An Open Debate on United States Citizens Designated as Enemy Combatants: Where Do We Go from Here?

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The tragic events of September 11, 2001 have required our courts, and more importantly our nation, to balance the need for national security against the protection of individual constitutional rights. One consideration is whether the executive branch, namely the President, has the authority to hold a United States citizen, who has been labeled an enemy combatant, indefinitely without charges or access to counsel. The Bush Administration has taken the position that an enemy combatant, regardless of citizenship status, does not have the right to counsel and, in particular, unmonitored access to counsel. An opposing view is that even though the President has the ability to determine enemy combatant status, the power to detain United States citizens without charges or procedural protections raises serious concerns and implications for individual rights and liberties.

This controversial issue is being debated in federal courts of appeals and district courts throughout the United States. The debate centers around the various ways in which the executive and judicial branches have dealt with recent enemy combatants, in particular, John Walker Lindh, Yaser Esam Hamdi, and Jose Padilla. This Comment presents an open dialogue that analyzes the various ways the courts have handled the adjudication of a United States citizen captured during times of national conflict and the protections that should be afforded to

1. In Hamdi v. Rumsfeld, 296 F.3d 278, 281-82 (4th Cir. 2002) [hereinafter Hamdi II] and in Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 588-97 (S.D.N.Y. 2002), the initial step in the courts' analyses centered on the President's authority to determine enemy combatant status. The authors of this Comment do not dispute the President's authority to determine such status. The focus of this Comment is to debate the protections that should be afforded to a United States citizen once labeled an enemy combatant.

2. Hamdi II, 296 F.3d at 282; Padilla, 233 F. Supp. 2d at 603.

3. Hamdi II, 296 F.3d at 282.

4. See Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003) [hereinafter Hamdi III] (holding that the President may lawfully designate a United States citizen who is "captured in a zone of active combat in a foreign theater of conflict" as an enemy combatant, and giving deference to the President's decision to designate a United States citizen as an unlawful enemy combatant); United States v. Lindh, 212 F. Supp. 2d 541, 558 (E.D. Va. 2002) (denying lawful enemy combatant status to a United States citizen); Padilla, 233 F. Supp. 2d at 599 (granting access to counsel to a United States citizen labeled an enemy combatant for the purpose of pursuing a habeas petition).
those captured and labeled enemy combatants. After summarizing the relevant law in the area, this Comment will first present arguments in favor of detaining enemy combatants without affording them the right to counsel.5 Thereafter, the counterpoint will be presented, arguing that a United States citizen designated as an enemy combatant cannot be detained indefinitely by the executive branch without recognizing inherent constitutional rights and safeguards, such as the access to counsel.6

I. BACKGROUND7

The Supreme Court has rarely spoken on issues affecting national security during times of war or national emergency. However, on a few occasions, the Court has considered certain controversial issues, the resolution of which have shaped the current national security landscape. On one such occasion, the Supreme Court set forth the basic principle that the President, as Commander-in-Chief in charge of military affairs, is to be given great deference to determine enemy status of those who take up arms against the United States.8 In addition, the Court has struggled with the evolving issue of what protections should be afforded to an individual classified as an enemy combatant. The Court's analysis in these cases has focused on whether the individual was a United States citizen or a foreign national.9 The Court has also addressed whether a military commission or a civilian court is the appropriate forum to try an enemy combatant.10 Despite considering these peripheral issues, the Court, until now, has not faced the specific question of whether a United States citizen alleged to be an enemy combatant can be held indefinitely without charges or access to counsel.

A. Presidential Authority to Name Enemy Status

The Supreme Court first considered the President's authority to name enemy status in The Prize Cases.11 These cases presented the issue of whether cargo vessels captured during the Civil War could be

5. See discussion infra Part II.A.
6. See discussion infra Part II.B.
7. The legal background represents relevant case law and legislative developments current as of July 2003.
8. The Prize Cases, 67 U.S. 635, 670 (1862). During the Civil War, the Court held that the President alone had the authority to classify southern Confederates as enemy belligerents, and the Court must defer to such designations. Id.
10. Id. at 24.
11. 67 U.S. 635 (1862).
brought in as prizes by public ships to the United States. A determination of enemy status was important because the Court had reasoned that enemy ships could permissibly be captured, but traitor ships could not. Thus, the Court had to first decide whether southern confederates should be considered enemies or traitors. The Court held that the President, acting as Commander-in-Chief, has the sole authority to decide whether the resistance by southern confederates was of such alarming proportions as to allow them to be declared enemy belligerents. According to the Court, this question of enemy status was to be decided by the President alone and the courts are bound by the decisions of the executive branch in these matters. From this premise, the Court upheld the President's decision that the southern ships belonged to enemy belligerents and were, therefore, permissible to be captured as prizes.

B. Detention of Enemy Belligerents

In addition to the question of Presidential authority to name enemy combatants, the Supreme Court has also considered several issues stemming from the detention of enemy belligerents. Cases arising during the Civil War and World War II addressed the difference between a United States citizen held as an enemy combatant and a foreign national held as an enemy combatant. In the cases involving United States citizens, the government has responded either through

12. Id. at 674-82. In cases of war with recognized foreign powers, the Court set forth the established principle that the capture and seizure of enemy ships is an appropriate coercing power. Id. at 651. However, the novel issue presented in this case was whether this same practice could occur against a nation in civil uprising. Id. at 670.

13. See id. at 670 (recognizing the difference between enemies in war and traitors in an insurrection).

14. Id.

15. Id. The debate surrounding this issue was whether the uprising should be considered a war or merely an insurrection. Id. If the uprising was considered a war then the southern confederates would be considered enemy belligerents and could be captured. Id. Reciprocally, if it was an insurrection the confederates would be considered traitors and could not be captured. Id.

16. Id. The proposition that the President has the authority to name enemy status has been upheld in subsequent cases. See Ex parte Quirin, 317 U.S. 1, 28 (1942); Duncan v. Kahanamoku, 327 U.S. 304, 314 (1946); Hamdi II, 296 F.3d 278, 281 (4th Cir. 2002); Campbell v. Clinton, 203 F.3d 19, 26 (D.C. Cir. 2000); Padilla v. Bush, 233 F. Supp. 2d 564, 589 (S.D.N.Y. 2002).

17. The Prize Cases, 67 U.S. at 674. The Court stated that "[a]ll persons residing within this territory whose property may be used to increase the revenues of the hostile power, are in this contest, liable to be treated as enemies, though not foreigners." Id. The Court applied this rationale individually to each of the four captured ships. Id. at 674-682.

18. See Ex parte Milligan, 71 U.S. 2 (1866); Ex parte Quirin, 317 U.S. 1, (1942); In re Yamashita, 327 U.S. 1 (1946).
the judicial process by way of Article III courts or through the military powers of the Executive. In contrast, the government has only employed the use of military tribunals when confronted with a foreign national labeled an enemy combatant. Regardless, these cases form the basis for evaluating enemy combatant protections and procedures.

1. Detention of United States Citizens.—

a. Ex parte Milligan & Ex parte Quirin.—In Ex parte Milligan, a Civil War-era case, the Supreme Court considered whether a military tribunal could try a United States citizen. Lamdin P. Milligan was charged with plotting to seize arsenals and to liberate prisoners of war. Sixteen days after his arrest, Milligan was tried by a military commission and sentenced to hang.

On a petition for writ of habeas corpus, Milligan argued that the military commission did not have jurisdiction to try him because he was a United States citizen. The Supreme Court agreed, stating that “[a]ll other persons, citizens of states where the courts are open, if charged with [a] crime, are guaranteed the inestimable privilege of trial by jury,” and that “[t]his privilege is a vital principle, underlying the whole administration of criminal justice . . . .” The Supreme Court specifically noted that Milligan was not a prisoner of war and, therefore, any illegal acts that he committed were punishable only in the courts of Indiana.

19. See Ex parte Milligan, 71 U.S. 2 (1866); Ex parte Quirin, 317 U.S. 1, (1942); In re Territo, 156 F.2d 142 (1946). In these cases, the United States citizens were seized both on United States soil and in foreign territory.
22. Id. at 108. Milligan, a citizen of Indiana for twenty years, had never served in the armed forces of the United States. Id. at 107-08. Furthermore, Indiana was not a state in rebellion during Milligan’s arrest and trial. Id. at 108.
23. Id. at 6-7.
24. Id. at 107.
25. The writ of habeas corpus allows judicial review of the legality of a person’s arrest or detention. U.S. Const. art. I, § 9, cl. 2.
26. Milligan, 71 U.S. at 108. The Court indicated that a petition for a writ of habeas corpus was the proper method to challenge an alleged unlawful detention, as was claimed here. Id. at 113 (citation omitted).
27. Id. at 123 (emphasis added). The Supreme Court drew a distinction between members of the United States armed forces, who were subject to trial by a military commission, and United States citizens. Id.
28. Id. at 131. The Government contended that Milligan was a prisoner of war. Id. at 131, 134. The Court, however, noted that it could not “see how [Milligan could] be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion.” Id. at 131.
The issue of trying a United States citizen before a military commission arose again during World War II. In *Ex parte Quirin*, the Supreme Court recognized that the government can detain a United States citizen as an enemy belligerent and try him in a military tribunal. In *Quirin*, several military detainees filed petitions for writs of habeas corpus in the United States District Court for the District of Columbia and were denied. The detainees then filed petitions for *certiorari* in the Supreme Court to review the district court's ruling. The question raised was whether a United States citizen, who entered the country to conduct sabotage at the direction of a foreign government, could be tried by a military commission appointed by the President. Petitioner Haupt, one of several saboteurs, argued that he was a United States citizen because he came to the United States when he was five years old and had obtained citizenship when his parents were naturalized during his minority. The Government argued that Haupt had renounced or abandoned his citizenship through his actions. Ultimately, however, the Court did not find it necessary to resolve the citizenship issue. The Court indicated that citizenship in the United States does not grant an enemy belligerent any special rights. Therefore, Haupt's citizenship was irrelevant to the Court's decision in this case.

Because the saboteurs were captured on American soil and not in uniform, the Court discussed the distinction between a lawful enemy combatant and an unlawful enemy combatant. The Court explained that a lawful enemy combatant is a soldier captured on a battlefield by opposing military forces. Lawful enemy combatants are subject to

29. 317 U.S. 1 (1942).
30. Id. at 37-38, 44. The Court noted that military tribunals can be convened by the President, or other competent military authorities, to try persons charged with violations of the law of war. Id. at 25-27. In addition, the President can prescribe the regulations for the procedure of the trial as well as the procedures for the review of the record and any judgment or sentence. Id. at 22.
31. Id. at 18.
32. Id.
33. Id. at 18-19. Haupt received training and payments from the German government to conduct acts of sabotage in the United States. Id. at 21. Specifically, Haupt came ashore from a German submarine carrying "explosives, fuses, and incendiary and timing devices." Id.
34. Id. at 20.
35. Id.
36. Id.
37. Id. at 37-38.
38. Id.
39. Id. at 30-31.
40. Id. at 31.
capture and detention as prisoners of war.\textsuperscript{41} On the other hand, the Court indicated that unlawful enemy combatants are combatants who pass behind enemy lines in civilian attire for the purpose of waging war by destruction of life or property.\textsuperscript{42} Unlawful enemy combatants are subject to capture and punishment by military tribunals for the acts that render them unlawful enemy combatants.\textsuperscript{43} In addressing Haupt's citizenship argument, the Court stated that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because [sic] in violation of the law of war."\textsuperscript{44}

The Court also addressed the detainees’ argument that they were entitled to the protections of the Fifth and Sixth Amendments to the United States Constitution.\textsuperscript{45} The Court stated that the protections offered by the Fifth and Sixth Amendments, namely trial by jury and presentment by a grand jury, were familiar elements of criminal procedure when the Constitution was adopted.\textsuperscript{46} These protections were not, however, known to military tribunals which are not considered courts "in the sense of the Judiciary Article."\textsuperscript{47} The Court then reiterated that the purpose of section 2 of Article III, the Judiciary Article, was not to enlarge the then existing right to a jury trial.\textsuperscript{48} The Court stated that:

All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, § 2 or the provisions of the Fifth and Sixth Amendments relating to 'crimes' and 'criminal prosecutions.'\textsuperscript{49} In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by

\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 37.
\textsuperscript{45} Id. at 38-39. The Fifth Amendment requires presentment or indictment of a grand jury for capital or infamous crimes. U.S. Const. amend. V. The Sixth Amendment grants the right to a jury trial in criminal cases. U.S. Const. amend. VI.
\textsuperscript{46} Quirin, 317 U.S. at 39.
\textsuperscript{47} Id. (citation omitted).
\textsuperscript{48} Id.
\textsuperscript{49} The Court was discussing the fact that petty offenses could be tried without a jury in the federal courts despite the Fifth and Sixth Amendments because the petty offenses were originally triable at common law without a jury. Id. at 40 (citation omitted). In addition, the Court noted that "an action for debt to enforce a penalty inflicted by Congress was not subject to the constitutional restrictions upon criminal prosecutions." Id. (citation omitted).
military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in civil courts.\textsuperscript{50}

The Court, thus, made clear that the Fifth and Sixth Amendments applied to criminal trials as they were known at the time of the adoption of the Constitution.\textsuperscript{51} The Court did not believe that Congress had intended to extend Fifth and Sixth Amendment protections to alien or citizen offenders who violated the law of war, which was triable by a military tribunal.\textsuperscript{52}

The detainees, in particular Haupt, pointed out that the Court in \textit{Milligan} had previously held that the law of war could “‘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.’”\textsuperscript{53} However, the Court distinguished \textit{Milligan} based on its unique facts and rejected this argument.\textsuperscript{54} Instead, the Court affirmed the district court’s ruling and denied the detainees leave to file petitions for habeas corpus in the Supreme Court.\textsuperscript{55}

