

**Return of the Great Writ: Judicial Review of the Detention of  
Alleged Terrorists as Enemy Combatants**

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I. INTRODUCTION

The federal government's reaction to the terrorist attacks of September 11, 2001, included a wide range of statutes, policies, and strategies for aggressively pursuing, capturing, detaining, and punishing not only the individuals directly responsible for the attacks but also those who seek to carry out future attacks. The objective was no less ambitious than the elimination of the entire terrorist organization known as Al Qaeda, from its leaders like Osama Bin Laden to its agents in the field. To accomplish this aim the government invoked the full range of its powers in foreign and domestic affairs: military force abroad, foreign intelligence gathering, cooperation with international allies, immigration laws, military tribunals, civilian arrests and prosecutions, grand jury investigations, and more. This massive effort has provoked praise and outrage about nearly every facet of its scope and particulars from a wide variety of perspectives.

This Article examines a single piece of the vast antiterrorism mosaic: the proper role of judicial review, through the procedure of a petition for the writ of habeas corpus, of the detention of an individual as an "enemy combatant" under the laws of war based on the government's allegation that the person is a terrorist. These prisoners are held outside the rubric of the ordinary criminal justice process in the custody of the United States Armed Forces. As such they are denied the constitutional rights usually taken for granted when the government deprives a person of liberty. The President's classification of an individual as an enemy combatant rather

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than an ordinary criminal therefore has consequences of tremendous significance, and determining the role of the courts in reviewing those classifications is of paramount importance.

Despite the fundamental nature of the issue, however, the role of judicial review in this context is surprising unclear, and the courts have yet to reach—much less resolve—many of the most basic questions. This Article confronts those questions and proposes answers to them.

The Article begins in Part II by reviewing the framework of constitutional and statutory law that governs the federal government’s detention of persons. It first considers detention under provisions of civilian law, including arrests of alleged criminals, incapacitation of dangerous persons in non-punitive proceedings, and the application of immigration laws to non-citizens. It then describes the power to detain enemy combatants under the laws of war and try them before military tribunals, and discusses the manner in which that power has actually been exercised and the precedent and contemporary rulings the courts have made concerning it. Finally, it explains the questions left open by these doctrines and practice that the Article will answer.

In Part III the Article examines two significant jurisdictional thresholds for habeas petitions challenging an enemy combatant detention. One is the requirement of that the petitioner have standing to assert the prisoner’s interests in contesting the detention. The other is the requirement that the petitioner’s claims be within the court’s subject matter jurisdiction, because not every person detained under the authority of the United States may pursue a habeas petition. Fortunately the law on these two issues is relatively clear in most cases (and the Supreme Court has granted certiorari to resolve the question of subject matter jurisdiction over prisoners held at the naval base at Guantanamo Bay, Cuba, that has divided the lower courts).

Part IV of the Article analyzes the fundamental questions—so far left unanswered by the courts—concerning judicial review of the detention of alleged terrorists as enemy combatants.

To adjudicate the constitutionality of such prisoners' detentions requires determination of the government's burden of proof and the appropriate methods for establishing that proof. That analysis depends in part upon an evaluation of how the doctrine of enemy combatant detentions should be adapted to account for the elusive nature of the battlefields on which the conflict is waged, particularly with respect to persons seized within the United States before carrying out a terrorist attack. Finally, the analysis also implicates the issues of the prisoners' access to counsel and the concession or stipulation of undisputed facts.

The Article concludes that [insert summary of conclusions].

## II. DOCTRINAL AND FACTUAL BACKGROUND

The issue of the scope of judicial review of the detention of alleged terrorists as enemy combatants implicates a number of significant, longstanding doctrines of both civilian and military law. On the civilian side, constitutional doctrines of criminal procedure, non-punitive civil detention, and immigration law govern the arrest, detention, and incarceration of individuals. On the military side, the rules governing the power to detain, and the conditions of detention applicable to, persons as enemy combatants have substantial and crucial differences from the otherwise applicable civilian procedures. Thus, the power of the federal courts to review the President's designation of an individual as an enemy combatant has far-reaching effects.

One small component of the government's reaction to the September 11th terrorist attacks was the President's decision to detain several hundred persons as alleged enemy combatants, and to issue an Executive Order providing for the possibility of trials by military tribunal for them. Whether the President had constitutional or statutory power to take these actions has been the subject of considerable debate and some litigation. Because of the factual

circumstances in which these actions took place and in which precedents arose, however, several fundamental questions about the scope of the federal government’s power to detain alleged terrorists as enemy combatants remained unanswered.

A. Detention of Individuals Under Civilian Law

The Constitution provides a number of bases upon which the government may detain individuals. Some grounds, like incarceration for a criminal offense or involuntary civil commitment of dangerous mentally ill persons, have substantial procedural hurdles. Others, like arrests of criminal suspects or removal of aliens unlawfully present in the United States, may be carried out under much less rigorous procedures. Taken together these doctrines form the civilian law framework against which the military law detention of alleged enemy combatants must be evaluated.

1. Detention in the Criminal Justice Process

The federal government may detain individuals in connection with the investigation or prosecution of criminal offenses through a variety of procedures. The number and degree of the procedural requirements the government must satisfy to constitutionally invoke such detentions are directly proportional to the nature and length of the deprivation of liberty involved.

On one end of the continuum is a deprivation of liberty for a term of imprisonment pursuant to a conviction for a criminal offense. To obtain such a conviction the government must provide the accused with the familiar list of constitutional protections, including the right to trial by jury, the right to counsel, the right to confront witnesses, and the government’s burden of proving guilt beyond a reasonable doubt.<sup>1</sup> These procedural requirements serve as a bulwark

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<sup>1</sup> See U.S. CONST. ams. V-VI; *In re Winship*, 397 U.S. 358, 364 (1970); *see generally* 3 LAFAYETTE ET AL., CRIMINAL PROCEDURE ch. 24 (3d ed. 2000 & 2003 Pocket Part).

against tyranny by precluding the government from imprisoning persons except upon the most persuasive proof.<sup>2</sup>

At the other end of the continuum are brief, temporary detentions in exercise of the government’s investigations or prosecutions of offenses. For example, when criminal investigations are carried out by a grand jury, subpoenas may be issued to compel individuals to appear and testify. Because of the limited imposition on liberty caused by such subpoenas and the historical and constitutional role of the grand jury, they may be issued on the very low threshold of “relevance” to the grand jury’s investigation.<sup>3</sup> Similarly, upon “reasonable suspicion” a law enforcement officer may briefly stop a person for investigative purposes without the encounter constituting an arrest.<sup>4</sup>

A person suspected of having committed a criminal offense may be arrested and taken into custody.<sup>5</sup> The Fourth Amendment requires that this seizure be “reasonable” and that the government be able to demonstrate “probable cause” that the person is responsible for the alleged offense.<sup>6</sup> The sufficiency of the government’s evidence of probable cause is subject to judicial review—either beforehand through the issuance of an arrest warrant or afterward at a

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<sup>2</sup> See, e.g., *Winship*, 397 U.S. at 361-64 (discussing importance of proof beyond a reasonable doubt); *United States v. Gaudin*, 515 U.S. 506, 510-11 (1995) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769) and 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-541 & n.2 (4th ed. 1873)) (discussing importance of right to jury trial); *Duncan v. Louisiana*, 391 U.S. 145, 151-154 (1968) (same).

<sup>3</sup> See, e.g., *United States v. R. Enters.*, 498 U.S. 292 (1991); *United States v. Dionisio*, 394 U.S. 721 (1969); 2 LAFAVE ET AL., *supra* note 1, at § 8.8.

<sup>4</sup> See, e.g., *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Terry v. Ohio*, 392 U.S. 1 (1968); LAFAVE ET AL., *supra* note 1, at § 3.8.

<sup>5</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); 1 LAFAVE ET AL., *supra* note 1, at § 3.5(a).

<sup>6</sup> U.S. CONST. am. IV; see also, e.g., *Atwater*, 532 U.S. at 318; 1 LAFAVE ET AL., *supra* note 1, at § 3.5(a).

hearing within forty-eight hours—but that review may be *ex parte* and non-adversarial.<sup>7</sup>

Similarly, federal felony charges may be filed only pursuant to an indictment approved by a grand jury upon a finding of probable cause.<sup>8</sup>

Additionally, in certain limited circumstances a witness whose testimony is material to a federal criminal case may be arrested to ensure that the testimony can be obtained.<sup>9</sup> The Second Circuit has concluded that such “material witness warrants” may be used to detain witnesses who will be called to testify before a grand jury.<sup>10</sup> Like the arrest of a criminal suspect, the arrest of a material witness is subject to judicial oversight.<sup>11</sup>

Under the federal bail statute persons who have been arrested are entitled to be released on whatever combination of financial or non-financial conditions the judge presiding over the bail hearing determines will ensure the person’s appearance and the public safety pending further proceedings.<sup>12</sup> A criminal suspect charged with an offense, or a material witness arrested to ensure their testimony will be given, may be detained in government custody without release *only* if, after an adversary hearing at which the person was represented by counsel and had the

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<sup>7</sup> See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); 1 LAFAVE ET AL., *supra* note 1, at § 3.5(a).

<sup>8</sup> See, e.g., *United States v. R. Enters.*, 498 U.S. 292, 297 (1991); *United States v. Mechanik*, 475 U.S. 66, 67 (1986); 2 LAFAVE ET AL., *supra* note 1, at § 15.2(f). The existence of a pending indictment is itself a sufficient deprivation of liberty to constitute a “custody” that may be challenged in a § 2241 habeas petition. See, e.g., *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 488-89 (1973).

<sup>9</sup> See 18 U.S.C. § 3144. The statute requires that “it may become impracticable to secure the presence of the person by subpoena” before the witness can be arrested, and authorizes detention “for a reasonable period of time until the deposition of the witness can be taken” only if conditions of bail cannot ensure compliance with release pending the taking of a deposition. See *id.*

<sup>10</sup> See *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003), *reversing and remanding United States v. Awadallah*, 202 F. Supp. 2d 82 (S.D.N.Y. 2002), *and United States v. Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002), *and approving In re Material Witness Warrant*, 213 F. Supp. 2d 287 (S.D.N.Y. 2002).

<sup>11</sup> See 18 U.S.C. § 3144 (requiring application of *id.* § 3142 bail procedures).

<sup>12</sup> 18 U.S.C. § 3142(a)-(c).

right to present evidence and witnesses and contest the government’s allegations, the judge finds by *clear and convincing evidence* that “no condition or combination of conditions will reasonably assure the appearance of the person and the safety of any other person and the community.”<sup>13</sup> In *United States v. Salerno* the Supreme Court upheld the constitutionality of these “preventive detention” provisions against challenges under the Due Process Clause and the Eighth Amendment’s prohibition on excessive bail.<sup>14</sup> At the hearing in that case the government had met its burden with the presentation of extensive evidence, including recordings from wiretaps and the testimony of witnesses, that the defendants were leaders of the Genovese crime family in New York and would continue to pose a threat of violent crime (including murder) in the community if not detained preventively.<sup>15</sup>

Finally, an additional constitution protection applies across the range of these detention powers: the Fifth Amendment privilege against compulsory self-incrimination.<sup>16</sup> At trial or sentencing, or any other formal stage of a criminal proceeding, the accused has a right not to testify.<sup>17</sup> Persons who have been arrested also have a right to refuse to answer questions while in custody, and statements made without a proper waiver of the *Miranda* warnings cannot be used

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<sup>13</sup> *See id.* § 3142(e)-(g).

<sup>14</sup> *See* 481 U.S. 739 (1987). The Court found no violation of substantive Due Process because the preventive detention at issue was regulatory, not punitive, in nature. *See id.* at 746-51; *see also infra* note 22. The Court also held that the procedures required by the Act were sufficient to defeat a facial challenge under procedural Due Process. *See id.* at 751-52. Finally, the Court concluded that prevention of danger to the community, and not only prevention of flight to avoid trial, was a compelling interest justifying the preventive detention provisions of the Act. *See id.* at 752-55.

<sup>15</sup> *See id.* at 743-44, 755. The defendants asserted that the Act was unconstitutional on its face; the Court decided the case on that basis, while noting that as-applied challenges might be raised in future cases. *See id.* at 745-46 & n.3, 747 n.4, 752, 755.

<sup>16</sup> *See* U.S. CONST. am V (“nor shall [any person] be compelled in any criminal case to be a witness against himself”); *see generally* 2 LAFAVE ET AL., *supra* note 1, at §§ 8.10-8.14 (3d ed. 2000).

<sup>17</sup> *See, e.g.,* *Mitchell v. United States*, 526 U.S. 314 (1999); *Griffin v. California*, 380 U.S. 609 (1965); 3 LAFAVE ET AL., *supra* note 1, § 24.5.

against the person in a criminal prosecution.<sup>18</sup> Similarly, persons subpoenaed to testify before a grand jury may invoke the privilege, and can be compelled to testify only under a grant of immunity from prosecution.<sup>19</sup> To the extent the information in question is not personally incriminatory, however, the privilege does not apply and the person can be compelled to testify.<sup>20</sup> Accordingly, even when the government properly invokes its power to detain a person it cannot compel him to give statements that might incriminate him in connection with criminal activities. The Fifth Amendment privilege is a significant constraint on the government's techniques of investigation because the government often must forgo the possibility of prosecuting the person in order to compel him to provide information.<sup>21</sup>

## 2. Non-Punitive Civil Detention

The Constitution also permits detentions of persons on grounds independent of the criminal justice process. Although the fact of government custody resembles incarceration pursuant to a criminal conviction, the Supreme Court has upheld the constitutionality of such detentions on the basis that they are “non-punitive” and therefore civil in nature.<sup>22</sup>

The form of civil detention most closely related to the detention of enemy combatants is the involuntary, indefinite confinement of dangerous, mentally ill individuals in psychiatric facilities. In a series of recent cases the Court held that so-called “sexual predators” could be

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<sup>18</sup> See, e.g., *Dickerson v. United States*, 530 U.S. 428 (2000); ; *Miranda v. Arizona*, 378 U.S. 478 (1966); see generally 2 LAFAYETTE ET AL., *supra* note 1, at §§ 6.5-6.10.

