ENEMY COMBATANTS AND THE WRIT OF HABEAS CORPUS

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I. INTRODUCTION

Prior to the September 11, 2001, terrorist attacks, the United States treated international terrorism problems as primarily a criminal law concern. If terrorists could be captured, U.S. courts tried them under U.S. criminal law.¹ The FBI was the primary federal agency charged with finding and capturing such criminals. With the attacks, however, everything changed. On September 18, 2001, Congress authorized the President to take military action against the Taliban and Al Qaeda, as well as against all who aid and support them.² Although the United States will clearly continue to use the normal criminal justice processes when convenient, 9/11 altered the legal nature of the U.S. effort to fight international terrorism. Not only would the terrorists themselves be brought to justice, the U.S. military would also now actively seek out those who support terrorism.

As part of this new focus, the U.S. military entered Afghanistan to oust the Taliban government, a supporter of the al Qaeda organization responsible for the 9/11 attacks.³ In the process, U.S. forces captured Taliban and al Qaeda members. The United States labeled them enemy or

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¹ One example was the prosecution of four individuals for the bombings of U.S. embassies in East Africa. For a description of that trial, see Benjamin Weiser, A Jury Torn and Fearful in 2001 Terrorism Trial, N.Y. TIMES, Jan. 5, 2003, at A1. The government has chosen to press criminal charges in one 9/11 case against Zacarias Moussaoui, a French citizen alleged to have been the 20th hijacker. See Sarah Downey, Who Is Zacarias Moussaoui?, NEWSWEEK WEB EXCLUSIVE (Dec. 14, 2002), at http://www.msnbc.com/news/673068.asp.

² See Authorization for Use of Military Force, 50 U.S.C. § 1541 (2001) (allowing the President “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 . . . .”).

unlawful combatants and detained them. Arguing that these individuals were dangerous to the United States, President Bush created military tribunals to try non-U.S. citizens. This plan has stirred up much controversy because it arguably subverts the U.S. Constitution. To date, apparently none of the captured Taliban or al Qaeda captives have been

4. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001) (providing that certain non-citizens may be “detained at an appropriate location designated by the Secretary of Defense outside or within the United States”). The order purported to cover any person there is reason to believe:

(i) is or was a member of an organization known as al Qaeda;
(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
(iii) has knowingly harbored one or more individuals described [above].


5. See sources cited in Michal R. Belknap, A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective, 38 CAL. W. L. REV. 433, 435-37 nn.14–34. See Neal K. Katyal & Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 YALE L.J. 1259 (2002) (arguing that the establishment of military tribunals is unconstitutional); Neil King, Jr., Bush’s Plan to Use Tribunal Will Hurt U.S. in Human-Rights Arena, Some Say, WALL ST. J., Nov. 27, 2001, at A2. Indeed, Professors Katyal and Tribe seem to argue that the President’s powers do allow detention; it is the adjudication of guilt that troubles them:

The moment the President moves beyond detaining enemy combatants as war prisoners to actually adjudicating their guilt and meting out punishment, however, he has moved outside the perimeter of his role as Commander in Chief of our armed forces and entered a zone that involves judging and punishing alleged violations of the laws, including the law of nations (which encompasses the laws of war). In that adjudicatory and punitive zone, the fact that the President entered wearing his military garb should not blind us to the fact that he is now pursuing a different goal—assessing guilt and meting out retrospective justice rather than waging war. Contrast, for example, a prisoner of war punished for infractions committed while detained in that capacity (such as killing prison guards or injuring fellow prisoners) with a captured combatant punished for wantonly slaughtering unarmed and wholly innocent civilians. The first case is ancillary to the commander-in-chief function; the second is logically, morally, and legally separable.

subjected to such a process, and the greater danger may be the U.S. argument that as long as a state of war exists, these individuals may be detained without any process.6

The United States has set up a detention camp at Guantanamo, Cuba,7 to hold these enemy combatants.8 Given the government’s stated position that this “war” may last for a very long time,9 internment for the duration may amount to a life sentence. The United States does not need to subject these individuals to the tribunal process if indefinite incarceration is possible without meaningful judicial process or proof of wrongdoing. In addition, because the United States does not believe that the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention) covers these detainees,10 it has no concern about that treaty’s provision requiring repatriation at the end of hostilities.11 Although the United States is treating detainees relatively well12—with access to needed food, clothing, and medical care—they cannot leave, and the United States has only allowed sporadic contact with relatives.13 The detainees have shown their

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6. Apparently because U.S. officials argued that such military tribunals could operate in secret. See Kelly Wallace et al., Bush Officials Defend Military Trials in Terror Cases (Nov. 15, 2001), at http://www.cnn.com/2001/LAW/11/14/inv.military.court. Thus, we may not know whether any trials have taken place.

7. In 1903, the United States leased the Guantanamo land from Cuba. An indefinite lease was signed in 1934. After the Cuban revolution, Fidel Castro sought to void the lease, but the United States has continued to uphold its validity. Many service members consider the base to be an attractive assignment because of the Caribbean climate and beautiful beaches. See Bob Dart, New Mission for Odd Outpost, ATLANTA J. & CONST., Dec. 28, 2001, at 11A (explaining Guantanamo history).


11. See id. art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).


displeasure through hunger strikes and chanting of prayers.\textsuperscript{14} Nevertheless, Americans generally support continued detention.\textsuperscript{15}

In addition to the alien detainees in Guantanamo, the United States has picked up citizens as suspected terrorists, treating them differently than non-citizens. In two cases that are well-publicized, the United States holds citizens in naval brigs, uncharged with any crimes.\textsuperscript{16} Others face criminal charges.\textsuperscript{17}

U.S. law places the remedy for unlawful detention in the writ of habeas corpus.\textsuperscript{18} A prisoner can ask a court to require that the government justify her continued incarceration.\textsuperscript{19} The government must then show that the detention is legal.\textsuperscript{20} Individuals claiming to represent the interests of the enemy combatants have filed habeas corpus petitions in U.S. courts seeking the release of both aliens and citizens being held as enemy combatants without charges.\textsuperscript{21}

This article will analyze the legal arguments under U.S. national security law for indefinite detention of enemy combatants.\textsuperscript{22} It will begin by


\textsuperscript{15} See Dana Blanton, Majority Approve of Cuban Terrorist Prison (July 24, 2002) (reporting the results of a FOX News/Opinion Dynamics Poll finding that Americans think such imprisonment is fair by a four-to-one margin), at http://www.foxnews.com/story/0,2933,58635,00.html.

\textsuperscript{16} See discussion accompanying infra notes 318–497.

\textsuperscript{17} The cases of John Walker Lindh, Richard Reid, and Zacarias Moussaoui will not be discussed in this article. Lindh was charged with a crime, to which he pleaded guilty and received a twenty-year sentence. See Katharine Q. Seelye, Threats and Responses: The American in the Taliban; Regretful Lindh Gets 20 Years in the Taliban Case, N.Y. TIMES, Oct. 5, 2002, at A1 (reporting on Lindh’s tearful repudiation of terrorism). Richard Reid, the so-called “shoe bomber,” also pleaded guilty to criminal charges. Richard Reid Pleads Guilty: Faces Minimum Sentence of 60 Years (Jan. 22, 2003), at http://www.cnn.com/2002/LAW/10/04/reid.guilty.plea/. The criminal charges against Moussaoui relating to the 9/11 events have become embroiled in a controversy over his attorneys’ access to alleged mastermind Ramzi Binalshibh, who is in government custody. See Associated Press, Justice Defies Moussaoui Judge (July 17, 2003), at http://www.msnbc.com/news/938917.asp.

\textsuperscript{18} See Chin Yow v. United States, 208 U.S. 8, 13 (1908).

\textsuperscript{19} See 2-41 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 41.3(b) (2002).


\textsuperscript{21} See discussion of cases accompanying infra notes 226–317.

\textsuperscript{22} This discussion is limited to cases discussing detainees who have not been charged with a crime. There has also been litigation surrounding deportation hearings for aliens thought to have something to do with terrorists. See, e.g., N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (refusing to require the Attorney General to allow the press access to deportation hearings).
reviewing the facts surrounding the enemy combatants’ imprisonment. It will briefly discuss the history of the writ of habeas corpus and then examine international law, which might provide detainees with their only available remedy. Next, this article will review U.S. Supreme Court cases dealing with military power to imprison people during national emergencies. Finally, it will analyze recent decisions relating to detainees in light of this Supreme Court authority and international law. Ultimately, it will conclude that although the U.S. position relating to the aliens at Guantanamo may not be the best policy and may be subject to challenge under international law, domestic law appears to justify unlimited detention. U.S. citizens, on the other hand, deserve—and receive—greater protections under the Constitution.

II. The Detainees

The United States began to transfer captured al Qaeda and Taliban fighters to the Guantanamo site in January 2002, but the majority arrived after the Camp Delta base was constructed. The Camp Delta detention facility was designed to hold as many as 612 prisoners. Early on, the United States said that the detainees represented thirty-three nationalities, including about 100 Saudis and a few Europeans. Reportedly, 650 men have been held at Guantanamo. Some prisoners have been sent home. In one case, officials determined that the man was mentally ill, not a terrorist. In some instances, the United States hoped to send the men home for prosecution, but their home governments often lacked the legal authority to hold them or put them on trial.

Some dispute whether certain men should be held at Camp Delta at all. An article in Newsweek described Kuwaitis who were caught up in the

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25. Roy Gutman & Sami Yousafzai, The Madman of Guantanamo, NEWSWEEK, May 27, 2002, at 50 (reporting on the variety of nationalities at Guantanamo). There may be as many as six Russians among the group. More Russians May be Among Al-Qa’idah Prisoners in Guantanamo, FIN. TIMES INFO., July 27, 2002 (reporting that Russians were among those held), available at LEXIS, News Library, Global News Wire File.
27. Gutman & Yousafzai, supra note 25, at 50.
28. Id.
United States sweep as unlikely being terrorists.\textsuperscript{29} One was a father of five and government bureaucrat.\textsuperscript{30} Another worked for the Kuwaiti Interior Ministry.\textsuperscript{31} One was a teacher who often spent his summers working for charities in the Middle East or Africa.\textsuperscript{32} A fourth, an engineer for the Kuwaiti electric company, went to the Afghanistan border to help refugees and was captured when the border closed.\textsuperscript{33} Fighting for their release, these detainees’ families hired a Washington law firm to represent them.\textsuperscript{34} Although other detainees are undoubtedly the dangerous men depicted by the United States, recent news reports have indicated that as many as fifty-nine Guantanamo prisoners remain there despite the U.S. intelligence officers’ determination that they have nothing to do with Al Qaeda.\textsuperscript{35} Indeed, the United States has admitted that some detainees may be innocent and will be released as soon as innocence can be determined.\textsuperscript{36}

Initially, some debated whether the Geneva Convention provided any prisoner of war protections to the Guantanamo detainees. The United States insisted that they were not entitled to those rights, although they would be provided humane treatment.\textsuperscript{37} The United States initially characterized these individuals as unlawful enemy combatants that did not fit into traditional prisoner-of-war categories.\textsuperscript{38} Later, the United States changed its view, allowing that the Geneva Convention covered Taliban members, but not Al Qaeda.\textsuperscript{39} Nevertheless, the United States claimed that under that

\textsuperscript{29} Roy Gutman et al., \textit{Guantanamo Justice?}, NEWSWEEK, July 8, 2002, at 34.
\textsuperscript{30} Id. at 36.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 37.
\textsuperscript{35} Greg Miller, \textit{Many Held at Guantanamo Not Likely Terrorists Dozens of Detainees Pose No Real Threat, but U.S. Policies Make it Nearly Impossible to Get Names off Lists: There’s Also Fear of Freeing ’21st Hijacker}, L.A. TIMES, Dec. 22, 2002, at A1. The report indicates that about ten percent of the prisoners held at Guantanamo had been found to be of no intelligence value by U.S. intelligence officials in Afghanistan. Id. The intelligence officers recommended that these prisoners be repatriated. Id. According to the report, classified documents established that most of these were “farmers, taxi drivers, cobblers, and laborers.” Id. Some had been forced to join Taliban fighters in the last few weeks of that regime. Id. at A25.
\textsuperscript{37} Gutman & Yousafzai, \textit{supra} note 25, at 50.
convention's provisions, the Taliban were not POWs. Despite this view, the United States said that it would provide most privileges normally allowed POWs to both groups.

To date, over 600 detainees remain in Guantanamo, apparently lacking the legal rights that one would normally expect in the United States. The United States has established Military Tribunals that could someday try these individuals, but as of yet, no trials have been held. In addition to the Guantanamo detainees, the United States holds two American citizens stateside in Navy brigs without charges. U.S. forces captured one on the battlefield in Afghanistan, while justice department officials arrested the other in Chicago in support of a warrant to give testimony before a grand jury investigating the 9/11 attacks. The details of their arrest and detention will be discussed in greater detail below.

III. THE WRIT OF HABEAS CORPUS

In order to regain their freedom, the detainees' traditional remedy is a writ of habeas corpus from a federal district court. In such a proceeding, the applicant asks to be freed because detention is contrary to law. Although most writs considered in federal courts are attempts to obtain relief from state criminal determinations, the writ can serve as a restraint on the federal government's own abuse of authority. Speaking of the writ of habeas corpus, Justice Story said:

It is . . . justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge. This writ is most

40. Id. Apparently, the Bush Administration felt that the Taliban had excluded themselves from POW status because of violations of the rules of war and its close relationship with al Qaeda. Contemporary Practice of the United States Relating to International Law, 96 Am. J. INT'L L. 461, 479–80 (2002).
41. Privileges specifically excluded were “access to a canteen to purchase food, soap, and tobacco, a monthly advance of pay, the ability to have and consult personal financial accounts, the ability to receive scientific equipment, musical instruments, or sports outfits.” Press Release, White House, supra note 39.
43. See text accompanying notes 318–465.
44. See text accompanying notes 318–328 and 389–390.
46. See WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE JURISPRUDENCE § 4261 (2d ed. 1988).
beneficially construed; and is applied to every case of illegal restraint, whatever it may; for every restraint on a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner, in which the restraint is effected.\textsuperscript{47}

The modern day writ of habeas corpus finds its roots in thirteenth century England, where it was used to require that a party to an action appear before the court.\textsuperscript{48} In the fifteenth and sixteenth centuries, the English common law courts used it as a device to wrest jurisdiction away from other courts.\textsuperscript{49} In the seventeenth century, in what was the most important event to the American experience, the writ was used to challenge unlawful confinement by the state.\textsuperscript{50} In a 1627 case known as the Case of the Five Knights,\textsuperscript{51} the King's Bench allowed that the writ could be used to enforce the Magna Carta's guarantees, but deferred to the crown's assertion that the detention was lawful.\textsuperscript{52} That case led to a Parliamentary response constricting the crown's right to arrest without probable cause and allowing a detained person an immediate right to a judicial hearing.\textsuperscript{53}

In the American colonies, courts continued to utilize the writ, and the Constitution specifically includes provision for the writ in article I, section 9, clause 2, which states that the "privilege of the writ shall not be suspended."\textsuperscript{54} Originally, this language applied only to federal prisoners being held in state facilities, but the Judiciary Act of 1789\textsuperscript{55} allowed federal courts to issue writs for prisoners held in federal facilities. The Habeas Corpus Act of 1867 gave the courts authority to order the writ in "all cases where any person may be restrained of his or her liberty in violation of the


\textsuperscript{48} CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE, AN ANALYSIS OF CASES AND CONCEPTS § 33.01 at 968 (4th ed. 2000). Habeas corpus literally means, "you have the body." \textit{Id.}

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} \textit{Id.} at 968–69. The Parliament used the writ to challenge the King's confinement of persons without probable cause when it passed the Habeas Corpus Act of 1679. The courts used the act to review confinement both before and after conviction. \textit{Id.}

\textsuperscript{51} Darne's Case, 3 How. St. Tr. 1 (K.B. 1627).

\textsuperscript{52} \textit{Id.}


\textsuperscript{54} U.S. CONST. art. I, § 9, cl. 2.

[C]onstitution, or of any treaty or law of the United States . . . 

Today’s provision is substantially similar.  

