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Enemy Combatants: The Legal Origins of the Term "Enemy Combatant" Do Not Support its Present Day Use

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LEXISNEXIS SUMMARY:

... Two United States citizens, Yaser Hamdi and Jose Padilla , are currently being detained indefinitely as "enemy combatants," which is an unprecedented legal classification and action. ... I will discuss the details of Hamdi's and Padilla's capture and detention to illustrate how far the term "enemy combatant" is being stretched by the government from its roots in Quirin. ... However, several international law experts contend that if the government had instead decided to declare these men "unlawful combatants," it would still be required to provide the chance for a hearing to challenge their designation as an "unlawful combatant" or a trial in front of a military tribunal. ... Although Quirin addressed the pre-trial detention and trial of the saboteurs by military commission ... whereas no such charges have been brought against Padilla, the Court's opinion [in Quirin] makes clear that the President's authority over enemy combatants encompasses not just the authority to prosecute them through military commissions, but also the more commonly practiced authority to detain enemy combatants in the course of armed conflict without charging them with specific crimes. ... The differences in where Hamdi and Padilla were captured, Hamdi was taken on foreign soil while Padilla was within the United States, may lead the court to apply a different definition to Padilla's status as an "enemy combatant." ...

TEXT:

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I. Introduction

For the first time in history, the United States government is following executive orders to imprison its own citizens without meaningful review by habeas petition or access to counsel. Two United States citizens, Yaser Hamdi and Jose Padilla n1, are currently being detained indefinitely as "enemy combatants," which is an unprecedented legal classification and action. Previously, the courts have held that citizens detained during times of war must be allowed the right to meet with counsel to challenge their detention through a habeas petition, such as in the ex parte Milligan case. n2 In addition, previous case law mandates that citizens in like positions be tried in front of a military tribunal or in the civilian courts. n3 Although district and appellate courts and the Supreme Court have considered the President's

authority to detain United States citizens during times of war, the same tribunals have never been so willing to accept as legitimate what appears to be a legal term with no authoritative meaning. Unlike the terms "unlawful combatant" and "Prisoner of War" ("POW"), the term "enemy combatant" has no formal legal authority at home or abroad.

The government claims that designating two citizens as "enemy combatants" is within its authority under the power granted to the President in Article I of the United States Constitution and that its action is further supported by history and precedent. The government further contends that this designation allows the detention of the two United States citizens, [*146] Yaser Hamdi and Jose Padilla incommunicado. n4 For nearly two years these men did not have access to their attorneys or families, n5 and neither Hamdi nor Padilla have been charged with a crime. In declaring these men "enemy combatants," the government is seizing on language that has never been used in relation to the underlying policy of detaining citizens. Up to this point, the courts have accepted the government's position that an "enemy combatant" should be denied the right to meet in confidence with their attorney to challenge their detention through a habeas petition. Additionally, the courts have not yet supported the idea that, as citizens, these men should be charged and tried in the civilian courts. As a result, the courts have enabled the government to avoid following constitutional procedure and well-established precedent. The justification for denying fundamental rights to Hamdi and Padilla, and the government's decision not to follow established precedent, hinges on the fact that these citizens have been designated "enemy combatants."

In the following article, I will first trace the origins of the term "enemy combatant" in case law from its first appearance in *ex parte Quirin*, in 1942, to the present. By analyzing the origins of this term, I will show that the government's use of the term is inaccurate and unprecedented. I will further prove this point by discussing what the government could have done to further its interests while respecting the rights of such detainees, [*147] instead of designating these men as "enemy combatants." I will also examine how the term "enemy combatant," through government conjecture, has become accepted to describe a legal category that has never existed. Ultimately, I will demonstrate that the term "enemy combatant" has not been previously used in the context of detentions of United States citizens, and that there is no legal authority on which the courts can base their present day holdings - which subsequently allow the unlawful detentions of both Hamdi and Padilla.

II. Origins Of The Term Enemy Combatant

The term "enemy combatant" first appears in the *ex parte Quirin* case. n6 In *Quirin*, eight German spies, one of whom was a United States naturalized citizen, were captured in 1942 while entering the United States in Florida and New York. n7 The spies came ashore during the night from boats near the coast and were wearing caps of the German marines when they landed. n8 After landing on United States soil, they removed their caps and changed into civilian clothes. n9 The men were carrying explosives, fuses, and timing devices. n10 They were captured within days of their entry into the United States and were taken into custody by the F.B.I.. n11 *Quirin* is a famous and indeterminate case, the specific holding of which remains unclear to this day. n12 The Court described the issue before it in *Quirin* as whether or not the President had the statutory authority to order the petitioners to be tried by a military tribunal rather than in the civil courts. n13 The Court ultimately concluded in response to the central question presented in the case that the President did have the authority to order the trial of the captured spies in front of a tribunal for their violations of the laws of war. In *Quirin*, the Court used the term "enemy combatant" in only one sentence. n14 The *Quirin* Court used the term to exemplify the type of activity that warrants the denial of rights typically accorded to POWs. Spies without uniforms who cross military lines to gather information and communicate it to the enemy, "enemy combatants" who without uniform [*148] come secretly through the lines for the purpose of waging war by destruction of life or property are familiar examples of belligerents who are generally deemed not to be entitled to the status of POWs, but to be offenders against the law of war subject to trial and punishment by military tribunals. n15 The fact that one of the captured spies in *Quirin* was a United States natural citizen was not central to the case. The Court found that an American who put on an enemy uniform and swore allegiance to a country at war with the United States could be treated the same as a captured foreign enemy belligerent and would not be afforded the rights of a POW. n16

The *Quirin* case uses the term "unlawful combatant," "enemy combatant" and "enemy belligerent" seemingly

interchangeably to refer to enemy soldiers who had violated the rules of war. As noted above, the Court refers to an "enemy combatant" as an enemy soldier who is not wearing a uniform. In the next sentence, the Court states that those "enemy combatants" are examples of "belligerents" not entitled to POW status. The terminology of these three terms in the Quirin case is confusing. However, the term "enemy belligerent" and "unlawful combatant" appear more than ten times in the case, while the term "enemy combatant" appears only once, suggesting that the Court is more willing to refer to it as legitimate legal term. Further, the Quirin Court expressly defined "unlawful combatant:"

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as Prisoners of War by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. n17

The Court finds that the appropriate punishment for captured "unlawful combatants" is trial by military commission. As will be discussed later in this article, after the Quirin case the term "unlawful combatant" went on to become an established term in international law because it was referred to in the 1949 Geneva Conventions.

