

The Detention Power

Stephen I. Vladeck†

It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.¹

INTRODUCTION

Concerns over the proper separation of powers—the delicate interplay between the roles and responsibilities of the three branches of government—have inundated the legal landscape in the aftermath of the terrorist attacks of September 11, 2001,² and rightly so. Never is the correct balance of competing governmental interests more imperiled than during times of trouble,³ and there is little doubt that, more formal legal terminology aside, the past couple of years have been just that.⁴

That the Constitution confers considerable power upon the government to take decisive action during such troubled times is, by now, a foregone

† Yale Law School, J.D. expected 2004. My grateful thanks to Bill Banks, Harold Koh, and Ingrid Wuertch for their helpful comments, to Jonathan Freiman for illuminating conversations, to Peter Beardsley, Andrea Courtois, and Jenn Peresie, just because, and to Fiona Doherty, Mary Hahn, Ken Hurwitz, Jenny Martinez, Elisa Massimino, and the entire student cast of the Balancing Civil Liberties & National Security Post-9/11 Project at Yale, especially Chad Golder, Emma Quinn-Judge, Heidee Stoller, and Tahlia Townsend, without whose insights this Note would not be possible.

1. *United States v. Robel*, 389 U.S. 258, 264 (1967).

2. *See, e.g., Hamdi v. Rumsfeld*, 337 F.3d 335, 351, 356 (4th Cir. 2003) (Traxler, J., concurring with denial of rehearing en banc), *petition for cert. filed*, No. 03-6696 (U.S. Oct. 1, 2003); *United States v. Moussaoui*, 336 F.3d 279, 284-86 (4th Cir. 2003) (Wilkinson, J., dissenting from denial of rehearing en banc); *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 951-52 (D.C. Cir. 2003) (Tatel, J., dissenting), *petition for cert. filed*, 72 U.S.L.W. 3248 (U.S. Sept. 29, 2003) (No. 03-472).

3. *See generally* EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 35-77 (1947) (describing the effects of total wars on domestic governments); CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES* 209-87 (Transaction Publishers 2002) (1948) (surveying how separation of powers concerns are at their most poignant during times of crisis); Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* (forthcoming Mar. 2004) (surveying the competing interests and proposing a legislative solution); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1134 (2003) ("Acute national emergencies are a test of faith—faith in ourselves, in our ability to cope and emerge victorious in the face of adversity, and in principles that we hold to be 'fundamental.'").

4. *See* Diane P. Wood, *The Rule of Law in Times of Stress*, 70 *U. CHI. L. REV.* 455 (2003). Much has been made of the question of whether the "war on terror" constitutes a "war," "emergency," or other "crisis" for constitutional purposes. *See, e.g.,* Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 *AM. J. INT'L L.* 345, 346-50 (2002); Derek Jinks, *September 11 and the Laws of War*, 28 *YALE J. INT'L L.* 1 (2003); David Meltzer, *Al Qa'ida: Terrorists or Irregulars?*, in *LAW AFTER GROUND ZERO* 71 (John Strawson ed., 2002). The answer, however, is mostly immaterial to the analysis herein, thus this Note largely neglects this immensely important question.

conclusion and an unquestionable fact.⁵ One of these powers is what might be called the “detention” power—the authority to incarcerate or otherwise restrain individuals without a preexisting statutory basis—e.g., criminal laws or civil commitment statutes.⁶ This detention power is of enormous significance, for it allows the government to deprive individuals of their most sacred liberty—their freedom—without affording what we have come to think of as “normal” procedural protections or judicial review. On its face, invocation of the detention power is tantamount to an assertion that the exigency of the situation justifies the abrogation of due process.

In the aftermath of September 11, the Bush Administration has advanced just such a claim—that the exigency justifies the detention⁷—in its military confinement of hundreds of “enemy combatants,”⁸ including, as of fall 2003, two U.S. citizens held at Navy brig within the United States, one non-citizen also detained at a South Carolina Navy Brig, and hundreds of non-citizens detained at the U.S. Naval Station at Guantánamo Bay, Cuba. Invoking “the president’s . . . commander-in-chief responsibilities under the Constitution” as “[t]he president’s authority to detain enemy combatants, including U.S. citizens,”⁹ the Administration has held these “enemy combatants” incommunicado, without charges, without counsel, and without due process, for, in most cases, well over two years.¹⁰

5. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-60 (1963). See generally DANIEL FARBER, *LINCOLN’S CONSTITUTION* 176-200 (2002) (making this point in the context of the Civil War).

6. I should be clear, from the outset, that by the “detention” power, I do not mean the actual authority to detain individuals *initially*, be they combatants on the battlefield or suspected terrorists within the United States. The detention power that this Note is concerned with is the power to detain *beyond* those periods normally allowed by the Constitution, other statutes, or international law. See, e.g., 18 U.S.C. §§ 3161, 3164 (2000) (mandating, as part of the Speedy Trial Act, time limits on detention without charges in the federal criminal system). For lawful combatants whose belligerency is not in doubt, international law generally allows their detention as prisoners of war until the end of hostilities. See *infra* Section II.B (discussing the authority to detain enemy citizen prisoners of war).

7. The exigency of the “war on terror” has been invoked as the grounds for a whole host of policy changes. For detailed accountings of these, see FIONA DOHERTY ET AL., *LAWYERS COMM. FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES* (2003), <http://www.lchr.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf>.

8. A separate issue in these cases, as we will see, is the extent to which “enemy combatant” is a term with its own dubious meaning. See *infra* note 92; see also *infra* text accompanying note 190.

9. *Oversight of the Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong., 2002 WL 1722725 (2002) (testimony of Att’y Gen. John Ashcroft).

10. Whereas the detentions received little initial attention from the academy, many recent works, mostly student-written, have focused on specific aspects of the two cases. See, e.g., Jordan Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503 (2003); Irma Alicia Cabrera Ramirez, Comment, *Unequal Treatment of United States Citizens: Eroding the Constitutional Safeguards*, 33 GOLDEN GATE U. L. REV. 207 (2003); Nickolas A. Kacprowski, Note, *Stacking the Deck Against Suspected Terrorists: The Dwindling Procedural Limits on the Government’s Power To Indefinitely Detain United States Citizens as Enemy Combatants*, 26 SEATTLE U. L. REV. 651 (2003); Thomas J. Lepri, Note, *Safeguarding the Enemy Within: The Need for Procedural Protections for U.S. Citizens Detained as Enemy Combatants Under Ex parte Quirin*, 71 FORDHAM L. REV. 2565 (2003); Samantha A. Pitts-Kiefer, Note, *Jose Padilla: Enemy Combatant or Common Criminal?*, 48 VILL. L. REV. 875 (2003); Alejandra Rodriguez, Comment, *Is the War on Terrorism Compromising Civil Liberties? A Discussion of Hamdi and Padilla*, 39 CAL. W. L. REV. 379

The Detention Power

This Note argues that such an inherent, constitutional executive detention power, particularly as invoked against U.S. citizens,¹¹ simply does not exist. Rather, even in emergencies, the various forms of the detention power—irrespective of the detaining authority—have always belonged to Congress, to delegate or to restrain as it sees fit. To support this claim, this Note constructs a historical narrative of the detention power in the United States, beginning with the Founding, and the various forms the detention power takes, or may be argued to take, in the Constitution. As the narrative demonstrates, from the earliest moments of the Republic, it was understood that the power to authorize detentions, even during wartime, was a power emphatically vested in Congress, not the President. The actual act of detention was the responsibility of the executive branch, but only when Congress had, in some form, previously authorized the detention itself. Up until the Civil War, the debate centered on the Suspension Clause of the Constitution, which precludes suspension of the writ of habeas corpus “unless when in cases of rebellion or invasion the public safety may require it,”¹² whereas, during World War II, the power took several different forms. Most notorious was the internment of tens of thousands of Americans of Japanese descent, but equally important were the detention and trial of Nazi saboteurs (including two U.S. citizens), the imposition of martial law in Hawaii, and the confinement of U.S. citizen enemy prisoners of war.

As I argue, one of the heretofore overlooked common threads underlying

(2003); Amanda Schaffer, Comment, *Life, Liberty, and the Pursuit of Terrorists: An In-Depth Analysis of the Government's Right To Classify United States Citizens Suspected of Terrorism as Enemy Combatants and Try Those Enemy Combatants by Military Commission*, 30 FORDHAM URB. L.J. 1465 (2003); Stephen I. Vladeck, Policy Comment, *A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen "Enemy Combatants,"* 112 YALE L.J. 961 (2003). For an early summary of some of the post-September 11 detention issues, see Whitney D. Frazier, Note, *The Constitutionality of Detainment in the Wake of September 11th*, 90 KY. L.J. 1089 (2001-2002).

11. Though there is certainly no moral imperative that requires such a distinction based on citizenship, there are significant statutory and constitutional differences between the government's power as to the detention of its own citizens and its power to detain non-citizens, especially those outside the territorial United States. Even within the United States, the Alien Enemy Act of 1798, 50 U.S.C. §§ 21-24, allows the President to deport alien enemies during wartime without due process or judicial review. See *infra* note 40 (discussing the Alien Enemy Act). Further, non-citizens identified as terrorists may be detained for a short period—no more than seven days—without charges under certain, statutorily-prescribed conditions. See Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350-52 (codified at 8 U.S.C.A. § 1226a (West 2003)); see also Shirin Samar, Note, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN L. REV. 1419 (2003) (providing an overview and an assessment of the mandatory detention provisions). See generally DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003) (surveying the non-citizen issues).

Because of these fundamental differences, this Note focuses on the detention power as it applies to the detention of U.S. citizens *only*, though many of the conclusions can be juxtaposed onto the cases of the Guantánamo detainees. Thus far, however, each habeas petition filed on their behalf has been dismissed on jurisdictional grounds. See, e.g., *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003) (Nos. 03-334, 03-343). The case of Ali Saleh Kahliah Al-Marri, the non-citizen detained in South Carolina, raises many of the same policy issues, even if the legal issues are distinct. See *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003).

