OBSERVING THE SEPARATION OF POWERS: THE PRESIDENT'S WAR POWER NECESSARILY REMAINS "THE POWER TO WAGE WAR SUCCESSFULLY"

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I. INTRODUCTION

When Attorney General Alberto Gonzales appeared before the Senate Judiciary Committee to defend the Patriot Act, his defense was premised largely upon the need for hypothetical authority. Public criticism of the Patriot Act has been particularly sharp in respect to the government's ability to discover with secret warrant which books patrons have borrowed from local libraries.[1] Apparently, Patriot Act Section 215[2] has never been used, but Attorney General Gonzales opined that it is a provision that should nevertheless be maintained because we are in the midst of a "war on terror."[3] To further explain, the Attorney General observed that even though a police officer may have yet to fire his service revolver, the anticipated nature of his work suggests that he should not be disarmed.[4] Senator Arlen Specter responded: "Attorney General Gonzalez, I don't think your analogy is apt."[5] We were left to discern if

1. For a balanced review of these criticisms and some suggestions for modest reform, see generally Michael J. Woods, *Counterintelligence and Access to Transactional Records: A Practical History of USA PATRIOT Act Section 215*, 1 J. NAT'L SEC. L. & POL'Y 37 (2005).

2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 287-88 (2001) (codified at 50 U.S.C. § 1861 (Supp. II 2002)). Section 215 authorizes the FBI to seek a court order compelling the production of "tangible things" with relevance to counterintelligence and counterterrorism investigations. 50 U.S.C. § 1861(a)(1). By definition, counterintelligence relates to the gathering of information about a foreign state or terrorist organization or its agents. *Id.*

3. Tom Curry, *Gonzales Ready to Deal on Patriot Act Fixes* (Apr. 5, 2005), *at* http://www.msnbc.msn.com/id/7393814. For a full transcript of the April 5, 2005 hearing, see *Transcript: Senate Judiciary Hearing on the Patriot Act* (Apr. 5, 2005), *at* http://www.washingtonpost.com/ac2/wp-dyn/A28081-2005Apr5 [hereinafter *Senate Judiciary Transcript*]. For the prepared remarks of Attorney General Gonzalez, see *Statement of Alberto R. Gonzalez, Attorney General of the United States, Before the United States Senate Committee on the Judiciary* (Apr. 5, 2005), *at* http://judiciary.senate.gov/testimony.cfm?id=1439&wit_id=3936.

4. *Senate Judiciary Transcript*, *supra* note 3; Curry, *supra* note 3.

5. *Senate Judiciary Transcript*, *supra* note 3. In response to questions from Senator Specter, Attorney General Gonzalez replied that the Department of Justice "has no interest in rummaging through the library records or the medical records of Americans." Curry, *supra* note 3. Specter probed further: "Does that mean you're ready to exclude them?" *Id.* "No, Gonzales said, explaining, 'We do have an interest, however, in records that may help us capture terrorists. And there may be occasions where having the tools under 215 to access this kind of information may be very helpful to the department in dealing with the terrorist threat.'" *Id.* The Attorney General then offered an analogy: [The Justice Department not using Section 215 so far to get library

this inaptness is true, and if so, why.

This Article rests upon the supposition that more than the merit of an isolated statutory search provision rests on the differing perspectives of the Attorney General and his Senate interlocutor. Specifically, the constitutional assessment of the war on terror depends almost entirely upon whether one—in fact—believes that the United States is at war.

Having been in residence in Washington, D.C. on September 11, 2001, and having lost both a member of my law faculty and a valued personal friend in the plane that was targeted for the Pentagon, the losses of that day's violence were encountered then, and remembered now, with sadness and dismay. These personal emotions would soon join a nation's appeal for justice. The President of the United States, with the added specific responsibility to "preserve, protect and defend the Constitution,"[6] was of like mind as he weighed the practical need and ethical justification for a proportionate military response. In light of the magnitude and unprovoked nature of the attack,[7] the immediate steps the President took in return—the introduction of troops into Afghanistan and the subduing, capture and detention of enemy combatants from that theater of war—cannot be seriously questioned. Indeed, while components of the media today regularly highlight international objection to the U.S. strategic determination that Iraq is also a key theater in the war on terror,[8] there is

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or medical records] is comparable to a police officer who carries a gun for 15 years and never draws it." *Senate Judiciary Transcript*, *supra* note 3. "'It should not be held against us that we've exercised, in my judgment, restraint,'" he assured Specter. Curry, *supra* note 3. "I don't think your analogy is apt," responded the chairman. *Id.*

6. U.S. CONST. art. II, § 1, cl. 8.

7. On September 11, 2001, the United States endured the deadliest and most savage attack of any single nation on any single day of history. Agents of the al Qaeda terrorist network hijacked four commercial airliners, crashing three into the World Trade Center towers in New York and the Pentagon outside Washington. A fourth plane was diverted from its anticipated terrorist target—the Capitol or the White House—by the heroic actions of everyday airline passengers who subdued their attackers at the cost of their own lives. Just under 3000 persons were killed in the attacks, thousands more were seriously injured, and billions of dollars in property was destroyed.

8. In giving the prestigious Gauer Lecture for the National Legal Center for the Public Interest in 2003, then-National Security Advisor Dr. Condoleezza Rice observed: "Confronting Saddam Hussein's regime in Iraq was also essential. For 12 years, Saddam Hussein sat in the middle of the world's most volatile region, defying more than a dozen United Nations Security Council resolutions . . . . He maintained ties to terror. He harbored known terrorists within his border, and he subsidized Palestinian suicide bombers." National Security Advisor Dr. Condoleezza Rice, Remarks at the National Legal Center for the Public Interest (Oct. 30, 2003), *available*

general international agreement that the United States had suffered an attack warranting individual and collective defense under all relevant international standards.[9] Further, in light of the global war declared and partially implemented[10] on the United States in the late 1990s—a declaration that vowed to kill civilian Americans in the millions wherever located[11]—it seems rather petulant to challenge the reasonable necessity to

at http://www.whitehouse.gov/news/releases/2003/10/20031031-5.html.

9. The day following 9/11, the United Nations Security Council issued Resolution 1368 declaring "such acts, like any act of international terrorism . . . a threat to international peace and security." S.C. Res. 1368, U.N. SCOR, 57th Sess., 4370th mtg. (2001), *available at* http://www.un.org/Docs/scres/2001/sc2001.htm. The resolution "'affirmed the right of nations to individual and collective self-defense under the Article 51 of the UN Charter.'" Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 44 (2004) (quoting Gordon P. Hook, *US Military Commissions and International Criminal Law*, NEW ZEALAND L. J. 1, 4 (Nov. 2003)). "'Article 51 provides that individual and collective self-defence is inherent to nations when an "armed attack occurs against a Member of the United Nations."'" *Id.* (quoting Hook, *supra*). In addition, NATO, invoking Article 5 of the NATO treaty following the 9/11 attacks, recognized that an "armed attack" on a member state had been launched, fully justifying a response by the collective force of the alliance. *Id.* (quoting Hook, *supra*). "'And Australia, with the US, invoked Article 4 of the ANZUS treaty'" to the same effect. *Id.* (quoting Hook, *supra*).

10. The desire by radical Islamic forces to destroy the World Trade Center dates back at least to the February 1993 World Trade Center bombing. As recounted in Laurie Mylroie's recent work entitled STUDY OF REVENGE, those sentenced for that bombing had hoped to topple the north tower onto the south tower "amid a cloud of cyanide gas that would engulf those trapped in the [north] tower." LAURIE MYLROIE, STUDY OF REVENGE: THE FIRST WORLD TRADE CENTER ATTACK AND SADDAM HUSSEIN'S WAR AGAINST AMERICA 1 (rev. ed. 2001). Mylroie records that United States District Judge Kevin Thomas Duffy observed that "[i]f that had happened, we would have been dealing with tens of thousands of deaths." *Id.* The mastermind of the 1993 bombing was Ramzi Yousef, who escaped. *Id.* at 1, 44-45. But as recounted by Mylroie, Yousef was in Manila less than two years later, in January 1995, plotting "to bomb twelve U.S. commercial aircraft over the Pacific." *Id.* at 1. Yousef's plan was thwarted by a fire that forced him to flee and leave behind a computer containing information which led to his arrest one month later. *Id.* Yousef is now in a supermaximum security prison in Colorado. Sharon Walsh, *N.Y. Bomber Gets 240 Years*, WASH. POST, Jan. 9, 1998, at A2. Initially, the 1993 World Trade Center bombing was attributed only to the blind radical Islamic Egyptian cleric Shaykh Omar Abdul Rahman. MYLROIE, *supra*, at 2. Later, however, after the legal proceedings were completed, the bombing conspiracies were attributed to Osama bin Ladin, possibly in collaboration with Iraqi intelligence. Laurie Mylroie, *Iraqi Complicity in the World Trade Center Bombing and Beyond*, 3 MIDDLE EAST INTELLIGENCE BULLETIN (June 2001), *at* http://www.meib.org/articles/0106_ir1.htm.

11. Osama bin Laden declared the following in an Arabic newspaper in February 1998:

capture and detain enemy combatants wherever they operate, abroad or in this country.

The appropriateness of the Executive's military response was bolstered by the sweeping Authorization for Use of Military Force (AUMF)[12] that Congress provided, confirming not only the President's inherent authority as Commander in Chief under Article II to respond to sudden attack,[13] but also the exercise of Congress's own judgment and discernment that a military response was fully appropriate.[14] The AUMF instructed the President to hunt down those who had perpetrated 9/11 or those who assisted or harbored the perpetrators, and specifically, to avoid the recurrence of this unprovoked attack upon human life and national sovereignty.[15] In light of the nature of the war to be fought, there was

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> We—with Allah's help—call on every Muslim who believes in Allah and wishes to be rewarded to comply with Allah's order to kill the Americans and plunder their money wherever and whenever they find it. We also call on Muslim ulema, leaders, youths, and soldiers to launch the raid on Satan's U.S. troops and the devil's supporters allying with them, and to displace those who are behind them so that they may learn a lesson.

Jihad Against Jews and Crusaders: World Islamic Front Statement, AL-QUDS AL-ARABI (London), Feb. 23, 1998, at 3, *available at* http://www.fas.org/irp/world/para/docs/980223-fatwa.htm.

Another spokesman for al Qaeda in June 2002 proclaimed that "'[w]e have the right to kill four million Americans—2 million of them children—and to exile twice as many and wound and cripple hundreds of thousands.'" Paul Marshall, *Four Million*, NAT'L REV. ONLINE, Aug. 27, 2004, *at* http://www.nationalreview.com/comment/marshall20040 8270844.asp (quoting article written by al Qaeda spokesman Suleiman Abu Gheith).

12. With the nation's financial and political centers seriously damaged, Congress enacted an Authorization for Use of Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224 (2001).

13. The AUMF preamble recognizes that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism." *Id.*

14. In its AUMF, Congress noted that the United States had the right in light of the attacks to "exercise its rights to self-defense and to protect United States citizens both at home and abroad." *Id.*

15. Section 2(a) provides: "That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Id.* § 2(a), 115 Stat. at 224. The Congress further recited that the AUMF fulfilled the "specific statutory authorization" of the War Powers Resolution. *Id.* § 2(b)(1), 115 Stat. at 244.

little, if any, serious concern that the President would overreach his constitutional authority. As discussed below, three years later, the Supreme Court would largely concur in the assessment that the President and the Congress had acted within constitutional bounds.[16]

There is now an even greater distance of years from 9/11, and with each passing month in relative domestic security there are increased calls to return to normalcy, especially as that relates to treating those captured in the war, no longer as combatants, but as criminal defendants. Even the United States Government at times seems to be equivocating, treating some of those captured, like the "American Taliban" John Walker Lindh and two recently charged individuals,[17] as criminal defendants rather than as wartime detainees. Is there a reasoned basis for treating some as combatants and some as criminal defendants? Sometimes, it may simply relate to the laboring oar of investigation. For example, in recent arrests,[18] the criminal avenue may have resulted from the extensive involvement of the FBI, which acquired the necessary charging evidence through a video-taped sting operation. Criminal charges may also reflect captures outside of a "traditional" battlefield, though—as will be discussed more fully later[19]—where the battlefield of the war on terror begins and ends cannot fairly be discussed in traditional terms, and at a minimum, should be admitted as difficult to discern.

The difficulty of drawing the combatant/criminal defendant line can be compared by specific reference. Lindh was originally detained as a military combatant. However, perhaps because Lindh had the dubious distinction of being the first American to be on the wrong side of the war, he was rerouted into the criminal justice system and a twenty-year plea agreement.[20] Yasser Hamdi—arguably, an even more nominal citizen than Lindh—stayed in the military system. He was released, subject to the

16. *See* discussion *infra* Parts III-V.

