. Lower courts that have addressed questions the Supreme Court left unanswered have not achieved a consensus on the extent to which Congress has authorized the detention without trial of U.S. persons as "enemy combatants," and Congress has not so far clarified its intent. If *Hamdi* stands for the proposition that U.S. citizens may be detained under the same circumstances that make noncitizens amenable to law-of-war detention, regardless of location, then the Guantanamo cases may provide sufficient legal precedent for detaining similarly situated persons within the United States. If, on the other hand, historical precedent has any bearing on the interpretation of the state of the law and authorities regarding detention of U.S. persons under the law of war, as preserved by Section 1021(e) of the 2012 NDAA, it seems difficult to conclude that the AUMF should be read to imply the authority to detain such persons unless they are part of the armed forces of a belligerent party to an armed conflict. Congress has on occasion exercised the authority to permit the detention of civilians without trial based on the risk they are deemed to pose to national security, but if a declaration of war alone has not sufficed to trigger that authority, it seems unlikely that an authorization to use force would be presumed to confer it.

Author Information

Jennifer K. Elsea
Legislative Attorney

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[319] White House, Office of the Press Secretary, Statement by the President on H.R. 1540, December 31, 2011, *available at* http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540.