The Supreme Court in Quirin used the term "enemy combatant" in the context of discussing captured spies in a formal, declared war, unlike the present situation with the War on Terror. Further, both Hamdi and Padilla were born in the United States, unlike the one naturalized citizen in Quirin. [*149] In addition, the Quirin Court focused its analysis on what constitutes a violation of the rules of war, and, if foreign spies do in fact violate these rules, whether or not they may be tried in front of a tribunal. The Supreme Court did not create a new jurisdictional concept by referring to enemy soldiers as "enemy combatants" because they did not use the term in a way that suggested any meaning outside of the direct context in which the term was used. Previously "enemy combatant" was only applied to spies engaging in activity outside of the rules of war. Furthermore, the ultimate holding of Quirin, that foreign spies could be tried in front of a military tribunal, does not hinge on the use or meaning of the term "enemy combatant." n18

In the fifty years between Quirin and September 2001, the courts wrote seven opinions in which they used the term "enemy combatant." Since September 11, 2001 the term has been used twenty-six times. n19

III. Historical Use of Term "Enemy Combatant" in Case Law from 1946-2001 Offers No Legal Definition

None of the seven cases prior to September 11, 2001, provide any basis for assigning the term "enemy combatant" an acknowledged legal meaning. The lack of a legitimate basis calls into question the government's claim that being declared an "enemy combatant" has historical precedent or legal significance. It suggests instead that an unsubstantiated label is being used to deny fundamental rights. By tracing the term from 1946 until 2001, it is clear that prior to the government's declaration of Hamdi and Padilla as "enemy combatants," it was not a legal term of art. In fact, each of the seven cases uses the term in surprisingly varied contexts, which indicates there was no uniform meaning.

[*150]

A. Yamashita and Its Offspring

Between the 1946 Quirin decision and 1952, the term "enemy combatant" appeared in three cases. n20 In Application of Yamashita, n21 the Commanding General of the Japanese Army on the Philippine Islands was captured after hostilities between Japan and the United States had ended. At issue was whether the military commission set up to hear Yamashita's case was created by a lawful military command, and if so, whether it had the authority to try Yamashita after the cessation of hostilities between the United States and Japan. In Yamashita, the term "enemy combatant" appears 11 times to refer to foreign captured soldiers who have violated the laws of war. n22 Each time it appears, the

Court is referring specifically to foreign captured soldiers (or, in the case of Yamashita, a General) who had violated the laws of war. For example, the Court states, "the trial and punishment of an enemy combatant who has committed violations of the law of war is not only a part of conduct of war, but also is an exercise of authority sanctioned by Congress to administer system of military justice recognized by law of war." n23 Later, it states, "we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war." n24 In another example, the Court says, "we further pointed out that Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries." n25 While Yamashita does not include a formal recognition that the term "enemy combatant" applies to United States citizens, since the tribunals in Yamashita were being used to try a non-citizen, it does suggest that "enemy combatants" and "unlawful combatants" (the terms are again used interchangeably) are part of a distinct category that describes foreign enemies captured during combat. It is interesting that now the government has chosen to rely on Quirin, where the term casually appears once, instead of Yamashita, where the term appears eleven times which implies that it is given more recognition. However, both Quirin and Yamashita were decided before the 1949 [*151] Geneva Conventions and gave apparent intentional and international meaning to the term "unlawful combatant" but not to "enemy combatant."

Ultimately, Yamashita does not clarify the legal significance of the term "enemy combatant" or the Court's previous use of the term in Quirin. In neither Quirin nor Yamashita does the Court address whether or not citizens can be designated either "enemy combatants" or "unlawful combatants," nor that there is a distinct difference between the two. To the contrary, in both cases the Court limits the discussions to that of foreigners during a formal war; in Quirin and Yamashita, respectively, German spies and a Japanese General violated the rules of war. Consequently, neither Quirin nor Yamashita should be the legal authority or basis for the detention of United States citizens who are captured in an undeclared war. The Court's deference to the government's reliance on Quirin n26 as a justification for Hamdi's and Padilla's detentions is a gross and dangerous missapplication of established law.

Following Yamashita, there were no cases until 1952 in which the term "enemy combatant" appeared. In 1952, the Supreme Court decided the case of Madsen v. Kinsella. n27 The term appears one time in this case. Madsen was a habeas corpus proceeding to secure the release of a soldier's widow from the custody of the Federal Reformatory for Women. The Supreme Court held that the United States Court of Allied High Commission for Germany had jurisdiction in 1950 to try the widow in front of a military commission. She was charged with murdering her husband in violation of Germany's criminal code. The Court found that military commissions have jurisdiction to hear nonmilitary crimes, such as murder and other violent crimes. In a direct quote from Yamashita, the Madsen case noted, ""by thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in Ex Parte Quirin, to any use of the military commission contemplated by the common law of war." n28 The main legal significance for the term "enemy combatant" presented in the Yamashita quote was the extension of military tribunals' jurisdiction over both military and non-military crimes of military [*152] personnel. The context of the term, as a description of the type of person typically tried in front of a military tribunal, is not relevant to the overall disposition of the case that held Madsen could be tried in front of a German military tribunal for killing her husband while in the country.

In another case decided in 1952, U.S. v. Shultz, n29 the Court of Military Appeals uses the same Yamashita quote as the Madsen Court. Shultz was appealing a court martial in front of the court on certificate from the Advocate General of the Air Force in accordance with Article of War 50 U.S.C., section 67(b)(2). In January 1951, Shultz was tried and convicted by a general court martial in Japan after driving a car that struck and killed two Japanese pedestrians a year earlier. He was convicted of involuntary manslaughter and drunk driving. n30 At issue was whether the appellate court had jurisdiction over Shultz as a person subject to the law of war, rather than a person subject to military law. n31 The Court of Military Appeals cites Yamashita to assert that the benefits of military law, including review by the Court, are available only to persons subject to military law under Article 2(d). The Court states in Yamashita that "by thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we [did] in Ex Parte Quirin, to any use of the military commission

contemplated by the common law of war." n32

B. The Term as it Appears During the 1990s

The term "enemy combatant" does not appear in published case law between 1952 and 1991. The term appears in four cases during the 1990s for various purposes. None of the opinions refer to the other related cases or use the term "enemy combatant" in a way that establishes clear legal meaning. Certainly none of the cases use the term in a way that would give legitimacy to the government's current use of the term which allows the detention of citizens without meaningful judicial review. The term is used in three of the four cases in reference to combat, recognizing "enemy combatants" and referring to them as part of enemy forces. The fourth case refers to military tribunals for captured "enemy combatants." Three of the cases in which the term appears were decided in front of the Court of [*153] Military Review while the fourth was tried before a Massachusetts Appellate Court. In all four of these cases, the term is used to describe or reference non-citizen members of the opposing side's forces.