<sup>19</sup> See, e.g., *United States v. Hubbell*, 520 U.S. 27 (2000); *Kastigar v. United States*, 406 U.S. 441 (1972).

<sup>20</sup> See, e.g., *Ohio v. Reiner*, 532 U.S. 17 (2001); 2 LAFAYETTE ET AL., *supra* note 1, at § 8.10.

<sup>21</sup> See, e.g., *Hubbell*, 520 U.S. at 27 (reversing conviction for violation of grant of immunity); *United States v. North*, 910 F.3d 843, *modified by* 920 F.2d 940 (D.C. Cir. 1990) (same).

<sup>22</sup> See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 361-69 (1997); *United States v. Salerno*, 481 U.S. 739, 746-51 (1987); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Among other factors, the detention is punitive if it is imposed to serve purposes of retribution or general deterrence. See *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (citing *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)).

compelled, after a full and fair adversarial hearing with counsel, to remain indefinitely confined to a secure hospital upon a showing by *clear and convincing evidence* that the individual is both dangerous and so severely mentally ill as to be unable to control that dangerous behavior.<sup>23</sup> This doctrine makes equally clear, however, that the defendant *must* be released when he is either no longer mentally ill or no longer dangerous, and is entitled to periodic review of those factors.<sup>24</sup>

Thus, like the “preventive detention” of accused criminals approved in *Salerno*, the confinement of dangerous mentally ill persons is predicated on a substantial showing by the government that detention is the only viable method of avoiding a harm it has a compelling interest in preventing, such as flight from prosecution, obstruction of justice, or grave risk of danger to innocent persons.

### 3. Immigration Detention

Foreign nationals present in the United States are subject to detention under the immigration laws in certain circumstances. The Fifth Amendment determines the constitutional limitations on such detentions because it protects not only citizens but also aliens—it commands that “no person” be deprived of liberty without due process.<sup>25</sup>

[This section will summarize the relevant provisions of the federal immigration statutes concerning the removal of resident aliens, lawfully present aliens, and unlawfully present aliens. It will discuss the burden of proof to justify removal and the authority to detain aliens pending a hearing on removal.]

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<sup>23</sup> See, e.g., *Crane*, 534 U.S. at 409-10; *Seling v. Young*, 531 U.S. 250 (2001); *Hendricks*, 521 U.S. at 357-60; *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Addington v. Texas*, 441 U.S. 418, 426-27 (1979). In *Crane* the Court explained that the person must have a “serious difficulty in controlling behavior” to be detained on grounds of dangerousness. 534 U.S. at 413.

<sup>24</sup> See, e.g., *Crane*, 534 U.S. at 411-15; *Foucha*, 504 U.S. at 80.

<sup>25</sup> See U.S. CONST. am. V.

[This section also will describe 8 U.S.C. § 1226a, a provision enacted in the Patriot Act providing for detention of aliens suspected of terrorist ties or posing other threats to national security. Finally, this section will note the statutory provisions applicable in wartime.<sup>26</sup>]

B. Detention of Enemy Combatants Under Military Law

Completely separate from the doctrines permitting detention of individuals under civilian law is a body of military law governing the detention of persons as enemy combatants under the laws of war. Such prisoners are outside the ordinary constitutional framework and instead may be held indefinitely in military custody, and potentially may be interrogated or subject to the military justice system. Such dramatic differences from the civilian law have made enemy combatant detentions highly controversial.

The concept of enemy combatant detentions derives principally from the Geneva Convention Relative to the Treatment of Prisoners of War (“GCPW”), to which the United States is a signatory<sup>27</sup> and which codified principles previously well established in the customary international laws of war and predecessor treaties.<sup>28</sup> Those principles were developed to account for situations involving wars or other “armed conflicts” between nations or within the territory of a single nation,<sup>29</sup> such as World War II or the United States military action against the Taliban regime in Afghanistan.<sup>30</sup> In the aftermath of September 11th, the government also has sought to

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<sup>26</sup> This includes removal of nationals of enemy nations under the Alien Enemy Act during a declared war. *See* *Ludecke v. Watkins*, 335 U.S. 160, 161-63, 171-173 (1948).

<sup>27</sup> *See* 6 U.S.T. 3316, 75 U.N.T.S. 135 (signed Aug. 12, 1949, entered into force Oct. 21, 1950).

<sup>28</sup> *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1, 30-36 (1942); *United States v. Lindh*, 212 F. Supp. 2d 541, 552-58 (E.D. Va. 2002).

<sup>29</sup> *See* GCPW arts. 2-3.

<sup>30</sup> *See Quirin*, 317 U.S. at 20-24 (seven members of German Army during World War II); *Lindh*, 212 F. Supp. 2d at 552-58 (alleged soldier for Taliban); *Hamdi v. Rumsfeld*, 316 F.3d 450, 469-77 (4th Cir. 2003) (same).

detain members of Al Qaeda, an independent, non-governmental terrorist organization, as enemy combatants.<sup>31</sup>

The GCPW defines two categories of enemy combatants. Lawful enemy combatants are called “prisoners of war” in the GCPW and must be treated in accordance with the terms of the treaty,<sup>32</sup> including the prohibition on interrogation beyond providing basic identifying information such as their “name, rank, and serial number” to the capturing power.<sup>33</sup> Lawful enemy combatants may be detained, but they cannot be tried or punished for their participation in the armed conflict unless their activities are war crimes in violation of the laws of war.<sup>34</sup>

Under the GCPW “an organization must meet [four criteria] for its members to qualify for lawful combatant status:

- i. the organization must be commanded by a person responsible for his subordinates;
- ii. the organization’s members must have a fixed distinctive emblem or uniform recognizable at a distance;
- iii. the organization’s members must carry arms openly; and
- iv. the organization’s members must conduct their operations in accordance with the laws and customs of war.”<sup>35</sup>

Courts have concluded that the Taliban military forces in Afghanistan failed all four criteria, and have agreed with the government’s claims that the same is true of Al Qaeda.<sup>36</sup>

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<sup>31</sup> See *Padilla v. Rumsfeld*, 352 F.3d 695, 702-04 (2d Cir. 2003), *affirming in part and reversing in part*, *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 575-76 (S.D.N.Y. 2002).

<sup>32</sup> See GCPW arts. 4-5, 12-17.

<sup>33</sup> See GCPW arts. 17.

<sup>34</sup> See *Padilla*, 233 F. Supp. 2d at 592 (citing *Lindh*, 212 F. Supp. 2d at 553; GCPW art. 87).

<sup>35</sup> *Lindh*, 212 F. Supp. 2d at 557 (citing GCPW art. 4(A)(2)).

Individuals who do not qualify under these requirements are unlawful enemy combatants, and the capturing power is not bound by the rules of the GCPW in its treatment of them.<sup>37</sup>

Accordingly, unlawful enemy combatants not only may be detained, but also may be interrogated concerning any information they possess and may be “subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”<sup>38</sup> For example, the German soldiers in the *Quirin* case were unlawful enemy combatants because immediately after entering the United States they had discarded the uniforms and emblems that identified them as belligerents.<sup>39</sup>

If the government seeks only to detain the alleged terrorist for purpose of incapacitating him from participating in planning or committing further attacks, then it does not matter whether the person is a lawful or unlawful enemy combatant because both are subject to indefinite detention under the laws of war.<sup>40</sup> Detention may continue until the end of the armed conflict, at which time prisoners of war must be repatriated.<sup>41</sup> It is unclear whether the President’s determination that an armed conflict has not yet ended would be a justiciable controversy subject to judicial review; with respect to persons associated with the Taliban or Al Qaeda courts have refused to reach even that question on ripeness grounds.<sup>42</sup>

On the other hand, if the government seeks not merely to detain an alleged terrorist but also to interrogate him or try him in a military tribunal, then the determination whether the

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<sup>36</sup> See *id.* at 558 (Taliban); *Padilla*, 223 F. Supp. 2d at 605-610 (Al Qaeda); see also *id.* at 593 (quoting Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT’L L. 328, 335 (2002) (“Al Qaeda has failed to fulfill four prerequisites of lawful belligerency.”)).

<sup>37</sup> See *Padilla*, 223 F. Supp. 2d at 592-93.

<sup>38</sup> *Quirin*, 317 U.S. at 31; see also *Padilla*, 223 F. Supp. 2d at 593.

<sup>39</sup> See *Quirin*, 317 U.S. at 36-37; *Padilla*, 223 F. Supp. 2d at 594 & n.12.

<sup>40</sup> See *Hamdi v. Rumsfeld*, 316 F.3d 450, 465-66, 468-69 (4th Cir. 2003).

<sup>41</sup> See *In re Territo*, 156 F.2d 142, 148 (9th Cir. 1946) (noting that repatriation of Italian prisoner of war was not required because no peace treaty had yet been signed).

<sup>42</sup> See *Hamdi*, 316 F.3d at 476-77; *Padilla*, 223 F. Supp. 2d at 588-92.

individual is a lawful or an unlawful enemy combatant is dispositive. Only unlawful enemy combatants may be interrogated or tried, so the allegations that the person's activities did not comply with the four GCPW criteria have tremendous consequences. It is possible, then, that a prisoner might seek judicial review to contest his classification as an unlawful enemy combatant rather than a lawful enemy combatant.

### C. The “War” Against Terrorism

In the aftermath of the September 11th attacks the federal government's antiterrorism efforts were given the rhetorical label of a “war” against terrorism.<sup>43</sup> In addition to the established uses of domestic civilian criminal enforcement<sup>44</sup> and foreign intelligence agencies like the CIA, the government expressly invoked its war powers in taking action against the Al Qaeda organization and its members. As part of this shift the President designated certain individuals as enemy combatants subject to detention under military, rather than civilian, law. Although some of these persons were captured by the United States Armed Forces in zones of

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<sup>43</sup> Among many other instances, the President used such a label in his State of the Union address four months after the attacks. *See* Address Before a Joint Session of the Congress on the State of the Union, 38 WEEKLY COMP. PRES. DOC. 133, 134-135 (Jan. 29, 2002) (describing “war on terror” and “war against terror”).

<sup>44</sup> For example, members of the conspiracy responsible for the bombings of the United States embassies in Kenya and Tanzania in 1998 were tried in the United States District Court for the Southern District of New York. *See, e.g.,* United States v. El-Hage, 213 F.3d 74 (2nd Cir.), *cert. denied*, 531 U.S. 881 (2000); United States v. Bin Laden, 91 F. Supp. 2d 600 (S.D.N.Y. 2000). Accused “shoe bomber” Richard Reid likewise faced civilian charges. *See* United States v. Reid, 214 F.Supp.2d 84 (D. Mass. 2002). Reid eventually pled guilty. *See* Pamela Ferdinand, *Would-Be Shoe Bomber Gets Life Term; Al Qaeda Member Shouts at Judge*, WASH. POST, Jan. 31, 2003, at A01.

combat in Afghanistan, others were not—including at least two who were initially arrested by civilian law enforcement in the United States.<sup>45</sup>

As explained further below, this Article is not concerned directly with the specific factual or legal circumstances of these enemy combatant detentions. Instead, it analyzes the broader constitutional question of the proper scope of judicial review in a habeas corpus proceeding challenging such a detention purely on its merits—that is, when all other constitutional and statutory standards are satisfied and the only remaining question is the legitimacy of detention itself under the Constitution.

Nevertheless, a brief review of the government’s actual practice in detaining persons as enemy combatants is necessary. First, examining the circumstances in which the issue has arisen, continues to develop, and could arise again in the future are important to evaluating the constitutional standards discussed later. Second, the ongoing litigation concerning the constitutionality of this actual practice is inevitably influenced by the manner in which the detentions have been carried out, and those influences have affected the decisions the courts have reached. To properly analyze the broader theoretical questions, therefore, requires an understanding of the idiosyncrasies of actual practice.

### 1. Constitutional and Statutory War Powers Relating to Detention

The constitutional issues involving the scope and nature of the federal government’s war powers in general have generated an entire body of doctrine and scholarship that is far beyond

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<sup>45</sup> See, e.g., *Padilla*, 223 F. Supp. 2d at 571 (United States citizen initially arrested by FBI in Chicago); *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) (foreign national initially arrested by FBI in Peoria, Illinois); *Hamdi*, 316 F.3d at 460 (United States citizen initially seized in Afghanistan).

the scope of this Article.<sup>46</sup> A summary of the basic principles is helpful in examining the doctrines specifically relating to detentions, however.

The Constitution allocates powers over foreign affairs and war to the political branches. Congress has the power to declare war and to create the United States military.<sup>47</sup> The President is the Commander-in-Chief of the armed forces and has power to repel invasions and attacks against the United States.<sup>48</sup> The federal courts, therefore, give great deference to the actions of the political branches involving war and other use of military force abroad.<sup>49</sup> Similarly, under the Supreme Court's famous *Youngstown* framework, the courts also will give more deference to the exercise of emergency powers domestically when the President acts pursuant to statutory authority from Congress than when he does not.<sup>50</sup>

Two lines of Supreme Court precedent specifically implicate war powers relating to detention of persons in military custody. Although none of these doctrines directly address the scope of judicial review of the detention of alleged enemy combatants, they nonetheless have significance for analyzing that issue.