17. In late May 2005, two U.S. citizens were charged with giving material assistance to al Qaeda. Larry Neumeister, *Suspected al-Qaida Loyalists Denied Bail* (May 31, 2005), *at* http://abcnews.go.com/US/wireStory?id=806562. In New York, Tarik Shah, 42, was accused of taking an oath to assist the radical Islamist terrorist organization with martial arts instruction and in Florida, Dr. Rafiq Abdus Sabir, 50, was alleged to commit to treating jihadists in Saudi Arabia. *Id.* The criminal charges against Shah and Sabir carry a maximum of 15 years in prison. *Id.*

18. That of Shah and Sabir. *See id.*

19. *See* discussion *infra* Parts III-V.

20. Plea Agreement at 1-3, United States v. Lindh, (E.D. Va. 2002) (No. 02-37A), *available at* http://news.findlaw.com/cnn/docs/terrorism/uslindh71502pleaag.pdf (last visited June 4, 2005).

renunciation of his U.S. citizenship, to Saudi Arabia, once his interrogation value had been exhausted.[21] Jose Padilla—another citizen detainee—remains in a military brig, presumably because his intelligence value is greater, though again as discussed later in this article,[22] at least one federal district judge has presumed to contradict military judgment by demanding that Padilla be treated as a criminal defendant, or released.

Attempting to discern a pattern, intelligence value, rather than U.S. citizenship, seems a more reliable predictor of being treated as a combatant, rather than a criminal defendant. Moreover, it is not the prospect of harm from the individual detainee, as both British national and "shoe bomber" Richard Reid, who threatened to take down a commercial air-craft,[23] and Zacharias Moussaoui, the so-called "20th hijacker" from 9/11,[24] had the greater potential or actuality of inflicting mass casualty.

It has also been asserted that the Department of Justice is wrongfully employing a whipsaw—threatening indefinite military detention to gain advantage in the criminal justice system. A former Justice Department lawyer, Jesselyn Radack, has published an essay criticizing this practice.[25] Assuming, however, it is not unethical to detain and interrogate enemy combatants as a matter of wartime capture for the length of relevant hostilities, it is difficult to see how subjecting a detainee to a possibly lesser period of criminal confinement after a conviction at trial is wrongful. Of course, if the sequence is the reverse, and evidence is obtained through military interrogation which would not ordinarily be admissible in a civilian criminal setting, there are indeed serious and complicated evidentiary and due process issues that would need extensive and novel analysis. Some of this difficulty can be grasped in the trial of Zacharias Moussaoui, who sought unsuccessfully to have unfettered access to high-level al Qaeda figures who had been captured and are being detained as enemy combatants outside the United States.[26] Before Moussaoui decided to

21. *See* discussion *infra* Part III.

22. *See* discussion *infra* Part V.

23. For additional information on Reid, see Pamela Ferdinand, *Would-Be Shoe Bomber Gets Life Term*, WASH. POST, Jan. 31, 2003, at A1.

24. For additional information on Moussaoui, see generally Frank Dunham, *Where* Hamdi *Meets* Moussaoui *in the War on Terror*, 53 DRAKE L. REV. 839 (2005).

25. *See* Jesselyn Radack, *How the "Enemy Combatant" Label Is Being Used, Part 2*, FREEDOM DAILY (Feb. 2005), *available at* http://www.fff.org/freedom/fd0502g.asp.

26. The Fourth Circuit ultimately subordinated Moussaoui's Fifth and Sixth Amendment claims to national security interests. Specifically, the appellate panel found that ordering production of certain enemy combatant witnesses did not infringe

plead guilty, the federal courts had more or less settled upon an awkward method of allowing Moussaoui to propound questions to these detainees and supplying him with summaries of their answers which did not implicate classified information.[27]

Radack argues that "when the government moves detainees like pawns between the civilian and military systems, the legitimacy of both is undermined."[28] There is merit to this criticism, but it underscores why the President wisely sought to have enemy combatants detained, and largely tried (if necessary to vindicate the laws of war), before military commissions. As a matter of policy, the President decided to exclude American citizens from the jurisdiction of his wartime commissions. He did not have to do this as a matter of law. Orderliness and regularity would have been promoted had he kept all enemy belligerents, citizen and non-citizen alike, solely within the military system, and this then would have more clearly identified insufficient intelligence value—a distinctly, war-related concern—as the better explanation for either repatriating (Hamdi) or trying by civilian means (Lindh, whose al Qaeda network knowledge seemed limited, or Moussaoui, whose knowledge may have been greater, but whose mental fitness seemed questionable). It is a mistake, however, to accuse one's country of employing the practices of the Star Chamber or a totalitarian regime merely because it has tried to sort criminals from combatants for logical, intelligence-related, military purposes.

If the label criminal defendant is too casually or sweepingly applied, individuals will be afforded a level of due process that is far from costless in terms of the likely success of war efforts. Further, it will be a level of due process that has heretofore never been extended to lawful combatants in wartime, let alone offered to those—like al Qaeda and the Taliban—who fight in disregard of the laws of war. Those who seek this increased and unprecedented "judicialization" of the treatment of those detained make

on the Executive's war making authority, in violation of separation of powers principles, but that given the government's rightful exercise of its prerogative to protect national security interests, it could refuse to produce the witnesses and instead supply written summaries of the witness' statements made over the course of several months in lieu of their deposition testimony. United States v. Moussaoui, 382 F.3d 453, 470-82 (4th Cir. 2004). The Supreme Court denied review. Moussaoui v. United States, 125 S. Ct. 1670 (2005).

27. See Jerry Markon, *Moussaoui Pleads Guilty in Plot, Says White House was Target*, WASH. POST, Apr. 23, 2005, at A1 (noting that U.S. District Judge Leonie Brinkema indicates that the issue of access to high level al Qaeda witnesses will resurface in the sentencing phase, especially since the Department of Justice has indicated that it will pursue the death penalty).

28. Radack, *supra* note 25.

the estimable point that America should never lower herself to the base means of her radical Islamic challengers. Yet, the United States has not contemplated, as a matter of policy, fighting by internationally unlawful means. The shameful events of Abu Ghraib were not policy,[29] but condemned abuse.[30] Even the exploration by the White House and the Department of Justice of the precise meaning of international measures against torture and improper interrogation were conducted with characteristic openness and self-criticism, to such an extent that the President's lawyers rewrote an initial analysis to avoid confusion.[31] Nevertheless, correcting isolated abuses of authority should not be conflated with lawfully authorized, defensive measures aimed at subduing or capturing unlawful insurgents who target civilian populations. Insufficiently disaggregating these matters may too easily delude us into thinking a war can be successfully conducted by prosecutorial or judicial means. If we are truly at war—a *real* war, and not just a metaphorical one like the war on drugs or poverty—such is not faithful to the constitutional "power to wage war successfully."[32]

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29. An independent inquiry headed by former Defense Secretary James R. Schlesinger concluded: "No approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities." JAMES R. SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 5 (Aug. 24, 2004), *available at* http:// www.dod.gov/news/Aug2004/d20040824finalreport.pdf.

30. General Janis Karpinski, who had overall supervisory responsibility for the prison, was demoted in rank to colonel. Associated Press, *Bush OKs General's Demotion* (May 6, 2005), *at* http://www.foxnews.com/story/0,2933,155652,00.html. In addition to several high-profile convictions of participants in the abuse, a dozen or more lower-ranking officers, whose names have not all been released, also received various punishments. *Id.*

31. "[T]he Department of Justice withdrew an earlier legal analysis that had been interpreted by some as authorizing the torture of war detainees." Douglas W. Kmiec, *Wise Counsel*, WALL ST. J., Jan. 5, 2005, at A10. "Rejecting that notion categorically, the department's Office of Legal Counsel wrote anew: 'Torture is abhorrent both to American law and values and to international norms.'" *Id.* (quoting Department of Justice, Office of Legal Counsel memo).

32. The power to wage war is "the power to wage war successfully." Hirabayashi v. United States, 320 U.S. 81, 93 (1943) (Stone, C.J.) (quoting Charles Evans Hughes, *War Powers Under the Constitution*, 42 A.B.A. REP. 232, 238 (1917)). This observation of Chief Justices Hughes, echoed by Chief Justice Stone, was also noted by two famous Court civil libertarians, Justices Douglas and Black, in their concurring opinion in *New York Times Co. v. United States*, 403 U.S. 713, 722 (1971) (per curiam), which denied in that context a prior restraint on the publication of stolen classified documents pertaining to the Vietnam War. *Id.* at 714. It is possible that the result in *New York Times*, itself, would have been different if there was an AUMF-equivalent for Vietnam. Justices Douglas and Black thus observe and qualify their

The Supreme Court has thus far made three interventions into the war, largely to consider the propriety of the detention of those captured in its wake. In *Hamdi v. Rumsfeld*,[33] the issue was the due process rights of an American citizen who had been captured in the midst of Afghan hostilities.[34] In *Rasul v. Bush*,[35] the Court contemplated whether any federal court had jurisdiction to consider claims asserted on behalf of noncitizen combatants captured in Afghanistan as well as a number of other venues and who are being held in a military prison in Guantánamo, Cuba.[36] In *Rumsfeld v. Padilla*,[37] the Court confronted the detention of another American citizen believed to have eluded initial capture in Afghanistan only to plot with the perpetrators of 9/11 to unleash a "dirty bomb" or destroy residential apartment complexes in the United States.[38] Padilla was ultimately captured, but in the United States itself, rather than foreign territory.[39]

The most memorable media phrase of the Court's cases was uttered by Justice O'Connor in *Hamdi*, namely: "The President does not have a blank check."[40] In truth, the President never asked for one. He did, however, ask the Court to observe the substantial deposit of authority he had been given by the Constitution and the Congress. For the most part, the Court did faithfully observe the allocation of military authority to the President, though its extension of statutory habeas relief to alien enemy combatants outside the sovereign territory of the United States is as yet undefined and inviting of unwarranted judicial involvement.

II. NOVEL ARGUMENTS IN A NOVEL WAR

Putting aside for the moment the particularities of the argumentation

judgment stating: "But the war power stems from a declaration of war. The Constitution by Art. I, § 8, gives Congress, not the President, power '[t]o declare War.' Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have." *Id.* at 722.

33. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (plurality opinion).

34. *Id.* at 2635.

35. Rasul v. Bush, 124 S. Ct. 2686 (2004).

36. *Id.* at 2960.

37. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

38. *Id.* at 2715.

39. *Id.*

40. More specifically, Justice O'Connor stated: "[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2650 (2004) (plurality opinion).

of these Supreme Court interventions into the war, it is useful to perceive the layered nature of the arguments made on behalf of those captured in the war on terror. The first argument—"I'm innocent, let me go"—is perhaps a familiar refrain of criminal defendants, but a moment's reflection will suggest it to be highly unusual and untenable in war. Certainly, if American or other allied soldiers in World War II made such a plea to their Japanese or German captors, it would have been without effect, even incomprehensible, in the midst of a war fought by uniformed armies. The second argument made on behalf of combatants in the war on terror is a follow-on corollary to this unusual plea of innocence; that is: "If you doubt my innocence, prosecute me in your criminal justice system." The arguments continue to turn in this curious analytical circle, however, on the third lap: "Oh wait, you cannot prosecute me in your criminal justice system because I am a prisoner of war (POW) protected by the Geneva Convention, and therefore immune from criminal prosecution for actions taken in support of a military campaign." When the unlawful terrorist means of the military campaign are raised casting doubt upon the legitimacy of any asserted prisoner-of-war (POW) status, a fourth argument is proffered: "If you think us to be unlawful combatants, you cannot just detain us for the length of the war, you must instead prosecute us for an internationally recognized war crime under a duly constituted military commission or tribunal." But alas, fifthly, "if you attempt to prosecute us for war crimes, it cannot be by just any military commission or tribunal, it must be by means equivalent to the Uniform Code of Military Justice (UCMJ), which largely incorporates the procedural formality of the criminal justice system in its totality."[41]

41. This last claim is bolstered by the undefined and unexplored invitation issued by Justice Stevens in footnote fifteen of the *Rasul* opinion to fully export and apply constitutional due process to non-citizen enemy combatants captured in the war on terror and held anywhere in the world, or at least, in Cuba. *See* Rasul v. Bush, 124 S. Ct. 2686, 2698 n.15 (2004). Arguably, however, as discussed in the text immediately below, neither the UCMJ nor the due process/Article III limits speculated by Justice Stevens apply to *unlawful* combatants, such as al Qaeda or Taliban. The UCMJ art. 2(a)(9) (2002) provides that POWs—not unlawful combatants—"may only be tried and sentenced in a criminal judicial forum that is substantially equivalent to the proceedings and rights provided to members of the armed forces of the detaining power." Bialke, *supra* note 9, at 70 n.73 (citing Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 5, 6 U.S.T. 3316; 75 U.N.T.S. 135) [hereinafter GPW, or GPW III]. Bialke notes that "[a]lthough a substantially equivalent forum usually would be a court-martial, a military commission that provides similar rights and proceedings to a court-martial could also try a POW." *Id*; *see also* UCMJ art. 21, 10 U.S.C. § 821 (2002) (providing concurrent jurisdiction to "military commissions, provost courts, or other military tribunals" authorized under statute or

These novel arguments or assertions reveal that litigating a war on terror brings one into problematic and uncharted legal terrain. The terrain is rendered altogether unnavigable by a failure to make meaningful distinction between lawful and unlawful combatants.[42] What is the difference?[43] Lawful combatants are worthy adversaries. They fight in uniform. They fight with their weapons openly displayed. They are under a command and control structure. They observe the laws of war insofar as they are not targeting civilian populations, but military installations. If a lawful combatant is captured in the context of a military engagement, he is entitled to the prisoner of war protections of the Geneva Convention and the common law of war that preceded it.[44] This will mean that those captured cannot be prosecuted for the taking of life or other bodily assaults associated with military engagement.[45] What's more, interrogation is

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the laws of war).