In *U.S. v. Peri*, n33 the Court of Military Review used the term "enemy combatant" while discussing the circumstances surrounding Peri's decision to take two disks with classified information on them, without permission, before his leaving. The term appeared once: the disks included "a listing of the advantages and disadvantages of terrain and weather as these factors would affect United States and enemy combatants." n34 Peri was a Specialist in the United States Army and stationed in Germany, where he was convicted of AWOL, espionage, and two counts of wrongful appropriation. The Court of military review upheld Peri's sentence of dishonorable discharge and 25 years in prison. The use of the term in Peri refers to foreign soldiers and how the weather might affect them. The Court did not use the term to reflect any legally significant category but instead used it as a descriptive term to identify enemy soldiers.

In 1992, in *U.S. v. Rankins*, n35 the Court of Military Review used the term enemy combatant in the context of establishing a public-duty defense. The defense applies to "killing an enemy combatant in battle." n36 Rankins was convicted by special court martial after failing to accompany her troop when ordered. The Court of Appeals held that Rankins did not raise the defense of public duty duress. The Court again used the term as a descriptive term to describe enemy soldiers.

In 1993, the Court of Military Review mentions the term in *U.S. v. McMonagle*, n37 and like Peri and Rankins, used the term in reference to members of the enemy's fighting unit. However, in *McMonagle*, the court quotes the defendant's own use of the term as he argued that he thought he was under hostile attack and only shot at an "enemy combatant" during Gulf War-related combat. In *McMonagle*, the defendant was convicted of murder while engaged in an act inherently dangerous to others, conspiracy to obstruct justice, willful disobedience of a commissioned officer, and wrongful discharge of a firearm. The term appeared once again as a reference to enemy soldiers in *McMonagle's* description of the events that resulted in his being charged. n38

[*154] A Massachusetts appellate court also used the term enemy combatant in 1993. In *Commonwealth v. Delaney*, n39 the term "enemy combatant" appears in a footnote within a description of the defendant's physical strength. "Delaney, a supposed veteran of physical encounters with armed enemy combatants, stood six feet, five inches tall, and weighed 240 pounds." n40 The case was on appeal from a trial court decision convicting Delaney of second-degree murder for strangling his ex-wife. The appellate court affirmed, despite the defendant's objections that certain evidence be suppressed before trial. The brief mention of the term in a footnote had nothing to do with the legal issue before the court - whether the defendant had strangled his ex-wife. Delaney presents the most random use of the term, and again, failed to establish a legal significance with which the government could justify its present attempt to designate citizens as "enemy combatants."

IV. The Term "Enemy Combatant" is Being Used to Deny Citizens Their Rights And in a Way That is Unprecedented

Since September 11, 2001, the term "enemy combatant" has been used in a distinctly different way than in the

aforementioned cases. For the first time, the government has officially declared two United States citizens, Hamdi and Padilla, to be "enemy combatants." In January of 2003, I began contacting national experts on terrorism and international law to identify the procedure the government used to determine who was an "enemy combatant" and the term's definition. I contacted David Cole, a professor at Georgetown University, who is considered an expert on the Patriot Act, Jeremy Kamens, one of the assistant federal public defender's representing Hamdi, and Viet Dinh, also a professor at Georgetown, and a former attorney for the Department of Justice. This caused questions regarding (1) the term's significance and (2) the existence of established protocol for these "enemy combatants." Mr. Cole suggested that there was no independent legal meaning for the term "enemy combatant" and said, "my sense is that there are two types of combatants who can be detained during a war - privileged combatants, who must be held as POWs, and unprivileged, or unlawful combatants, who may be tried for their war crimes in military tribunals. I assume the administration is using the term "enemy combatant" to muddy that distinction." n41 In response to what it [*155] meant to be an "enemy combatant" or what procedure existed to designate a person as such, Mr. Kamen's responded, "that's a good question - Padilla has been declared an enemy combatant by the President; Hamdi has been declared an enemy combatant by someone in the military who remains unknown. There is no established procedure for declaring someone an enemy combatant because the military regulations do not include that term." n42 Finally, I specifically asked Mr. Dinh, the former government employee, if he was aware of any formal, legal definition for the term "enemy combatant" and if so, was it publicly available. He responded, "the short answer to both of your questions is no." n43 These responses convinced me that the term "enemy combatant" was, in fact, being used in a very different way in the cases of Hamdi and Padilla than it had been historically. I will discuss the details of Hamdi's and Padilla's capture and detention to illustrate how far the term "enemy combatant" is being stretched by the government from its roots in Quirin.

Although Hamdi was born in Louisiana, Hamdi's father moved the family to Saudi Arabia when Hamdi was a year old; thus, Hamdi is a United States citizen, but he grew up in Saudi Arabia. In the fall of 2001, Hamdi was captured in Afghanistan during the United States' ongoing military operation following the attacks of September 11, 2001. An unknown member of the United States military n44 declared Hamdi an "enemy combatant" while he was in captivity in Afghanistan. Hamdi and other captives were transferred to Camp X-Ray at the Guantanamo Naval Base in Cuba. After it came to light that Hamdi was born in the United States and had not renounced his citizenship, he was transferred to the Norfolk Naval Brig in Virginia during April of 2002. n45 Hamdi was transferred out of Guantanamo because, unlike the other detainees in Guantanamo who were non-citizens and could be tried in front of military tribunals, Hamdi was not eligible for trial in front of a military tribunal pursuant to President Bush's recent order exempting citizens from [*156] tribunals. n46 Hamdi has remained detained in Norfolk since April 2002 and has not been allowed to meet with his attorney, to communicate with his family, or to defend or explain the underlying facts that the government claims make him an "enemy combatant."