On the one hand, the Supreme Court has sustained the constitutionality of trials of enemy combatants by military tribunals rather than civilian courts. In *Ex parte Quirin* the Court

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<sup>46</sup> See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* (1990); H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS* (2002).

<sup>47</sup> See U.S. CONST. art. I, § 8, cls. 10-16.

<sup>48</sup> See *id.* art. II, § 2, cl. 1; see also, e.g., *The Prize Cases*, 67 U.S. 365, 668-70 (1862); *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring).

<sup>49</sup> See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450, 462-66 (4th Cir. 2003) (citing cases); *Hamdi v. Rumsfeld*, 296 F.3d 278, 281-82 (4th Cir. 2002) (same).

<sup>50</sup> See, e.g., *Hamdi*, 296 F.3d at 281; *Padilla v. Rumsfeld*, 352 F.3d 695, 711-12 (2d Cir. 2003); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-45 (1952) (Jackson, J., concurring).

heard on an expedited basis petitions by six German nationals and one United States citizen challenging the President’s military order designating them for trial by military tribunal for violations of the laws of war on U.S. soil during World War II.<sup>51</sup> A unanimous Court held that the President properly had invoked statutory authority granted by Congress to convene such tribunals.<sup>52</sup> Furthermore, the Court concluded that on the “conceded facts” of the case,<sup>53</sup> the petitioners had violated the laws of war and were unlawful enemy combatants.<sup>54</sup> Finally, the Court held that the citizen could be tried by the military tribunal as well by virtue of his status as an unlawful enemy combatant.<sup>55</sup> On similar reasoning the Court in *Application of Yamashita* upheld the conviction by military tribunal of the former Japanese commander for the Philippines.<sup>56</sup>

On the other hand, the Court has strongly suggested that it is unconstitutional to hold trials by military tribunal of civilians and other non-combatants when civilian courts are functioning. In *Duncan v. Kahanamoku* the Court held that despite the existence of a state of martial law in Hawaii during World War II, civilians could not be tried for civil crimes by military tribunals.<sup>57</sup> Because the civilian courts were open and trying cases, the civilian

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<sup>51</sup> See 317 U.S. 1, 18-25 (1942).

<sup>52</sup> See *id.* at 26-36, 47-48.

<sup>53</sup> *Id.* at 46.

<sup>54</sup> See *id.* at 30-31, 36-46.

<sup>55</sup> See *id.* at 37-38, 44; see also *Colepaugh v. Looney*, 235 F.2d 429, 431-33 (10th Cir. 1956); *In re Territo*, 156 F.2d 142, 142-45 (9th Cir. 1946). The *Quirin* Court accordingly did not address the government’s claim that the petitioner’s actions constituted a renunciation of his citizenship. See 317 U.S. at 20-21, 37-38.

<sup>56</sup> See 327 U.S. 1, 5-13 (1946).

<sup>57</sup> 327 U.S. 304 (1946). The two petitioners had been convicted by military tribunals for embezzlement and assault, respectively. See *id.* at 309-11.

defendant could not be subject to military jurisdiction.<sup>58</sup> Similarly, in the famous case of *Ex parte Milligan* the Court ordered the release of defendant tried and sentenced to death by a military tribunal during the Civil War because the prisoner was entitled to release under a controlling federal statute.<sup>59</sup> A majority of the Court also held that a military tribunal could not constitutionally try the defendant because he was a civilian in a state (Indiana) that had not seceded and where the civilian courts were open and functioning.<sup>60</sup>

None of these cases, however, resolves the issue of the government’s burden of proof in a case in which the prisoner’s status is contested. In *Quirin* and *Yamashita* the prisoners were indisputably enemy combatants; in *Duncan* and *Milligan* the prisoners were concededly civilians. Thus, the fundamental constitutional issue—the scope of judicial review in a contested case—remains unresolved.

In addition to these constitutional doctrines, a federal statute limits the power of the President to detain citizens as enemy combatants. The Non-Detention Act, also referred to as § 4001(a), provides as follows: “No citizen shall be imprisoned or otherwise detained by the

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<sup>58</sup> *See id.* at 313-24. The Court held that the Organic Act for the territorial government of Hawaii did not authorize the use of military tribunals on the facts presented. *See id.* at 313-24. The Court noted the significant constitutional implications of the case but did not decide it on that basis. *See id.* at 319-24; *see also id.* at 325-35 (Murphy, J., concurring).

In *Ex parte Endo* the Court held that the concededly loyal habeas petitioner was improperly subject to continued military custody during the Japanese relocations; this decision also was based on statutory, not constitutional, grounds. *See* 323 U.S. 283, 297-304 (1944).

<sup>59</sup> *See* 71 U.S. 2, 107-08, 115-16 (1866); *see also Ex parte Merryman*, 17 F. Cas. 144, 147-48, 150 (D. Md. 1861) (Taney, C.J.).

<sup>60</sup> *See* 71 U.S. at 107-08, 118-27. The concurring justices agreed Milligan was entitled to release under the statute, *see id.* at 130-31, but argued that Congress had the constitutional power to declare martial law even in loyal states, in which case a trial by military tribunal would be constitutional. *See id.* at 136. The Court in *Quirin* expressly distinguished *Milligan* on the grounds that Milligan was a non-belligerent, unlike the petitioners in *Quirin*. *See* 317 U.S. at 45-46.

United States except pursuant to an Act of Congress.”<sup>61</sup> Enacted in 1971 to repeal a prior statute authorizing broad domestic detention authority in times of war,<sup>62</sup> the Non-Detention Act would preclude the detention of United States citizens as enemy combatants absent congressional approval.<sup>63</sup> As discussed below, whether Congress has approved the detention of enemy combatants in the war against terrorism is disputed.

## 2. Responses to the September 11th Attacks

On the morning of September 11, 2001, nineteen members of the Al Qaeda terrorist organization hijacked four commercial airliners nearly simultaneously. Two were crashed into the World Trade Center towers in New York City, which were destroyed. The third was flown into the Pentagon in Washington, and the fourth crashed in a field in rural Pennsylvania after the passengers turned against the hijackers. Approximately 3,000 persons were killed in the attacks and billions of dollars in property damage and economic effects resulted.<sup>64</sup>

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<sup>61</sup> 18 U.S.C. § 4001(a).

<sup>62</sup> *See Padilla v. Rumsfeld*, 352 F.3d 695, 718-22 (2d Cir. 2003) (reviewing enactment and legislative history of Non-Detention Act).

<sup>63</sup> *Compare id.* at 718-24 (finding lack of congressional approval for detention), *with id.* at 726-32 (Wesley, J., dissenting) (finding congressional approval); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 596-99 (S.D. N.Y. 2002) (same); *Hamdi v. Rumsfeld*, 316 F.3d 450, 467-68 (4th Cir. 2003) (same). The Act potentially could bar the detention of a citizen even on a foreign battlefield, which might interfere with the President’s constitutional powers in foreign, rather than domestic, affairs. *Compare Hamdi*, 316 F.3d at 468 (“There is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is”), *with Padilla*, 352 F.3d at 721 & n.29 (“[T]he President, acting alone, possesses no inherent constitutional authority to detain American citizens seized within the United States, away from a zone of combat, as enemy combatants ... it might have been preferable to hold that Congress could not intrude on the President’s Commander-in-Chief power on the battlefield rather than to interpret the Act as the Fourth Circuit did.”).

<sup>64</sup> *See, e.g., Hamdi*, 316 F.3d at 459; *Padilla*, 233 F. Supp. 2d at 570.

On September 14, 2001, the President signed a proclamation entitled “Declaration of National Emergency by Reason of Certain Terrorist Attacks” to declare a national emergency and invoke a number of statutory emergency powers.<sup>65</sup>

Four days later Congress enacted a Joint Resolution authorizing the President to take military action by using:

all necessary and appropriate force against those nations, *organizations, or persons* he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, *organizations or persons*.<sup>66</sup>

Pursuant to this authority the President deployed United States military forces to Afghanistan against Al Qaeda agents and the Taliban regime that supported them.<sup>67</sup> As discussed further below, the President also relies on the Joint Resolution as a source of congressional approval for the detention of alleged terrorists as enemy combatants.

On October 26, 2001, Congress passed the notorious “USA PATRIOT Act” to enact a wide range of antiterrorism measures.<sup>68</sup> Among other changes the Act expanded criminal offenses relating to terrorism and money laundering, amended the Foreign Intelligence Surveillance Act and the Federal Rules of Criminal Procedure governing secrecy of grand jury investigations, and authorized greater search and surveillance powers in criminal

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<sup>65</sup> See Proclamation 7463, 66 FED. REG. 48199 (Sept. 14, 2001).

<sup>66</sup> Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001) (emphasis added). The President signed the resolution the same day. See Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 570 & n.3 (S.D.N.Y. 2002).

<sup>67</sup> See, e.g., *Hamdi*, 316 F.3d at 459-60.

<sup>68</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

investigations.<sup>69</sup> The Patriot Act did not specifically authorize military tribunals or enemy combatant detentions, however.

In addition to these congressional actions, the President declared his willingness to use military tribunals, rather than civilian courts, to hold trials of alleged terrorists. On November 13, 2001, the President signed a Military Order authorizing the Secretary of Defense to detain alleged terrorists and convene military tribunals to try them.<sup>70</sup> The persons subject to the military order were “any individual who is not a citizen of the United States” who the President has “reason to believe” is a member of Al Qaeda or is otherwise an accomplice or conspirator in international terrorism against the United States.<sup>71</sup> Subsequently the Department of Defense promulgated regulations governing the military tribunals, including provisions relating to offenses subject to trial, military and civilian defense counsel, admission of evidence,

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<sup>69</sup> See, e.g., *id.* §§ 201-220; *In re Sealed Case*, 310 F.3d 717 (FIS Ct. Rev. 2002) (interpreting amendment to FISA); Sara Sun Beale & James E. Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL’Y 699 (2002) (discussing amendment to Fed. R. Crim. P. 6(e)); see also *Broad Anti-Terrorism Package Passed by Congress, Signed by President*, 70 BNA CRIMINAL LAW REPORTER 93 (October 31, 2001) (summarizing provisions of Act).

<sup>70</sup> See Military Order, *Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism*, 66 FED. REG. 57833 (Nov. 13, 2001).

<sup>71</sup> See *id.* § 2(a)(1), 66 FED. REG. at 57834.

trial procedures, and sentencing.<sup>72</sup> These actions by the President and the Department of Defense have generated a substantial body of scholarship.<sup>73</sup>

As of March 2003, no person has yet been tried by a military tribunal pursuant to this authority, although several captured leaders of Al Qaeda may ultimately be tried.<sup>74</sup> Several hundred persons remained detained pursuant to the Military Order, however, principally at Guantanamo Bay naval base.<sup>75</sup>

### 3. Litigation Concerning the Detention of Enemy Combatants

The President's detention of alleged terrorists as enemy combatants has been challenged in a number of habeas corpus proceedings. Several actions were instituted concerning the detention of foreign nationals at the naval base at Guantanamo Bay, Cuba. As of March 2003

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<sup>72</sup> See Military Commission Order No. 1 (Mar. 21, 2002); Military Commission Instructions Nos. 1-8 (Apr. 30, 2003).

<sup>73</sup> See, e.g., Michael R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433 (2002); John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899 (2003); Laura A. Dickinson, *Using Legal Process To Fight Terrorism: Detentions, Military Commissions, International Tribunals, And The Rule Of Law*, 75 S. CAL. L. REV. 1407 (2002); Robert Iraola, *Military Tribunals, Terrorists, And The Constitution*, 33 N.M. L. REV. 95 (2003); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002); Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653 (2002); Michael Ratner, *Moving Away From the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 CARDOZO L. REV. 1513 (2003); Carl Tobias, *Detentions, Military Commissions, Terrorism, And Domestic Case Precedent*, 76 S. CAL. L. REV. 1371 (2003); Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648 (2002); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328 (2002).

<sup>74</sup> See, e.g., John Mintz, *U.S. Charges 2 as Bin Laden Aides*, WASH. POST, Feb. 25, 2004, at A01 (reporting that two alleged bodyguards of Osama Bin Laden will be tried by military tribunals for war crimes).

<sup>75</sup> Associated Press, *U.S. Releases 26 Guantanamo Detainees*, WASH. POST, Mar. 16, 2004, at A02 (reporting that "about 610" persons are detained at base, and government has released 119 and transferred 12); John Mintz, *U.S. Outlines Plan for Detainee Review*, WASH. POST, Mar. 4, 2004, at A10 (reporting that "about 650" persons are detained at base).

these cases have addressed only the question of the courts' subject-matter jurisdiction over the petitions, a subject reviewed in depth below.<sup>76</sup> In the cases of two United States citizens, however, the courts have considered the merits of the challenges.

Yaser Hamdi is a United States citizen detained as an enemy combatant at the navy brig in Norfolk, Virginia.<sup>77</sup> Hamdi apparently was taken into custody by the United States military in Afghanistan in late 2001; he subsequently was transferred in early 2002 to the detention facilities at Guantanamo Bay naval base and then, when it was determined he might be a citizen, to Norfolk.<sup>78</sup> In the habeas proceeding the district court initially ordered that counsel be given unmonitored access to Hamdi, but the Fourth Circuit stayed and ultimately overruled those orders for having given insufficient consideration to the government's interests.<sup>79</sup> The district court then ruled that the government's sole evidence—a "Mobbs Declaration" by a Special Advisor in the Department of Defense classifying Hamdi as an enemy combatant because of his "affiliation" with Taliban military forces in Afghanistan—was insufficient to justify the detention of Hamdi as an enemy combatant.<sup>80</sup> The Fourth Circuit once again reversed, holding that the detention of enemy combatants falls squarely within the Constitution's war powers and that the Joint Resolution constituted sufficient congressional authority under the Non-Detention

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<sup>76</sup> See *Al Odah v. U.S.*, 321 F.3d 1134, 1142-45 (D.C. Cir. 2003), *affirming* *Rasul v. Bush*, 215 F. Supp. 2d 55, 68-73 (D.D.C. 2002); *Gherebi v. Bush*, 262 F. Supp. 2d 1064, 1065-69 (C.D. Cal. 2003), *reversed* *Gherebi v. Bush*, 352 F.3d 1278, 1284-1300 (9th Cir. 2003); *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1046-50 (C.D. Cal. 2002), *vacated in relevant part by* *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1164 (9th Cir. 2002). The Supreme Court granted certiorari in the *Rasul-Al Odah* case. See *Rasul v. Bush*, 124 S. Ct. 524 (2003); *Al Odah v. United States*, 124 S. Ct. 524 (2003).

