

Detention and Military Trial of Suspected Terrorists: Stretching Presidential Power

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The system of detention and military trial authorized by President George W. Bush on November 13, 2001,¹ and additional claimed authority to hold terrorist suspects indefinitely without process, have been litigated in several judicial circuits, moving from district courts to the Supreme Court and back down again. In 2006, these authorities returned to the Court for further exploration in *Hamdan v. Rumsfeld*.² Regrettably, until very recently the separation of powers issues raised by the President's initiatives received little attention from Congress, which, under the Constitution, has primary responsibility over military courts, tribunals "inferior to the supreme Court," "Offenses against the Law of Nations," the war power, and "Rules concerning Captures on Land and Water."³ Because of congressional passivity, the principal checks on presidential power have been supplied instead by litigants and courts. The constitutional issues that emerge from this concentration of power in the presidency form the central theme of this article.

I. CONSTITUTIONAL JUSTIFICATIONS

The military order issued by President Bush on November 13, 2001, provides for the detention and trial by military commission of non-U.S. citizens who are members of al Qaeda or who participate in or offer assistance to the terrorist activities of that group or similar organizations.⁴ The order draws heavily from language in Proclamation 2561,⁵ issued by President Franklin D. Roosevelt in 1942 after the capture of eight German saboteurs. The proclamation denied access to the courts by enemy saboteurs and spies entering the United States, and a contemporaneous military order⁶ appointed

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1. Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

2. 126 S. Ct. 2749 (2006).

3. U.S. CONST., art. I, §8, cls. 9-11.

4. Military Order, *supra* note 1.

5. 7 Fed. Reg. 5101 (July 7, 1942).

6. 7 Fed. Reg. 5103 (July 7, 1942) (establishing a military commission).

a military commission to try the eight captives. Under both the 1942 and 2001 orders, conviction and sentencing would require the vote of only two-thirds of the members of a military commission. Bush's order allowed evidence that would have "probative value to a reasonable person," whereas the Roosevelt order spoke of "probative value to a reasonable man." Roosevelt directed his military tribunal to conduct a "full and fair trial." Bush used the identical phrase. Both Bush and Roosevelt attempted to prohibit judicial review.⁷ The dependence of the Bush administration on the Nazi saboteur case, *Ex parte Quirin* (1942),⁸ for authority to promulgate the 2001 Military Order is striking. A few days after the release of the Bush order, William P. Barr, Attorney General in the George H.W. Bush administration, referred to *Quirin* as the "most apt precedent."⁹

Although Bush's military order focused solely on non-citizens, the Administration also claimed legal authority to detain U.S. citizens if the President designates them as "enemy combatants." The Administration accordingly classified two U.S. citizens, Yaser Esam Hamdi and José Padilla, as enemy combatants who could be detained for an indefinite period, denied counsel, and neither charged nor brought to trial, either in civilian court or before a military tribunal. Through this process the Administration claimed the right to make law (defining the meaning of enemy combatant), the right to execute it, and the right to adjudicate (or not).

In reviewing the constitutionality of detaining U.S. citizens as enemy combatants, a plurality of the Supreme Court in *Hamdi v. Rumsfeld* (2004) referred to *Quirin* as "the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances."¹⁰ Justice Scalia, familiar with the history of how the Court in 1942 did its job, remarked in his dissent in *Hamdi* that the *Quirin* case was "not this Court's finest hour."¹¹ This article provides detailed evidence to support his judgment.

7. See LOUIS FISHER, NAZI SABOTEURS ON TRIAL 50-52, 159 (2003). This book was reissued in 2005 as a second edition, "abridged and updated," in which footnotes were removed and the final chapter updated to take account of Abu Ghraib, the Supreme Court decisions in *Hamdi*, *Padilla*, and *Rasul*, and the *Moussaoui* trial. All subsequent references herein to this book are to the first edition.

8. 317 U.S. 1 (1942).

9. William P. Barr & Andrew G. McBride, *Military Justice for al Qaeda*, WASH. POST, Nov. 18, 2001, at B7.

10. 542 U.S. 507, 523 (2004).

11. *Id.* at 569.

Although the Administration argued that it can hold enemy combatants without bringing them to trial, the plurality in *Hamdi* held that “an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”¹² It also declared that an enemy combatant “unquestionably has the right to access to counsel.”¹³ The plurality spoke about the need for an “independent tribunal,” an “independent review,” and an “impartial adjudicator,”¹⁴ but it appeared satisfied with some kind of review panel within the executive branch, perhaps even “an appropriately authorized and properly constituted military tribunal.”¹⁵

No review panel within the executive branch, much less within the military, could possibly possess the sought-for qualities of neutrality, detachment, independence, and impartiality if it has to pass judgment on a President’s decision that a U.S. citizen is an “enemy combatant.” What the plurality did in *Hamdi* was to offer a soothing mix of words to obscure the fundamental point that it was allowing all three powers of government – legislative, executive, and judicial – to be concentrated in the presidency. In their efforts to interpret *Hamdi*, district and circuit judges have since compiled a very uneven record of appreciating the importance of the principle of separation of powers and the need for checks from an independent judiciary. Substantial clarification on some points finally was achieved by the Supreme Court’s decision in *Hamdan v. Rumsfeld*, which is analyzed in Section X of this article.

II. HISTORICAL LESSONS

In *Hamdan v. Rumsfeld*,¹⁶ the government argued in its brief in the D.C. Circuit that military commissions “have tried enemy combatants since the earliest days of the Republic under such procedures as the President has deemed fit.”¹⁷ This claim seriously distorts the historical record. It is more nearly accurate to say that military commissions have been created under such procedures as Congress saw fit to spell out by statute.

Military tribunals have been used as emergency measures by commanders in the field to fill temporary gaps created by the absence of civilian courts or by limitations on court-martial jurisdiction. Tribunals traditionally are

12. *Id.* at 533.

13. *Id.* at 539.

14. *Id.* at 534-535.

15. *Id.* at 538.

16. 415 F.3d 33 (D.C. Cir. 2005).

17. Brief for Appellants, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. Dec. 8, 2004), at 53.

created in a zone of combat operations or occupied territory. They have generally been conducted following procedures used in courts-martial, and have never been used to single out a broad class of non-citizens, as was done with the Bush military order. Tribunals that exceeded those parameters have left a stain upon the American system of justice.

The American constitutional system is founded upon the principle of the separation of powers. In Federalist No. 47, James Madison described the “accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . [as] the very definition of tyranny.”¹⁸ Military abuses by the King of England drove colonial leaders to America to seek their independence and to limit the concentration of military power in their new republic. Paragraph 14 of the Declaration of Independence charged the King with affecting to “render the Military independent of and superior to the Civil Power.”¹⁹

American law borrows heavily from British precedents and customs, but in the area of the war power, foreign affairs, and control of the military, the Framers broke decisively with their English forebears. The great English jurist William Blackstone placed all of external affairs exclusively in the King: the power to declare war, raise and regulate fleets and armies, make treaties, appoint ambassadors, and issue letters of marque and reprisal.²⁰ The drafters of the U.S. Constitution decided that not a single one of those powers should be placed solely in the President. Some are vested exclusively in Congress: the power to declare war (art. I, §8, cl. 11), to raise and regulate fleets and armies (art. I, §8, cls. 12-16), and to issue letters of marque and reprisal (art. I, §8, cl. 11). Other powers are shared between the President and the Senate: making treaties and appointing ambassadors (art. II, §2, cl. 2). In addition, the Constitution empowers Congress to “regulate Commerce with foreign Nations” (art. I, §8, cl. 3), to “constitute Tribunals inferior to the supreme Court” (art. I, §8, cl. 9), and to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations” (art. I, §8, cl. 10).

The Framers understood the need sharply to limit executive authority to establish military tribunals, absent clear congressional approval. On June 30, 1775, the Continental Congress adopted rules and regulations for the military in a series of 69 Articles of War.²¹ Thus, from the beginning, the punishment of offenses by the military was “wholly statutory, having been . . . enacted by

18. THE FEDERALIST NO. 47, at 336 (James Madison) (Benjamin F. Wright ed., 1961).

19. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

20. WILLIAM BLACKSTONE, 2 COMMENTARIES *238-262.

21. American Articles of War of 1775, Continental Congress (June 30, 1775), *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 953-960 (2d ed. 1920).

Congress as the legislative power.”²² As Commander in Chief during the Revolutionary War, George Washington adhered faithfully to the Articles of War by reviewing death sentences imposed by courts-martial.²³ Sometimes he overturned a death penalty for lack of legal basis.²⁴ He recognized that changes in the military code “can only be defined and fixed by Congress.”²⁵

When the *Hamdan* case was before the D.C. Circuit, the government argued that the Founding era history supports President Bush’s establishment of military tribunals: “It was well recognized when the Constitution was written and ratified that one of the powers inherent in military command was the authority to institute tribunals for punishing enemy violations of the laws of war,” and that General Washington had appointed a “Board of General Officers” in 1780 to try British Major John André as a spy.²⁶ “At the time,” the government said, “there was no provision in the American Articles of war providing for jurisdiction in a court-martial to try an enemy for the offense of spying.”²⁷

Those arguments are false. The Continental Congress adopted a resolution in 1776 expressly providing that enemy spies “shall suffer death . . . by sentence of a court martial, or such other punishment as such court martial shall direct,” and ordered that the resolution “be printed at the end of the rules and articles of war.”²⁸ A year before that, the Congress had made it punishable by court-martial for members of the Continental Army to “hold[] correspondence with, or . . . give[] intelligence to, the enemy.”²⁹

The government further argued before the D.C. Circuit in *Hamdan*, “In investing the President with full authority as Commander in Chief, the drafters of the Constitution surely intended to give the President the same authority that General Washington possessed during the Revolutionary War to convene military tribunals to punish offenses against the laws of war.”³⁰ General Washington was given what future Presidents received, however: statutory authority and specific directions and limits as decided by the

22. WINTHROP, *supra* note 21, at 21; *see also* ALEXANDER MACOMB, A TREATISE ON MARTIAL LAW AND COURTS-MARTIAL 19-20 (1809) (describing courts-martial jurisdiction under Articles of War).

23. 13 WRITINGS OF GEORGE WASHINGTON 136-140 (J. Fitzpatrick ed., 1931).

24. 11 *id.* at 262.

25. 17 *id.* at 239.

26. Brief for Appellants, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. Dec. 8, 2004), at 58.

27. *Id.*

28. 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 693.

29. American Articles of War of 1775, art. 28, *reprinted in* WINTHROP, *supra* note 21, at 955.

30. Brief for Appellants, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. Dec. 8, 2004), at 58-59.

legislative branch.

That point is borne out by another historical example offered by the government: the military trial of Alexander Arbuthnot and Robert Christy Ambrister in 1818. The government made this claim to the D.C. Circuit in the *Hamdan* case:

Throughout this country's history, Presidents have exercised their inherent authority as Commanders in Chief to establish military commissions, without any authorization from Congress. In April 1818, for example, military tribunals were convened, without Congressional authorization, to try two British subjects for inciting the Creek Indians to war with the United States.³¹

Again the government misrepresents the historical experience with military tribunals. The prosecution of Arbuthnot and Ambrister during the Seminole war in Florida highlights the abuses to which military tribunals have always been prone. After the tribunal changed its sentence against Ambrister from death to corporal punishment, General Andrew Jackson overrode that decision and directed that Ambrister be shot. Far from claiming inherent authority over the creation of military tribunals, President James Monroe sought to distance himself from Jackson's actions, forwarding documents about the episode to Congress for its investigation.³²

The following year, the House Committee on Military Affairs issued a highly critical report of the trials. It found that no law authorized the men's trial before a military court for the alleged offenses, except the charge that Arbuthnot was "acting as a spy," of which he was not found guilty, and it concluded that there was not even "a shadow of necessity for [their] death."³³ The committee found it "remarkable" that Jackson would seek to justify the tribunals on the ground that the men were pirates or outlaws, since the former applies only to "offences upon the high seas" and the latter "applies only to the relations of individuals with their own Governments."³⁴ Similarly, a Senate report rejected the theory that Arbuthnot and Ambrister were "outlaws and pirates" and further noted that "[h]umanity shudders at the idea of a cold-blooded execution of prisoners, disarmed, and in the power of the conqueror."³⁵ Military jurist William Winthrop later remarked that if an

31. *Id.* at 59.

32. 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 612 (J. Richardson ed., 1925); 15 ANNALS OF CONG. 2135-2150 (1818).

33. 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 735 (1819) (internal quotation marks omitted).

34. *Id.* (internal quotation marks omitted).

35. 15 ANNALS OF CONG. 267 (1819) (internal quotation marks omitted).

officer ordered an execution as Jackson had, he “would now be indictable for murder.”³⁶

In *Hamdan* the government also advised the D.C. Circuit that the President’s authority to create military tribunals can be drawn from the use of military commissions during the Mexican war.³⁷ That experience, however, provides no support for independent or inherent presidential power. In his capacity as commander of U.S. forces in Mexico, General Winfield Scott originally established military commissions – a term he coined – as an emergency measure to address undisciplined action and other misconduct by American troops.³⁸ He never questioned Congress’s authority to control the commissions, and he never claimed any type of inherent executive power. To the contrary, he sought statutory authority in advance and explained that he was merely filling a gap by instilling discipline among his troops in an effort to avoid guerrilla warfare. Scott knew from military history that lawless action by American soldiers in Mexico would invite and incite an insurgency.³⁹ He relied heavily on the statutory Articles of War and existing practices in the States, and he further provided that no commission “shall try any case clearly cognizable by any court martial.”⁴⁰

Military commissions during the Civil War were grounded in statutes that recognized their existence and operation as early as 1862.⁴¹ Francis Lieber noted that the comprehensive code he developed to enable commanders in the field to wage war effectively and humanely was issued as an Army general order because the word “code” indicated something the President “has no right to issue – something which requires the assistance of Congress – an

36. WINTHROP, *supra* note 21, at 465 (emphasis omitted). For more on Jackson’s troubles with tribunals in Florida and New Orleans, see LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER* 25-31 (2005).