\textbf{b. In re Territo & Duncan v. Kahanamoku.—}Another World War II era case, \textit{In re Territo},\textsuperscript{56} concerned a United States citizen who was fighting as a solider for the Italian Army and captured by the United States on the battlefield in Italy.\textsuperscript{57} Gaetano Territo was then held as a prisoner of war (POW) in the United States.\textsuperscript{58} The United States Court of Appeals for the Ninth Circuit was presented with the issue of whether Territo could be detained as a POW.\textsuperscript{59} The court reasoned that anyone who actively opposed an army in war could be captured and held as a prisoner of war, with the exception of spies and non-uniformed fighters who were not afforded such status.\textsuperscript{60}

\begin{itemize}
  \item[50.] \textit{Id.}
  \item[51.] \textit{Id.} at 39.
  \item[52.] \textit{Id.} at 44. The Court was referring to the fact that the Fifth and Sixth Amendments, by construction, were exempt in cases “arising in the land [or naval] forces.” \textit{Id.} at 41. The Fifth Amendment states in pertinent part “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” U.S. CONST. amend. V.
  \item[53.] \textit{Quirin}, 317 U.S. at 45 (citing \textit{Ex parte Milligan}, 71 U.S. 2, 121 (1866)).
  \item[54.] \textit{Id.; see supra} notes 21-28 and accompanying text (discussing the Supreme Court’s analysis of \textit{Milligan}).
  \item[55.] \textit{Quirin}, 317 U.S. at 48.
  \item[56.] 156 F.2d 142 (1946).
  \item[57.] \textit{Id.} at 142-43.
  \item[58.] \textit{Id.} at 143.
  \item[59.] \textit{Id.} at 142.
  \item[60.] \textit{Id.} at 145.
\end{itemize}
Therefore, the court concluded that Territo was properly held as a POW and his restraint was lawful for the duration of the war.\textsuperscript{61}

In addition, the Supreme Court has considered whether a United States citizen could be tried in a military tribunal when he is not labeled as an enemy combatant. In Duncan \textit{v. Kahanamoku},\textsuperscript{62} the Governor of Hawaii, pursuant to the Hawaiian Organic Act,\textsuperscript{63} suspended the writ of habeas corpus\textsuperscript{64} and placed the territory under martial law because of the deadly attack on Pearl Harbor in 1941.\textsuperscript{65} In accordance with the Act, the Commanding General established military tribunals to replace the courts.\textsuperscript{66} The two petitioners in the case, White and Duncan, were civilians respectively charged and convicted of stock embezzling and assault in a military tribunal.\textsuperscript{67} The issue presented to the Supreme Court was whether the military tribunal had the authority to try these civilians.\textsuperscript{68} The Court held that martial law was not to authorize the supplanting of courts by military tribunals because Congress did not intend the Hawaiian Organic Act to exceed the boundaries between military and civilian power.\textsuperscript{69} Therefore, the petitioners were ordered to be released from custody.\textsuperscript{70}

\begin{itemize}
  \item[61.] Id. at 146-48.
  \item[62.] 327 U.S. 304 (1946).
  \item[63.] Section 67 of the Hawaiian Organic Act, 31 Stat. 141, 48 U.S.C.A. section 532 states, "the governor . . . may, in case of rebellion or invasion, or imminent danger . . . when public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory . . . under martial law . . . ." \textit{Duncan}, 327 U.S. at 307 n.1.
  \item[64.] The writ of habeas corpus can be suspended during times of national emergency. \textit{Duncan}, 327 U.S. at 307-08.
  \item[65.] Id. at 307.
  \item[66.] Id. at 308. These military tribunals had the authority to try civilians charged with violating the law. Id. at 309.
  \item[67.] Id. at 309-10.
  \item[68.] Id. at 307. The Government argued that section 67 of the Hawaiian Organic Act authorized military tribunals and that the Governor, with the approval of the President, can declare martial law whenever public safety so requires. \textit{Id.} at 312. Therefore, the Court began its analysis by determining whether the Hawaiian Organic Act gave the military the power to replace the civilian courts during this period of martial law. \textit{Id.} at 313. The Court looked to the language of the Act, the legislative history, and prior cases for guidance in interpreting the Act; however, none of these sources allowed such a procedure. \textit{Id.} at 315-23. The Court stated, "[c]ourts and their procedural safeguards are indispensable to our system of government . . . to protect the liberties [our founders] valued." \textit{Id.} at 322. Moreover, the Court noted that our government is opposed to total military rule and "opposed to governments that placed in the hands of one man the power to make, interpret and enforce the law." \textit{Id.} The Court recognized that the "established principle of every free people is, that the law shall alone govern; and to it the military must always yield." \textit{Id.} at 323 (quoting Dow \textit{v. Johnson}, 100 U.S. 158, 169 (1879)).
  \item[69.] Id. at 324.
  \item[70.] Id.
c. United States v. Lindh.—The same questions presented to the courts during World War II, recently resurfaced during the war on terrorism. In United States v. Lindh, a United States citizen, John Phillip Walker Lindh, was captured in November 2001 in Afghanistan while fighting against the Northern Alliance and the United States. Prior to his capture, in mid-2001, Lindh received several weeks of training at a terrorist training camp in Pakistan. After completing his training, Lindh traveled to Afghanistan where he expressed a desire to join the Taliban. While at Taliban headquarters, he agreed to receive additional military training at an al Qaeda training camp.

After Lindh completed training with al Qaeda, he traveled to Kabul, Afghanistan where he joined with approximately 150 non-Afghanistan fighters. Lindh then traveled to Northeastern Afghanistan where he and other members of his unit fought against Northern Alliance troops. Finally in November 2001, Lindh and his unit retreated from Takhar, Afghanistan and surrendered to Northern Alliance troops. Following his capture, Lindh was transported to a prison compound where he was interviewed by two Americans from the Central Intelligence Agency (CIA). After the interview, prison detainees overpowered guards at the camp and attacked the CIA agents. One CIA agent, Johnny Michael Spann, was killed during the uprising. Lindh and other prisoners retreated to a basement in the compound and were subsequently recaptured. As a result of his

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71. See Andrew P. Napolitano, Enemy Combatants' Cast into a Constitutional Hell, L.A. Times, June 27, 2003, at B17 (discussing the war on terrorism).
73. Id. at 545.
74. Id.
75. Id.
76. Id. During his training at the al Qaeda training camp, Lindh met with Osama Bin Laden who thanked him for taking part in the jihad movement. Id. at 546. While at the al Qaeda training camp, Lindh "participated in 'terrorist training courses in, among other things, weapons, orienteering, navigation, explosives and battlefield combat.'" Id.
77. Id. at 546.
78. Id. Lindh stayed with his unit after September 11, 2001, despite his knowledge that Bin Laden had ordered the attacks against the United States and that additional attacks were planned. Id.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id. at 546-47.
actions prior to his initial capture on the battlefield, Lindh was charged with various criminal violations.  

Lindh moved to have the charges dismissed on a number of bases. Lindh claimed that one of the counts should have been dismissed because he was entitled to lawful combatant immunity as a Taliban soldier. The court recognized that lawful combatant immunity is a doctrine rooted in the "customary international law of war" and that it "forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets." The court considered the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GPW), and concluded that Lindh was ineligible for lawful combatant immunity status. Specifically, the court concluded that the Taliban did not satisfy the criteria for lawful combatant status set forth by the GPW. The court also deferred to the President's determination that Lindh was an unlawful enemy combatant. Therefore, the

84. Id. at 547. Lindh was charged in a ten-count indictment with a wide range of criminal charges, such as conspiracy to murder nationals of the United States, conspiracy to provide material support and resources to a foreign terrorist organization, among other charges. Id.

85. Id.

86. Id. at 552. In addition, Lindh requested dismissal of the indictment on a number of other grounds including, for example, that pre-trial publicity deprived him of his Sixth Amendment right to a fair trial, and that he was the victim of selective prosecution. Id. at 547-48, 552, 564.

87. Id. at 553.


89. Lindh, 212 F. Supp. 2d at 553, 558.

90. Id. at 557-58. In order for an organization's member to qualify for lawful combatant status, an organization must meet the following criteria: (1) "[t]he organization must be commanded by a person responsible for his subordinates"; (2) "[t]he organization's members must have a fixed distinctive emblem or uniform recognizable at a distance"; (3) "[t]he organization's member must carry arms openly"; and (4) "[t]he organization's members must conduct their operations in accordance with the laws and customs of war." Id. (citing GPW, art. 4(A)(2)). According to the court, the Taliban failed to meet the criteria because the group lacked a hierarchical structure, failed to distinguish themselves as uniformed soldiers, and failed to observe the laws and customs of war. Id. at 558.

91. Id. at 558. The court addressed and rejected Lindh's other challenges to the various criminal charges against him. Specifically, the court rejected Lindh's claim that several of the counts should be dismissed because they "charge violations of regulations that were promulgated in excess of the statutory authority provided by the parent legislation, the International Economic Emergency Powers Act." Id. In addition, the court rejected Lindh's selective prosecution claim because he failed to show "both that the government's prosecution policy had a discriminatory effect and that it was motivated by a discriminatory purpose." Id. at 565. Lindh claimed that he was prosecuted because he associated with the Taliban for religious reasons while entities that associated with the Taliban for non-religious reasons were not prosecuted. Id. at 565-66.
court refused to grant lawful combatant immunity to Lindh.\textsuperscript{92} The court also rejected Lindh’s claim that several of the counts should be dismissed because the indictment was insufficient on its face and that Lindh’s conduct did not violate the statute in question.\textsuperscript{93} Finally, the court rejected Lindh’s claim that he had not carried firearms and destructive devices in furtherance of crimes of violence because the underlying crimes did not constitute crimes of violence.\textsuperscript{94}

d. United States v. Hamdi.—In addition to capturing Lindh, American military forces at the direction of President Bush captured thousands of other enemy combatants while in Afghanistan. One of those captured in the Fall of 2001 was Yaser Esam Hamdi.\textsuperscript{95} In January 2002, Hamdi, along with other captured enemy combatants, was transferred to Camp X-Ray, located at Guantanamo Bay Naval Base, Cuba.\textsuperscript{96} While at Camp X-Ray, the authorities learned that Hamdi was born in Louisiana and may not have renounced his American citizenship.\textsuperscript{97} Consequently, Hamdi was transferred to the Norfolk Naval Station Brig in April 2002.\textsuperscript{98} In order to facilitate its intelligence gathering efforts, the United States wanted to continue to detain Hamdi as an enemy combatant “in accordance with the law and customs of war.”\textsuperscript{99}

\textsuperscript{92} Id.

\textsuperscript{93} Id. at 574-75. The counts in question were violations of 18 U.S.C. section 2339B, which prohibits providing material support or resources to a foreign terrorist organization. Id. at 574; 18 U.S.C. § 2339B (1996).

\textsuperscript{94} Lindh, 212 F. Supp. at 578. The underlying crimes involved “providing material support and resources and supplying services to the Taliban and al Qaeda.” Id.

\textsuperscript{95} Hamdi III, 316 F.3d 450, 460 (4th Cir. 2003).

\textsuperscript{96} Id.

\textsuperscript{97} Id.

\textsuperscript{98} Id.

\textsuperscript{99} Hamdi II, 296 F.3d 278, 280 (4th Cir. 2002). In Ex parte Quinir, 317 U.S. 1, 27-28 (1942), the Supreme Court indicated that the law of war included “that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.” Furthermore, the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, permits the capture of certain persons as prisoners of war. 6 U.S.T. 3317, Article 4. If Hamdi met the requirements of Article 4, then he could presumably be detained as a prisoner of war. However, it is unclear whether Hamdi met the requirements of Article 4, because the Government has continually referred to him as an “enemy combatant” rather than a prisoner of war. Brief Submitted by United States Attorney Paul J. McNulty on Behalf of Donald Rumsfeld, throughout, available at http://news.findlaw.com.hdocs/hamdi/hamdirums61902gbrif.pdf (last visited May 16, 2003). In addition, the Government’s information regarding Hamdi’s status as an “enemy combatant” was in a sealed declaration. Hamdi II, 296 F.3d at 284. Nevertheless, the United States Court of Appeals for the Fourth Circuit seemed to treat the term “enemy combatant” the same as “prisoner of war.” Id. at 283. The court stated that “[i]t has long been established that if Hamdi is indeed an ‘enemy combatant’ who was captured during
To challenge the government's detention of Hamdi, his father, Esam Fouad Hamdi, filed a petition for a writ of habeas corpus under 28 U.S.C. sections 2241 & 2242, naming himself as Hamdi's next friend. On June 11, the United States District Court for the Eastern District of Virginia determined that Esam Hamdi could proceed as next friend and ordered that Hamdi have unmonitored access to counsel. Specifically, the district court ordered that the meeting should be "private between Hamdi, the attorney, and the interpreter, without military personnel present, and without any listening or recording devices of any kind being employed in any way."

On appeal, the United States Court of Appeals for the Fourth Circuit in Hamdi II agreed with the district court that Hamdi's father had filed a valid petition because he clearly had a significant relationship with his son. Because Esam Hamdi's petition was valid, the court considered the district court's June 11, 2002 order granting Hamdi unmonitored access to counsel. The court held that the district court's June 11, 2002 opinion and order failed to extend proper deference to the political branches in these current matters of foreign policy, national security, or military affairs, and failed to address enemy combatant status. The court thought, however, that hostilities in Afghanistan, the government's present detention of him is a lawful one." (citing Ex parte Quirin, 317 U.S. 1, 31, 37 (1942) for the proposition that United States citizenship would not prevent the Government from holding Hamdi as a "prisoner of war").

100. Hamdi II, 296 F.3d at 280. Next friend standing permits a person lacking standing to proceed in federal court on behalf of someone who does have standing. Hamdi v. Rumsfeld, 294 F.3d 598, 603 (4th Cir. 2002) [hereinafter Hamdi I]. Next friend standing has most often been invoked on behalf of prisoners who are detained and unable to seek relief themselves either due to mental incompetence or inaccessibility. Id. On May 10, 2002, objecting to Hamdi's detention, Frank Dunham, Federal Public Defender for the Eastern District of Virginia, and Christian Peregrim, a private citizen, also filed writ of habeas corpus petitions as Hamdi's next friend. Id. at 600. Peregrim had no previous relationship with Hamdi and filed the petition as next friend "out of concern only for the unlawful nature of [Hamdi's] incarceration." Id. at 601. Although the United States District Court for the Eastern District of Virginia concluded that Dunham's petition was appropriately filed, the Fourth Circuit in Hamdi I dismissed both Dunham and Peregrim's petitions because they lacked a significant relationship with Hamdi. Id. at 600.

101. Hamdi II, 296 F.3d at 280-81. Esam Hamdi's petition asked that the district court: (1) grant him next friend status; (2) appoint counsel to represent Yaser Hamdi; (3) order the government to stop all interrogations of Yaser Hamdi; and (4) order that Yaser Hamdi be released. Id. at 280.