42. The United States has been unfairly criticized for relying upon this distinction, but it is a well-settled one in the law of armed conflict. *See generally* Bialke, *supra* note 9 (finding ample support from the international laws of armed conflict (LOAC) for such a distinction). There is no legal or moral equivalence between these categories, and al Qaeda and Taliban detainees have no bona fide claim to POW status under GPW III. *Id.* at 81-85.

43. International law scholar Ingrid Detter draws the distinction in this manner:

> The main effect of being a lawful combatant is entitlement to prisoner of war status. Unlawful combatants, on the other hand, though they are a legitimate target for any belligerent action, are not, if captured, entitled to any prisoner of war status. They are also personally responsible for any action they have taken and may thus be prosecuted and convicted for murder if they have killed an enemy soldier. They are often summarily tried and enjoy no protection under international law.

INGRID DETTER, THE LAW OF WAR 148 (2d ed. 2000) (footnote omitted); *see also* ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 419 (1976) (noting that "persons who are not entitled to prisoner-of-war status are as a rule regarded as unlawful combatants"); Richard R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 BRIT.Y.B. INT'L L. 323, 328 (1951) (defining unprivileged or unlawful belligerents as "persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949").

44. Bialke, *supra* note 9, at 9-10.

45. International scholar Telford Taylor summarizes the privileges of the lawful combatant as follows:

> War consists largely of acts that would be criminal if performed in time

limited to rudimentary identification, and any detention is for the purpose of preventing return to the battle and can last for the length of the war.

The unlawful combatant side of the ledger is the flip of all of those things as the Supreme Court recognized in its unanimous opinion in *Ex parte Quirin*.[46] Unlawful combatants do not fight in uniform. They are not subject to a centralized command and control. Al Qaeda, for example, exists worldwide in loosely affiliated "cells."[47] Unlawful combatants hide weapons, and, notoriously, do not observe—as we know from 9/11—any semblance of the laws of war. They not only endanger civilians by hiding among them, they target civilian populations. Indeed, as the World Islamic Front Declaration of War illustrates for al Qaeda, that is its central

> of peace—killing, wounding, kidnapping, and destroying or carrying off other peoples' property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors. But the area of immunity is not unlimited, and its boundaries are marked by the laws of war.

Telford Taylor, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 19 (1970); *see also* John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 221-22 (2003) ("The customary laws of war immunize only lawful combatants from prosecution for committing acts that would otherwise be criminal under domestic or international law. And only those combatants who comply with the four conditions are entitled to the protections afforded to captured prisoners of war . . . .") (citation omitted).

46. *Ex parte* Quirin, 317 U.S. 1 (1942). The unanimous opinion in *Quirin* included the following passage:

> 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. 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.

Id. at 31-32 (footnotes omitted).

47. Al Qaeda's roots are traced to opposition fighters during the 1979 Soviet invasion of Afghanistan. COUNCIL ON FOREIGN RELATIONS, TERRORISM: QUESTIONS AND ANSWERS: AL-QAEDA, *at* http://cfrterrorism.org/groups/alqaeda.html (last modified May 2003).

purpose. These individuals have never been immune from prosecution for war crimes under any convention. They can be captured and interrogated. There is even common law authority to summarily execute them in the field.[48]

The differentiation of lawful and unlawful combatants is not an exercise of revenge or animus, but the preservation of civilization. The military is asked to direct its aim at military targets and to preserve the lives of civilians and POWs. For this to be possible, lawful soldiers must be assured that civilians and prisoners are not taking aim to kill them. As two international terrorism scholars succinctly put the matter: "Civilians who abuse their non-combatant status are a threat not only to soldiers who abide by the rules, they endanger innocents everywhere by drastically eroding the legal and customary restraints on killing civilians. Restricting the use of arms to lawful combatants has been a way of limiting war's savagery since at least the Middle Ages."[49] In 1987, President Reagan rejected a proposed modification to Geneva (Protocol I, art. 44(3)) noting that it was "fundamentally and irreconcilably flawed [because it] would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian

48. "Traditionally . . . unlawful combatants could be killed out of hand, entitled to little more than a blindfold by way of procedure. During World War II, unlawful combatants were often subject to summary disposition, and the war crimes tribunals established after the War acknowledged that their deaths would not justify later criminal charges against their executioners." *See, e.g.*, Lee A. Casey et al., *Unlawful Belligerency and Its Implications Under International Law*, NAT'L SEC. WHITE PAPERS (2003), *available at* http://www.fed-soc.org/Publications/Terrorism/unlawfulcombatants.htm (footnote omitted) (last visited June 4, 2005); FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (THE LIEBER CODE), U.S. WAR DEP'T, GENERAL ORDERS NO. 100, § IV, art. 83 (Apr. 24, 1863) ("Scouts, or single soldiers, if disguised in the dress of the country or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death."), *available at* http://fletcher.tufts.edu/multi/texts/historical/LIEBER-CODE.txt (last visited June 4, 2005); J. L. Whitson, The Laws of Land Warfare: The Privileged Guerilla and the Deprived Soldier (1984) (unpublished thesis, The Marine Corps Command and Staff College), *available at* http://www.globalsecurity.org/military/library/report/1984/WJL.htm (last visited June 4, 2005) ("[U]nconventional forces were generally accorded no legal status as combatants and no mercy when captured. Instead, they were summarily executed outright or were tried for their 'treacherous' acts and then executed.").

49. ANDREW APOSTOLOU & FREDRIC SMOLER, THE FOUND. FOR THE DEF. OF DEMOCRACIES, THE GENEVA CONVENTION IS NOT A SUICIDE PACT 3-4 (Mar. 2002), *available at* http://www.defenddemocracy.org/usr_doc/GenevaConvention_11_6_02.pdf.

population and otherwise comply with the laws of war."[50]

Notwithstanding the importance of drawing and maintaining a reasonably bright line between lawful and unlawful combatants, the President has provided al Qaeda and the Taliban with humane treatment well in excess of the minimum standards of law.[51] As one writer put it, "as a matter of policy, the U.S. has exercised its discretion by caring for captured al Qaeda and Taliban detainees, ex gratia, 'as a matter of grace,' in a manner beyond the minimal standards of humane treatment required by customary international law."[52] Media reports have seldom detailed the

50. Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, S. TREATY DOC. NO. 2, 100th Cong., at III (1987), *reprinted in* 81 AM. J. INT'L L. 910, 911. The rejected Protocol had been drafted by third world nations who were anxious to grant combatant status to liberationists and guerillas who challenged "racist regimes." Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 425 & n.31 (1987). The drafting unfortunately overlooked the consequences to innocent civilians and civil order. President Reagan foresaw its ill-consequence.

51. For the minimum standards of humane treatment, see generally Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 75, 1125 U.N.T.S. 3, 37-38 [hereinafter Protocol I]. Article 75 of Protocol I prohibits, among other matters: collective punishment, torture, hostage-taking, and threats to perform any of these acts. *Id.* Article 75 further requires that detainees be given notice of the reasons for their detention and that they be released when such reasons, or attendant circumstances, no longer exist. *Id.*; *see also* Bialke, *supra* note 9, at 6 n.6 (detailing protections under Protocol I).

52. Bialke, *supra* note 9, at 56. Bialke elaborates upon the treatment given the unlawful combatant, noting as follows:

> The detainees held in Guantanamo are provided inter alia with adequate shelter in a mild climate with the ability to communicate among themselves, metal bed frames/bunks with foam mattresses, sheets, blankets, hot showers, sinks, running water, and clean new clothes and shoes.
>
> Dietary and religious privileges include three nutritious halal (culturally-appropriate and conforming to Islamic dietary laws) meals a day with assorted condiments (or, should a detainee elect, as a few have, a detainee may have the same food as the detention facility guards), special meals at special times during traditional Muslim holy periods such as Ramadan (a holy month in Islam, celebrating when the Q'uran, the holy scripture of Islam, was revealed to the prophet Muhammad in 610 A.D.), hot tea, unrestricted access to Muslim Imam military chaplains, a Quibla (a huge green and white sign that points toward Mecca, Saudi Arabia, the holiest city in Islam—the city revered

humanity of detention. But then, the media has had some difficulty getting an accurate assessment of the facts of detention practices, as *Newsweek*'s unfortunate misreporting of the desecration of the Q'uran reveals.[53]

> by Islam as being the first place created on earth), an arrow in each cell pointing to Mecca, a recorded loudspeaker call to prayer five times a day, regular opportunities to worship, copies of the Q'uran in the detainees' native languages as well as other religious reading materials in numerous languages, prayer caps, prayer rugs, prayer beads, and holy oil (provided by Muslim military chaplains).
>
> Personal hygiene products include toiletries, towels, washcloths, and toilets. Detainees are also provided letter writing materials, secular reading materials in numerous languages, the ability to send and receive mail and packages subject to security screening, regular exercise, initial medical examinations, continuing modern medical care to include rehabilitative surgery, dental care, eye examinations [and] glasses, medications (ultimately, the same medical care afforded to the detention facility guards), counseling, and access to Arabic translators as needed. Further, although POWs can lawfully be required to work for the detaining power (work that has no direct connection to armed conflict operations), the U.S. does not require al-Qaeda and Taliban detainees to work. Additionally, since January 2002, the International Committee of the Red Cross (ICRC) has maintained a permanent mission at the Guantanamo Bay installation, and its delegates continually assess the confinement facilities and the treatment the U.S. provides the detainees. ICRC delegates also conduct regular private visits with the detainees, personally speaking with each detainee in the detainee's native language.
>
> Further, the U.S. has constructed a medium-security detention facility in Guantanamo Bay, consisting of several 20-member unit communal dormitories. A large number of select detainees who have exhibited acceptable behavior, adhered to facility rules, and cooperated during interviews have been admitted to the new medium-security facility and are able to spend more time outdoors, have considerably more exercise time, and may participate in group recreation. Further, they are allowed to eat together at outdoor picnic tables, interact, sleep, pray, and worship together. Detainees, whose intelligence worth is exhausted, and who no longer pose a security risk to the U.S. or its allies, and are not facing criminal charges, will be released when it is appropriate to do so.

Id. at 56-59 (footnotes omitted).

53. *Newsweek* reported without identified source and subsequently retracted that U.S. interrogators had flushed the Q'uran down a toilet to "rattle" detainees being questioned. *See* Evan Thomas, *How a Fire Broke Out*, NEWSWEEK, May 23, 2005, at 32, 32-33 (noting incorrect May 9 story). The story proved to be false but not before it had serious, deadly consequences leading to rioting and over two dozen deaths in Afghanistan and a rupture in U.S. relations with a number of Arabic leaders who had been helpful in the war on terror. *Id.*; Howard Kurtz, *Newsweek Apologizes*, WASH.