IV. SUPREME COURT PRECEDENT

Very limited judicial authority addresses claims for release by enemy combatants. U.S. prisoners have attempted to use the writ of habeas corpus in cases implicating national security concerns. In particular, U.S. Supreme Court decisions relating to military commissions during wartime provide some guidance regarding claims for release prior to conviction. 

In each case, the United States held prisoners following a military commission’s conviction. The prisoners argued that detention illegally exceeded the executive branch’s authority or violated the prisoner’s fundamental rights. Each case presents different factual settings, providing different bases on which to argue the legality of continued imprisonment.

A. MILITARY COMMISSION CASES

1. Ex parte Milligan

The first key Supreme Court case came in a Civil War era opinion that tested the limits of executive authority to deprive a U.S. citizen’s life and liberty. In Ex parte Milligan, the Supreme Court addressed certified questions from the circuit court relating to the detention and trial by military tribunal of Lambdin P. Milligan, a U.S. citizen. Military authorities arrested Milligan and brought him before a military commission, which

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58. One author has described the role of the military commission:
   “The laws of war have long recognized that military commissions can be convened to prosecute war crimes during an armed conflict. “The [military] commission,” as one authority notes, “is simply an instrumentality for the more efficient execution of the laws of war.” There is, moreover, a long-established history of using military commissions to try those accused of “violations of the laws and usages of war” . . . .”
   Christopher M. Evans, Terrorism on Trial: The President’s Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission, 51 DUKE L.J. 1831, 1836 (2002) (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 330, 334 (2d ed. 1920)) (citations omitted).
59. 71 U.S. (4 Wall) 2 (1866).
60. Id. at 8–9.
sentenced him to death. The circuit court asked the Supreme Court to consider whether a writ of habeas corpus should be issued, whether Milligan should be released from custody, and whether the military commission had jurisdiction to hear the charges against Milligan. In addressing these questions, the Court began by recognizing that there may be times when swift action is necessary to preserve the nation:

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.

The Court found the key issue was whether the military commission had jurisdiction to try and sentence Milligan. Because Milligan was a civilian living in a loyal state, the Court was reluctant to subject him to the military tribunal’s jurisdiction. The Court established that every American citizen has the right to be tried according to the law when he is accused of a crime. That law includes the constitutional protections of a trial by jury, the right to be free from unreasonable searches and seizures, proof of probable cause, right to a grand jury, and the right to due process of law. The Court found that these protections could not be taken away, even in time of national exigency. Any other result could lead to “anarchy or despotism.”

Having established these general parameters, the Court moved on to the specifics of Milligan’s case. The Court could not find the basis for the military tribunal’s jurisdiction in the judicial power vested under the

61. Id. at 107.
62. Id. at 108–09.
63. Id. at 109.
64. Id. at 118.
65. Id.
66. Id. at 121–22.
67. Id. at 119.
68. Id. at 119–20.
69. Id. at 121.
70. Id.
Constitution. The Constitution granted that power to the Supreme Court and such inferior courts as were created by Congress. Moreover, there was no argument that the military commission was such a court. Similarly, the President lacked the power to grant jurisdiction over Milligan’s case because the President’s job was to execute the law, not make it.

The law of war did not provide a basis for Milligan’s prosecution:

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

The Court could not find a good reason preventing Milligan from being handled by the Article III courts, which were authorized to try the relevant offenses. No unrest in Indiana made the courts unavailable. Milligan’s right to a jury trial under the Sixth Amendment could not be denied. Although the Fifth Amendment excepted “cases arising in the land and naval forces, or in the militia, when in actual service, in time of war or public danger,” and this exception applied to the Sixth Amendment jury requirement as well, this exception applied only to military forces, and Congress had exercised this power when it created a disciplinary system.

71. Id.
72. Id.
73. Id.
74. Id.
75. Id. at 121–22.
76. Id. at 122.
77. Id.
78. Id. at 122–23.
79. U.S. CONST. amend. V.
applicable to those in the military. All others retained their right to a jury trial.

The Court also dismissed the argument that martial law provided a basis for jurisdiction because a military commander had the power to determine when civil rights need to be curtailed. The Court reasoned that this would be liberty’s end because civil rights were fundamental to liberty, and the Constitution provided that only one right, the writ of habeas corpus, could be suspended. Suspension merely allowed the government to refuse to produce a person being held on court order, nothing more. The Court resisted the argument that the country’s safety may necessitate freer government action, stating, “that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.” The Court noted that nothing in this decision would prevent martial law in a case where war actually existed in the community in question. In those cases where the courts were actually closed and there was no other authority to retain order, the military may rule until the danger passes and the civil authorities regain control. Martial law could not exist when the judicial system was operating.

80. Ex parte Milligan, 71 U.S. (4 Wall) at 123.
81. Id. at 124.
82. Id. at 125–26.
83. Id. at 126.
84. Id.
85. Id.
86. Id. at 127.
87. Id. Four Justices argued for a different view of the habeas corpus suspension:

We assent, fully, to all that is said, in the opinion, of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty. And we concur, also, in what is said of the writ of habeas corpus, and of its suspension, with two reservations: (1.) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2.) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.

We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana.

We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly
2. *Ex parte Quirin*

Seventy-six years later, war once again forced the Supreme Court to address the legality of a military commission’s determination in *Ex parte Quirin*. That World War II case involved the arrest and trial by military commission of eight men, including one who might have been a U.S. citizen. The German military had sent the men by submarine to the United States to commit sabotage against U.S. munitions factories. When they landed, they quickly discarded their German military uniforms for civilian clothing. The FBI arrested all of the saboteurs, and the President appointed a military commission to try the offenders for violations of the rules of war. The Presidential proclamation authorizing the military commission also purported to deny the saboteurs access to the federal courts. The men filed a petition for a writ of habeas corpus in federal district court, which the court denied. Due to the case’s importance, the Supreme Court granted certiorari before the court of appeals reached a judgment and affirmed the lower court’s denial of leave to file for habeas corpus relief.

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incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

*ld.* at 137–41.

88. 317 U.S. 1 (1942).

89. *Id.* at 20. Although born in Germany, one of the petitioners was said to have obtained U.S. citizenship due to his parent’s naturalization. In any event, the court found the issue irrelevant and therefore did not determine his status. *Id.*

90. *Id.* at 21.

91. *Id.*

92. *Id.* at 21–22

93. *Id.* at 22–23.


The petitioner, Richard Quirin, asks leave to file a petition for a writ of habeas corpus by his counsel. It is conceded by petitioner’s counsel that petitioner landed on the coast of the United States in June, 1942, from a German submarine, with explosives, which he was instructed by a German officer to use for the purpose of committing sabotage on certain American industries. In view of this statement of fact, it seems clear that the petitioner comes within that category of subjects, citizens or residents of a nation at war with the United States, who, by a proclamation of the President, dated July 2, 1942, are not privileged to seek any remedy or maintain any proceeding in the courts of the United States.

I do not consider that *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281, is controlling in the circumstances of this petitioner. The application of the petitioner must, therefore, be denied.

*Id.*

95. 317 U.S. at 19.
The alleged saboteurs argued that the President lacked statutory or constitutional authority to order their trial by military commission. The government, on the other hand, maintained that the petitioners had to be denied access to the courts because they were enemy combatants who entered the United States as belligerents. The Presidential proclamation’s purpose, after all, had been to deny such access.

The Supreme Court, in an opinion written by Chief Justice Stone, found that nothing in the President’s proclamation prevented the federal courts from determining that proclamation’s applicability to a particular case. Moreover, the Court found that it had a right to determine whether the Constitution or other U.S. law prohibited trial by military commission. Nevertheless, the Court noted that the Presidential decision should not be set aside without a clear constitutional or legal conflict.

The Court sketched out the foreign affairs powers enumerated in the Constitution, which gave Congress the power to “provide for the common Defense,” “raise and support Armies,” “provide and maintain a Navy,” “make Rules for the Government and Regulation of land and naval Forces,” “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” and “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” In addition, the Court noted that the Constitution provided that Congress had the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .” From these enumerated powers, the Court concluded that the President had:

96. Id. at 24.
97. Id. at 24–25.
98. Id. at 25.
99. Id.
100. Id. The court said:
But the detention and trial of petitioners—ordered by the President in the declared exercise of his power as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.
101. Id. at 26 (quoting U.S. CONST. art. I, § 8, cl. 1).
102. Id. (quoting U.S. CONST. art. I, § 8, cl. 12).
103. Id. (quoting U.S. CONST. art. I, § 8, cl. 13).
104. Id. (quoting U.S. CONST. art. I, § 8, cl. 14).
105. Id. (quoting U.S. CONST. art. I, § 8, cl. 11).
106. Id. (quoting U.S. CONST. art. I, § 8, cl. 10).
107. Id. (quoting U.S. CONST. art. I, § 8, cl. 18).
the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.\textsuperscript{108}

The Court next reviewed the Articles of War passed by Congress, which provided courts-martial for military members and military commissions for those offenses not normally covered by courts-martial.\textsuperscript{109} The Articles also stated that the President would create the commission procedures.\textsuperscript{110} In addition, the Articles of War provided for courts-martial or trial by commission for spying.\textsuperscript{111} A savings clause provided that nothing contained therein would deprive a military commission of its jurisdiction over appropriate offenses.\textsuperscript{112} The Articles specified coverage over U.S. military personnel and "any other person who by the law of war is subject to trial by military tribunals."\textsuperscript{113} The Court noted that the Espionage Act of 1917, which gave the district courts jurisdiction over behavior that hindered the war's prosecution, also contained a savings clause stating that nothing in that statute limited the jurisdiction of courts-martial or military commissions.\textsuperscript{114} In the Articles and the Act, the Court found that Congress had acted "to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."\textsuperscript{115} In creating the commission to try the saboteurs, the President had acted under the authority granted by Congress and under his own military authority as Commander in Chief:

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war. It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions

\textsuperscript{108} Id.
\textsuperscript{109} Id. at 26–27.
\textsuperscript{110} Id. at 27.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id. (quoting Articles of War, 10 U.S.C. §§ 1471–1593, art. 12, repealed by the Uniform Code of Military Justice, 10 U.S.C. §§ 801–950 (2000)).
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 28.
without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged.\textsuperscript{116}

Given the congressional authorization added to the Presidential power as Commander in Chief, the Court only needed to determine whether the alleged crimes here were violations of the law of war making them subject to a military tribunal without a jury.\textsuperscript{117} It noted that Congress had not delineated the specific violations subject to such procedures, but instead had incorporated by reference all violations of the law of war that were constitutionally allowed.\textsuperscript{118}

To determine the crimes’ parameters, the Court looked to international law. It found universal agreement that the rules of war differentiated between armed forces and peaceful citizenry in countries that are at war with one another.\textsuperscript{119} Lawful combatants were subject to the rules of war and could be captured and detained as prisoners of war.\textsuperscript{120} In contrast, unlawful combatants could be captured and detained, but also could be put on trial by a military tribunal for unlawful acts.\textsuperscript{121} As an example, the Court noted that military tribunals had traditionally tried and punished plain-clothed spies coming surreptitiously across military lines to do damage.\textsuperscript{122} Contemporary U.S. military rules contained similar provisions, and the Court determined that U.S. law, by defining a class of lawful belligerents who should be treated as POWs, necessarily assumed that others—unlawful belligerents—would not be subject to such protection.\textsuperscript{123} The Court maintained that the U.S. practice of detaining and trying such individuals before a military commission found support internationally.\textsuperscript{124}

\textsuperscript{116} \textit{Id.} at 28–29.
\textsuperscript{117} \textit{Id.} at 29.
\textsuperscript{118} \textit{Id.} at 30.
\textsuperscript{119} \textit{Id.} The Court cited numerous conventions, military rules, and international legal scholars in support of this proposition. \textit{Id.} at n.7 (citing authority for the different treatment of military and civilians).
\textsuperscript{120} \textit{Id.} at 31.
\textsuperscript{121} \textit{Id.} The Court found support for this proposition in military rules, international practice, and legal scholarship. \textit{Id.} at n.8 (citing authority for trial by military commission).
\textsuperscript{122} \textit{Id.} The Court noted numerous examples from the U.S. experience, including actions taken during the Revolutionary, Mexican, and Civil Wars. \textit{See id.} at 31–32 nn.9–10 (citing examples from U.S. history).
\textsuperscript{123} \textit{Id.} at 35.
\textsuperscript{124} \textit{Id.} The Court stated:
Having found that the detention and trial were within constitutional powers and that the alleged violations were contrary to the law of war, the Court cleared up a few minor issues. First, it dismissed the argument that there was no violation because the petitioners carried no conventional weapons and did not necessarily mean to harm the U.S. military, instead focusing on the U.S. industry supporting the war effort. According to the Court, modern war included infrastructure destruction, which was exactly what the petitioners intended to accomplish.

The Court was equally unimpressed with the argument that Haupt, allegedly a U.S. citizen, needed to be treated differently than the other petitioners. Haupt had allied himself with a belligerent nation, receiving his orders and support from that country. Under such circumstances, the United States could consider him an unlawful combatant. Additionally, the Court did not adopt the argument that the petitioners here had been deprived of their Fifth and Sixth Amendment constitutional protections

Great Britain, War Office, Manual of Military Law (1929) § 445, lists a large number of acts which, when committed within enemy lines by persons in civilian dress associated with or acting under the direction of enemy armed forces, are “war crimes.” The list includes: “damage to railways, war material, telegraph, or other means of communication, in the interest of the enemy. . . .” Section 449 states that all “war crimes” are punishable by death.

Authorities on International Law have regarded as war criminals such persons who pass through the lines for the purpose of (a) destroying bridges, war materials, communication facilities, etc.: 2 Oppenheim, International Law (6th ed. 1940) § 255; Spaight, Air Power and War Rights (1924) 283; Spaight, War Rights on Land (1911) 110; Phillipson, International Law and the Great War (1915) 208; Liszt, Das Volkerrecht (12 ed. 1925), § 58 (B) 4; (b) carrying messages secretly: Hall, International Law (8th ed. 1924) § 188; Spaight, War Rights on Land 215; 3 Merignhac, Droit Public International (1912) 296–97; Bluntschli, Droit International Codifie (5th ed. tr. Lardy) § 639; 4 Calvo, Le Droit International Theorique et Pratique (5th ed. 1896) § 2119; (c) any hostile act: 2 Winthrop, Military Law and Precedents, (2nd ed. 1896) 1224. Cf. Lieber, Guerrilla Parties (1862), 2 Miscellaneous Writings (1881) 288.

These authorities are unanimous in stating that a soldier in uniform who commits the acts mentioned would be entitled to treatment as a prisoner of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war.

Id. at n.12.
125. Id. at 37.
126. Id.
127. Id.
128. Id. at 37–38.
129. Id. at 38.
because there had been no grand jury or jury trial. The Court found that these amendments were designed to preserve the jury entitlements in existence at the time. Because no right to a jury existed for military tribunals when the amendments were written, petitioner’s argument would impermissibly expand those rights. Indeed, historical U.S. practice showed no intent to include Fifth or Sixth Amendment rights for military commissions.

Finally, petitioner Haupt argued that the Milligan case required that he be tried in the federal courts, quoting language from that case stating that the law of war “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.” The Court found the argument unpersuasive, noting that there was no indication that Milligan was a combatant, either lawful or unlawful. Thus, he was not subject to the rules of war unless martial law was declared. In the instant case, the petitioners clearly had violated the rules of war and were thus subject to detention and trial by a military commission.

3. In re Yamashita

In another WWII era case, In re Yamashita, Japanese General Yamashita sought review of the Supreme Court of the Philippines’ denial of a writ of habeas corpus after he was tried by a U.S. military commission and sentenced to death for violations of the rules of war. The commission held Yamashita responsible for the barbarism of soldiers under his command, and Yamashita argued that the commission lacked authority. The Philippine Supreme Court had denied the writ, holding that its authority was limited to a review of whether the commission had jurisdiction over the petitioner and the alleged crimes.