102. Id. at 281.

103. Id.

104. Id.

105. Id. at 284.
complete dismissal of the petition was not appropriate at the time.\textsuperscript{106} Chief Judge Wilkinson, writing for the unanimous three judge panel, first inferred that the Commander-in-Chief provision of Article II, section 2 directs that much deference should extend to "military designation of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle."\textsuperscript{107}

Second, the court noted that the district court's order was not a typical appointment of counsel in an ordinary criminal case and that Hamdi's case raised serious issues, which were not addressed by the district court.\textsuperscript{108} The final issue the court addressed was the Government's request for dismissal.\textsuperscript{109} Unwilling to dismiss the case entirely, the court stated that a dismissal would "embrac[e] a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."\textsuperscript{110} In closing, the court did not give specific direction to the district court on what procedures and standards to use on remand, but instead emphasized that the issue of detaining enemy combatants was not being resolved initially and guidance should come from long established cases upholding such detentions.\textsuperscript{111}

In \textit{Hamdi III}, the Fourth Circuit accepted a certified appeal concerning the district court's order that required the Government to produce various materials regarding Hamdi's status as an enemy combatant.\textsuperscript{112} The appeal considered whether a declaration by a government official, setting forth the Government's account of the circumstances of Hamdi's capture, was by itself sufficient to warrant his detention.\textsuperscript{113} The court concluded that the declaration was a suffi-

\begin{itemize}
\item \textsuperscript{106} \textit{Id.} at 283. The court recognized that dismissal would be premature due to the interlocutory nature of the appeal. \textit{Id.} Thus, a remand was deemed the more appropriate remedy. \textit{Id.}
\item \textsuperscript{107} \textit{Id.} at 281.
\item \textsuperscript{108} \textit{Id.} at 282. The court pointed out that the major issue of enemy combatant status was never even addressed by the district court. \textit{Id.} In addition, the district court failed to consider the implications of unmonitored access upon the government's intelligence gathering or to what extent federal courts are permitted to review military judgments of combatant status. \textit{Id.}
\item \textsuperscript{109} \textit{Id.} at 283.
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Id.}; see, e.g., \textit{Ex parte Quirin}, 317 U.S. 1, 31, 37 (1942); Duncan v. Kahanamoku, 327 U.S. 304, 313-14 (1946); \textit{In reTerrito}, 156 F.2d 142, 145 (9th Cir. 1946). In conclusion, the court in \textit{Hamdi II} noted that hazards of judicial involvement in military decisionmaking cautioned the district court to resolve the case using the least drastic measures and suggested avoiding unnecessarily intrusive steps. \textit{Hamdi II}, 296 F.3d at 284.
\item \textsuperscript{112} \textit{Hamdi III}, 316 F.3d 450, 459 (4th Cir. 2002).
\item \textsuperscript{113} \textit{Id.} at 462.
\end{itemize}
cient basis upon which to conclude that Hamdi had been constitutionally detained pursuant to the war powers entrusted to the Commander-in-Chief.\textsuperscript{114}

The declaration was an affidavit signed by the Under Secretary of Defense for Policy, Michael Mobbs.\textsuperscript{115} It confirmed “the material factual allegations in Hamdi’s petition—specifically that he was seized in Afghanistan by allied military forces during the course of a sanctioned military campaign, designated an ‘enemy combatant’ by [the] Government, and ultimately transferred to the Norfolk Naval Brig for detention.”\textsuperscript{116} In the \textit{Hamdi II} opinion, the Fourth Circuit had directed the district court to review the sufficiency of the Mobbs’ declaration.\textsuperscript{117} Despite the district court’s recognition that the government was entitled to “considerable deference in detention decisions during hostilities,” the district court went on to state that it was going to carefully review and scrutinize the Mobbs’ declaration.\textsuperscript{118} The district court then issued an order directing the Government to turn over numerous documents related to Hamdi’s capture and detention.\textsuperscript{119} The Government moved to certify the production order for immediate appeal.\textsuperscript{120}

The Fourth Circuit then reiterated the fact that the President has the power to wage war and included in that power is the “authority to detain those captured in armed struggle.”\textsuperscript{121} The court also reiterated the fact that courts owe a great deal of deference to the President’s decisions in war time.\textsuperscript{122} The court, however, also indicated that the President’s discretion to make decisions in war time was not unlimited and could, in some cases, be reviewed by the judiciary.\textsuperscript{123}

\begin{footnotes}
\footnotetext[114]{\textit{Id.} at 459.}
\footnotetext[115]{\textit{Id.} at 461.}
\footnotetext[116]{\textit{Id.}
\footnotetext[117]{\textit{Id.} at 462.}
\footnotetext[118]{\textit{Id.} The district court was highly critical of the Mobbs’ declaration and implied that the government might be “hiding disadvantageous information from the court.” \textit{Id.}}
\footnotetext[119]{\textit{Id.} The documents included, among other things, copies of Hamdi’s statements, information pertaining to the interrogators, and statements by members of the Northern Alliance. \textit{Id.}}
\footnotetext[120]{\textit{Id.} The district court then certified the question regarding the sufficiency of the Mobbs declaration alone as sufficient for “meaningful judicial review of Yaser Esam Hamdi’s classification as an enemy combatant.” \textit{Id.} The Fourth Circuit granted the Government’s petition for review and noted that it might address other issues included in the certified order. \textit{Id.}}
\footnotetext[121]{\textit{Id.} at 463.}
\footnotetext[122]{\textit{Id.} The court indicated that although this was not a “conventional” war, it did not reduce the level of deference owed to the President. \textit{Id.} at 464.}
\footnotetext[123]{\textit{Id.} The court discussed the importance of the Bill of Rights and the Fourteenth Amendment to the United States Constitution and stated that it was the duty of the judicial}
\end{footnotes}
The court found it "significant" that Hamdi had sought relief through a petition for writ of habeas corpus, stating that "[i]n war as in peace, habeas corpus provides one of the firmest bulwarks against unconstitutional detentions." The court determined that a habeas petition was the proper method for Hamdi to challenge his detention because he was an American citizen challenging his detention by the Government.

In addition to considering the question of the sufficiency of the Mobbs' declaration, the court considered two additional bases for relief proposed by Hamdi, 18 U.S.C. section 4001(a) and Article 5 of the Geneva Convention. The court rejected the first basis of relief on the grounds that Congress had authorized the President to detain enemy combatants when it issued the Authorization for Use of Military Force. The court rejected the second basis of relief on the grounds that the Geneva Convention is not self-executing and, therefore, does not provide for a private right of action. Thus, the court concluded that there were "no purely legal barriers to Hamdi's detention."

The court addressed two final issues. First, it considered whether Hamdi as a United States citizen being detained by the military on American soil could be heard before an Article III court to challenge the factual assertions submitted to support his enemy combatant designation. The court held that it was unnecessary to conduct an evidentiary hearing or factual inquiry because it was undisputed that

branch to defend individual freedoms, even when military forces are involved in an armed conflict. Id.

124. Id.

125. Id. at 465. The court indicated that the safeguards that have become expected in connection with criminal prosecutions are not necessarily appropriate in the "arena of armed conflict." Id.

126. Id. at 467.

127. Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The court concluded that detaining enemy combatants was an "inherent part of warfare" and was therefore included in the authorization by Congress. Hamdi III, 316 F.3d at 467.

128. Hamdi III, 316 F.3d at 468. The court concluded that even if Article 5 of the Geneva Convention was self-executing and provided a private right of action, it was not clear that an Article III court would be a competent tribunal to determine whether Article 5 applied to Hamdi's case. Id. at 469.

129. Id. at 469. The court indicated that Hamdi's petition failed as a matter of law; therefore, the Government should not be required to comply with the district court's order. Id. The court also pointed out numerous practical difficulties if the Government were in fact required to comply with the district court's order. Id. at 470. For example, the district court ordered the Government to provide copies of all of Hamdi's statements, a list of all interrogators who questioned Hamdi, the name of the individual in the government who made the determination that Hamdi was an enemy combatant, and the screening criteria used in the enemy combatant determination. Id.

130. Id. at 473.
Hamdi was captured in an active combat zone. The court lastly considered Hamdi’s argument that hostilities were sufficiently at an end, and that his detention was no longer lawful. The court stated that it was not clear “whether the timing of a cessation of hostilities is justiciable” and that it was a decision best left to the executive branch.

e. Padilla v. Bush.—In addition to American citizens captured abroad, the recent cases have also involved American citizens captured on American soil and labeled as enemy combatants. Recently, in Padilla v. Bush, the United States District Court for the Southern District of New York considered a petition for writ of habeas corpus filed on behalf of Jose Padilla, a United States citizen held by the Department of Defense as an enemy combatant. On May 8, 2002, Padilla was arrested and taken into custody by the Justice Department on a material witness warrant. The warrant was issued based on findings that Padilla had information and knowledge material to a grand jury investigation concerning the activities of al Qaeda. However, on June 9, 2002, President Bush issued an order withdrawing the subpoena and designating Padilla an enemy combatant. The President next directed the Department of Defense to detain Padilla and take him into custody. Currently, Padilla is being detained without being formally charged and has no prospect of release. His attorney, Donna R. Newman, acting as next friend, filed a petition for writ of habeas corpus to challenge the lawfulness of Padilla’s detention and sought an order allowing Padilla to consult with counsel. The court granted Newman next friend standing, distinguishing Hamdi I on the basis that Newman had a pre-existing relationship with Padilla.
that involved his initial apprehension and confinement under the materia-

First, the court considered the lawfulness of Padilla’s detention as an enemy combatant. The central issue involved was whether the President has the authority to designate a United States citizen captured on American soil an enemy combatant and detain him without trial. Padilla relied on Milligan’s holding that the Constitution forbids indefinite detention of citizens captured on American soil so long as the courts are open and their process unobstructed. However, the court observed that Milligan had been narrowed by the subsequent decision in Quirin. The court recognized that although the issue in Quirin was different from the one presented in Padilla, it nevertheless relied on Quirin for guidance on distinguishing lawful and unlawful enemy combatant status and on the President’s authority to detain unlawful enemy combatants. The court ultimately held that the President is authorized under the Constitution and by law to direct the military to detain enemy combatants. Therefore, Padilla’s detention is not per se unlawful.

The court then considered whether and how Padilla should be permitted to present facts before the court in conjunction with his habeas petition. The court concluded that Padilla did have a right to present facts at the petition hearing and that the most convenient way for Padilla to do so was through counsel. Therefore, the court concluded that Padilla could consult with counsel during prosecution of his petition despite concerns expressed by the Government.

141. Id. at 575-78.
142. 233 F. Supp. 2d at 587-600.
143. Id. at 593.
144. Id.
145. Id. at 594.
146. Id. at 594-96. The particular issue in Quirin was whether those petitioners could be tried by military tribunals, whereas the issue in Padilla was whether Padilla could be held without trial. Id. at 594.
147. Id. at 596. The court stated that the basis for the President’s authority to order the detention of an unlawful combatant arises both from the terms of the Joint Resolution and from his constitutional authority as Commander-in-Chief as set forth in The Prize Cases and other authority cited above. See supra notes 8-17 and accompanying text (discussing the President’s authority to name enemy status).
148. 233 F. Supp. 2d at 599. The “detention of Padilla is not barred by 18 U.S.C. § 4001(a); nor . . . is it otherwise barred as a matter of law.” Id.
149. Id.
150. Id.
151. Id. The Government argued that granting access to counsel would “jeopardize the two core purposes of detaining enemy combatants—gathering intelligence about the enemy, and preventing the detainee from aiding in any future attacks against America.” Id. at 603.
In concluding that Padilla had a right to present facts during the proceeding, the court first looked to relevant statutory provisions. The court determined that although no provision expressly provides for such relief, Congress intended for a habeas petitioner to be able to present facts before the court because to prevent him from doing so would impair the petitioner's ability to receive the remedy being requested. The court cited to 18 U.S.C. section 3006A(2)(B), which permits a court to grant access to counsel in a habeas proceeding when "the court determines 'the interests of justice so require.'" Relying on this statute, the court determined that Padilla should be granted access to counsel for the purpose of presenting facts at the habeas proceeding only.

The court also considered whether the Fifth or Sixth Amendment guaranteed Padilla access to counsel. The court concluded that the Sixth Amendment did not provide a right of counsel in this case because it was not a criminal proceeding. The court relied on Middendorf v. Henry and United States v. Gouveia to support its con-

152. Id. at 599. The statutory provisions the court considered were 28 U.S.C. sections 2241, 2243, and 2246. Id. In addition, the court looked to the Federal Rules of Civil Procedure. Id.
153. Id. at 600.
154. Id.
155. Id. at 603. The court made it clear that it was not granting a general right to counsel; therefore, counsel should not be able to interfere during any interrogations. Id. In addition, the court permitted military personnel to monitor Padilla's meetings with counsel as long as the monitoring personnel would not be involved in any future criminal prosecutions of Padilla. Id. at 604.
156. Id. at 600.
157. Id.
158. 425 U.S. 25 (1976). In Middendorf, the Supreme Court considered a case in which several members of the military brought suit "challenging the authority of the military to try them at summary courts-martial without providing them with counsel." Id. at 28. In acknowledging that the issue had never been "squarely resolved," the Court considered past cases analyzing the types of hearings which required a Sixth Amendment right to counsel. Id. at 33, 35. For example, the Court considered that a revocation of probation hearing, or a juvenile proceeding, either of which could result in the deprivation of liberty, was not a criminal proceeding, and therefore did not necessarily trigger the Sixth Amendment right to counsel. Id. at 35-36. In addition, the Court recognized that the military has a unique function to perform, and it would not be possible to impose the same requirements on military courts as it does on civilian courts. Id. at 45-46. The Court thus concluded that neither the Sixth Amendment nor the Fifth Amendment required counsel in summary court-martial proceedings. Id. at 48.

Justice Marshall, with whom Justice Brennan joined, dissented and indicated that the Sixth Amendment should apply to military courts-martial. Id. at 52 (Marshall, J., dissenting). Justice Marshall believed that "[a]pplication of the Sixth Amendment right to counsel to the military follow[ed] logically . . . from the modern right-to-counsel decision, in which the right ha[d] been held fully applicable in every case in which a defendant faced a conviction of a criminal offense and potential incarceration." Id. at 53. The dissenting
The court then considered the self-incrimination clause and the Due Process Clause of the Fifth Amendment and whether they provided for a constitutional guarantee of access to counsel.\textsuperscript{161} The court determined that the self-incrimination clause was of no help to Padilla because he did not face the prospect of trial.\textsuperscript{162} In considering whether there was a due process right to counsel, the court discussed \textit{Mathews v. Eldridge}.\textsuperscript{163} Ultimately, the court concluded that because there was a statutory basis for its decision, it would not

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Justices rejected the claim that military necessity justified the conclusion that the Sixth Amendment right to counsel was not applicable to military courts-martial proceedings. \textit{Id.} at 63.