37. Brief for Appellants, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. Dec. 8, 2004), at 59.

38. 2 WINFIELD SCOTT, *MEMOIRS OF LIEUT.-GENERAL SCOTT*, LL.D. 392-393 (1864).

39. TIMOTHY D. JOHNSON, *WINFIELD SCOTT: THE QUEST FOR MILITARY GLORY* 166-170 (1968).

40. *Id.* at 544. For additional details on Scott’s actions in Mexico, see FISHER, *supra* note 36, at 32-35.

41. Act of July 17, 1862, ch. 201, §5, 12 Stat. 597, 598 (“[T]he President shall appoint . . . a judge advocate general . . . to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon.”); *see also* Act of March 3, 1863, ch. 75, §30, 12 Stat. 731, 736 (making murder, manslaughter, robbery, arson, and specified other crimes, when committed by persons in military service of United States and subject to articles of war, punishable by sentence of court-martial or military commission); Act of July 2, 1864, ch. 215, §1, 13 Stat. 356, 356 (military commander authorized the execute sentences imposed by military commission for, inter alia, “violations of the laws and customs of war”).

enactment.”⁴² Moreover, when military commissions were employed, they were sometimes misused. For example, Captain Henry Wirz, the superintendent of the notorious Andersonville prison, was unfairly blamed by a military commission for the conditions there and was “hurried to his death by vindictive politicians, an unbridled press, and a nation thirsty for revenge.”⁴³ The military commission hastily set up to try alleged conspirators in Lincoln’s assassination was, in the words of Lincoln’s former Attorney General, Edward Bates, “not only unlawful, but . . . a gross blunder in policy: It denies the great, fundamental principle, that ours is a government of *Law*, and that the law is strong enough, to rule the people wisely and well.”⁴⁴

III. COMMANDER-IN-CHIEF AUTHORITY

The government claims a number of constitutional authorities in an effort to justify the President’s right to detain indefinitely U.S. citizens without trying them in court or giving them access to counsel. In its brief in *Hamdan*, the government spoke of “the President’s authority, exercised since the Revolutionary War and inherent in his role as Commander in Chief, to establish military tribunals to punish enemy violations of the laws of war.”⁴⁵ The government further claimed that the President “has inherent constitutional authority to create military commissions in the absence of Congressional authorization,” and also that authority “is derived from the Commander-in-Chief Clause, which vests in the President the full powers necessary to prosecute a military campaign successfully.”⁴⁶ By reading the Commander in Chief Clause too broadly, the government’s general thrust is to support a form of martial law that is anathema to the principles of republican government, checks and balances, and separation of powers.

The Framers’ rejection of executive power as promoted by Blackstone and other writers was rooted in their study of history and the needs of representative government. Joseph Story, who served on the Supreme Court from 1811 to 1845, wrote about the essential republican principle of vesting in elected lawmakers the control over the military. The power to declare war

42. R. R. Baxter, *The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100*, 3 INT’L REV. RED CROSS 171, 185 (No. 25, Apr. 1963).

43. Darrett B. Rutman, *The War Crimes and Trial of Henry Wirz*, 6 CIVIL WAR HIST. 117, 118 (1960).

44. THE DIARY OF EDWARD BATES, 1859-1866, at 483 (H. Beale ed., 1933) (emphasis in original). The experience of military tribunals during the Civil War is covered in FISHER, *supra* note 36, at 41-70.

45. Brief for Appellants, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. Dec. 8, 2004), at 10.

46. *Id.* at 57.

“is not only the highest sovereign prerogative; . . . it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation.” The decision to engage in war activities “never fails to impose upon the people the most burthensome taxes, and personal sufferings.” The conduct of war “is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead.” The cooperation “of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation.”⁴⁷

The Framers feared that Presidents, in their search for fame and personal glory, would have an appetite for war.⁴⁸ John Jay warned in *Federalist No. 4*:

[A]bsolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families, or partisans. These, and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.⁴⁹

Many of these sentiments were underscored by the Framers. In 1793, James Madison called war

the true nurse of executive aggrandizement. . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and the most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace.⁵⁰

Five years later, in a letter to Thomas Jefferson, Madison said that the Constitution “supposes, what the History of all Govts demonstrates, that the

47. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 60-61 (1833).

48. William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

49. THE FEDERALIST NO. 4, at 101 (John Jay) (Benjamin F. Wright ed., 1961).

50. 6 WRITINGS OF JAMES MADISON 174 (G. Hunt ed., 1900-1910).

Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl.”⁵¹

What the Framers left solely in the hands of the President, as Commander in Chief, was the power “to repel sudden attacks.”⁵² All three branches understood that the President could exercise defensive, but not offensive, military powers.⁵³ The reason for removing the war power from the President centers on the qualities associated with creating a republic, the right of citizens to rule through their elected representatives, and the fear of executive abuse and misjudgment.

The Bush administration refers to the President’s “inherent authority as Commander in Chief to detain a citizen as an enemy combatant.”⁵⁴ It asserted that the “President’s decision to detain petitioner [Padilla] as an enemy combatant represents a basic exercise of his authority as Commander in Chief to determine the level of force needed to prosecute the conflict against al Qaeda.”⁵⁵ But the Constitution contains no authority for the President to indefinitely detain an American citizen without charging the individual with criminal offenses, going to trial, and allowing the assistance of counsel.

The purpose of the Commander in Chief Clause is much narrower. The Constitution designates the President as “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States” (art. II, §2, cl. 1). Congress, not the President, does the calling. Congress is empowered to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” (art. I, §8, cl. 15).

The Commander in Chief Clause has two principal objectives: to provide unity of command and to assure civilian supremacy. In Federalist No. 74, Alexander Hamilton explained that “the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”⁵⁶ Unity of command does not prevent Congress under its Article I powers from directing the purpose and scope of military operations.

51. *Id.* at 312.

52. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed., 1937), at 318.

53. LOUIS FISHER, PRESIDENTIAL WAR POWER 8-12, 17-51 (2d ed. 2004).

54. Respondent’s Opposition to the Motion for Summary Judgment, *Padilla v. Hanft* (D.S.C. Nov. 22, 2004) [hereinafter Respondent’s Opposition], at 10, available at http://www.pegc.us/archive/Padilla_v_Hanft/govt_memo_opp_20041122.pdf; see also Respondent’s Answer to the Petition for Writ of Habeas Corpus, *Padilla v. Hanft* (D.S.C. Aug. 30, 2004) [hereinafter Respondent’s Answer], at 1, 11-12, available at http://www.pegc.us/archive/Padilla_v_Hanft/Padilla_Govt_Answer_20040830.pdf.

55. Respondent’s Opposition, *supra* note 54, at 11.

56. THE FEDERALIST NO. 74, at 473 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

Designating the President as Commander in Chief also served to assure civilian supremacy over the military. The person leading the armed forces would be the civilian President, not a military officer. Attorney General Edward Bates observed in 1861 that the President is Commander in Chief not because he is “skilled in the art of war and qualified to marshal a host in the field of battle.” He is Commander in Chief for a different reason. Whatever soldier leads U.S. armies to victory against an enemy, “he is subject to the orders of the *civil magistrate*, and he and his army are always ‘subordinate to the civil power.’”⁵⁷ The same principle of civilian supremacy that subordinates military commanders to the President subordinates the President to statutory limits enacted by the people’s representatives in Congress.

In the *Steel Seizure Case* of 1952, Justice Robert Jackson noted in his concurrence that the Commander in Chief Clause is sometimes put forth “as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with the army or navy.”⁵⁸ To this claim he said that nothing would be “more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture.”⁵⁹ Toward the end of his concurrence, Justice Jackson identified the basic values that animate the U.S. Constitution: “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”⁶⁰

In the *Padilla* litigation, the Bush administration cited the Supreme Court’s decision in *The Prize Cases* (1863) for the proposition that the President, as Commander in Chief, “is bound to accept the [military] challenge without waiting for any special legislative authority.”⁶¹ However, the Court in *The Prize Cases* read presidential power narrowly, even in the extraordinary context of the Civil War. Justice Grier carefully limited the President’s power to defensive actions, noting that he “has no power to initiate or declare a war either against a foreign nation or a domestic State.”⁶² The executive branch adopted precisely the same position. During oral

57. 10 OPS. ATT’Y GEN. 74, 79 (1861) (emphasis in original).

58. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641-642 (1952) (Jackson, J., concurring).

59. *Id.* at 642.

60. *Id.* at 655.

61. Respondent’s Answer, *supra* note 54, at 12 (citing *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863)).

62. 67 U.S. at 668.

argument, Richard Henry Dana Jr., who was representing the President, acknowledged that Lincoln's actions had nothing to do with "the right *to initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress."⁶³

In its *Padilla* brief in the federal district court in South Carolina, the government cited three cases to demonstrate that U.S. citizenship "of an enemy belligerent does not relieve him from the consequences of [his] belligerency."⁶⁴ The government overreached. Unlike *Padilla*, the defendants in the *Quirin* and *Colepaugh v. Looney* Nazi saboteur cases were charged, given counsel, and tried. The defendant in the third case cited (*In re Territo*) was held as a prisoner of war, not as an enemy combatant.

Finally, the Bush administration cited a concurrence by Judge Silberman in *Campbell v. Clinton* (2000),⁶⁵ a case involving the war in Kosovo. Silberman concluded that the President "has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."⁶⁶ While to Judge Silberman courts lack competence to review military actions by the President, a concurrence by Judge Tatel in the same case concluded that courts possess competence in war power disputes and have exercised a review function over the course of the republic.⁶⁷

IV. DEPENDENCE ON *QUIRIN*

For legal and constitutional authority, the Bush administration has relied primarily on *Ex parte Quirin* and its own theories of inherent presidential authority. This article argues that constitutional principles and practice do not support the government's contentions in the *Padilla* litigation, after its return to South Carolina, that (1) *Quirin* "controls this case," (2) the President has statutory or constitutional authority to indefinitely detain a U.S. citizen, and (3) the Non-Detention Act (18 U.S.C. §4001) limits civilian authorities but not military authorities.⁶⁸

Quirin clearly was based on the assumption that the Constitution requires that *trials* of detainees be fair in some sense. While the Court in *Quirin*

63. *Id.* at 660 (emphasis in original).

64. Respondent's Answer, *supra* note 54, at 12; Respondent's Opposition, *supra* note 54, at 12-13 (citing *Ex parte Quirin*, 317 U.S. 1, 37 (1942); *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957); and *In re Territo*, 156 F.2d 142, 142-143 (9th Cir. 1946)).

65. 203 F.3d 19, 24 (D.C. Cir. 2000) (Silberman, J., concurring).

66. *Id.* at 27, cited in Respondent's Answer, *supra* note 54, at 12.

67. 203 F.3d at 37-41 (Tatel, J., concurring).

68. Respondent's Opposition, *supra* note 54, at 14-15.

agreed that a U.S. citizen could be tried by military tribunal,⁶⁹ subsequent judicial decisions and congressional statutes have adopted important safeguards to protect U.S. citizens from executive and military tribunals. *Ex parte Quirin* is not an appropriate precedent to justify the indefinite *detention* of a U.S. citizen without charges, trial, or access to counsel. Indeed, except in extraordinary times of martial law, which the Administration does not now assert, the Constitution does not permit the President to detain U.S. citizens for extensive periods without proceeding to trial with formal charges and assistance of counsel.

The government argued in *Padilla* that in *Hamdi* the Supreme Court “strongly reaffirmed” *Quirin*, “which remains a unanimous, binding, and apposite decision of the Supreme Court,” that “*Quirin* controls this case,” and that “the ‘precise facts’ of *Quirin* were indistinguishable in every material respect from the instant facts.”⁷⁰ The government further argued that *Quirin* “recognized the military’s authority to seize and detain enemy combatants in factual circumstances indistinguishable from this case.”⁷¹ According to the government, a comparison between the prosecution of the eight German saboteurs at issue in *Quirin* and the handling of Padilla demonstrates that “the factual parallels are striking.”⁷²

Because of serious problems with the manner in which the Supreme Court decided *Quirin* (see Sections V and VI, *infra*), there are substantial and unnecessary risks in trying to read too much into the decision in order to reach issues that were never fully addressed and settled. There is little reason to stray from the core holding, which was to sustain the jurisdiction of the military commission to *try* the eight Germans, who had been provided assistance of counsel in defending against the four charges brought against them. As the Court stated, “in our per curiam opinion, we have resolved those questions by our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue.”⁷³ Consequently there is no need, or cause, to interpret *Quirin* as offering any support for the indefinite detention of U.S. citizens without ever charging them, bringing them to trial, or permitting them access to counsel. As to the “parallels” that the government finds between *Quirin* and the treatment of Padilla, there are five fundamental differences.

69. In *Quirin*, the Supreme Court held that one of the German saboteurs, Herbert Haupt, a U.S. citizen, could be tried by the military tribunal. *Quirin*, 317 U.S. at 20, 37-38, 45.

70. Respondent’s Opposition, *supra* note 54, at 14-15.

71. Respondent’s Answer, *supra* note 54, at 13.

72. *Id.* at 14.

73. *Quirin*, 317 U.S. at 25.