12. U.S. CONST. art. I, § 9, cl. 2.

all of these various categories of detention was the role, in each case, of Congress. Courts may have historically looked to the legislature as an afterthought, desperate to somehow justify their wartime deference to the executive, but it is immensely significant that they looked in that direction at all, rather than deferring, as they easily could have, to a broad conception of unilateral executive power. A proper understanding of this historical relationship further helps to understand the importance of the Emergency Detention Act of 1950, its repeal in 1971, and the contemporaneous codification of 18 U.S.C. § 4001(a), which mandates that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹³ As this Note argues, § 4001(a) marked a fundamental turning point in the history of the detention power, for, to whatever extent the constitutional role of Congress was implicitly mandated prior to 1971, § 4001(a) fundamentally and undeniably reaffirms the constitutional dynamic envisioned by the Framers.

With that in mind, in Part IV, the Note turns to the present U.S. citizen “enemy combatant” cases, *Hamdi* and *Padilla*. This Note is not primarily about these two cases, nor does it attempt to be.¹⁴ Even as it goes to press, further proceedings are pending in each before the Supreme Court and the Second Circuit, respectively. And yet, it would be impossible to understand the importance of the argument set forth in Parts I, II, and III without understanding the full scope of the claims advanced by the Bush Administration in these instant cases.

Thus far, the U.S. Court of Appeals for the Fourth Circuit (in *Hamdi*) and the U.S. District Court for the Southern District of New York (in *Padilla*) have upheld the facial legality of the detentions, and have focused much—if not most—of their attention on other issues. In *Hamdi*, questions about the so-called “battlefield” distinction dominate, along with concerns over the proper evidentiary standard, whether Hamdi has actually admitted that he was captured in a zone of active combat, who should have standing to press Hamdi’s claims in court, and so on.¹⁵ In *Padilla*, much of the legal wrangling thus far has focused on procedural issues, including proper venue, jurisdiction, and, most controversially, access to counsel.¹⁶

13. 18 U.S.C. § 4001(a).

14. My earlier piece on the subject focused more directly, albeit in a more limited fashion, on the specific arguments at issue in those two cases, as do many of the other pieces thus far discussing either case. See sources cited *supra* note 10.

15. See *Hamdi v. Rumsfeld* (*Hamdi IV*), 337 F.3d 335 (4th Cir. 2003), petition for cert. filed, No. 03-6696 (U.S. Oct. 1, 2003); *Hamdi v. Rumsfeld* (*Hamdi III*), 316 F.3d 450 (4th Cir. 2003), rev’g 243 F. Supp. 2d 527 (E.D. Va. 2002); *Hamdi v. Rumsfeld* (*Hamdi II*), 296 F.3d 278 (4th Cir. 2002); *Hamdi v. Rumsfeld* (*Hamdi I*), 294 F.3d 598 (4th Cir. 2002).

16. See *Padilla ex rel. Newman v. Rumsfeld* (*Padilla II*), 243 F. Supp. 2d 42 (S.D.N.Y. 2003); *Padilla ex rel. Newman v. Bush* (*Padilla I*), 233 F. Supp. 2d 564 (S.D.N.Y. 2002). After adhering to the original opinion and order on reconsideration, Judge Mukasey certified *Padilla* for appeal to the Second

The Detention Power

Yet, underlying everything in these cases are two fundamental questions that have been too quickly dismissed: Who has the power to authorize the detention of these two U.S. citizens, and has that power been properly exercised? Whether the detentions satisfy various constitutional requirements—such as due process—are, at their core, questions of application. Whether the detentions are constitutional on their face is a separate question altogether, one that deserves more attention, and, indeed, one that should be answered at the threshold. If there is no such thing as an executive constitutional detention power, then the existence of unambiguous congressional authorization is a manifest necessity. To satisfy this burden, the government has invoked two different statutes, neither of which, as I show, demonstrates congressional acquiescence in the detentions.

Instead, because of § 4001(a), Congress's failure to specifically invoke the detention power to authorize the extra-judicial confinement of U.S. citizen "enemy combatants" is tantamount to a rejection of the Bush Administration's independent authority thereto. To be clear, I do not mean to suggest that there is *no* constitutional detention power, and that § 4001(a) creates statutory authority out of thin air. Instead, this Note seeks to demonstrate that the Constitution clearly creates a detention power, but vests it in Congress, and that no subsequent statutory or jurisprudential development casts this allocation in any serious doubt. Indeed, what is at stake in these cases is not the interaction between § 4001(a) and the executive's constitutional authority, but rather the executive's usurpation of an authority that has always belonged to Congress. Though the executive is, and always has been, the detaining authority, the detention power itself belongs to Congress, and to Congress alone.

Finally, in the Conclusion, I consider the proper place of the judiciary in such troubled times. As Part IV demonstrates, the courts have thus far been loath to interfere with the actions of the executive branch in conducting the so-called "war on terror." Yet, is this the role that the courts are supposed to play? Is this a role that we want them to play?

It is hard to overstate the significance of the issues implicated here, even if some of the principals have urged the opposite.¹⁷ At stake are two of our most basic constitutional precepts: the proper separation of powers between the

Circuit, *Padilla ex rel. Newman v. Rumsfeld (Padilla III)*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003), where oral arguments took place on November 17, 2003.

17. See, e.g., *Padilla II*, 243 F. Supp. 2d at 57 (Mukasey, C.J.) ("Those to whom images of catastrophe come . . . easily might take comfort in recalling that it is a year and a half since September 11, 2001, and *Padilla*'s is not only the first, but also the only case of its kind. There is every reason not only to hope, but also to expect that this case will be just another of the isolated cases, like *Quirin*, that deal with isolated events and have limited application."). This statement is all the more ironic because it is an *expansive* reading of *Quirin* that is one of the major issues in these cases. See *infra* Section II.A; cf. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 28 (2003) ("Those who claim that the United States has avoided the mistakes of the past in its current war on terrorism have failed to look beneath the surface.").

executive and the legislature, and the individual right to not be deprived of personal liberty without due process of law. Though much of the history this Note traces tangentially implicates the latter, the underlying imperative is undoubtedly the former—the importance of the proper separation of powers after September 11. As James Madison warned,

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that . . . [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.¹⁸

Obviously, the extra-judicial detention of two U.S. citizens does not a tyrannical regime make, yet this does not mean that there is no cause for concern. Though “[t]he world has changed since Sept[ember] 11, . . . the values this country was founded on have not. Fear is no guide to the Constitution. We must fight the enemies of freedom abroad without yielding to those at home.”¹⁹

I. THE DETENTION POWER THROUGH THE CIVIL WAR

Without question, the Framers, in drafting the Constitution, clearly provided the federal government with the power to detain its own citizens without due process, without a right to counsel, and even without access to the courts, in certain, *limited* times of national emergency.²⁰ As the primary manifestation of this intent, the Suspension Clause of the Constitution, conceived of as a defense against a tyrannical government,²¹ explicitly precludes suspension of the writ of habeas corpus “unless when in Cases of Rebellion or Invasion the public Safety may require it.”²² When such conditions existed, the writ *could* be suspended, but only when the Union was in dire straits.²³ Thus, the question that dominated the first century of detention-

18. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961); *see also* Cable from Winston Churchill to British Home Secretary Herbert Morrison (Nov. 21, 1943), *quoted in* A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN 391 (1992) (“The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers, is in the highest degree odious and is the foundation of all totalitarian government . . . Nothing is more abhorrent than to imprison a person or keep him in prison because he is unpopular. This is really the test of civilization.”).

19. Editorial, *The War on Civil Liberties*, N.Y. TIMES, Sept. 10, 2002, at A24; *see also* Cole, *supra* note 17, at 30 (“Now more than ever it is critical that we remain true to our principles. . . . The success of the war on terrorism, and indeed of our democratic experiment, requires us to reconsider the shortcuts that we have all too swiftly and predictably adopted.”).

20. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 127-33 (1980); FARBER, *supra* note 5, at 160-61.

21. *See* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 12-19 (2001) (discussing the origins of the Suspension Clause).

22. U.S. CONST. art. I, § 9, cl. 2. I should be clear that I do not mean to ground the detention power solely in the Suspension Clause. If anything, the detention power is an amalgamation of various powers delegated to Congress, and most of its forms do *not* require the suspension of habeas to withstand constitutional scrutiny. My thanks to Professor Ingrid Wuerth for raising this important distinction.

23. *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J.,

The Detention Power

related jurisprudence was not *whether* such a power existed, but rather in *which branch* such power was properly vested, even though the Suspension Clause is part of Article I—those provisions pertaining to Congress.²⁴

A. The Suspension Clause and the Detention Power in the Early Republic

Neither Congress nor the courts had much of an opportunity, prior to the onset of the U.S. Civil War, to speak to the nature of the detention power. Two early cases, however, *Ex parte Bollman*²⁵ and *Brown v. United States*,²⁶ are quite illustrative, as the Marshall Court twice affirmed the importance of Congress in the detention scheme.

Bollman arose out of the fabled “Burr Conspiracy,” when Vice President Aaron Burr, at the end of President Thomas Jefferson’s first term in office, left the government and started an uprising in the western states and territories.²⁷ In December 1806, James Wilkinson, the American military commander in New Orleans, arrested Samuel Swartwout and Dr. Erick Bollman, two of Burr’s alleged co-conspirators.²⁸ Wilkinson subsequently ignored two writs of habeas corpus, one from a territorial court in New Orleans and one from a federal judge in Charleston, South Carolina, and transported the prisoners to Washington to stand trial for treason. Eventually, after attempts to pass a bill suspending the writ failed,²⁹ the government applied to the D.C. circuit court for an arrest warrant, to which a divided panel agreed.³⁰ The prisoners in turn filed a petition for a writ of habeas corpus in the Supreme Court, challenging the legality of their arrest and confinement pending indictment.

Bollman, the first major Supreme Court decision to consider the

concurring) (seizing on the Suspension Clause as the only express constitutional grant of emergency power to the executive). As one early member of Congress put it, suspension was meant to be limited to “instances in which the judges themselves were a part of the rebellion.” DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829*, at 132 (2001) (citing 16 *ANNALS OF CONG.* 414 (1807) (statement of Rep. Nelson)).

24. The role of Congress was indeed *explicit* in early drafts of the provision. See *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1264 (1970) (“[I]t is fairly clear that the suspension clause itself was addressed exclusively to Congress: the original motion for a habeas clause mentioned Congress expressly, as did some subsequent proposals; there is no indication in the debates that the omission of reference to Congress in the clause finally adopted was intended to broaden its applicability.” (footnotes omitted)); see also DUKER, *supra* note 20, at 131-32.