130. Id. at 38–39.
131. Id. at 39.
132. Id.
133. Id. at 42 n.14.
134. Id. at 45 (quoting Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123 (1866)).
135. Id.
136. Id.
137. Id. at 46.
138. 327 U.S. 1 (1946).
139. Id. at 5–6.
140. Id. at 13–15.
141. Id. at 6–7.
In addressing the writ of certiorari, the U.S. Supreme Court reviewed its holding in the *Quirin* case, restating Congress's authority to create the commissions and the domestic courts' inability to review the substance of the charges against petitioner.\(^{142}\) Only military authorities could conduct such reviews.\(^{143}\) Nevertheless, as the Court noted in *Quirin*, Congress had not eliminated the petitioner's defense, including the writ of habeas corpus to challenge the commission's authority.\(^{144}\)

Here, petitioner argued that the war was over, ending the commission's authority.\(^{145}\) The Court reviewed the commission's creation and found that it was created in conformity with the relevant law.\(^{146}\) Although the war had ended, the Court viewed dealing with war criminals as one necessary function of military tribunals.\(^{147}\) As a practical matter, this would not always be possible during the heat of conflict, and in most cases the commission's jurisdiction could not be exercised until after the hostilities ceased.\(^{148}\) There was also the concern that war might rekindle if justice was not achieved shortly following the war's end.\(^{149}\) The Court found state practice supporting military commissions after the formal cessation of hostilities and noted the paucity of contrary authority.\(^{150}\) Here, where Japan had surrendered, acquiesced in the war crimes trials and accepted the Potsdam Declaration, and the tribunal sanctioned by Congress did not violate international law, the issue ultimately was best left to the political branches.\(^{151}\)

\(^{142}\) *Id.* at 7–9.

\(^{143}\) *Id.*

\(^{144}\) *Id.* at 9.

\(^{145}\) *Id.* at 5–6.

\(^{146}\) *Id.* at 10. The Court found that the commission was appointed by the appropriate U.S. military commander in the field, and sanctioned by Congress under the Articles of War and through acquiescence in long-held U.S. military policy. *Id.* This was supported by a Presidential order providing for military tribunals to try enemy belligerents who act in violation of the laws of war. *Id.* The Court also cited to a specific order to U.S. military authorities in the region to conduct military trials of Japanese war criminals. *Id.*

\(^{147}\) *Id.* at 12–13.

\(^{148}\) *Id.*

\(^{149}\) *Id.* at 12. The Court stated:

The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced.

*Id.*

\(^{150}\) *Id.*

\(^{151}\) *Id.* at 13.
In reviewing charges against the petitioner, the Court noted that commissions were only authorized to try rules-of-war offenses. Here, the charges alleged that Yamashita had failed to maintain control over his forces, allowing them to commit numerous atrocities. Yamashita argued that he had not committed or commanded any of the alleged illegal acts and was therefore not legally responsible. The Court disagreed, holding that a commander has an international legal duty to protect civilians and POWs. The Court did not review the evidence presented, finding only that the allegations against Yamashita amounted to a crime that the commission was authorized to try.

Petitioner also argued that the proceedings against him had been irregular in that evidence was allowed that normally would not be used in a trial or courts-martial. The Court held that admission of such evidence did not violate constitutional, military, or treaty law, and that review of such claims should be left to military authorities. Although the Court did reserve judgment on whether such issues might be subject to a habeas corpus petition, it denied the petition for certiorari, as well as petitions for leave to file writs of habeas corpus and prohibition. The commission was legally constituted, the charge against the petitioner was a violation of the rules of war, and the trial violated no applicable law. Thus, as in Quirin,

152. Id.
153. Id. at 13–14.
154. Id. at 14.
155. Id. The Court cited to numerous international conventions relating to the rules of war to support its position. Id. at 15–16.
156. Id. at 23.
157. Id.
158. Id.
159. Id. at 25–26.
160. In separate dissents, Justices Murphy and Rutledge saw the problem simply as whether the United States would stand behind its principles when difficult cases arose. Murphy noted:

The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the
petitioners possessed the right to seek habeas corpus review from the courts, but that review was quite limited.

4. Johnson v. Eisentrager

Again facing WWII detentions in Johnson v. Eisentrager, the Supreme Court rejected the habeas corpus petitions brought by German nationals. Arrested and tried by a U.S. military commission in China for violations of the rules of war, the Germans had continued hostilities against the United States after Germany’s surrender, but before Japan’s surrender. At the time of the petition, the prisoners were incarcerated in a U.S. military facility in Germany. The district court dismissed the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

Id. at 26–27. Justice Murphy argued that here, without any military exigency, the United States had rushed the defendant to trial, denying him basic procedural and substantive rights. Id. at 27–28. Justice Murphy was particularly concerned about the validity of charging Yamashita for failure to control his troops:

In other words, read against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: “We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them.”

Id. at 34-35. With the same concerns as Justice Murphy, Justice Rutledge pointed out the commission’s lack of jurisdiction, arguing that the danger of war had passed and there was no longer any necessity for military tribunals. Id. at 46.

162. Id. at 763.
163. The petitioners were tried primarily for collecting intelligence relating to U.S. military forces and providing it to Japan. Id. at 766.
164. Id.
165. Id. Because the prison commander in Germany could not be served, the Secretary of Defense and various military officials were the defenders of the suit. Id. The Court agreed that
petition, but the court of appeals reversed, finding that any person deprived of liberty anywhere in the world by the United States could seek a writ of habeas corpus for violations of applicable constitutional rights.\textsuperscript{166}

The Supreme Court disagreed, holding that an enemy alien who had never been on U.S. soil could not seek the U.S. Constitution's protections.\textsuperscript{167} No constitutional provision provided such a remedy, and no legislation granted one. The Court noted that citizens and aliens could be treated differently, that friendly and enemy aliens could be differentiated as well, and that loyal and non-loyal resident and enemy aliens might be distinguished.\textsuperscript{168} The Court pointed out that an alien's rights depended upon several factors. Presence in the United States provided certain rights, which increased when the alien sought citizenship, and then increased again upon naturalization.\textsuperscript{169} Nevertheless, in war, an alien's rights are restricted. The Court pointed out that:

> The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.\textsuperscript{170}

The Court found that resident enemy aliens had limited standing in U.S. courts, but nonresident enemy aliens had no claim to access.\textsuperscript{171} Here, the access claims seemed at their weakest:

> We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United

\textsuperscript{166} Id. at 767.
\textsuperscript{167} Id. at 768.
\textsuperscript{168} Id. at 769.
\textsuperscript{169} Id. at 770.
\textsuperscript{170} Id. at 775 (citation omitted).
\textsuperscript{171} Id. at 776.
States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.¹⁷²

In Eisentrager, no constitutional protection was forthcoming. Previously, courts had granted aliens the right to litigate based on the protection inherent in their presence in the United States. Here, the litigants were not in this country.¹⁷³ The Court acknowledged that one might allow access to those whose enemy status was imputed to them, but who were nevertheless friendly to the United States.¹⁷⁴ In this case, the petitioners were acting against U.S. interests.¹⁷⁵ The Court further noted the practical and political difficulties in giving every enemy prisoner access to U.S. courts.¹⁷⁶ Finally, the Court recognized that foreign nations would likely never grant reciprocal access to U.S. prisoners.¹⁷⁷

The Supreme Court rejected the argument that the Quirin case required access.¹⁷⁸ The Court found Quirin inapplicable to the instant case because the state action took place in the United States and even involved the detention and trial of a purported U.S. citizen.¹⁷⁹ The Yamashita case also provided little solace for these petitioners. There, the Supreme Court had rejected an application for a writ of habeas corpus.¹⁸⁰ The Supreme Court heard the case when it was consolidated with a writ of certiorari to review the Philippine Supreme Court’s decision to deny a writ of habeas corpus.¹⁸¹ At the time, the Philippines was a U.S. territory, meaning that both Yamashita’s crimes and trial took place in the United States.¹⁸² In the instant case, nothing occurred domestically.

The Supreme Court also rejected the court of appeals’s argument that the Constitution and right to habeas corpus follow U.S. officials anywhere in the world that they go.¹⁸³ The court of appeals had held that the Fifth Amendment’s “any person” was broad enough to include these petitioners.¹⁸⁴ The Court noted that if this were true, no prisoners of war could ever be tried by a military commission for offenses against the rules

ⁱ⁷² Id. at 777.
ⁱ⁷³ Id. at 778.
ⁱ⁷⁴ Id.
ⁱ⁷⁵ Id.
ⁱ⁷⁶ Id. at 778–79.
ⁱ⁷⁷ Id. at 779.
ⁱ⁷⁸ Id.
ⁱ⁷⁹ Id. at 779–80.
ⁱ⁸⁰ In re Yamashita, 327 U.S. 1, 9 (1946).
ⁱ⁸¹ Eisentrager, 339 U.S. at 767.
ⁱ⁸² Id.
ⁱ⁸³ Id. at 782–83.
ⁱ⁸⁴ Id. at 781.
of war.\textsuperscript{185} The Court found no authority to support such a broad constitutional reading and noted that even U.S. soldiers lose their Fifth Amendment rights to civilian justice when they enter the military.\textsuperscript{186} The court of appeals’s approach would have put a foreign enemy in a better position than a U.S. soldier or a resident enemy alien.\textsuperscript{187} It might also mean that U.S. military officials around the world would have to occupy themselves with providing all the civil liberties guaranteed by the U.S. Constitution.\textsuperscript{188} The Court determined that no such rights were created and affirmed the district court’s holding.\textsuperscript{189}

It is worth noting that in three of the four decisions, the Supreme Court allowed meaningful review of the petitioner’s situation.\textsuperscript{190} It was only in the \textit{Eisentrager} case, where the petitioners were aliens and there was no connection with the territory of the United States, that the Court refused to question the executive’s authority.\textsuperscript{191} Thus, in determining whether a court should hear a detainee’s request for habeas corpus relief, the courts will consider the prisoner’s nationality, place of capture and detention, whether a state of belligerency existed, and the nature of his supposed activities.

\textbf{B. Post-Eisentrager Decisions of Note}

At first blush, the \textit{Eisentrager} case seems to apply directly to the post 9/11 detainees being held at Guantanamo. Nevertheless, some have questioned \textit{Eisentrager}'s continued validity in light of the Supreme Court’s decision in \textit{Reid v. Covert}.\textsuperscript{192} \textit{Reid} involved a constitutional claim by the

\begin{itemize}
\item \textsuperscript{185} Id. at 782–83.
\item \textsuperscript{186} Id. at 783.
\item \textsuperscript{187} Id. at 783–84.
\item \textsuperscript{188} Id. at 784.
\item \textsuperscript{189} Id. at 791. Justices Black, Douglas and Burton dissented, arguing that the judicial branch of government has the final authority to determine imprisonment for criminal violations. \textit{Id}.
\item \textsuperscript{190} \textit{In re Yamashita}, 327 U.S. 1 (1946); \textit{Ex parte Quirin}, 317 U.S. 1 (1942); \textit{Ex parte Milligan}, 71 U.S. (4 Wall) 2 (1866).
\item \textsuperscript{191} 339 U.S. 763, 790–91 (1950).
\item \textsuperscript{192} 354 U.S. 1 (1957). Professor Paust argues that the President’s order establishing military commissions creates constitutional due process concerns:
\begin{quote}
There are also important constitutional issues involving due process, especially in view of the rationale in \textit{Reid v. Covert} concerning the lawful power or authority of the government of the United States (despite cases like \textit{Eisentrager}). The \textit{Reid} rationale is consistent with the fundamental myth system adopted since the Founders that ours is a government of delegated powers and one that is entirely a creature of the Constitution and has no power or authority to act here or abroad inconsistently with the Constitution. Under this approach, the major question is not whether aliens abroad in time
\end{quote}
\end{itemize}
wife of a slain U.S. serviceman that she had been unlawfully denied a jury trial when a U.S. courts-martial convicted her for her husband’s murder while they were stationed in England. The Court found that she had been unconstitutionally deprived of this rights:

At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government. It was recognized long before Paul successfully invoked his right as a Roman citizen to be tried in strict accordance with Roman law.

Thus, the U.S. government was without power to violate its own fundamental principles. The case’s holding, however, rested solidly on the fact that the defendant was a U.S. citizen, making the case apparently inapplicable to the aliens held at Guantanamo.

In United States v. Verdugo-Urquidez, the Supreme Court put to rest any question whether Reid could provide comfort to the Guantanamo detainees. The case involved evidence obtained in a search of the defendant’s residence in Mexico without following Fourth Amendment of war have rights, but whether our government has any power or delegated authority to act inconsistently with the Constitution. Additionally, the rationale in Verdugo-Urquidez, noting language in the Fourth Amendment that differs from words in the Fifth and Sixth Amendments (which can apply to aliens), could form an additional basis for Supreme Court recognition consistent with that of many lower federal courts that Fifth and Sixth Amendment rights apply to aliens abroad. Several courts have also recognized that international law can inform the meaning of “due process” protected by the Fifth Amendment here and abroad. Yet, what process is constitutionally due abroad, viewed contextually and as informed by international law, might not be the same as that required in a federal district court.

194. Id. at 5–6 (emphasis added and citations omitted).
strictures.\textsuperscript{196} The defendant was not a U.S. citizen, and the Court found the Fourth Amendment inapplicable.\textsuperscript{197}

In dicta, the Court reiterated its holding from \textit{Eisentrager} that the Fifth Amendment is inapplicable to aliens outside U.S. territory:

Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States. In \textit{Johnson v. Eisentrager}, 339 U.S. 763 (1950), the Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment and other constitutional provisions. The \textit{Eisentrager} opinion acknowledged that in some cases constitutional provisions extend beyond the citizenry; 

\textit{[t]he alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society.} But our rejection of extraterritorial application of the Fifth Amendment was emphatic: 

\textit{Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.}\textsuperscript{198}

Indeed, the Court found \textit{Reid} to be tailored narrowly to U.S. citizens:

Respondent urges that we interpret [\textit{Reid}] to mean that federal officials are constrained by the Fourth Amendment wherever and against whomever they act. But the holding of \textit{Reid} stands for no such sweeping proposition: it decided that U.S. citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments. The concurring opinions by Justices Frankfurter and Harlan in \textit{Reid} resolved the case on much narrower grounds than the plurality and declined even to hold that United States citizens were entitled to the full range of constitutional protections in all overseas criminal prosecutions. . . . Since respondent is not

\textsuperscript{196} \textit{Id.} at 263.
\textsuperscript{197} \textit{Id.} at 274–75.
\textsuperscript{198} \textit{Id.} at 269 (quoting \textit{Johnson v. Eisentrager}, 339 U.S. 763, 784 (1950)) (citations omitted). As late as 2001, the Supreme Court cited \textit{Eisentrager} with apparent approval. \textit{See Zadvydas v. Davis}, 533 U.S. 678, 682 (2001) (holding that an alien may be detained only as long as is reasonably necessary to bring about his removal from the United States and that a writ of habeas corpus can be used to review the reasonableness).
Of particular relevance to the Guantanamo situation are the Court’s words concerning the negative consequences of applying U.S. constitutional strictures to American officials’ activities abroad. First, the Court pointed out that Fourth Amendment application to U.S. officials abroad could apply to the armed forces as well as police, hindering the U.S. military’s ability to protect American interests abroad. The Court also suggested that such an extension could tie the hands of the political branches in carrying out U.S. foreign policy. Finally, the Court expressed concern that aliens might bring lawsuits for damages occurring outside U.S. territories for constitutional breaches. The policies behind the Court’s opinion apply equally to the situation in Guantanamo, where a court’s interference with the executive branch’s detention determinations could interfere with the military mission and undercut the political branch’s efforts in the war on terrorism.

V. INTERNATIONAL LAW

The fact that U.S. courts may be unable to give a remedy to aliens being detained by the United States does not preclude international law from providing one. The Supreme Court recognized the executive branch’s supremacy in upholding the Geneva Convention in the Eisenmenger case:

We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

199. Verdugo-Urquidez, 494 U.S. at 270 (citations omitted).
200. Id. at 273.
201. Id. at 273–274.
202. Id. at 274.
International treaties are replete with provisions possibly applicable to these enemy combatants. The Geneva Convention is most directly on point. The Geneva Convention provides basic entitlements such as humane treatment, medical care, food and clothing, and freedom from some sorts of prosecution for prisoners of war. When the status of combatants is unclear, as is the case with the Taliban and Al Qaeda, the convention requires that a “competent tribunal” resolve that status. Although the United States apparently argues that these prisoners are not covered by the convention, making such a status determination unnecessary, the United States’ explanations have been so unclear as to make this argument dubious. Indeed, John Walker Lindh asserted that part of the criminal complaint against him should be dismissed because he was a lawful combatant under the convention’s terms. The court dismissed this contention because of the deference accorded to the Executive’s treaty interpretation and because Lindh failed to meet his burden of proof.