A. *Bringing Charges*

In *Quirin*, the eight Germans were charged with four offenses: violations of the “law of war,” violation of Article of War 81, violation of Article of War 82, and conspiracy.⁷⁴ No formal charges were made against Padilla until, after three and a half years of confinement, he was indicted on much less serious offenses.⁷⁵ His earlier detention without charges was based on claims and assertions in such documents as the Mobbs Declaration⁷⁶ and the Rapp Declaration⁷⁷ (discussed below), which were used to support his designation as an “enemy combatant.”

The government issued a number of statements to justify the continued military detention of Padilla. On June 9, 2002, President Bush designated him an enemy combatant and directed Secretary of Defense Donald Rumsfeld to “receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.”⁷⁸ This presidential statement declared that Padilla “is closely associated with al Qaeda, an international terrorist organization with which the United States is at war,” and that he “engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States.”⁷⁹ Bush’s statement further maintained that Padilla “possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens.”⁸⁰ Finally, the statement said that Padilla “represents a continuing, present and grave danger to the national security of the United States,” and that his detention “is necessary to prevent him from

74. 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 310-313 (1975).

75. Indictment, *United States v. Hassoun*, No. 4-60001-CR-COOKE (S.D. Fla., Nov. 17, 2005), at 4; *see also* Eric Lichtblau, *Threats and Responses: The Padilla Case; in Legal Shift, U.S. Charges Detainee in terrorism Case*, N.Y. TIMES, Nov. 23, 2005, 2005, at A1.

76. Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, Aug. 27, 2002, *reproduced* in Respondents’ Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, *Padilla v. Bush*, No. 02 Civ. 4445 (S.D.N.Y. 2002), at Exhibit A, *available at* <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/padilla/padillabush82702mobbs.pdf>.

77. Declaration of Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism, Aug. 27, 2004, *reproduced in* Joint Appendix, *Padilla v. Hanft*, No. 05-6396 (4th Cir.), at 17-24, *available at* <http://www.wiggin.com/db30/cgi-bin/pubs/Joint%20Appendix%20Part%201.PDF>.

78. Order by President Bush to the Secretary of Defense, June 9, 2002, *reproduced in* Appendix A, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003).

79. *Id.*

80. *Id.*

aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens.”⁸¹

Subsequent to President Bush’s designation of Padilla as an enemy combatant, the government issued two “declarations” by officials within the Administration to further justify Padilla’s detention: the Mobbs Declaration (prepared by Michael H. Mobbs, August 27, 2002)⁸² and the Rapp Declaration (prepared by Jeffrey N. Rapp, August 24, 2004).⁸³ There are strong grounds to reject the two declarations as unreliable or inaccurate.

In the first sentence of his declaration, Mr. Mobbs, a Special Advisor to the Under Secretary of Defense for Policy, states that “to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct.” Yet Mobbs had no direct knowledge about the statements in the subsequent paragraphs, which consist of third-hand hearsay from a collection of informers and sources whose truthfulness, reliability, and motivation could not possibly be judged or determined by Mobbs. In the second paragraph of his declaration, Mobbs reviewed “government records and reports” on the petitioner, and in the next paragraph he explained that several confidential sources “claim to have knowledge of the events described.”

Footnote 1 of the Mobbs Declaration states that “it is believed” that two detained confidential sources were involved with the al Qaeda terrorist network, but it also states that “[i]t is believed that these confidential sources have not been completely candid about their association with Al Qaeda and their terrorist activities.” According to the footnote, “[m]uch of the information” from the sources has been “corroborated and proven accurate and reliable,” but some information remains uncorroborated “and may be part of an effort to mislead or confuse U.S. officials.” One of the sources, in a subsequent interview with a U.S. law enforcement official, “recanted some of the information that he had provided,” and another source “was being treated with various types of drugs to treat medical conditions.”

Paragraph 7 of the Mobbs Declaration claims that Padilla “and his associate conducted research in the construction of a ‘uranium-enhanced’ explosive device” at one of al Qaeda’s safehouses in Lahore, Pakistan. Paragraph 8 describes discussions between Padilla and Osama bin Laden lieutenant Abu Zubaydah to build and detonate a “dirty bomb” within the United States, “possibly in Washington, D.C.” The dirty-bomb plot is further discussed in Paragraph 9. Although this was the most sensational claim in the Mobbs Declaration, it does not appear at all in the Rapp Declaration released

81. *Id.*

82. Declaration of Michael H. Mobbs, *supra* note 76.

83. Declaration of Jeffrey N. Rapp, *supra* note 77.

two years later. Thus, despite assurances that much of the information from the confidential sources had been “corroborated and proven accurate and reliable,” the government abandoned the “factual” basis for the dirty-bomb threat used to justify Padilla’s detention. At what point, before the Rapp Declaration, did the government conclude that the dirty-bomb story was unreliable? Which informers, previously considered reliable, proved to be the source of false information?

In his declaration, Mr. Rapp states that he is “familiar with all the matters discussed in this Declaration,” but his familiarity extended only to knowledge about the intelligence documents collected and presented to him. He had no personal knowledge of the facts or of the reliability of the informers who provided information to the government.

The government said it “does not dispute that [Padilla] is entitled to ‘receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.’”⁸⁴ Yet there appeared to be no opportunity for Padilla to rebut the government’s assertion, since the information came from confidential sources held abroad and he could not confront them.

The issue of charges brought by the government is the first major difference between *Quirin* and the cases of the enemy combatants designated by President Bush. The charges against the eight German saboteurs were set forth in advance of the military tribunal that condemned them. The “charges” used to justify Padilla’s military detention were not actual charges, issued before a trial, but rather claims made in the declarations by Mobbs and Rapp, and some of those initial claims were later abandoned.

B. Providing Counsel

The second difference between *Quirin* and the more recent enemy combatant cases is found in the government’s obligation to give the accused – especially someone who faces the death sentence – access to counsel. In *Quirin*, President Franklin D. Roosevelt assigned counsel to the eight German defendants.⁸⁵ Col. Kenneth Royall and Col. Cassius M. Dowell represented seven of the saboteurs, and Col. Carl L. Ristine represented George Dasch.⁸⁶ By the time the trial began, the defense team of Royall and Dowell had been augmented by the assignment of Maj. Lauson H. Stone and Capt. William G. Hummell.⁸⁷ Padilla received the counsel of Public Defender Donna Newman

84. Respondent’s Answer, *supra* note 54, at 23, quoting *Hamdi*, 124 S. Ct. at 2648 (542 U.S. at 533) (plurality).

85. 7 Fed. Reg. 5103 (1942).

86. FISHER, *supra* note 7, at 52.

87. *Id.* at 56.

during his month of confinement as a material witness in New York City, but after his designation as an enemy combatant on June 9, 2002, the government barred her from meeting with him.⁸⁸ It was not until shortly after the Supreme Court's decision to hear his case – almost two years later – that Padilla was able to consult with his attorney again.⁸⁹

C. Conducting a Trial

The government held a trial for the eight German saboteurs in 1942, stretching from July 8 to August 1.⁹⁰ The *Quirin* defendants were tried before a military commission, which started its deliberations less than two weeks after the eight men were apprehended. Padilla was arrested on May 8, 2002, on a material witness warrant. On June 9, 2002, he was designated an enemy combatant and transferred to the custody of the Defense Department. Padilla was charged with criminal offenses on November 17, 2005, and transferred back into the custody of the Justice Department, and a trial on those charges was set to begin in April 2007.⁹¹

D. Presenting Evidence

In *Quirin*, the evidence against the Germans was clear and uncontested. It included recovered boxes of explosives and fuses, the defendants' own testimony, and the testimony of individuals in the United States who collaborated with them.⁹² The "evidence" against Padilla to justify his military detention consisted of third-hand hearsay set forth in the Mobbs and Rapp Declarations.

Why should *claims* and *assertions* by Administration officials be accepted by courts as *evidence*? In holding for the government on September 9, 2005, Judge Michael Luttig of the Fourth Circuit began his decision by stating, as fact, that Padilla was

88. See Paula Span, *Enemy Combatant Vanishes Into a "Legal Black Hole,"* WASH. POST, July 30, 2003, at A1. In preparing for litigation and participating in oral argument, Newman was assisted by Andrew G. Patel, Michael P. O'Connell, Jonathan M. Freiman, and Jenny S. Martinez.

89. See Michael Powell, *Lawyer Visits "Dirty Bomb" Suspect,* WASH. POST, Mar. 4, 2004, at A10.

90. FISHER, *supra* note 7, at 52-85.

91. See Curt Anderson, *A Key Padilla Charge Is Reinstated,* WASH. POST, Jan. 31, 2007, at A8; Deborah Sontag, *Federal Judge Is Set to Decide if Padilla Is Competent for Trial,* N.Y. TIMES, Dec. 14, 2006, at A32.

92. FISHER, *supra* note 7, at 29-32, 34-42, 80-84; FISHER, *supra* note 36, at 92-93, 126.

associated with forces hostile to the United States in Afghanistan and took up arms against United States forces in that country in our war against al Qaeda. Upon his escape to Pakistan from the battlefield in Afghanistan, Padilla was recruited, trained, funded, and equipped by al Qaeda leaders to continue prosecution of the war in the United States by blowing up apartment buildings in this country.⁹³

Those are extraordinary statements. They faithfully repeat all of the government's allegations and claims about Padilla. Only part way through the opinion does Judge Luttig mention the procedure being followed: "For purposes of Padilla's summary judgment motion, the parties have stipulated to the facts as set forth by the government. J.A. [Joint Appendix] 30-31. It is only on these facts that we consider whether the President has the authority to detain Padilla."⁹⁴ Elsewhere in his opinion, Judge Luttig continues to talk about "facts": "Under the facts as presented here, Padilla unquestionably qualifies as an 'enemy combatant'"⁹⁵ Still later he begins a paragraph with: "These facts unquestionably establish that Padilla poses the requisite threat"⁹⁶

The reader of this opinion might assume that the cited passage (J.A. 30-31) contained a stipulation by the parties to the facts that appear in Luttig's opening paragraph and subsequent statements. Instead, J.A. 30-31 only cites a statement by David B. Salmons, an attorney in the Solicitor General's office, telling the court that Padilla's attorneys "have an argument that they would like to present to the Court initially, that would assume the Government's facts as set forth in our return and the attached declaration [the Rapp Declaration], and that would say even under those facts, the President lacked the authority to detain Mr. Padilla as an enemy combatant."⁹⁷

When Padilla signed his habeas petition on June 30, 2004, he stated that he is not an "enemy combatant," has "never joined a foreign Army and was not arrested on a foreign battlefield," and "carried no weapons or explosives when he was arrested." He disputed "the factual allegations underlying the Government's designation of him as an 'enemy combatant.'"⁹⁸

93. *Padilla v. Hanft*, 423 F.3d 386, 388 (4th Cir. 2005).

94. *Id.* at 390 n.1.

95. *Id.* at 391.

96. *Id.* at 396.

97. Statement of David Salmons, Dept. of Justice, in Transcript of Status Conference, Sept. 14, 2004, Joint Appendix, *Padilla v. Hanft*, No. 05-6396 (4th Cir. 2004), at 30, available at <http://www.wiggin.com/db30/cgi-bin/pubs/Joint%20Appendix%20Part%201.PDF>.

98. Petition for Writ of Habeas Corpus, June 30, 2004, Joint Appendix, *Padilla v. Hanft*, No. 05-6396 (4th Cir. 2004), at 7, available at <http://www.wiggin.com/db30/cgi-bin/pubs/Joint%20Appendix%20Part%201.PDF>.

To the extent that Judge Luttig relied on information supplied by the government, there is good reason to be cautious about the claims. Nowhere does Judge Luttig acknowledge, or mention, that an earlier Administration claim incorporated in the Mobbs Declaration (about Padilla's plans for a "dirty bomb") had been jettisoned by the Administration as unreliable. Judge Luttig should have explained at the start of his opinion that he was deciding a summary judgment motion, under which Padilla's attorneys assumed the facts as set forth by the government (without agreeing to them) in order to focus on the legal issue: whether President Bush possessed authority under the stated circumstances to detain a U.S. citizen.

It would have been useful and balanced for the Fourth Circuit to take judicial notice of other areas where the Bush administration claimed to be operating on facts, not assertions, but failed to substantiate its allegations. Its claims about Iraqi weapons of mass destruction, Iraqi attempts to seek uranium from a country in Africa, the availability of mobile vans to disperse biological agents, the purchase of aluminum tubes to pursue nuclear weapons, drones to spread chemical and biological agents, and other WMD capabilities were found to have no factual basis.⁹⁹

E. The Affected Population

The military order and proclamation issued by President Franklin D. Roosevelt in 1942 applied to eight Germans who were "subjects, citizens or residents of any nation at war with the United States" and "who during time of war enter or attempt to enter the United States . . . to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war."¹⁰⁰ The military order issued by President Bush on November 13, 2001, may be applied to any non-citizen when the President determines there is "reason to believe" that the individual (i) "is or was a member of the organization known as al Qaida," (ii) "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy," or (iii) has "knowingly harbored one or more individuals described in subparagraphs (i) or (ii)."¹⁰¹

99. See generally Louis Fisher, *Justifying War Against Iraq*, in RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS 289-313 (James A. Thurber ed., 3d ed. 2006).

100. Proclamation 2561, *Denying Certain Enemies Access to the Courts of the United States*, 7 Fed. Reg. 5101 (July 7, 1942); *Appointment of a Military Commission*, 7 Fed. Reg. 5103 (July 7, 1942).