<sup>77</sup> See *Hamdi v. Rumsfeld*, 294 F.3d 598, 601 (4th Cir. 2002); *Hamdi v. Rumsfeld*, 296 F.3d 278, 280-81 (4th Cir. 2002); *Hamdi v. Rumsfeld*, 316 F.3d 450, 459-62 (4th Cir. 2003).

<sup>78</sup> See *id.*

<sup>79</sup> See 294 F.3d at 602; 296 F.3d at 280-83.

<sup>80</sup> See *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 532-536 (E.D. Va. 2002).

Act.<sup>81</sup> The court of appeals further concluded that the Mobbs Declaration provided a sufficient factual basis to justify detention of Hamdi's detention as an enemy combatant in light of concessions in the petition that left the fact of Hamdi's seizure in a foreign zone of combat undisputed.<sup>82</sup> On January 9, 2004, the United States Supreme Court granted Hamdi's petition for certiorari.<sup>83</sup>

José Padilla is a United States citizen detained as an enemy combatant at the navy brig in Charleston, South Carolina.<sup>84</sup> Pursuant to a material witness warrant issued by a federal district court in New York, Padilla was arrested by the FBI on May 8, 2002, at O'Hare International Airport in Chicago when he returned to the United States from Pakistan.<sup>85</sup> On June 9, two days before a scheduled hearing on Padilla's motion to quash the warrant, the President designated Padilla as an enemy combatant and Padilla was taken into military custody.<sup>86</sup> In the ensuing habeas proceeding the district court concluded that the President has constitutional power to detain Padilla as an enemy combatant and that the Joint Resolution satisfied the Non-Detention Act.<sup>87</sup> The court further ruled that Padilla had a right to present facts and contest the government's allegations in another "Mobbs Declaration" that Padilla was acting under the direction of senior Al Qaeda operatives in researching and planning a plot to explode a "dirty

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<sup>81</sup> See 316 F.3d at 462-69.

<sup>82</sup> See *id.* at 469-77. On petition for rehearing *en banc* two judges disputed whether the petition in fact conceded the dispositive facts. See *Hamdi v. Rumsfeld*, 337 F.3d 335, 345-57 (4th Cir. 2003) (Traxler, J., concurring); *id.* at 357-68 (Luttig, J., dissenting). One judge wrote in agreement with the district court's conclusion that the Mobbs Declaration was insufficient. See *id.* at 368-76 (Motz, J., dissenting); *cf. id.* at 341-45 (Wilkinson, J., concurring) (responding to arguments).

<sup>83</sup> See *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (Jan. 9, 2004).

<sup>84</sup> See *Padilla v. Rumsfeld*, 352 F.3d 695, 699-702 (2d Cir. 2003); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 569-74 (S.D.N.Y. 2002).

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See 233 F. Supp. 2d at 588-99.

bomb” in the United States or in other terrorist activities. The court concluded that in the interests of justice counsel was necessary to assist Padilla in pursuing the petition,<sup>88</sup> and held that on the merits of the petition the government’s burden of proof was to establish “some evidence” justifying the designation of Padilla as an enemy combatant.<sup>89</sup> On appeal a panel of the Second Circuit reversed, emphasizing that the case involved “an American citizen arrested in the United States, not on a foreign battlefield or while actively engaged in armed conflict against the United States” and holding “that the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat.”<sup>90</sup> For the same reasons the court of appeals held that the Non-Detention Act barred Padilla’s detention because the Joint Resolution could not be construed to authorize a detention in these domestic, non-combat circumstances.<sup>91</sup> One judge dissented on both grounds while strongly criticizing the government’s handling of Padilla’s detention.<sup>92</sup> Those rulings mooted the issues of Padilla’s ability to pursue the petition or the government’s burden of proof, and the Second Circuit ordered that a writ of habeas corpus issue directing that Padilla be released from military custody.<sup>93</sup> On February 20, 2004, the Supreme Court granted the government’s petition for certiorari.<sup>94</sup>

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<sup>88</sup> See *id.* at 572-73, 599-605; see also 352 F.3d at 724-25 (President’s order designating Padilla as enemy combatant).

<sup>89</sup> See 233 F. Supp. 2d at 605-08.

<sup>90</sup> 352 F.3d at 711-12; see also *id.* at 715 n.24, 718 n.27. The court distinguished *Quirin* and other cases as inapplicable on the facts. See *id.* at 710-718.

<sup>91</sup> See *id.* at 718-24.

<sup>92</sup> See *id.* at 726-33 (Wesley, J., dissenting).

<sup>93</sup> See *id.* at 699 & n.1, 724. The Second Circuit subsequently stayed its order pending the government’s petition for certiorari. See Reuters, *Appeals Court Stays Order To Free Padilla*, WASH. POST, Jan. 23, 2004, at A02.

<sup>94</sup> See *Rumsfeld v. Padilla*, 124 S. Ct. 1353 (2004).

Hamdi was held incommunicado for approximately two-and-a-half years until he was permitted to meet with counsel under strictly controlled circumstances on February 3, 2004.<sup>95</sup>

After being taken into military custody on June 9, 2002, Padilla was held incommunicado until March 3, 2004, when he met with counsel under similar strict conditions.<sup>96</sup>

#### D. The Open Questions About Judicial Review of Enemy Combatant Detentions

Within this framework of doctrines regarding civilian and military detentions and the federal government's war powers are several significant open questions of constitutional law concerning the scope of judicial review of enemy combatant detentions. These questions are of fundamental importance, but they have not yet been answered in the course of actual governmental conduct. In particular, federal courts decide the cases before them, not issues of constitutional law in the abstract.<sup>97</sup> For example, neither the Fourth Circuit in *Hamdi* nor the Second Circuit in *Padilla* reached the question of the appropriate burden of proof the government must satisfy to detain a United States citizen as an enemy combatant—the former by ruling that status was conceded, the latter by holding the President lack the asserted power regardless of the evidence.<sup>98</sup> Thus, addressing the fundamental open questions requires setting aside the numerous factual complexities of past and present litigation.

The analysis to follow in this Article assumes that the federal government is asserting its maximum possible war powers under the Constitution. For purposes of clarity, suppose that Congress enacted and the President signed a statute providing the following:

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<sup>95</sup> See, e.g., Jerry Markon, *Terror Suspect, Attorneys Meet for 1st Time*, WASH. POST, Feb. 4, 2004, at B03.

<sup>96</sup> See, e.g., Michael Powell, *Lawyer Visits 'Dirty Bomb' Suspect*, WASH. POST, Mar. 4, 2004, at A10.

<sup>97</sup> Article III precludes federal courts from issuing advisory opinions. See, e.g., *Clinton v. Jones*, 520 U.S. 681, 700 (1997) (citing cases).

<sup>98</sup> See *Hamdi v. Rumsfeld*, 316 F.3d 450, 459-61 (4th Cir. 2003); *Padilla v. Rumsfeld*, 352 F.3d 695, 699 (2d Cir. 2003).

The President may by written declaration designate any person, regardless of citizenship, as an enemy combatant engaged in armed conflict against the United States. As the President determines best serves the interests of the United States, in accordance with the laws of war and notwithstanding any other provision of law or treaty, such persons may be: (i) detained in military custody for the duration of the conflict, (ii) interrogated, and (iii) tried and punished for violations of the laws of war by such military tribunals as the President shall duly constitute.

In addition, the analysis assumes that the section of the Constitution providing for suspension of the writ of habeas corpus has *not* been exercised, making it unnecessary to determine whether the scope of that power is a justiciable controversy.<sup>99</sup>

The analysis also presumes that a petition for a writ of habeas corpus is filed to seek judicial review of the designation of a person as an enemy combatant pursuant to this statutory authority. It further presumes that the petition is filed while the person is detained on the basis of the President's declaration (not the judgment of a military tribunal), and that the petition contests that designation on the facts without any concessions that might doom the petition on its face.

Under these assumptions the facts and procedural postures that existed in cases like *Quirin*, *Yamashita*, *Hamdi*, and *Padilla* and prevented the courts from reaching the fundamental open questions are not present. The government's constitutional powers to detain persons as enemy combatants are at the maximum in the *Youngstown* analytical scheme. Those powers have been invoked, and are being challenged to the fullest by the detainee. Consequently, the

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<sup>99</sup> See U.S. CONST. art. I, § 9, cl. 2; *INS v. St. Cyr*, 533 U.S. 289 (2000); *Felker v. Turpin*, 518 U.S. 651 (1996). Cf. *Ex parte McCordle*, 74 U.S. 506, 507-08, 514-15 (1868) (upholding constitutionality of statute depriving Supreme Court of appellate jurisdiction in habeas cases).

difficult open questions of habeas corpus procedure and constitutional law can be confronted directly.

First, the analysis discusses the procedural thresholds to a petition for a writ of habeas corpus challenging an enemy combatant detention. This involves consideration of the proper parties and the proper district in which the petition may be filed. Although much of this law is settled, some of it is not.

Second, the analysis examines the subject matter jurisdiction of the federal courts over such petitions. Because the writ can be issued only to terminate custody that violates the Constitution,<sup>100</sup> the petitioner must be a person who possesses constitutional rights the government is obligated to respect. Once again, although much of this law is clear, there remain unresolved issues.

Third, the analysis turns to the fundamental—and still open—question: the burden of proof the government must satisfy to detain a person in military custody as an enemy combatant, rather than in civilian custody with the usual constitutional rights. To date no final judgment of any federal court has reached this issue. Yet the question is one of paramount importance in the constitutional scheme, and to which this Article gives an answer.

Fourth, the analysis also considers a number of subsidiary questions related to the broader problem of burden of proof. These are the circumstances under which application of the laws of war to alleged terrorists is justifiable, the scope of petitioner's access to counsel, and the role of concessions or undisputed facts.

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<sup>100</sup> The writ also may be issued to terminate custody in violation of the laws or treaties of the United States. *See* 28 U.S.C. § 2241(c)(3). The assumptions previously stated exclude those two grounds by the terms of the hypothetical statute negating the application of other laws and treaties, with the exception of the laws of war.

Only by considering these fundamental open questions unobstructed by the factual complexities of actual past and present litigation can the core constitutional controversies be seen, and the appropriate balance of governmental power and individual rights determined.

### III. WRIT OF HABEAS CORPUS: PROCEDURAL THRESHOLDS

A petition for a writ of habeas corpus provides a procedure by which an individual in custody may seek judicial review of the lawfulness of that custody. The modern American law governing the filing of such petitions evolved from the common law Great Writ, which was used to challenge a citizen’s summary detention by order of the Crown—a proceeding upon which considerable praise rightfully has been bestowed over the centuries.<sup>101</sup> So highly regarded was the necessity for the availability of the writ that the drafters of the Constitution specifically restricted the federal government’s power to suspend it.<sup>102</sup>

Despite its origin in executive detentions, contemporary habeas corpus law is concerned almost exclusively with challenges to incarceration pursuant to a judgment issued by a duly constituted court for conviction for a criminal offense. A federal offender may attack his imprisonment or sentence in federal court under § 2255 on the grounds that it was imposed in violation of the Constitution or federal law.<sup>103</sup> A state prisoner, subject to numerous and highly technical procedural hurdles, similarly may petition in federal court under § 2254 for a determination that “he is in custody in violation of the Constitution or laws or treaties of the United States.”<sup>104</sup> The case law construing the federal statutory provisions providing these forms

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<sup>101</sup> See, e.g., *Hamdi*, 316 F.3d at 465 (stating that habeas corpus review’s “essential function of assuring that restraint accords with the rule of law, not the whim of authority, remains unchanged”); *id.* at 464 (quoting Blackstone).

<sup>102</sup> See U.S. CONST. art. I, § 9, cl. 2.

<sup>103</sup> See 28 U.S.C. § 2255.

<sup>104</sup> 28 U.S.C. § 2254(a); see also *id.* §§ 2244, 2254.

of relief is extensive.<sup>105</sup> A habeas corpus proceeding is a civil cause of action in which the petitioner, the prisoner, seeks release from the custody of the respondent, the warden of the facility where the prisoner is incarcerated.<sup>106</sup>

The detention of alleged terrorists as enemy combatants, however, marks a return to the very kind of incarceration for which the privilege of the writ of habeas corpus was designed: custody pursuant not to a judicial judgment but rather executive fiat. As the Fourth Circuit noted in the *Hamdi* litigation:

While the scope of habeas review has expanded and contracted over the succeeding centuries, its essential function of assuring that restraint accords with the rule of law, not the whim of authority, remains unchanged. Hamdi’s petition falls squarely within the Great Writ’s purview, since he is an American citizen challenging his summary detention for reasons of state necessity.<sup>107</sup>

In such circumstances § 2241 of the habeas corpus statutes applies; like the more commonly invoked statutes that section permits a detainee to challenge his custody as “in violation of the Constitution or laws or treaties of the United States.”<sup>108</sup> Therefore, if the President’s detention of an alleged terrorist exceeds the constitutional powers of the federal government, a federal court may issue a writ of habeas corpus directing the President to release the individual from custody.