Padilla was born in New York, New York. As a juvenile, Padilla was convicted of murder in Chicago where he served time in prison. After his release from prison at age 18, Padilla later spent time in a Florida prison for a weapons charge where he converted to Islam. In the early 1990s, Padilla moved to Egypt. On May 8, 2002, Padilla was arrested in the Chicago O'Hare Airport on a material witness warrant issued by Judge Mukasey of the Southern District Court of New York. The warrant was issued to enforce a subpoena to secure Padilla's testimony before a grand jury. n47 On or around May 15, 2002, Padilla was moved from Chicago to New York and detained at the Metropolitan Correctional Center. Shortly thereafter, Padilla appeared in court, and federal public defender Donna Newman was appointed as his counsel. On June 7, 2002, after conferring with Padilla, Ms. Newman filed a motion to vacate the warrant. A hearing was scheduled for June 11, 2002, to address Padilla's motion to vacate the warrant. n48 On June 9, 2002, two days before the scheduled hearing, the government notified the court that it was withdrawing the subpoena, and requested the court to vacate the warrant for Padilla. At that time, the government disclosed to the court that the President had designated Padilla as an "enemy combatant" and directed the Secretary of Defense to detain Padilla. The government informed the court that the Department of Defense would take custody of Padilla and transfer him to a naval brig in South Carolina. On June 11, 2002, the day of the scheduled hearing, Ms. Newman appeared before the court without Padilla, and filed a writ of habeas corpus on his behalf. The government informed Ms. Newman that she would not be allowed access to Padilla, and that if she attempted to write to him, her correspondence might not reach him. n49 Since

June 2002, Padilla has been detained without access to his family or his attorney until March 2004. Military handlers monitored the meeting between Padilla and his attorney. Like Hamdi, Padilla has also not had the opportunity to [*157] defend or explain the underlying facts being used to justify his designation as an "enemy combatant."

Historically, citizens suspected of plotting against the government who were captured in the United States have been given the right to challenge their detention through a habeas petition, which was guaranteed by Article III of the United States Constitution and reaffirmed in *ex parte Milligan*.ⁿ⁵⁰ Furthermore, legal precedent allows citizens detained within the boundaries of the United States to be tried before a military tribunal, as seen in the *Quirin* case and in the criminal courts. Citizens and non-citizens captured outside the United States who were fighting for the enemy have traditionally been treated as POWs, or more recently, in the cases of John Walker Lindh and Zacarias Moussauoi, brought back to the United States and tried in the criminal justice system.

A. The Writ of Habeas is a Constitutionally Provided Right

Habeas corpus "remains the most basic protection against unbridled detention by the Executive."ⁿ⁵¹ Because of the danger posed by the government's power to detain citizens, the Suspension power was included in Article I of the Constitution and limited the instances in which the habeas power could be suspended to cases of "rebellion or invasion."ⁿ⁵² Pursuant to the congressional procedure for habeas relief, courts are required to "hear and determine the facts related to a petitioner's detention."ⁿ⁵³ Petitioners are allowed to deny "any of the facts set forth and to allege any other material facts before the court."ⁿ⁵⁴ Neither Hamdi nor Padilla have been allowed to challenge the underlying facts of the Micheal Mobbs declaration, even though it was used as the basis to determine their "enemy combatants" status.ⁿ⁵⁵

The Supreme Court has addressed the fundamental right to habeas petition in several cases, perhaps most famously in *ex parte Milligan*.ⁿ⁵⁶ In [*158] *Milligan*, a citizen living in Indiana was arrested by the Union Army during the Civil War.ⁿ⁵⁷ *Milligan* was charged with aiding the Confederacy by conspiring to seize munitions and to liberate POWs.ⁿ⁵⁸ He was tried, convicted, and sentenced to death by a military tribunal.ⁿ⁵⁹ The Supreme Court reversed the decision of the military tribunal and held that if the civilian courts were open and their processes were unobstructed, *Milligan* must be allowed to challenge the lawfulness of his imprisonment in a civilian court with a habeas petition.ⁿ⁶⁰ The Court also found that only Congress - and not the President - could suspend the writ of habeas corpus.ⁿ⁶¹

If the government had followed the requirements set forth in *Milligan*, which stem from Article III of the Constitution, both Hamdi and Padilla should have been allowed to offer their own evidence to challenge the underlying factual basis for their detentions. Further, both Hamdi and Padilla would have been allowed to meet with attorneys to discuss the factual challenges. However, neither Hamdi nor Padilla were allowed to meet with counsel regarding their habeas petition, nor were they allowed to challenge the underlying facts of their detentions in a formal hearing. In both cases the government relied on the declaration of Micheal Mobbs, a special advisor to the Department of Defense who has never appeared at a formal hearing in either case. Much of Mr. Mobbs' declarations have been kept sealed from the defense attorneys and the courts at the request of the government due to national security concerns. What remains of these declarations are sparse details about Hamdi's and Padilla's background and the details of their captures.

B. Historically Citizen Detainees Were Permitted to Challenge Their Detention before Military Tribunals or Were Tried in Civilian Courts

In *Quirin*,ⁿ⁶² the Supreme Court addressed the procedures involving the detention of United States citizens captured and detained during times of war. In *Quirin*, the Court found that citizens and non-citizens captured while attempting to enter the United States with the intent to do harm were to be tried in front of a military tribunal. President Roosevelt appointed a military commission and directed it to try prisoners for offenses against the [*159] laws of war. The President prescribed regulations for their trial and review before the commission. All the men had access to counsel appointed to represent them in front of the military commission. that ultimately ordered all the men to be executed. The captured men appealed the military commission's decision to the Supreme Court, which heard the appeal almost immediately and upheld the decision to execute the men.ⁿ⁶³ The *Quirin* decision effectively authorizes the use of

military tribunals to try those "unlawful combatants" accused of violating the laws of war. Because President Bush declared by Proclamation on November 13, 2001, that only non-citizens could be tried in front of Military Tribunals; as citizens, Hamdi's and Padilla's right to a tribunal hearing was eliminated.