204. Geneva Convention, supra note 10.
205. Id. art. 13.
206. Id. art. 15.
207. Id. arts. 26–27.
208. Id. arts. 87, 99. These articles made it clear that prisoners cannot be prosecuted for legal acts of war.
209. Id. 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.” Id. art 5.
212. Id. at 555. The district court said:

In the application of these criteria to the case at bar, it is Lindh who bears the burden of establishing the affirmative defense that he is entitled to lawful combatant immunity, i.e., that the Taliban satisfies the four criteria required for lawful combatant status outlined by the GPW. On this point, Lindh has not carried his burden; indeed, he has made no persuasive showing at all on this point. For this reason alone, it follows that the President’s decision denying Lindh lawful combatant immunity is correct. In any event, a review of the available record information leads to the same conclusion. Thus, it appears that the Taliban lacked the command structure necessary to fulfill the first criterion, as it is manifest that the Taliban had no internal system of military command or discipline. As one observer noted, “there is no clear military structure with a hierarchy of officers and commanders while unit commanders are constantly being shifted around,” and the Taliban’s “haphazard style of enlistment . . . does not allow for a regular or disciplined army.” Thus, Lindh has not carried his burden to show that the Taliban had the requisite hierarchical military structure.

Id. at 557–58 (citations omitted).

Defendants bear the burden with respect to affirmative defenses, i.e., defenses that do not merely negate one of the elements of a crime.
finding that the convention covered the prisoners would have created extensive international obligations for the United States.\(^{213}\)

In addition to the Geneva Convention, more general international human rights treaties may create international obligations for the United States.\(^{214}\) The Universal Declaration of Human Rights, which is considered customary international law, states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by the law"\(^{215}\) and

Similarly, it appears the Taliban typically wore no distinctive sign that could be recognized by opposing combatants; they wore no uniforms or insignia and were effectively indistinguishable from the rest of the population. The requirement of such a sign is critical to ensure that combatants may be distinguished from the non-combatant, civilian population. Accordingly, Lindh cannot establish the second criterion.

Next, although it appears that Lindh and his cohorts carried arms openly in satisfaction of the third criterion for lawful combatant status, it is equally apparent that members of the Taliban failed to observe the laws and customs of war. Thus, because record evidence supports the conclusion that the Taliban regularly targeted civilian populations in clear contravention of the laws and customs of war, Lindh cannot meet his burden concerning the fourth criterion.

*Id.* at 558 (citation omitted).

What matters for determination of lawful combatant status is not whether Lindh personally violated the laws and customs of war, but whether the Taliban did so.

In sum, the President's determination that Lindh is an unlawful combatant and thus ineligible for immunity is controlling here (i) because that determination is entitled to deference as a reasonable interpretation and application of the GPW to Lindh as a Taliban; (ii) because Lindh has failed to carry his burden of demonstrating the contrary; and (iii) because even absent deference, the Taliban falls far short when measured against the four GPW criteria for determining entitlement to lawful combatant immunity.

*Id.* (citations omitted).

213. The Geneva Convention may also create domestic rights. At least one court has found that some provisions of that convention are self-executing. *Id.* at 553, n.20. On the other hand, as discussed earlier, the Fourth Circuit rejected such a claim in the *Hamdi* case, 316 F.3d 450, 469 (4th Cir. 2003).

214. In *The Paquete Habana*, 175 U.S. 677 (1900), the Supreme Court made its seminal statement on the applicability of international law in U.S. courts:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.
provides for freedom from arbitrary detention.216 The United States is party to the International Covenant on Civil and Political Rights, which says that "[n]o one shall be subjected to arbitrary arrest or detention" 217 and that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release of the detention is not lawful."218 The United States might argue that these provisions are not applicable to the Guantanamo detention because of the emergency context. In fact, the Covenant specifically provides an exception for national threats:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.219

The United States would accordingly argue that the instant detention was in response to an armed attack that threatens the life of the nation.

In addition to these binding legal principals, the General Assembly of the United Nations has adopted the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, which provides that detained persons are entitled to access to the courts,220 access to legal counsel,221 and the right to contact family and the outside world.222

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216. Id. art. 9.
218. Id. art. 9(4).
219. Id. art. 4(1).
220. "A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law." G.A. Res. 43/173, U.N. GAOR, 43d sess., Supp. No. 49, Principle 11 at 298, U.N. Doc. A/43/49 (1988).
221. "A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it." Id. Principle 17. "A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel." Id. Principle 18.
222. "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to
United States may even have violated the Vienna Convention on Consular Relations by failing to allow adequate access to detainees.\footnote{223} Because these principles and treaties primarily rely on diplomatic efforts to protect the treaty’s objects, the detainees ultimately will be subject to the changing winds of politics. If the detainees’ home states are not interested in pressing for their release, little likely can be done to protect their interests. Right now, there seems to be limited international pressure on the United States to release the detainees. Amnesty International has found that the United States “has denied or threatens to deny the recognized rights of people taken into custody.”\footnote{224} If maintained, this sort of pressure may ultimately move the United States to reconsider its approach to detention. In the meantime, men held in both the United States and Cuba may find themselves unheard. Although much has changed in the international law of human rights since the \textit{Eisenhower} decision, that change probably will not motivate U.S. courts to overturn that case’s holding. These treaties generally are not self-executing, and the courts are unlikely to use general principles of international law to overrule the President acting in his foreign affairs role.\footnote{225}

\section*{VI. GUANTANAMO LITIGATION}

Individuals and groups claiming to represent the interests of the Guantanamo detainees have brought suits seeking their release in the federal courts. The courts have not received these petitions particularly well.


\footnotetext{225}{For general discussions of Presidential power in the foreign affairs realm, see Goldwater v. Carter, 444 U.S. 996, 997 (1979) (refusing to decide issues relating to Presidential foreign affairs power based on notions of ripeness and the political question doctrine); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (arguing for a three-part analysis of Presidential power); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (holding the President has broad powers in the area of foreign affairs).}
A. Coalition of Clergy v. Bush

In Coalition of Clergy v. Bush, a group that included at least "two journalists, ten lawyers, three rabbis, and a Christian pastor" filed a writ of habeas corpus on behalf of those held at Guantanamo. The writ charged violations of the Constitution's Due Process Clause and the Geneva Convention and asked that the United States identify those held, show cause as to why they were being detained, and produce the detainees in court.

In rejecting the writ, the court conceded its importance to the protection of constitutional rights, but nevertheless found that that the petitioners lacked standing to bring the claim and that no district court had jurisdiction to hear the case. The threshold question for habeas corpus actions is jurisdiction, which only exists when there is injury to the party before the court. Either the person seeking relief or another acting on her behalf must sign the petition. The court found that when the writ is brought on behalf of the imprisoned individual, the party bringing the suit—the so-called "next friend"—has the burden to show that he represents the other person's interests. The next friend must show a good reason why the writ's subject cannot bring his own claim. The court noted that this had been allowed in cases where the imprisoned person lacked access to the courts, was mentally ill, or was disabled. In addition, the court stated that the next friend must be "truly dedicated to the best interests of the person on whose behalf he seeks to litigate" and must have a significant relationship with the person.

The court first addressed inaccessibility. The United States was not holding the detainees incommunicado; the United States allowed some to write letters to relatives and friends, and others to communicate with diplomats. Indeed, the International Red Cross had been visiting prisoners, and some parents already had brought suit in another court.

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227. Id. at 1038.
228. Id.
229. Id. at 1039.
230. Id. at 1040.
231. Id.
232. Id.
233. Id.
234. Id.
235. Id. at 1040–41.
236. Id. at 1041–42.
Nevertheless, the court noted that the government had admitted the detainees did not have “unimpeded or free access to court.”\(^6\) Ultimately refusing to make a finding on this issue, the court continued its analysis as though the requirement was met.\(^7\)

The test’s next prong, a significant relationship between petitioners and the prisoners, was more difficult. The court concluded that there was no relationship in this case when petitioners had not even attempted to contact the detainees.\(^8\) Rejecting the government’s contention that cases in which the petitioner was acting contrary to the prisoner’s interests or were uninvited meddlers were controlling,\(^9\) the court nevertheless concluded that there was no indication that the suit’s objects welcomed the actions.\(^10\) No one directly tied to the detainees had supported this suit. Although the petitioners may have thought that any attempts to contact detainees would have proved useless, the court suggested that petitioners should have at least tried to make such contact.\(^11\) Because there was no significant relationship, no standing existed.\(^12\)

The district court also addressed its own authority to handle this matter because the detention custodians were outside the court’s jurisdiction. The court first noted that the applicable statute provided jurisdiction over habeas writs to the “Supreme Court, . . . the district courts and any circuit judge within their respective jurisdictions.”\(^13\) The court reviewed cases establishing that the custodial official must be within the district and that there was no room for nationwide service.\(^14\) In this case, the court found that no one in the chain of command was within its jurisdiction; the usual course of action would then be to transfer the case to a court having such jurisdiction—in this case, the United States District Court for the District of Columbia.\(^15\)

To determine whether any court would have jurisdiction, the court applied *Johnson v. Eisentrager*. The court found that in every important way the detainees were similar to the *Eisentrager* prisoners.\(^16\) None were

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\(^{238}\) *Coalition of Clergy*, 189 F. Supp. 2d at 1042.

\(^{239}\) *Id.*

\(^{240}\) *Id.* at 1043.

\(^{241}\) *Id.; see* Davis v. Austin, 492 F. Supp. 273, 275 (N.D. Ga. 1980) (holding that a court lacks standing when habeas petitioners were acting contrary to the declared wishes of the imprisoned individual).

\(^{242}\) 189 F. Supp. at 1043–44.

\(^{243}\) *Id.*

\(^{244}\) *Id.* at 1044.

\(^{245}\) *Id.* (quoting 28 U.S.C. § 2241(a) (2000)).

\(^{246}\) *Id.*

\(^{247}\) *Id.* at 1045–46.

\(^{248}\) *Id.* at 1048.
U.S. citizens. All were captured during hostilities and were in the military authorities' hands. None were currently within the U.S. territorial jurisdiction and had not been since their capture. Moreover, the court found that there were national security issues that would "make it unwise for this or any court to take the unprecedented step of conferring such a right on these detainees." Petitioner's argued that *Eisentrager* was not applicable because in that case, the prisoners had been given access to the American judicial process. The court rejected this argument, noting that in *Eisentrager* prisoners had access only to a military tribunal sitting in China and were seeking access to the U.S. judicial system. In this case, the United States planned to put these detainees before a similar tribunal and the petitioners were seeking access to the U.S. courts, making the cases comparable.

The court also rejected petitioner's argument that the detainees were present for jurisdictional purposes because Guantanamo was part of the United States. It found that Guantanamo is not U.S. sovereign territory because the lease specifically provides that Cuba has the "ultimate sovereignty," even though it also gives the United States complete jurisdiction and control. Thus, neither this district court nor any other could exercise jurisdiction in the case.

On appeal, the Ninth Circuit affirmed in part and vacated in part. On the issue of next friend standing, the appellate court affirmed. The court noted that a prisoner effectively lacked access to the courts if there was a showing of mental incapacity or a similar disability or an actual lack of access to the court. Here there was no argument that the detainees were mentally or physically disabled; so the question was whether the United States was holding the prisoners incommunicado so that they had no access to the courts. Although petitioner's argument did not particularly impress the circuit court, it conceded that there was no free access to attorneys or the judicial system. In any event, the court concluded that resolving this

249. Id.
250. Id.
251. Id.
252. Id.
253. Id.
254. Id.
255. Id. at 1049.
257. Id. at 1158 (citing Whitmore v. Arkansas, 495 U.S. 149, 161–64 (1994)).
258. Id. at 1161.
point was unnecessary and moved on to consider the need for a pre-existing relationship between the prisoner and next friend.\textsuperscript{259} The petitioners argued that a significant relationship was unnecessary so long as petitioner could explain why the prisoner could not appear and why the petitioner had the detainee’s best interests in mind.\textsuperscript{260} The court rejected this view, finding that the significant relationship requirement was a good way to ensure that the petitioner was interested in the detainee’s best interests.\textsuperscript{261} Nevertheless, the court allowed that significant relationship was not a static concept.\textsuperscript{262} If the prisoner had no close ties with anyone able to represent her interests, the requirement might be relaxed. Even in those cases, however, petitioner must show some relationship and the prisoner’s consent.\textsuperscript{263} In this case, the petitioners lacked standing because they had not shown any relationship or any attempt to establish a relationship.\textsuperscript{264} Because the coalition lacked standing, the Ninth Circuit declined to decide whether anyone in the custodial chain was within the court’s jurisdiction and whether \textit{Eisentrager} precluded jurisdiction for any district court.\textsuperscript{265} Under the circumstances, the court felt that exploring such concerns, which might have a significant impact on the rights of other individual detainees, would be inappropriate.\textsuperscript{266}

\textbf{B. Rasul \textit{v. Bush}}

In \textit{Rasul \textit{v. Bush}},\textsuperscript{267} the United States District Court for the District of Columbia decided two petitions relating to Guantanamo detainees taken into custody in Afghanistan and Pakistan. United Kingdom and Australian detainees being held at Guantanamo and their parents brought the first case (the Rasul claim).\textsuperscript{268} Their habeas corpus petition demanded relief from custody, provisions for meeting with their attorneys, and an order requiring

\begin{flushright}
\textsuperscript{259} \textit{Id}.
\textsuperscript{260} \textit{Id}.
\textsuperscript{261} \textit{Id.} at 1161–62.
\textsuperscript{262} \textit{Id.} at 1162.
\textsuperscript{263} \textit{Id.} at 1163.
\textsuperscript{264} The court also found that the petitioners lacked third party standing. \textit{Id}. According to the court, a litigant may bring an action on behalf of a third party only when it can show “(1) injury-in-fact; (2) close relationship to the third party; and (3) hindrance to the third party.” \textit{Id}. The court found that the coalition lacked the first two elements. \textit{Id}.
\textsuperscript{265} \textit{Id.} at 1164.
\textsuperscript{266} \textit{Id.} at 1165.
\textsuperscript{268} \textit{Id.} at 57.
\end{flushright}
that interrogation be suspended during litigation.\textsuperscript{269} Unlike this first case, the petitions in the second (Al Odah claims) made no request for release.\textsuperscript{270} Families of twelve Kuwaitis sought an injunction requiring that the detainees be allowed to meet with their families, be informed of the charges, be permitted to confer with attorneys, and be given access to the courts or some other impartial tribunal.\textsuperscript{271} They alleged violations of due process, the Alien Tort Claims Act,\textsuperscript{272} and the Administrative Procedure Act.\textsuperscript{273} When the second claim was filed, it was assigned to the same court as the first because the two cases were related. When it became clear that the government would move to dismiss both cases on jurisdictional grounds, the court determined to make a preliminary jurisdictional ruling in both cases.\textsuperscript{274}

The court first addressed petitioners' claims under the Alien Tort Claims Act and the Administrative Procedure Act. The Rasul claims sought release from custody, which the court said only a writ of habeas corpus could remedy.\textsuperscript{275} Thus, the court found that jurisdictional issues under the Alien Tort Statute and the Administrative Procedure Act were simply not relevant.\textsuperscript{276} The Al Odah claims, however, did not seek release, but did challenge the continuing detention's legality.\textsuperscript{277} The fact that they were seeking a hearing in which they could establish their innocence amounted to "a frontal assault on their confinement."\textsuperscript{278} Because this could only be done through the writ process, those claims did not provide any additional jurisdictional basis. The additional requests for relief involving the right to meet with family or an attorney directly related to the writ and accordingly did not assist the Al Odah petitioners.\textsuperscript{279}