A § 2241 petition challenging the detention of an alleged terrorist designated by the President as an enemy combatant will be dismissed if it fails to satisfy certain jurisdictional prerequisites. First, the petition must be filed by an appropriate party against an appropriate

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<sup>105</sup> See, e.g., *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Tyler v. Cain*, 533 U.S. 656 (2001); *Williams v. Taylor*, 529 U.S. 420 (2000); *Williams v. Taylor*, 529 U.S. 362 (2000).

<sup>106</sup> See 28 U.S.C. §§ 2241(a) & (d), 2242, 2254(a).

<sup>107</sup> *Hamdi v. Rumsfeld*, 316 F.3d 450, 465 (4th Cir. 2003).

<sup>108</sup> 28 U.S.C. § 2241.

respondent. These requirements usually are satisfied easily. Second, the petition must involve the custody of a prisoner to whom the privilege of the writ of habeas corpus under the Constitution applies—that is, the federal court must have subject matter jurisdiction over the controversy. Because the Constitution’s extraterritorial reach is not unlimited, certain persons detained abroad by the government of the United States lack any constitutional protections at all and therefore cannot obtain relief under § 2241.

A. Standing and Personal Jurisdiction: Petitioner and Respondent

Only certain individuals may file a § 2241 petition challenging a prisoner’s detention. In the absence of a proper party Article III courts lack the power to adjudicate the petition, just as an equivalent lack of standing would doom any other civil case.<sup>109</sup> For § 2241 cases there are two permissible petitioners.<sup>110</sup>

First, of course, the prisoner may file the petition. In typical habeas cases under § 2255 or § 2254 the incarcerated criminal offender is the person who files the petition, often *pro se*. Although such persons face many practical obstacles in their pursuit of relief, they have access to the courts as well as outside resources like family or friends to assist in their endeavors. Persons detained as enemy combatants, by contrast, may be held entirely incommunicado in military custody for extended periods of time.<sup>111</sup> Such conditions would make it impossible for the detainee to file personally a § 2241 petition to challenge his custody, and courts readily have recognized that dilemma.<sup>112</sup>

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<sup>109</sup> See, e.g., *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>110</sup> “Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.” 28 U.S.C. § 2242.

<sup>111</sup> See *supra* notes 95-96 and accompanying text.

<sup>112</sup> See, e.g., *Hamdi v. Rumsfeld*, 294 F.3d 598, 603 (4th Cir. 2002); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 575-76 (S.D.N.Y. 2002).

Second, a “next friend” may file a § 2241 petition on behalf of a detainee. To have standing to file as a next friend the party claiming that status must explain why the detainee is unavailable to petition for his own release and must demonstrate a significant relationship to the detainee that ensures the party will be dedicated to the pursuit of the detainee’s interests.<sup>113</sup> Immediate family members, such as parents or siblings, are suitable next friends.<sup>114</sup>

Other persons are not proper next friends and cannot file a petition to challenge a prisoner’s custody. To expand standing beyond the narrowly defined class of next friends would allow “intruders or uninvited meddlers, styling themselves next friends” to intervene in matters in which they hold no personal stake.<sup>115</sup> For example, citizens who seek to vindicate “a generalized interest in constitutional governance”—but who lack any significant connections to the specific detainee—lack Article III standing.<sup>116</sup> Similarly, while counsel who previously represented a detainee in connection with the investigation of his alleged terrorist ties prior to his designation as an enemy combatant possesses a significant relationship that justifies next friend status, the Federal Public Defender for the district in which the prisoner is being held lacks standing absent a preexisting professional relationship.<sup>117</sup> The requirement of a significant prior relationship might be weakened if there were no party available to serve as a proper next friend

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<sup>113</sup> See, e.g., *Hamdi v. Rumsfeld*, 294 F.3d at 603-07; *Padilla v. Rumsfeld*, 352 F.3d 695, 702-04 (2d Cir. 2003), *affirming in relevant part* *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d at 575-78.

<sup>114</sup> See *Hamdi v. Rumsfeld*, 296 F.3d 278, 280-81 (4th Cir. 2002); *Hamdi*, 294 F.3d at 600 n.1; *Al Odah v. U.S.*, 321 F.3d 1134, 1136-38 (D.C. Cir. 2003); *Gherebi v. Bush*, 262 F. Supp. 2d 1064, 1065 (C.D. Cal. 2003), *reversed on other grounds*, *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003).

<sup>115</sup> *Hamdi*, 294 F.3d at 603 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990)).

<sup>116</sup> *Hamdi*, 294 F.3d at 603 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990)); see also *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1039-46 (C.D. Cal. 2002), *affirmed in relevant part by* *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1156-64 (9th Cir. 2002).

<sup>117</sup> Compare *Padilla*, 233 F. Supp. 2d at 575-78, with *Hamdi*, 294 F.3d at 603-07.

on behalf of an incommunicado detainee, but as such facts have not yet arisen the contours of a possible exception for such unusual circumstances are unresolved.<sup>118</sup>

The petition must be filed not only by a proper petitioner but also against the proper respondent. In the usual case under § 2254 the petition is filed in the federal district where the facility holding the incarcerated criminal offender is located, and the respondent is the warden of that facility;<sup>119</sup> most courts have held that the same rule applies to § 2241 petitions challenging the detention of aliens pending removal under the immigration laws.<sup>120</sup> A subsequent transfer of the prisoner to a different facility after the filing of the petition would not deprive that district court of jurisdiction to continue with the case.<sup>121</sup> In the *Hamdi* case the petition was filed in the district where the petitioner was detained.<sup>122</sup>

Two circuits have held, however, that this usual rule should be modified in § 2241 cases involving detention of an alleged terrorist as an enemy combatant.<sup>123</sup> Unlike convicted criminals

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<sup>118</sup> See *Coalition*, 310 F.3d at 1165-68 (Berzon, J., concurring).

<sup>119</sup> See *Padilla*, 233 F. Supp. 2d at 578-80. Prior to the enactment of § 2255, which provides for the motion to be filed in the district where the prisoner was sentenced, see 28 U.S.C. § 2255, habeas petitions challenging federal sentences under § 2241 were filed in the district where the prisoner was incarcerated. See *United States v. Hayden*, 342 U.S. 205, 212-19 (1952).

<sup>120</sup> See, e.g., *Vasquez v. Reno*, 233 F.3d 688, 691 (1st Cir. 2000); *In re Hansard*, 123 F.3d 922, 925 & n.2 (6th Cir. 1997); *Robledo-Gonzalez v. Ashcroft*, 342 F.3d 667, 673 (7th Cir. 2003); but see *Ali v. Ashcroft*, 346 F.3d 873, 887-88 (9th Cir. 2003); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998) & *Yesil v. Reno*, 175 F.3d 287 (2d Cir. 1999).

<sup>121</sup> See *Ex parte Endo*, 323 U.S. 283, 307 (1944); *Al-Marri v. Rumsfeld*, \_\_\_ F.3d \_\_\_, 2004 WL 415279 at \*5 (7th Cir. Mar. 8, 2004) (No. 03-3674). In *Padilla* the next friend filed the petition at a previously scheduled hearing two days after *Padilla* was removed from the district into military custody. See 233 F. Supp. 2d at 571-72; 352 F.3d at 700.

<sup>122</sup> *Hamdi* is detained at Norfolk naval base, which is located in the Eastern District of Virginia. See 294 F.3d at 601. Accordingly, the identification of the proper respondent is less important because both the commander of that base, and Secretary of Defense Rumsfeld at the Pentagon, are located in the same district. See also *In re Territo*, 156 F.2d 142, 144 (9th Cir. 1946) (petition filed in district where prisoner of war was detained); *Colepaugh v. Looney*, 235 F.2d 429, 430 (10th Cir. 1956) (same).

<sup>123</sup> See *Padilla*, 352 F.3d at 704-708, affirming in relevant part 233 F. Supp. 2d at 578-83; *Gherebi*, 352 F.3d at 1300-05.

or deportable aliens detained pursuant to civilian law, enemy combatant detainees are held at military installations at the direction of superiors in Washington. Under these circumstances a suit against an immediate custodian such as the commander of a local military base may not in fact adequately join the actual, *de facto* custodian of the custody the petitioner is challenging. For this reason the Second Circuit in *Padilla* and the Ninth Circuit in *Gherebi* concluded that the proper respondent in § 2241 cases challenging enemy combatant detentions is the Secretary of Defense, who exercises direct authority on behalf of the President over those detainees.<sup>124</sup> Hence, the petition may be filed in the district where the next friend is located, rather than the district where the prisoner is actually detained, so long as personal jurisdiction over the Secretary is proper based on his ties to the district satisfying the relevant long-arm jurisdiction statute.<sup>125</sup>

The Seventh Circuit has rejected this analysis, however, holding that a § 2241 petition challenging the detention of an enemy combatant must be filed against the prisoner's immediate custodian, the commander of the military facility where he is being held.<sup>126</sup> Notwithstanding that the prisoner is in military rather than civilian custody, the court found no basis to depart from the general rule and held that the petition must be filed not against the Secretary of Defense but rather against the immediate custodian: the commander of the military facility where the petitioner is detained.<sup>127</sup>

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<sup>124</sup> *See id.*

<sup>125</sup> *See Padilla*, 233 F. Supp. 2d at 583-87, *affirmed in relevant part by* 352 F.3d at 708-10; *Gherebi*, 352 F.3d at 1300-05; *cf.* *Al-Marri v. Bush*, 274 F. Supp. 2d 1003, 1005-1010 (C.D. Ill. 2003) (holding venue improper where neither prisoner nor next friend was located in district), *affirmed on other grounds Al-Marri*, 2004 WL 415279 at \*3-5.

<sup>126</sup> *See Al-Marri*, 2004 WL 415279 at \*3-5.

<sup>127</sup> *See id.*

The principal doctrinal dispute concerns the application of several Supreme Court precedents relating to non-physical custody over a person.<sup>128</sup> In *Braden v. 30th Judicial Circuit Court* the Court held that a prisoner confined in an Alabama prison could challenge a Kentucky detainer through a petition filed in federal court in Kentucky.<sup>129</sup> Although the prisoner was physically detained in Alabama, the custody being challenged in the petition was the non-physical custody imposed by the Kentucky detainer—and thus the state court in which the indictment was pending was the proper respondent for the federal petition.<sup>130</sup> Similarly, in *Strait v. Laird* the Court held that a reservist challenging orders to report for active duty could pursue his petition in California, where he was located.<sup>131</sup> The Court held that the proper respondent was the officer ultimately responsible for issuing the challenged orders, who was located in Indiana, but nonetheless concluded that the petitioner should be treated as being in custody in California due to the Army’s extensive handling of his matter there.<sup>132</sup> On the other hand, in *Schlanger v. Seamans* the Court concluded that a petition alleging a breach of enlistment contract could not proceed in Arizona, where the petitioner was located.<sup>133</sup> As in *Strait* the proper respondent was the commanding officer in Georgia who was imposing the custody by enforcing the challenged contract, but unlike *Strait* that officer had taken no action in and had no ties to Arizona, so the appropriate district for the petition was Georgia.<sup>134</sup>

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<sup>128</sup> See *Padilla*, 233 F. Supp. 2d at 583-86, *affirmed in relevant part by* 352 F.3d at 705-708; *Gherebi*, 352 F.3d at 1300-01; *Al-Marri*, 2004 WL 415279 at \*4-5.

<sup>129</sup> See 410 U.S. 484, 495, 499-500 (1973).

<sup>130</sup> See *id.*

<sup>131</sup> See 406 U.S. 341, 344-46 (1972).

<sup>132</sup> See *id.*

<sup>133</sup> See 401 U.S. 487, 489-91 (1971).

<sup>134</sup> See *id.*; see also *Strait*, 406 U.S. at 344 (distinguishing *Schlanger* based on “total lack of formal contacts between Schlanger and the military” in Arizona).

In each of these cases, the Court ruled that in the unusual situation where the prisoner, the custody, and the custodian are not all present in the same place, the petition may be filed in the location of the *custody* rather than that of the prisoner or the custodian. In *Braden* the custody *being challenged* was not the physical custody of the Alabama incarceration but rather the non-physical custody of the Kentucky detainer. The petition was properly filed where the respondent was imposing *that* custody (Kentucky), even though the petitioner was physically elsewhere (Alabama). Similarly, the military orders being challenged in *Strait* and *Schlanger* imposed custody where they were being applied to the petitioner—California (not Indiana) in *Strait*, and Georgia (not Arizona) in *Schlanger*. Thus, the petitioner may proceed in the district where the challenged custody exists, even if the petitioner is not present there (Kentucky in *Braden* or Georgia in *Schlanger*) or the respondent is not present there (California in *Strait*).

The courts in *Padilla* and *Gherebi* relied on this precedent to assert power to hear the petitions based on the presence of the petitioner (the next friend) in the district and personal jurisdiction over the respondent. Yet both petitions unquestionably are challenging the two men’s detention in *physical* custody. Moreover, neither *Padilla* nor *Gherebi* arose from the district where that challenged physical custody existed at the time the petition was filed—*Padilla* is detained in South Carolina (not New York) and *Gherebi* is detained at Guantanamo Bay (not California). Accordingly, the precedent relied upon does not support the broader scope of § 2241 jurisdiction applied in *Padilla* and *Gherebi*.