101. Military Order of November 13, 2001, *supra* note 1, at §2(a)(1), 66 Fed. Reg. at 57,834.

Whereas the Roosevelt proclamation and military order applied to eight named individuals, with trial personnel and counsel specified, the Bush military order covers a population of approximately 18 million resident non-citizens, and an indeterminate number of other non-citizens who may be taken into custody, whose liberties are jeopardized by the potential unilateral government designation of them as “enemy combatants,” with no assurance of a trial. Military tribunals have never before expressly discriminated against such a broad and open-ended class of persons. And even President Roosevelt’s proclamation authorizing the military trial of the German saboteurs did not discriminate based upon citizenship status. Proclamation 2561 applied to “all *persons* who are subjects, citizens or residents of any nation at war with the United States.”¹⁰²

V. THE NAZI SABOTEUR TRIAL: A DISCREDITED PRECEDENT

Although the Bush military order was closely modeled on the Roosevelt proclamation and military order, and although the plurality in *Hamdi* referred to *Quirin* as “the most apposite precedent” on whether U.S. citizens may be detained,¹⁰³ the Roosevelt administration concluded that its own handling of the eight Germans in 1942 was so flawed procedurally that it was not a model worth repeating. Secretary of War Henry L. Stimson was highly critical of the manner in which the military commission was assembled and the procedures it employed. He found it objectionable that Attorney General Francis Biddle would commit the time and energy in the middle of World War II to prosecute the case.¹⁰⁴ Joining Biddle as co-prosecutor was Maj. Gen. Myron C. Cramer, Judge Advocate General of the Army. Stimson objected to that appointment as well, insisting that the Judge Advocate General should serve in an independent capacity after the trial to review the fairness of the proceedings.

On November 29, 1944, two more German agents (Erich Gimpel and William Colepaugh) arrived by submarine, reaching land in Maine and making their way to New York City, where they were apprehended. The Roosevelt administration was prepared to try them in the same manner as in 1942: by a military commission sitting on the fifth floor of the Justice Department in Washington, D.C., and with Biddle and Cramer again serving as co-prosecutors. This time, however, Stimson intervened forcefully to block their participation. He advised Roosevelt that Gimpel and Colepaugh should be tried by either court-martial or military commission, with the

102. 7 Fed. Reg. 5101 (July 7, 1942) (emphasis added).

103. *Hamdi v. Rumsfeld*, 542 U.S. 507, 523 (2004).

104. Diary of Henry L. Stimson, July 1, 1942, Roll 7, at 136, Manuscript Room, Library of Congress.

appointment authority placed not in the President but in the Army Commander in Boston or New York. At a Cabinet meeting, Stimson told Roosevelt that he “wouldn’t favor any high-ranking officers as members of the tribunal and did not propose to have the Judge Advocate General personally try it.”¹⁰⁵

Despite Biddle’s opposition, Stimson prevailed. On January 12, 1945, President Roosevelt issued a military order to try Gimpel and Colepaugh. Unlike the 1942 military order, Roosevelt did not name the members of the tribunal, the prosecutors, or the defense counsel. He empowered the commanding generals, with Stimson’s supervision, to appoint the military commission. Instead of the trial record going directly to the President, as in 1942, it would be processed within the Judge Advocate General’s office, consistent with Article of War 50½.¹⁰⁶ The commanding general selected the officers to serve as prosecutors and defense counsel. The trial took place not in Washington, D.C. but at Governors Island, New York.¹⁰⁷ Through these actions, the Roosevelt administration reconsidered and rejected the precedent of 1942.

VI. DEFICIENCIES OF *QUIRIN*

The Supreme Court decided *Quirin* under difficult circumstances, resulting in subsequent misgivings from Justices who participated in the decision and in strong critiques from scholars. First, there was a rush to judgment. The Supreme Court labored under a number of procedural and substantive limitations. On July 23, 1942, it agreed to hear the case, and on July 27 it publicly announced that oral argument would begin on July 29, before there had been any action by lower courts.¹⁰⁸ At 8 p.m. on July 28, a federal district court dismissed an application by defense counsel for a writ of habeas corpus and held that *Ex parte Milligan* (1866) was not “controlling in the circumstances of this petitioner.”¹⁰⁹ At noon the following day, the Supreme Court began to hear the case. The briefs filed by the opposing parties are dated the same day that oral argument began.¹¹⁰ As a result, the Justices were unprepared to analyze complex issues of military law and Articles of War that are rarely placed before the Court. The nine hours of oral

105. *Id.*, Jan. 5, 1945, Roll 9, at 18-19.

106. Military Order, 10 Fed. Reg. 549 (Jan. 16, 1945).

107. FISHER, *supra* note 7, at 143; FISHER, *supra* note 36, at 127-129.

108. Lewis Wood, *Supreme Court Is Called in Unprecedented Session To Hear Plea of Nazi Spies*, N.Y. TIMES, July 28, 1942, at 1.

109. *Ex parte Quirin*, 47 F. Supp. 431, 431 (D.D.C. 1942).

110. 39 LANDMARK BRIEFS, *supra* note 74, at 395, 463, 495.

argument, spread across two days, were as much for the benefit of the Justices as for the litigants.

A second deficiency concerns the two-step procedure. One of the first issues confronted during oral argument was the propriety of having the case placed before the Court without first hearing from the D.C. Circuit.¹¹¹ The Court agreed to continue oral argument with the understanding that the defense counsel would present their papers to the D.C. Circuit. On July 31, after two days of oral argument, the Court received the papers from the D.C. Circuit. At 11:59 a.m. it granted certiorari, and one minute later it issued a one-page per curiam that upheld the jurisdiction of the military commission.¹¹² The per curiam did not contain legal justifications. Instead, it promised a full opinion, “which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk.”¹¹³ The full opinion was not released until nearly three months later, on October 29.

Third, the Justices knew that President Roosevelt had violated the Articles of War, which were enacted by Congress, but did not know how to handle that issue. In drafting the full opinion, Chief Justice Stone worked with the knowledge that on August 8, after the military commission completed its deliberations and found the eight Germans guilty, six of the men were electrocuted pursuant to an order from President Roosevelt. Yet the Court was aware that the Administration had failed to follow a number of statutory requirements in the Articles of War. On September 10, Stone wrote to Justice Felix Frankfurter that he found it “very difficult to support the Government’s construction of the articles [of war],” adding that it “seems almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed and it is too late for them to raise the question if in fact the articles as they construe them have been violated.” Only after the war, Stone said, would the facts be known, with release of the trial transcript and other documents to the public. By that time, the two surviving saboteurs could raise the question successfully, which “would not place the present Court in a very happy light.”¹¹⁴ If the survivors prevailed in court, Stone said “it would leave the present Court in the unenviable position of having stood by and allowed six to go to their death without making it plain to all

111. *Id.* at 499-501

112. Myron C. Cramer, *Military Commissions: Trial of the Eight Saboteurs*, 17 WASH. L. REV. & ST. B.J. 247, 253 (1942).

113. *Ex parte Quirin*, 317 U.S. 1, 11 (1942).

114. Letter from Chief Justice Harlan Fiske Stone to Justice Felix Frankfurter, Sept. 10, 1942, Papers of Felix Frankfurter, Part III, Reel 43, Manuscript Room, Library of Congress.

concerned – including the President – that it had left undecided a question on which counsel strongly relied to secure petitioners’ liberty.”¹¹⁵

While the full opinion was being drafted, Justice Frankfurter prepared a memorandum that spoke with assurance that “there can be no doubt that the President did *not* follow” Articles of War 46 through 53.¹¹⁶ Having already issued the per curiam opinion, however, the Justices were in no position to look too closely, or at least to do so publicly, at the question whether President Roosevelt had acted inconsistently with the Articles of War. In the words of Alpheus Thomas Mason, “Their own involvement in the trial through their decision in the July hearing practically compelled them to cover up or excuse the President’s departures from customary procedures.”¹¹⁷ Years later, Justice William O. Douglas wrote that “it was unfortunate the Court took the case,” and he recalled that while “it was easy to agree on the original per curiam,” the Court “almost fell apart when it came time to write out the views.”¹¹⁸

After the Court released the full opinion in late October, Justice Frankfurter asked Frederick Bernays Wiener, his former student but by then an acknowledged expert on military law, to evaluate the decision. Wiener told him that the “[w]eaknesses in the [Court’s] decision flowed ‘in large measure’ from the [Roosevelt] Administration’s disregard for ‘almost every precedent in the books’ when it established the military tribunal.”¹¹⁹ Wiener emphasized that court-martial procedures had “almost uniformly been applied to military commissions,” and that it was “too plain for argument” that the President could not waive or override the required review by the Judge Advocate General’s office.¹²⁰ He pointed out that the only precedent for using the Judge Advocate General of the Army as prosecutor – the trial of the Lincoln conspirators – was one which “no self-respecting military lawyer will look straight in the eye.” Even in that sorry precedent, he said, “the Attorney General did not assume to assist the prosecution.”¹²¹

The letters from Wiener apparently had an impact on Frankfurter. In 1953, when the Court was considering whether to sit in summer session to

115. Papers of Harlan Fiske Stone, “Memorandum re Saboteur Cases,” Sept. 25, 1942, at 2, Manuscript Room, Library of Congress.

116. “Memorandum of Mr. Justice Frankfurter, In re Saboteur Cases,” Papers of William O. Douglas, Box 77, at 1 (emphasis in original), Manuscript Room, Library of Congress.

117. Alpheus Thomas Mason, *Inter Arma Silent Leges*, 69 HARV. L. REV. 806, 826 (1956).

118. THE COURT YEARS, 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 138-139 (1980).

119. “Observations of Ex parte Quirin,” signed “F.B.W.,” Nov. 5, 1942, Papers of Felix Frankfurter, *supra* note 114, at 1.

120. *Id.* at 8.

121. *Id.* at 9.

hear the espionage case of Ethel and Julius Rosenberg, one of the Justices recalled that the Court had sat in summer session in 1942 to hear the Nazi saboteur case, and that it had issued a short per curiam upholding the jurisdiction of the military commission, followed by the full opinion three months later. Frankfurter noted that there was discussion about this two-step procedure and that Justice Robert H. Jackson “opposed this suggestion also, and I added that the *Quirin* experience was not a happy precedent.”¹²²

Justice Douglas also expressed regret about the procedure adopted by the Court in 1942. During an interview conducted on June 9, 1962, he remarked that the “experience with *Ex parte Quirin* indicated, I think, 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, the examination of the grounds that had been advanced is made, sometimes those grounds crumble.”¹²³ Knowledge of this checkered history probably explains Justice Scalia’s observation in *Hamdi* that the Nazi saboteur case was “not this Court’s finest hour.”¹²⁴

Alpheus Thomas Mason, in an article for the *Harvard Law Review* and in his biography of Chief Justice Stone, remarked that the Court could do little other than uphold the jurisdiction of the military commission, being “somewhat in the position of a private on sentry duty accosting a commanding general without his pass,” with the outcome of the case putting the judiciary “in danger of becoming part of an executive juggernaut.”¹²⁵ Michal Belknap remarked in another article that Stone went to “such lengths to justify Roosevelt’s proclamation” that he preserved the “form” of judicial review while “gutt[ing] it of substance.”¹²⁶ So long as Justices decided to march to the beat of war drums, he wrote, the Court “remained an unreliable guardian of the Bill of Rights.”¹²⁷ In a separate article, Belknap described an essay written by Frankfurter (“F.F.’s Soliloquy”) in the midst of the drafting of the full opinion as the work of a “judge openly hostile to the accused and manifestly unwilling to afford them procedural safeguards.”¹²⁸ David J.

122. “Memorandum Re: *Rosenberg v. United States*, Nos. 111 and 687, October Term 1952,” June 4, 1953, at 8, Papers of Frankfurter, *supra* note 114, Part I, Reel 70.

123. Conversation between Justice William O. Douglas and Professor Walter Murphy, June 9, 1962, at 204-205, Seeley G. Mudd Manuscript Library, Princeton University.

124. *Hamdi*, 542 U.S. at 569.

125. Mason, *supra* note 117, at 830, 831; ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 665, 666 (1956).

126. Michal Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 83 (1980).

127. *Id.* at 95.

128. Michael Belknap, *Frankfurter and the Nazi Saboteurs*, 1982 Y.B. SUP. CT. HIST. SOC’Y 66, 66. For the language of the Soliloquy, see either FISHER, *supra* note 7, at 117-121, or FISHER, *supra* note 36, at 116.

Danelski called the full opinion in *Quirin* “an agonizing effort to justify a *fait accompli*.”¹²⁹ The opinion represented a “constitutional and propaganda victory” for the executive branch, but “an institutional defeat” for the Supreme Court.¹³⁰ According to Danelski, the lesson for the Court is to “be wary of departing from its established rules and practices, even in times of national crisis, for at such times the Court is especially susceptible to co-optation by the executive.”¹³¹

VII. THE YAMASHITA TRIAL

In its *Hamdan* brief to the Supreme Court in September 2005, the government relied on another World War II military tribunal case, *In re Yamashita* (1946), to argue that the “concern for interference with military exigencies is only heightened where, as here, the military proceedings involve enforcement of the laws of war against an enemy force targeting civilians for mass death.”¹³² Among other cases, the government cited *Yamashita* for the proposition that “military commissions in a variety of circumstances may try enemy combatants for offenses against the laws of war.”¹³³

Like *Quirin*, *Yamashita* is not a precedent worth honoring or repeating. After his surrender in the Philippines on September 3, 1945, General Tomoyuki Yamashita was charged as a war criminal on September 25. The tribunal was under great pressure from President Harry Truman to “proceed, without avoidable delay.”¹³⁴ Prosecutors accused Yamashita in his capacity as commanding general of the Japanese Fourteenth Army Group in the Philippines of failing to prevent his troops from committing atrocities against the civilian population and prisoners of war. There was never any doubt about the magnitude and horror of the atrocities. The question was in determining the responsible authority. In the end, Yamashita was prosecuted not for what he did but for what he failed to do, not for what he knew but for what he should have known.

In addition to 64 individual charges, the comprehensive charge claimed that between October 9, 1944, and September 2, 1945, Yamashita “unlawfully

129. David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 61 (1996).

130. *Id.* at 80.