Having dispensed with the peripheral issues, the district court examined \textit{Eisentrager}'s applicability to these habeas petitions. The court rejected the detainees' argument that \textit{Eisentrager}'s holding should be limited to aliens determined to be the enemy.\textsuperscript{280} Here, the detainees were aliens with no

\begin{itemize}
  \item \textsuperscript{269} \textit{Id.}
  \item \textsuperscript{270} \textit{Id.} at 58.
  \item \textsuperscript{271} \textit{Id.}
  \item \textsuperscript{272} 28 U.S.C. § 1350 (2000).
  \item \textsuperscript{273} 5 U.S.C. §§ 555, 702, 706 (2000) (providing for access to counsel and a right of review in administrative proceedings).
  \item \textsuperscript{274} 215 F. Supp. 2d at 59.
  \item \textsuperscript{275} \textit{Id.} at 62.
  \item \textsuperscript{276} \textit{Id.}
  \item \textsuperscript{277} \textit{Id.}
  \item \textsuperscript{278} \textit{Id.} at 63.
  \item \textsuperscript{279} The court rejected the Al Odah argument that they were merely trying to challenge the detention conditions, as opposed to the detention itself. \textit{Id.} at 62–64.
  \item \textsuperscript{280} The court explained:
connection to the United States.\textsuperscript{281} \textit{Eisentrager} applied unless Guantanamo was sovereign U.S. territory and the court noted that all parties agreed that this was not the case.\textsuperscript{282} Nevertheless, petitioners argued that the United States possessed de facto sovereignty over the Guantanamo facility, providing the basis for jurisdiction.\textsuperscript{283} Plaintiffs based this argument on the D.C. Circuit’s decision in \textit{Ralpho v. Bell},\textsuperscript{284} in which the plaintiff argued that the court violated his due process rights when it relied on secret evidence in denying his claim in a Micronesian proceeding. The \textit{Ralpho} court found that plaintiff was entitled to basic constitutional rights even though Micronesia was not U.S. sovereign territory, but only a United Nations trust.\textsuperscript{285} That was because the court treated Micronesia as the equivalent of sovereign territory, not de facto sovereign.\textsuperscript{286} Unlike Micronesia, which was similar to other U.S. territories such as Guam, the United States merely leased Guantanamo from the sovereign.\textsuperscript{287} The court

In sum, the \textit{Eisentrager} decision establishes a two-dimensional paradigm for determining the rights of an individual under the habeas laws. If an individual is a citizen or falls within a narrow class of individuals who are akin to citizens, i.e. those persons seeking to prove their citizenship and those aliens detained at the nation’s ports, courts have focused on status and have not been as concerned with the situs of the individual. However, if the individual is an alien without any connection to the United States, courts have generally focused on the location of the alien seeking to invoke the jurisdiction of the courts of the United States. If an alien is outside the country’s sovereign territory, then courts have generally concluded that the alien is not permitted access to the courts of the United States to enforce the Constitution. Given that \textit{Eisentrager} applies to the aliens presently detained at the military base at Guantanamo Bay, the only question remaining for the Court’s resolution is whether Guantanamo Bay, Cuba is part of the sovereign territory of the United States.

\textit{Id.} at 68.


282. \textit{Id.} at 68–69.

283. \textit{Id.} at 69.

284. 569 F.2d 607 (D.C. Cir. 1977).


286. See \textit{id.}

287. The court cited to provisions of the original lease between the United States and Cuba: The United States occupies Guantanamo Bay under a lease entered into with the Cuban government in 1903. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. 418. The lease provides:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [the military base at Guantanamo Bay], on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United
found support in other cases finding that Guantanamo Bay should not be considered de facto sovereign.\footnote{288} It also rejected the petitioners’ reference to \textit{Haitian Centers Council, Inc. v. McNary},\footnote{289} which had found U.S. sovereignty over Guantanamo, because the case had been dismissed as moot and was distinguishable because it involved aliens who had already been given process relating to asylum applications.\footnote{290} Here, there had been no process, and the Guantanamo detainees had no interest in entering the United States. Thus, the court found that the sovereignty requirement was not met.\footnote{291}

Having found that \textit{Eisentrager} precluded the court’s jurisdiction over this habeas corpus writ, the court pointed out that the petitioners were not left totally without remedy. International law provided rights that could protect petitioners.\footnote{292}

The D.C. Circuit Court of Appeals affirmed.\footnote{293} It first addressed the petitioners’ argument that \textit{Eisentrager} was inapplicable because these detainees were not “enemy aliens.”\footnote{294} The court admitted that because they were not citizens of a state with which the United States was at war, petitioners did not meet the traditional definition of enemy alien.\footnote{295} Nevertheless, the court found \textit{Eisentrager} applicable. After all, detainees were aliens captured abroad during military operations being held abroad by

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\textit{Id.} As is clear from this agreement, the United States does not have sovereignty over the military base at Guantanamo Bay. 215 F. Supp. 2d at 69 n.14.

\footnote{288} See, e.g., Cuban Am. Bar Ass’n v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995) (explaining that Cuba is not the functional equivalent to the United States); Bird v. United States, 923 F. Supp. 338, 342 (D. Conn. 1996) (rejecting contention that United States was de facto sovereign of Cuba).

\footnote{289} 969 F.2d 1326 (2d Cir. 1992), \textit{vacated as moot sub nom.} Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 918 (1993). The \textit{Rasul} court distinguished the \textit{Haitian} case because the aliens in that case had been given an initial determination by the United States that they could claim asylum in the United States. According to the \textit{Rasul} court, this gave them a liberty right that the United States could not take away without due process. In \textit{Rasul}’s case, there was no desire to enter the United States or decision relating to status, making \textit{Haitian} inapplicable. 215 F. Supp. 2d at 72.

\footnote{290} 215 F. Supp. 2d at 72.

\footnote{291} \textit{Id.}

\footnote{292} \textit{Id.} at 73.

\footnote{293} Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

\footnote{294} \textit{Id.} at 1139.

\footnote{295} \textit{Id.} at 1140.
military authorities. They had no contact with the United States. The court thus read *Eisentrager* to mean that Fifth Amendment rights are not available to aliens outside the United States, regardless of whether they are enemy aliens. In support of this reading, the court noted that *Verdugo-Urquidez* rejected claims by aliens outside the United States to Fifth Amendment rights. Although this proposition may have been dicta in *Verdugo-Urquidez*, the court noted that the D.C. Circuit had consistently followed this principle. Because the constitutional due process rights do not apply to the detainees, they have no right to habeas corpus relief to protect such nonexistent rights.

The D.C. Circuit Court also rejected the detainees’ argument that Guantanamo is U.S. sovereign territory. The court echoed the lower court’s discussion of the issue, finding that the terms of the lease establish Cuba’s sovereignty over the territory.

C. *Eisentrager* Controls Decisions Relating to Aliens at Guantanamo

In these two cases, the courts correctly applied the applicable law and policies. In *Coalition of Clergy*, the Ninth Circuit’s decision that the petitioners lacked standing reflects the concern that there must be some relationship between the prisoner and the petitioner. However pure the petitioners’ motivation in this case, they may not have shared the same interests as the prisoners held at Guantanamo. Those prisoners may have an

296. *Id.*
297. *Id.* at 1141–42.
298. *Id.* at 1141.
299. The court discussed the D.C. precedent:

Although the Supreme Court’s statement in *Verdugo-Urquidez* about the Fifth Amendment was dictum, our court has followed it. In *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev’d on other grounds sub nom., Christopher v. Harbury*, 536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002), we quoted extensively from *Verdugo-Urquidez* and held that the Court’s description of *Eisentrager* was “firm and considered dicta that binds this court.” Other decisions of this court are firmer still. Citing *Eisentrager*, we held in *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960), that “non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States.” The law of the circuit now is that a “foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.” *People’s Mojahedin Org. v. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); see also *32 County Sovereignty Comm. v. Dep’t of State*, 292 F.3d 797, 799 (D.C. Cir. 2002).

300. *Id.* at 1143–44.
utter disdain for the U.S. legal process and prefer to have their freedom negotiated by their home countries on the diplomatic plane. Others might prefer to stay at Guantanamo rather than be sent somewhere where the treatment might be worse. Other countries may present tougher conditions, torture, or other punishments not allowed under U.S. law. In addition, the petitioners’ motivations may not be so pure. For example, petitioners may have political concerns and may pursue legal action to undercut the war effort. Given the strong national security deference shown for the executive branch, it would be wrong for the courts to allow parties with questionable motivations to pursue such claims.

The concerns in Rasul v. Bush are somewhat different. Because those claims were brought by interested parties, the Coalition of Clergy rationale was inapplicable. Instead, the courts had to address directly the applicability of Supreme Court national security precedent. The D.C. Circuit Court’s decision that Eisentrager controlled Rasul makes sense. After all, petitioners were aliens apprehended in a combat zone who had never been brought into the United States. The argument that Guantanamo is within U.S. sovereignty rests primarily on the Second Circuit’s 1992 decision in Haitian Centers, an alien detention case. In that case, the Second Circuit determined that sovereignty existed over Guantanamo because the United States exercised complete control over the area. That holding seems to ignore the Supreme Court’s decision in United States v. Spelar, which found that the United Kingdom’s leasing of an area to the United States under a ninety-nine-year lease did not transfer sovereignty, and Vermilya-Brown Co. v. Connell, which held that a U.S. naval base in Bermuda held under a lease from the United Kingdom was outside U.S. sovereign territory. In addition, the Haitian case was vacated, limiting its precedential value. The Eleventh Circuit Court of Appeals correctly read the Guantanamo lease in Cuban American Bar Ass’n v. Christopher, holding that as long as an area remained under the sovereignty of another government, it was not “functionally equivalent” to being part of the United States. Although Guantanamo is under U.S. control, it is not part of U.S.

302. Id. at 72.
303. Id.
304. 338 U.S. 217 (1949) (holding that the Federal Tort Claims Act does not apply to a U.S. leased air base in Newfoundland).
305. 335 U.S. 377 (1948).
307. 43 F.3d 1412, 1425 (11th Cir. 1995).
308. Id.
sovereign territory. Guantanamo is a U.S. military facility on leased land in Cuba and can only be used as a naval facility. The lease does not allow private businesses. If the U.S. decides to abandon the base, it reverts back to Cuba. The practical reality simply does not comport with sovereign attributes. The situation in Ralpaho was entirely different because the United States acted as the government to a civilian population. To hold the United States sovereign over Guantanamo could create small enclaves of American constitutionalism anywhere in the world where the United States happens to possess and control real property. Although there are cases suggesting that the Constitution applies in areas beyond the fifty

309. The exact nature of the U.S. sovereignty over Guantanamo is made even less clear in a history found on a Guantanamo website:

Thus it is clear that at Guantanamo Bay we have a Naval reservation which, for all practical purposes, is American territory. Under the foregoing agreements, the United States has for approximately fifty years exercised the essential elements of sovereignty over this territory, without actually owning it. Unless we abandon the area or agree to a modification of the terms of our occupancy, we can continue in the present status as long as we like. Persons on the reservation are amenable only to United States legislative enactments. There are a few restrictions on our freedom of action, but they present no serious problem. We may not use the reservation for other than a naval station; we have agreed not to interfere with the passage of vessels engaged in Cuban trade; private enterprise is forbidden on the reservation; and we are obligated to prevent the smuggling of materials and merchandise into Cuban territory.

The prosecution of Cuban Nationals and other aliens who commit crimes and misdemeanors on the reservation presents a subject that should be mentioned. Until the advent of the Uniform Code of Military Justice on 31 May 1951, the United States has had no peacetime legal machinery for trying such offenders. Accordingly, we have habitually requested local Cuban courts to exercise concurrent jurisdiction and handle such cases. Because essential witnesses, usually U.S. military personnel, are oftentimes transferred before offenders are brought to trial, this procedure has its shortcomings. However, it will likely be continued. In a reciprocal manner, U. S. military personnel, charged with offenses in Cuba, are habitually turned over to U. S. jurisdiction for legal action.


310. Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. III, T.S. No. 426.


312. 569 F.2d 607 (D.C. Cir. 1977).
states, none of those obviates *Eisentrager*’s applicability to Rasul’s claims.

If one can overcome the sovereignty issue, *Eisentrager* is directly relevant to the determination of the habeas writs. The one difference is that a military tribunal had convicted the *Eisentrager* combatants. Of course, in order to be convicted they had to have been initially detained. The military commission’s legitimacy in that case was dependent on the President’s right to capture and detain aliens in a belligerent situation, which is exactly what happened to Rasul. The executive had the power and exercised his discretion by holding Rasul in territory outside the United States. In addition, the United States has indicated that some of the detained individuals may be tried before military commissions.

The policies supporting judicial deference to the executive in this area undoubtedly support the court’s decisions. One can imagine multiple law suits brought by the inevitable prisoners from any conflict. Although the Geneva Conventions prescribe the rights of military personnel, numerous others may accompany the army. In order to defeat that enemy, those who provide support must be detained as well. Providing constitutional rights to each non-military detainee would make it difficult to fight a war. One can imagine a flurry of lawyers on the battlefield taking depositions and the courts clogged with claims relating to what happened in a bloody conflict halfway across the world. In fact, enemies of the United States might bring these claims for the express purpose of weakening the U.S. military effort. The President and those who work under his command must be free to make important decisions affecting national security. Preserving the Nation in a time of war is the primary goal of the executive branch, and the judiciary should be extremely hesitant to interfere.


315. *See supra* text accompanying note 5.

316. In addition, the policies behind the Alien Enemy Act of 1798, ch. 66, § 1, 1 Stat. 577, 577 (codified as amended at 50 U.S.C. § 21 (2000)), provide support for the detention of these enemy combatants. The statute provides:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the
Moreover, the President will be held accountable for the decisions that are made. Because an alien sitting in a jail outside the United States has no right to seek redress in a U.S. court does not mean that no remedy exists. International law provides basic rights that the political branches take into account when making decisions relating to detainees. Choosing to wrongfully detain an individual may weaken the U.S. position in the international community and lead to acts of retribution or reprisal, even war. Under the U.S. system of separation of powers, these possibilities are fit for executive branch consideration. A decision by the U.S. courts that an enemy combatant is being unlawfully detained could well undercut the nation’s foreign policy initiatives and threaten U.S. security. If the court is wrong and releases a terrorist, the individual may return to his previous anti-U.S. activities. On the other hand, a decision by the courts that an individual is a terrorist may limit the executive’s ability to negotiate terms for his release. The possibility also exists that the United States may possess information that it cannot reveal in court because to do so would harm national security interests. As a result, unlawful combatants might be released, negatively impacting the President’s ability to conduct a war. Finally, it should not be forgotten that the executive must respond to the people of the United States. Although detaining prisoners may be currently popular, one can imagine a situation in which the executive would pay a price for detention of popular figures.

VII. DETENTION OF U.S. CITIZENS

In addition to the alien detainees at Guantanamo, U.S. citizens have been detained without charges within the United States. Two of these citizens have sought habeas corpus review in federal courts leading to surprisingly different outcomes.

United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

Although by its terms not applicable to the current situation, the fact that this statute has been found to be constitutional adds support to the idea that the President may be able to constrain the liberty of aliens, even aliens inside the United States with purportedly greater constitutional protections, during the time of national emergency. See Citizens Protective League v. Clark, 155 F.2d 290 (D.C. Cir. 1946) (finding the statute constitutional as a grant of power by the Congress to the President).