One of the questions presented in the Supreme Court in the *Padilla* case is the issue of personal jurisdiction over the proper respondent.<sup>135</sup> Notwithstanding the foregoing analysis, the Court might sustain the ruling of the lower courts on either of two grounds. First, the Court

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<sup>135</sup> See Petition for Certiorari at i, *Rumsfeld v. Padilla* (No. 03-1027) (January 16, 2004); see also 124 S. Ct. 1353 (2004) (granting petition).

might conclude that the timing of the President’s designation of Padilla as an enemy combatant—after the conclusion of briefing and two days before a scheduled hearing on Padilla’s pending motion to quash the material witness warrant<sup>136</sup>—was strategic conduct designed to divest the district court of jurisdiction before the warrant could be quashed or a petition for habeas corpus could be filed. On that basis the Court could rule that the petition filed at that scheduled hearing should be given effect to deprive the government of the benefits of its strategic behavior.<sup>137</sup> Second, the Court might conclude that although the existing precedent does not create the broader scope of habeas jurisdiction adopted in *Padilla*, the lower courts nevertheless reached the correct interpretation of § 2241 on the facts of the case. Given the nature of an enemy combatant detention by the military, the Court could hold that the custody involved is *sui generis*—and for purposes of proper forum should be treated flexibly, more akin to the non-physical custody cases of *Braden*, *Strait*, and *Schlanger* than to the stringent rules governing archetypal habeas petition challenging physical custody pursuant to criminal or immigration incarceration under civilian law.<sup>138</sup> Consequently, it is difficult to predict how the Court will rule on this issue in the *Padilla* case.

#### B. Subject Matter Jurisdiction: Citizenship and Location

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<sup>136</sup> See *Padilla v. Rumsfeld*, 352 F.3d 695, 699-702 (2d Cir. 2003); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 569-74 (S.D.N.Y. 2002).

<sup>137</sup> Governmental conduct in a criminal case taken solely to gain a strategic or tactical advantage violates the Due Process Clause. See, e.g., *United States v. Sherman*, 150 F.3d 306, 312-13 (3d Cir. 1998); *United States v. Ciampaglia*, 628 F.2d 632, 639 (1st Cir. 1980) (citing *United States v. Marion*, 404 U.S. 307, 324 (1971)).

<sup>138</sup> Compare *Padilla*, 233 F. Supp. 2d at 583-87, affirmed in relevant part by 352 F.3d at 708-10; *Gherebi*, 352 F.3d at 1300-05, with *Al-Marri*, 2004 WL 415279 at \*3-5. Contrary to the suggestion in the Seventh Circuit’s opinion in *Al-Marri*, see 2004 WL at \*3, a holding that the petition need not be filed in the district where the prisoner in actual physical custody would not necessarily authorize suit in any district in the country—proper venue readily could be limited to the district either where the next friend resides (S.D.N.Y. in *Padilla* or C.D. Cal. in *Gherebi*) or where the respondent’s office is located (E.D. Va. for the Secretary of Defense).

In addition to the requirements of standing and personal jurisdiction, a petition challenging the detention of an alleged terrorist as an enemy combatant must fall within the subject matter jurisdiction of the federal courts in § 2241 cases. A writ of habeas corpus may only be issued to terminate custody in violation of the Constitution or federal laws, but the Constitution does not apply to every action taken by the government of the United States anywhere in the world. Citizens of the United States retain their constitutional rights abroad, including the privilege of the writ of habeas corpus. Likewise, all persons present in the United States, including aliens, are protected by many of the constitutional provisions relevant to detentions. But when agents of the United States take action against non-citizens abroad, the Constitution does not govern those actions. For this last category of persons, federal courts lack subject matter jurisdiction to hear a § 2241 claim challenging detention.

1. United States Citizens

The detention by the federal government of a United States citizen always provides subject matter jurisdiction for a § 2241 petition alleging that the detention is unconstitutional or unlawful. This is true whether the citizen is taken into custody within the United States, is taken into custody abroad and returned to the United States for detention, or is taken into custody abroad and detained abroad. In each of these circumstances the Constitution applies to the actions of the federal government with respect to the citizen, and therefore claims of constitutional violations are cognizable under § 2241. The petitioner may lose on the *merits* of the claim, of course, but the federal courts have power to hear them.

A citizen taken into custody inside the United States indisputably may challenge that detention as unconstitutional. After confirming standing and jurisdiction, for example, the courts considering the detention of José Padilla as an enemy combatant proceeded directly to the merits

of the next friend’s constitutional claims.<sup>139</sup> Judge Wesley went so far as to point out that the writ of habeas corpus had not been suspended as provided in Article I, § 9 of the Constitution, and yet the “government contends that Mr. Padilla can be held incommunicado for 18 months with no serious opportunity to put the government to its proof by an appropriate standard” that Padilla’s detention is constitutional.<sup>140</sup> Similarly, in *Quirin* the Supreme Court heard the habeas claim of a citizen arrested in the United States who challenged his designation as an enemy combatant subject to trial by military tribunal for violations of the laws of war.<sup>141</sup> And the famous *Milligan* case was a habeas petition challenging military detention and trial during the Civil War in violation of a controlling federal statute.<sup>142</sup>

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<sup>139</sup> See *Padilla v. Rumsfeld*, 352 F.3d 695, 710 (2d Cir. 2003); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 588 (S.D. N.Y. 2002).

<sup>140</sup> 352 F.3d at 732 (Wesley, J., concurring in part and dissenting in part).

<sup>141</sup> See *Ex parte Quirin*, 317 U.S. 1, 18-25 (1942). Petitioner Haupt was a citizen; although the government alleged his allegiance to Nazi Germany constituted a renunciation of his citizenship, the Court did not reach that question because it held Haupt was properly treated as an enemy combatant regardless. See *id.* at 20-21, 37-38. Notably, although the text of the President’s order establishing the military tribunals seemed to suggest it sought to deny judicial review, the Court interpreted the order not to bar habeas review of the applicability of the order to a person or of the President’s power to issue it. See *id.* at 25. The Court similarly heard a habeas petition challenging the lawfulness of certain conditions imposed on citizens during the relocation of Japanese-Americans on the West Coast. See *Ex parte Endo*, 323 U.S. 283, 297-304 (1944).

<sup>142</sup> The Court was unanimous that Milligan was entitled to release under the terms of the 1863 statute authorizing President Lincoln to suspend the writ of habeas corpus. See *Ex parte Milligan*, 71 U.S. 2, 107-08, 115-16, 130-31 (1866); see *id.* at 134-135 (Chase, C.J., concurring). The Court divided over whether Congress had the power to authorize Milligan’s trial by military commission. See *id.* at 118-30; *id.* at 136-142 (Chase, C.J., concurring); see also *Ex parte Merryman*, 17 F. Cas. 144, 147-48, 150 (D. Md. 1861) (Taney, C.J.). The Court later upheld the constitutionality of a statute depriving it of appellate jurisdiction in habeas cases, however. See *Ex parte McCardle*, 74 U.S. 506, 507-08, 514-15 (1868).

A citizen of the United States seized abroad and subsequently detained in the United States also may challenge his detention as unconstitutional under § 2241.<sup>143</sup> When the government sought dismissal of Yaser Hamdi’s petition on the grounds that he was an enemy combatant captured on a battlefield in Afghanistan, the Fourth Circuit responded by ordering that the merits of the allegations be reached: “In dismissing, we ourselves would be summarily embracing a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so.”<sup>144</sup> Although the court ultimately concluded Hamdi’s claim failed on the merits, the court concluded that the fact that Hamdi was seized on a foreign battlefield only affected the degree of deference owed to the government’s allegations, not Hamdi’s right to challenge his detention in the United States.<sup>145</sup>

The courts apparently have not yet been confronted directly with a situation in which a citizen is taken into custody abroad and remains detained there as an enemy combatant at the time the § 2241 petition is filed. Given the Court’s rulings in related areas of constitutional law, however, it seems unlikely a court would hold that it lacked subject-matter jurisdiction over such a petition. For example, in a series of cases the Supreme Court established that civilians residing or stationed abroad in affiliation with the United States armed forces cannot constitutionally be tried for criminal offenses by military courts-martial that do not provide full Fifth and Sixth

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<sup>143</sup> John Walker Lindh, a citizen seized in Afghanistan and ultimately detained in the United States, objected to his classification as an unlawful combatant, rather than a lawful combatant, in the motion to dismiss the criminal charges filed against him in United States District Court. *See United States v. Lindh*, 212 F. Supp. 2d 541, 552-58 (E.D. Va. 2002).

<sup>144</sup> *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).

<sup>145</sup> *See id.* at 283-84; *Hamdi v. Rumsfeld*, 316 F.3d 450, 465-77 (4th Cir. 2003); *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (en banc) (opinions respecting denial of rehearing). The Fourth Circuit explained: “Hamdi’s citizenship rightfully entitles him to file this petition to challenge his detention, but the fact that he is a citizen does not affect the legality of his detention as an enemy combatant.” 316 F.3d at 475.

Amendment rights.<sup>146</sup> If such rights in the ordinary criminal justice process have extraterritorial application to citizens, then the government’s power to detain a citizen in military custody as an enemy combatant ought likewise be subject to judicial review, even when the location of the custody is abroad. As discussed further below, the fact that the prisoner was taken into custody and remained detained abroad might, as in the *Hamdi* case, lead the court to extend more deference to the government’s allegations *on the merits*. But § 2241 provides subject-matter jurisdiction to challenge the detention of a citizen of the United States by the government of the United States, regardless of where that detention takes place.

## 2. Aliens Detained in the United States

Like citizens, aliens present in the United States are protected by the constitutional provisions governing detentions. Both the Fourth Amendment’s proscription on unreasonable seizures and the Fifth Amendment’s prohibition on deprivations of liberty without due process of law, for example, are guaranteed to “the people” and all “persons,” respectively, and not merely to citizens. Accordingly, an alien detained in the United States as an enemy combatant possesses constitutional rights that may be vindicated through a § 2241 petition. In *Quirin*, for example, the Supreme Court considered petitions by six German soldiers arrested in New York and Chicago contesting their designation as unlawful combatants subject to trial by military tribunal.<sup>147</sup>

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<sup>146</sup> See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269-70 (1990) (discussing *Reid*). Thus, “[c]ourts-martial cannot be given jurisdiction, even abroad, over civilian dependents of military personnel or over civilian employees of military forces.” 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-5 at 301 (3d ed. 2000).

<sup>147</sup> See *Ex parte Quirin*, 317 U.S. 1, 20-24 (1942).

Detention on U.S. soil—in one of the fifty states—is not required, however, because the Constitution applies anywhere the United States has sovereignty. Thus, in *Yamashita* the Court heard a petition challenging the trial by military tribunal of the Japanese commander in the Philippines, a federal Territory over which the United States had sovereignty at the time.<sup>148</sup>

The Bush Administration has detained hundreds of foreign nationals alleged to be enemy combatants at the Guantanamo Bay naval base on the island of Cuba. In reviewing petitions challenging these detentions, the courts had to determine whether subject matter jurisdiction existed over the claims. Two district courts and the D.C. Circuit found no subject matter jurisdiction because the United States did not have sovereignty over the base, but rather Cuba retained sovereignty over the leased land.<sup>149</sup> The Ninth Circuit, on the other hand, concluded that the United States was sovereign over the base and held that subject matter jurisdiction existed.<sup>150</sup> The Supreme Court has granted certiorari to resolve this issue.<sup>151</sup> Setting aside the unique factual circumstances of the Guantanamo base, aliens detained in the United States or its sovereign territories may pursue a § 2241 petition.

### 3. Foreign Nationals Detained Abroad

Unlike United States citizens or aliens present in the United States, however, foreign nationals abroad do not have constitutional rights. The Constitution is not given extraterritorial

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<sup>148</sup> See Application of Yamashita, 327 U.S. 1, 5-9 (1946); see also Johnson v. Eisentrager, 339 U.S. 763, 779-80 (1950) (distinguishing *Yamashita*); Gherebi v. Bush, 352 F.3d 1278, 1285 (9th Cir. 2003) (same).

<sup>149</sup> See Al Odah v. U.S., 321 F.3d 1134, 1142-45 (D.C. Cir. 2003), affirming Rasul v. Bush, 215 F. Supp. 2d 55, 68-73 (D.D.C. 2002); Gherebi v. Bush, 262 F. Supp. 2d 1064, 1065-69 (C.D. Cal. 2003), reversed Gherebi v. Bush, 352 F.3d 1278, 1284-1300 (9th Cir. 2003); see also Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1046-50 (C.D. Cal. 2002), vacated in relevant part by Coalition of Clergy, Lawyers, and Professors v. Bush, 310 F.3d 1153, 1164 (9th Cir. 2002).

<sup>150</sup> See *Gherebi*, 352 F.3d at 1284-1300.

<sup>151</sup> See Al Odah v. United States, 124 S. Ct. 524 (2003).

effect with respect to such persons, even for purposes of seizures by United States agents or deprivations of liberty without due process.<sup>152</sup> Accordingly, federal courts lack subject matter jurisdiction to hear § 2241 petitions challenging detentions of foreign nationals overseas because such detentions cannot violate the Constitution.

In *Johnson v. Eisentrager* the Supreme Court expressly applied this principle to a habeas petition challenging the World War II detention of twenty-one German nationals in a prison in Allied-occupied Germany.<sup>153</sup> The prisoners had been taken into custody in China and were convicted by a U.S. military tribunal in Nanking of violating the laws of war by engaging in continuing military activities against the United States after the surrender of Germany (but not Japan).<sup>154</sup> Unlike aliens present in the United States, the Court ruled, these aliens were not entitled to invoke habeas corpus proceedings to challenge the power of the military tribunals to try them or otherwise contest the validity of their incarceration.<sup>155</sup> In litigation concerning the detention of alleged enemy combatants at the Guantanamo Bay naval base the lower courts

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<sup>152</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (stating that it is “well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders,” including Fifth Amendment Due Process Clause); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-75 (1990) (Fourth Amendment search); see also *Al Odah*, 321 F.3d at 1141 (“The law of the circuit now is that a ‘foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.’”) (quoting *People’s Mojahedin Org. v. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir.1999)).