III. SHOWING RESTRAINT: *HAMDI V. RUMSFELD*

While Supreme Court litigation is assuredly better informed and briefed, public discussion cannot help but have some effect upon judicial thinking. Given that the intense media attention of the Abu Ghraib prison scandal overlapped with Court deliberations in *Hamdi*, it is a tribute to the Justices that the Court responded with as much restraint as it did. In *Hamdi,* the Court made plain that "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'"[54] The Court relied upon *Ex parte Quirin*[55] for this proposition as well as scholarly commentary that grounds the purpose of detention in the prevention of captured individuals from returning to battle and taking up arms once again.[56] Properly, the Court—unlike the most aggressive advocacy for the judicialization of the war—specifically differentiates lawful and unlawful combatants, indicating that the latter do not have a soldier's immunity and may be prosecuted for war crimes.[57] Furthermore, there is no suggestion that continued detention is contingent upon such trials being held, or that if they are, that they must be in Article III courts or their UCMJ equivalents accompanied by the constitutional due process protections associated with the civilian setting. The Court grasped that the purpose of such detention is neither revenge nor punishment, but the implementation of military strategy to win a war.[58]

POST, May 16, 2005, at A1. As a Pentagon spokesman noted, the reporting was "'irresponsible,'" and while the retraction is helpful, "'[u]nfortunately, they cannot retract the damage that they have done to this nation or those who were viciously attacked by those false allegations.'" Kurtz, *supra* (quoting Pentagon Spokesperson Bryan Whitman).

54. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion) (quoting *Ex parte* Quirin, 317 U.S. 1, 28 (1942)) (second alteration in original).

55. *Ex parte* Quirin, 317 U.S. 1.

56. Hamdi v. Rumsfeld, 124 S. Ct. at 2640 (plurality opinion) (citing Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5FLBZK/$File/irrc_847_Naqvi.pdf (last visited June 4, 2005) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.'") (citation omitted)).

57. Hamdi v. Rumsfeld, 124 S. Ct. at 2640-43, 2650-52 (plurality opinion).

58. *See id.* at 2640 (quoting Naqvi, *supra* note 56, at 572 ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.'") (citation omitted); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 788 (rev. 2d ed. 1920) ("The time has long passed when 'no quarter' was the rule on the battlefield . . . . It is now recognized that '[c]aptivity is neither a punishment nor an act

Notwithstanding *Hamdi*, the scope of detainee due process remains a source of litigation in the lower courts on behalf of noncitizen detainees held in Cuba. This will be discussed further below.[59] For now, it is enough to note that the Court did not let the fact of claimed citizenship alone obscure the importance of wartime detention of combatants to military success. "There is no bar to this Nation's holding one of its own citizens as an enemy combatant,"[60] reasoned the Justices. Here, the earlier unanimous holding in *Quirin* was again directly relevant, since there "one of the detainees, Haupt, alleged that he was a naturalized United States citizen."[61] As it happened, Haupt was tried for his unlawful belligerency.[62] The trial, however, was not mandatory. To the contrary, the Court in *Hamdi* explicitly finds that "nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities."[63]

The thornier problem for the Court in *Hamdi* was not the propriety of detention, which it found implicit in the AUMF from Congress,[64] but its potentially indefinite length.[65] The President's lawyers pointed out the obvious fact that the duration of any conflict is never known in advance.[66] Nevertheless, the Court seemed troubled by the substantial prospect that a "war on terror" could last far longer than previous conventional wars.[67]

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of vengeance,' but 'merely a temporary detention which is devoid of all penal character.' . . . 'A prisoner of war is no convict; his imprisonment is a simple war measure.'") (citations omitted); *In re* Territo, 156 F.2d 142, 145 (9th Cir. 1946) ("The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released.") (footnotes omitted)).

59. *See* discussion *infra* Part VI.

60. Hamdi v. Rumsfeld, 124 S. Ct. at 2640 (plurality opinion). In *Hamdi*, Five Justices (which includes four Justices in the plurality opinion written by Justice O'Connor and Justice Thomas in dissent) concluded that Congress, through the AUMF, implicitly authorized the Executive to detain enemy combatants until the conclusion of hostilities, even if these combatants were U.S. citizens. *Id.* at 2640-42 (plurality opinion); *id.* at 2679 (Thomas, J., dissenting).

61. *Id.* (citing *Ex parte* Quirin, 317 U.S. 1, 20 (1942)).

62. *Id.*

63. *Id.*

64. *Id.* at 2639-40.

65. *Id.* at 2641.

66. *Id.*

67. *See id.* For example, in prefacing its analysis of Hamdi's argument that the AUMF did not authorize the "indefinite detention" to which he claimed to be unlawfully subject, the Court noted as follows:

Frankly, the Court had no answer to this, other than to note that the framework of international accord contemplates some endpoint for hostilities.[68] To not be at odds with this international precept, the Court outlined two potential limits upon detention: the availability of a status hearing to a citizen enemy combatant[69] and the prospect that indefinite detention of a citizen enemy combatant solely for the purpose of interrogation would not be permitted,[70] even as continued detention to prevent return to the battle would.[71] Beyond this, the Court holds out the general prospect of revisiting the issue in the future should detentions continue well beyond the point of "active hostilities."[72] To be sure, these qualifications paper over some difficulty, especially since the Court chooses to reference only the Afghan theater,[73] and not the wider global war on terror. What happens when the record no longer establishes, as it did in *Hamdi*,[74] that United States troops are involved in active combat in the

> We recognize that the national security underpinnings of the "war on terror," although crucially important, are broad and malleable. . . . The [indefinite detention] prospect Hamdi raises is therefore not far-fetched. If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.

Id.

68. *See id.* (citing GPW III, *supra* note 41, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."); Convention with Respect to the Laws and Customs of War on Land (Hague Convention II), July 29, 1899, art. 20, 32 Stat. 1803, 1817 (noting that POWs should be released as soon as possible after "conclusion of peace"); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 HARV. INT'L L.J. 503, 510-11 (2003) ("POWs can be detained during an armed conflict, but the detaining country must release and repatriate them 'without delay after the cessation of active hostilities,' unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences.") (footnote omitted)).

69. *Id.* at 2648-52 (outlining the nature and scope of process due).

70. *Id.* at 2641-43.

71. Released detainees have already resumed the fight against the United States as they proclaimed they would. *See, e.g.*, Lee A. Casey & David Rivkin, *The Facts about Guantanamo*, WALL ST. J., Feb. 16, 2004, at A6 (noting U.S. Department of Defense confirmation that some released Guantánamo detainees have "returned to the fight").

72. Hamdi v. Rumsfeld, 124 S. Ct. at 2641 (plurality opinion).

73. *See id.* at 2642 (referencing only the conflict in Afghanistan).

74. *See id.* ("Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.").

region in which the combatant is captured? The question may soon require an answer if Afghan hostilities cease and the Court intervenes further in the case of Jose Padilla.[75]

The *Hamdi* Court is clear that detention of citizen enemy combatants is permissible for a reasonable period of interrogation or for the length of the "relevant" hostilities *or both* so long as the individual is determined to be such a combatant, by concession or "some other process that verifies this fact with sufficient certainty."[76] What is the nature of this "other process"? To discern it, the Court employed the *Mathews v. Eldridge*[77] balancing formulation.[78] In doing so, the Court found it "beyond question that substantial interests lie on both sides of the scale in this case."[79] Hamdi's private interest was "the most elemental of liberty interests—the interest in being free from physical detention by one's own government."[80] By comparison, "on the other side of the scale [were] weighty and sensitive governmental interests."[81] And the recognition that under the Constitution "core strategic matters of war making belong in the hands of those who are best positioned and most politically accountable for making them."[82]

75. Rumsfeld v. Padilla, 124 S. Ct. 2711, 2727 (2004) (dismissing detainee's petition for writ of habeas corpus challenging his confinement in a military facility as a suspected terrorist due to its being improperly filed outside the district having supervision over the immediate custodian of the detainee). Upon refiling within the proper venue, a district court on summary judgment directed Padilla's criminal charge or release. Padilla v. Hanft, 2005 WL 465691, at *13 (D.S.C. Feb. 28, 2005). The Fourth Circuit has scheduled an expedited appeal and Padilla has sought to take the case directly to the Supreme Court before judgment. Brief of Petitioner for Writ of Certiorari Before Judgment, Padilla v. Hanft (U.S. filed Apr. 7, 2005) (No. 04-1342), *available at* 2005 WL 818535. The averments in the Padilla case recite that Padilla was, in fact, active—but not captured—on the Afghan battlefield. Padilla v. Hanft, 2005 WL 465691, at *1-2.

76. Hamdi v. Rumsfeld, 124 S. Ct. at 2641, 2643 (plurality opinion).

77. Mathews v. Eldridge, 424 U.S. 319 (1976).

78. Hamdi v. Rumsfeld, 124 S. Ct. at 2646-50 (plurality opinion) (employing the *Mathews* tripartite balancing test).

79. *Id.* at 2646.

80. *Id*. (citations omitted).

81. *See id*. at 2647 (noting "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States").

82. *Id.* (citing Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (recognizing "broad powers in military commanders engaged in day-to-day fighting in a theater of war")).

The citizen-detainee is entitled by this balancing to notice of the factual basis for detention and an opportunity to challenge that factual basis before a neutral decisionmaker.[83] The process is to be afforded in a manner consistent with wartime exigency.[84] In this respect, it does not apply to the initial period of capture, but only to its extended continuance.[85] Moreover, since "proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," hearsay may be accepted and a presumption given in favor of the government.[86] The presumption may be rebutted, but the burden of doing so is on the detainee.[87] The underlying purpose is to avoid erroneous detention without interfering with "the central functions of war making."[88] Thus, the Court instructs that the process should be "a minimal one."[89] Citing the lessons of the Japanese internment cases,[90] the Court wishes to "accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide,"[91] while "reviewing and resolving claims like those presented" by individuals like Hamdi.[92]

The commonsense accommodation of interests in *Hamdi* was a vindication for the President and the Congress, and for war conducted largely by nonjudicial—but still constitutional—means. In an age of concern over the pervasiveness of judicial presence,[93] it is important to

83. *Id.* at 2648.

84. *Id.* at 2649.

85. *See id.* ("[I]nitial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized.").

86. *Id.* at 2649.

87. *Id*.

88. *Id.*

89. *Id*.

90. Throughout its opinion, the Court cited to the noteworthy decisions of *Korematsu v. United States*, 323 U.S. 214 (1944), and *Ex parte Endo*, 323 U.S. 283 (1944).

91. Hamdi v. Rumsfeld, 124 S. Ct. at 2649 (plurality opinion).

92. *Id.* at 2650 (citing Korematsu v. United States, 323 U.S. at 233-34 (Murphy, J., dissenting) ("[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled."); Sterling v. Constantin, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.")).

93. *See generally, e.g.*, MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME

reflect even momentarily on how all that is constitutional is not necessarily judicial. Acting constitutionally is not synonymous with acting judicially. The Supreme Court in *Hamdi* demonstrated considerable, but not total, deference to its coequal branches, and that is much to its credit. The depth of that respect is revealed by the Court's comment that the due process standards outlined could be met by military tribunal.[94] In this regard, Justice O'Connor makes reference to a tribunal mechanism far less exacting than that envisioned by President Bush's military order and Pentagon regulation for the trial of al Qaeda or those who harbor or assist them.[95] Specifically, the Justices highlight existing military regulations that tribunals be made available to determine the status of enemy detainees who assert POW status under the Geneva Convention.[96] If the military chooses not to supply the review itself, the Court concedes that habeas is available to a citizen-detainee within the jurisdiction of the United States, but admonishes district courts to proceed with caution and to "engag[e] in a factfinding process that is both prudent and incremental."[97]

Hamdi has enormous virtue because it avoided the extremes that Justices Jackson and Frankfurter debated in the Japanese internment cases. As I have explored elsewhere,[98] Justice Jackson formally did not defer to the military order in *Korematsu* (he dissented[99]), but at the same time he found the military's approach to be a reasonable military precaution.[100] Jackson thus attempted to have it both ways by separating military necessity from constitutional integrity. He wrote, "if they were permissible military procedures, I deny that it follows that they are constitutional."[101] Jackson's argument was that "military decisions are not susceptible of

COURT IS DESTROYING AMERICA (2005) (accusing the Supreme Court of, inter alia, judicial tyranny, constitutional misinterpretation, and unconstitutional "judicial activism"). *But see generally* Keenan D. Kmiec, *The Origin and Current Meaning of Judicial Activism*, 92 CAL. L. REV. 1441 (2004) (suggesting that the charge of "judicial activism" requires, but is not always given, careful definition).

94. Hamdi v. Rumsfeld, 124 S. Ct. at 2651 (plurality opinion).

95. *See id.* at 2651-52.

96. *See id.* at 2651 (citing Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190-8, § 1-6 (1997)).

97. *Id.* at 2652.

98. *See* Douglas W. Kmiec, *The Supreme Court in Times of Hot and Cold War: Learning from the Sounds of Silence for a War on Terrorism*, 28 J. SUP. CT. HIST. SOC'Y 270, 277-78 (2003).

99. Korematsu v. United States, 323 U.S. 214, 242-48 (1944) (Jackson, J., dissenting).

100. *See id.* at 245 (Jackson, J., dissenting).