C. The Government Could Have Charged Hamdi and Padilla with Crimes in the Civilian Courts

The cases of John Walker Lindh n64 and Zacarias Moussaoui n65 represent similar factual situations to that of Hamdi and Padilla. However, Lindh, a United States citizen, and Moussaoui, a French national, were charged with crimes after being captured at the same time in Afghanistan, allegedly fighting for the Taliban. The similarity between how the two cases were handled ends there.

Unlike Hamdi, Lindh was clearly an "American;" he spoke English, and stood out from the rest of those captured in the government's ongoing sweeps in Afghanistan after September 11, 2001. Hamdi was sent to Guantanamo with most of the rest of those captured in Afghanistan, while Lindh was taken into custody by the U.S. government in Afghanistan. After growing media pressure, and the fact that Lindh's father hired a renowned attorney to represent his son, the U.S. government transported Lindh back to the United States and charged him in a ten-count complaint, including such charges of conspiracy to murder nationals of the United States and providing material support to a foreign terrorist organization. Lindh pled guilty to supplying services to the Taliban and was sentenced to twenty years in federal prison. n66 Lindh is a unique example of someone who was initially declared to be an "enemy combatant" and whose designation changed to that of a criminal defendant when he was officially charged.

[*160] The circumstances surrounding Padilla and Moussaoui are significantly similar in that both were initially taken into custody in the United States and brought into the criminal justice system as material witnesses. Moussaoui, like Padilla, was detained by the government as a material witness shortly after the September 11, 2001 attacks and later charged with conspiracy to commit murder and several other terrorist related offenses. n67 However, the similarities ended when Padilla was removed from the civilian court system and declared an "enemy combatant;" subsequently, he was swiftly denied the fundamental rights accorded to him as a citizen.

At the same time, Moussaoui, a non-citizen, has been allowed to remain in the criminal courts, and was provided many of the fundamental rights that the same courts continue to deny Padilla. It seems logical that because the government charged Moussaoui, they could sensibly have chosen to try Padilla in the civilian courts as well. This would have guaranteed Padilla's rights to meet with counsel, his ability to access court documents and witnesses to challenge his detention, and also allowed him his Sixth Amendment right to a fair trial.

V. The Term Enemy Combatant is Not Recognized in International Law

The term "enemy combatant" is not officially recognized in any domestic or international law. It is not defined in the Uniform Code of Military Justice, n68 nor the Department of Defense Dictionary on Military Terms. n69 The term was not included in Convention III, Treatment of POWs, or Convention IV, Protection of Civilian Persons in Time of War, of the 1949 Geneva Accord. n70

On the contrary, the term "unlawful combatant" is a term associated with the 1949 Geneva Convention and carries well-established international meaning. Convention III, relating to the Treatment of POWs, contains criteria that separate civilians from lawful combatants and defines who should and should not be treated as a POW in Article 4(A)1, including: a person must (1) be commanded by a person responsible for his subordinates; (2) have a fixed distinctive sign that is recognizable from a [*161] distance (be wearing a uniform); (3) be carrying arms openly; and (4) be conducting their operation in accordance with the laws and customs of war. The term "unlawful combatant" as applied in international law has been inferred from the definition of a lawful combatant. "Unlawful combatants" are either members of the regular forces or members of resistance guerilla movements that do not fulfill the conditions of lawful combatants. n71 The main legal impact of being a lawful combatant under the Geneva standards is the right to POW status. n72 Unlawful combatants, although still targets of capture, are presumably not entitled to POW status. As

a POW, a detained enemy fighter has more rights, which were codified in the 1949 Geneva Convention. These rights include the right to communicate with family on a regular basis, to live in comfortable quarters, freedom from interrogation, and most importantly, the promise of release at the conclusion of combat. n73

The government could have chosen to designate Hamdi and Padilla as "unlawful combatants" instead of "enemy combatants." As "unlawful combatants" they would have been denied the rights designated in the 1949 Geneva Convention to lawful combatants or POWs. "Unlawful combatants" are traditionally foreign captured soldiers and not citizens of the detaining power. One of the reasons the government may not have chosen to designate Hamdi and Padilla as "unlawful combatants" is because the application of the term to a citizens would be misunderstood and challenged in the international community. However, several international law experts contend that if the government had instead decided to declare these men "unlawful combatants," it would still be required to provide the chance for a hearing to challenge their designation as an "unlawful combatant" or a trial in front of a military tribunal. "Unlawful combatants," because of their violation of the laws of war, are personally responsible for their actions and may be prosecuted and convicted of murder if they have killed an enemy. n74

"Unlawful combatants," unlike lawful combatants, have traditionally been tried in front of military tribunals, but there is no requirement that they be punished. n75 It is not clear how long "unlawful combatants" may be detained. Commentators on the 1949 Geneva Convention suggest that they [*162] can be detained even after the end of hostilities. n76 However, one international expert suggests that they are typically tried and punished in front of military tribunals. n77 Fortunately, the government could not deny the men a hearing to challenge the basis of their detention. Nevertheless, the existing standard still suggests that a decision to label Hamdi and Padilla "unlawful combatants" might enable the government to detain the men indefinitely. After all, there is no foreseeable end to the "War on Terror."

VI. The Term Enemy Combatant Has Taken on a Meaning Not Previously Used in the Context of Detaining United States Citizens

The government asserts that Hamdi's and Padilla's status as "enemy combatants" justifies their detention without charges, meaningful judicial review nor access to an attorney. The government relies on the language of Quirin and the authority given to the President in Article I of the Constitution to justify their ability to designate "enemy combatants." In their brief to the Supreme Court in Padilla's case, the government states that the "United States-consistent with its settled historical practice in times of war-has captured and detained numerous individuals fighting for and associated with the enemy. The detention of enemy combatants serves the vital wartime objectives of preventing captured combatants from continuing to aid the enemy... ." n78 However, there is no known "historical tradition" or "established practice" that gives relevance to the claim that Padilla's or Hamdi's status as "enemy combatants" warrants their illegal detention without charges or access to counsel. Padilla and Hamdi are the first United States citizens n79 to be officially declared "enemy combatants" and held without charges or access to counsel.