25. 8 U.S. (4 Cranch) 75 (1807).

26. 12 U.S. (8 Cranch) 110 (1814).

27. See generally THOMAS PERKINS ABERNATHY, *THE BURR CONSPIRACY* (1954) (surveying the history). President Jefferson had considered a partial suspension of the writ in some cases arising from the incident, but, believing that only Congress could do so, he backed down when the House rejected a suspension bill that had passed in the Senate. See Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 340 (1952) (discussing the background of the proposed Jefferson suspension); see also CURRIE, *supra* note 23, at 131-33 (same).

28. See Eric M. Freedman, *Milestones in Habeas Corpus* (pt. 1), 51 ALA. L. REV. 531, 559 (2000). Indeed, Wilkinson “was himself heavily and discredibly involved in the alleged events.” *Id.*

29. See *id.* at 559-61 (discussing the background); see also Collings, *supra* note 27, at 340.

30. See *United States v. Bollman*, 24 F. Cas. 1189 (C.C.D.D.C. 1807) (No. 14,822).

constitutional dynamic of the writ of habeas corpus, was primarily concerned with the Supreme Court's jurisdiction to issue the writ, especially after it had limited its original jurisdiction in *Marbury v. Madison*,³¹ along with the separate—but no less important—question of whether federal courts could issue writs against state proceedings where no underlying federal claim existed, and vice versa. Though Chief Justice Marshall's treatment of both issues has met with significant criticism,³² one pronouncement from *Bollman* has not. One of the arguments raised at bar had been whether the writ had been suspended, especially during the pendency of the litigation below.³³ Responding to this assertion at the end of his opinion for the Court, Marshall concluded that "If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide."³⁴ Thus, Chief Justice Marshall emphatically placed the Suspension Power in the hands of Congress, even if he did so in dicta.³⁵

Whereas *Bollman* reached the issue of which branch possessed the Suspension Power, another early Marshall Court decision also invoked the role of Congress in sanctioning executive seizures of persons and property. At issue in *Brown v. United States* was whether the U.S. government could condemn British property captured as a result of an embargo authorized by Congress during the War of 1812 that was not intended to act on foreign property.³⁶ As Chief Justice Marshall, again writing for the Court, set out, "[t]he questions to be decided by the Court are: 1st. May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war? 2d. Is there any legislative act which authorizes such seizure and condemnation?"³⁷

Marshall proceeded to answer both questions in the negative. To the first question, he concluded:

That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers which accompanies that of declaring war. 'Congress shall have power'—'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.'

31. 5 U.S. (1 Cranch) 137 (1803).

32. See, e.g., FREEDMAN, *supra* note 21, at 20-28.

33. See, e.g., *Bollman*, 8 U.S. (4 Cranch) at 91-92.

34. *Id.* at 101 (emphasis added).

35. In his 1833 *Commentaries on the Constitution of the United States*, Justice Story espoused a similar view. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1336 (photo. reprint 1991) (Boston, Hilliard, Gray & Co. 1833).

36. 12 U.S. (8 Cranch) 110 (1814).

37. *Id.* at 123.

The Detention Power

... If [the latter power] extends to rules respecting enemy property found within the territory, then we perceive an express grant to congress of the power in question as an *independent substantive power, not included in that of declaring war*.³⁸

Thus, “the declaration of war does not, of itself, authorize proceedings against *the persons* or property of the enemy found, at the time, within the territory.”³⁹ In one of the critical passages of the opinion, Marshall next went on to cite various acts of Congress for support, showing how Congress had additionally authorized, in the Alien Enemy Act of 1798,⁴⁰ the detention and deportation of alien enemies within the United States during wartime, and how, in 1812, it also authorized the President to make “arrangements for the safe keeping, support, and exchange of prisoners of war.”⁴¹ If these were independent war powers of the President that came part and parcel with the congressional declaration of war, Marshall asked, why would Congress have acted to independently authorize or delegate them?⁴² Thus, as Marshall wrote, the right of the sovereign in wartime “to take the persons and confiscate the property of the enemy” is “an independent substantive power” of Congress, and not the executive.⁴³ Any argument that *Brown* was limited to wartime condemnation of property, and not to the detention of combatants, was precluded by the *Brown* Court itself. “War gives an equal right over persons and property,” Chief Justice Marshall concluded, and thus the constitutional limitations on seizures of either must be the same.⁴⁴

Brown, one of a number of interesting military authority cases arising out of the War of 1812,⁴⁵ thus stands for two propositions of undeniable

38. *Id.* at 125-26 (emphasis added).

39. *Id.* at 126 (emphasis added). This argument thus expanded on the Court’s earlier holding in *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178-79 (1804), that the President lacked authority in excess of that provided by Congress to make maritime captures during a conflict with France.

40. See Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21-24 (2000)). Passed in between its far more notorious siblings—the Alien and Sedition Acts—the Alien Enemy Act is the only one of the three that today remains on the books. See generally Ludecke v. Watkins, 335 U.S. 160 (1948) (discussing the Act and its history).

41. See Act of July 6, 1812, ch. 128, 2 Stat. 777 (repealed 1817).

42. *Brown*, 12 U.S. (8 Cranch) at 128-29. Similarly, the Militia Act of 1792, ch. 33, 1 Stat. 271 (as amended by the Act of Feb. 28, 1795, ch. 36, 1 Stat. 424) authorized the President to use such of the militias of the several states to repel invasions or otherwise suppress rebellions as he saw fit, and today’s version, codified at 10 U.S.C. § 332, also authorizes the use of the federal armed forces. See 10 U.S.C. § 332. If the executive’s constitutional war power included as inherent powers such of those described above, then, first, Congress would never have needed to delegate such in the first instance, and second, all of these statutes—the Militia Act, the Alien Enemy Act, and the 1812 Prisoner of War Act, among others—would be unconstitutional. Yet none have ever been struck down, though the 1812 Prisoner of War Act was repealed in 1817 after the war was over. See Act of Mar. 3, 1817, ch. 34, 3 Stat. 358; see also *infra* note 62 (discussing the constitutional validity of the Militia Act).

43. *Brown*, 12 U.S. (8 Cranch) at 122, 126 (emphasis added).

44. *Id.* at 126.

45. A series of New York State cases arising out of the war dealt more squarely with questions of military authority over civilians, particularly those accused of espionage. See *Smith v. Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815); *McConnell v. Hampton*, 12 Johns. 234 (N.Y. Sup. Ct. 1815); *In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813). Indeed, *Smith* (and a series of other contemporary cases) rejected

significance: First, declarations of war do not, in and of themselves, independently authorize anything, except the use of military force and the general understanding that there exists a state of war.⁴⁶ Second, those powers granted by Congress to the executive *during* wartime, including the power to “authorize proceedings against the person and the property of the enemy,” are triggered by declarations of war, but nothing more—Congress only *activates* wartime authority in declaring war, it does not expand it.⁴⁷ Thus, the power to detain, under *Brown*, would have to be independently delegated by Congress, in one form or another.

B. *The Suspension Power and the Civil War*

Notwithstanding *Bollman* and *Brown*, the question of the executive’s unilateral authority to detain U.S. citizens during times of emergency arose most dramatically during the Civil War,⁴⁸ in a series of cases challenging President Abraham Lincoln’s—and not Congress’s—suspension of the writ of habeas corpus at the outset of hostilities.⁴⁹ After the initial suspension, Lincoln subsequently extended the suspension geographically,⁵⁰ a measure that was eventually ratified by Congress in a broad, all-encompassing endorsement of the beleaguered President’s earlier actions.⁵¹ Nevertheless, *Ex parte*

the military’s authority to detain and try civilians for spying because it found no *statutory* authorization. See generally Ingrid Brunk Wuerth, *The President’s Power To Detain “Enemy Combatants”*: Modern Lessons from Mr. Madison’s Forgotten War, 98 NW. U. L. REV. (forthcoming 2004) (manuscript at 17-23, on file with author).

46. Subsequent cases would clarify that there could exist a state of war prior to a congressional declaration thereto, and that the authority to determine when a war had begun properly belonged to the executive. Barring a preexisting determination, however, a congressional declaration was authoritative. See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635 (1863). Additionally, in 1850, the Court held, continuing the *Brown* understanding, that a congressional declaration of war did not include a delegation of its rulemaking authority. See *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

47. Cf. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178-79 (1804) (rejecting President Jefferson’s use of authority in excess of that explicitly set out by Congress during a maritime conflict with France).

48. The suspension issue only truly arose one other time before the war—at the very end of the War of 1812, when then-General Andrew Jackson suspended the writ in New Orleans. The New Orleans saga, an interesting historical footnote but tangential to the argument herein, is excellently surveyed in George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776-1861*, 18 AM. J. LEGAL HIST. 52, 61-65 (1974); and Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233, 243-52 (1981).

49. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 25 (1998). Chapter 2 of Chief Justice Rehnquist’s book discusses the factual background leading to Lincoln’s suspension of the writ. *Id.* at 11-25; see also MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 7-9 (1991).

50. The suspension became nationwide in August of 1862, when Secretary of War Edwin M. Stanton issued an order “by direction of the President” suspending the writ for those resisting the draft and for “persons arrested for disloyal practices.” See REHNQUIST, *supra* note 49, at 59-60.

51. Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755 (“[D]uring the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof.”). The Supreme Court subsequently (though indirectly) sustained the 1863 Act in *Mitchell v. Clark*, 110 U.S. 633 (1884).

The Detention Power

Merryman,⁵² the first of a series of cases to arise out of Lincoln's unilateral suspension,⁵³ witnessed a harsh rebuke of the action by Chief Justice Roger B. Taney, who ruled that the President had no independent authority to suspend the writ, particularly because the Suspension Clause was located in Article I of the Constitution, not Article II. As Taney wrote, "I had supposed it to be one of those points in constitutional law upon which there was no difference of opinion . . . that the privilege of the writ could not be suspended, except by act of congress."⁵⁴ Yet, Lincoln completely ignored Taney's stern ruling,⁵⁵ famously noting before Congress, one month later, that Taney's decision would allow "all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated."⁵⁶

On its face, *Merryman* was emblematic of a resistance to unilateral executive authority to suspend the writ. However, the writ remained suspended solely by executive order until Congress finally acted in March of 1863, by which point thousands of U.S. citizens had been arrested and detained without charges. Indeed, to this day, the debate over which branch may properly suspend the writ is, at least officially, unresolved,⁵⁷ though most legal scholars⁵⁸—and, indeed, most courts⁵⁹—have long since considered the question settled.

52. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.).

53. For a detailed exposition of the background of *Merryman*, see Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 89-92 (1993).

54. *Merryman*, 17 F. Cas. at 148; *see also Ex parte Benedict*, 3 F. Cas. 159, 165 (N.D.N.Y. 1862) (No. 1292) ("[T]he power of suspension is a legislative and not an executive power, and must be exercised, or its exercise authorized, by congress."); *Johnson v. Duncan*, 3 Mart. (o.s.) 530 (La. 1815).

55. This, as one recent scholar noted, is the true importance of *Merryman*. *See* Paulsen, *supra* note 53, at 92 ("But the more important question framed by *Merryman* concerns not the interpretation of the writ suspension provision, but whether the Executive is bound to enforce a judicial decree that he believes is founded on an incorrect reading of the law."). Paulsen is too generous. The real question, which has not been answered yet, is: If a sitting president defies a judicial order in the name of emergency, what—if any—remedies do the courts have to enforce their mandates?

56. Message to Congress in Special Session, July 4, 1861, *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 430 (Roy P. Basler ed., 1953).

57. *See* CLINTON ROSSITER & RICHARD P. LONGAKER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 25 (expanded ed. 1976) ("It would seem equally futile to argue over the present location of this power, for it is a question on which fact and theory cannot be expected to concur. Today, as ninety years ago, the answer to it is not to be found in law but in circumstance.").

58. *See, e.g., Developments in the Law—Federal Habeas Corpus*, *supra* note 24, at 1263-64. *But see* Martin S. Sheffer, *Presidential Power To Suspend Habeas Corpus: The Taney-Bates Dialogue and Ex parte Merryman*, 11 OKLA. CITY U. L. REV. 1 (1986).

59. *See, e.g., McCall v. McDowell*, 15 F. Cas. 1235 (C.C.D. Cal. 1867) (No. 8673); *Benedict*, 3 F. Cas. 159; *In re Dunn*, 8 F. Cas. 93 (S.D.N.Y. 1863) (No. 4171); *In re Fagan*, 8 F. Cas. 947 (D. Mass. 1863) (No. 4604); *Ex parte McDonald*, 143 P. 947 (Mont. 1914). As Professor Duker highlights, "[t]he Supreme Court has never dealt directly with the issue"; however, in *Ex parte Milligan*, the Court—in examining the Habeas Corpus Suspension Act of 1863—"stated that '[t]he President was authorized by it to suspend the privilege of the writ of habeas corpus . . .'" Thus, in sustaining the suspension of habeas before it in *Milligan*, the Court looked to Congress's authority, and not the executive's, over the government's arguments to the contrary. DUKER, *supra* note 20, at 177 n.188 (citation omitted).

C. An Emergency Exception? Insurrection and Martial Law During the Early Republic and the Civil War

Another question that both *Bollman* and *Merryman* left unresolved was whether the same constitutional mandates vis-à-vis suspension of the writ of habeas corpus applied in the context of martial law, in areas where there were no lawful civilian authorities. Indeed, the question of whether the imposition of martial law provides an exception to our understanding of the detention power is a critically important one, for if it does not, then it is difficult to conceive of more exigent circumstances that would.

Martial law, under the Constitution, is reflected in the Militia Clauses (in addition to the Suspension Clause), which collectively authorize Congress:

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions; [and]

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.⁶⁰

Acting under this power, Congress passed the Militia Act of 1792, which created a uniform national militia, and amended such in 1795 to authorize the President, "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe," to call forth the militia.⁶¹ Thus, the Third Congress delegated to the President the authority to respond to sudden invasions or other insurrections, a power that the executive did *not* otherwise derive from the Constitution itself.⁶²

Since the passage of the 1795 Act, it has generally been read as congressional authorization for the imposition of martial law under the circumstances provided for by the Constitution.⁶³ The question of significance here, first raised during the Civil War (but returned to during World War II), was whether the imposition of martial law ipso facto authorized the suspension of habeas, and, consequently, the invocation of the detention power.

60. U.S. CONST. art. I, § 8, cls. 15-16.

61. Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424, 424 (codified as amended at 10 U.S.C. § 332 (2000)). The authority to call forth the militia of the several states was expanded to include the authority to call forth the federal armed forces in 1861. See Act of July 29, 1861, ch. 25, § 1, 12 Stat. 281, 281. Thus, the power to use *federal* troops to suppress insurrections also derives from the 1795 Militia Act.

62. In 1827, the Supreme Court settled any question as to the constitutionality of the 1795 Act. See *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29 (1827) ("[T]he act of 1795 is within the constitutional authority of Congress . . ."); see also *Raymond v. Thomas*, 91 U.S. 712, 714-15 (1875). See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 160-62 & n.228 (1997) (discussing the legislative history of the Militia Acts, the delegation of congressional power at their core, and Justice Story's affirmation thereof in *Martin v. Mott*).

63. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 42-45 (1849) ("By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President." (emphasis added)).

The Detention Power

In *Ex parte Field*,⁶⁴ the Civil War case first expounding this theory, the conflict centered on President Lincoln's imposition of martial law in "loyal" states nowhere near the front lines, such as Vermont, and whether that included, by necessity, a suspension of habeas. After exhaustively recounting the precedents, District Judge David A. Smalley concluded that the President had lawfully imposed martial law on Vermont, and that "[i]t must be evident to all, that martial law and the privilege of [the] writ [of habeas corpus] are wholly incompatible with each other."⁶⁵ Thus, the imposition of martial law necessarily included the suspension of habeas.

To distinguish *Merryman* and a similarly reasoned case, *Ex parte Benedict*, Judge Smalley relied both on the extent to which martial law had been declared nationwide in *Field*, but had not yet at the time of the former cases, and also, critically, on the importance of the 1795 Militia Act.⁶⁶ Congress, via the Militia Act, delegated broad power to the executive to impose martial law during emergencies, and that power necessarily included the Suspension Power. Judge Smalley did not explicitly state the most obvious conclusion of his argument, but implicitly, it was undeniable: Congress itself, via the 1795 Act, authorized the suspension of habeas at the outset of the Civil War.⁶⁷ Thus, *Merryman* and *Benedict* wrongly presupposed the absence of congressional action to suspend the writ.⁶⁸ Regardless of the resolution of the *Field* question, it is of undeniable significance that *Field*, like *Benedict* and *Merryman* before it, presupposed that the detention power always emanated from Congress, whether it had been delegated or not.⁶⁹

64. 9 F. Cas. 1 (C.C.D. Vt. 1862) (No. 4761).

65. *Id.* at 8.

66. *Id.*

67. See FARBER, *supra* note 5, at 162-63. For an example of another Civil War-era court adopting a form of this argument, see *In re Kemp*, 16 Wis. 382 (1863). Curiously, in denouncing the unilateralism of Lincoln's acts, most scholars have traditionally overlooked the martial law/emergency argument. See, e.g., Eli Palomares, Note, *Illegal Confinement: Presidential Authority To Suspend the Privilege of the Writ of Habeas Corpus During Times of Emergency*, 12 S. CAL. INTERDISC. L.J. 101 (2002).

68. The relationship between martial law and habeas would largely be left alone in the aftermath of the Civil War, but in 1909, Justice Oliver Wendell Holmes largely embraced—albeit implicitly—Judge Smalley's theory in *Moyer v. Peabody*, 212 U.S. 78 (1909). In *Moyer*, the issue was whether the extra-judicial detention, for two and one-half months, of a citizen under order of the Governor of Colorado was lawful under the Colorado and federal Constitutions. Justice Holmes, writing for the Court, rejected the contention that such detention violated the Fourteenth Amendment. As he wrote, "what is due process of law depends on circumstances." *Id.* at 84. Because the Colorado Constitution authorized the governor to declare martial law, it naturally conveyed the right to detain individuals for the duration of the emergency. See also FARBER, *supra* note 5, at 162-63.

69. Indeed, even the *Prize Cases*, a series of Civil War admiralty cases that have been read to suggest a broader form of executive constitutional power than that endorsed here, relied on the 1795 Militia Act as authority for President Lincoln's imposition of a blockade—and seizure of ships attempting to run it—at the beginning of hostilities. Compare *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 589 (S.D.N.Y. 2002) ("I read the *Prize Cases* to stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected." (quoting *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring))), with *The Prize Cases*, 67 U.S.

D. *Past as Prologue: Milligan and Military Tribunals*

Compared to the suspension of habeas, however, the trial of civilians before military tribunals was “certainly the most dubious and judicially assailable” of President Lincoln’s questionable actions against civil liberties during the Civil War.⁷⁰ These trials formed the factual background to two Civil War cases, *Ex parte Vallandigham*⁷¹ and *Ex parte Milligan*,⁷² the latter of which is of importance to the argument here for two different reasons: First, at issue in *Milligan* was not the President’s authority to carry out military tribunals authorized by Congress, but rather his independent authority to create them in the first place. Second, *Milligan* remains today the boldest and most definitive statement on the availability of martial law in peaceful areas, despite the extent to which later cases may have limited its other holdings.

At its core, *Milligan* rejected the President’s authority to act unilaterally during wartime to detain and try civilians by military commissions in areas where the civil courts were open and functioning properly, as in Indianapolis, where Lamdin P. Milligan was detained and tried.⁷³ Neither the Habeas Corpus Act of 1863 nor any other Act of Congress had authorized the commissions at issue in *Milligan*, and, though the Court split 5-4 on the question of whether Congress was also constitutionally barred from authorizing such commissions,⁷⁴ all nine Justices agreed that President Lincoln certainly could not create them unilaterally, since neither the Constitution nor Congress had granted him the power to do so.

Additionally, the *Milligan* Court clarified an issue that had been raised first

(2 Black) 635, 668 (1863) (“[The President] has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to called [sic] out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.”).