131. *Id.*

132. Brief for the Respondents in Opposition, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), at 22, *citing* *In re Yamashita*, 327 U.S. 1, 11 (1946) (“trial and punishment of enemy combatants” for war crimes is “part of the conduct of war operating as a preventive measure against such violations”).

133. *Id.*

134. RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* 67, 89-91 (1982).

disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes” against Americans and allies (particularly Filipinos), thereby violating the “laws of war.”¹³⁵ None of the charges established a direct link between Yamashita and the underlying criminal acts.¹³⁶ Shortly before the trial began, the prosecution submitted a supplemental list of 59 additional charges.¹³⁷

Six U.S. Army officers were appointed to defend Yamashita. They had only three weeks to prepare for trial, locate witnesses, and conduct research on the original 64 charges, and a mere three days on the additional charges.¹³⁸ The commission consisted of five American generals. None of them were lawyers or had any legal experience, despite having to rule on complex legal issues.¹³⁹ One of the generals was designated a “law member,” but he was not a lawyer.¹⁴⁰ Only one of the generals had recent combat command experience.¹⁴¹ When defense counsel for Yamashita argued that the charges set forth “no instance of neglect of duty” by him, and no acts of commission or omission “permitting” the crimes, and that American military jurisprudence did not hold a commanding officer responsible for the criminal acts of subordinates, the prosecution responded that the crimes were so flagrant that “they must have been known” to Yamashita, and that if he did not know “it was simply because he took affirmative action not to know.”¹⁴² Two prosecution witnesses attempted to link Yamashita to the atrocities, but the first depended on hearsay and the second’s testimony was rebutted by a defense witness. Both of the witnesses for the prosecution had much to gain, personally and financially, by cooperating with U.S. officials.¹⁴³

On December 7, 1945, the tribunal found Yamashita guilty as charged and sentenced him to death by hanging. Twelve international correspondents covering the trial voted 12 to 0 that Yamashita should have been acquitted.¹⁴⁴ In an opinion written by Chief Justice Stone, the Supreme Court split 6-2 in upholding the tribunal’s actions. Before reaching the substantive issues presented to the Court, Stone emphasized that the Court was “not here

135. George F. Guy, *The Defense of Yamashita*, 4 WYO. L.J. 153, 156 (1949).

136. See LAEL, *supra* note 134, at 80-81.

137. See *id.* at 81-82.

138. See *id.* at 81.

139. See J. Gordon Feldhaus, *The Trial of Yamashita*, 15 S.D.B.J. 181, 185 (1946).

140. Guy, *supra* note 135, at 161.

141. See LAEL, *supra* note 134, at 88; Stephen B. Ives, Jr., *Vengeance Did Not Deliver Justice*, WASH. POST, Dec. 30, 2001, at B2.

142. LAEL, *supra* note 134, at 82-83.

143. See *id.* at 84-85.

144. PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-51*, at 57 (1979).

concerned with the power of military commissions to try civilians,” citing *Ex parte Milligan* for authority.¹⁴⁵ When Stone found it impossible to attract a majority of Justices behind certain constitutional principles, he simply struck those aspects of his opinion.¹⁴⁶ He concluded that Yamashita’s failure to control his troops deserved inclusion in the law of war, citing language from the Fourth Hague Convention that required that troops be “commanded by a person responsible for his subordinates.”¹⁴⁷ Language of that breadth, however, does not necessarily mean that a commander is liable for criminal actions by subordinates. Certainly it is not U.S. practice to hold an American commander liable for the criminal conduct of his troops.

Justices Murphy and Rutledge issued lengthy and biting dissents. Murphy charged that Yamashita’s rights under the Due Process Clause of the Fifth Amendment had been “grossly and openly violated without any justification.”¹⁴⁸ The Due Process Clause, Murphy pointed out, applies to “any person” who is accused of a federal crime. No exception “is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent.”¹⁴⁹ Murphy said that Yamashita “was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged.”¹⁵⁰ Although “brutal atrocities” had been inflicted upon the Filipino population by Japanese armed forces under Yamashita’s command,¹⁵¹ there was no evidence that he knew of the atrocities or in any way had ordered them. In fact, U.S. forces had tried to disrupt his control over Japanese troops.¹⁵²

Rutledge objected that it was not in the American tradition “to be charged with crime which is defined after his conduct, alleged to be criminal, has taken place; or in language not sufficient to inform him of the nature of the offense or to enable him to make defense.”¹⁵³ He rejected the idea that there were two types of military commission, “one bound by the procedural provisions of the Articles [of War], the other wholly free from their restraints.”¹⁵⁴ *Yamashita* thus stands as a cautionary tale of the violations that

145. *In re Yamashita*, 327 U.S. 1, 9 (1946).

146. JOHN P. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 135-137 (1972); MASON, HARLAN FISKE STONE, *supra* note 125, at 666-671.

147. *Yamashita*, 327 U.S. at 15.

148. *Id.* at 40 (Murphy, J., dissenting).

149. *Id.* at 26.

150. *Id.* at 27-28.

151. *Id.* at 29.

152. *Id.* at 34.

153. *Id.* at 43 (Rutledge, J., dissenting).

154. *Id.* at 69-70.

can result when military commissions are allowed to function uninhibited by the procedural rules that govern courts-martial and civilian courts.

VIII. POSTWAR CHANGES

The period after World War II ushered in major shifts in the conduct of military trials, reflecting both statutory changes by Congress and significant rethinking by the Supreme Court. The system of military justice was profoundly altered by the enactment of the Uniform Code of Military Justice (UCMJ) in 1950.¹⁵⁵ The statute represented an effort to unify, consolidate, and codify the Articles of War, the Articles for the Navy, and the Disciplinary Laws of the Coast Guard. Underlying passage of the bill was the “precept that military effectiveness depends on justice and that, by and large, civilian forms and principles are necessary to ensure justice” in military trials.¹⁵⁶ Courts-martial today “reflect evolving standards in both military and civilian criminal law.”¹⁵⁷ Nevertheless, the military order issued by President Bush after 9/11 was released without any assistance from the Judge Advocate General’s offices, let alone from Congress.¹⁵⁸ Career military attorneys criticized the commissions’ departure from established standards.¹⁵⁹

A major purpose of the UCMJ was to add professionalism and expertise to the military justice system. Congress established two levels of review. The Judge Advocate General of each of the armed forces would create one or more boards of review, “each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.”¹⁶⁰ The boards of review evolved into Courts of Criminal Appeals.

The second level of review provided by the UCMJ is the Court of Military Appeals, now called the Court of Appeals for the Armed Forces. As an Article I court, it consisted originally of three judges (now five) appointed from civilian life by the President, with the advice and consent of the Senate. The term of office is 15 years. Judges on this court also must be members of the bar of a federal court or of the highest court of a state. Congressional debate on the UCMJ reveals opposition to having appellate review conducted

155. See John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 7-8 (1998).

156. *Id.* at 9.

157. Kevin J. Barry, *Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 1, 2.

158. See FISHER, *supra* note 36, at xi.

159. See Jeanne Cummings, *Gonzales Rewrites Laws of War*, WALL ST. J., Nov. 22, 2002, at A4.

160. Pub. L. No. 81-506, art. 66(a), 64 Stat. 107, 128 (1950).

solely within the military departments: “This has resulted in widespread criticism by the general public, who, with or without cause, look with suspicion upon all things military and particularly matters involving military justice.”¹⁶¹ Lawyers and laymen were disturbed to find “that the same official was empowered to accuse, to draft and direct the charges, to select the prosecutor and defense counsel from the officers under his command, to choose the members of the court, to review and alter their decision, and to change any sentence imposed.”¹⁶² Identical words could be applied to the military order and proclamation issued by President Roosevelt in 1942 and the tribunal used against General Yamashita. Part of the motivation of Congress in 1950 was to pass legislation to regulate and check “arbitrary, capricious, and whimsical action of commanding officers at every level and every point.”¹⁶³

Federal courts after World War II also took steps to limit the concentration of power that allowed the executive branch to create military tribunals and use courts-martial to try civilians. From 1952 to 1960, the Supreme Court began to adopt restrictions on military courts, particularly their authority to try U.S. citizens stationed overseas and members of the military who had left the service. In the first of these cases, the Court upheld the action of a military commission in Germany that sentenced Yvette Madsen, a native-born U.S. citizen, to 15 years in prison for murdering her husband. The Court concluded that the President, in the “absence of attempts by Congress to limit” his power, may in time of war “establish and prescribe the jurisdiction and procedure of military commissions.”¹⁶⁴

Justice Black penned the only dissent, but his position would influence the Court in subsequent decisions. He objected to concentrating the judicial power solely within the executive branch: “Executive officers acting under presidential authority created the system of courts that tried her, promulgated the edicts she was convicted of violating, and appointed the judges who took away her liberty.”¹⁶⁵ He said that whatever scope is granted to the President as Commander in Chief of the armed forces, “I think that if American citizens in present-day Germany are to be tried by the American Government, they should be tried under laws passed by Congress and in courts created by Congress under its constitutional authority.”¹⁶⁶

Under Black’s influence, the Court began to narrow the broad scope that had been given to military trials. In 1955, the Court reviewed the court-

161. 95 CONG. REC. 5721 (1949) (remarks by Rep. Brooks) (discussing Article 67).

162. *Id.* at 5725 (remarks by Rep. Durham).

163. *Id.* at 5726 (remarks by Rep. Philbin).

164. *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952).

165. *Id.* at 372.

166. *Id.*

martial of an ex-serviceman after he had served in Korea, been honorably discharged, and returned to the United States. The Justices seemed ready to support the military, but Black successfully insisted that the case be reargued, particularly after the confirmation of John Marshall Harlan to replace Robert Jackson. After scheduling the rehearing, Chief Justice Earl Warren announced at conference that he had changed his position, shifting the majority to Black.¹⁶⁷

Writing for the Court, Black invoked Article III and the Bill of Rights to place restrictions on what Congress could do under its Article I powers and what Presidents may do as Commander in Chief in asserting military authority over citizens. He ruled that ex-servicemen must be tried by federal civil courts.¹⁶⁸ Although the case focused on a court-martial, its reasoning can be applied to military tribunals: “We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property.”¹⁶⁹

A series of Court rulings from 1956 to 1960, known as “The Cases of the Murdering Wives,” tested the constitutionality of using courts-martial to try civilian dependents of military personnel serving overseas. In one case, the wife of an army colonel was tried by a general court-martial in Tokyo for murdering her husband. She was found guilty and sentenced to life imprisonment. The Court found no constitutional deficiency to the proceeding, issuing its decision on June 11, 1956, just as the court was completing its business for the term.¹⁷⁰ Clearly, the matter did not sit well with some members of the Court. In a section called a “Reservation,” Justice Felix Frankfurter spoke with some delicacy about hasty judicial actions: “Doubtless because of the pressure under which the Court works during its closing weeks,” several arguments “have been merely adumbrated in its opinion.”¹⁷¹ That was judicial-speak for a careless, sloppy opinion. The dissent by Warren, Black, and Douglas was more pointed: “The questions raised are complex, the remedy drastic, and the consequences far-reaching upon the lives of civilians. The military is given new powers not hitherto thought consistent with our scheme of government. For these reasons, we need more time than is available in these closing days of the Term in which

167. BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY* 180-181 (1983).

168. *Toth v. Quarles*, 350 U.S. 11 (1955).

169. *Id.* at 17.

170. *Kinsella v. Krueger*, 351 U.S. 470 (1956).

171. *Id.* at 483.

to write our dissenting views. We will file our dissents during the next Term of Court.”¹⁷²

On the same day, the Court held that Clarice Covert could be convicted and sentenced to life imprisonment by a court-martial in England for murdering her husband, an Air Force sergeant. She was brought to the United States and confined in a federal prison for women. The Court distinguished the case from the serviceman who had been honorably discharged.¹⁷³ The dissent by Warren, Black, and Douglas in the Tokyo case applied to this case as well. Because of the evident haste with which the Court issued these decisions, the dissenters pressed for a rehearing.¹⁷⁴ There were several changes on the Court. Sherman Minton stepped down on October 15, 1956, with William Brennan taking his seat. Stanley Reed retired on February 25, 1957, replaced by Charles Whittaker. The new appointments pushed the Court in a more liberal direction.

After granting a petition for rehearing, the Court on June 10, 1957, reversed both decisions. Whittaker did not participate. The Court decided that when the United States acts against its citizens abroad, it must act in accordance with all the limitations imposed by the Constitution, including Article III and the Fifth and Sixth Amendments. The plurality held that civilians who are citizens must be tried by Article III courts, not military courts.¹⁷⁵ The reasoning is broad enough to cover not only courts-martial but also military tribunals. Dependents of military personnel overseas “could not constitutionally be tried by military authorities.”¹⁷⁶

The Court’s ruling left some grey areas. While acknowledging that it had “not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces,” can promulgate the substantive law or procedures of military courts in time of peace or war, and conceding that Congress “has given the President broad discretion to provide the rules governing military trials,” Justice Black’s plurality opinion held firm to fundamental principles of separation of powers and the presumption against concentrated power: “If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative,

172. *Id.* at 485-86.

173. *Reid v. Covert*, 351 U.S. 487, 491 (1956).

174. SCHWARTZ, *supra* note 167, at 239-243.

175. *Reid v. Covert*, 354 U.S. 1 (1957).