In addition to relying on Quirin for the actual term "enemy combatant," the government also cites to Quirin in an attempt to show historical precedent of the detention of such citizens. In particular, in Padilla's case, the government asserts that the factual similarities between Padilla and Quirin, who were both citizens captured on United States soil, are enough to justify Padilla's incommunicado detention. In making this leap, the government states:

[*163]

Although Quirin addressed the pre-trial detention and trial of the saboteurs by military commission ... whereas no such charges have been brought against Padilla, the Court's opinion [in Quirin] makes clear that the President's authority over enemy combatants encompasses not just the authority to prosecute them through military commissions, but also the more commonly practiced authority to detain enemy combatants in the course of armed conflict without charging them with specific crimes. n80

However, many critics of the government have pointed out that *Quirin* does not stand for the general detention of citizens without charges or the chance to challenge their detention. The American Bar Association Task Force on the Treatment of Enemy Combatants points out that *Quirin* may not provide the clear precedential value claimed by the government because it occurred pursuant to a formal Congressional Declaration of War against Germany and not by Executive Act. More importantly, the Task Force argues that *Quirin* did not stand for the proposition that detainees may be held incommunicado and denied access to counsel. n81 In fact, "the defendants in *Quirin* were able to seek review and they were represented by counsel." n82 The Task Force further states that because the *Quirin* Court decided that since even enemy aliens n83 within the United States are entitled to review with counsel, that the right could "hardly be denied to United States citizens." n84

The ABA articulated why *Quirin* does not allow the government to deny Hamdi and Padilla the right to meet with an attorney simply because they have been declared "enemy combatants." More troubling than the government's misstatement of and unjustified reliance on the *Quirin* holding is the Court's willingness to accept the term "enemy combatant" as existing legal authority to deprive Hamdi and Padilla of their rights. The Fourth Circuit's decision in Hamdi and the Second Circuit's decision in Padilla provide excellent examples of the judiciary's willingness to accept the government's designation of United States citizens as "enemy combatants," and, in effect, to deny these citizens their fundamental rights.

[*164]

A. Appellate Courts Have Accepted the Legal Significance of the Term Enemy Combatant

The Fourth Circuit, in their denial of rehearing en banc in Hamdi, defers completely to the President's ability to detain Hamdi as an "enemy combatant." The term itself appears eighty-nine times in the 4th Circuit's opinion, which implies that Hamdi's designation as an "enemy combatant" is a legitimate legal category. While the legal authority of the term itself is never fully analyzed by the court, the majority acknowledges that, "Hamdi is being held according to the time-honored laws and customs of war. There is nothing illegal about his initial detainment. The option to detain those captured in the zone of active combat for the duration of hostilities belongs indisputably to the Commander in Chief" pursuant to Article II, Section II of the Constitution. n85 The majority opinion further states that the prior decision by a panel of the 4th Circuit "has upheld the President's Article II power as Commander in Chief of the armed forces to defend this country from its enemies and to determine who are and who are not enemies of the United States." n86

In his dissent, Judge Luttig points out the dangers of allowing the President the power to designate and detain people he deems to be enemy combatants. He states that courts promise citizens seized by the government judicial review of the reasons for their detention, which, in this case, would guarantee Hamdi a forum in which to prove he is "not an enemy combatant." n87 Luttig states he agrees with Hamdi's position of pointedly, "refusing to embrace a sweeping proposition—namely that, with no meaningful judicial review any American citizen could be alleged to be an enemy combatant and could be detained indefinitely, without charges on the government's so-say." n88 However, the majority is not persuaded by Luttig's concerns, and accepts the government's use of the term "enemy combatant" as a legitimate basis for denying Hamdi his right to meaningful review of his detention with the help of an attorney. Dissenting Judge Motz summarizes the elusive nature of the term "enemy combatant" when she states this "decision marks the first time in our history that a federal court has approved the elimination of protections afforded a citizen by the Constitution solely on the basis of the Executive's designation of that citizen as an enemy combatant." n89

[*165] The 2nd Circuit Court of Appeals, which heard the government's and Padilla's cross-appeals from Judge Mukasey's District Court opinion, is less deferential toward the government than the 4th Circuit. n90 The term "enemy combatant" appears 45 times in the opinion. Unlike the 4th Circuit, the 2nd Circuit addresses the President's specific authority to detain "enemy combatants." The court considers both sides' arguments regarding the President's authority to designate "enemy combatants" below:

The government contends that the Constitution authorizes the President to detain Padilla as an enemy combatant as

an exercise of inherent executive authority. Padilla contends that, in the absence of express congressional authorization, the President, by his June 9 Order denominating Padilla an enemy combatant, has engaged in the "lawmaking" function entrusted by the Constitution to Congress in violation of the separation of powers. In response, no argument was (or "has been") made that the Constitution expressly grants the President the power to name United States citizens as enemy combatants and order their detention. Rather, the government contends that the Commander-in-Chief Clause implicitly grants the President the power to detain enemy combatants domestically during times of national security crises such as the current conflict with al Qaeda. n91

The court ultimately found that in the domestic context, the President's inherent constitutional powers do not extend to the detention of an American citizen as an "enemy combatant" who is seized within the country when combat is not on United States soil. The government has appealed this decision.

B. The U.S. Supreme Court's Interpretation of the Term "enemy combatant"

In the June 28, 2004, ruling in Hamdi's case, the Supreme Court defined the term "enemy combatant." Justice O'Connor, although admitting debate over the actual meaning and scope of the term, adopts the government's definition of the term for Hamdi's circumstances. The majority opinion states:

There is some debate as to the proper scope of this term, and the government has never provided any court with the full criteria that it uses classifying individuals as such. It has made clear, however, that for purposes of this case, the enemy combatant that it is seeking to [*166] detain is an individual who, it alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in armed conflict against the United States." n92

Whether or not this definition will apply in Padilla's case has yet to be determined. n93 Because of the Court's language in Hamdi, "for purposes of this case the "enemy combatant" that it is seeking to detain..." n94, in light of its specific mention of Afghanistan, it appears that this definition may not apply to Padilla. The differences in where Hamdi and Padilla were captured, Hamdi was taken on foreign soil while Padilla was within the United States, may lead the court to apply a different definition to Padilla's status as an "enemy combatant." Unless Padilla's case returns to the Supreme Court, or until another citizen is declared an "enemy combatant," there will be no further word from the Court on whether the definition provided in Hamdi's case will be the formal and accepted definition of this term.

Since the June 28, 2004, decision, nine lower court decisions have cited the Supreme Court's decision. However, none of these nine cases includes the specific language defining an "enemy combatant."