70. ROSSITER & LONGAKER, *supra* note 57, at 26.

71. 68 U.S. (1 Wall.) 243 (1864). In *Vallandigham*, the Court refused to issue a writ of certiorari (rare at the time) to review an Indiana politician’s conviction by a military commission for anti-war speech based on its determination that the military commission was not a “court” under Section 14 of the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82, and that it therefore did not fall under the Court’s appellate jurisdiction, including its authority to grant certiorari. 68 U.S. (1 Wall.) at 251.

72. 71 U.S. (4 Wall.) 2 (1866).

73. This proved to be the critical “linchpin” that allowed the Court to revisit (and distinguish) *Vallandigham*. See ROSSITER & LONGAKER, *supra* note 57, at 32.

74. Chief Justice Chase, along with Associate Justices Miller, Swayne, and Wayne, wrote that, “the opinion which has just been read goes further; and as we understand it, asserts not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it We cannot agree to this.” *Milligan*, 71 U.S. (4 Wall.) at 136 (Chase, C.J.). Thus, “Congress had power, though not exercised, to authorize the military commission which was held in Indiana.” *Id.* at 137. The opinion of the Court made no such distinction between unilateral executive power and the power of the executive acting in concert with the legislature. It was because of *this* conflation—and not the agreement of all nine Justices rejecting the independent executive authority—that *Milligan* has received such a dubious reception from the modern academy. See, e.g., ROSSITER & LONGAKER, *supra* note 57, at 32.

The Detention Power

in *Luther v. Borden*, but never settled: What were the limits, both geographic and temporal, on the imposition of martial law during an emergency? As Justice Davis wrote,

[T]here are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.⁷⁵

Thus, whereas *Milligan*, in the present debate, is of undeniable importance for its stance on the constitutional validity (or lack thereof) of military commissions to try civilians,⁷⁶ it is equally important for imposing the above constraint on the declaration of martial law. The *Field* argument—that martial law ipso facto includes a suspension of habeas—is thus informed by the *Milligan* response, for suspension under the Militia Act could only be in areas where the courts were not “open . . . and unobstructed.” Further, though the distinction between military tribunals for civilians and combatants would be at the heart of the Supreme Court’s subsequent decision in *Ex parte Quirin*,⁷⁷ *Milligan* clearly “hold[s] congressional authorization to be at least a necessary requirement for such tribunals. This general principle of *Milligan*—a principle never repudiated in subsequent cases—leaves the President little unilateral freedom to craft an order to detain people on his own suspicion for indefinite warehousing.”⁷⁸

II. THE DETENTION POWER DURING WORLD WAR II: NAZI SABOTEURS, INTERNEES, HAWAIIAN MARTIAL LAW, AND THE ROLE OF CONGRESS

A. *Ex parte Quirin*, *Enemy Citizens*, and *Military Tribunals*

Milligan returned to the forefront in 1942 with *Ex parte Quirin*, the so-called “Nazi Saboteurs” case, which has been cited as the major precedent for two of the more controversial policies pursued by the Bush Administration in the aftermath of September 11—the authority to create military tribunals to try

75. *Milligan*, 71 U.S. (4 Wall.) at 127.

76. *Id.* at 121.

77. 317 U.S. 1 (1942).

78. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1279-80 (2002). This reading of *Milligan*, though not often highlighted, is fairly well established. Indeed, even Rossiter—who has criticized *Milligan* as overreaching on a number of different points, including the notion that not even Congress had the authority to authorize the commissions—agreed with this understanding. See ROSSITER & LONGAKER, *supra* note 57, at 36.

suspected terrorists,⁷⁹ and the authority to detain “unlawful” or “enemy” combatants.⁸⁰ In *Quirin*, eight Nazi soldiers had landed in the United States with the intent to sabotage key components of the American war industry. George Dasch, one of the cadre, turned himself in to authorities, and then proceeded to help the FBI capture the other seven. President Roosevelt subsequently promulgated an executive order authorizing trial by military commissions for the saboteurs, who, during those proceedings, filed a petition for a writ of habeas corpus in the D.C. district court, which was summarily dismissed.⁸¹ Quickly, the case worked its way to the Supreme Court, which, sitting in Special Term, found the commissions constitutional.

In reaching this conclusion, the Court was faced with the necessity of distinguishing the factual circumstances before it from those present in *Milligan*.⁸² This distinction turned on two critical facts: First, the petitioners in *Quirin*, unlike those in *Milligan*, were actively engaged in combat against the United States, and as such, were not civilians, but were combatants, “unlawful,” in this case, because they were engaged in spying and sabotage.⁸³ Second, as opposed to *Milligan*, where the military commissions had been created unilaterally by President Lincoln, in *Quirin*, there was at least some congressional authorization—via the Articles of War.⁸⁴

Thus, though the Court endorsed President Roosevelt’s authority to capture and detain “enemy belligerents” and to try “unlawful” belligerents before a military commission, the endorsement was pinned almost entirely on the extent to which Roosevelt was enforcing laws already passed by Congress.⁸⁵

79. See, e.g., Mike Allen, *Bush Defends Order for Military Tribunals*, WASH. POST, Nov. 20, 2001, at A14 (quoting a statement from President Bush that “I would remind those who don’t understand the decision I made that Franklin Roosevelt made the same decision in World War II. Those were extraordinary times, as well.”).

80. See, e.g., Respondents’ Response to, and Motion To Dismiss, the Petition for a Writ of Habeas Corpus at 7, *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002) (No. 2:02cv439) (on file with author).

81. *Ex parte Quirin*, 47 F. Supp. 431 (D.D.C. 1942). For what are easily the two most comprehensive modern discussions of *Quirin* written before September 11, see Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59 (1980); and David J. Danelski, *The Saboteurs’ Case*, 1 J. SUP. CT. HIST. 61 (1996). Not surprisingly, *Quirin* has also been an inordinately popular subject of post-September 11 scholarship. For the most in-depth contribution thereto, see LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* (2003). See also Katyal & Tribe, *supra* note 78, at 1280-83 (providing a narrower discussion of the 1942 case).

82. See *Quirin*, 317 U.S. at 45-46.

83. *Id.* at 35 (“[T]hose who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission.”).

84. *Id.* at 29 (“It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.”). *Milligan* established the limits on the President’s unilateral authority, and *Quirin* did not alter that pronouncement.

85. *Id.* at 28 (“By his Order creating the present Commission he has undertaken to exercise the

The Detention Power

Critically, the Court read the President's Commander-in-Chief power exhaustively as

the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.⁸⁶

Thus, *Quirin*, a decision manifestly predicated on congressional authorization,⁸⁷ read the President's power to detain and try combatants, be they unlawful or otherwise, *not* in the Commander-in-Chief Clause of the Constitution, but in his power to enforce the Articles of War, a statutory

authority conferred upon him by Congress.”). The Articles of War in force during World War II were enacted by Congress in 1920. *See* Act of June 4, 1920, ch. 227, 41 Stat. 759, 787-812. Whereas Articles 81 and 82 clearly applied to the petitioners in *Quirin*, the Court was also on fairly solid ground in concluding that Congress, via Article 15, had otherwise authorized military tribunals for violations of the laws of war. *See Quirin*, 317 U.S. at 30 (“Congress has the choice of crystallizing in permanent form and minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.”).

The problem with the opinion, and the quandary that has continued to plague scholars up until today, is the extent to which the military commission ordered by President Roosevelt differed substantially from the requirements the 1920 Articles laid out. In several significant ways, the tribunal that tried the *Quirin* petitioners did not include the safeguards mandated by the 1920 Articles, including independent review of convictions and the requirement of a unanimous verdict for the death penalty. *See FISHER, supra* note 81, at 129-34. Thus, to find the tribunal to be a legitimate exercise of the executive's authority in enforcing the laws Congress passed was a legal fiction, and a disturbing one at that. What is critical, however, is that the Court invented such a fiction rather than uphold the constitutionality of the trial based solely on the executive's constitutional authority. Such authority did not exist, and the Court, its many other missteps in *Quirin* notwithstanding, clearly did not otherwise suggest that it did.

86. *Quirin*, 317 U.S. at 26; *see also* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14 (1955) (endorsing a limited reading of the Clause); United States v. Sweeny, 157 U.S. 281, 284 (1895) (same). Such a reading is also consistent with one of the original interpretations of the Clause. *See* THE FEDERALIST NO. 69, at 418 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy.”); *see also* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 5 (1993) (“Proponents of broad executive authority . . . often rely on the constitutional designation of the President as ‘Commander in Chief of the Army and Navy of the United States,’ but the record is entirely clear that all this was meant to convey was command of the armed forces once Congress had authorized a war . . .”). Ely further notes that [w]holly missing in either the Philadelphia debates or *The Federalist*, or in the ratification debates, is any broader construction of the term. The Federalists did not construe it broadly in an effort to build the power of the executive, and neither did the Antifederalists as part of their attack on the inordinate executive power allegedly created by the document they were seeking to defeat.

Id. at 142 n.22 (citations omitted). *But cf.* EDWARD S. CORWIN ET AL., THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 262-97 (5th rev. ed. 1984) (discussing the evolution of the Commander-in-Chief power from the original understanding to the so-called “stewardship” theory during total wars, such as World War II).

87. In two different World War II-era cases, the Supreme Court embraced this reading. *See In re Yamashita*, 327 U.S. 1, 20 (1946) (“By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war.”); *see also* Madsen v. Kinsella, 343 U.S. 341, 355 (1952) (recognizing this holding from *Quirin* and quoting the discussion from *Yamashita*). This is one of the deeper underpinnings of Katyal and Tribe's argument. *See* Katyal & Tribe, *supra* note 78, at 1266-68; *see also supra* note 85 (discussing the reliance on the Articles of War).

authorization.⁸⁸ The *Quirin* Court did not say that the President lacked such power independently; rather, it refused even to reach that question, finding a sufficient basis in the actions of Congress.⁸⁹ Nevertheless, this understanding of the 1942 decision, previously overlooked, is essential.