159. 467 U.S. 180 (1984). In \textit{Gouveia}, the Supreme Court considered a claim by two prison inmates that they were entitled to legal counsel while being held in an Administrative Detention Unit (ADU) awaiting charges for murder. \textit{Id.} at 182-83. William Gouveia was serving time in a Federal Correctional Institute when he and a fellow inmate, Adolpho Reynoso were suspected of killing a third inmate. \textit{Id.} Gouveia and Reynoso were placed in the ADU where they stayed for nineteen months before being indicted on charges of first-degree murder. \textit{Id.} at 183. During those nineteen months in the ADU, Gouveia and Reynoso were not provided with legal counsel. \textit{Id.} They claimed that the nineteen-month confinement in the ADU, without appointment of counsel, violated their Sixth Amendment right to counsel. \textit{Id.} The Court stated that

\[ \text{[i]n a line of constitutional cases in this Court stemming back to the Court's landmark opinion in Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 [(1984)]}, \]

\[ \text{it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.} \]

\textit{Id.} at 187. The Court went on to state that the literal language of the Sixth Amendment right to counsel requires the existence of both a "criminal prosecutio[n]" and an "acccused." \textit{Id.} at 188. The Court indicated that the right to counsel extends to some "critical" pretrial proceedings, but these proceedings are ones in which the accused is confronted by the "procedural system, or by his expert adversary." \textit{Id.} at 189.


161. \textit{Id.} at 600-01.

162. \textit{Id.}

163. 424 U.S. 319 (1976). The Supreme Court in \textit{Mathews} considered a Fifth Amendment due process challenge to the termination of disability insurance benefits. \textit{Id.} at 323. Eldridge challenged the constitutional validity of the administrative procedures for assessing whether he had a continuing disability. \textit{Id.} at 324-25. The challenge was a procedural due process challenge because "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." \textit{Id.} at 332. The Court indicated that due process requires a meaningful opportunity to be heard. \textit{Id.} at 333 (citation omitted). The Court also indicated that due process is a flexible concept and the protections it affords are dictated by the particular situation. \textit{Id.} at 334 (citation omitted). As a result, the Court established a three-part balancing test to be applied when assessing the sufficiency of procedural due process requirements. The Court identified three distinct factors to be considered:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the
rely on a due process right to counsel. Therefore, the court ordered that Padilla may consult with counsel to aid in filing his habeas petition, but only under conditions to minimize the likelihood that he could use his attorneys as unwilling intermediaries for the transmission of information to others.

The last issue addressed by the court in Padilla was the standard that should be applied in determining whether the facts presented by the Government were sufficient to warrant a finding that Padilla was an unlawful combatant. The court utilized a deferential standard of whether the President had some evidence to support his findings that Padilla was an enemy combatant.

On January 9, 2003, the Government filed a motion to reconsider the order granting Padilla access to counsel in light of Hamdi II's decision. Despite reconsidering the motion, the court rejected the Government's request to deny Padilla access to counsel. The court noted that the facts of Padilla's case were sufficiently different than those in Hamdi II, so as not to warrant a reconsideration of the original order granting Padilla access to counsel.

2. Detention of Non-Citizens.—The capture and designation of enemy combatants has not been confined to just United States citizens captured during times of hostilities. In In re Yamashita, the Supreme Court considered whether a military commission could try a Japanese POW after the hostilities between the United States and Ja-
General Yamashita claimed that the United States could not try him because the hostilities with Japan had ended, and he claimed that admission of evidence in question would lead to a violation of the Due Process Clause of the Fifth Amendment.

The Court recognized that Congress had the right to create military commissions to try enemy combatants. Furthermore, the Court indicated that the rulings and judgments of military tribunals were not reviewable by it, and that upon an application for habeas corpus, the Court only considers whether the military commission has the lawful power to try the petitioner for the offense charged. Because the creation of military commissions was authorized, the Court rejected General Yamashita’s claim that he could not be tried by military commission after the hostilities between the United States and Japan had ended.

In his dissenting opinion, Justice Murphy expressed that “[t]he grave issue raised by this case is whether a military commission so established and so authorized may disregard the procedural rights of an accused person as guaranteed by the Constitution, especially by the due process clause of the Fifth Amendment.” According to Justice Murphy, all persons accused of a crime were guaranteed the right to due process and there was no exception for those accused of a war crime.

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172. Id. at 6. During World War II, General Yamashita commanded Japanese forces that allegedly committed various atrocities against the inhabitants of the Philippines. Id. at 1. The alleged atrocities included starvation, massacre, rape, murder, torture and wanton destruction. Id. at 29 (Murphy, J., dissenting). The case was before the Supreme Court because General Yamashita submitted an application for leave to file a petition for writ of habeas corpus and prohibition in the Supreme Court as well as a petition for writ of certiorari to review an order of the Supreme Court of the Philippines. Id. at 4-6. General Yamashita originally submitted an application for leave to file petition for a writ of habeas corpus and prohibition in the Supreme Court of the Commonwealth of the Philippines, but it was denied by that Court. Id.

173. Id. In addition, Yamashita claimed that admission of the depositions, affidavits, hearsay, and opinion evidence were prohibited by the 25th and 38th Articles of War (then codified at 10 U.S.C. §§ 1496, 1509) and the Geneva Convention. Id. The Court rejected the argument that 25th and 38th Articles of War applied to Yamashita as an enemy combatant reasoning that these Articles only applied to members of the armed forces of the United States. Id. at 21. Therefore, the Court rejected Yamashita’s argument that due process was violated in this case because he was not a member of the United States armed forces. Id. at 23.

174. Id. at 7 (citing Ex parte Quirin, 317 U.S. 1 (1942)). Congress’s power to create military commissions comes from Article I, section 8, clause 10 of the Constitution. Id.

175. Id. at 7-8.

176. Id. at 11-12. The Court indicated that in most instances the system of military justice would fail if a military commission could not try persons charged with violations of the law of war once the hostilities ended because it is only after the cessation of hostilities that many of the violations come to light. Id. at 12.

177. Id. at 26 (Murphy, J., dissenting).
crime or for someone possessing the status of an enemy belligerent.178 Justice Murphy indicated that he believed the rights guaranteed by the Fifth Amendment “belong to every person in the world” and that the rights “rise above the status of belligerency or outlawry.”179 The courts have struggled with the evolving issue of what protections should be given to an individual classified as an enemy combatant, especially United States citizens designated as enemy combatants. This struggle continues today as the courts are faced with the specific question of whether a United States citizen alleged to be an enemy combatant can be held indefinitely without charges or access to counsel.

II. Analysis

The recent cases arising from military operations in Afghanistan and the war on terrorism raise the issue of what safeguards and procedural protections does or should a United States citizen have once that person is detained and labeled an enemy combatant by the President.180 This issue captures the struggle between the government’s legitimate interest in protecting its citizens against future terrorist attacks and preserving the individual rights and liberties upon which our nation was founded.

The government has a compelling interest in protecting its citizens from terrorist attacks.181 Thus, at times it might be necessary to detain even United States citizens in furtherance of this goal. A habeas petition provides a sufficient safeguard against an improper or unlawful detention and United States citizenship status does not compel additional protections.182 Once one is labeled an enemy combatant by the President and detained, the laws of war apply and the rights

178. Id.
179. Id. In addition, Justice Murphy stated that “[t]hey survive any popular passion or frenzy of the moment.” Id. In a separate dissenting opinion, Justice Rutledge wrote to express his concern that the military commission could disregard the normal rules of evidence and follow its own procedures and rules of evidence. Id. at 47 (Rutledge, J., dissenting). Justice Rutledge also vehemently objected to denying General Yamashita the safeguards guaranteed by the Fifth Amendment. Id. at 79. The two due process safeguards that Justice Rutledge was most concerned about in the case were that a conviction must rest on facts and not mere rumor or report and that the charged party has a “fair chance to defend.” Id. Justice Rutledge believed that denying due process safeguards to an enemy belligerent could possibly lead to the denial of due process safeguards for others, “perhaps ultimately for all.” Id.
182. See, e.g., Ex parte Quirin, 317 U.S. 1 (1942).
afforded to that person emanate from the Geneva Convention.\textsuperscript{183} The Geneva Convention does not provide for counsel merely because of detention; and the Constitution should not be construed to guarantee a right to counsel in cases where an American citizen is detained and properly labeled an enemy combatant.\textsuperscript{184} The government has various ways to protect its interests and it is the role of the executive branch to determine how to use the powers it is given to accomplish its objectives.\textsuperscript{185}

Opposing this compelling government interest is the need to defend our constitutionally protected freedoms and liberties from unbridled executive action. The ability to label a United States citizen an enemy combatant and detain the citizen indefinitely without charges or access to counsel has no precedential support.\textsuperscript{186} The President can only detain a United States citizen pursuant to an Act of Congress.\textsuperscript{187} If such detention occurs, a citizen's constitutionally protected rights guarantee the ability to challenge such detention through a petition for writ of habeas corpus.\textsuperscript{188} To effectively petition the court, however, the detainee must be given access to counsel in order to properly bring issues and facts surrounding the detention before the court.\textsuperscript{189} The judicial branch, through Article III courts, is the appropriate body to guard against executive action that infringes on constitutional protections afforded to United States citizens. Because checks and balances are more, not less, important during times of national crisis, United States citizens designated as enemy combatants should retain these basic constitutional protections.

\textbf{A. In Defense of Detaining Enemy Combatants Without Granting Them Access to Counsel}

The United States government has taken several different approaches when dealing with American citizens who take up arms along side terrorists or otherwise support terrorist groups. One of the
more controversial approaches was that taken by the Fourth Circuit in *Hamdi III*.\(^{190}\) This author believes, however, that *Hamdi III* represents the most logical approach that the United States has taken in a terrorism case.\(^{191}\) The court appropriately limited Hamdi to a petition for writ of habeas corpus, restricted his access to counsel, and is validly holding him in detention until hostilities end.\(^{192}\) This approach maximizes the government's ability to gather intelligence and prevents the detainees from engaging in additional terrorist activities. Accordingly, the Court's decision in *Hamdi III* should be regarded as the proper explanation of what protections are afforded to United States citizens captured and labeled as enemy combatants.

1. *The Writ of Habeas Corpus Provides a Sufficient Safeguard Against Improper Detention.*—As several courts have recognized, in the event that a United States citizen is detained and labeled as an enemy combatant, the writ of habeas corpus is a sufficient safeguard to protect that person from an improper detention.\(^{193}\) In *Hamdi I*, before Yaser Esam Hamdi's father filed a valid habeas petition as next friend, the Public Defender for the Eastern District of Virginia and Christian Peregrim attempted to file habeas petitions as next friend for Hamdi.\(^{194}\) Similarly, in *Padilla v. Bush*, Padilla's attorney filed a habeas petition as his next friend.\(^{195}\) The habeas petitions specifically set forth chal-

\(^{190}\) *Hamdi III*, 316 F.3d 450 (4th Cir. 2003).

\(^{191}\) *Id.*

\(^{192}\) *Id.* at 460-61, 471, 476.

\(^{193}\) See, e.g., *Ex parte Milligan*, 71 U.S. 2, 113 (1866) (stating that "if a party is unlawfully imprisoned the writ of habeas corpus is his appropriate legal remedy") (citation omitted).

\(^{194}\) *Hamdi I*, 294 F.3d at 600. Although the Fourth Circuit determined that neither the Public Defender nor Peregrim had filed a valid next friend petition because they did not have a significant relationship with Hamdi, this example demonstrates how the next friend petition operates. *Id.* at 607. The fact that the Public Defender's petition was not valid does not lessen the argument that this was the proper method for Hamdi to challenge his detention. The court was well aware that Hamdi's father was "ready, willing, and able to file, and in fact [had] filed, a petition as Hamdi's next friend . . ." when it reached its conclusion. *Id.* at 600. Given the important nature of this issue, it is not clear whether the court would have reached the same conclusion if Hamdi's father had not filed or been able to file a next friend petition. The court stated,

> We are not saying that an attorney can never possess next friend standing, or that only the closest relative can serve as next friend. We simply note the contrast here between the Public Defender and Peregrim's suits on the one hand, and the action of the detainee's father on the other.

*Id.* at 607.

\(^{195}\) 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002). The court specifically pointed out that Padilla's case was different than Hamdi's because Padilla had a preexisting relationship with his attorney while Hamdi did not have a preexisting relationship with the Public Defender. *Id.* at 576-77. Therefore, Padilla's attorney could proceed as next friend. *Id.* at 578.
lenges to the government's authority to detain Hamdi and Padilla.\(^\text{196}\) Therefore, a procedure was available for the enemy combatant detainees to challenge their detention if they, or others on their behalf, believed it was unlawful. As the Supreme Court indicated in *Milligan*, the writ of habeas corpus is the proper method for challenging an improper or illegal detention.\(^\text{197}\) The habeas petition is proper because it brings the unlawful detention issue to an independent third party in the court.

Once a court grants leave to file a petition for writ of habeas corpus there is no reason to provide unmonitored access to counsel when doing so poses a national security concern.\(^\text{198}\) As the Supreme Court has repeatedly made clear, it does not consider the guilt or innocence of the petitioner in these types of cases; rather, it only considers whether the military commission was lawfully convened, and that it has the power to take a particular course of action.\(^\text{199}\) Therefore, a person who is challenging his detention gains no benefit by having unmonitored access to counsel because he is not preparing any type of defense as to his guilt or innocence in a criminal proceeding. In addition, even in cases where an enemy combatant detainee is preparing a defense against criminal charges, issues of national security could outweigh any benefits that might be derived from unmonitored access to counsel when certain safeguards are put into place.\(^\text{200}\)

The Geneva Convention does not compel the government to provide enemy combatant detainees with access to counsel. The Geneva

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197. *Milligan*, 71 U.S. at 113. The Court indicated that the habeas petition was the only way for Milligan to recover his liberty. *Id.* at 112. This implies that a person challenging his detention must do so through the habeas petition because there are no other methods available even if the person wishes to pursue a different course of action. *See id.* (indicating that Milligan was "powerless to do more" than file a habeas petition).