VII. Conclusion

The historic use of the term "enemy combatant" in Quirin and other subsequent case law does not support its present use by the government in the cases of Hamdi and Padilla. Historically, the term "enemy combatant" was used as a descriptive term by courts to refer to enemy soldiers and was generally used interchangeably with other terms like "unlawful combatant." The term was not given independent legal or international meaning prior to the government's declaration of United States citizens as "enemy combatants" in the fall of 2001. Following the genesis of this designation, the government has been able to redefine the rules of detentions governing these situations. Hamdi and Padilla have not been allowed the constitutional right to challenge the underlying facts of their detention via a habeas corpus petition. Additionally, the government has ignored standard detention procedures, such as the right to meet with an attorney, to be tried in front of a military tribunal, or to be tried in the civilian courts. [*167] Classifying Hamdi and Padilla as "enemy combatants" is legally unprecedented and potentially unconstitutional.

Legal Topics:

For related research and practice materials, see the following legal topics:

Governments Federal Government International Detainees International Law Dispute Resolution Laws of War Military & Veterans Law Warfare

FOOTNOTES:

n1. Jose Padilla officially changed his name to Abdullah Al Muhajir in 1998, however, in this paper I will refer to him as Padilla, as his name appears in all court documents.

n2. *71 U.S. 1 (1866)*.

n3. *Ex parte Quirin, 317 U.S. 1, 31 (1942)*.

n4. In addition to the two United States citizens, one legal resident has been detained as an "enemy combatant," Ali Saleh Kahlah Al-Marri. However, because Al-Marri is a legal resident and not a citizen, and his case is more recent than both Padilla's and Hamdi's, his case is beyond the purview of this article. It is important to note, however, the similarities between Al-Marri's case and the circumstances of his capture to those of Padilla. Al-Marri is a Qatari citizen who was studying at Bradley University, on a lawful student visa. He lived in Illinois with his wife and five children; he was arrested on December 12, 2002 by the FBI and held as a material witness in the government's investigation of the attacks of September 11, 2001. On January 28, 2002, the government formally arrested and charged him with several non-terrorist offenses including credit card fraud. Al-Marri was held initially in Peoria, Illinois, and then moved to a larger prison facility in New York. On February 6, 2002, Al-Marri was charged with possessing 15 or more unauthorized or counterfeit access devices, with intent to defraud, in violation of *18 U.S.C. 1029(a)(3)* in the U.S. District Court in New York. In April, all of Al-Marri's cases were consolidated in Illinois, where the original charges were filed. On June 23, 2003, President Bush ordered Donald Rumsfeld to designate and detain Al-Marri as an "enemy combatant." At this time the Attorney General ordered the United States District Court in the Central District of Illinois to surrender Al-Marri to the Justice Department. The court did so, and dismissed all criminal charges against Al-Marri. He was then moved to the same naval brig as Hamdi and Padilla, where he remains today. Al-Marri has not been allowed to meet with his attorneys, nor have criminal charges been re-filed against him. Al-Marri has filed a habeas petition in District Court in the Central District of Illinois.

n5. In March, 2004, for the first time, Padilla was allowed to meet with his attorneys. This meeting was monitored by the government. Hamdi has not yet been able to meet with his attorneys.

n6. *317 U.S. 1, 31 (1942)*.

n7. *Id. at 21*

n8. *Id.*

n9. *Id.*

n10. *Id.*

n11. *Id.*

n12. There are drastically different interpretations as to the uniform holding of *ex parte Quirin* in both caselaw and published law review & journal articles.

n13. *Id.*

n14. *Id.*

n15. *Id. at 31.*

n16. *Id.*

n17. *Id. at 30-31.*

n18. According to the American Bar Association Task Force on the Treatment of Enemy Combatants, "the term 'enemy combatant' is not a term of art which has a long established meaning." American Bar Association Task Force on the Treatment of Enemy Combatants, Preliminary Report, August 8, 2002, at 7. The Task Force goes on to cite a legal commentator who says the following: "until now, as used by the attorney general, the term 'enemy combatant' appeared nowhere in U.S. criminal law, international law, or in the law of war. The term appears to have been appropriated from *ex parte Quirin*." *Id.* 7 (citing Gary Solis, Even a "Bad Man" Has Rights, Wash. Post, June 25, 2002, at A19.)

n19. The fact that the term appeared during the 1940s and early 1950s in the context of WWII, and then not again until the 1990s, in some contexts related to the Gulf War, does not necessarily mean that the term appears only in relation to times of war. This is evidenced by the fact that the term does not appear during the time frame of either the Korean War or Vietnam War, during the late 1950s through the 1970s.

n20. I used Westlaw and Lexis to search for published cases with the term "enemy combatant" to determine the number of cases the term appeared prior to 2001.

n21. *66 U.S. 340 (1946).*

n22. The term "enemy combatant" appears in *Yamashita* at: 343, 344 (two times), 346 (two times), 347, 349 (two times), 350 (two times) and at 351.

n23. *Id. at 341* (emphasis added).

n24. *Id. at 344* (emphasis added).

n25. *Id. at 344* (emphasis added).

n26. In addition to relying on Quirin, the government also relies on another WWII case, *In re Territo*, 156 F. 2d 142 (9th Cir. 1946). In Territo, the American army captured a United States citizen who was fighting, in uniform, for the enemy Italian army. Territo, the captured enemy soldier, was brought back to the United States and held as a POW. The court denied his petition for writ and held that as a captured enemy soldier he would be considered a POW. While the Territo case is factually similar to both Hamdi's and John Walker Lindh's situations, it remains outside the purview of this Article because the term enemy combatant does not appear in it.

n27. 343 U.S. 341 (1952).

n28. *Id.* at 355 (emphasis added).

n29. 4 C.M.R. 104 (1952).

n30. Shultz was charged with involuntary manslaughter in violation of Article of War 98, 10 U.S.C. 1565 and drunken driving and speeding in violation of Article of War 96, 10 U.S.C. 1598.

n31. The law of war refers to the internationally accepted rules of war, codified in the Geneva Conventions whereas military law refers to United States military regulations.

n32. 66 U.S. at 355.

n33. 33 M.J. 927 (A.C.M.R. 1991).

n34. *Id.* at 928.

n35. 34 M.J. 326 (A.C.M.R. 1992).