Quirin also set another key precedent by obliterating any distinction between unlawful combatants who were German nationals and those who were U.S. citizens.⁹⁰ Yet, despite its apparent validity as authority for denying U.S. citizens at arms against the United States any additional rights compared to non-citizen combatants, its approval of military commissions to try offenses against the laws of war, and its other suggested shortcomings, *Quirin*, a paradoxical and controversial case through and through,⁹¹ quite simply does not stand for propositions as broad as those for which it has been cited in the aftermath of September 11—especially the argument that the President has inherent and unilateral constitutional authority to detain and try enemy combatants⁹² during wartime. For everything *Quirin* was, it was not, under any tenable reading, an endorsement of an executive detention power.⁹³

B. Enemy Citizen Prisoners of War

Quirin's obfuscation of the line between U.S. citizen and non-citizen enemies had limited—but significant—repercussions in two other World War

88. *Quirin*, 317 U.S. at 26-27; see Vladeck, *supra* note 10, at 965 n.24 (“*Quirin* . . . clearly located the President’s power to detain and try unlawful combatants during wartime in Congress’s Articles of War and *not* in the Constitution. Under *Quirin*, then, a President’s detention power derives from the Constitution only to the extent that it is delegated by Congress.”).

89. See *supra* note 84 (quoting this conclusion from *Quirin*).

90. *Quirin*, 317 U.S. at 37 (“Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”).

91. Many recent scholars, in their attempts to distinguish *Quirin*, have relied on the novelty and exigency of the circumstances under which it was decided. See, e.g., G. Edward White, *Felix Frankfurter’s “Soliloquy” in Ex parte Quirin: Nazi Sabotage and Constitutional Conundrums*, 5 GREEN BAG 2D 423, 423 (2002) (“Occasionally Supreme Court Justices find themselves confronted with cases that present an awkward combination of relatively novel constitutional issues, potentially momentous short-run consequences, and considerable pressure for a quick decision. . . . *Ex parte Quirin* . . . was such a case.”). *Quirin* was exceptional, but that is not how it should be distinguished. Rather, it is distinguishable because it does not implicate the detention power *at all*. It neither upheld nor rejected an executive power to detain, just as it neither upheld nor rejected an executive power to create military tribunals. It was legal prevarication to the fullest, but that is why a proper understanding of the 1942 case is so important here.

92. Indeed, even *Quirin*'s coinage of the term “enemy combatant” may have been entirely accidental, since, from the plain language of the opinion, the term only meant to distinguish enemy members of the armed forces from enemy spies or allies. See *Quirin*, 317 U.S. at 31 (discussing “[t]he spy who secretly and without uniform passes the military lines of a belligerent in time of war, . . . or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property”). Nowhere else in the opinion is the term even mentioned, let alone used to create a category distinct from lawful and unlawful combatants.

93. But see *Hamdi v. Rumsfeld (Hamdi III)*, 316 F.3d 450, 463 (4th Cir. 2003), *petition for cert. filed*, No. 03-6696 (U.S. Oct. 1, 2003).

The Detention Power

II-era cases. The latter, *Colepaugh v. Looney*,⁹⁴ upheld a later version of military tribunals for a second group of Nazi saboteurs, though the government, perhaps wary of the *Quirin* debacle, followed the procedures set forth in the 1920 Articles much more closely the second time around.⁹⁵

The earlier case presented a slightly different issue: What about prisoners of war? Gaetano Territo was an American citizen captured while fighting for the Italian Army in Italy in 1943. Territo, unlike the petitioners in *Quirin*, had committed no violation against the laws of war, and was, by all accounts, a “lawful” combatant, and thus a POW entitled to the protections afforded by the 1929 Geneva Conventions.⁹⁶ Territo filed a habeas petition in the Southern District of California, challenging his detention as a POW on the grounds that he was a citizen. The court summarily dismissed the petition, and Territo appealed to the Ninth Circuit.

On appeal, the Ninth Circuit rejected Territo’s argument by reference both to *Quirin* and to the 1929 Geneva Conventions themselves.⁹⁷ Yet, the *Territo* court never identified the actual source of the authority for detaining U.S. citizens as prisoners of war. If anything, the only authority cited as support for detaining Territo as a POW were the Geneva Conventions, which the court invoked repeatedly.⁹⁸ Thus, *Territo* might otherwise suggest the argument that Congress authorized the detention of POWs when the Senate ratified the 1929 Geneva Convention, and that the Supremacy Clause thus made the Convention the “Law of the Land,” similar, if not equivalent, to an Act of Congress. This contention is quite unsatisfying, however, as the ratification of a treaty is *not* a congressional act—it is strictly the province of the Senate, without the requirements of bicameralism or presentment.

But if the Geneva Convention did not itself authorize the detention of U.S. citizens as POWs, what did? The Ninth Circuit did not say, and no commentator has ever tried to reconcile this distinction—between *Quirin*’s reliance on the Articles of War and the lack of a similar proviso in *Territo*. *Brown*, in 1814, had located the power to detain POWs in an 1812 Act of Congress, but that Act was repealed in 1817.⁹⁹ If anything, *Territo* stands for the proposition that POWs are lawfully detained *somehow*, even if no court has ever suggested the actual source of authority thereto. This opens up the possibility—which the Ninth Circuit did not itself suggest—that the executive’s power to detain POWs actually *may* come from the Constitution,

94. 235 F.2d 429 (10th Cir. 1956) (upholding the second round of military commissions).

95. See FISHER, *supra* note 81, at 138–44.

96. Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 118 L.N.T.S. 343. These protections included the right not to be tried; thus, Territo could not be indicted for treason or levying war against the United States, even though he was very likely guilty of both offenses.

97. *In re Territo*, 156 F.2d 142 (9th Cir. 1946).

98. *Id.* at 146–47 & n.5.

99. See *supra* notes 40–44 and accompanying text (discussing *Brown* and the two Acts).

once Congress has actually declared war (and triggered the Geneva Conventions), subject to the due process requirements of the Fifth Amendment. Whether the source of such authority is the Commander-in-Chief Clause or the executive's broad discretion over foreign affairs is a different question altogether (though it would seem to be the latter, based on the original understanding of the former¹⁰⁰), but it certainly is defensible that the authority to detain combatants *as POWs* may possibly be a power inherently belonging to the executive.¹⁰¹ If nothing else, it is an issue that, at least prior to the enactment of 18 U.S.C. § 4001(a) in 1971, would fall into Justice Jackson's "zone of twilight" from *Steel Seizure*.¹⁰²

Territo was ultimately unclear on this point, and I do not mean to otherwise infer clarity where none exists. Instead, what is important about *Territo* is that the actual source of the executive's power to detain U.S. citizens captured on the battlefield as enemy prisoners of war remains an open question today, a question that may eventually be unavoidable, but that, at least in the present cases, is not otherwise implicated.

C. Martial Law in Hawaii

As opposed to *Territo*, where the source of the detention authority was unclear at best, the detention of citizens in Hawaii during World War II was a different story. Hawaii, a U.S. territory until 1959, was governed by the Organic Act—a statute passed in 1900 when it first came under U.S. control.¹⁰³ The Organic Act included a provision allowing the imposition of martial law under certain emergencies.¹⁰⁴ After the attack on Pearl Harbor, just such an emergency was declared, and control of the territory was surrendered to the military. Soon thereafter, the civilian courts were closed, replaced with provost courts for petty crimes and military tribunals for more serious offenses.¹⁰⁵

100. See *supra* note 86 and accompanying text (discussing the Commander-in-Chief Clause).

101. This might otherwise provoke a debate over why there is a distinction between lawful and unlawful combatants, save for one critical point: Under the Constitution, it is up to Congress to "define and punish . . . Offenses against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10. The Offenses Clause has sparked heated academic debate in recent years over its import to the role of international law in U.S. courts. Compare, e.g., Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447 (2000), with Michael T. Morley, Note, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109 (2002). Nevertheless, since what makes a combatant "unlawful" is some kind of offense against the law of nations, which must, by necessity, subsume the laws of war, this distinction seems constitutionally appropriate, if even necessary. Under *Territo*, U.S. citizens who take up arms against the United States as lawful combatants during wartime are properly detained until the end of hostilities as POWs. Under *Quirin*, U.S. citizens who violate the laws of war in fighting against the United States are detained and tried pursuant to statutes. Thus, neither of these types of detention implicate the authority that this Note rejects. For further discussion, see *supra* note 6.

102. See *infra* note 143 and accompanying text.

103. Act of Apr. 30, 1900, ch. 339, 31 Stat. 141.

104. See *id.* § 67, 31 Stat. at 153.

105. See FISHER, *supra* note 81, at 145-46. See generally J. GARNER ANTHONY, HAWAII UNDER

The Detention Power

Though the Ninth Circuit upheld the suspension of habeas under the terms of the Organic Act in 1942,¹⁰⁶ by the end of the year, it was clear that the emergency had subsided, and the Hawaiian civil government was at least partially restored via a February 8, 1943 proclamation from the local government. On October 24, 1944, President Roosevelt issued a proclamation restoring habeas and terminating the state of martial law.¹⁰⁷ Lloyd Duncan, a civilian, had twice been arrested and punished by the Hawaiian provost court, the second time sentenced to five years at hard labor. After the restoration of civilian authority, Duncan filed a habeas petition in the Hawaii district court, which Judge Delbert E. Metzger, famous for his opposition to the military government in Hawaii,¹⁰⁸ granted on the grounds that, after March 10, 1943 (the date the February 8 proclamation took effect), martial law had effectively (if not formally) ceased to exist in Hawaii, and the military no longer possessed lawful control over civilians.¹⁰⁹ Though the Ninth Circuit reversed *Duncan* and its companion,¹¹⁰ the Supreme Court subsequently restored the effect, if not the principle, of Judge Metzger's opinion.¹¹¹

The Court's decision in *Duncan v. Kahanamoku*, building largely on *Milligan*, reaffirmed the force of the 1866 decision—even in light of *Quirin*—by focusing on Congress's intent in passing the Organic Act. Yes, Congress clearly gave the Governor of Hawaii the authority to impose martial law, but not indefinitely, and such authority did *not* include the power to try civilians for civilian offenses in military courts.¹¹² Thus, *Duncan* highlighted the most important of the *Milligan/Quirin* distinctions—civilians versus unlawful combatants. Indeed, the issue in *Duncan* was not whether Duncan's *detention* was legal; rather, the issue was whether his trial was. The Court never reached the question of the validity of the suspension of habeas; instead, it focused on military tribunals, and the extent to which military trials could not supplant the civilian justice system for non-combatant civilians. On this, the Court, with its decision four years earlier in *Quirin* in mind, was unequivocal.¹¹³

ARMY RULE (1955) (providing a detailed historical overview of the tumultuous history of Hawaii under martial law); Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai'i, 1941-1946*, 19 U. HAW. L. REV. 477 (1997) (same).