101. *Id.* (Jackson, J., dissenting).

intelligent judicial appraisal."[102] In words that resonate in the background of the *Hamdi* Court's deferential due process assessment, Jackson commented that military decisions "do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy."[103]

In the Japanese cases, Justice Jackson sought awkwardly to avoid a finding of nonjusticiability. The absence of manageable standard gave Jackson pause,[104] but it was ultimately the legacy that a judicially standardless opinion would have left that prompted Jackson's admonitions. Military orders, right or wrong, constitutional or not, he supposed, were transient things, but a judicial opinion justifying them under the Constitution is dangerous. "The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution."[105] Jackson needed no further proof of his supposition than the slide from approved curfews in *Hirabayashi* to the acceptance of exclusion in *Korematsu.* Justice O'Connor for the *Hamdi* plurality was obviously writing with this caution in mind as she sought to navigate between Justice Thomas's case for greater deference[106] and Justice Scalia's plea for less.[107]

Justice Frankfurter was at odds with Justice Jackson in the Japanese internment cases, arguing that Jackson could not simply declare military power to be outside constitutional analysis. "The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as

102. *Id.* (Jackson, J., dissenting).

103. *Id.* (Jackson, J., dissenting).

104. *See id.* at 244-47 (Jackson, J., dissenting). Whether the area of foreign affairs is less manageable for the Court than other subjects has been questioned. *See, e.g.*, Norman Dorsen, *Foreign Affairs and Civil Liberties*, 83 AM. J. INT'L L. 840, 844 (1989) (arguing that it is no more difficult than antitrust or family law). Even Professor Dorsen acknowledges, however, that the consequences of judicial error in reviewing foreign policy may be greater. *Id.*

105. Korematsu v. United States, 323 U.S. at 246 (Jackson, J., dissenting).

106. *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2675-85 (2004) (Thomas, J., dissenting).

107. *See id.* at 2660-74 (Scalia, J., dissenting).

provisions looking to a nation at peace."[108] Moreover, the Court has a special obligation, argued Frankfurter, to construe the document "in the context of war."[109] Such construction, Frankfurter admitted, is to be different than peacetime. An "action is not to be stigmatized as lawless because like action in times of peace would be lawless."[110] This, of course, did not mean that Justice Frankfurter approved of the military internment action. That, he said, is neither his job nor that of the Court: "That is their business, not ours."[111] Justice Frankfurter's realism and differentiation of function is well taken, and well represented by Justice O'Connor in *Hamdi*, who, in fashioning a relaxed due process standard that can be satisfied by even intramilitary means, combines the best of the Jackson-Frankfurter dialogue.

IV. *RASUL*: EXTENDING HABEAS REVIEW TO THE WHOLE WORLD

If *Hamdi* is a moment of pride for the Supreme Court, *Rasul v. Bush*[112] is not. *Rasul* presented the "question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated abroad at the Guantánamo Bay Naval Base, Cuba."[113] As the U.S. Department of State has summarized, the alien detainees at Guantánamo have been in the thick of the war on terror, and "include many rank-and-file jihadists who took up arms against the U.S., as well as senior al Qaida operatives and leaders, and Taliban leaders."[114] Types of enemy combatants captured during the current course of hostilities include:

- Terrorists linked to major al Qaida attacks, including the East Africa U.S. embassy bombings and the USS Cole attack.
- Terrorists who taught or received training on arms and explosives, surveillance, and interrogation resistance

108. Korematsu v. United States, 323 U.S. at 224 (Frankfurter, J., concurring).

109. *Id.* at 224 (Frankfurter, J., concurring).

110. *Id.* (Frankfurter, J., concurring).

111. *Id.* at 225 (Frankfurter, J., concurring) (referring, of course, to the Executive and the Congress).

112. Rasul v. Bush, 124 S. Ct. 2686 (2004).

113. *Id.* at 2690.

114. U.S. DEP'T OF STATE, INTERNATIONAL INFORMATION PROGRAMS: GUANTANAMO DETAINEES (Mar. 16, 2004), *at* http://usinfo.state.gov/dhr/Archive/2004/Mar/17-718401.html [hereinafter U.S. DEP'T OF STATE RELEASE] (reissuing February 2004 Department of Defense fact sheet).

techniques at al Qaida camps in Afghanistan and elsewhere.

- Terrorists who continue to express their commitment to kill Americans and conduct suicide attacks if released.
- Terrorists who have sworn personal allegiance to Usama bin Laden.
- Terrorists linked to several al Qaida operational plans, including possible targeting of facilities in the United States.
- Members of al Qaida's international terrorism support network, including financiers, couriers, recruiters, and operatives.
- Terrorists who participated in attempted hijacking incidents.[115]

115. *Id.* The State Department, in conjunction with the Department of Defense, gives as a representative sample of detainees at Guantánamo the following list:

- An admitted al Qaida explosives trainer who has provided information on the September 2001 assassination of Northern Alliance leader Masood and on the al Qaida organization's use of mines.
- An individual who completed advanced terrorist training at camps in Afghanistan and participated in an attempted hijacking/escape while in custody that resulted in the deaths of Pakistani guards.
- An individual involved in terrorist financing who provided information on Usama bin Laden's front companies, accounts, and international money movements for financing terror.
- Taliban fighter who spent three months fighting on the front lines in Afghanistan and is linked to al Qaida operatives connected to the East Africa embassy bombings.
- An individual with links to a financier of the September 11th plots who attempted to enter the United States though Orlando Florida in August 2001. Phone records suggest September 11th hijacker Mohammed Atta was also at the Orlando airport that day. This individual was later captured in Pakistan after fleeing Tora Bora.
- Two individuals associated with senior al Qaida members who were working on remotely detonated explosive devices for use against U.S. forces.
- A member of an al Qaida supported terrorist cell in Afghanistan that targeted civilians, especially journalists and foreign aid workers; responsible for a grenade attack on a foreign journalist's automobile.
- An admitted al Qaida member who was plotting to attack oil tankers in the Persian Gulf using explosives laden fishing boats.
- An individual who fought with an al Qaida supported terror cell in

The Supreme Court had previously decided in a unanimous opinion—*Johnson v. Eisentrager*[116]—that aliens outside the sovereignty of the United States did not have constitutional or statutory access to the writ of habeas corpus and did not have constitutional guarantees that would otherwise apply to American citizens when American citizens are outside the sovereign territory of the United States, but come within the grasp or direction of American power.[117] The *Rasul* Court chose not to follow the precedent in a manner that was less than convincing, highly ambiguous, and seemingly in tension with its opinion of the same day in *Rumsfeld v. Padilla*.[118] Even though Padilla, a U.S. citizen, could not pursue a writ of habeas corpus because he filed in the wrong court (he filed in a court where his custodian was not present),[119] the noncitizen Guantánamo Bay detainees *could* somehow file for a writ of habeas corpus because they did not need venue over their immediate custodian.[120] Indeed, by the Court's interpretation in *Rasul*, the failure to be in a proper district is converted from a disqualifying factor to one that qualifies alien enemy combatants to petition in the district of their choice. For the *Rasul* majority, it was somehow enough that a federal court have service of process venue over the detainee's remote custodian, namely, Secretary Rumsfeld.[121]

How did the court get to this startling result? It is a tortured statutory tale. The Court per Justice Stevens declared the alien combatants in Cuba to be "differently situated" than those in *Eisentrager.*[122] For example,

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Afghanistan, personally establishing reconnaissance and ambush positions around Kandahar Airbase.

- An individual who served as a bodyguard for Usama Bin Laden and escorted him to Tora Bora, Afghanistan following the fall of Jalalabad, Afghanistan.
- An admitted al Qaida member who served as an explosives trainer for al Qaida and designed a prototype shoe bomb for destroying airplanes and a magnetic mine for attacking ships.
- An individual who trained al Qaida associates in the use of explosives and worked on a plot to use cell phones to detonate bombs.
- An individual who served as an al Qaida translator and managed operating funds for al Qaida. An individual who helped stockpile weapons for use against U.S. forces in Afghanistan.

U.S. DEP'T OF STATE RELEASE, *supra* note 114.

116. Johnson v. Eisentrager, 339 U.S. 763 (1950).
117. *Id.* at 784-85.
118. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).
119. *Id.* at 2727; *see* discussion *infra* Part V.
120. Rasul v. Bush, 124 S. Ct. 2686, 2693-99 (2004).
121. *Id.*
122. *Id.* at 2693-94.

Justice Stevens found them not to be nationals of countries at war with the United States,[123] which was sometimes true, but also rather obvious and irrelevant. The Congress had authorized the use of military force against all those who attacked the United States on 9/11 or those who assisted or harbored them or who would strike in like manner again.[124] To say that those captured in pursuit of that objective were not "at war" with the United States is to be either blinded to the reality of asymmetrical warfare or to beg the question. Likewise, the Court's proffered difference that those captured have not been charged with an offense does no more than reflect the factual reality of the preventive purpose of military detention that had just been fully approved—even with respect to citizens—in *Hamdi*. Combatant citizen detainees can be held for interrogation for a reasonable time and held for the length of hostilities to prevent the reaugmentation of enemy forces.[125] Why this is acknowledged authority for the Executive for a citizen-detainee like Hamdi held within the boundaries of the United States, but not for alien combatant detainees held in a more remote place is unexplained.

On the most slender of semantic reeds, the *Rasul* majority dubiously asserts that *Eisentrager* was relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus,[126] though passingly, even the majority had to concede that such was not articulated by the Court in *Eisentrager*.[127] Rather, a unanimous Court in *Eisentrager* found that "[n]othing in the text of the Constitution extends such a [habeas] right, nor does anything in our statutes."[128] Justice Stevens argues that subsequent Court decisions undermine *Eisentrager*'s statutory holding,[129] but the difficulty is the text of the statute had not changed. The words authorizing federal courts to grant habeas "within their respective jurisdictions"[130] remained in tact, even as Justice Stevens claims they could no longer be read to require the habeas petitioner's physical presence within the territorial jurisdiction of a federal district court.[131]

123. *Id.* at 2693.

124. *See supra* notes 12-15 and accompanying text (discussing the terms of Congress' AUMF).

125. *See* discussion *supra* Part III (discussing the *Hamdi* case).

126. Rasul v. Bush, 124 S. Ct. at 2693-94.

127. *Id.* at 2694; *see infra* note 128 and accompanying text.

128. Johnson v. Eisentrager, 339 U.S. 763, 768 (1950).

129. *See* Rasul v. Bush, 124 S. Ct. at 2694-95.

130. 28 U.S.C. § 2241(a) (2000).

131. Rasul v. Bush, 124 S. Ct. at 2693-96. Since the Court purports to resolve *Rasul* on statutory grounds, it is worth examining the statute, even if the Court chose

Things could have been worse—namely, instead of a tortured statutory construction, the Court might have relied upon Justice Kennedy's concurrence. Justice Kennedy concedes that *Eisentrager* controls, but then reads into it the belief that the availability of habeas relief turns on the circumstances of the detainees' confinement.[132] Presumably, this would have meant judicial assessment of, among other things, the length of the detention and whether or not detainees are being held "far removed from any hostilities."[133] As Justice Scalia points out in dissent, this would mean "that courts would *always* have authority to inquire into circumstances of confinement, and . . . the Executive would be unable to know with certainty that any given prisoner-of-war camp is immune from writs of habeas corpus. . . . Justice Kennedy's approach provides enticing law-school-exam imponderables in an area where certainty is called for."[134]

With his usual flair, Justice Scalia points out that *Rasul* judicializes the issue of enemy detention by "boldly extend[ing] the scope of the habeas statute to the four corners of the earth."[135] According to the Court's gloss upon the habeas statute, a district court acts "within its respective jurisdiction" if "the custodian can be reached by service of process."[136] Carried to its logical conclusion, aliens captured anywhere outside the country can obtain federal court review of their capture and detention so long as a district court can serve a writ on the Secretary of Defense at his office in Arlington—which means, always. Had this been the law over the previous century, the courts would have had jurisdiction

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not to do so. As Justice Scalia properly notes in dissent, § 2241(a) states:

> "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions.*" [The statute] further requires that "[t]he order of a circuit judge shall be entered in the records of *the* district court of *the district wherein the restraint complained of is had.*"

Id. at 2701 (Scalia, J., with whom Rehnquist, C.J., and Thomas, J., join, dissenting) (emphases and second alteration added by the *Rasul* dissent) (quoting 28 U.S.C. § 2241(a)). Moreover, "§ 2242 provides that a petition 'addressed to the Supreme Court, a justice thereof or a circuit judge . . . shall state the reasons for not making application to *the* district court of *the district in which the applicant is held*.'" *Id.* (Scalia, J., dissenting) (emphases added by the *Rasul* dissent) (quoting 28 U.S.C. § 2242). Since no court—at least prior to *Rasul*—had such jurisdiction over Cuba, the statutory right claim should have been found to be wholly without support.