n36. *Id. at 328.*

n37. *38 M.J. 53 (A.C.M.R. 1993).*

n38. *Id.*

n39. *616 N.E.2d 111 (Mass. App. Ct. 1993).*

n40. *Id. at 116.*

n41. E-mail from David Cole, Professor of Law, Georgetown University, to Joanna Woolman (May 19, 2003, 20:31:01 PST) (on file with author).

n42. E-mail from Jeremy Kamens, Assistant Federal Public Defender, Eastern District of Virginia, to Joanna Woolman (February 23, 2003, 12:28:00 PST) (on file with author).

n43. E-mail from Viet Dinh, Professor of Law, Georgetown University, to Joanna Woolman (December 8, 2003, 13:00:36 PST) (on file with author).

n44. The identity of the individual who initially declared the large group of captured Taliban men to be "enemy combatants" is not known according to one of the federal public defenders working on Hamdi's case, Jeremy Kamens. E-mail from Jeremy Kamens, Assistant Federal Public Defender, Eastern District of Virginia, (February 25, 2003, 16:53:44 PST) (on file with author).

n45. The factual information regarding Hamdi's capture and detention was summarized in *Hamdi v. Rumsfeld*, 294 F.3d 598, 601 (4th Cir. 2002).

n46. On November 13, 2001, President Bush issued a Military Order, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 *F.R.* 57833, 57834.

n47. Judge Mukasey of the Southern District of New York signed the warrant authorizing Padilla's arrest to ensure his testimony in front of a grand jury convened in the Southern District of New York to investigate terrorist activity.

n48. The factual information regarding Padilla's capture and detention was summarized in *Brief for Petitioners at 4-7, Hamdi v. Rumsfeld*, 2004 WL 378715, (S.D.N.Y. 2004) (no. 03-6696).

n49. *Padilla v. Bush*, WL 31718308, 2 (S.D.N.Y. 2002).

n50. 71 *U.S.* 2 (1866). See discussion in section IV., A.

n51. *Brief for Petitioners at 14-15, Hamdi v. Rumsfeld*, 2004 WL 378715, (S.D.N.Y. 2004) (no. 03-6696).

n52. U.S. Const. Art. I, 9.

n53. 28 *U.S.C.* 2243 (2000).

n54. 28 *U.S.C.* 2246 (2000).

n55. Mr. Mobbs, federal employee working in the Pentagon on anti-terrorism activities during 2001, wrote a brief two page document setting forth the evidence against Mr. Padilla, and an even shorter document setting forth the evidence against Mr. Hamdi. In the case of Mr. Hamdi, the only evidence cited in the Mobbs' declaration were quotes of testimony given by Mr. Hamdi while he was in captivity after his capture. Interview with Frank Dunham, University of Chicago Law School (October 22, 2004).

n56. *71 U.S. 2 (1866)*.

n57. *Id. at 6-7*.

n58. *Id.*

n59. *Id. at 6*.

n60. *Id. at 122*.

n61. *Id.*

n62. *Ex parte Quirin, 317 U.S. 1 at 31*.

n63. *Id. at 48*.

n64. *U.S. v. Lindh, 227 F.Supp.2d 565 (E.D. Va. 2002)*.

n65. *U.S. v. Moussaoui, 365 F.3d 292 (4th Cir. 2004)*.

n66. *Lindh, 227 F. Supp. 2d at 566*.

n67. *Moussaui*, 365 F.3d. at 392.

n68. 10 U.S.C. 801 et seq.

n69. Department of Defense Dictionary on Military and Associated Terms, available at: <http://www.dtic.mil/doctrine/jel/doddict> (last visited on May 24, 2005).

n70. Supplemental Brief of Amici Curiae, *Padilla v. Bush* (2002) [02-Civ-4445 (MBM)], at 13.

n71. Ingrid Detter, *The Law of War* 137 (Cambridge Univ. Press 2001) (citing R.R. Baxter, *So-called Unprivileged Belligerency: Spies, Guerilla, and Saboteurs*, 28 *British Yearbook of Int'l L.* 323, (1951)).

n72. Detter, *supra* note 67.

n73. *Id.* at 394.

n74. *Id.* at 148.

n75. Jean de Preux, *Commentary on the Geneva Conventions of 12 August* (International Committee of the Red Cross) (1949).

n76. *Id.*

n77. *Id.*

n78. Petition for a Writ of Certiorari at 11, *Rumsfeld v. Padilla*, WL 113598 (2004).

n79. Hamdi and Padilla are the only United States citizens to be held incommunicado without charges. However, aliens and members of foreign armies have been held without charges, or as POWs. See, *In Re Yamashita*, 327 U.S. 1 (1946).

n80. *Id.* at 7.

n81. The American Bar Association Task Force on Treatment of Enemy Combatants, *supra* note 18.

n82. *Id.*

n83. The American Bar Association Task Force refers to enemy aliens, in reference to the fact that seven of the eight spies captured in *Quirin* were German nationals who still received legal representation and the chance to challenge their detention through habeas petition.

n84. Inherent in the debate surrounding the extent of the *Quirin* holding to justify the detentions of Hamdi, Padilla and Al-Marri is the fact that the *Quirin* court limited their holding to the very narrow facts of the case, which suggests that the Court did not intend for it be used in the type of broad-sweeping manner that the government attempts to use it now.

n85. *Hamdi*, 337 F.3d at 341.

n86. *Id.* at 357.

n87. *Id.* at 358 (Luttig, J., dissenting).

n88. *Id.*

n89. *Id. at 368* (Luttig, J., dissenting). (emphasis added)

n90. *Padilla v. Rumsfeld*, 352 F.3d 695 C.A.2 N.Y. (Dec. 2003) (This is in part because of the fatal differences in the case. Padilla was captured in Chicago, and Hamdi was in the "zone of active combat" in Afghanistan.)

n91. *Id. at 713* (emphasis added).

n92. *Brief for Respondents 3*, 542 U.S. 2004, at 9. (pre-publication).

n93. Although the Supreme Court heard both Hamdi's and Padilla's cases at the same time, they did not rule on the substantive aspects of Padilla's case and instead ruled that it had been filed in the wrong venue and required Padilla's attorney to refile the case in federal court in South Carolina, where Padilla is presently being detained.

n94. *Brief for Respondents 3*, 542 U.S. 2004, at 9.

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