106. *Ex parte Zimmerman*, 132 F.2d 442 (9th Cir. 1942).

107. *See Duncan v. Kahanamoku*, 327 U.S. 304, 312 n.5 (1946).

108. *See* Claude McColloch, *Now It Can Be Told: Judge Metzger and the Military*, 35 A.B.A. J. 365 (1949); *see also* Scheiber & Scheiber, *supra* note 105, at 563-88 (summarizing the proceedings).

109. *Ex parte Duncan*, 66 F. Supp. 976, 979-81 (D. Haw. 1944); *see also Ex parte White*, 66 F. Supp. 982 (D. Haw. 1944) (reaching a similar conclusion).

110. *Ex parte Duncan*, 146 F.2d 576 (9th Cir. 1944).

111. *Duncan v. Kahanamoku*, 327 U.S. 304, 322-24 (1946).

112. *Id.* at 323-24.

113. *Id.* *Duncan* thus further highlighted the exceptionalism of *Quirin*, and, as importantly, the extent to which *Quirin* did not overrule *Milligan*, even though some have argued that it did. *E.g.*, ARTHUR S. MILLER, *PRESIDENTIAL POWER IN A NUTSHELL* 175 (1977); Martin S. Sheffer, *Does Absolute Power Corrupt Absolutely? Part I. A Theoretical Review of Presidential War Powers*,

D. Internment and the Detention Power from *Hirabayashi* to *Endo*

Finally, no discussion of the detention power during World War II would be complete without a discussion of the internment of hundreds of thousands of Americans of Japanese descent in the western part of the mainland United States, easily the most notorious of the U.S. government's actions during the war—if not during the entire twentieth century. Yet, of the four major cases to reach the Supreme Court challenging the internments—*Hirabayashi v. United States*,¹¹⁴ *Yasui v. United States*,¹¹⁵ *Korematsu v. United States*,¹¹⁶ and *Ex parte Endo*¹¹⁷—only *Endo* invoked the detention power itself. The other three—*Hirabayashi*, *Yasui*, and *Korematsu*—all involved challenges to criminal convictions for violating exclusion orders, an offense Congress criminalized via statute.¹¹⁸ Though each case was replete with serious constitutional questions, the dispositive issue in all three, due largely to the Court's reluctance to confront the constitutional issues head-on,¹¹⁹ was the legality of the exclusion orders themselves and the Act of Congress criminalizing violations thereof, and not the constitutionality of (or authority for) the detention.¹²⁰ Indeed, *Korematsu* itself distinguished the two decisions: "The *Endo* case, *post*, graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected."¹²¹ *Korematsu* dubiously upheld the former. *Endo*, however, rejected the latter, since Mitsuye Endo had not violated anything.¹²² The Court, in a decision released on the same day as *Korematsu*, ordered Endo's discharge, largely because Congress had not explicitly authorized her confinement.¹²³ As Justice Douglas wrote for the Court,

[W]e stress the silence of the legislative history and of the Act and the Executive Orders on the power to detain to emphasize that any such authority which exists must be implied. If there is to be the greatest possible accommodation of the

24 OKLA. CITY U. L. REV. 233, 267 (1999). *Quirin* clearly endorsed and upheld military tribunals—in compliance with procedures established by Congress—for U.S. citizens who violated the laws of war. U.S. citizens who were prisoners of war were a different story, as *Territo* suggests. *Duncan*, then, suggested that *Milligan* applied to all other U.S. citizens, precluding their trial by military commission, and, implicitly (but necessarily), their military detention pending trial.

114. 320 U.S. 81 (1943).

115. 320 U.S. 115 (1943).

116. 323 U.S. 214 (1944).

117. 323 U.S. 283 (1944).

118. See, e.g., Act of Mar. 21, 1942, Pub. L. No. 77-503, ch. 191, 56 Stat. 173 (repealed 1948).

119. See *infra* text accompanying note 226 (discussing *Korematsu*).

120. Historically, however, *Korematsu* was read as the Supreme Court's rubber stamp on the internment program. See generally Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649 (1997) (discussing the effect of *Korematsu*'s holding); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945) (same).

121. *Korematsu*, 323 U.S. at 222.

122. See Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003).

123. *Endo*, 323 U.S. at 300-02.

The Detention Power

liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program.¹²⁴

Since the detention of “admittedly loyal” citizens such as Mitsuye Endo did not fall under the “precise purpose” of the evacuation program, the Court ordered her release.¹²⁵

Endo made no noticeable impact on the internment program, even though it nominally required the release of 60,000 other “loyal” Americans of Japanese descent, because the camps had already been closed by the time the decision was issued.¹²⁶ Additionally, though *Endo* may have been wrongly forgotten as arguably the more meaningful of the two decisions, it was hardly perfect itself, for the Court did not find that Endo’s detention actually violated the Constitution, a point that Justice Roberts, in his concurrence, as in his dissenting opinion in *Korematsu*, criticized the majority for not reaching.¹²⁷

Its shortcomings notwithstanding, *Endo* simultaneously suggests an undeniable reluctance on the part of the Court to explicitly approve the policy of interning Japanese Americans, and, more significantly, a reinforcement of the idea that the detention of U.S. citizens, even during the most exigent circumstances, generally requires preexisting authorization, even if such acquiescence is implicit. Further, the Court’s pronouncement that, in light of *implied* authorization, the power to detain must be narrowly confined to the precise purpose of the evacuation program, suggests an appropriate level of judicial scrutiny for evaluating detention schemes when Congress has not explicitly approved them, at least prior to the enactment of 18 U.S.C. § 4001(a).

Indeed, for all that *Korematsu* and its sister cases are scorned for, none ever explicitly upheld *any* form of extra-legislative detention. Congress criminalized violations of military exclusion orders, and it was the constitutionality of the 1942 statute that was at issue in *Hirabayashi*, *Yasui*, and *Korematsu*. This is not to suggest that the Court was on any firmer ground in upholding the convictions in each of the three earlier cases; it was just on *different* ground. When the Court was finally confronted with the previously sidestepped issue of the facial legality of the detentions, it balked—albeit in a decision that probably could have been worded more harshly, and that history has otherwise forgotten.

124. *Id.* at 301-02.

125. *Id.* at 302-04; see also Grossman, *supra* note 120, at 662 (discussing the decision in *Endo*); Gudridge, *supra* note 122, at 1947-53 (same).

126. See PETER H. IRONS, JUSTICE AT WAR 345 (1983). The impact of *Endo* behind the scenes, as Irons notes, was quite formidable. Indeed, it is at least possible that, *because* of the Court’s decision, the Roosevelt Administration acted when it did, prompting Patrick Gudridge to quip: “[p]erhaps it’s Felix Frankfurter’s fault” that no one remembers *Endo*. See Gudridge, *supra* note 122, at 1934-35.

127. *Endo*, 323 U.S. at 309 (Roberts, J., concurring in the judgment); see also Dennis J. Hutchinson, “The Achilles Heel” of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 SUP. CT. REV. 455, 476-87 (reprinting Justice Jackson’s draft concurring opinion in *Endo*, and surveying Jackson’s overall discontent and anger over how the Court handled the cases).

Endo did indeed close the camps, and in doing so, it reaffirmed the importance of congressional authorization in any detention scheme. Yet again, when U.S. citizens were detained without charge, the validity of the detention turned on the actions of Congress, or the lack thereof.

III. THE DETENTION POWER AFTER WORLD WAR II: THE EMERGENCY DETENTION ACT, 18 U.S.C. § 4001(A), AND CIVIL COMMITMENT

A. Steel Seizure and the Emergency Detention Act of 1950

What followed, in the early 1950s, were two significant precedents—one legislative and one judicial—that further helped to clarify the scope of the president's power to detain his own citizens: the September 23, 1950 override of President Harry S. Truman's veto of the Internal Security Act of 1950,¹²⁸ which included, as Title II, the Emergency Detention Act,¹²⁹ and the Supreme Court's landmark decision on the scope and limits of presidential power during national emergencies two years later in the *Steel Seizure* case.¹³⁰

The Internal Security Act, at the time of its enactment, "constitute[d] the most comprehensive legislation which the United States has ever adopted to deal with a threat to its internal security."¹³¹ It was also the reconciliation of two very different approaches to protecting national security. Senator McCarran's version of the bill focused on the registration of organizations and persons "deemed to endanger American security."¹³² By contrast, West Virginia Senator Harley M. Kilgore, a staunch opponent of registration, "offered a substitute measure providing for the detention of potential spies and subversives whenever Congress and the President deemed the national safety to be sufficiently imperiled."¹³³ After an extended period of legislative debate,¹³⁴ McCarran's proposal ended up forming the bulk of Title I of the Internal

128. Pub. L. No. 81-831, ch. 1024, 64 Stat. 987 (1950) (codified as amended in scattered sections of 50 U.S.C.).

129. *Id.*, tit. II, 64 Stat. at 1019, 1019-31 (repealed 1971) [hereinafter EDA]. For an excellent survey of the political background to the Act and the history of its existence, see Richard Longaker, *Emergency Detention: The Generation Gap, 1950-1971*, 27 W. POL. Q. 395 (1974). See also Leslie W. Dunbar, *Beyond Korematsu: The Emergency Detention Act of 1950*, 13 U. PITT. L. REV. 221 (1952).

130. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

131. Note, *The Internal Security Act of 1950*, 51 COLUM. L. REV. 606, 606 (1951). Two years prior to the passage of the EDA, the Justice Department had secretly adopted a program, known as "the Portfolio," under which "dangerous persons" could be interned in an emergency if so declared by the executive. For an overview of the program, see Robert Justin Goldstein, *An American Gulag? Summary Arrest and Emergency Detention of Political Dissidents in the United States*, 10 COLUM. HUM. RTS. L. REV. 541, 558-61 (1978).