A. Hamdi v. Rumsfeld

The Fourth Circuit has been unsympathetic to the claims for release by a U.S. citizen being detained in Virginia. 318 The Northern Alliance captured Hamdi and turned him over to the U.S. military during operations in Afghanistan after the 9/11 attacks. He was originally placed in the U.S. facility on Guantanamo, but after it was discovered that he might have U.S. citizenship, he was transferred to a U.S. naval facility in Norfolk, Virginia. The government claimed that Hamdi was an enemy combatant who could be indefinitely detained under the rules of war. 319 In the first of a trilogy of appeals relating to his captivity, the government sought review of the district court’s decision that allowed a federal public defender to seek a writ of habeas corpus as Hamdi’s next friend. 320 The Fourth Circuit remanded with instructions that the case be dismissed because the public defender’s standing to file the writ as next friend required a significant relationship with Hamdi. 321 Because there had been no pre-existing relationship, the court found no standing. 322

Next, Hamdi’s father filed a petition for a writ of habeas corpus as Hamdi’s next friend in the district court. 323 That writ alleged Hamdi’s U.S. citizenship. The district court found that his father had standing as next friend, appointed the federal public defender as counsel, and ordered the government to allow counsel unmonitored access to Hamdi. 324 The Fourth Circuit reversed the allowance of unmonitored access to counsel, saying that the lower court had failed to “adequately consider the implications of its actions . . . .” 325 Citing to Curtiss Wright Export Corp., 326 and Justice Jackson’s concurring opinion in Youngstown Sheet and Tube Co., 327 the

318. See Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002) (refusing petition by previously unconnected public defender); Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (reversing lower court decision to allow unmonitored access by counsel); Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (dismissing Hamdi’s application for a writ of habeas corpus).
319. Hamdi, 294 F.3d 598 at 601.
320. Id. at 602.
321. Id. at 607.
322. Id. at 604.
323. Hamdi, 296 F.3d at 278.
324. Id. at 279.
325. Id.
326. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (pointing out that the President holds the “delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . .”).
327. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 & n.2 (1952) (Jackson, J., concurring) (arguing that the President acts at the peak of his powers when he uses his inherent foreign affairs powers buttressed by Congressional authorization).
court first noted that the case involved foreign relations and national security—areas in which courts should generally defer to the executive branch, particularly when those acts have received congressional imprimatur.  

The court found that the power to capture and detain those who bear arms against the United States fell clearly within the executive branch's prerogative. Here, the Fourth Circuit found that the district court's order allowing the public defender access "in the face of ongoing hostilities" failed to consider relevant concerns. The government argued that Hamdi was an enemy combatant captured on the battlefield and thus subject to detention for the duration of the hostilities. As an enemy combatant, Hamdi was not entitled to access to counsel. The public defender countered that a U.S. citizen detained in the United States should have basic constitutional protections.

The Fourth Circuit found that the lower court had given insufficient weight to the government's national security concerns when it allowed unmonitored access to counsel. In reaching this conclusion, it noted that the district court had ordered access three days before the government's papers on the issue were due and that the order did not discuss what effect such access might have on the government's legitimate need to gather intelligence from Mr. Hamdi. The court found the order to be defective because it failed to discuss the court's role in reviewing the executive's enemy combatant status determination. Instead, the lower court had assumed that Hamdi was not an enemy combatant and that even if he were, he would be allowed full and unmonitored access to counsel. Given this failure to consider these most serious questions, the court reversed and remanded to the lower court.

In reversing, the court did not go so far as to declare a lack of judicial authority to review an executive determination that an individual is an unlawful combatant. The government had argued that the court should dismiss the writ because courts lacked the authority to review the executive determination. The Fourth Circuit refused, rejecting the idea that a U.S. citizen could be declared an unlawful combatant and held indefinitely

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328. Hamdi, 296 F.3d at 281.
329. The court noted the President's power as Commander in Chief, as well as decisions such as Quirin. Id. at 281–82.
330. Id. at 282.
331. Id.
332. Id.
333. Id.
334. The court noted that the order did not even mention the term enemy combatant. Id.
335. Id.
336. Id.
without any form of review or legal counsel.\textsuperscript{337} Nevertheless, the court found that deference to the executive was appropriate, even though this national security challenge did not meet the definition of a conventional war.\textsuperscript{338} Finally, the Fourth Circuit established that it should not define the exact procedures going forward in the case.\textsuperscript{339} If Hamdi were an enemy combatant, then the executive branch was entitled to hold him for the hostilities' duration. In reviewing the government's determination that Hamdi was an unlawful combatant, the lower court should keep separation of powers principles clearly in mind, noting the impact that judicial involvement could have on "military decision-making."\textsuperscript{340}

Back in the district court, the government filed a motion to dismiss the petition.\textsuperscript{341} The government attached an affidavit from Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, stating that Hamdi had been captured during the Afghanistan military campaign and that the government had designated him an enemy combatant.\textsuperscript{342} Mobbs's affidavit also explained the circumstances surrounding Hamdi's detention, including how Hamdi ended up armed with a Taliban unit in a battle with the Northern Alliance. The Fourth Circuit took its third crack at the case after the district court ordered the government to produce copies of Hamdi's statements and the notes taken from any interviews with him; the names and addresses of all interrogators who [had] questioned Hamdi; statements by members of the Northern Alliance regarding the circumstances of Hamdi's surrender; and a list of the date of Hamdi's capture and all the dates and locations of his subsequent detention.\textsuperscript{343}

The government appealed, and the district court certified this question to the court of appeals: "Whether the Mobbs declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?"\textsuperscript{344}

The Fourth Circuit once again began by emphasizing the executive's power to detain those captured during a military confrontation.\textsuperscript{345} The court reiterated its earlier view that the constitutional structure necessitated

\textsuperscript{337} \textit{Id.} at 283.
\textsuperscript{338} \textit{Id.}
\textsuperscript{339} \textit{Id.}
\textsuperscript{340} \textit{Id.} at 284.
\textsuperscript{341} Hamdi v. Rumsfeld, 316 F.3d 450, 461 (4th Cir. 2003).
\textsuperscript{342} \textit{Id.}
\textsuperscript{343} \textit{Id.} at 462.
\textsuperscript{344} \textit{Id.}
\textsuperscript{345} \textit{Id.} at 462–63.
judicial deference in matters relating to foreign policy or national security. The executive branch was designed to deal with foreign policy issues, while the courts were not. In addition, the court noted that the executive and legislative branches were accountable to the populace, while the courts were not. Indeed, the court argued that providing these powers to the political branches protected the American people’s freedoms. Judicial interference could “trespass upon the exercise of the warmaking powers[,] . . . infringing] the right to self-determination and self-governance at a time when the care of the common defense is most critical.” The court pointed out that this was no less true when the enemy was not a nation-state.

Despite this large dose of deference, the court noted that the political branches’ powers were not limitless. The Constitution’s Bill of Rights restrains their actions. Indeed, the court noted that even when the country is at war, the judicial branch has a duty to protect the individual freedoms guaranteed by the Constitution. It also found that a petition for a writ of habeas corpus by a U.S. citizen was just the type of right that required judicial protection during difficult times. Nevertheless, the court found that deference to the executive over battlefield decisions was particularly appropriate, because detention ensured that Hamdi did not rejoin his compatriots and made certain that military commanders were not forced to prosecute individuals in a battle setting in another part of the world.

Having addressed the underlying policies, the court turned to the certified question: “Whether the Mobbs declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi’s classification as an enemy combatant?” Obviously tired of playing ping pong with the district court, the court of appeals explained that it could deal with “any issue fairly included within the certified order . . . .” The court then determined that this appeal contended that continued imprisonment would be illegal even if the government’s facts were entirely correct. Because the detention was illegal per se, no
additional discovery would be necessary. This put legal challenges to the detention within the order’s scope.

Hamdi and amici had argued that Hamdi’s continued detention was illegal under 18 U.S.C. § 4001(a), which provided in relevant part that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The court quickly rejected this contention, finding authorization in Congress’s September 18th declaration. Because capturing and detaining prisoners was part of war, such executive actions were a necessary and appropriate use of force. In addition, Congress exhibited its support by appropriating funds for detention, and the court noted the critical need to detain such individuals during hostilities.

Hamdi and amici also argued that Hamdi’s continued detention was contrary to the Geneva Convention. The court rejected this view because that treaty is not self-executing. Under U.S. law, the courts will not directly enforce a treaty unless it is found to be self-executing or has been implemented by appropriate congressional action. The court noted that a treaty was self-executing when intended to provide a private right of action and concluded that the Geneva Convention reflected no such intent. No specific provision provided a private cause of action, and the treaty itself showed diplomacy as its primary enforcement means. The court found that this did not mean that the treaty was without meaning, only that the dual nature of international and domestic legal systems required a different forum for redress. Finally, the court held that the convention’s application would make no difference, as a determination of whether Hamdi was a lawful or unlawful combatant would not affect the outcome. Either way, he would be subject to detention.

Having determined the legality of Hamdi’s detention, the Fourth Circuit turned to a more general discussion of whether the government had to provide the materials ordered by the district court. The lower court found that Hamdi carried a weapon and went to Afghanistan to join the Taliban;

355. Id. at 466–67.
356. The amici included over 150 law professors and public interest groups on the side of Hamdi. Id. at 450–55.
358. Hamdi, 316 F.3d at 467.
359. Id. at 467–68.
360. Id. at 468.
361. Id.
364. Hamdi, 316 F.3d at 469.
365. Id.
nevertheless, it ordered the government to provide a laundry list of evidence to support its position.\textsuperscript{366} The Fourth Circuit found that this requirement would lead the courts into an area that was constitutionally assigned to the political branches:

Viewed in their totality, the implications of the district court’s August 16 production order could not be more serious. The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of efficiency and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi’s detention may have been slain or injured in battle. Others might have to be diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance.\textsuperscript{367}

Thus, the production order was overruled.

Finally the court addressed the possible dismissal of Hamdi’s petition. In order to decide this, the court used a two-step analysis. First, the court would determine the source of authority for holding the prisoner. Next, the court would evaluate whether that authority had been exercised legitimately.\textsuperscript{368} Article II, § 2 of the Constitution placed the authority in the President’s war power.\textsuperscript{369} The court cited \textit{Quirin} in support of its view that the courts should defer to the executive.\textsuperscript{370} Even so, the courts must determine whether the detention decision was appropriately made pursuant to those powers. As a threshold matter, the courts could determine whether the government’s facts would, on their face, justify detention.\textsuperscript{371} Thus, a citizen could ask a court to investigate the basic authority and the facts that support its exercise. Here, the government had asserted the war powers authority and had provided a detailed affidavit from Under Secretary Mobbs.\textsuperscript{372} According to the Fourth Circuit, the district court’s demands for additional information “went far beyond the acceptable scope of review.”\textsuperscript{373} Although these demands might be appropriate in a domestic setting, they were excessive in the context of the executive’s war powers. In sum, the

\textsuperscript{366} ld. at 470.
\textsuperscript{367} ld. at 471.
\textsuperscript{368} ld.
\textsuperscript{369} ld.
\textsuperscript{370} ld. at 472.
\textsuperscript{371} ld.
\textsuperscript{372} ld.
\textsuperscript{373} ld. at 472–73.
court found the affidavit's assertions alone were sufficient to make a
determination as to whether Hamdi's continued detention was legal. 374

The court next addressed whether Hamdi was entitled to an evidentiary
hearing on his status as an enemy combatant. 375 This was unnecessary
because all agreed that Hamdi had been captured in a combat zone in a
foreign country, and that was enough to justify continued detention. 376 The
government had also asked the court to use a "some evidence" standard
when determining whether a factual inquiry was necessary. 377 This
standard comes from historical practice in cases involving habeas corpus
petitions for those in federal custody. 378 Where there is "some evidence"
to support the executive's determination, the courts will defer. The purpose
is not to correct executive error in making a discretionary determination, but
to correct abuses of authority. 379 Where the standard has been met, the
prisoner cannot rebut the government's evidence. Although the court
acknowledged that the standard had been used in other contexts, it found it
unnecessary to determine whether that standard should apply. 380 Because a
court could not overturn the executive's decision to detain enemy
combatants absent a clear constitutional or statutory violation, the courts
would show great deference to the executive's powers. 381 The Fourth
Circuit pointed out that courts were not well positioned to review the
military's detention decision. A court would have to examine the detainee's
conduct at the time of his arrest; such factual questions would be very
difficult and could interfere with the war effort. 382

Hamdi also argued that any U.S. citizen held in the United States was
entitled to the same due process protections that he would have in the
criminal context. 383 The court rejected this argument, pointing out that
Hamdi had not been charged with a crime. Instead, it looked to Quirin,
where citizenship made no difference when the prisoner was an enemy
combatant. 384

374. Id. at 473.
375. Id.
376. Id. at 473–74.
377. Id. at 473.
review facts in deportation orders, except to determine whether there is "some evidence" to
support the order); Eagles v. Samuels, 329 U.S. 304, 312 (1946) (finding that there must be no
evidence to support an agency detention order before it will be overturned).
379. 329 U.S. at 311–12.
380. 316 F.3d at 474.
381. Id. (citing Ex parte Quirin, 317 U.S. 1, 25 (1942)).
382. Id.
383. Id. at 475.
384. The court argued for the applicability of Quirin:
Hamdi next contended that even if his original detention in Afghanistan was legal, continued detention in the United States was not, claiming that the decision to continue holding him was not a military one. The court rejected this contention, finding that courts were just as ill-equipped to make this determination for U.S. detentions as when the applicant is abroad. Finally, Hamdi argued that he could no longer be detained because the war was over. Once again, the court said that this was for the executive to determine, although it did point out that U.S. troops still remained in Afghanistan hunting down the terrorists and rebuilding the country.

Ultimately, Hamdi had no recourse. The government had made an adequate showing that the Executive's war powers authorized the detention of enemy combatants, and the court found that this authorization was properly invoked when the government showed that Hamdi was apprehended in a war zone.

B. Padilla v. Bush

The United States District Court for the Southern District of New York was not quite as willing to dispose of the petitioner's case in Padilla ex rel. Newman v. Bush. The United States Department of Justice arrested Jose Padilla in Chicago on a material witness arrest warrant to enforce a

Indeed, this same issue arose in Quirin. In that case, petitioners were German agents who, after the declaration of war between the United States and the German Reich, were trained at a German sabotage school where they "were instructed in the use of explosives and in methods of secret writing." The petitioners then journeyed by submarine to the beaches of New York and Florida, carrying large quantities of explosives and other sabotage devices. All of them were apprehended by FBI agents, who subsequently learned of their mission to destroy war industries and facilities in the United States. All of the petitioners were born in Germany but had lived in the United States at some point. One petitioner claimed American citizenship by virtue of the naturalization of his parents during his youth. The Court, however, did not need to determine his citizenship because it held that the due process guarantees of the Fifth and Sixth Amendments were inapplicable in any event. It noted that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful." The petitioner who alleged American citizenship was treated identically to the other German saboteurs.