132. *Id.* at 2699-2701 (Kennedy, J., concurring).
133. *Id*. at 2700 (Kennedy, J., concurring).
134. *Id*. at 2705 n.4 (Scalia, J., dissenting).
135. *Id*. at 2706 (Scalia, J., dissenting).
136. *Id.* at 2695 (internal quotation omitted).

over millions of alien prisoners captured abroad.[137]

This is a matter of great concern if the Court is serious. This is the way the unanimous Supreme Court put it prior to *Rasul*:

> Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "were-wolves" [special covert forces during World War II] could require the American Judiciary to assure them freedoms of speech, press, and assembly . . . right to bear arms . . . security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.[138]

In short, had *Rasul* applied to World War II, Tom Hanks would have had to make the movie *Saving Private Ryan*[139] much differently. In scenes where he and his army confreres capture enemy combatants,[140] the provision of *Miranda*[141] rights and access to counsel would be a necessity.[142] Skirmishes will no longer be limited to fending off rooftop sniping, but will also be extended to debates over the suppression of evidence. Since actor Hanks no doubt retains final script approval, he can probably still have the allies prevail, but in the reality of real war, such favorable outcome is less obvious. As the Court in *Eisentrager* observed, such judicialization

> would hamper the war effort and bring aid and comfort to the enemy. [It] would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it

137. *See, e.g.*, GEORGE G. LEWIS & JOHN MEWHA U.S. DEP'T OF ARMY, HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776-1945, PAMPHLET NO. 20-213, at 244 (1955) (noting that "[b]y the end of hostilities [in World War II], U.S. forces had in custody approximately two million enemy soldiers").

138. Johnson v. Eisentrager, 339 U.S. 763, 784 (1950).

139. SAVING PRIVATE RYAN (DreamWorks SKG/Paramount Pictures/Amblin Entm't 1998).

140. *See id.*

141. Miranda v. Arizona, 384 U.S. 436 (1966).

142. Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18 ("U.S. Marines may have to burrow down an Afghan cave to smoke out the leadership of al-Qaeda. It would be ludicrous to ask that they pause in the dark to pull an Afghan-language Miranda card from their kit bag. This is war, not a criminal case.").

> unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.[143]

The possibility that the drafters of the Constitution or legislators supplying statutes enacted pursuant to it could have intended to hamper military defense in this manner was incredible in World War II. The *Eisentrager* Court continued:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of government[] that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word [was] cited [to suggest it]. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.[144]

But not of course the majority in *Rasul.* Can the damage to the successful conduct of the war be contained? Yes and no. Yes, because just as the Court's statutory construction was more the product of assertion than reasoning, so too, its scope was by like declaration limited to the unique confines of Guantánamo Bay. Justice Stevens and the *Rasul* majority do not explicitly limit the holding to Cuba, but it can be inferred from the Court's casual dismissal of the customary rule against the extraterritorial application of statutes. When "the 'longstanding principle of American law' that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested"[145] was brought to the Court's attention, its response was to say, "what extraterritorial application?" Noting that "[b]y the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses," the Court finds the base to be the geographic equivalent of American sovereignty.[146] That the leadership of Cuba might think otherwise is apparently beside the point. Somehow the breadth of the lease agreement together with the concession by the government that a federal court would have habeas jurisdiction over the claims of an American in Cuba was enough for the Court to find that

143. Johnson v. Eisentrager, 339 U.S. at 779.

144. *Id.* at 784-85.

145. Rasul v. Bush, 124 S. Ct. 2686, 2696 (2004) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991)).

146. *Id.* at 2708 (Scalia, J., dissenting).

alien enemy combatant claims could be handled, too. The Court could have easily chosen to distinguish its relationship to its own citizens from its nonrelationship with aliens outside sovereign territory, but in an age of increased globalization and international citation, this is unfashionable. Unfashionable or not, access to courts of a country have regularly been understood as a reciprocal aspect of citizenship or, in exceptional cases, of noncitizen physical presence in sovereign territory. While it may seem noble to open our federal courts more widely, that nobility of purpose will likely only be rewarded by the international community so long as alien claimants prevail. Failing to supply another country's citizens with a desired outcome can easily foster international dispute when the bonds of citizenship and the mutual understandings of the civil order are not shared.[147]

V. PADILLA DEFERRED

Nevertheless, having found habeas jurisdiction, the Supreme Court has now tasked the lower federal courts to assess the merits of noncitizen claims beyond our borders. This has already spawned great disagreement, but before turning to that, a few observations about the detention of Jose Padilla—the last in the Supreme Court's trilogy of cases intervening to date in the war on terror.[148] Mr. Padilla, it will be recalled, is a United States citizen, though hardly a model one, having been involved in serious criminal gang activity from his youth.[149] At the time of his initial Supreme Court litigation, Padilla was "detained by the Department of Defense pursuant to the President's determination that he is an 'enemy combatant' who conspired with al Qaeda to carry out terrorist attacks in the United States."[150] In taking up the case, the Court inquired first, whether Padilla had properly filed his habeas corpus petition in the Southern District of New York, and second, if he did, whether the President had military authority to detain him.[151] In a decision that is faithful to the habeas

147. *Cf.* Medellin v. Dretke, 544 U.S. ___, 2005 WL 1200824, at *1 (May 23, 2005) (per curiam) (remanding to Texas whether to consider an international court judgment that a state court should have advised an alien accused of a heinous rape and murder of the availability of access to a consular officer). Medellin is one of fifty Mexican nationals facing a death sentence in U.S. courts. *Id.* at *9 (O'Connor, J., with whom Stevens, Souter, and Breyer, JJ., joined, dissenting).

148. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

149. *'Dirty Bomb' Suspect's Criminal Record*, CNN.com, June 11, 2002, *at* http://archives.cnn.com/2002/US/06/11/muhajir.background.

150. *Id.* at 2715.

151. *Id.*

statutory text—quite unlike *Rasul*—the Court found a lack of jurisdiction, and therefore did not reach the merits of Padilla's detention.[152]

The federal habeas statute plainly "provides that the proper respondent to a petition is 'the person who has custody over [the petitioner].'"[153] The custodian is the person who has the capacity to produce the person to the court in a literal sense, and hence, reasoned the Chief Justice, it could not mean the Attorney General or Secretary of Defense or other more remote officers.[154] While the dissent argued that the Court could be "flexible,"[155] the Court rejected that proposition, both to discourage forum shopping and simply to be faithful to the legislative power lodged in Congress.[156] Thus, if Padilla was to challenge the detention, he would need to name the commander of the military brig in South Carolina where he was being held.

Padilla refiled in the proper place and on summary judgment succeeded in convincing a district court judge that he should not be detained.[157] The lower court thought Padilla distinguishable from *Hamdi*.[158] In particular, the court found that Padilla's *place* of capture—O'Hare International Airport in Chicago—was dispositive, since, as the district judge saw it, the Supreme Court in *Hamdi* gave this fact considerable weight in construing the scope of the President's military authority from Congress.[159] In a remarkably intrusive and nondeferential ruling, the district court proceeds to assess whether the President's military decision making was "*necessary and appropriate force*," under the AUMF.[160] According to the district judge, Hamdi satisfied that standard since he was fighting on a foreign battlefield;[161] however, the standard was not met for Padilla because his terrorist plot had already been thwarted by the time of his capture.[162] To the district court, Padilla was at worst a bad

152. *Id.* at 2715, 2727.

153. *Id.* at 2717 (alteration added by *Padilla* Court) (quoting 28 U.S.C. § 2242 (2000)); *see also* 28 U.S.C. § 2243 ("The writ, or order to show cause shall be directed to the person having custody of the person detained.").

154. *Id.* at 2717-18.

155. *Id.* at 2731-33 (Stevens, J., dissenting).

156. *Id.* at 2725-27.

157. Padilla v. Hanft, 2005 WL 465691, at *13 (D.S.C. Feb. 28, 2005).

158. *See id.* at *5-7.

159. *Id.* at *6-7 & n.8 (construing Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635-43 (2004) (plurality opinion)).

160. *Id.* at *7 (internal quotation marks omitted).

161. *Id.* at *5, *7.

162. *Id.* at *7.

criminal actor who could be "arrested" rather than "captured," and "[t]here were no impediments whatsoever to the Government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing."[163]

The district judge also chose to construe the Supreme Court's decision in *Ex parte Quirin* quite narrowly. As noted earlier, *Quirin* upheld the detention of an American citizen named Haupt captured in the United States in the midst of domestically-located enemy belligerency (plotting, as it happens like Padilla, to blow up various American properties).[164] The obvious factual similarity did not matter, said the district court, since Haupt—unlike Padilla—was promptly subject to a trial by military tribunal which the Congress had specifically authorized.[165] In Padilla's case, there is no new or specific legislative authority for military tribunals and in any event, the government at this time is not seeking to put Padilla to trial by that means.[166] The district court also found *Quirin* to be inapplicable since the purpose of Haupt's detention was punitive, rather than preventive, and because the war on terror lacks a definite ending date.[167] For good measure, the district court even mentioned that "*Quirin* preceded the Non-Detention Act,"[168] holding that the AUMF did not satisfy that statute.[169] Since each of these points is rebutted in *Hamdi*,[170] perhaps the advance sheets got misplaced at the courthouse.

The lower court judgment in Padilla is simply a full-throated renunciation of the idea that we are at war and that the Executive and Legislative branches under the Constitution have been assigned the

163. *Id.*

164. *See id.* at *7-8 (discussing *Quirin*); *supra* notes 46, 54-55, 61-63 and accompanying text (same).

165. Padilla v. Hanft, 2005 WL 465691, at *8.

166. *Id.*

167. *Id.* n.10.

168. 18 U.S.C. § 4001(a) (2000).

169. Padilla v. Hanft, 2005 WL 465691, at *8 n.10. The Non-Detention Act states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). The Supreme Court in *Hamdi* concluded that § 4001(a) was satisfied by the AUMF, and because that was so, did not address an even more fundamental argument that § 4001(a) does not apply to the military context altogether, a fact suggested by its legislative placement in Title 18 of the United States Code—a title related to prisons and law enforcement. The statute was prompted by concerns over the civilian—not military—internment of the Japanese during World War II.

170. *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2638-43 (2004) (plurality opinion).

fighting of it. The *Padilla* lower court judgment finds constitutional accountability to be synonymous with judicial process, neglecting altogether the electoral and political check. For the district judge, it is the criminal process or nothing. The court writes:

> [I]n declaring Padilla an enemy combatant, the President relied upon facts that would have supported charging Padilla with a variety of offenses. The government thus had the authority to arrest, detain, interrogate, and prosecute Padilla apart from the extraordinary authority it claims here. The difference between invocation of the criminal process and the power claimed by the President here, however, is one of accountability. The criminal justice system requires that defendants and witnesses be afforded access to counsel, imposes *judicial supervision over government action*, and places congressionally imposed limits on incarceration.[171]

Padilla is on expedited appeal to the Fourth Circuit and a petition has been filed for early Supreme Court review,[172] though that is unlikely. Because the appeal occurs in the summary judgment context, the facts will be construed in favor of the United States.[173] Perhaps the most critical fact is one which underscores the similarity between Messrs. Hamdi and Padilla—both were alleged to be associated with enemy forces while carrying assault rifles on the battlefield of Afghanistan. This fact challenges Padilla's main contention: namely, that he somehow sheds his enemy combatant status when he fortuitously evades battlefield capture only to come to the United States for the purpose of launching attacks domestically.[174] The supposition is illogical and certainly in tension with the *Hamdi* Court's definition of enemy combatant—that is, someone (whether or not a U.S. citizen) who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who

171. Padilla v. Hanft, 2005 WL 465691, at *13 (alteration added by *Padilla* court) (emphasis added) (internal quotation omitted).

172. *See* Brief of Petitioner for Writ of Certiorari Before Judgment, Padilla v. Hanft (U.S. filed Apr. 7, 2005) (No. 04-1342), *available at* 2005 WL 818535.

173. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (noting that "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion") (alteration added by the *Matsushita* Court) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

174. *Cf.* Brief of Petitioner for Writ of Certiorari Before Judgment, Padilla v. Hanft (U.S. filed Apr. 7, 2005) (No. 04-1342), *available at* 2005 WL 818535 (stressing the difference between "battlefield capture" of a combatant overseas and "civilian arrest" inside the United States) (citations omitted).

engaged in an armed conflict against the United States there."[175] Padilla is arguably more, not less, of a threat to our military success because of his battlefield escape and persistence in wanting to bring the war back to the U.S. But even if a judge thinks there is no war—but only isolated forms of criminal wrongdoing—is it really the judiciary's place to second guess military commanders (including the President)? This judicial intervention is hardly faithful to Congress' grant of "necessary and appropriate" authority in the AUMF—an authorization which specifies no geographical limit as to where the enemy can be engaged. Indeed, the debate in Congress clearly anticipated the fighting of the war on terror at home and abroad. In debate on September 14, 2001, floor commentary noted that "[t]his will be a battle unlike any other, fought with new tools and methods; fought with intelligence and brute force, rooting out enemies *among* us and those outside our borders."[176]

The Supreme Court's *Hamdi* discussion of venerable precedent, notably *Ex parte Milligan*,[177] likewise suggests that Padilla's capture in the United States is of little moment. Indeed, the Justices noted that *Milligan* "does not undermine our holding about the Government's authority to seize enemy combatants,"[178] since Milligan was not actively involved in the confederate fight and was arrested at home.[179] By contrast, the factual averments that bind the court on summary judgment review show Padilla to be highly active with his al Qaeda confederates—narrowly evading capture in Afghanistan and undertaking a far-flung itinerary of international training and support visits with al Qaeda leadership.[180]

The district court's attempt to distinguish Padilla from the *would be*[181] saboteur Haupt in *Quirin* is unavailing. To be sure, Haupt in *Quirin*

175. Hamdi v. Rumsfeld, 124 S. Ct. at 2639 (plurality opinion) (internal quotations omitted); *see also id.* at 2679 (Thomas, J., dissenting) (noting similarly). The plurality opinion of Justice O'Connor in *Hamdi* is of course the controlling opinion with respect to the President's authority to detain enemy combatants because Justice Thomas in dissent would have sustained the President's power even more deferentially. *See id.* at 2640-41 (plurality opinion); *id.* at 2679-85 (Thomas, J., dissenting); *see also supra* note 60.

176. 147 CONG. REC. H5660 (daily ed. Sept. 14, 2001) (statement of Rep. Menendez) (emphasis added).

177. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

178. Hamdi v. Rumsfeld, 124 S. Ct. at 2642 (plurality opinion).

179. *Id.* (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) at 118, 131).

180. Brief for the Respondent in Opposition at 3-4, Padilla v. Hanft (U.S. filed Apr. 7, 2005) (No. 04-1342), *available at* http://www.usdoj.gov/osg/briefs/2004/0responses/2004-1342.resp.pdf.

181. Haupt's desire to blow up bridges was as unsuccessful as Padilla's alleged

was tried for punitive purposes, but as the plurality in *Hamdi* observed "nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities."[182] And the notion that *Quirin* can be distinguished on the basis that World War II had a definite ending date is simply false as a matter of history and irrelevant as a matter of fact insofar as no one can credibly argue that the conflict with al Qaeda, with which Padilla is directly associated, has concluded. No precedent denies the authority of the President to detain Padilla as an enemy combatant. Most notably, Padilla's detention cannot be fairly compared to the lack of civilian detention authority of a concededly loyal citizen in the Japanese internment case of *Ex parte Endo*.[183] *Endo*, itself, observed that "[d]etention which furthered the campaign against espionage and sabotage would be one thing[, b]ut detention which has no relationship to that campaign is of a distinct character."[184] Padilla's activities fall squarely into the category of military hostilities and are reasonably encompassed by Congress's direction to the President "to prevent any future acts of international terrorism against the United States."[185]

VI. DEBATE IN THE LOWER COURTS

Mr. Padilla is entitled to the calibrated due process review anticipated by *Hamdi*.[186] Given the allegations against him, the presumption in the government's favor, and the ability to employ somewhat relaxed evidentiary standards reflecting the exigencies of a war on terror, Padilla's detention should be vindicated and continue. By contrast, how the courts will assess the merits of the cases brought by Guantánamo detainees under

interest in doing the same to apartment structures. *Compare Ex parte* Quirin, 317 U.S. 1, 21 (1942) (noting Haupt's failed plan and subsequent detention by the FBI), *with* Brief for the Respondent in Opposition at 3-4, Padilla v. Hanft (U.S. filed Apr. 7, 2005) (No. 04-1342), *available at* http://www.usdoj.gov/osg/briefs/2004/0responses/2004-1342.resp.pdf (noting Padilla's alleged plan and subsequent detention by the FBI upon arrival at Chicago's O'Hare International Airport). This fact, too, illustrates the similarity between *Quirin* and *Padilla*—detention as enemy combatant does not turn in either case on whether the belligerency was successful, or successfully "thwarted" to use the district court's terminology. Padilla v. Hanft, 2005 WL 465691, at *7, *12 (D.S.C. Feb. 28, 2005).

182. Hamdi v. Rumsfeld, 124 S. Ct. at 2640 (plurality opinion).

183. *Ex parte* Endo, 323 U.S. 283 (1944).

184. *Id.* at 302.

185. Authorization for Use of Military Force (AUMF), Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

186. *See* Hamdi v. Rumsfeld, 124 S. Ct. at 2647-50 (plurality opinion) (outlining the nature and scope of the process due).

their newfound statutory habeas right is wholly open-ended. The Supreme Court in *Rasul*, it will be remembered, left this up to the lower courts to fill out,[187] but with an unexplained footnote-thumb on the scale, noting that the detainees' "allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"[188]

The district courts have taken up the grand debate. It is a debate that is largely occurring in Washington, D.C. between Judges Leon and Green over what rights, if any, accompany the extension of a statutory right of habeas corpus to noncitizen detainees outside U.S. sovereign territory.[189] In a nutshell, Judge Leon reasons that the writ means that these alien detainees are empowered to ask: were we properly captured as part of a properly authorized military conflict?[190] Judge Leon finds this question largely answered for him by Congress's sweeping AUMF and the President's own inherent Constitutional authority,[191] provided, of course, the detainees were captured within the scope of those parameters.[192] The last proviso is not unimportant as it gives lie to the rhetorical claim that anyone could be snatched up at any time for indefinite detention. To the contrary, it is only upon the proper showing of a wartime capture that Judge Leon finds other causes of action, that are really only multiply-expressed challenges to the authority to detain during war, to be either not judicially enforceable or inapplicable.[193]

Judge Green skips over the issue of whether or not someone was properly captured and proceeds directly to the issue of whether or not noncitizens have Fifth Amendment due process rights.[194] Relying upon the *Rasul* footnote, Judge Green concludes that noncitizen detainees may challenge not just the detention itself, but also its nature and manner in

187. *See* Rasul v. Bush, 124 S. Ct. 2686, 2699 (2004) (remanding to the district court the merits and remedial questions).

188. *Id.* at 2698 n.15 (quoting 28 U.S.C. § 2241(c)(3)).

189. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) (Green, J.); Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (Leon, J.).

190. *See* Khalid v. Bush, 355 F. Supp. 2d at 317 (Leon, J.) ("Stated simply, the petitioners must establish at least one viable legal theory, accepting the facts as they plead them to be true, under which this Court could issue a writ of habeas corpus challenging the legality of their detention.").

191. *Id.* at 318-20.

192. *Id.* at 320-21.

193. *See id.* at 320-30 (finding no viable claim under, inter alia, the War Crimes Act, the Alien Tort Claims Act, the Administrative Procedure Act, certain Army Regulations, certain United States Treaties, and several international laws).

194. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 447 (D.D.C. 2005).

terms of the conditions of custody, access to counsel, and perhaps a full panoply of matters arising under the Fifth and Sixth Amendments.[195] Judge Green thereby produces an anomaly: citizens within the United States (pursuant to the Supreme Court's decision in *Hamdi*) may challenge the lawfulness of the detention, but noncitizens beyond our borders have federal judicial supervision well in excess of that, over a host of subsidiary matters that were previously thought to be the subject of diplomacy or the province of military judgment limited by international accord.

With respect, Judge Green is mistaken. Arguably, the government had no obligation under international law to make individualized determinations of the unlawful combatancy status of alien detainees at Guantánamo. In early 2002, the President thoroughly considered the en masse nature of captured Taliban and al Qaeda members, determining them, by virtue of their flagrant disregard of the laws of war, not to be entitled to POW status.[196] In the absence of factual doubt, it is the scholarly consensus that this presidential determination is unassailable.[197] Even if one assumes factual doubt, the government fully discharged its international obligations by providing for Combat Status Review Tribunals (CSRT) to review the basis for detaining those held at Guantánamo.[198] CSRTs more than fulfill the "competent tribunal" called for under Article 5 of the Geneva Convention when there is doubt concerning whether a detainee qualifies as a POW.[199] In CSRT proceedings, detainees are

195. *Id.* at 456-64.

196. John Mintz & Mike Allen, *Bush Shifts Position on Detainees*, WASH. POST, Feb. 8, 2002, at A1.

197. The very language of GPW III, Article 5 being plural in nature implies that an Article 5 tribunal may make a collective determination as to the lawful or unlawful status of a group of captured combatants. *See* GPW III, *supra* note 41, art. 5 ("Should any doubt arise as to whether *persons*, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such *persons* shall enjoy the protection of the present Convention until such time as *their* status has been determined by a competent tribunal.") (emphases added); *see also* W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict*, 9 CASE W. RES. J. INT'L L. 39, 62 (1977) ("According to the widely accepted view, if the group does not meet the . . . criteria . . . the individual member cannot qualify for privileged status as a POW.").

198. *See* Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunals (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review .pdf [hereinafter Wolfowitz Memorandum]; *see also* John Mintz, *Pentagon Sets Hearings for 595 Detainees*, WASH. POST, July 8, 2004, at A8.

199. *See* GPW III, *supra* note 41, art. 5; *see also supra* note 197. A detaining

provided with a military personal representative and such representative as well as the "recorder" (the person presenting the evidence of enemy combatant status) is duly bound to search for and disclose exculpatory evidence.[200] Detainees are given unclassified summaries of the evidence against them and the three-person tribunal finding, confirming or denying enemy combatant status is subject to review by higher military authority.[201]

Judge Green, however, remains unimpressed by either the absence of international obligation or the CSRTs, finding there to be broader constitutional due process imperatives to give captured alien detainees legal counsel and/or access to classified information.[202] Judge Green's due process speculations are reasonable enough vis-a-vis a criminal defendant in the United States, but again, if this is a war, providing legal counsel and access to classified information to hostile alien enemies seems lavish, if not fanciful. This is especially so given the generous release or repatriation of detainees by the United States as a result of CSRTs[203] and in the war generally.[204]

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party convenes a "competent tribunal" under GPW Article 5 only "when it is necessary to resolve a material factual issue of doubt as to the legal status of captured combatants." Bialke, *supra* note 9, at 49-50. The treaty does not mandate any particular POW status tribunal, deferring instead to the detaining power regarding tribunal procedures and composition. *Id.* at 50. "Article 5 does not instruct that the detaining power establish a separate tribunal for each detainee who has 'fallen into the hands of the enemy.'" *Id.* Rather, it merely directs a "competent tribunal." *Id.* CSRTs more than suffice, especially since they were modeled on preexisting military regulation aimed at fulfilling the treaty obligation. *See generally* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190-8, § 1-6 (1997).

200. Wolfowitz Memorandum, *supra* note 198.

201. *Id.*; *see also* Memorandum from Gordon England, Secretary of the Navy (Sept. 14, 2004), *available at* http://www.defenselink.mil/news/Sep2004/d20040914admin review.pdf (establishing administrative review procedures for detained enemy combatants).

202. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 465-77 (D.D.C. 2005).

203. As of late March 2005, "'[o]f the 558 CSRT hearings conducted, the enemy combatant status of 520 detainees was confirmed.'" Kathleen T. Rhem, *38 Guantanamo Detainees to Be Freed After Tribunals* (Mar. 30, 2005), *at* http://www.defenselink.mil/news/Mar2005/20050330_368.html (quoting Navy Secretary Gordon England). The tribunals concluded that 38 detainees "no longer [met] the criteria to be designated as enemy combatants." *Id.* (quoting Navy Secretary Gordon England).

204. Detainees at Guantanamo represent a tiny fraction of those captured in the global war on terror. Bialke comments that "[o]f the roughly 10,000 people that were originally detained in Afghanistan, fewer than ten percent were brought to

The decisions by Judges Leon and Green are on appeal, as is a case questioning whether the President's military tribunals are constitutionally composed.[205] Judge Robertson, also of the district bench in Washington, D.C., has enjoined prosecutions before these presidentially-established tribunals.[206] The particular case involves Salim Ahmed Hamdan, Osama bin Laden's former chauffeur, who allegedly conspired to advance terror activities over a considerable period.[207] Like the remarkably supervisory judgment of the district judge in *Padilla*, Judge Robertson has refused even to abstain until the military tribunal proceeding could be concluded,[208] and instead has rejected the President's interpretation of international treaties, and arguably misread the provisions of the UCMJ to insist that Hamdan face a court-martial or Article III court.[209]

An important, but largely implicit, question in *Hamdan* is why the President's military tribunals are needed at all. There are multiple reasons, but these reasons make sense only in the context of a bona fide war, and especially where the war is being lodged against a global terror network.