<sup>153</sup> See *Johnson v. Eisentrager*, 339 U.S. 763, 765-67 (1950).

<sup>154</sup> See *id.*

<sup>155</sup> See *id.* at 770-80. Although the Court frequently referred to the prisoners as “enemy aliens” because they were nationals of a country with which the United States was at war, see, e.g., *id.* at 765, 768-69 & n.2, the Court’s jurisdictional ruling depended not on their status as enemies but on their status as aliens outside the United States, see *id.* at 777-78 (“We have pointed out that the privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in the country implied protection. No such basis can be invoked here...”) (emphasis added). Subsequent cases have confirmed this interpretation of *Eisentrager*. See, e.g., *Zadvydas*, 533 U.S. at 693; *Verdugo-Uquidez*, 494 U.S. at 269. But see David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 984 (2002) (“[The] principles [of *Johnson*] apply only in a time of declared war to citizens of the country with which we are at war.”).

uniformly have agreed that if the base is not under United States sovereignty, *Eisentrager* divests foreign nationals of subject matter jurisdiction for a § 2241 petition because they any lack presence in the United States that would provide them with constitutional rights.<sup>156</sup>

Although the *Eisentrager* doctrine precludes a § 2241 petition on behalf of a foreign national detained by the United States abroad, the United States remains subject to international law and treaties that govern its conduct. The courts have noted that diplomatic measures may be taken by the foreign nationals' home countries to enforce the Geneva Conventions or other international obligations owed by the United States.<sup>157</sup> However important those obligations may be for purposes of the government's international reputation, they are not enforceable in federal court by foreign nationals not present in the United States.

### C. Conclusions about Procedural Thresholds

The jurisdictional prerequisites for a § 2241 petition challenging the detention of a prisoner as an enemy combatant derive from the nature of the petition as applied in these circumstances. The petitioner could be the prisoner, but given the conditions of incommunicado military detention it is more likely to be a next friend with a demonstrated substantial basis for representing the prisoner's interests. The Secretary of Defense, as the official exercising *de facto* personal control over the detainee's custody, is the appropriate respondent. And because the immediate custodian of the prisoner is not the respondent, it is not necessary to litigate in the

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<sup>156</sup> See *Al Odah*, 321 F.3d at 1138-42, *affirming* *Rasul v. Bush*, 215 F. Supp. 2d 55, 65-68 (D.D.C. 2002); *Gherebi v. Bush*, 262 F. Supp. 2d 1064, 1065-70 (C.D. Cal. 2003), *reversed* *Gherebi v. Bush*, 352 F.3d 1278, 1284-85 (9th Cir. 2003); *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1046-50 (C.D. Cal. 2002), *vacated in relevant part by* *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1164 (9th Cir. 2002); *cf.* *Nash ex rel. Hashimoto v. MacArthur*, 184 F.2d 606, 606, 608 (D.C. Cir. 1950) (discussing *Eisentrager* rule).

<sup>157</sup> See, e.g., *Rasul*, 215 F. Supp. 2d at 56-57; *Gherebi*, 262 F. Supp. 2d at 1072; *cf.* *Eisentrager*, 339 U.S. at 789 n.14.

district where the prisoner is actually detained—a location would be subject to change at the authority of the Secretary, rather than the immediate custodian, in any event.

Similarly, the scope of subject matter jurisdiction for such § 2241 petitions follows from the scope of the writ. Unless the privilege is suspended as provided in Article I, § 9 of the Constitution, the writ of habeas corpus under § 2241 is available to challenge summary executive detention that violates the Constitution or laws. United States citizens at home or abroad have constitutional rights the government must respect, and may file a petition for a writ of habeas corpus challenging their detention regardless of where they are taken into custody and detained. Aliens present in the United States likewise have constitutional rights that a petition could vindicate. But the Constitution does not apply extraterritorially to foreign nationals abroad, and therefore such persons cannot be unconstitutionally in custody. The *Eisentrager* doctrine reflects this limitation on the scope of constitutional rights by precluding the use of § 2241 to challenge the detention of foreign nationals held outside the sovereign territory of the United States.

#### IV. WRIT OF HABEAS CORPUS: JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF DETENTION

The detention of alleged terrorists as enemy combatants is justifiably controversial. By detaining individuals pursuant to the laws of war, rather than civilian law, the government can deprive them of the constitutional rights to which they otherwise are entitled. Any such assertion of power by the government is rightfully viewed with a high degree of skepticism.

Yet the fact that the government claims sweeping and dangerous authority does not itself answer the question of the proper scope of judicial review of that claim. After all, the federal courts are not the only check against abuse of power by Congress and the President—the political branches must stand for reelection and faced the judgment of the voters. On the other hand, the courts are expected to play a greater role in protecting constitutional rights against

encroachment by the other two branches precisely because political expediency—or the will of the majority—may pay insufficient attention to the Bill of Rights. And when the governmental powers at issue implicate foreign affairs and war-making, the role of the courts is usually more limited. Such questions of the separation of powers and constitutional theory are as deeply contested as they are important.<sup>158</sup>

The most direct implications of those issues for the proper role of judicial review of the detention of individuals as enemy combatants, however, relate to questions that this Article does not seek to address. As described in Part II.D., the following analysis assumes that the federal government is exercising its maximum constitutional authority through a duly enacted statute that expressly authorizes the President to detain alleged terrorists as enemy combatants. Accordingly, absent a suspension of the writ and subject to the procedural thresholds discussed in Part III, the federal courts have power to hear petitions for the writ of habeas corpus challenging the constitutionality of such detentions.

With all other objections of constitutional law set aside, a single fundamental question remains: the burden of proof the government must satisfy to detain a person in military custody as an enemy combatant, rather than in civilian custody with the usual constitutional rights. This Part analyzes that question and provides the answer the courts so far have avoided, beginning with consideration of the circumstances under which application of the laws of war to alleged terrorists is justifiable as a grounds for detention as an enemy combatant. It then concludes that as with issues of subject matter jurisdiction, the burden the government should be required to bear varies depending on the citizenship of the person and where they were taken into custody.

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<sup>158</sup> For purposes of this Article it is not necessary to adopt a single unifying theory of judicial review or the constitutional war powers. *See generally* 1 TRIBE, *supra* note 146, at §§ 3-3 to 3-6 (discussing constitutional theories of judicial review).

This Part also examines two subsidiary questions related to the broader problem of burden of proof: the scope of petitioner’s access to counsel and the role of concessions or undisputed facts in adjudicating a petition.

A. The Laws of War and Alleged Terrorists

[This section will begin by addressing why Al Qaeda qualifies as an armed force to which the laws of war apply. It then will consider whether membership in Al Qaeda is sufficient to make a person an enemy combatant against the United States per se, or whether active membership in a terrorist plot should be required. It also will examine whether persons who aid and abet or harbor terrorists, or who have even lesser ties with them, are enemy combatants.]

[This section next will discuss the nature of the battlefield to which the laws of war apply in antiterrorism actions against Al Qaeda. It will argue that foreign zones of combat such as Afghanistan or Iraq clearly qualify, and that civilian locations in the United States clearly do not. Accordingly, to justify detaining a person seized in the United States as an enemy combatant the government should be required to show that the person’s participation in a terrorist attack was imminent. This preserves the analogy to the German saboteurs in *Quirin*. If participation in a terrorist attack was not imminent, then a person seized in the United States cannot be subject to military jurisdiction.]

[Finally, this section briefly will consider the implications of the *Youngstown* analysis for determining the appropriate burdens of proof in the following sections.]

B. Burden of Proof: United States Citizens

The Constitution guarantees to United States citizens a wide range of rights the federal government may infringe only upon the most compelling grounds.<sup>159</sup> Included among these are the rights discussed regarding the procedures that must be followed to deprive a citizen of liberty for punitive or non-punitive reasons. The presumption that citizens retain these rights when the government seeks to detain them—even on serious allegations like espionage or terrorism or even treason<sup>160</sup>—is a very strong one.

Yet the possession of constitutional rights is not an irrebuttable presumption. As the Supreme Court recognized in *Quirin*, when a citizen joins an enemy armed force and engages in acts of war against the United States, that citizen rightfully is treated as an enemy combatant under the laws of war. For example, an American citizen captured during World War II while fighting for the Italian Army in Italy was without question an enemy soldier<sup>161</sup>—not a civilian entitled to be tried in a criminal court. Similarly, were José Padilla or Yaser Hamdi members of the Iraqi army taken prisoner during the recent military action in that country, their status as

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<sup>159</sup> See, e.g., *Grutter v. Bollinger*, 123 S.Ct. 2325, 2237-38 (2003) (discussing strict scrutiny under Equal Protection clause); *Turner Broadcasting Sys. v. F.C.C.*, 512 U.S. 622, 641-43 (1994) (discussing strict scrutiny under First Amendment); *Perry Educ. Ass’n v. Perry Local Educators’ Assn*, 460 U.S. 37, 54 (1983) (discussing application of strict scrutiny to “fundamental rights”); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (same).

<sup>160</sup> For example, John Walker Lindh was charged in civilian court; he ultimately pled guilty to two counts (aiding the Taliban and a weapons offense) and received a sentence of twenty years’ imprisonment. See, e.g., Tom Jackman, *In Deal, Lindh Pleads Guilty to Aiding Taliban*, WASH. POST, July 16, 2002, at A01. Similarly, Robert Philip Hanssen was permitted to plead guilty to thirteen counts of espionage and a sentence of life imprisonment to avoid the death penalty. See David A. Vise, *From Russia With Love; FBI agent Robert Hanssen was a frustrated loner isolated from co-workers, family and friends. Finally he found someone to appreciate his mind and talents: the nice folks from the KGB*, WASH. POST, Jan. 6, 2002, at W18. Neither Lindh nor Hanssen was ever charged with treason. Treason trials are presumptively held in Article III courts, under requirements of proof expressly delineated in the Constitution. See U.S. CONST. art. III, § 3.

<sup>161</sup> See *In re Territo*, 156 F.2d 142, 142-44, 145-46 (9th Cir. 1946).

prisoners of war would not be open to question. That the government chose to pursue civilian charges against John Walker Lindh, who apparently fought with the Taliban militias in Afghanistan, does not change the fact that he was an unlawful enemy combatant and therefore not constitutionally entitled to a civilian hearing.<sup>162</sup>

Thus, the real debate is not whether the federal government has the power to detain its own citizens as enemy combatants—clearly it does, at least under certain circumstances—but whether the government has justified its decision to detain specific persons as enemy combatants on the particular facts of their seizure into government custody. That is, the sole issue is whether the government has met its *burden of proof* in demonstrating that the prisoner it has labeled as an enemy combatant in fact is one. In addition to establishing the applicability of the laws of war in the first instance, discussed above, the government must prove that the individual being detained as an enemy combatant committed the acts alleged and therefore can be held in military custody and denied the constitutional rights that otherwise would apply.

#### 1. Seized in the United States

The *Padilla* case has been so controversial precisely because it involves a United States citizen arrested in Chicago yet denied his constitutional rights. Padilla later was taken into military custody without any judicial oversight of the sufficiency of the grounds for his indefinite detention as an enemy combatant. He has not been charged with any crimes, nor has he been given a bail hearing. He has been held incommunicado and denied access to his counsel. And he apparently has been compelled to submit to interrogation at length for intelligence

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<sup>162</sup> See *United States v. Lindh*, 212 F. Supp. 2d 541, 552-58 (E.D. Va. 2002) (discussing Lindh's status as unlawful enemy combatant).

information, presumably on the grounds that his status as an enemy combatant vitiates the Fifth Amendment privilege against compulsory self-incrimination.<sup>163</sup>

Were Padilla clearly an agent of a nation with which the United States was at war—like petitioner Haupt in *Quirin*, a German saboteur landed on U.S. soil during World War II<sup>164</sup>—it seems unlikely his case would have garnered similar attention. But Padilla has contested the allegations against him both before and after his designation as an enemy combatant.<sup>165</sup>

Yet perhaps Padilla is a member of Al Qaeda, and was planning to commit acts of terrorism soon after his return to the United States had he not been arrested. If this is true—if the government’s allegations are correct—then Padilla is properly detained as an enemy combatant and denied his constitutional rights. Assuming *arguendo* the only issue in the case is the government’s burden of proof, what does the Constitution require that burden be?

A low burden, such as probable cause, is plainly inadequate. A finding of probable cause supports only a minimal deprivation of liberty: the existence of pending charges and a brief detention pursuant to an arrest. Such intrusions, while not trivial, are insignificant compared to extended incarceration. For this reason, the government’s assertion in the *Padilla* litigation that the courts should review designations of individuals as enemy combatants under the highly deferential “some evidence” standard should be flatly rejected.<sup>166</sup> Although the invocation of

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<sup>163</sup> See *Padilla v. Rumsfeld*, 352 F.3d 695, 699-702 (2d Cir. 2003). The only judicial oversight was the issuance of the material witness warrant on which Padilla was first arrested and the ongoing habeas corpus proceedings challenging his detention as an enemy combatant. See *id.*; *id.* at 732-33 (Wesley, J., concurring in part and dissenting in part).

<sup>164</sup> See *supra* note 141.

<sup>165</sup> See 352 F.3d at 699-702 (noting that Padilla and counsel Newman were contesting material witness warrant prior to President designating Padilla as enemy combatant); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 599-608 (S.D. N.Y. 2002) (discussing petitioner’s intention to contest government’s allegations).