176. *Id.* at 5 (plurality opinion of Justice Black, joined by Chief Justice Warren and Justices Douglas and Brennan). Justice Frankfurter concurred in the result, emphasizing that in his view “it is only the trial of civilian dependents in a capital case in time of peace that is in question.” *Id.* at 45. Justice Harlan also concurred in the result, “on the narrow ground that where the offense is capital [the statute granting court-martial jurisdiction] cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace.” *Id.* at 65.

executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.”¹⁷⁷

Three decisions by the Supreme Court in 1960 further restricted the use of military courts outside the country, limiting their use for civilian dependents of military personnel and civilian employees of the armed forces.¹⁷⁸ In a case in 1979, an Article III judge found himself presiding over an Article II occupation court in West Berlin. The State Department thought it could direct U.S. District Judge Herbert J. Stern on the availability of constitutional safeguards. He had other ideas. After a confrontation between the two branches, Judge Stern ran the trial the way he wanted. His decision had this parting warning. If the executive branch could create a tribunal and direct its proceedings, it would allow the government “to arrest any person without cause, to hold a person incommunicado, to deny an accused the benefit of counsel, to try a person summarily and to impose sentence – all as a part of the unreviewable exercise of foreign policy.”¹⁷⁹ Those words fit closely with the Bush military order of November 13, 2001.

IX. THE NON-DETENTION ACT

Judicial and executive reliance on *Quirin* as authority to detain and try U.S. citizens by military tribunals ignores legislative action in 1971. Congress passed a bill to repeal the Emergency Detention Act of 1950 and enact this new language: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹⁸⁰ The provision, called the “Non-Detention Act,” is codified at 18 U.S.C. §4001(a).

In the *Padilla* litigation, the government argued that §4001(a) “does not apply to the military’s wartime detention of enemy combatants,”¹⁸¹ in part because Section 4001(a) is a separate enactment “to an existing provision in United States Code Title 18 (‘Crimes and Criminal Procedure’) rather than Title 10 (‘Armed Forces’) or Title 50 (‘War and National Defense’).”¹⁸² The government stated that the existing Title 18 provision “was directed to the Attorney General’s control over federal prisons; its terms, which remain

177. *Id.* at 38-39.

178. *Kinsella v. Singleton*, 361 U.S. 234 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960).

179. *United States v. Tiede*, 86 F.R.D. 227, 243 (U.S. Court for Berlin 1979). For further details on this case, see FISHER, *supra* note 36, at 160-167.

180. Pub. L. No. 92-128, 85 Stat. 347 (1971).

181. Respondent’s Opposition, *supra* note 54, at 20.

182. *Id.* at 29.

unchanged, stated that the ‘control and management of Federal penal and correctional institutions, *except military or naval institutions*, shall be vested in the Attorney General.’¹⁸³

To accept the government’s analysis, one would have to believe that Congress, in 1971, limited imprisonment or detention by civilian authorities (unless specifically authorized by Congress), but intended to allow military authorities to imprison or detain without an Act of Congress. The legislative history does not support that interpretation, which would give a green light to a form of ongoing, unlimited, and unchecked martial law in the United States.

The Non-Detention Act was passed in an atmosphere of fear and anxiety about the power of the national government, both its civilian and military authorities. The purpose of §4001(a) is clarified by understanding the political pressures that emerged with the urban riots that spread across the nation after 1964. In signing the 1971 legislation, President Richard M. Nixon explained that the Administration was “wholeheartedly” in support of the repeal of the Emergency Detention Act, and that he wanted

to underscore this Nation’s abiding respect for the liberty of the individual. Our democracy is built upon the constitutional guarantee that every citizen will be afforded due process of law. There is no place in American life for the kind of anxiety – however unwarranted – which the Emergency Detention Act has evidently engendered.¹⁸⁴

His statement appears to cover both domestic and military detention, for it would do little to alleviate anxiety if individuals and groups knew they remained vulnerable to detention by military authorities.

President Nixon added, “This strong country has no reason to fear that the normal processes of law – together with those special emergency powers which the Constitution grants to the Chief Executive – will be inadequate to deal with any situation, no matter how grave, that may arise in the future.”¹⁸⁵ He did not elaborate on the “special emergency powers” available from the Constitution rather than from statutes. Did his additional remark suggest that, under the constitutional power as Commander in Chief, the President could order the military to arrest and detain individuals and groups without statutory authority? Such a claim would conflict with his promise that “every citizen will be afforded due process of law.” In any case, the legislative history of

183. *Id.* (emphasis in original).

184. Presidential Statement upon Signing the Bill Repealing the Emergency Detention Act, 1971 PUB. PAPERS 986 (Sept. 25, 1971).

185. *Id.*

the Non-Detention Act of 1971 offers no support for the proposition that the President could use the military to detain U.S. citizens.

Congress acted in 1971 under pressure from two sources. In 1968, the Japanese American Citizens League, with more than 25,000 members and 92 chapters in 32 states, spearheaded a nationwide drive to repeal the Emergency Detention Act.¹⁸⁶ Second, in 1968 the House Committee on Un-American Activities submitted a report that recommended the possible use of detention camps for certain black nationalists and Communists.¹⁸⁷ It was in this climate that Deputy Attorney General Richard G. Kleindienst wrote to the Senate Committee on the Judiciary in 1969, recommending repeal of the Emergency Detention Act. He explained, “In the judgment of this Department, the repeal of this legislation will allay the fears and suspicions – unfounded as they may be – of many of our citizens.”¹⁸⁸ Leaving citizens vulnerable to military detention would not have allayed those fears and suspicions.

In 1969, the Senate passed legislation to repeal the Emergency Detention Act. Senator Daniel Inouye, who introduced the bill, said he became

aware of the widespread rumors circulated throughout our Nation that the Federal Government was readying concentration camps to be filled with those who hold unpopular views and beliefs. These rumors are widely circulated and are believed in many urban ghettos as well as by those dissidents who are at odds with many of the policies of the United States. Fear of internment, I believe, lurks for many of those who are by birth or choice not “in tune” or “in line” with the rest of the country.¹⁸⁹

The Senate passed the bill by voice vote.¹⁹⁰

The House did not act on the Senate bill. Instead, the House Committee on Internal Security reported legislation in 1970 to amend certain provisions of the Emergency Detention Act

so as to relieve any misapprehension as to the circumstances in which it may be applied [M]isinformation regarding the terms and possible application of the act, by which it is made to appear that the title would authorize the establishment of ‘concentration camps’ for

186. 117 CONG. REC. 31,535 (1971) (statement of Rep. Evins).

187. H.R. Rep. No. 90-1351, at 59 (1968); S. REP. No. 91-632, at 3 (1969) (letter of Sen. Inouye).

188. S. REP. No. 91-632, at 4 (1969).

189. 115 CONG. REC. 40,702 (1969).

190. *Id.*

the incarceration of racial groups, has received wide dissemination within recent years.¹⁹¹

As part of the amendments, the committee proposed adding this language: “No citizen of the United States shall be apprehended or detained pursuant to the provisions of this title on account of race, color, or ancestry.”¹⁹² The dissenting view of Rep. Louis Stokes in this report said that the new language would do nothing “to quash the fears and rumors in the black community.”¹⁹³

The legislative history of §4001(a) provides ample evidence that Congress intended to limit all government power, whether exercised by civil or military authorities. In 1971, the House Committee on Internal Security again reported a bill to amend the Emergency Detention Act.¹⁹⁴ However, the House was moving in the direction of the Senate bill and chose to repeal rather than amend the Act. Initially, the House Judiciary Committee adopted an amendment by Rep. Spark Matsunaga, stating, “No person shall be detained except pursuant to title 18.”¹⁹⁵ As explained below, the Justice Department advised Congress that the power of government to detain individuals is not limited to Title 18, but appears in other titles of the U.S. Code.

As a consequence, the House Judiciary Committee reported legislation to repeal the Emergency Detention Act and add this language to Title 18: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹⁹⁶ Nothing in the report implies that the provision on imprisonment and detention applied only to civilian authorities (covered by Title 18). Neither indirectly or by implication did the report recognize an independent power by the President or the military to imprison or detain. The committee was responding to the political situation described in testimony by Assistant Attorney General Robert Mardian. He said that the Justice Department was “unequivocally in favor” of repealing the Emergency Detention Act, and he reminded the committee of the earlier letter from Deputy Attorney General Kleindienst, who regarded continuation of the Act as “extremely offensive to many Americans.”¹⁹⁷ People’s fears and suspicions would not be put to rest if military authorities possessed independent power to imprison and detain U.S. citizens suspected of posing a danger to national security.

191. H.R. REP. 91-1599, at 1 (1970).

192. *Id.* at 17.

193. *Id.* at 23.

194. H.R. REP. No. 92-94 (1971).

195. 117 CONG. REC. 31,755 (1971) (statement by Rep. Ichord).

196. H.R. REP. No. 92-116, at 1 (1971).

197. *Id.* at 3; *see supra* text accompanying note 188.

The committee left unchanged the following language in existing §4001: “The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General”¹⁹⁸ The government’s brief in *Hamdan* interpreted this passage as a green light for military imprisonment and detention, but the language merely recognizes that the Attorney General’s jurisdiction does not cover military or naval institutions.¹⁹⁹ The provision does not sanction military detentions.

During House debate, several lawmakers acknowledged that Congress was about to place limits not merely on the Attorney General but also on the President and the military. Rep. H. Allen Smith expressed concern that the proposed legislation would interfere with the kind of emergency actions taken by President Roosevelt immediately after Pearl Harbor, including taking aliens into custody. In 1942, Roosevelt had authorized the military to order the curfew and detention of Japanese-Americans without first receiving statutory authority. Smith supported the repeal of the Emergency Detention Act but objected strongly to adding new language: “[I]f the President were absolutely handicapped by this language that no citizens shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress, what could he possibly do if there were an emergency?”²⁰⁰ The Justice Department, however, had testified to Congress that “[t]here is a considerable amount of statutory authority to protect the Internal Security interests of our country from sabotage and espionage or other similar attacks.”²⁰¹

Rep. Thomas F. Railsback, who sponsored the new language, responded to Smith in this manner: “If we are concerned about what happened in 1942 when there really was not a statute existing upon which the President relied, then we have to do something in addition if we really want to prevent some kind of a recurrence of what happened in 1942.”²⁰² In this way Railsback argued that mere repeal of the Emergency Detention Act would not suffice. Only the adoption of new language would prevent the President from detaining U.S. citizens until he received statutory authority.

The question of whether §4001(a) was confined to detention by civilian authorities under Title 18 was debated extensively in the House. Rep. Abner Mikva recalled that a Justice Department official had testified

very wisely, that many of the provisions that do allow detention and imprisonment appear in other sections than title 18. He made

198. *Id.* at 6.

199. Respondent’s Answer, *supra* note 54, at 21-22.

200. 117 CONG. REC. 31,536 (1971).

201. *Id.* (statement of Rep. Matsunaga, quoting Assistant Attorney General Yeagley).

202. *Id.* at 31,537.

reference to them including [titles] 26 and 49, and in response to the Department of Justice opposition to that over extension, the Railsback amendment came into being, which made it very clear that we are not talking about title 18 but any detention authorized by an act of Congress.²⁰³

Rep. Robert Kastenmeier, who managed the bill, also spoke of detention and imprisonment authorities outside of Title 18. He referred to testimony from a Justice Department official that it was a mistake to assume “that all provisions for the detention of convicted persons are contained in title 18. He pointed to a number of criminal provisions that appear in other titles; for example, titles 21 – narcotics; 50 – selective service; 26 – internal revenue; and 49 – airplane hijacking.”²⁰⁴

Kastenmeier explained why the Railsback Amendment would restrict both civilian and military authorities:

To alleviate these problems raised by the Department of Justice, the committee recommends an amendment that would take the place of sections 1 and 2. The amendment provides that no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress.

In this way, the legislation also avoids the pitfalls that might be created by repealing the Detention Act by leaving open the possibility that people might nevertheless be detained without the benefit of due process, merely by executive fiat.

In other words, the requirement of legislative authorization would close off the possibility that the repeal of the Detention Act could be viewed as simply leaving the field unoccupied. It provides that there must be statutory authority for the detention of a citizen by the United States. Existing detention practices are left unaffected. Incarceration for civil and criminal contempt, and detention of mental defectives, for example, are already covered by statutes.²⁰⁵

Kastenmeier emphasized that “[r]epeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority.”²⁰⁶ Rep. Poff also noted that the bill’s sponsors and the House Judiciary Committee “did not content themselves with a simple repeal of the Emergency Detention Act, because it is far from certain what effect a

203. *Id.* at 31,538.

204. *Id.* at 31,540.

205. *Id.* at 31,540-31,541.

206. *Id.* at 31,541.

simple repealer would have on the President's powers to detain persons during an internal security emergency."²⁰⁷

Rep. Richard Ichord opposed the Railsback Amendment by warning that "this most dangerous committee amendment [would] deprive the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises. Hence the amendment also has the consequence of doing patent violence to the constitutional principle of separation of powers."²⁰⁸ Railsback's amendment, he said,

would deny to the President the means of executing his constitutional duties, and could have the effect of rendering him helpless to cope with the depredations of those hard-core revolutionaries in our midst who, in the event of war, may be reasonably expected to attempt a widespread campaign of sabotage and bloodletting, including the assassination of public officials, in aid of the enemy.²⁰⁹

Rep. Lawrence Williams opposed the Railsback Amendment because he did "not want to see the President's hands tied," objecting to language that "would represent an arrogant invasion of the emergency powers of the President."²¹⁰

Railsback stated, however, that his amendment

eliminates whatever authority the President would have on his own to establish detention camps except in those cases of emergency when martial law may properly be invoked. . . . Nothing Congress does can affect executive martial-law powers which arise when the processes of government cannot function in an orderly way. For that is truly a "nonlaw" situation.²¹¹

With the House prepared to repeal the Emergency Detention Act, Ichord urged that the following amendment be adopted in the nature of a substitute for the Judiciary Committee amendment:

That the prior enactment and repeal herein of provisions of Title II of the Internal Security Act of 1950 (50 U.S.C. 811-826) shall not be construed to preempt, disparage, or affect the powers accorded to or the duties imposed upon the President under the Constitution and

207. *Id.* (statement of Rep. Poff).