Guantanamo Bay in the first place. The vast majority were processed in Afghanistan and released in Afghanistan. Of those sent to Guantanamo Bay, 87 have been transferred for release thus far and a few have already been returned to their home country for continued detention or prosecution." Bialke, *supra* note 9, at 66 n.70 (internal quotation omitted). Bialke was writing in 2004 and the number repatriated has been augmented.

205. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004), *cert. denied*, 125 S. Ct. 972 (2005). Hamdan's current appeal is to the United States Court of Appeals for the District of Columbia Circuit. *See* Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir. filed Mar. 2, 2005) (rescheduling oral argument). The President established military tribunals or commissions for the trial of al Qaeda and other noncitizens who assist them. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833, 57,833-34 (Nov. 16, 2001). The Department of Defense has issued elaborate implementing regulations. *See* Bialke, *supra* note 9, at 77 & n.79 (listing over fifteen such regulations, designed to "foster impartial, full, and fair trials, providing unlawful combatants tried in U.S. military commissions more procedural protections than what is required by international law").

206. Hamdan v. Rumsfeld, 344 F. Supp. 2d at 173-74.

207. *See* Scott Higham, *Bin Laden Aide Is Charged at First Tribunal*, WASH. POST, Aug. 25, 2004, at A1.

208. Hamdan v. Rumsfeld, 344 F. Supp. 2d at 157-58.

209. *Id.* at 161-72. The judgment is hinged on the district court's belief that there is some doubt about Hamdan's status as being either an unlawful, al Qaeda-related, enemy combatant or a POW. *Id.* at 160-62. As an earlier footnote indicated, were Hamdan a POW, he would have a GPW right to a UCMJ proceeding. *See supra* note 41. The President believes this doubt to have been sufficiently resolved against Hamdan by the CRST. Hamdan v. Rumsfeld, 344 F. Supp. 2d at 162 (noting the Government's contention).

In this regard, by virtue of their military base location, military tribunals provide greater safety to the participants of the tribunal process—judges, prosecutors, juries, witnesses, counsel, the media, courtroom observers and the accused as well. The extraordinary difficulty of providing security during the trial of the first World Trade Center bombers in the early 1990s is sufficient illustration. In a terror-laden conflict, any courtroom is a target. Risks are lessened when trials occur at military bases far removed from urban centers. It is also likely that military tribunals do a better job protecting witnesses from post-trial retaliation, insofar as the tribunal has somewhat greater ability to limit the dissemination of witness identities. While the Classified Information Protection Act (CIPA)[210] affords some protection for classified evidence in criminal court settings, it can be at the cost of the proceeding, itself.[211] Greater flexibility permits the military tribunal to provide appropriate defense counsel access without jeopardizing ongoing military operations or revealing sources and methods of gathering information.

Of course, military tribunals also vary the applicable evidentiary standards to reflect the exigencies of gathering evidence in combat, rather than at a controlled crime scene. The President's military order preserves the presumption of innocence and the need for conviction beyond a reasonable doubt, but it also supplies far less procedural formality that would otherwise lead to evidentiary exclusion. That said, the evidentiary standard for military tribunals mirrors that of the special international courts for Rwanda and the former Yugoslavia, and even by one writer's reckoning, the International Criminal Court.[212] The general standard for admissibility is the common sense one of evidence that is "probative to a

210. Classified Information Protection Act (CIPA), Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. 3, §§ 1-16 (2000), as amended by Pub. L. No. 106-567, tit. VI, § 607, 114 Stat. 2855 (2000)).

211. The government may offer an unclassified substitute under CIPA. *Id.* § 4. If the district court will not accept a substitution proposed by the government, an interlocutory appeal is possible under CIPA § 7. *Id.* § 7. If the issue is resolved against the government, classified information is thereby subject to a disclosure order of the court. *Id.* § 6(e). However, the Attorney General may file an affidavit effectively prohibiting the use of the contested classified information. *Id.* If that is done, the court will likely impose sanctions against the government, which may include striking all or part of a witness's testimony, resolving an issue of fact against the United States, or dismissing part or all of the indictment. *Id.* § 6(e)(2).

212. Bialke, *supra* note 9, at 74 ("'[L]ike the . . . ICC, U.S. military commission rules do not prohibit commission members from "weighing evidence" and determining which evidence is more reliable than other evidence. It will be for counsel to make any submissions in that regard in order to persuade the commission in respect of any evidence admitted.'") (quoting Hook, *supra* note 9, at 7).

reasonable person."[213] It is common sense because in a war, operations are aimed at prevailing in mortal combat, not preserving a crime scene or maintaining an unimpeachable chain of custody.

VII. CONCLUSION: SO ARE WE AT WAR?

How will these cases be resolved? Any speculation is naturally colored by the premises that one brings to the argument, the most important of which is the question with which we started and that has been asked throughout: Are we at war? Whether a strong supporter of presidential and congressional prerogative to defend a grievously-injured national sovereignty or an international humanist hoping for a new world order, candor requires admitting this to be a perplexing question indeed. But why is it so perplexing?

We tend to think it so because of the peculiarities of terrorism—so-called asymmetrical warfare. Most people, including the 9/11 Commission, contend that there is, after all, no dominant nation-state that has attacked us.[214] There is no territorial dispute or even predominant locus of combat.

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213. *Id.* at 76.

214. The 9/11 Commission found no overwhelming al Qaeda-Iraq linkage, though the Commission found multiple contacts between al Qaeda and Iraq. Walter Pincus & Dana Milbank, *Al Qaeda-Hussein Link Dismissed*, WASH. POST, June 17, 2004, at A1. Its staff report noted "that bin Laden explored possible cooperation with Iraq" during a stay in Sudan through 1996, but concluded that

> "Iraq apparently never responded" to a bin Laden request for help in 1994. The commission cited reports of contacts between Iraq and al Qaeda after bin Laden went to Afghanistan in 1996, adding, "but they do not appear to have resulted in a collaborative relationship. Two senior bin Laden associates have adamantly denied that any ties existed between al Qaeda and Iraq. We have no credible evidence that Iraq and al Qaeda cooperated on attacks against the United States."

Id. (quoting 9/11 Commission staff report). Others are not so sure. The American Enterprise Institute's Laurie Mylroie argued much earlier to the contrary. *See generally* MYLROIE, *supra* note 10. Mylroie questions the theory that loosely organized cells are responsible for the terrorism directed at the United States. *See id.* at 2-9, 106-18. In this, she clings to a view that she says also inhabits the FBI's office in New York—namely, that Iraq, rather than a loose network, was behind the World Trade Center bombing in 1993, and the encouragement of the completion of the act thereafter. *Id.* at 4-9, 106-18. If the Department of Justice had this belief, they did not aggressively pursue linking bombing-master-plotter Yousef with Iraq until much later—post 9/11. The question of who was behind Ramzi Yousef was never properly investigated, Mylroie claims, because of a peculiar division between the Justice Department and the national security bureaucracies. *Id.* at 6-9. This problem was

There is no well-defined origin to the hostility, and while there are ideological and religious differences, there is not even a cogent list of specific ideological complaints[215] that fully explains the breakdown of peace.

Domestically, we should think seriously about the question of whether we are at war, because we have not been asked—as a nation—to make meaningful wartime sacrifice, or at least most of us have not. The troops who are courageously fighting have not been mobilized with a draft or general conscription. Domestic goods have not been rerouted, by and large, to the war effort. Moreover, what economic and social dislocation that has been suffered has been for an Iraqi military effort which may or may not be part of the larger war on terror, but about which few deny the mal-influence of intelligence mistakes. Apart from the 9/11 AUMF, the declaration of military force—which, of course, does not answer the question of whether in reality we are at war, it merely declares it so—we remain deeply troubled about our status. And we are troubled not just as a matter of abstract philosophy, but because, frankly, we continue to fear for our national safety. Statements and reports from our military commanders indicate that the possibility of another terror attack is very real, a fact made painfully plain by the sight of hundreds of legislators and their staffs scurrying out of the capitol upon the spotting of an errant piper cub. Embarrassed by false terror alerts though we may be, we are told that those who think another attack is not likely have merely been lulled into complacency by an enemy that has great patience and savvy.[216]

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only addressed in the fall of 2001 by the Patriot Act, which allows for increased sharing of intelligence between law enforcement (which seeks to establish individual culpability by due process and trial), and national security agencies (that seek to avoid terrorism in advance by identifying its state sponsors).

215. Some writers have attempted to distill a list, however:

> As far as can be determined, al-Qaeda demands that the state of Israel must be eliminated and replaced in its entirety by Palestine, that all "non-Muslim" countries must cease to exist, and all of their *infidel*, nonbeliever citizens be converted to Islam, that geographical borders separating Muslim countries be erased, and that all democratic governments in Muslim countries be replaced by a unified Islamist government similar to a Talibanesque theocracy.

Bialke, *supra* note 9, at 38.

216. One such writer summarizes as follows:

> Americans have become complacent and no longer concerned about future acts of terrorism. Yet the threat posed by al Qaeda and other terrorists remains real. . . .

The uncertainty over whether we are at war or at peace is the analytical thread running through the Supreme Court's divided opinions, the citizen enemy combatant cases, the Guantánamo alien detainee cases, as well as the related challenges to presidential authority to establish military tribunals. This perplexity is really what separates everyone from an Attorney General arguing for the "aptness" of Patriot Act tools that may one day be needed to Judge Leon and Judge Green's profoundly different assessments over whether constitutional rights extend to individuals who have no loyalty or physical connection to the United States, other than that they may have engaged in hostilities against her. There is no escape from answering the question of whether we are at war or whether we are in some kind of regrettable, unavoidable, police action against the equivalent of a new virulent form of organized crime that will always be with us.

If what our nation confronts is merely a variant of organized crime, then many of the arguments made for Hamdi by Frank Dunham and his co-public defenders make perfect sense. Then, the lower court judge in *Padilla* is right: Padilla should be criminally charged or released. Our traditions of due process and constitutional adjudication demand no less if our challenge is to dampen a criminal enterprise. However, if we are at war, then counselor Dunham is mistaken and the Justices and judges who would presume to take military command are engaged in behavior most unbecoming. If we are at war, the law is on the President's side in the detention and related cases because that is where the Constitution allocates it. Once the President is given legislative authority and appropriation, as he has, the Constitution allocates the war power to a Commander in Chief who can act with energy and dispatch.

Mix the perplexing question about our war status with concerns over presidential and congressional misjudgment abetted by flawed intelligence, and it should not be surprising to hear public doubt expressed over detentions and other war efforts. Add in the absence of a call for national sacrifice or some practical reexamination of conscience and the justness of our cause becomes even more tendentious. Hard cases make bad law. Military misjudgment fostered by bad intelligence makes bad law too, since

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> . . . . Al Qaeda's previous practices are telling; they bespeak of their patience and willingness to spend years to plan, train for, and then execute an attack. The United States is at war with this unconventional enemy.

Thomas L. Hemingway, *In Defense of Military Commissions*, 35 U. MEM. L. REV. 1, 1 (2004).

such misjudgment weakens the war power by inviting judges to import criminal due process limits into contexts where they are ill-suited and constitutionally unwarranted. This may well leave us vulnerable when the enemy returns—assuming, that is, we are at war.[217]

217. A recitation of the targeting of America by al Qaeda suggests the unfortunate answer:

> Al Qaeda's campaign throughout the 1990s against American targets amounted to a war. In recitation, this may seem more obvious now. The cumulative chain of events is quite striking—the 1992 attempt to kill American troops in Aden on the way to Somalia; the 1993 ambush of American army rangers in Mogadishu; the 1993 truck bombing of the World Trade Center by conspirators who later announced that they had intended to topple the towers; the 1995 bombing of the Riyadh training center in Saudi Arabia; the 1996 bombing of the Khobar Towers American barracks in Saudi Arabia (five weeks after bin Laden was permitted to leave Sudan); the 1998 destruction of two American embassies in East Africa; and the 2000 bombing of the U.S.S. Cole, in a Yemeni harbor. The innumerable other threats against American embassies and offices around the world; the plot to down ten American airliners over the Pacific and to bomb the Lincoln and Holland Tunnels in New York, as well as the United Nations; the smuggling of explosive materials across the Canadian border for a planned millennium attack at Los Angeles Airport; and finally, the attacks on the Pentagon and the World Trade Center—were taken to constitute a coherent campaign rather than the isolated acts of individuals.

Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 330 (2002).