198. In *Padilla*, the Government contended that granting unmonitored access to counsel posed a national security concern because there was a possibility that Padilla could use his attorney to communicate with terrorists. *Padilla*, 233 F. Supp. 2d at 603. In *Hamdi II*, the Government indicated that Hamdi's continued detention was necessary for its intelligence gathering efforts and that an adversarial relationship with Hamdi would interfere with its intelligence gathering efforts. *Hamdi III*, 316 F.3d 450, 466 n.4 (4th Cir. 2003).

199. *Ex parte Quirin*, 317 U.S. 1, 25 (1942). Although there is no indication that a military commission was convened in Hamdi's case, Hamdi's capture and detention was affected under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). *Hamdi III*, 316 F.3d at 459-60. Therefore, on the petition for habeas corpus, the role of the court is to determine whether Hamdi can be detained under the Authorization for Use of Military Force, rather than under the authority of a military commission.

200. *See Padilla*, 233 F. Supp. 2d at 604 (determining that Padilla's discussions with his lawyers could be monitored by military personnel, provided that the personnel monitoring the discussions were insulated from any activity in connection with the petition, or in connection with a future criminal prosecution).
Convention Relative to the Treatment of Prisoners of War of August 12, 1949, (GPW) only affords a prisoner of war the right to counsel when he has been *charged* with a crime.\(^{201}\) Article 105 of the GPW states:

The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defense by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.\(^{202}\)

As the plain language of Article 105 makes clear, it only applies when the prisoner of war is subject to a trial.\(^{203}\) Therefore, it is implicit that the right to counsel only exists when the prisoner of war has been charged with a crime. Unmonitored access to counsel may be necessary to prepare a defense to criminal charges, but that is not the case in *Hamdi* or *Padilla* as neither was charged with a crime. In addition, Article 5 of the GPW states:

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. 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.\(^{204}\)

The writ of habeas corpus is sufficient to guarantee the rights the Geneva Convention affords an enemy combatant detainee.\(^{205}\) For ex-

\(^{201}\) The *Hamdi II* court did not directly address the question of whether or not Hamdi was a prisoner of war. *Hamdi II*, 296 F.3d 278, 283 (4th Cir. 2002). It is also unclear whether the Government contended that Hamdi is a prisoner of war or something different because the Government continually referred to Hamdi as an "enemy combatant" rather than a prisoner of war. *Id.* at 282. This author is treating the terms "enemy combatant" and "prisoner of war" as interchangeable.

\(^{202}\) 6 U.S.T. 3316, Article 105.

\(^{203}\) *See id.*

\(^{204}\) 6 U.S.T. 3316, Article 5. Article 4 of the GPW defines who may qualify for lawful combatant status. *See supra* note 90 (stating necessary qualifications).

\(^{205}\) There is a question as to whether the GPW provides for a private cause of action. In *Hamdi III*, the Fourth Circuit indicated that Article 5 of the GPW did not apply to Hamdi's case because the GPW is not self-executing and as such "does not 'create private rights of action in the domestic courts of the signatory countries.'" 316 F.3d 450, 468 (4th Cir. 2003) (citation omitted). *But see United States v. Noriega*, 808 F. Supp. 791, 794 (S.D. Fla. 1992) (indicating that the GPW is self-executing and provides a POW with a right of action in a United States court for a violation of its provisions). In either event, the GPW
ample, Article 5 of the GPW indicates that if there is doubt as to whether a person falls into one of the categories enumerated in Article 4, the person will be afforded the rights in the GPW until the person's status has been determined by a "competent tribunal." In the United States, the petition for a writ of habeas corpus is the proper process to bring this issue before the court. Unmonitored access to counsel is simply not necessary to challenge the detainee's status as an enemy belligerent, and the GPW makes no reference to the right to counsel when doing so.

In addition to the Geneva Convention, it is informative to examine the Lieber Code of 1863 to determine what rights a prisoner of war has today. The Lieber Code does not afford a prisoner of war the right to counsel. This omission is particularly informative because the Lieber Code controlled the conduct of the Union Army during the American Civil War. At the time of its making, the drafters of the Lieber Code recognized that United States citizens would become involved in the war against the United States. In such situations, they would be treated as either prisoners of war or charged with treason. In either event, there was no general right to counsel as a prisoner of war. This is instructive for two reasons. First, the Lieber Code served as a basis for many of the modern law of war treaties. Second, the
The drafters of the Lieber Code knew unequivocally that they would be dealing with United States citizens because the Code was enacted in 1863 and governed the Union Army during the Civil War. If there was a general right to counsel for United States citizens held by the United States as prisoners of war, one would certainly expect this right to be reflected in the Lieber Code. This right was not reflected in the Code; therefore, it is implicit that the right did not exist.

2. The Constitution Does Not Guarantee Access to Counsel for Enemy Combatants.—Even if the Geneva Convention does not apply, constitutional protections do not guarantee the right to counsel for an enemy combatant detainee.

a. The Sixth Amendment Does Not Provide Access to Counsel for an Enemy Combatant Detainee.—An enemy combatant detainee is not and should not be afforded the right to counsel to challenge his detention under the Sixth Amendment. The Sixth Amendment only guarantees access to counsel in criminal prosecutions. Because the United States has not criminally charged either Hamdi or Padilla, the Hamdi and Padilla courts have properly declined to find a constitutional guarantee of access to counsel in these cases. The Supreme Court has previously acknowledged that the Sixth Amendment does not apply to all types of proceedings. In Middendorf, the Court stated that "a proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial." The detention of Padilla and Hamdi is easily distinguishable from a "traditional civilian
criminal trial" because the United States has not charged them with any criminal violations and they are not standing trial.\textsuperscript{217}

In \textit{Gouveia}, the Supreme Court determined that two prison inmates did not have a Sixth Amendment right to counsel while being held in an Administrative Detention Unit (ADU) awaiting an indictment for murder.\textsuperscript{218} The Court considered the plain language of the Sixth Amendment and its purpose and concluded that the right to counsel attaches only at the initiation of adversarial judicial proceedings.\textsuperscript{219} The Court recognized that the Sixth Amendment "requires the existence of both a 'criminal prosecution' and an 'accused.'"\textsuperscript{220} The Court further indicated that the "core purpose" of the right to counsel "is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'"\textsuperscript{221} Hamdi and Padilla have not been charged with a crime, thus the two elements necessary to trigger the right to counsel are lacking. Therefore, the Sixth Amendment should not apply in either case nor should it apply in future cases where American citizens are labeled and detained as enemy combatants.

\textbf{b. The Fifth Amendment Does Not Compel Access to Counsel.}\textemdash Like the Sixth Amendment, the Fifth Amendment does not guarantee an American enemy combatant detainee access to counsel and certainly not unmonitored access to counsel.\textsuperscript{222} The Due Process Clause of the Fifth Amendment does not guarantee an enemy combatant detainee access to counsel because due process is a flexible concept that is dictated by the circumstances of a particular set of facts.\textsuperscript{223} The Supreme Court has recognized that due process is not a static con-

\begin{footnotesize}
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\item \textsuperscript{217} See Hamdi \textit{III}, 316 F.3d 450, 465 (4th Cir. 2003) (stating that the protections afforded in criminal prosecutions do not translate well to the arena of armed conflict); \textit{Padilla}, 235 F. Supp. 2d at 569 (stating that Padilla is being held without formal criminal charges).
\item \textsuperscript{218} \textit{Gouveia}, 467 U.S. at 187. The inmates were held in the ADU for more than nineteen months and each requested access to counsel during that time. \textit{Id.} at 186.
\item \textsuperscript{219} \textit{Id.} at 189.
\item \textsuperscript{220} \textit{Id.} at 188 (alteration in original).
\item \textsuperscript{221} \textit{Id.} at 188-89 (alteration in original) (citation omitted).
\item \textsuperscript{222} The Fifth Amendment states in pertinent part: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .
\item \textsuperscript{223} Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (citation omitted).
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cept; rather, it is a balance among several factors. The factors are: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." In these cases, courts should strike a balance between an enemy combatant detainee's interest in having unmonitored access to counsel and the government's interest in protecting national security and the welfare of its citizens.

Hamdi argued that he could best challenge the legality of his detention if he had unmonitored access to counsel. Admittedly, Hamdi's interest in being free from an unlawful detention is very strong. However, he can challenge his detention through a petition for writ of habeas corpus even without unmonitored access to counsel. As previously discussed, a petition for writ of habeas corpus is a sufficient safeguard to protect his interest and thus satisfies due process. Giving Hamdi unmonitored access to counsel in no way enhances his ability to challenge his detention because the court is not considering his guilt or innocence. Therefore, unmonitored access to counsel in this context is unnecessary for the purposes asserted by Hamdi.

Allowing Hamdi to have unmonitored access to counsel, however, could directly harm the government's interest in protecting the nation against future acts of terrorism. As the Hamdi court stated, "[the] government has no more profound responsibility than the protection of Americans, both military and civilian, against additional un-

224. Id at 334-35.
225. Id. at 335.
226. See Hamdi I, 294 F.3d 598, 602 (4th Cir. 2002) (explaining that the district court ordered unmonitored access to counsel "because of fundamental justice provided under the Constitution of the United States"). In Hamdi III, however, the court did not address the issue of unmonitored access to counsel because that issue was not raised on appeal. 316 F.3d 450, 466 n.4 (4th Cir. 2003). Although Hamdi did not raise the issue of unmonitored access to counsel on appeal, this issue is still relevant to the ongoing debate and is included for that reason.
227. See Ex parte Milligan, 71 U.S. 2, 113 (1866).
228. See supra notes 193-200 and accompanying text (discussing the sufficiency of the habeas petition).
229. See In re Yamashita, 327 U.S. 1, 8 (1946) (stating that the court does not consider a petitioner's guilt or innocence in a habeas petition).
One of the government’s primary interests in preventing Hamdi from meeting with counsel is its ability to gather intelligence. If Hamdi has the opportunity to meet with counsel, it is possible that counsel will advise him not to cooperate with authorities if the information would be used against him at a later proceeding. This will directly impact the government’s ability to gather intelligence that could aid in the battle against al Qaeda and the other terrorist organizations. Hamdi also could take advantage of unmonitored access to counsel to pass messages to terrorists. Balancing the government’s strong interests in this case against Hamdi’s interests, the court properly denied him unmonitored access to counsel.

In Padilla, the Government similarly argued against granting Padilla access to counsel due to concerns that Padilla could use his attorney to pass messages to al Qaeda operatives and that the presence of counsel would interfere with interrogations. The court determined that under these circumstances, these concerns were not strong enough to deny Padilla access to counsel. However, the court explained that it was not granting Padilla a general right to counsel. Therefore, Padilla’s counsel would not be able to interfere with interrogations. The court relied on the fact that Padilla had already met in private with his attorney on several occasions after he was taken into custody on the material witness warrant. The court determined that military authorities could monitor Padilla’s meetings with counsel so long as the monitoring personnel were not involved in any future

231. Hamdi II, 296 F.3d 278, 283 (4th Cir. 2002).
232. Id. at 280.
233. See, e.g., Lynne Stewart Indictment, 02 Crim. 395 (discussing the potential use of counsel to contact other terrorists), available at http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf (last visited Dec. 29, 2002). Sheik Abdel Rahman’s defense attorney, Lynn Stewart, was indicted for conspiring to provide material support or resources to designated foreign terrorist organizations, seditious conspiracy, and other charges because she is alleged to have assisted Rahman in communicating with other terrorists after his incarceration. Id. Rahman was convicted of seditious conspiracy, which was related to the 1993 World Trade Center bombing. Id. The Padilla court, however, indicated that this was not a concern. See Padilla, 233 F. Supp. at 605 (indicating that Padilla’s situation differed from Hamdi’s because Padilla had access to counsel before his designation as an enemy combatant, and thus an order barring access to counsel would have been ineffective).
235. Id. at 603-04.
236. Id. at 603.
237. Id.
238. Id. at 604. Therefore, any damage that might result from allowing Padilla to meet with counsel could already have occurred. Id.
Based on these facts, the court recognized that granting Padilla access to counsel for the purpose of presenting facts in connection with the habeas petition would not result in the harm feared. Thus, the Padilla court applied the Mathews balancing test in favor of limited access to counsel for Padilla.

The result in Padilla does not support an argument that Hamdi should have been granted access to counsel. First, the President did not initially designate Padilla as an enemy combatant. Hamdi, on the other hand, was one of many enemy combatants taken into custody in Afghanistan fighting against American and allied forces. Second, unlike Padilla, Hamdi had not met with counsel previously. Third, the Padilla court specifically permitted military personnel to monitor the meetings between Padilla and his counsel. In Hamdi, however, the district court strictly forbid military or any other government personnel from monitoring Hamdi’s meetings with counsel. Finally, the Padilla court, unlike the district court in Hamdi, granted Padilla access to counsel only for the purpose of presenting facts at the habeas petition hearing. Therefore, the result in Padilla supports neither a contrary result in Hamdi, nor the notion that the court should provide enemy combatants access to counsel in all cases. Rather, the courts must continue to weigh the government’s interest against those of the enemy combatant detainees, just as the Hamdi III and Padilla courts did.

c. United States Citizenship Does Not Affect the Constitutional Analysis of Access to Counsel.—Courts have routinely rejected the argument that an enemy combatant’s United States citizenship affords him rights beyond those afforded to other prisoners of war. Therefore, an enemy combatant detainee’s status as a United States citizen does

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239. Id.
240. Id.
241. Id. at 568-69, 571. Padilla was taken into custody as a material witness on May 8, 2002. Id. at 568-69. The Government did not reveal that the President had designated Padilla an enemy combatant until June 9, 2002. Id. at 571.
244. Id. at 604.
245. Hamdi II, 296 F.3d at 281.
247. See In re Territo, 156 F.2d 142, 145 (9th Cir. 1946) (finding no support for the proposition that United States citizenship affects the status of a prisoner of war captured on the field of battle); see also Ex parte Quirin, 317 U.S. 1, 37 (1942) (noting that “[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war”).
not guarantee him unmonitored access to counsel. An enemy combatant detainee must rely on the Geneva Convention, rather than the Constitution, for the rights he has as a prisoner of war. As discussed above, the GPW provides access to counsel when a country has charged a prisoner of war with a crime. Article 4 of the GPW, however, does not make a distinction between citizen and non-citizen personnel subject to capture as prisoners of war. This language makes implicit that a detainee will not have any additional rights, even if he is a citizen of the country detaining him.

d. Indefinite Length of Detention Is Not Unconstitutional.—In Padilla, the court, relying on Supreme Court precedent, specifically rejected an argument that an indefinite period of detention is unconstitutional. The court discussed civil commitments of persons under Kansas' Sexually Violent Predator Act and concluded there was no per se ban on detentions that are indefinite in nature. Therefore, even though not all enemy combatants' detentions end at a predetermined point, they are nonetheless proper. The court specifically left open the question of when an indefinite detention might become “too long.” The court indicated that it would not address this question until a credible argument could be made that a detention was too long based on the “sheer duration of his confinement or the diminution or outright cessation of hostilities.” But the court properly concluded that an indefinite detention is not per se unconstitutional.