<sup>166</sup> See *Padilla*, 233 F. Supp. 2d at 605-08 (discussing and acceding to government’s assertion).

war powers matters, it cannot justify depriving a citizen of constitutional rights on such a thin level of proof. The strong presumption of constitutional rights cannot be overcome so easily.

Extended involuntary detention may be imposed without a criminal conviction, however. Criminal defendants not yet tried (much less convicted) may be preventively detained under the federal bail statute. This requires, first, a finding of probable cause to sustain the indictment and, second, a finding by clear and convincing evidence after an adversarial hearing with counsel that detention is necessary to ensure the defendant's appearance for trial or the public safety. Preventive detention pending trial may last for lengthy periods of time without violating Due Process.<sup>167</sup>

In addition, some forms of civil confinement may be indefinite. Upon a finding by clear and convincing evidence that an individual is both dangerous and unable to control that dangerous behavior due to mental illness, the person may be detained until such time as those two factors no longer exist. A defining feature of the indefinite nature of the confinement, however, is the detainee's lack of culpability with respect to dangerousness due to the mental illness causing the inability to control behavior. It is the mental illness, not the dangerousness alone, that justifies the indefinite civil detention.<sup>168</sup>

The detention of an alleged terrorist as an enemy combatant has some aspects in common with indefinite civil detention, but others than are closer to criminal punishment. On the one hand, to the extent the government seeks only to detain an enemy combatant—whether a lawful combatant as prisoner of war under the GCPW or an unlawful combatant outside the protections of the treaty—the analogy to civil detention is sound. Like preventive detention of some

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<sup>167</sup> See, e.g., *United States v. El-Hage*, 213 F.3d 74, 79-81 (2nd Cir. 2000) (holding that pretrial preventive detention exceeding 30 months did not violate Due Process despite unusual length).

<sup>168</sup> See *supra* notes 22-24 (citing cases).

criminal defendants or the civil confinement of sexual predators, the purpose of enemy combatant detentions is incapacitation: preserving the public safety by preventing the enemy from engaging in further hostilities for the duration of the conflict. On the other hands, unlawful enemy combatants may be interrogated about their involvement in and knowledge of the armed conflict. Persons subject to civil detention, however, may invoke the Fifth Amendment privilege against compulsory self-incrimination while they are in custody, and cannot be subject to compelled interrogation.<sup>169</sup> Unlawful enemy combatants also may be put on trial before military tribunals for their actions that violate the laws of war. This aspect of their status clearly implicates the goals of retribution and general deterrence that reflect a punitive, rather than a civil, purpose.<sup>170</sup> Accordingly, evaluating the government’s allegations under the same standard applicable to civil confinements does not reflect the potentially profound consequences of the designation of a citizen as an unlawful enemy combatant.

Nevertheless, to impose the highest standard, the criminal law requirement of proof beyond a reasonable doubt, would be inconsistent with the nature of the inquiry at issue. It is not the purpose of a petition for a writ of habeas corpus challenging the prisoner’s detention as an enemy combatant to require the government to place the prisoner on trial and convict him of a criminal offense pursuant to the usual constitutional procedures. A § 2241 habeas proceeding is not a bench trial of a criminal charge—it is judicial review of the constitutionality of summary

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<sup>169</sup> *Cf. McKune v. Lile*, 536 U.S. 24 (2001) (holding that requirement that sex offender disclose prior criminal acts in prison treatment program did not violate Self-Incrimination Clause). Although the Court divided on the application of the Self-Incrimination Clause to the facts of the case, the Court was unanimous that the prisoner could not to be compelled to give incriminating statements. *See id.* at 35-39; *id.* at 48-49 (O’Connor, J., concurring); *id.* at 55-57 (Stevens, J., dissenting).

<sup>170</sup> *See, e.g., Kansas v. Crane*, 534 U.S. 407, 412 (2002) (citing *Kansas v. Hendricks*, 521 U.S. 346, 372-73 (1997) (Kennedy, J., concurring)).

executive detention.<sup>171</sup> After all, if the government's allegations are true, the prisoner does not in fact possess the right have his fate litigated under ordinary rights and doctrines of criminal procedure in the first place. Requiring proof of a criminal conviction to establish that the individual is an enemy combatant not subject to the criminal justice system is illogical.

Finally, some account must be taken of the nature of the inquiry in a § 2241 petition challenging the detention as an enemy combatant of a citizen seized on U.S. soil. Although the presumption of the possession of constitutional rights is strong, the analysis also assumes that political branches also are asserting their maximum possible war powers under the Constitution. Unless that assertion is patently frivolous or tyrannical, it would be inappropriate for the federal courts to contradict the conclusions of the political branches about the grave dangers facing the nation. On the other hand, it is equally inappropriate for the courts to abrogate their responsibility to ensure that war powers justifiably invoked on a general level are being applied properly in the cases of specific citizens. The very purpose for the Great Writ was to permit citizens to challenge summary detention pursuant to executive decree, and the courts should not abandon that responsibility in the face of a claim of military exigency.

In light of the competing constitutional interests, the best solution to the question of the government's burden of proof is to require it to justify by *clear and convincing evidence* the detention of a United States citizen as an enemy combatant. First, this conclusion is consistent with the idea that proof beyond a reasonable doubt is illogical as the threshold standard. Second, it accords with the burden applied to extended and indefinite detention for non-punitive purposes. Third, although designation as an unlawful enemy combatant may lead to trial by

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<sup>171</sup> Likewise, § 2254 and § 2255 habeas cases are not retrials of the criminal conviction being challenged; rather, they address specific claims of error asserted to have tainted the earlier proceeding. See 28 U.S.C. §§ 2254-55 (limiting nature of claims); *supra* note 105 (citing cases regarding nature of habeas claims).

military tribunal rather than a civilian court, permitting that punitive aspect of the designation is a sensible accommodation to the invocation of war powers by the political branches. Fourth, as discussed further below, the nature of the clear and convincing evidence standard requires a number of significant procedural protections for the petitioner, including access to counsel and the right to contest the government's allegations and present alternative evidence.

In practice this burden of proof means that the government will have to produce substantial compelling evidence to persuade the court that the citizen seized on U.S. soil is an enemy combatant. If the individual was arrested in preparation for an imminent terrorist attack, then the government should be able to demonstrate those facts with relative ease, just as the government justified preventive detention of the organized crime family leaders in *Salerno* with recordings and testimony.<sup>172</sup> And because the § 2241 petition is adjudicated by a judge in a writ proceeding, the Rules of Evidence and other strict trial procedures are not directly applicable, just as they are not in a bail or suppression motion hearing in a criminal case. Nonetheless, the government's burden is a high one, and seeking to carry it principally with hearsay and summaries might fail to persuade the judge that the proof is sufficient. By comparison, if the individual is alleged to be an enemy combatant based on active membership in Al Qaeda, then the government may have to reveal significant portions of the basis for that allegation. A simple conclusory affidavit by a government official is plainly insufficient.<sup>173</sup> Similarly, although some use of *ex parte* classified submissions might be permissible, the petitioner also must be given a full and fair opportunity to contest the allegations in an adversarial manner. Particularly if the

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<sup>172</sup> See *supra* note 15 and accompanying text.

<sup>173</sup> Compare *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 572-74, 605-10 (S.D. N.Y. 2002) (discussing Mobbs Declaration regarding Padilla); *Hamdi v. Rumsfeld*, 316 F.3d 450, 461, 469-77 (4th Cir. 2003) (discussing Mobbs Declaration regarding Hamdi), *reversing* *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 528-36 (E.D. Va. 2002) (same).

petitioner raises a significant challenge such as mistaken identity or alibi, the government may be required to reveal even more evidence to satisfy its burden of proof. While the government might fear that requiring this level of proof may lead to the public disclosure of intelligence information, confidential informants, or other sensitive matters, that is a price the government must be willing to pay if it seeks to deny a citizen his constitutional rights on the accusation that he is an enemy combatant.

Thus, a comprehensive view of the conflicting interests explains why clear and convincing evidence is the most satisfactory burden of proof for these § 2241 petitions. On the one hand, this standard permits punitive sanctions by a later military tribunal without the usual criminal procedure protections and the interrogation of the individual without the protections of the Fifth Amendment privilege. On the other hand, it requires the government to surpass a rigorous review even at the fullest extent of its domestic constitutional war powers. Although the detention of a citizen as an enemy combatant has greater consequences than preventive detention of a criminal accused without bail or indefinite civil confinement of the mentally ill, proof by the same standard used in those situations prevents arbitrary or unsupportable detentions while also providing the government the power to protect the public from those it can persuasively demonstrate are terrorists.

## 2. Seized Abroad

The analysis of the seizure of United States citizens abroad is considerably more complex. In some situations the seizure will be virtually indistinguishable from a similar seizure in the United States—for example, an expatriate citizen living in Paris or London or Berlin and arrested on suspicion of active membership in Al Qaeda, rather than in preparation for an imminent terrorist attack, is little different than a citizen arrested in New York or Los Angeles or

Boston. In other situations the seizure will be a classic battlefield detention of an enemy soldier in a foreign zone of combat where constitutional war powers are at their maximum—such as a citizen fighting with the Taliban. To what extent should the government’s burden of proof be altered to account for these differing situations?

The best solution to this question is to retain the same standard applied to seizures within the United States, proof by clear and convincing evidence, and leave it to the judgment of the courts to adjudicate whether the government’s allegations outweigh the petitioner’s challenges in the totality of the circumstances. The nature of the factual dispute in each particular case, therefore, will determine the ease with which the government can meet this burden.

On the one hand, if the petition claims the prisoner was seized in civilian circumstances in a place that is not an active zone of combat, the government either must prove that the petition is factually inaccurate because the prisoner was in fact seized on a battlefield, or must provide similar proof to a detention in the United States, such as that the prisoner is an active member of Al Qaeda. That is, citizens should not be given lesser protection against designation as enemy combatants simply because they reside abroad or travel as tourists to foreign countries.

On the other hand, if the petition cannot reasonably contest that the prisoner was seized in a place where the United States is engaged in active military operations, the government would be able to carry its burden with less difficulty. It would not be appropriate, for example, to require the government to provide the direct testimony of the individual U.S. soldiers involved in the specific seizure of the prisoner on a battlefield; rather, an affidavit from a commanding officer describing and summarizing the conditions of the capture might be sufficient. Likewise, as discussed below, the concessions of the petition itself might doom the claim in light of the government’s allegations. Yet there also might be contested claims, such as an individual the

government claims was captured fighting for an enemy militia but whose petition maintains was a journalist or non-belligerent humanitarian relief worker.<sup>174</sup> In such disputes the government must provide sufficient proof to persuade the court that it has clearly and convincingly refuted the petition's contentions to justify detaining the person as an enemy combatant.

Thus, in cases where the government readily can demonstrate that the place where the prisoner was seized was an active zone of foreign combat, it will be correspondingly easier to justify the enemy combatant status of the person. In other cases, where those circumstances are far more ambiguous, the government must justify the enemy combatant detention with a level of proof comparable to a seizure within the United States.

#### C. Burden of Proof: Aliens

[This section will evaluate the government's power to detain aliens seized in the United States as enemy combatants. In contrast to the heavy burdens required to detain citizens under civilian law, a lower burden is sufficient to detain an alien pending a hearing on removal. Consequently, it is appropriate to impose a lower burden for the designation of an alien as an enemy combatant as well. This burden should be a preponderance of the evidence.]

#### D. Access to Counsel and Related Procedural Issues

[This section will examine the procedural requirements that must be satisfied in adjudicating § 2241 petitions challenging a person's detention as an enemy combatant.]

[In cases involving citizens, the government must justify the detention by clear and convincing evidence. Accordingly, the petitioner must be given an adversary hearing at which he has the right to confront the evidence against him and to introduce contrary evidence. The

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<sup>174</sup> See *Hamdi v. Rumsfeld*, 337 F.3d 335, 357-65 (4th Cir. 2003) (opinions respecting denial of rehearing en banc) (Luttig, J., dissenting) (arguing that fact of seizure in Afghanistan was not conclusive of enemy combatant status); *id.* at 368-76 (Motz, J., dissenting) (same).

petitioner must be provided with counsel to enable the effective pursuit of the petition. Without these procedures, the proceeding falls short of the constitutional requirements in similar hearings under the same burden of proof.]

[In cases involving aliens, the government must justify the detention by a preponderance of the evidence. Nevertheless, the same set of procedures generally is required under ordinary immigration law in hearings regarding removal. The same procedures are appropriate before indefinite detention as an enemy combatant is constitutional.]

[This section also will briefly note the applicability of the Classified Information Procedures Act to civilian courts, and review how CIPA might be used in adjudicating § 2241 petitions challenging enemy combatant detentions.]

#### E. Concessions and “Undisputed” Facts

[This section will consider the circumstances in which it is appropriate for a court to conclude that certain facts are conceded or undisputed, and therefore deny relief to the § 2241 petitioner. In the *Hamdi* case the panel concluded that the next friend’s petition conceded Hamdi’s seizure in a foreign zone of combat. The panel relied upon this concession in holding that the Mobbs Declaration was sufficient evidence to justify the detention of Hamdi as an enemy combatant. Dissenting from the denial of rehearing en banc, Judge Luttig argued that the panel’s interpretation of the facts was improper. Thus, it is important to determine exactly when and how a court may conclude that facts are conceded.]

[This section also will note the important distinction between unlawful enemy combatants, who may be interrogated, and lawful enemy combatants, who may not be. For this reason a concession that a person is an enemy combatant will justify their detention. But a concession would not also justify interrogation unless either the concession was to violations of

the laws of war making the person an enemy combatant or the concession was to belligerency on behalf of an organization whose members are unlawful enemy combatants per se.]

V. CONCLUSION

[Insert conclusion.]