208. *Id.* at 31,542.

209. *Id.* at 31,544.

210. *Id.* at 31,554.

211. *Id.* at 31,755.

other laws of the United States: provided, however, that no citizen of the United States shall be apprehended or detained for the prevention of espionage or sabotage solely on account of race, color, or ancestry.²¹²

Ichord's amendment failed, 124 to 272.²¹³ An earlier Ichord amendment, to revise some of the provisions of the Emergency Detention Act, failed by a vote of 22 to 68.²¹⁴ After the Judiciary Committee amendment (adapted by Railsback) was agreed to, 290 to 111, the bill passed the House 356 to 49.²¹⁵ The Senate passed the House bill by voice vote.²¹⁶ The Supreme Court has interpreted Section 4001(a) to proscribe "detention of *any kind* by the United States, absent a congressional grant of authority to detain."²¹⁷

Thus, the political climate of 1971, combined with the legislative history, provide persuasive evidence that the purpose of repealing the Emergency Detention Act and adding the Railsback Amendment was to strip from the executive branch – both its civilian and military components – any claim of independent authority to round up, imprison, and detain disfavored individuals or groups.

X. *HAMDAN V. RUMSFELD*

On June 29, 2006, the Supreme Court in *Hamdan v. Rumsfeld*²¹⁸ clarified a number of legal issues about military commissions. The Bush administration had argued that "inherent" powers available to the President under Article II included full authority to create military commissions. Based on this position, there was no need to seek legislation from Congress. As stated in a Justice Department brief, presidential power under Article II

includes the inherent authority to create military commissions even in the absence of any statutory authorization, because that authority is a necessary and longstanding component of his war powers. . . . Throughout our Nation's history, Presidents have exercised their

212. *Id.* at 31,545.

213. *Id.* at 31,766.

214. *Id.* at 31,761.

215. *Id.* at 31,768 and 31,781.

216. *Id.* at 32,145.

217. *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original).

218. 126 S. Ct. 2749.

inherent commander-in-chief authority to establish military commissions without any specific authorization from Congress.²¹⁹

The government also cited earlier cases for the proposition that the President may determine that the Geneva Convention does not apply to al Qaeda in Afghanistan or elsewhere, and that al Qaeda detainees do not qualify as prisoners of war.²²⁰

In *Hamdan*, the Court held that the type of military commission fashioned by the Administration was not expressly authorized by any congressional statute. Existing law, including Article 21 of the Uniform Code of Military Justice (UCMJ), did not provide a mandate to the President to authorize any type of commission he decided to create, nor did the Court find anything in the text or legislative history of the Authorization for Use of Military Force (AUMF),²²¹ enacted after 9/11, that intended to expand or alter the authorization set forth in Article 21.²²² Neither did the Court find in the Detainee Treatment Act any authority for the commission.²²³ In this manner the Court identified fundamental defects under the system of separation of powers. The type of commission established by the Administration, the Court said, “risk[ed] concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution.”²²⁴

The Court ruled that the military commission established by the Administration, in terms of its structure and procedures, violated both the UCMJ and the Geneva Conventions.²²⁵ It concluded that UCMJ Article 36 had not been complied with because the President had made an insufficient determination “to justify variances from the procedures governing courts-martial.”²²⁶ The Court expressed concern that the accused and his civilian counsel “may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to ‘close.’”²²⁷ It also noted that neither “live testimony nor witnesses’s written statements need be sworn.”²²⁸

219. Brief for Respondents, *Hamdan v. Rumsfeld*, No. 05-184, Supreme Court of the United States, Feb. 23, 2006, at 21-22.

220. *Id.* at 38.

221. Pub. L. No. 107-40, 115 Stat. 224 (2001).

222. *Hamdan*, 126 S. Ct. at 2775.

223. *Id.*

224. *Id.* at 2780.

225. *Id.* at 2791-2798.

226. *Id.* at 2791.

227. *Id.* at 2786.

228. *Id.* at 2786-2787.

The Administration was not required to follow every procedure established in the UCMJ, but “any departure must be tailored to the exigency that necessitates it.”²²⁹ This the Administration had failed to do. The rules set forth in the Manual for Courts-Martial “must apply to military commissions unless impracticable.”²³⁰ Nothing in the record before the Court “demonstrate[d] that it would be impracticable to apply court-martial rules in this case.”²³¹ The unwillingness or inability of the Administration to demonstrate impracticability “is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present.”²³²

The Court’s decision compelled the Administration to come to Congress to seek statutory authority. *Hamdan* marked a clear and pointed rebuff to the Administration’s legal and constitutional reasoning, and yet executive officials responded as though no serious deficiencies existed in the structure and procedures they had adopted for military commissions. At congressional hearings, witnesses from the executive branch advised Congress that it need only pass legislation to endorse what the Administration had stitched together before the Court’s ruling.

At a hearing on July 11, 2006, before the Senate Committee on the Judiciary, Steven G. Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel, claimed that the Court “did not address the President’s constitutional authority and did not reach any constitutional question.”²³³ Obviously, the Court reached a constitutional question by rejecting the Administration’s argument that the President possessed sufficient authority under Article II and did not need statutory authority from Congress. Bradbury also derided the Court’s decision by remarking, “The very notion of our military personnel regularly reading captured enemy combatants Miranda warnings on the battlefield is nonsensical.”²³⁴ That kind of comment amounted to a cheap shot, implicitly rebuking the Court for a position it had never taken.

At those same hearings, Daniel J. Dell’Orto, Principal Deputy General Counsel for the Department of Defense, offered another gratuitous attack on

229. *Id.* at 2790.

230. *Id.* at 2791.

231. *Id.* at 2792.

232. *Id.*

233. *The Supreme Court’s Decision in Hamdan v. Rumsfeld: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Steven G. Bradbury, Acting Asst. Attorney General, Office of Legal Counsel), available at http://judiciary.senate.gov/print_testimony.cfm?id=1986&wit_id=5505.

234. *Id.* at 2.

the Court. He urged Congress to adopt processes “to avoid the absurd result of adopting protections for terrorists that American citizens do not receive in civilian courts.”²³⁵ At hearings on July 12, 2006, before the House Armed Services Committee, one lawmaker suggested, “We could just ratify what the executive branch and the [Department of Defense] have done and move on.” Dell’Orto replied, “That would be a very desirable way to proceed.”²³⁶ Other members of Congress cautioned against that cavalier spirit. Senator Lindsey Graham, drawing from his experience as a military lawyer, advised, “The idea of reauthorizing military commissions as written would be a mistake.”²³⁷

Congressional hearings revealed a major divide between civilian and military lawyers in the Administration. Attorneys from the military services objected to the use of evidence derived from hearsay or coercion, the exclusion of defendants from their trials, and allowing classified evidence to be provided to a defense lawyer but not to the defendant.²³⁸ The civilian officials who drafted the new procedures were comfortable with denying defendants the right to confront accusers or even to be present at their own trials.²³⁹ To John D. Hutson, the Navy’s top uniformed lawyer from 1997 to 2000, the Administration’s proposed rules would allow the government to tell a detainee, “We know you’re guilty. We can’t tell you why, but there’s a guy, we can’t tell you who, who told us something. We can’t tell you what, but you’re guilty.”²⁴⁰ If evidence is classified and cannot be shown to the defendant, or if an informant cannot be identified to the accused without sacrificing national interests, one option is for the prosecution to drop the charges based on that information.²⁴¹

235. *The Supreme Court’s Decision in Hamdan v. Rumsfeld: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Daniel J. Dell’Orto, Principal Deputy General Counsel, Office of General Counsel, U.S. Department of Defense, available at http://judiciary.senate.gov/print_testimony.cfm?id=1986&wit_id=5506).

236. Jonathan Weisman, *Battle Looms in Congress Over Military Tribunals*, WASH. POST, July 13, 2006, at A6.

237. Jonathan Weisman, *Senators Gain Momentum to Change Military Tribunal System*, WASH. POST, July 15, 2006, at A6.

238. See R. Jeffrey Smith, *Top Military Lawyers Oppose Plan for Special Courts*, WASH. POST, Aug. 3, 2006, at A11.

239. See R. Jeffrey Smith, *White House Proposal Would Expand Authority of Military Courts*, WASH. POST, Aug. 2, 2006, at A4.

240. *Id.*

241. For comparable options of dropping charges when the administration does not want “state secrets” disclosed, see LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* 230-240 (2006).

Congressional hearings also emphasized the importance of reciprocity. At hearings before the Senate Armed Services Committee on August 2, 2006, Senator Graham developed this point:

Reciprocity is the key guiding light for me. Do not do something in this committee that you would not want to happen to our troops. The question becomes, for me, if an American servicemember is being tried in a foreign land, would we want to have that trial conducted in a fashion that the jury would receive information about the accused's guilt not shared with the accused, and that person be subject to penalty of death? I have a hard time with that.

Telling the lawyer doesn't cut it with me either, because I think most lawyers feel an ethical obligation to have information shared with their client.²⁴²

What the Court did in *Hamdan* was to recognize in Congress the constitutional authority it possessed under Article I but had declined to exercise in favor of the President. The decision also took from the backrooms of the Administration a military commission process that was supposed to assure "swift justice" but that in fact had been strikingly unsuccessful over a period of five years in ever prosecuting and convicting a single alleged terrorist. One of the prosecutors assigned to the commission charged with trying Salim Ahmed Hamdan called the system "a half hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged."²⁴³

XI. DRAFTING THE MILITARY COMMISSIONS ACT OF 2006

A virtue of a democratic republic is the capacity to deliberate on public policy issues in the open, forcing executive officials to justify their programs and obtain authority from the legislature. Success is never guaranteed in this process, but it offers more hope and constitutional legitimacy than the unilateral, secretive, inept model preferred by the Bush administration. When President Bush and his advisers sought legislative relief from the *Hamdan* decision, they decided to transfer the drafting task from the uniformed to the uninformed, from those who understood military law to those who promoted

242. *The Future of Military Commissions: Hearing of the S. Armed Services Comm.*, Aug. 2, 2006 (Lexis, News Library) (statement of Sen. Lindsey Graham).

243. *The Supreme Court's Decision in Hamdan v. Rumsfeld: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (written statement of Lt. Com. Charles D. Swift, JAGC, U.S. Navy), available at http://judiciary.senate.gov/print_testimony.cfm?id=1986&wit_id=5510. The prosecutor was Air Force Captain John Carr.

abstract and academic theories of presidential power and their own advancement to federal judgeships and other rewards. It is a model to sedulously avoid in the future.

Attorney General Alberto Gonzales appeared before the Senate Armed Services Committee on August 2, 2006, to outline the main elements of the bill being drafted. He proposed enacting a new Code of Military Commissions modeled on court-martial procedures of the UCMJ but adapted for use in the trials of terrorist unlawful combatants.²⁴⁴ The new code would track many of the procedures and structures of the UCMJ. Military commissions would be presided over by a military judge authorized to make final rulings at trial on law and evidence, as with courts-martial. Also following the court-martial model, the military judge would not be a voting member of the military commission. Gonzales recommended increasing the minimum number of commission members from three to five, and requiring twelve members of the commission for any case in which the death penalty is sought.²⁴⁵ The government would bear the burden of proving the accused's guilt beyond a reasonable doubt.

As to *Hamdan's* insistence that Common Article 3 of the Geneva Conventions be followed, Gonzales testified that the U.S. military "has never before been in a conflict in which it applied Common Article 3 as the governing detention standard."²⁴⁶ Instead, he said, the military was trained to apply the special procedures of the Conventions to regular and lawful combatants who are captured as prisoners of war. He noted that many of the provisions of Common Article 3 prohibit actions that are universally condemned, such as "murder," "mutilation," "torture," and the "taking of hostages."²⁴⁷ He expressed concern, however, that some of the language of Common Article 3 (such as "outrages upon personal dignity" and "humiliating and degrading treatment") was unclear and would create "an unacceptable degree of uncertainty for those who fight to defend us from terrorist attack, particularly because any violation of Common Article 3 constitutes a federal crime under the War Crimes Act."²⁴⁸

Gonzales proposed adding clarity to Common Article 3 by incorporating the McCain Amendment to the Detainee Treatment Act of 2005. The language of the amendment, he said, was "a reasonable interpretation of the

244. *Legislation in Response to Hamdan v. Rumsfeld: Hearings Before the S. Comm. on Armed Services*, 109th Cong. (2006) (prepared Statement of Attorney General Alberto R. Gonzales) (hereinafter Gonzales Statement), available at http://www.usdoj.gov/ag/testimony/2006/ag_speech_060802.html.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

relevant provisions of Common Article 3.”²⁴⁹ The McCain Amendment prohibits “cruel, inhuman, or degrading treatment or punishment” of persons in U.S. custody.²⁵⁰ The Bush administration viewed this provision “as consistent with, and a useful clarification of, our obligations under the relevant provisions of Common Article 3.”²⁵¹

During the hearing, Senators tried to understand what types of interrogation techniques would be permitted by the McCain Amendment in questioning detainees. Senator Carl Levin asked Gonzales whether he believed that the use of testimony obtained through such techniques as “waterboarding, stress positions, intimidating use of military dogs, sleep deprivation, sensory deprivation, [and] forced nudity” would be consistent with Common Article 3. Gonzales responded, “I can’t imagine that such testimony would be reliable, and therefore, I find it unlikely that any military judge would allow such testimony in his evidence.”²⁵²

When the Administration’s bill (S. 3861) was introduced in the Senate on September 7, it included this provision: “The President’s authority to convene military commissions arises from the Constitution’s vesting in the President of the executive power and the power of Commander in Chief of the Armed Forces.”²⁵³ That was the position that the Administration had presented to the Supreme Court in its legal briefs and arguments, and that is the position the Court squarely repudiated. The Court found the authority to convene military commissions not in Article II for the President but in Article I for Congress, as expressed in Articles 21 and 36 of the UCMJ. If the statement in the Administration’s bill were correct, the Court would have decided in favor of the President, not Congress, and there would have been no requirement for President Bush to seek statutory authority from Congress. This provision was eliminated from the bill that became law.