3. The Government's Treatment of Other United States Citizens Captured in Afghanistan Is Irrelevant.—The government has treated Hamdi differently than at least one other United States citizen who

248. See Padilla, 233 F. Supp. 2d at 596, 603 (stating that the President can detain United States citizens as unlawful enemy combatants and permit military personnel to monitor Padilla's meetings with his attorney). See supra notes 40-43 and accompanying text (discussing the distinction between lawful and unlawful enemy combatants).

249. See generally Territo, 156 F.2d at 142 (applying the Geneva Convention to determine Territo's rights).

250. GWP, supra note 88, at Article 105.

251. Id. at Art. 4. Article 4 specifies who is subject to capture as a prisoner of war. Id.

252. See Padilla, 233 F. Supp. 2d at 591 (“Moreover, insofar as the argument assumes that indefinite confinement of one not convicted of a crime is per se unconstitutional, that assumption is simply wrong.”).

253. Id. In Kansas v. Hendricks, 521 U.S. 346 (1997), the Supreme Court upheld a Kansas statute that permitted indefinite civil commitment of individuals who were likely to commit violent sexual acts. Id.

254. Id.

255. Id.
was captured on the battlefield in Afghanistan. This difference in treatment is irrelevant, however, because the government can protect its interests in more than one way. Therefore, this differential treatment should not be used to argue that all enemy combatants should be treated in the same way. In one instance, the government may choose to use criminal prosecution to protect its interests, while in another instance it can decide to use the laws of war to protect its interests. In Hamdi’s case, the government believed that the prospect of gathering intelligence was important, so it chose to detain Hamdi as an enemy combatant rather than to pursue criminal charges against him. As previously discussed, charging Hamdi criminally would have necessitated giving him access to counsel, which most likely would have hampered the government’s ability to gather intelligence.

The fact that the government elected to treat Hamdi, Padilla, and Lindh differently lends support to the government’s actions in these cases. Where there is little or no intelligence gathering potential, the government can choose to charge criminally rather than to detain. In Hamdi’s case, the government obviously believed the potential to

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256. See United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002). Lindh is a United States citizen who the United States captured on the battlefield in Afghanistan. Id. at 545. The Government charged Lindh, in a civilian court, with various criminal offenses related to his activities while fighting for al Qaeda. Id. at 547.

257. See id. at 566 (listing nine factors that play important roles in the decision to prosecute). This is analogous to the Government’s use of plea bargaining. In some instances the government will permit a defendant to plea to a lesser crime or even drop criminal charges altogether in exchange for information that will facilitate further criminal prosecutions. See United States v. Ruiz, 122 S. Ct. 2450, 2457 (2002) (recognizing that plea bargaining is a beneficial part of the criminal justice process). There is seldom complaint from either the defense attorneys or prosecution in these cases because it serves the interests of both parties. See id. Plea bargaining helps defense attorneys get better deals for their clients and allows the prosecution to dispose of cases.

258. The Constitution compels the President to “preserve, protect and defend the Constitution of the United States.” U.S. CONST. art. II, § 1, cl. 8. Therefore, the President should be able to exercise his authority as commander-in-chief to designate individuals as unlawful enemy combatants if it is necessary to protect our national security. In addition, the Authorization for use of Military Force provides the President with authority to do what is necessary to prevent future terrorist attacks. Pub. Law No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

259. Hamdi II, 296 F.3d 278, 280 (4th Cir. 2002).

260. See supra note 233 and accompanying text (discussing what could happen if the court granted Hamdi access to counsel).

261. United States officials recognized that Lindh held a low-level position within al Qaeda and would not be a valuable source of intelligence. Richard Sisk, Taliban Yank’s Held Inside Shipping Bin, N.Y. DAILY NEWS, Dec. 12, 2001, at 8. Padilla, on the other hand, could potentially offer valuable intelligence that could aid the government in preventing future terrorist attacks. During a press briefing, Secretary of Defense Donald Rumsfeld summarized how the government was dealing with Padilla:
gather intelligence outweighed the benefit of charging Hamdi criminally. This does not suggest any sort of evil or improper motive by the government. Rather, it reflects the government’s attempt to protect American citizens against similar future attacks. In the future, the government should maintain this liberty of choice and not be pigeonholed into treating all enemy combatant detainees the same.

As the Geneva Convention makes clear, prisoners of war are not afforded right to counsel solely because they are captured. Nor does the Constitution afford an enemy combatant detainee the right to counsel where the United States has not charged the detainee with a crime. United States citizenship status does not give an enemy combatant the right to counsel. There are sufficient safeguards in place to protect enemy combatant detainees from an improper or unlawful detention. The detainee or a next friend can file a petition for a writ of habeas corpus to challenge the detention. The Supreme Court has long recognized that a writ of habeas corpus is the proper method to challenge a detention when the detainee believes it is improper. The Hamdi III court acknowledged these facts and properly limited Hamdi to the writ of habeas corpus to challenge his detention. Nothing else was required, nor should it be.

**B. Concerns and Implications for Individual Rights and Liberties—A Defense of Constitutional Protections for “Enemy Combatants”**

The terrorists that attacked our nation on September 11, 2001 tragically took many innocent American lives. However, in the haste to bring these criminals to justice, the President has overstepped his authority and directly dismissed the constitutionally protected freedoms and liberties of United States citizens. The President designated several United States citizens captured in response to the terrorist at-
tacks as "enemy combatants," and, thus, has detained them indefinitely without charges or access to counsel. To justify these detentions, the courts and the President have misapplied and inappropriately relied on the Supreme Court's decision in *Quirin*, a faulty judicial opinion based upon a predetermined outcome. Furthermore, the law states that a United States citizen cannot be imprisoned or otherwise detained by the Government unless charged with violating an Act of Congress. To date, Congress has not authorized the President to detain United States citizens without charges and no formal charges have been filed against these enemy combatants. Such unlawful detentions, if they do occur, nevertheless still require that a citizen be able to challenge his detention through a habeas petition and be given access to counsel to properly petition the courts.

In addition, the legal precedent states that with respect to United States citizens there are only two ways to try "enemy combatants," through Article III courts or military commissions. The judicial branch, specifically Article III courts, is the appropriate body to protect against executive branch infringement on individual rights and freedoms. Therefore, Article III courts, which maintain inherent constitutional protections, are the proper fora to prosecute and severely punish United States citizens who commit unlawful actions against the United States.

1. The Court Misapplied *Quirin*'s Enemy Combatant Designation to Justify Detention of United States Citizens.—Designating a person as an enemy combatant allows the President to detain a United States citizen indefinitely without charges or access to counsel. A threshold question that warrants consideration is—what is an enemy combatant? The courts and the President in recent cases addressing this issue have relied on *Quirin*, a World War II-era case, to define the term. However, the Supreme Court in *Quirin* based its opinion on inherently flawed and forced reasoning. The *Quirin* Court also ignored its earlier decision in *Milligan*, which stated that a United States citizen cannot be tried before a military tribunal if Article III courts are

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271. *See Hamdi II*, 296 F.3d at 283.
Furthermore, the Quirin decision does not stand for the proposition that the Government can detain a United States citizen indefinitely without charges or access to counsel.275 The Quirin decision, thus, is an inherently flawed basis to support the President's designation of a United States citizen as an enemy combatant.

In addition, the courts in Hamdi and Padilla expanded the holding of Quirin to justify the detention of Hamdi and Padilla indefinitely without charges or access to counsel.276 Although the term enemy combatant has no clear definition, the courts have inappropriately used the label to allow the President the ability to classify and detain United States citizens without constitutional protections. This undefined designation creates a dangerous scenario where executive power can trump individual rights and liberties.

In Quirin, the Supreme Court used the term enemy combatant and explained it by dividing the designation into two subcategories—lawful and unlawful combatants.277 The Court noted that "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."278

Courts have interpreted this definition by employing four criteria to determine the lawfulness of an armed force: whether the force (1) is commanded by a person responsible for his subordinates, (2) has a fixed distinctive emblem recognizable at a distance, (3) carries arms openly, and (4) conducts their operations in accordance with the laws and customs of war.279 In Quirin, the Court seemed to focus more heavily on the second element—whether the combatant was in uniform.280 The German saboteurs in that case were captured on Ameri-

274. Quirin, 317 U.S. at 45; Ex parte Milligan, 71 U.S. 2, 123 (1866).
276. Hamdi III, 316 F.3d at 469; Padilla, 233 F. Supp. 2d at 594-96.
278. Id.
279. GPW, supra note 88, at art. 4(2); Padilla, 233 F. Supp. 2d at 592.
280. Quirin, 317 U.S. at 31. The Court stated: The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the
can soil and not in enemy uniform, plotting to commit severe destructive acts in the United States.\textsuperscript{281} Therefore, the Court found the saboteurs to be unlawful enemy combatants and held that the government could detain and try them in military tribunals, even though one of the men was a United States citizen.\textsuperscript{282}

In so holding, the Court overlooked \textit{Milligan}, which specifically held that a United States citizen cannot be tried in a military tribunal if Article III courts are available.\textsuperscript{283} By ignoring this precedent, the Court fashioned a decision to justify the predetermined, unfortunate outcome. The saboteurs in \textit{Quirin} had been hung by order from a military tribunal prior to the Court's opinion.\textsuperscript{284} Therefore, the Court was forced into crafting a decision that justified trying and punishing a United States citizen in a military tribunal.\textsuperscript{285} The \textit{Quirin} decision, therefore, stands for the inappropriate proposition that a United States citizen captured during a time of war and labeled an enemy combatant may be tried in a military tribunal.\textsuperscript{286} The \textit{Hamdi} and \textit{Padilla} courts' sole reliance on \textit{Quirin} to justify the labeling and treatment of Hamdi and Padilla as enemy combatants is erroneous.\textsuperscript{287} Furthermore, nothing in the \textit{Quirin} decision supports the indefinite detention of a United States citizen labeled an enemy combatant or complete denial of access to counsel.\textsuperscript{288} In fact, the government gave

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statue of prisoner of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.
\end{quote}

\textit{Id}.\textsuperscript{281} \textit{Id}. at 21.

\textit{Id}. at 37-38, 47. Haupt, one of the saboteurs, argued that he obtained United States citizenship when he was five years old. \textit{Id}. at 20. The Government, however, argued that Haupt renounced or abandoned his citizenship through his actions by receiving training and payments from the German government to conduct acts of sabotage in the United States. \textit{Id}. The Court did not resolve the citizenship issue because it instead found the saboteurs to be unlawful enemy combatants subject to military tribunals. \textit{Id}. at 20, 37, 41.

\textit{Id}. \textit{Ex parte Milligan}, 71 U.S. 2, 123 (1866).

\textit{Id}. Lazarus, supra note 273. The \textit{Quirin} Court convened a special session to hear the oral argument on the legality of the tribunal. \textit{Id}. As a result, the Court concluded that the charges against the saboteurs were susceptible to trial by a military court, and that the military court was lawfully constituted. \textit{Id}. However, the ruling was announced prior to the Court's written opinion. \textit{Id}. Chief Justice Stone found the task of justifying the Court's ruling difficult, but there was no turning back because the government already executed a few of the saboteurs. \textit{Id}. Justice Douglas later commented that "'experience with [the \textit{Quirin} case] indicated . . . to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble.'" \textit{Id} (omission in original).

\textit{Id}.\textsuperscript{285} \textit{Quirin}, 317 U.S. at 47.


\textit{Id}. Sonnett et al., supra note 275, at 4.
all of these protections to the Quirin saboteurs.\textsuperscript{289} Therefore, this inappropriate inferential leap in Hamdi and Padilla leads us down the slippery slope of unfettered executive discretion without appropriate safeguards and protections for United States citizens.

In both Hamdi and Padilla, the courts relied heavily on Quirin in their analysis.\textsuperscript{290} However, the issue presented in Hamdi and Padilla is different from that presented in Quirin.\textsuperscript{291} In Quirin, the issue was whether a United States citizen designated as an enemy combatant could be tried by a military tribunal.\textsuperscript{292} In contrast, Hamdi and Padilla focus on whether Hamdi and Padilla are enemy combatants and whether the government can hold them without trial.\textsuperscript{293} In essence, the government has coined the term "enemy combatant" without a clear definition of what an enemy combatant is. It is unconscionable for United States citizens to be detained without sufficient procedures to challenge such detentions and without proper checks by the other branches of government. Therefore, without any clear description of an enemy combatant, it is possible that any United States citizen could be named an enemy combatant and detained indefinitely by the government. Furthermore, once detained a citizen can be held incomunicado, without charges or access to counsel, and denied meaningful judicial review of such detention all on the basis of an undefined Presidential designation.\textsuperscript{294}

2. A United States Citizen Cannot Be Detained Indefinitely.—A United States citizen cannot be detained by the government without authorization from Congress, and neither the Joint Resolution authorizing the use of force nor any laws enacted in response to the terrorist

\textsuperscript{289} Id.

\textsuperscript{290} Hamdi III, 316 F.3d at 474-77. The Hamdi III court stated that "[t]he Quirin principle applies here. One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such." Id. at 475; see also Padilla, 233 F. Supp. 2d at 594-96. Ironically, the Padilla court noted that the issue in Quirin—whether the saboteurs could be tried by military tribunal—was not the same as the issue presented in Padilla—whether Padilla could be held without trial. Id. at 594. However, the court still relied on Quirin in distinguishing between lawful and unlawful combatants and the different treatment to which each is potentially subject. Id.

\textsuperscript{291} Id.

\textsuperscript{292} Ex parte Quirin, 317 U.S. 37-38, 47 (1942).

\textsuperscript{293} Hamdi III, 316 F.3d at 467-69, 474-75; Padilla, 233 F. Supp. 2d at 594.