Id. (citations omitted).
385. Id. at 475–76.
386. Id.
387. Id. at 476.
388. Id.
subpoena requiring him to appear before a grand jury looking into the 9/11 attacks.\textsuperscript{390} He was transferred to New York, where the federal district court appointed a public defender, Donna Newman.\textsuperscript{391} After conferring with Padilla, Newman filed a motion to vacate the warrant.\textsuperscript{392} Shortly thereafter, the United States informed the court that it was withdrawing the subpoena and requesting that the warrant be vacated.\textsuperscript{393} The President had found Padilla to be an enemy combatant.\textsuperscript{394} The Justice Department turned Padilla over to the Defense Department, which transferred him to a Navy brig in South Carolina.\textsuperscript{395}

Newman then filed a habeas corpus petition in the Southern District of New York, stating that she had not been allowed contact with her client, but that she had consulted with Padilla’s family.\textsuperscript{396} The United States moved to dismiss, attaching the President’s order and a Mobbs declaration like the one seen in the Hamdi matter.\textsuperscript{397} The President’s order said that Padilla was an enemy combatant, was associated with Al Qaeda, was engaged in warlike acts, was preparing for terrorist acts against the United States, had information that could be helpful to U.S. efforts against terrorism, and was a continuing threat to U.S. national security.\textsuperscript{398} The government based Padilla’s detention on the fact that he was born in the United States, convicted of murder in Chicago, and convicted on a weapons charge in Florida after being released in Illinois.\textsuperscript{399} At this point Padilla moved to Egypt, took a Moslem name, and traveled to Saudi Arabia.\textsuperscript{400} The Mobbs declaration stated that he met with senior al Qaeda officials and discussed building a “dirty bomb” for use in the United States.\textsuperscript{401} Confidential sources showed that Padilla, although probably not an al Qaeda member,

\begin{flushleft}
390. Id. at 568–70.
391. Id. at 571.
392. Id.
393. Id.
394. Id.
395. Id. at 569, 571.
396. Id. at 572.
397. Id. Two versions of the Mobbs declaration were given to the court. One was a redacted version of events that the government felt could be made public. The other, a non-redacted version, was meant only for in camera inspection by the court. See id.
398. Id.
399. Id.
400. Id.
401. Id. at 572–73. A dirty bomb (radiological dispersal device) is a conventional bomb with radioactive materials attached so as to create a large area in which the radioactive materials are dispersed. See Eric Umansky, A Dirty Plan, SLATE MAG., (June 11, 2002), at http://slate.msn.com/id/20668301 (describing Padilla’s alleged plan to create a dirty bomb for use in the United States).
\end{flushleft}
had numerous contacts with al Qaeda officials and had been sent to the United States to scout out possible terrorist targets when he was arrested.\textsuperscript{402}

In addressing the habeas corpus petition, the southern district considered many of the same issues addressed in \textit{Hamdi}. The court first considered whether Newman had standing to assert Padilla’s claim.\textsuperscript{403} The court found that this case was distinguishable from the first \textit{Hamdi} case, which reflected no pre-existing relationship, because Padilla’s attorney already had dealings with the detainee relating to quashing the arrest warrant.\textsuperscript{404} In addition, she had conferred with Padilla’s relatives, and no other family member wished to act as next friend.\textsuperscript{405}

The court next addressed whether the case should be transferred to South Carolina because the writ’s appropriate target was Padilla’s jailer there.\textsuperscript{406} Indeed, the petition had named President Bush, Secretary Rumsfeld, and the jailer.\textsuperscript{407} The court dismissed the President and the jailer, but determined that Secretary Rumsfeld would remain.\textsuperscript{408} Although the court agreed that in the usual case, the writ is properly addressed to the jailer, this was not the normal case.\textsuperscript{409} Here, the Secretary himself had been heavily involved: the President had charged Secretary Rumsfeld with Padilla’s detention and the Secretary determined where Padilla would be held, what information could be gleaned from Padilla, and when release was possible.\textsuperscript{410} The President, on the other hand, should not be in the suit because Padilla had not sought relief from the Chief Executive, and the court should avoid actions that could lead to an injunction against the President.\textsuperscript{411} Finally, the court dismissed the jailer because Secretary Rumsfeld had the authority to order her to release the prisoner, and there was no reason to believe that he would not issue such an order or that the jailer would not obey.\textsuperscript{412}

The court next turned to territorial and personal jurisdiction issues, noting that district courts could grant a writ of habeas corpus only “within their respective jurisdictions.”\textsuperscript{413} The United States argued that only the

\begin{footnotes}
\item[402] 233 F. Supp. 2d at 572–73.
\item[403] \textit{Id.} at 575.
\item[404] \textit{Id.} at 576–77.
\item[405] \textit{Id.}
\item[406] \textit{Id.} at 578.
\item[407] See \textit{id.}
\item[408] \textit{Id.} at 581–83.
\item[409] \textit{Id.} at 581.
\item[410] \textit{Id.}
\item[411] \textit{Id.} at 582.
\item[412] \textit{Id.} at 583.
\item[413] \textit{Id.} (quoting 28 U.S.C. § 2241(a) (2000)).
\end{footnotes}
South Carolina district court had jurisdiction because that was where Padilla was being held. The court found this argument to be without merit; what mattered was whether the court had jurisdiction over Secretary Rumsfeld. As to whether a New York federal district court had jurisdiction over the Secretary, the court applied the New York long-arm statute, which allows the court to exercise jurisdiction over anyone “transacting business” in New York. Here, the fact that Secretary Rumsfeld’s agents had picked up Padilla in New York provided the purposeful activity within the state. Because the claim related to that purposeful activity, the long-arm statute provided jurisdiction over the Secretary.

The court next considered the key issue of whether the President had the authority to classify a U.S. citizen arrested in the United States as an enemy combatant and detain that individual for the conflict’s duration. Padilla contended that the President only had the authority to detain enemy combatants during wartime. Here, no war existed, and even if it did, a U.S. citizen captured domestically could not qualify as an enemy combatant. Addressing whether the United States was at war, the court noted cases admitting the existence of war without a solemn declaration. Indeed, the court found that the great weight of authority allowed the President to decide whether hostilities existed and the appropriate degree of force to be used in response. Recent U.S. history buttressed this conclusion. The last declared U.S. war was World War II, making a declaration of war “the exception rather than the rule.” International law required no different result. The Geneva Convention, for example, applied to “declared war or any other state of armed conflict.”

Noting that U.S. troops were still seeking al Qaeda in Afghanistan and Pakistan, the court also rejected the idea that the war was over. The court

414. Id. at 586.
415. Id. at 587.
416. Id. (citing N.Y. C.P.L.R. § 302(a)(1) (McKinney 1990)).
417. Id.
418. 233 F. Supp. 2d at 587.
419. Id. at 588.
420. Id.
421. Id. at 588.
422. See, e.g., The Brig Amy Warwick, 67 U.S. (2 Black) 635, 668 (1862); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 42 (1800).
424. 233 F. Supp. 2d at 590.
425. Id. (citing Geneva Convention, supra note 10, art. 2).
426. Id.
admitted, however, that this argument might be reconsidered at some future date.\(^{427}\) To the extent Padilla argued that his detention was illegal as indefinite and potentially perpetual, the court dismissed this contention as illogical.\(^{428}\) Looking at cases relating to sexual predators,\(^{429}\) a union president held during an insurrection,\(^{430}\) and indefinite detention of aliens,\(^{431}\) the court found that the state’s interest in protecting the public could outweigh the individual liberty interest.\(^{432}\) Refusing to outline the requirements for determining when Padilla’s detention would become illegal, the court concluded that it could address such a situation only when it arose, and that, in any event, Padilla had made no such claim.\(^{433}\)

The court next turned to Padilla’s argument that the military’s detention of an American citizen within the United States during a time when the courts were functioning was outside the President’s authority.\(^{434}\) To decide this issue, the court found it important to define the term “enemy combatant.” It found that the laws of war distinguished between lawful and unlawful combatants.\(^{435}\) Lawful combatants could be held as prisoners of war, but received certain protections under the Geneva Convention.\(^{436}\) A lawful combatant would generally not be subject to any criminal sanctions during the conflict unless his actions constituted war crimes.\(^{437}\) In order to be classified as a lawful combatant, the detainee had to (1) be commanded by a person responsible to his subordinates; (2) have a fixed distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) conduct operations in accordance with the laws and customs of war.\(^{438}\) In earlier times, unlawful combatants were subject to summary execution; however, the modern trend was to try such individuals before military commissions, although there was no requirement that their captors do so.\(^{439}\) If not tried,

\(^{427}\) Id.
\(^{428}\) Id. at 590–91.
\(^{430}\) See Moyer v. Peabody, 212 U.S. 78 (1909) (allowing the detention of a union official during a time of insurrection).
\(^{431}\) See Zadvydas v. Davis, 533 U.S. 678 (2001) (allowing detention for a time reasonably required to remove the alien).
\(^{432}\) Padilla, 233 F. Supp. 2d at 591.
\(^{433}\) Id. at 592.
\(^{434}\) Id.
\(^{435}\) Id.
\(^{436}\) Id.
\(^{437}\) Id.
\(^{438}\) Id. (citing Convention Respecting the Laws and Customs of War, with Annex of Regulations, Oct. 18, 1907, Annex art. 1, 36 Stat. 2277, and the Geneva Convention, supra note 10, art. 4).
\(^{439}\) Id.
the court thought it logical to detain them to prevent their return to assist the enemy.\textsuperscript{440} The court noted that the Geneva Convention only made provision for the return of prisoners of war (lawful combatants) at the hostilities’ end.\textsuperscript{441} 

The President’s labeling of Padilla as an enemy combatant meant that Padilla did not meet the four requirements necessary to be a lawful combatant subject to the Geneva protections. Citing \textit{Milligan}, Padilla argued that although his treatment might be legal under international law, the Constitution prohibited his continued detention as an enemy combatant.\textsuperscript{442} The court resisted Padilla’s reliance on \textit{Milligan}, stating that \textit{Quirin} had narrowed the \textit{Milligan} holding.\textsuperscript{443} What distinguished \textit{Quirin} from \textit{Milligan} was the fact that the \textit{Quirin} petitioners were belligerents acting in concert with an opposing military force.\textsuperscript{444} Because Milligan was not a belligerent, and thus not subject to the rules of war, he could not be tried by a military tribunal.\textsuperscript{445} Padilla resembled more closely the saboteurs in the \textit{Quirin} case, as the court found he was working with an enemy of the United States, Al Qaeda.\textsuperscript{446} 

The Southern District agreed with the Fourth Circuit’s determination that 18 U.S.C. § 4001(a) does not prevent a citizen enemy combatant’s continued detention, finding that Padilla was being held pursuant to an act of Congress.\textsuperscript{447} The court held that the Military Force Authorization was such an act.\textsuperscript{448} At this point the Southern District’s opinion diverged significantly from the Fourth Circuit. The court determined that Padilla had a right to meet with counsel and present facts to counter the government’s continued detention.\textsuperscript{449} In reaching this determination, it looked to the habeas corpus statute’s wording, which required that the jailer produce the prisoner and that the detained party “may, under oath, deny any of the facts set forth in the return or allege any other material facts.”\textsuperscript{450} In addition, because a petition for a writ of habeas corpus was a civil action, the Federal

\textsuperscript{440} Id.
\textsuperscript{441} Id. at 593 (citing Geneva Convention, \textit{supra} note 10, art. 118).
\textsuperscript{442} Id.
\textsuperscript{443} Id.
\textsuperscript{444} Id.
\textsuperscript{445} Id.
\textsuperscript{446} Id.
\textsuperscript{447} Id. at 598.
\textsuperscript{448} Id.
\textsuperscript{449} Id. at 599.
\textsuperscript{450} Id. (citing 28 U.S.C. § 2243 (2000)).
Rules of Civil Procedure applied.\textsuperscript{451} Thus, the court concluded that Congress had intended that a habeas corpus petitioner could present facts.\textsuperscript{452}

The right to present facts did not, however, mean that Padilla had a Sixth Amendment right to counsel because this was not a criminal proceeding. Nevertheless, the court determined that the All Writs Act\textsuperscript{453} allowed the court to provide access to counsel.\textsuperscript{454} The government argued that granting Padilla access to counsel could interfere with its ability to obtain information from him and allow him to assist the enemy.\textsuperscript{455} Counsel would likely restrict the government's questioning of Padilla and might even be used unwittingly as an intermediary between the accused and Al Qaeda.\textsuperscript{456} The court rejected the first argument because Padilla was not being given a general right to counsel. The counsel could only confer to prepare for habeas corpus proceedings. Thus, the court held that interference with government interrogations would be minimal.\textsuperscript{457} The court also dismissed the government's second concern, finding that to do otherwise would mean that no al Qaeda member, even those with Sixth Amendment rights, could be allowed access to counsel.\textsuperscript{458} In addition, the government presented no evidence indicating that al Qaeda trained Padilla to fool counsel into passing along messages.\textsuperscript{459} The court also noted that Padilla had already met with counsel, so the damage may already have been done.\textsuperscript{460} Finally, the court found that the military could monitor Padilla's conversations with counsel so long as those monitoring are "fire-walled" from anyone who might eventually be involved in Padilla's criminal prosecution.\textsuperscript{461} The United States could not deprive him of counsel because of the very unlikely possibility that something vital to U.S. national security might be passed to al Qaeda through Padilla's lawyers.\textsuperscript{462} The court distinguished Hamdi, where the Fourth Circuit overturned the district court's order allowing unmonitored access to counsel; in this case, access could be monitored.\textsuperscript{463}

\textsuperscript{451} ld. at 599–600.
\textsuperscript{452} Id. at 600.
\textsuperscript{454} Id. § 1651(a) (2000) ("all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); Padilla, 233 F. Supp. 2d at 602.
\textsuperscript{455} 233 F. Supp. 2d at 603.
\textsuperscript{456} Id. at 603–04.
\textsuperscript{457} Id. at 603.
\textsuperscript{458} Id. at 603–04.
\textsuperscript{459} Id. at 604.
\textsuperscript{460} Id.
\textsuperscript{461} Id.
\textsuperscript{462} Id.
\textsuperscript{463} Id. at 604–05.
In addition, the court pointed out that the *Hamdi* decision came without full briefing and resulted from the district court’s failure to consider adequately important national security concerns.\(^{464}\) The court claimed no such defects had occurred here.\(^{465}\) In addition, the fact that Padilla had access to counsel before he was declared an enemy combatant lessened the potential negative effect of additional access.\(^{466}\)

The court next attempted to structure the standard that Padilla would have to meet to overcome the government’s contention that he was an enemy combatant. Apparently, Padilla accepted the general idea that the courts should defer to the executive branch in the area of national security.\(^{467}\) Under the instant circumstances, however, Padilla argued that the President lacked authority because the Joint Resolution only applied to those directly involved in the 9/11 attacks and that the President’s foreign affairs powers did not extend to U.S. citizens detained in the United States.\(^{468}\) Padilla contended that the court’s inquiry into these matters should be “searching,” and that he should have a trial to determine his combatant status.\(^{469}\) The court dismissed Padilla’s reworked arguments relating to Presidential power, reviewing Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co.* and finding that the President was operating at the height of his powers here because he was acting with congressional authorization.\(^{470}\) Nevertheless, the court conceded that there was little authority discussing the appropriate standard to be applied in a habeas corpus case such as Padilla’s.\(^{471}\) *Quirin* offered no help, as that case involved stipulated facts, and other cases dated back even further.\(^{472}\) Despite the paucity of relevant precedent, one thing was clear: courts should show deference to the executive branch. Thus, in *Zadvydas*,\(^{473}\) decided three months before the 9/11 attacks, the Court limited the government’s ability to detain aliens indefinitely, but at the same time noted that that case did not pertain to “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for

\(^{464}\) *Id.* at 604 (citing *Hamdi* v. Rumsfeld, 296 F.3d 278, 282 (4th Cir. 2002)).
\(^{465}\) *Id.* at 604–05.
\(^{466}\) *Id.* at 605.
\(^{467}\) *Id.*
\(^{468}\) *Id.* at 606.
\(^{469}\) *Id.*
\(^{470}\) *Id.*
\(^{471}\) *Id.* at 607.
\(^{472}\) *Id.*
\(^{473}\) *Id.;* see *Zadvydas* v. Davis, 533 U.S. 678 (2001) (holding that an alien may be detained only as long as is reasonably necessary to bring about his removal from the United States and that a writ of habeas corpus can be used to review the reasonableness).
heightened deference to the judgments of the political branches with respect to national security." The Padilla court pointed out that political decisions were subject to political, rather than judicial, review.

The court's determination ultimately turned on two questions: first, whether the President had properly exercised his power; second, whether subsequent events had changed anything. In answering these questions, the court looked to see whether there was "some evidence" that Padilla was on a mission against the United States on behalf of an enemy with which we were at war. Thus, with very little discussion, the court adopted the "some evidence" test that the government had presented in Hamdi. The court ordered Padilla and the government to work out the arrangements for compliance with the court's order. Unable to agree on such arrangements, the government sought reconsideration of the opinion, which the district court grudgingly granted. The government argued that allowing access to counsel would undermine its psychological pressure campaign against Padilla and that access to counsel was not needed because the "some evidence" standard had already been met.

In support of its motion, the government filed a new affidavit, the Jacoby Declaration, describing the government's interrogation techniques, which

475. Id.
476. Id. at 608.
477. Id.
478. See supra text accompanying note 217 for definition of "some evidence" standard. Padilla had argued that he needed access to the full version of the Mabbs Declaration in order to prepare his case. Having reviewed that document, the court concluded that the redactions were mostly made up of sources and details supporting the redacted version's allegations. Padilla should be able to get by with the redacted version. After Padilla's presentation, the court would determine whether any classified information was needed to meet the "some evidence" standard. At that point the court would allow the government to close the document or the court might review it in camera. Id. at 609–10.
479. Padilla, 233 F. Supp. 2d at 610.
480. Padilla v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003). The court was highly critical of the government's behavior:
The [local rule applicable to motions for reconsideration] requires that such motions be made within ten days after determination of the original motion, and bars affidavits unless authorized by the court. Because the government's motion was filed more than a month after the Opinion, and includes an affidavit without benefit of court order, and because of the casuistry the government has employed in an effort to justify its disregard of the cited rule, there is need to review both the briefing that preceded the Opinion, and the procedural steps that followed it.
Id. at 43–44 (footnote omitted).
481. Id. at 46.
482. Id. Admiral Jacoby was a commissioned officer with 30 years of experience, who has served as Director of the Defense Intelligence Agency. Id. at 49.
rely on the prisoner’s dependency on and trust of his captors. Such techniques can take months, and interruptions can totally disrupt the process. The Jacoby Declaration also stressed the importance of information that Padilla could provide and contained more detail about Padilla’s relationship with Al Qaeda. The court found much of this to be speculative, pointing out that the government had failed to provide any particulars on Padilla’s interrogation or examples of interruption by counsel in the past. The court further noted that Padilla was a criminal and that the court had more experience with criminals than Jacoby, and therefore was equally or better qualified to speculate than Jacoby. In fact, the court speculated that if Padilla were allowed to make his habeas submission and lose under the “some evidence” standard, he might see the hopelessness of his situation and cooperate. At worst, the case would have already been decided, and would have gone on an expedited basis to the Second Circuit. Therefore, the court rejected the government’s first argument.