As negotiations ensued, it appeared that several Republican Senators would block the bill that the Administration favored. President Bush “warned defiant Republican Senators” that he would close down a CIA interrogation program if they succeeded in passing their version of a bill regulating detention of enemy combatants.²⁵⁴ These Republican Senators included John Warner of Virginia, John McCain of Arizona, and Lindsey Graham of South Carolina. Other Republican Senators, including Olympia Snowe of Maine, announced their intention to join this opposition to the Administration.

249. *Id.*

250. Pub. L. No. 109-148, §1003(a), 119 Stat. 2739 (2005).

251. Gonzales Statement, *supra* note 244.

252. *The Future of Military Commissions*, *supra* note 242.

253. Bringing Terrorists to Justice Act of 2006, S. 3861, 109th Cong. §2(3) (2006).

254. Peter Baker, *GOP Infighting on Detainees Intensifies*, WASH. POST, Sept. 16, 2006, at A1.

Newspaper stories highlighted this rebellion within Republican ranks.²⁵⁵ During this period, the Administration barely had enough votes to gain the support of the House Judiciary Committee in passing a bill that the White House supported.²⁵⁶

In the days that followed, the resistance of Republican Senators began to fade and the White House gained the upper hand. Newspaper stories now featured such headlines as “Congress Clears Detainee Bill: Critics Question Constitutionality: Habeas Corpus Rights Are Denied; Coerced Confessions, Hearsay Evidence Are Allowed.”²⁵⁷ An editorial in the *Washington Post*, entitled “Profiles in Cowardice,” described the political purpose of President Bush as pressing his opponents “to cave to his will, against their better judgment, or to create an issue allowing his party to tar the opposition as soft on terrorism. In this case, thanks in part to the Democrats’ weak-hearted abdication, he got both.”²⁵⁸ One House Member complained, however, that in negotiations with the White House on the House side, “no Democrats were involved in any way” in key meetings in the final days, “nor did the House Rules Committee make in order any of the 15 amendments that Democrats offered to address the sections of the bill that most offend our democratic values and violate our most fundamental traditions.”²⁵⁹

Members of the House disagreed on whether the bill applied only to aliens or also to U.S. citizens. The bill specifically stated that “alien unlawful enemy combatants . . . shall be subject to trial by military commissions.”²⁶⁰ That much is clear. However, “unlawful enemy combatant” was defined as “an individual” – not distinguishing between aliens and U.S. citizens – “determined by or under the authority of the President or the Secretary of Defense” to have engaged in hostilities or to have supported hostilities against the United States.²⁶¹ The tension here could have been easily resolved by creating two categories, one for aliens tried by commissions, and the other for

255. See Carl Hulse, Kate Zernike & Sheryl Gay Stolberg, *How 3 G.O.P. Veterans Stalled Bush Detainee Bill*, N.Y. TIMES, Sept. 17, 2006, at 1; John M. Donnelly, *Detainee Treatment Fractures GOP: Influential Senators’ Challenge to Bush Proposal on Terrorist Suspects Keeps Issue at Cutting Edge of Security Debate*, C.Q. WEEKLY REP., Sept. 18, 2006, at 2458.

256. Charles Babington, *House Panel Supports Tribunal Plan, 20 to 19*, WASH. POST, Sept. 21, 2006, at A6.

257. Martin Kady II, *Congress Clears Detainee Bill: Critics Question Constitutionality: Habeas Corpus Rights Are Denied; Coerced Confessions, Hearsay Evidence Are Allowed*, C.Q. WEEKLY REP., Oct. 2, 2006, at 2624.

258. Editorial, *Profiles in Cowardice*, WASH. POST, Oct. 1, 2006, at B6.

259. 152 CONG. REC. H7510 (daily ed. Sept. 27, 2006) (statement by Rep. Slaughter).

260. S. 3861, *supra* note 253, §4(a)(1).

261. *Id.*

U.S. citizens who are designated as unlawful enemy combatants and never tried.²⁶²

The Senate Armed Services Committee acted in bipartisan fashion by reporting, 15 to 9, a bill that rejected the draft submitted by the Administration.²⁶³ However, the committee bill was never brought to the Senate floor. Instead, Republican Senators worked with executive officials to produce a substitute bill more to the liking of the Administration. An amendment by Senator Carl Levin (D-Mich.) to call up the committee bill failed on a vote of 43 to 54.²⁶⁴

The Military Commissions Act of 2006 creates a separate chapter in Title 10 of the U.S. Code governing the structure and procedures for military commissions.²⁶⁵ It defines unlawful enemy combatant to include a person “who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents,” and a person “who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.”²⁶⁶ The term “lawful enemy combatant” includes a person who is “a member of the regular forces of a state party engaged in hostilities against the United States” and “a member of a militia, volunteer corps, or organized resistance movement [who wears] a fixed distinctive sign recognizable at a distance, carr[ies] their arms openly, and abide[s] by the law of war.”²⁶⁷ A military commission established under this chapter “is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”²⁶⁸ The statute also provides: “No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States

262. 152 CONG. REC. H7541-42 (Rep. Wu), H7542 (Rep. Hunter), H7544 (Rep. Buyer), H7544 (Rep. Wu), H7549 (Rep. Schiff) (daily ed. Sept. 27, 2006).

263. *Id.* at S10243 (Senator Levin).

264. *Id.* at S10263.

265. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

266. *Id.* §3(a)(1), 120 Stat. 2601 (adding 10 U.S.C. §948a(1)(A)).

267. *Id.* §3(a)(1), 120 Stat. 2601 (adding 10 U.S.C. §948a(2)).

268. *Id.* §3(a)(1), 120 Stat. 2602 (adding 10 U.S.C. §948b(f)).

or its States or territories.”²⁶⁹ Any “alien unlawful enemy combatant is subject to trial by military commission.”²⁷⁰

As to procedures, the statute provides that compulsory self-incrimination is prohibited.²⁷¹ However, the statute then proceeds to explain the admissibility of statements obtained through coercive techniques. A statement obtained before December 30, 2005 (the date of the Detainee Treatment Act) in which the degree of coercion is disputed may be admitted as evidence if the military judge finds that (1) “the totality of the circumstances renders the statement reliable and possessing sufficient probative value” and (2) “the interests of justice would best be served by admission of the statements into evidence.”²⁷² How can evidence obtained by coercive means be considered “reliable” and have “probative” value? As for evidence obtained after enactment of the Detainee Treatment Act, if the degree of coercion is disputed the statements may be admitted only if the military judge finds (1) and (2) above and finds that “the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.”²⁷³

Other procedures concerning access to witnesses and to evidence are also controversial. The accused “shall be permitted to present evidence in his defense, to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing”²⁷⁴ These guarantees are complicated by the use of classified information. To protect classified information from disclosure, the military judge, upon motion of the government,

shall authorize, to the extent practicable, (i) the deletion of specified items of classified information from documents to be introduced as evidence before the military commission; (ii) the substitution of a portion or summary of the information for such classified documents; or (iii) the substitution of a statement of relevant facts that the classified information would tend to prove.²⁷⁵

269. *Id.* §5(a), 120 Stat. 2631.

270. *Id.* §3(a)(1), 120 Stat. 2602 (adding 10 U.S.C. §948c).

271. *Id.* §3(a)(1), 120 Stat. 2607 (adding 10 U.S.C. §948r).

272. *Id.* §3(a)(1), 120 Stat. 2607 (adding 10 U.S.C. §948r(c)).

273. *Id.* §3(a)(1), 120 Stat. 2607 (adding 10 U.S.C. §948r(d)).

274. *Id.* §3(a)(1), 120 Stat. 2608 (adding 10 U.S.C. §949a(b)(A)).

275. *Id.* §3(a)(1), 120 Stat. 2612 (adding 10 U.S.C. §949d(f)(2)(A)).

Suppose the government deletes the name of the informer? In that event, the accused has no right of confrontation and no right to examine and respond to evidence presented against him.

It is not even clear from the statute whether the accused's attorney would have access to such classified information. The defense counsel "shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense."²⁷⁶ With respect to the discovery obligations of government prosecutors, the military judge, upon motion of government counsel, "shall authorize, to the extent practicable," the "deletion of specified items of classified information to be made available to the accused," may substitute a portion or summary of the information for such classified documents," or may substitute a statement admitting relevant facts that the classified information would tend to prove.²⁷⁷

As to treaty interpretations and obligations, the statute authorizes the President to "interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulation for violations of treaty obligations which are not grave breaches of the Geneva Conventions."²⁷⁸ The President shall issue those interpretations by Executive Order and published them in the *Federal Register*.²⁷⁹ Any Executive Order so published "shall be authoritative (except as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations."²⁸⁰ Although these Executive Orders are "authoritative," they are not necessarily permanently binding or exclusive. The statute further provides: "Nothing in this section shall be construed to affect the constitutional functions and responsibilities of Congress and the judicial branch of the United States."²⁸¹

The Military Commissions Act includes a section that attempts to define the liability of U.S. officers who interrogate detainees. When are such officers subject to prosecution under the War Crimes Act? The term "grave breach of common Article 3" means any of nine specified acts, usually accompanied by intent.²⁸² For example, "torture" is defined in this manner:

The act of a person who commits, or conspires or attempts to commit, an act *specifically intended* to inflict severe physical or mental pain

276. *Id.* §3(a)(1), 120 Stat. 2614 (adding 10 U.S.C. §949j(a)).

277. *Id.* §3(a)(1), 120 Stat. 2614-2615 (adding 10 U.S.C. §948j(c)(1)).

278. *Id.* §6(a)(3)(A), 120 Stat. 2632.

279. *Id.* §6(a)(3)(B), 120 Stat. 2632.

280. *Id.* §6(a)(3)(C), 120 Stat. 2632.

281. *Id.* §6(a)(3)(D), 120 Stat. 2632.

282. *Id.* §6(b)(1), 120 Stat. 2633-2635 (amending 18 U.S.C. §2441(c)(3) and adding 18 U.S.C. §2441(d)) (emphasis added).

or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.²⁸³

What happens if the “specific intent” is to obtain information and the physical or mental pain is only incidental and not intended? Under those conditions, is there any liability under the War Crimes Act? The statute does not provide a clear answer.

In its decision in *Hamdan v. Rumsfeld* the Supreme Court rejected the Administration’s argument that the President has authority under Article II to create military commissions and determine their structures and procedures, at least in the face of inconsistent statutory requirements found in the UCMJ. Although in the early stages of executive-legislative negotiations there was substantial push-back from Congress in drafting the bill that became the Military Commissions Act of 2006, legislative resistance gradually declined, and the White House seemed to prevail on the central points. Members of Congress had not asserted their authority over military commissions in the five years after the terrorist attacks of 9/11. When asked by the Court to do so they showed little interest or confidence in exercising an independent constitutional role and providing life to the system of checks and balances.

CONCLUSION

The treatment of Padilla and other enemy combatants by all three branches of government has done much to impair the rights of defendants, going far beyond the boundaries mapped out by the Supreme Court in *Quirin* and *Yamashita*. The Administration claimed the right to hold U.S. citizens as enemy combatants and detain them indefinitely without being charged, given counsel, or tried. Alexander Hamilton expressed the fear of arbitrary imprisonment, where there is no opportunity to prove one’s innocence:

The observations of the judicious Blackstone . . . are well worthy of recital: “To bereave a man of life, [says he,] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation.”²⁸⁴

283. *Id.* §6(b)(1)(B), 120 Stat. 2633 (adding 18 U.S.C. §2441(d)(1)(A)) (emphasis added).

284. THE FEDERALIST No. 84, at 533 (Benjamin F. Wright ed., 1961).

The Framers rejected political models that concentrated power in a single branch, especially over matters of war. To minimize abuse and injustice by government officials, they relied on a system of checks and balances, separation of powers, review by an independent judiciary, and the operation of republican principles.

The Supreme Court has repeatedly warned about centralizing power in a single branch. In 1946, it emphasized the important constitutional principle that courts “and their procedural safeguards are indispensable to our system of government” because the Framers “were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws.”²⁸⁵ In 1957, Justice Black and the plurality in *Reid v. Covert* warned that if the President “can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials.”²⁸⁶ Such a concentration of power runs counter to the core constitutional principle of separation of powers and the Framers’ fear of presidential wars.²⁸⁷

The Framers designed the Constitution for times of peace and war and expected republican government and procedural safeguards to meet the common danger. It is especially during war and emergencies that the institution of the presidency poses the highest risk, executive errors inflict the greatest damage, and individual liberties are placed at maximum peril. Institutional checks are needed more, not less. Unfortunately, in periods of national crisis the legislative and judicial branches typically forfeit their independence and throw their support behind presidential initiatives, no matter how costly to the nation and its citizens. It is the obligation of scholars, citizens, and the media to constantly urge upon Congress and the courts that safeguarding individual rights, constitutional values, and structural checks are far more important than a show of national unity behind a particular President. Patriotism worth its name grants the highest priority to the nation, not the Chief Executive, and knows the difference between the two.

285. *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946).

286. *Reid v. Covert*, 354 U.S. 1, 38-39 (1957).

287. See Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. NAT'L SECURITY L. & POL'Y 73 (2005).