\textsuperscript{294} See Michael Greenberger, The Law of Counterterrorism Wants You!, 35 Md. B.J. Nov.-Dec. 2002, at 13-14 (hypothesizing that a United States citizen could be declared an enemy combatant and taken into custody by the FBI on the basis of a false report from a third party that the citizen had access to plans leading to terrorism. While detained as an enemy combatant the innocent citizen is denied traditional constitutional rights similar to Hamdi and Padilla).
attacks on September 11, 2001 authorize the detention of a United States citizen as an "enemy combatant." In *Hamdi* and *Padilla*, the Government argued that an alleged enemy combatant, even a United States citizen, can be detained indefinitely without charges or access to counsel. However, Title 18, section 4001(a) of the United States Code clearly states that the United States cannot detain a citizen except pursuant to an Act of Congress. Therefore, without an Act of Congress, the Executive’s continued detention of Hamdi and Padilla, both United States citizens, is unlawful. As the proper check to the President’s actions, the courts should have been cognizant of the fact that there had been no congressional authorization to detain Hamdi or Padilla. In addition, the courts should have done their job to prevent these unlawful detentions by allowing these United States citizens access to counsel and access to Article III courts to challenge the President’s unjust detentions.

Congress enacted section 4001(a) in 1971 in response to the Emergency Detention Act of 1950, which enabled the United States to detain people, even American citizens, without a trial if the President declared an internal security emergency. The House Report accompanying the Act noted much debate and found it significant that the Attorney General recommended having the Act repealed. Therefore, the House Judiciary Committee emphasized Congress’s intent in the revised statutory provision:

> [I]t is not enough merely to repeal the Detention Act . . . . Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority. . . . The Committee believes that

295. Sonnett et al., *supra* note 275, at 5.
296. *Hamdi II*, 296 F.3d 278, 283 (4th Cir. 2002); *Padilla*, 233 F. Supp. 2d at 574.
299. *Id.* at 1437. The Attorney General was responsible for dealing with subversion and the Act would have given the Attorney General more freedom to institute such responsibility. *Id.* Therefore, it is significant that the Attorney General, who would have gained more power under the Act, did not support the Act and actually recommended its repeal. *Id.* In a letter to Congress in 1969, the Justice Department acknowledged, "‘the continuation of the Emergency Detention Act is extremely offensive to many Americans. . . . [R]epeal of this legislation will allay the fears and suspicions . . . of many of our citizens.’" *Id.* (quoting a letter from Deputy Attorney General Kleindienst to Chairman Celler of the House Judiciary Committee). The letter went on to state that "‘[the] benefit outweighs any potential advantage which the Act may provide in a time of internal security emergency.’" *Id.* (same).
imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists.\textsuperscript{300} Congress recognized that in times of national emergency, detention of United States citizens may be necessary.\textsuperscript{301} However, Congress also recognized that a statute that gives the President so much unchecked power could cause extreme discomfort, fear, and resentment by citizens, not to mention, the potential unconstitutional validity of such a statute.\textsuperscript{302} Congress specifically weighed the competing interests and adopted a law that did not give unbridled power to the President, but instead left it to Congress to decide when the government could detain a United States citizen.\textsuperscript{303}

The first and only Supreme Court case to address section 4001(a) was \textit{Howe v. Smith}.\textsuperscript{304} In this case, Vermont closed its only maximum-security facility and contracted with the United States to house, in federal prisons, those prisoners committed to the Vermont maximum-security prison.\textsuperscript{305} Howe challenged his transfer on the ground that the federal government lacked the authority to hold him in a federal penitentiary.\textsuperscript{306} In a footnote within the majority opinion, Chief Justice Burger declared that "the plain language of § 4001(a) proscribes detention of any kind by the United States, absent a congressional grant of authority to detain."\textsuperscript{307} However, the Court found that in this situation there was adequate support that Congress had authorized such transfers.\textsuperscript{308} Thus, the Supreme Court read section 4001(a) broadly to apply to any and all United States citizens who were detained by the United States government, under any circumstances.\textsuperscript{309}

\begin{itemize}
\item \textsuperscript{300} \textit{Id.} at 1438.
\item \textsuperscript{301} \textit{Id.}
\item \textsuperscript{302} Id. at 1437-38.
\item \textsuperscript{303} \textit{Id.} at 1438.
\item \textsuperscript{304} 452 U.S. 473 (1981).
\item \textsuperscript{305} \textit{Id.} at 475. Robert Howe was a Vermont prisoner charged with murder and sentenced to life imprisonment and, upon conviction, he was transferred to the federal prison system. \textit{Id.} at 476.
\item \textsuperscript{306} \textit{Id.} at 477-78.
\item \textsuperscript{307} \textit{Id.} at 479 n.3.
\item \textsuperscript{308} \textit{Id.} at 487.
\item \textsuperscript{309} Neal R. Sonnett et. al., \textit{Am. B. Ass'n, Task Force on Treatment of Enemy Combatants, Preliminary Report}, Aug. 8, 2002, at 12, revised by Sonnett et al., supra note 275, at 5 (allowing for concessions to be made in order to have report pass ABA House of Delegates).
To date, there has been no Congressional authorization to allow for the detainment of either Hamdi or Padilla.\textsuperscript{310} The Government relies on the September 18, 2001 Joint Resolution for the Authorization for Use of Military Force, which provides “the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . .”\textsuperscript{311} However, no language in the statute indicates that the President can detain a United States citizen indefinitely without charges or the right to counsel.\textsuperscript{312}

Additionally, a statute passed one month later, the USA Patriot Act, indicated Congress’s intent regarding detention.\textsuperscript{313} The Patriot Act permits detention of aliens, not citizens, suspected of terrorism, but only for a period of seven days.\textsuperscript{314} After this time, the Government must charge the alien with either an immigration or criminal violation.\textsuperscript{315} It seems apparent that Congress would at least afford these same protections to a United States citizen suspected of terrorism, if it would grant them to foreign aliens.

In response to this argument, the Padilla court stated that it would not read the Patriot Act to explain the presidential powers under the Joint Resolution.\textsuperscript{316} However, the Padilla court misinterpreted the point of this argument. Without any clear indication from

\begin{itemize}
\item \textsuperscript{311} 115 Stat. at 224.
\item \textsuperscript{312} See \textit{id.} In addition, the Congressional Record is silent on the issue of detentions. \textit{See} S. J. Res. 23 and H. J. Res. 64. This silence is an indication that neither the House nor the Senate contemplated the remote idea of detaining United States citizens absent constitutional protections. Had members of Congress thought that the government could detain American citizens as enemy combatants, it is hard to imagine that this Joint Resolution would have passed unanimously.
\begin{itemize}
\item Commencement of Proceedings—The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.
\end{itemize}
\textit{Id.} at 351. Section 412(a)(6) states:
\begin{itemize}
\item Limitation on Indefinite Detention—An alien detained solely under paragraph (1) who has not been removed under section 241(a)(1)(A), and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.
\end{itemize}
\textit{Id.}
\item \textsuperscript{314} \textit{Id.}
\item \textsuperscript{315} \textit{Id.}
\item \textsuperscript{316} Padilla v. Bush, 233 F. Supp. 2d 564, 596 (S.D.N.Y. 2002).
\end{itemize}
Congress regarding detention of United States citizens, the Patriot Act was only being used as potential insight into Congress's intent regarding United States citizen detentions.\textsuperscript{317} Regardless, the Joint Resolution, which the court relied upon, does not give the President the authority to detain a United States citizen.\textsuperscript{318} Even if the Joint Resolution did give the President the authority to detain United States citizens, it did not unilaterally strip citizens of all their constitutional protections to challenge these detentions.

3. The Constitutionally Appropriate Review of an Enemy Combatant's Detention Is Through a Habeas Corpus Petition with the Right to Counsel.—A fundamental constitutional safeguard is the writ of habeas corpus, which allows judicial review of the legality of a person's arrest or detention.\textsuperscript{319} In both Hamdi and Padilla, the courts agreed that habeas petitions were the appropriate mechanisms for the prisoners to challenge their detentions.\textsuperscript{320} However, only the Padilla court appropriately granted access to counsel—an obvious necessity for detainees held incommunicado.\textsuperscript{321} Furthermore, courts can grant detainees counsel with appropriate safeguards, such as limiting factual presentation to information only associated with the habeas petition or requiring heightened security clearance of counsel as recognized in Padilla, because it will not interfere with the government's intelligence gathering. It is imperative that Hamdi and Padilla have access to counsel to prepare a habeas petition that will properly defend against their unlawful detentions.

The habeas petition is an essential safeguard of the Constitution, allowing for judicial review of the lawfulness of a person's arrest or detention.\textsuperscript{322} The writ is the "fundamental instrument for safeguarding individual freedom against arbitrary and lawless . . . action."\textsuperscript{323} Historically, it was used to question detention without

\textsuperscript{317} Id.
\textsuperscript{318} 115 Stat. at 224.
\textsuperscript{319} See U.S. CONST. art. I, § 9, cl. 2.
\textsuperscript{320} Both Hamdi and Padilla have filed habeas petitions with the court, through their father and attorney, as next friend, respectively, in order to challenge the lawfulness of their detentions. \textit{Hamdi III}, 316 F.3d at 450, 464-65, 472 (4th Cir. 2003); \textit{Padilla}, 233 F. Supp. 2d at 605.
\textsuperscript{321} In \textit{Hamdi III}, the court inappropriately failed to discuss the issue of right to counsel in its habeas corpus analysis, and no counsel has ever been given to Hamdi. 316 F.3d at 472-73.
\textsuperscript{322} See U.S. CONST. art. I, § 9, cl. 2.
Yet, the Government argued that Hamdi did not have a right to any meaningful judicial review against the President's actions because detaining Hamdi was solely within the President's power as Commander-in-Chief. The pre-eminent role of the habeas petition, however, is recognized in the Constitution as providing that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended . . . .” Therefore, the courts do have the ability to review Hamdi's and Padilla's detentions. Furthermore, the courts should review Hamdi's and Padilla's detention to insure that “miscarriages of justice within its reach are surfaced and corrected.” In *Harris v. Nelson*, the United States Supreme Court stated that:

There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.

In addition, this judicial power of inquiry is plenary and held solely by the judicial branch.

Both the Fourth Circuit and the Southern District of New York recognized that Hamdi's and Padilla's habeas petitions were the appropriate mechanisms for them to challenge their detentions, but only the *Padilla* court ordered the essential access to counsel needed.

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324. *Ex parte Milligan*, 71 U.S. 2, 113 (1866). The majority opinion quoted Chief Justice Taney in *Cohens v. Virginia*, 19 U.S. 264 (1821), where he noted that “if a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty.”


328. *Id.* at 292.

329. *Id.* Thus, the *Harris* Court held that “[a]t any time in the [habeas corpus] proceedings, when . . . necessary . . . in order that a fair and meaningful evidentiary hearing may be held so that the court may properly ‘dispose of the matter as law and justice require’ . . . .” *Id.* at 300 (citing 28 U.S.C. § 1651); see also *Ex parte Milligan*, 71 U.S. 2, 110 (1866) (explaining that the court can choose to waive the issuing of the writ and consider the facts of the case to discharge the prisoner).

330. *Hamdi III*, 316 F.3d 450, 464-65, 472 (4th Cir. 2003); *Padilla*, 233 F. Supp. 2d at 605. In *Hamdi II*, the Fourth Circuit did not give the indication that habeas review should be allowed, but finally by *Hamdi III* the court recognized that the writ of habeas corpus extended to Hamdi's detention. *Compare Hamdi II*, 296 F.3d at 283-84 (stating judicial inquiry should not overburden “military decision-making with the panoply of encumbrances associated with civil litigation”), and *Hamdi III*, 316 F.3d at 472 (recognizing that it is appropriate for a citizen to challenge unlawful detainment through a habeas petition).
to petition the courts effectively.\textsuperscript{331} It is impossible to expect an incommunicado detainee to have the necessary resources and knowledge to properly challenge his detention. Therefore, granting a detainee the ability to file a habeas petition is an empty remedy without the assistance of counsel.

Both Hamdi and Padilla, through next friends, petitioned the courts, pursuant to 28 U.S.C. section 2241.\textsuperscript{332} This section grants district courts the power to issue writs of habeas corpus.\textsuperscript{333} Section 2243 outlines the procedures to be followed in section 2241 cases, which includes “[t]he applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.”\textsuperscript{334} The statute allows detainees to obtain evidence through the use of depositions, affidavits, or interrogatories.\textsuperscript{335} Therefore, it is clear that Congress intended that a petitioner for habeas review under section 2241 would be able to place facts and issues of fact before the court.\textsuperscript{336} Even though habeas corpus statutes do not explicitly provide a right to counsel, 18 U.S.C. section 3006A(2) (B) permits a court reviewing a habeas petition to appoint counsel for the petitioner if the court determines that “the interests of justice so require.”\textsuperscript{337}

It is important to note that the Hamdi and Padilla courts came to different conclusions on whether Hamdi and Padilla should have the right to counsel.\textsuperscript{338} In Hamdi II, the Fourth Circuit reversed the district court’s order granting Hamdi unmonitored access to counsel.\textsuperscript{339} In Hamdi III, the Fourth Circuit specifically refused to address the issue of counsel and by doing so, effectively excluded Hamdi from ever meeting with counsel to obtain the necessary evidence to challenge his detention or to even tell his side of the story.\textsuperscript{340} Therefore, the Fourth Circuit frustrated the purpose of the habeas corpus procedures that Congress established when the court denied Hamdi, a pris-

\textsuperscript{331} Even though Padilla has been granted access to counsel, he has never met with counsel to assist in his habeas petition because the order has been appealed to the United States Court of Appeals for the Second Circuit. Paula Span, "Enemy Combatant Vanishes Into a "Legal Black Hole,“ WASH. POST, July 30, 2003, at A1.


\textsuperscript{333} \textit{Hamdi III}, 316 F.3d at 459; \textit{Padilla}, 233 F. Supp. 2d at 571-72.


\textsuperscript{335} \textit{Id.} In addition, the Federal Rules of Civil Procedure and the Rules Governing section 2254 cases may be applied in section 2241 habeas corpus cases, in the discretion of the court. \textsc{Fed. R. Civ. P. 81 (a)(2)}.


\textsuperscript{337} 18 U.S.C. § 3006A(2) (B).

\textsuperscript{338} \textit{Hamdi II}, 296 F.3d 278, 284 (4th Cir. 2002); \textit{Padilla}, 233 F. Supp. 2d at 605.

\textsuperscript{339} \textit{Hamdi II}, 296 F.3d at 284.