The court also rejected the government’s argument that the “some evidence” standard could be satisfied by merely looking at the government’s evidence without allowing the prisoner to respond. The court noted that the standard had always been applied by courts in cases in which the party opposing the government had been allowed to counter the government’s allegations. Because such an opportunity had been provided, reviewing courts had not found it necessary to “examine the entire record.” An appellate court should look to whether there was any evidence in the record to support the determination. That evidence must prove the defendant’s guilt in “some plausible way.” In addition, the

483. Id. at 49–50.
484. Id. at 49.
485. Id.
486. Id. at 52.
487. Id.
488. Id. The language of the opinion seems to suggest that the court feels that he is likely to lose “if Padilla consulted with counsel, made whatever submission he was inclined to make, if any, and lost in short order, as he well might under a ‘some evidence’ standard . . . .” Id.
489. Id.
491. Id. at 55.
492. Id. In support of this proposition, the court cited Zavaro v. Coughlin, 970 F.2d 1148, 1152–53 (2d Cir. 1992) (holding that evidence that prisoner was in a hall in which everyone rioted and assaulted guards was not enough to meet “some evidence” standard) and Lenea v.
court must determine the reliability of the evidence. The court found that the prisoner should be allowed to present evidence that undermines the reliability of the government's evidence:

Padilla must have the opportunity to present evidence that undermines the reliability of the Mobbs Declaration. Furthermore, inasmuch as Padilla has not yet been heard at all on the subject, he is entitled to present evidence that conflicts with what is set forth in the Mobbs Declaration, and to have that evidence considered alongside the Mobbs Declaration. When I refer to "the logic of Hill, Meeks and Viens," I mean only that. Those cases, which dealt with evaluation of evidence gathered in the relatively accessible setting of a prison, cannot be applied mechanically to evaluation of evidence gathered in the chaotic and less accessible setting of a distant battlefield. What allowances will have to be made in applying the logic of those cases will have to abide whatever submission Padilla may choose to make. However, unless he has the opportunity to make a submission, this court cannot do what the applicable statutes and the Due Process Clause require it to do: confirm what frankly appears likely from the Mobbs Declaration but cannot be certain if based only on the Mobbs Declaration—that Padilla's detention is not arbitrary, and that, because his detention is not arbitrary, the President is exercising a power vouchsafed to him by the Constitution. As set forth in the Opinion, because the only practicable way to present evidence, if he has any and chooses to do so, is through counsel, he must be permitted to consult with counsel.

The court distinguished this case from Hamdi because Hamdi did not dispute that he was captured on the battlefield and the government had alleged that he was an unlawful combatant. The court once again ordered the parties to work to agree on conditions for access to counsel. The government has announced that it will seek expedited review of the court's decision.

Lane, 882 F.2d 1171, 1175–76 (7th Cir. 1989) (holding that evidence that prisoner could have assisted escape not enough for some evidence). Id.

493. Id. The court cited to a number of cases in which failure to assess reliability undermined the "some evidence" determination. See, e.g., Williams v. Fountain, 77 F.3d 372 (11th Cir. 1996) (stating that an informant's credibility must be assessed); Bridges v. Wixon, 326 U.S. 135, 151, 155–56 (1945) (holding that deportation not allowed when based on unsworn witness statements that were later recanted).

494. 243 F. Supp. 2d at 56.

495. Id.

496. Id. at 57.

C. U.S. Citizens Detained as Enemy Combatants Have a Right to
Meaningful Habeas Corpus Review

Ultimately, the Padilla court was unwilling to go as far as the Fourth Circuit had in Hamdi, but the court’s standard made it very difficult for Padilla to obtain his freedom. Padilla leaves open a door that Hamdi appeared to close. The difference in the factual settings of their original capture may be pivotal. Armed forces arrested Hamdi in the theatre of war. Justice Department officials arrested Padilla on a civilian warrant in the United States. These distinctions are relatively minor, however, when compared with the distinction between the citizen detainees and the aliens on Guantanamo. Unfortunately, there is relatively little authority on how such a case should be handled. Justice Jackson pointed out the paucity of authority in national security cases in Youngstown Sheet & Tube Co.:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

Nevertheless, controlling constitutional principles require that U.S. citizens held in the United States not be subject to the dictates of Eisentrager. In these cases, the provisions of the Bill of Rights are more clearly applicable. The broader policies behind Milligan and Quirin should be the guiding light. On the one hand, Milligan recognizes the key protections offered to U.S. citizens in the United States. Quirin provides guidance as to when the nation’s need to deal with enemies should overrule our normal precepts of justice.

Courts should show great deference to the powers of the President as Commander in Chief. When the Nation faces attack as it did on 9/11, the

499. Id.
500. 343 U.S. at 634–35 (Jackson J., concurring) (footnote omitted).
Constitution charges the Executive with the country’s defense, and the courts should take extreme care not to act in a way that undercuts that defense. In these cases, the President has acted to further U.S. national security interests with the approval of the Congress. Under the reasoning of Curtiss-Wright and Youngstown Sheet & Tube Co., the President’s powers are at their greatest under these circumstances. On the other hand, history reveals that the courts can show too much deference to executive prerogative. The courts’ willingness to allow the detention of Japanese-Americans during World War II is one obvious example.  

A reasoned balance of national security needs versus individual civil rights is needed. Chief Justice Rehnquist has written:

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government’s ability to deal with conditions that threaten the national well-being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority the former should prevail. And if we feel free to criticize court decisions that curtail civil liberty, we must also feel free to look critically at decisions favorable to civil liberty.  

While Chief Justice Rehnquist may too quickly criticize courts protecting civil liberties, his analytical point makes sense. Balancing requires that the need for order—so pressing in cases like Quirin—be measured against the need for liberty protected in Milligan, which comes into play when greater domestic concerns exist. The United States is holding American citizens Hamdi and Rasul within the United States during a time when the Article III courts are operating normally. In both cases, the Article III courts could address their alleged criminal activity. Such proceedings would likely have little effect on the U.S. war effort. While the United States might detain hundreds of aliens during the Afghanistan campaign, there will be relatively few U.S. citizens charged with aiding the enemy. Providing basic process, as well as information required for this process, would not unduly drain military or judicial officials. Indeed, in a case like Padilla’s, there are no direct implications for the military because he was investigated by U.S. intelligence and initially detained by the Department of Justice.

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504. Padilla, 233 F. Supp. 2d at 571.
Of course, there are policy concerns that argue in favor of and against a great deal of executive discretion when it comes to detention. A primary detention goal is to prevent prisoners from assisting enemies of the United States. Certainly, the United States has less intrusive options than locking up alleged citizen enemy combatants for an indeterminate amount of time. For example, the government can prevent U.S. citizens from leaving the country to return to fight with the Taliban. It can also commence criminal procedures, with the required constitutional protections. It may be able to put suspected terrorists under surveillance to prevent further acts of terrorism. Because this is not a conventional war, the government might try nonconventional tactics such as public exposure of suspected terrorists. On the other hand, the enemy may target nonmilitary sites within the United States. This makes the government’s detention argument more compelling.

The government will likely encounter other problems when providing habeas corpus relief to U.S. citizens under these circumstances. With such relief available, the government may not be able to hold detainees indefinitely without showing some reason to believe that they have committed crimes. Attorneys may prevent the government from interrogating prisoners to as great an extent. Prisoners may be able to communicate with their cohorts who have not been captured. Nevertheless, the diminished impact on the U.S. war effort when the detainee is a citizen coupled with the valuable right to constitutional process enjoyed by all Americans dictates a role for the courts.

The government does not have to criminally charge citizens believed to be enemy combatants or release them. The government must, however, respond to a habeas corpus petition and provide evidence that national security in the time of war requires the continued detention of a U.S. citizen. Lacking this right, the U.S. citizen may be worse off than his alien counterpart. As shown above, international law provides remedies for an unlawfully detained individual, and in most cases these rights are established through the diplomatic process. If a foreign state feels that its citizen is being wrongfully detained, it can ask to see him. In fact, it appears that representatives of foreign governments have been allowed to meet with Guantanamo detainees. If the foreign government still feels that the detention violates international law, it can seek release through diplomatic channels.

Even the Fourth Circuit admits that a U.S. citizen being detained as an enemy combatant has a right to seek habeas corpus relief. Without the writ of habeas corpus, the hapless U.S. citizen may be totally friendless. He remains in the hands of the government that believes that he is a continuing threat, and the detainee has no means or assistance to show that he is not.
Although international human rights violations may be the subject of generalized worldwide condemnation, they are unlikely to result in the subject’s release.

U.S. citizens need and deserve a fair remedy in the U.S. courts. The Fourth Circuit’s Hamdi decision shows too great a willingness to take the government’s word that it is operating in good faith. By refusing to allow the district court to investigate beyond the fact that Hamdi went to Afghanistan to help the Taliban, the Fourth Circuit accepted the government’s affidavit as sufficient to support continued detention without question. Admittedly, the case may have been an easy one because it appeared undisputed that Hamdi was captured in a combat zone. It is possible, however, to imagine justifiable circumstances for his presence. The court should have permitted Hamdi to make such arguments.

The Hamdi court also refused to state the appropriate standard of review when facing a habeas corpus petition under these circumstances. Hamdi sought a thorough factual evaluation while the government preferred the more limited “some evidence” standard. The court refused to resolve the controversy, fearing that an inquiry into facts beyond Hamdi’s presence in the war zone would interfere with the war effort and concluded that Hamdi’s treatment conformed with Quirin’s constitutional requirements. Of course, establishing the facts relating to the initial detention would often go to the core of any effort to win a detained American’s release. The only way to make certain that the Executive has not acted outside of its admittedly broad war powers is by allowing the prisoner to make his case.

The Hamdi decision is also problematic in its rejection of petitioner’s argument that the U.S. locus of his detention made a difference. Of course, Quirin does suggest that an enemy combatant who is a U.S. citizen can be detained and tried before a military commission. Nevertheless, courts should not ignore totally the considerations that the Milligan court established. Indeed, the factual situations in Quirin and the current cases are quite different. Although the war against terrorism is a serious matter, it in no way has involved the entire nation in the war effort as did WWII. For the most part, the nation continues to function as it always has. The courts are open. The military is not patrolling the streets. Allowing the Executive to circumvent the basic protections that the Constitution provides American citizens is a dangerous precedent.

505. 316 F.3d 450, 470 (4th Cir. 2003).
506. Id. at 473–74.
507. Id. at 474.
508. See Ex parte Quirin, 317 U.S. 1, 30–34 (1942).
The *Padilla* decisions better reflect American values, in war and in peace. Reading the decisions together with *Hamdi*, the factual settings are obviously quite different. *Hamdi* is portrayed as a Taliban fighter who took the field against U.S.-allied forces. In contrast, the government characterizes *Padilla* as someone who may at some future time prove to be a terrorist in the United States. The former sounds more like a soldier; the latter seems more like an amateur criminal. Nevertheless, the rules being established are equally important in both contexts because of the constitutional principles they espouse.

The *Padilla* court's decision to provide counsel, along with controlled access, nicely balances constitutional concerns with the national security needs. Because *Padilla* was being held incommunicado, he was unlikely to present his case adequately without assistance of counsel. In addition, such assistance will not be effective without meaningful opportunities to meet with the client. Nevertheless, the government has a realistic national security concern relating to such interviews. Providing for monitored conversations subject to a firewall between those monitoring and those involved in any subsequent prosecution strikes the correct balance.

Courts need to develop rules better defining the level of review to be applied in these detention cases. *Padilla* argued for a "searching" investigation of the government's presentation of the facts surrounding his detention. The court correctly noted that precedent on the appropriate review standard in such situations was sketchy. The Supreme Court decided the most nearly applicable case, *Quirin*, on stipulated facts, never considering what factual demonstration was required. *Padilla*'s searching investigation is inappropriate in a national security context. The President does deserve deference, but that does not mean that there should be no review. Ultimately, the court's adoption of the "some evidence" rule provides some small degree of protection for American citizens; this standard, however, may prove to be too low, allowing the government to abuse this deference. The courts need to craft rules that balance the national security interest of the United States with basic constitutional guarantees. This does not mean that a detainee should be allowed the same rights as would be available in a criminal case. There are times when national security requires that the niceties of a grand jury, probable cause determination, and full jury trial with accompanying appellate review

509. 316 F.3d at 461.
511. Id. at 606.
512. Id. at 607.
513. Id. (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942)).
simply are inimical to the overriding national security interests. Nevertheless, some scrutiny that recognizes the presumptive validity of the President’s action while still allowing the detainee the realistic possibility that he might prevail should the facts exonerate him better reflects constitutional authority. The cases applying the “some evidence” test are instructive, but the interests at stake may be different. The Padilla case matches the liberty interest of a U.S. citizen against the President’s powers as commander in chief. Where a national security interest is at stake, the President certainly deserves deference. On the other hand, the liberty interest of the U.S. citizen also deserves reasonable protection. Allowing access to counsel, along with a possibility of evidentiary review, safeguards against potential executive abuse. The application of the Southern District’s “some evidence” rule should not be toothless. The court should require that the government present adequate information to support its determination of enemy combatant status. At the same time, the petitioner should be allowed to put forth evidence rebutting the allegations. The court need not review the case under a microscope, as Padilla requested. Instead, the court should merely require a basic showing that facts support the government’s contention and that the prisoner is unable to rebut those facts. The Padilla court’s requirements of plausibility and reliability coupled with the detainee’s right to present evidence further these goals.

VIII. CONCLUSION

Fortunately, the U.S. courts have rarely faced issues relating to the indefinite detention of those who wish to do harm to the United States during times of national crisis. As a result, the habeas corpus law relating to such detention has not been well-developed. Basing their decisions on relatively few Supreme Court decisions, none of which were decided after the WWII era, the federal courts have attempted to answer difficult questions about the relationship of the courts and the executive when it comes to fighting the war on terrorism. In the cases involving the Guantanamo detainees, the federal courts seem to have gotten it about right. The United States and its allies captured those detainees on foreign soil in the war effort. They are not being held within the territorial sovereignty of the United States. They can claim no rights as U.S. citizens. In addition, the need to avoid judicial interference in the war effort militates against a role for the courts. The Supreme Court’s WWII era Eisentrager decision correctly balances the interests of the United States against those of alien combatants not within the United States. There should be no right to habeas corpus relief for those determined to be enemy combatants by the executive
and held outside the United States. If the detainees have rights, they can be found in international law, and those interests must be espoused by their home states.

American citizens held in the United States deserve different treatment, however, and this is where the federal courts are in danger of going astray. The courts do not seem to question whether a U.S. citizen has a right to bring a petition for a writ of habeas corpus. The effectiveness of this right is open to question. In the \textit{Hamdi} case, the Fourth Circuit’s refusal to allow access to counsel or any investigation into the facts severely undercuts an American citizen’s basic rights to question his imprisonment. In \textit{Padilla}, the Southern District of New York was somewhat more sensitive to these issues, providing counsel and at least the possibility that the detainee may be able to question the government’s facts. Although the “some evidence” standard adopted in \textit{Padilla} does not provide much of a basis for review, it will make it possible to question egregious abuses of authority. In applying this standard, the courts should carefully balance the national security interests of the United States against the detainee’s interest in due process, giving so much deference to the executive as justice will allow, while retaining the U.S. citizen’s right to establish that he is being detained contrary to the law. Failure to do so undercuts the very rights that America is fighting to preserve.