\textsuperscript{340} \textit{Hamdi III}, 316 F.3d 450, 465 (4th Cir. 2003).
oner held incommunicado, the use and guidance of an attorney to present facts to the court.\textsuperscript{341}

In stark contrast, the Southern District of New York recognized that Padilla’s need for counsel was “obvious” in order to present and contest facts of his detention, especially because the government was holding him incommunicado.\textsuperscript{342} The court recognized that the habeas corpus statute gives courts the flexibility to grant habeas petitioners the assistance of counsel.\textsuperscript{343} The court also noted that petitioners usually file writs of habeas review on appeal from a trial proceeding in which the petitioner had been represented by counsel.\textsuperscript{344} Padilla, who had not been tried or even charged, had no such benefit of counsel at all in his case and, thus, counsel was essential for him to challenge his detention.\textsuperscript{345} The court concluded that assistance of counsel was the only practical means for Padilla to challenge his detention.\textsuperscript{346} Therefore, habeas relief without counsel was an empty remedy.\textsuperscript{347} The \textit{Padilla} court recognized this problem and ordered Padilla the right of counsel to assist him in arguing his habeas petition.\textsuperscript{348}

The government’s concerns that access to counsel might jeopardize intelligence gathering and the potential for message passing through attorneys to members of al Qaeda do not justify denial of access to counsel.\textsuperscript{349} As stated in \textit{Padilla}, access to counsel in these types of proceedings can be limited to presenting facts to the court in connection with the habeas petition.\textsuperscript{350} A general right of counsel to advise the detainee how to answer questions from the government is unnecessary, and any governmental interrogations therefore would not be hindered.\textsuperscript{351} Courts could require lawyers representing detainees to submit to security clearance and background checks to ensure that they provide effective representation without threatening the nation’s security.\textsuperscript{352} The \textit{Padilla} court appropriately determined that the

\begin{footnotes}
\footnoteref{341}{See \textit{Hamdi II}, 296 F.3d at 284.}
\footnoteref{342}{\textit{Padilla}, 233 F. Supp. 2d at 602.}
\footnoteref{343}{Id.}
\footnoteref{344}{Id.}
\footnoteref{345}{Id.}
\footnoteref{346}{Id.}
\footnoteref{347}{Id.}
\footnoteref{348}{Id.}
\footnoteref{349}{See supra notes 222-243 and accompanying text (discussing the Government’s interest in not granting access to counsel); see also \textit{Padilla}, 233 F. Supp. 2d at 603-04.}
\footnoteref{350}{\textit{Padilla}, 233 F. Supp. 2d at 603-04.}
\footnoteref{351}{Id.}
\footnoteref{352}{See \textit{Padilla}, 233 F. Supp. 2d at 604 (discussing procedures used by the United States Bureau of Prisons for dangerous prisoners).}
\end{footnotes}
government's concerns about granting enemy combatants access to counsel did not outweigh the detainee's liberty interest in pursuing his habeas petition with the effective assistance from an attorney.\textsuperscript{353} Therefore, future courts should follow the rationale from the Padilla court and allow limited access to counsel for United States citizens held as enemy combatants to challenge their detentions through habeas petitions.\textsuperscript{354}

4. Military Tribunals—An Alternate, Yet Undesirable Avenue of Process for United States Citizens Designated as Enemy Combatants.—There are only two potential ways to try United States citizens labeled "enemy combatants"—through Article III courts or by military commissions.\textsuperscript{355} However, being tried before a military tribunal is not an option for Hamdi, Padilla, or any other United States citizen captured in response to terrorism, because the President's November 13, 2001 military order (Order) specifically limits military commissions to non-United States citizens.\textsuperscript{356} On November 13, 2001, the President executed a military order to commission the use of military tribunals in the war against terrorism.\textsuperscript{357} However, the Order specifically limited the individuals that could be prosecuted in military commissions to non-United States citizens that are members of al Qaeda or non-United States citizens that have engaged in or assisted in acts of terrorism against the United States.\textsuperscript{358} Therefore, the President's Order effectively limited the Supreme Court's decision in Quirin that a United States citizen labeled an enemy combatant could be tried before a military tribunal.\textsuperscript{359} Furthermore, these established military commissions grant detained individuals the right to defense counsel through the judge advocate and allow individuals the ability to retain civilian defense counsel.\textsuperscript{360} Thus, it seems apparent that a United States citi-

\textsuperscript{353} Id. at 605.
\textsuperscript{355} Ex parte Milligan, 71 U.S. 2, 123 (1866); Ex parte Quirin, 317 U.S. 1, 44 (1942).
\textsuperscript{357} Id. at 57834-35.
\textsuperscript{358} Id. at 57834.
\textsuperscript{359} Quirin, 317 U.S. at 37-38, 44.
\textsuperscript{360} Department of Defense Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, Mar. 21, 2002, at 4.
 zen detained by the Department of Defense should be afforded the same minimal protections that non-United States citizens accused of terrorist activities receive. Because military commissions are not available for United States citizens labeled enemy combatants, the only and preferred option available to these United States citizens is Article III courts. Even if military commissions were available, they are still inferior to Article III courts. As United States citizens, Hamdi and Padilla deserve the full panoply of protections afforded under the Constitution inherent in Article III courts.

5. Article III Courts and Due Process Protections—The Proper Constitutional Protections for United States Citizens Against Unbridled Executive Actions.—In times of war or national emergency, it is important for the executive branch to act with one voice in matters of foreign policy, national security, and military affairs. In fact, in our tripartite government, deference is given to the President in matters of national emergency and security, but unchecked power is not allowed. Therefore, the judicial branch, through Article III courts, must be available to guard against executive actions that infringe on the constitutional rights of United States citizens. The purpose of the judiciary is to articulate the law and demand that the executive branch explain and defend its actions. However, the Government argues that no meaningful judicial review is allowed for United States citizens designated as enemy combatants. Therefore, the executive branch is operating outside the rule of law by asserting unreviewable power and asking that the other branches not question its judgment. But checks and balances are an essential element of our government, particularly in times of crisis, and the courts are properly equipped to handle these issues.

362. Hamdi III, 315 F.3d at 464.
363. In Duncan v. Kakanamoku, the Court stated that our founders were “opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws.” 327 U.S. 304, 322 (1946) (relying on Ex parte Milligan, 71 U.S. 2 (1866)). The established principle of “every free people is, that the law shall alone govern; and to it the military must always yield.” Id. at 323.
367. Id.
The rule of law has been tested many times throughout our history, but the courts have properly risen to the occasion to protect the Constitution. In *Milligan*, the Supreme Court declared that due process safeguards must be protected and ensured in the midst of a national emergency. The Court held that a United States citizen arrested during the Civil War for aiding the enemy had a right to be tried in civilian courts with all of the constitutional protections, so long as those courts were open and functioning. The *Milligan* Court's guidance is applicable to the *Hamdi* and *Padilla* cases. The Court stated that:

> [t]he history of the world . . . taught [our founders] that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rule and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances . . . [F]or the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence. . . .

At the most basic level of constitutional protections, is the notion that the government cannot detain someone accused of wrongdoing without the traditional elements of accusation, trial, conviction, and punishment. In *Milligan*, the Court held that due process even applies in times of war and "it is the birthright of every American citizen when charged with crime, to be tried and punished according to the law."

369. *Id.* at 123.
370. *Id.* at 120-21. The Government tried to distinguish Hamdi's case from *Milligan* by labeling Hamdi an enemy combatant. *See Hamdi II*, 296 F.3d 278, 280 (4th Cir. 2002) (determining that Hamdi should be labeled an enemy combatant). Therefore, the government is not treating Hamdi as a prisoner of war under the Geneva Convention or trying him before a military commission. *Id.* at 282. In essence the government is taking an unprecedented step by labeling Hamdi an enemy combatant and detaining him indefinitely without any opportunity to rebut such detainment. *See id.*


372. *Milligan*, 71 U.S. at 119. The Government contends that Hamdi and Padilla have not been charged with a crime and, thus, their Sixth Amendment right to counsel does not attach. *See discussion supra* Part II.A.2.a. However, the Government has disingenuously and purposefully not brought charges against Hamdi and Padilla in order to circumscribe the array of constitutional protections afforded to persons accused of criminal behavior. Therefore, it is even more essential that Hamdi and Padilla, as United States citizens be protected by the Constitution's full reach.
The Fifth Amendment guarantees apply to those accused of war crimes and to those who possess enemy belligerent status. Any exception to this rule would be contrary to the Constitution and to think otherwise would be to admit that the enemy has lost the battle but has destroyed our ideals. Hamdi and Padilla are currently being physically restrained by military force in the United States. Their liberty has been taken away and the Constitution requires that they be given due process of the law. At a minimum, this means notice and the opportunity to be heard, but the Fourth Circuit and Southern District of New York failed to acknowledge these requirements.

Article III courts are the proper forum to prosecute United States citizens labeled enemy combatants as shown through the courts' past prosecutions of other terrorists. For example, the individuals accused of the 1993 World Trade Center bombing were properly tried and convicted and sentenced to 240 years in prison and fined $250,000 in the Southern District of New York. In October 2001, a court sentenced four of Osama bin Laden's associates to two life terms of imprisonment and ordered them to pay $33 million to individual victims and our government for the 1998 bombing of United States embassies in Nairobi, Kenya. In addition, most recently, John Walker Lindh pled guilty to supplying services to the Taliban and carrying an explosive during the commission of a felony. He was sentenced to twenty years in prison. Lindh's case is compelling evidence that the rule of law does successfully prosecute and punish United States citizens who take up arms against the United States.

373. In re Yamashita, 327 U.S. 1, 26 (1946) (Murphy, J., dissenting).
374. Id. at 26, 29.
375. Hamdi II, 296 F.3d at 280; Padilla, 233 F. Supp. 2d at 569.
376. See Hamdi II, 296 F.3d at 282-84; Padilla, 233 F. Supp. 2d at 559-602. Furthermore, in Ex parte Milligan, the Court noted that all Constitutional protections should be granted, especially those provided by the Fourth (protects against unreasonable searches and seizures), Fifth (provides for grand jury indictments, no double jeopardy, and due process of law, and just compensation) and Sixth (rights of the accused to speedy and public trial, to confront witnesses, and to have the assistance of counsel or defense). Milligan, 71 U.S. at 119.
378. Id.
380. Id. at 572.
381. See id.
The facts of Hamdi's and Lindh's cases are almost identical, yet the Government considers Hamdi an enemy combatant and is not giving him any of the protections afforded to Lindh. Both Hamdi and Lindh are United States citizens and both were fighting on behalf of al Qaeda and the Taliban. Both were also found on the battlefield in Afghanistan taking up arms against the United States. And, both were captured by Northern Alliance and American forces in November/December 2001. However, the Government immediately recognized Lindh as a United States national and, after interrogating him, transported him to the United States and indicted him in federal court. In contrast, the Government did not acknowledge Hamdi's citizenship status until he was transported to Guantanamo Bay, Cuba in April 2002. He was then transported to Norfolk, Virginia and designated an enemy combatant. It is noteworthy that both of these United States citizens are being treated so inconsistently by the Government. Lindh received access to the courts with assistance of counsel and Hamdi cannot even meet with counsel to challenge his unlawful detention. It is evident from the Lindh case that Article III courts can properly prosecute and punish "enemy combatants." The courts are the proper mechanism to check the President's actions without undermining the national security goals and more importantly, without undermining a United States citizen's constitutional protections.

Our country is faced with a war on terror that has no boundaries or limitations, but we must not let our passions of the moment destroy the constitutional foundation upon which we stand. Hamdi and Padilla are United States citizens and deserve the constitutional protections that attach. The Fourth Circuit should have recognized Hamdi's inherent constitutional protections and allowed him to meet with counsel to challenge his detention. The court was wrong to look the other way and allow the executive branch to continue its unlawful detention of a United States citizen. Both courts failed the American

382. Hamdi III, 316 F.3d 450, 460 (4th Cir. 2003); Lindh, 227 F. Supp. 2d at 567-68.
383. Hamdi III, 316 F.3d at 460; Lindh, 227 F. Supp. 2d at 568-70. Padilla's case is even more compelling than Hamdi's or Lindh's because he was arrested on United States soil. Padilla v. Bush, 233 F. Supp. 2d 564, 568 (2002). Yet Lindh who was fighting in Afghanistan has been given access to the courts and Padilla has not. Lindh, 227 F. Supp. 2d at 546.
384. Hamdi III, 316 F.3d at 460; Lindh, 227 F. Supp. 2d at 569.
386. Id.
387. Id.
public by not protecting the rights of United States citizens. In *Yamashita*, Justice Murphy cautioned that

> [a]t a time like [war] when emotions are understandably high it is difficult to adopt a dispassionate attitude toward a case of this nature. Yet now is precisely the time when that attitude is most essential. While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. We live under the Constitution, which is the embodiment of all the high hopes and aspirations of the new world. And it is applicable in both war and peace.

Our government has gone astray in its designation and detention of United States citizens labeled enemy combatants and the courts in *Hamdi* and *Padilla* have justified these outrageous actions. Article III courts, as seen in *Lindh*, are the proper fora to prosecute and punish terrorists. It is essential that Hamdi, Padilla, and all United States citizens, be afforded access to these courts and their constitutional rights upheld.

III. Conclusion

The events of September 11, 2001 will remain a vivid reminder of our nation's vulnerabilities; however, they will also forever serve to demonstrate our strength and resilience. As citizens, we demand that the government take strong action against those responsible for the attacks on our nation, and we expect the government to protect us from future attacks. On one side of this debate is the notion that enemy combatants, regardless of citizenship, do not have a right to counsel, let alone unmonitored access to counsel, because they have not been charged with a crime. Enemy combatants are merely being held for intelligence gathering purposes and to prevent them from engaging in further warfare against the United States. Because there are sufficient safeguards in place to prevent injustice, the government is properly detaining these enemy combatants.

On the other side of the debate is the fact that these persons who have been labeled enemy combatants are United States citizens who should be afforded all the protections of the Constitution. This view does not undermine the importance of the President's responsibility

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388. Even though the *Padilla* court gave Padilla access to counsel, the court's "some evidence" standard of review is so low that in effect it is a meaningless review of the executive's enemy combatant designation. *Padilla*, 233 F. Supp. 2d at 605-08.

to protect all citizens, but in our system of checks and balances, the President does not have unfettered discretion to label and detain United States citizens as enemy combatants without procedural protections. Therefore, it is the responsibility of the Article III courts to check the power of the President and ensure that individual rights are protected and not sacrificed in the war on terror.

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