132. S. 4037, 81st Cong., 2d Sess. (1950); see also Note, *supra* note 131, at 606 n.3 (discussing the origin of the registration provisions).

133. Note, *supra* note 131, at 606 (citing S. 4130, 81st Cong., 2d Sess. (1950)).

134. For the legislative history behind the passage of the Internal Security Act, along with the external events impacting the debates, see WILLIAM W. KELLER, *THE LIBERALS AND J. EDGAR HOOVER: RISE AND FALL OF A DOMESTIC INTELLIGENCE STATE* 36-55 (1989).

The Detention Power

Security Act, and Kilgore's proposal, in a somewhat different form, was the basis for Title II—the Emergency Detention Act (EDA).

At the core of the EDA was the power of the Attorney General, once the President proclaimed an “Internal Security Emergency,”¹³⁵ to apprehend anyone whom he believed to be dangerous.¹³⁶ Though the overwhelming bulk of the Act dealt with the procedures to be followed once an emergency had been declared and detention had begun, the critical provisions—outlining what constituted an “Internal Security Emergency” and delimiting the powers of the executive branch when one was declared—were right at the beginning, including, most importantly, section 102(a):

[I]f . . . the President shall find that the proclamation of an emergency pursuant to this section is essential to the preservation, protection and defense of the Constitution, and to the common defense and safety of the territory and people of the United States, the President is *authorized* to make public proclamation of the existence of an “Internal Security Emergency.”¹³⁷

Thus, beginning in 1950, the President was given limited congressional authorization to pursue a program of preventive, administrative detention against anyone within the United States. Yet, a broader provision, authorizing preventive detention in the event of an “imminent invasion” or a *congressional* declaration of an “Internal Security Emergency,” was rejected “because of fear that the Constitution prohibits detention under the war powers *except in the event of active hostilities* presenting a clear threat to national security.”¹³⁸ The Emergency Detention Act nowhere dealt with whether or not the President, acting alone, has an inherent constitutional authority to detain U.S. citizens under certain circumstances during wartime,¹³⁹ yet, its mere existence suggests a conclusion all its own: If such power is inherently constitutional, why was the Act necessary in the first place? In other words, if the President, prior to the enactment of the Emergency Detention Act, could, in certain emergencies, unilaterally detain U.S. citizens on his own constitutional authority, why would Congress need to independently authorize such detentions?¹⁴⁰

With that in mind, the role of the *Steel Seizure* decision in the present

135. This could be done only upon invasion, declaration of war by Congress, or insurrection within the United States “in aid of a foreign enemy.” EDA § 102(a), 64 Stat. at 1021.

136. *Id.* §§ 103-04, 64 Stat. at 1021-22.

137. *Id.* § 102(a), 64 Stat. at 1021 (emphasis added).

138. Note, *supra* note 131, at 651 (emphasis added) (citing 96 CONG. REC. 14781.2, 14813 (1950)). The EDA was still a terrifying grant of power, for “[t]he authority of the Attorney General was uncontrolled. He could issue warrants at will and withhold evidence selectively, including the identity of the detainee’s accusers, thus by-passing the right of a defendant to confront and cross-examine his accusers.” Longaker, *supra* note 129, at 402; see also *Prohibiting Detention Camps: Hearings on H.R. 234 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong. 40-81 (1971) [hereinafter *4001 Hearings*] (collecting testimony on the perception of the EDA as a pernicious statutory regime).

139. See Note, *supra* note 131, at 651 n.427 (noting that the EDA leaves unresolved the question of whether the president could unilaterally authorize and pursue such detentions).

140. But see Arthur E. Sutherland, Jr., *Freedom and Internal Security*, 64 HARV. L. REV. 383, 410 (1951) (characterizing the EDA as a *restraint*); Note, *supra* note 132, at 659 (same).

analysis becomes readily apparent. *Steel Seizure*, or at least Justice Jackson's concurring opinion in the case, "outlined the three now-canonical categories that guide modern analysis of separation of powers."¹⁴¹ As Justice Jackson wrote, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."¹⁴² Jackson's second category, the so-called "zone of twilight," set forth the argument that

congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.¹⁴³

Finally, Jackson's third category, and the one of particular relevance here, dealt with presidential actions "incompatible with the expressed or implied will of Congress, [where] his power is at its lowest ebb."¹⁴⁴ As Jackson concluded, "then [the President] can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."¹⁴⁵

B. Abner Mikva's "Little Statute" and the Repeal of the EDA

With Justice Jackson's pronouncements in *Steel Seizure* in mind, the 1971 repeal of the EDA becomes all the more crucial to an understanding of the source of the detention power. Indeed, though no U.S. citizen was ever detained under the auspices of the EDA,¹⁴⁶ the Act was viewed as "an instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views."¹⁴⁷ Further, and perhaps most poignantly, "groups of Japanese-American citizens regard[ed] the legislation as permitting a recurrence of the round ups which resulted in the detention of Americans of Japanese ancestry in 1941 and subsequently during World War II."¹⁴⁸

Former Judge Abner Mikva, a U.S. congressman in 1971, summarized the

141. Katyal & Tribe, *supra* note 78, at 1274. On the background of the case and the substance of the other opinions, see MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* (1977).

142. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

143. *Id.* at 637. To support this proposition, Justice Jackson cited *Merryman*, *Milligan*, *Bollman*, and the debate over the authority to properly suspend the writ of habeas corpus. *Id.* at 637 n.3; *see also supra* text accompanying note 57.

144. *Steel Seizure*, 343 U.S. at 637.

145. *Id.* at 637-38.

146. No one was ever detained under the Act because no U.S. president declared an "internal security emergency" at any point during its twenty-one-year existence. *See* H.R. REP. NO. 92-116, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1436.

147. *Id.*, *reprinted in* 1971 U.S.C.C.A.N. at 1436.

148. *Id.*, *reprinted in* 1971 U.S.C.C.A.N. at 1436.

The Detention Power

background of the repeal of the EDA in a speech before the Chicago Lawyer Chapter of the American Constitution Society on June 15, 2003. As Mikva noted, his “little statute”

came about as a result of a 1970 visit I had made to Hyde Park High School, then a part of my congressional district. . . . [O]ne of the students asked me what I was going to do about the detention camps where they were going to send all the black kids in case of riots. I assured him that there were no such camps, and he showed me a picture of one The camps had [indeed] been authorized, and property was acquired, but camps were never opened. It also turned out that the Japanese American Citizens League, sensitive to what had happened in World War II, had been trying to get [the EDA] repealed. Each session, Congressman Matsunaga had put in a bill to repeal it, which was duly sent to the House Un-American Activities Committee where it didn’t even get a decent burial. One of my bright staffers suggested that instead of repealing the Emergency Detention Law, we put in a new provision in the criminal code, which said that “no citizen should be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” When I asked the parliamentarian where such a bill would get assigned, he smiled broadly, and said that it would go to the Judiciary Committee—of which I was a member.¹⁴⁹

The rest was history. In its report accompanying the Matsunaga-Mikva bill, the Ninety-Second Congress’s House Judiciary Committee also concluded that the EDA, if ever used, “would seem to violate the Fifth Amendment by providing imprisonment not as a penalty for the commission of an offense, but on mere suspicion that an offense may occur in the future.”¹⁵⁰ Yet, the Committee did not stop there. In the seminal passage, the Report concluded:

[I]t is not enough merely to repeal the Detention Act. . . . Repeal alone might leave citizens subject to arbitrary executive detention, with *no clear demarcation of the limits of executive authority*. It has been suggested that repeal alone would leave us where we were prior to 1950. The Committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists. This will assure that no detention camps can be established without at least the acquiescence of the Congress.¹⁵¹

Thus, in addition to repealing the Emergency Detention Act, the 1971 Act, an Act “[t]o amend title 18, United States Code, to prohibit the establishment of detention camps, and for other purposes,”¹⁵² also created, as per Mikva’s

149. Abner J. Mikva, *The Department of Injustice: John Ashcroft and His Rough Riders*, Remarks to the American Constitution Society, Chicago Lawyers Chapter 2-3 (June 15, 2003), *available at* <http://www.acslaw.org/pdf/mikvaspeech.pdf>; *see also* 4001 *Hearings*, *supra* note 138, at 42-43 (testimony of Rep. Mikva) (describing the origins of the Act); Longaker, *supra* note 129, at 400-07 (surveying the political background leading up to the repeal of the EDA).

150. H.R. REP. NO. 92-116, at 4, *reprinted in* 1971 U.S.C.C.A.N. at 1438.

151. *Id.* at 5, *reprinted in* 1971 U.S.C.C.A.N. at 1438 (emphasis added). Originally, the proposed bill required that all detentions be pursuant to the “incarceration” provisions of Title 18, the criminal code. The language was changed to any “Act of Congress” only after the government objected that provisions elsewhere in the U.S. Code—including in Title 10, the laws pertaining to the military—authorized the detention of citizens. *See* 4001 *Hearings*, *supra* note 138, at 72-80; *see also* Wuerth, *supra* note 45 (manuscript at 29 n.133). Thus, not only can there be no doubt that § 4001 applies to military detention as well, but it is also clear that Congress only had *specific* authorizations in mind.

152. Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347.

plan, 18 U.S.C. § 4001(a), which dictated that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹⁵³ The nature of the required authorization, implicit in the statute, was clear from the legislative history and the background—Congress had to *affirmatively* authorize the extra-judicial detention of U.S. citizens. As Richard Longaker put it:

Although there is no bar to Congress authorizing detention in the future, the legislative purpose is quite clear: Congress did not want to reserve detention for itself, it wanted to do away with it.¹⁵⁴ Congress was preparing only for the unthinkable when it preempted the field.

Any analysis of the scope or the extent of the application of § 4001(a) is significantly informed by *Howe v. Smith*,¹⁵⁵ in which the Supreme Court affirmed an expansive reading of the provision as “proscribing detention of *any kind* by the United States, absent a congressional grant of authority to detain.”¹⁵⁶ Thus, in *Howe*, the only case to date to bring it before the Supreme Court (albeit in a very different context), § 4001(a) was read expansively to apply to all federal detentions of U.S. citizens, and, as importantly, to require a congressional *grant* of authority, a clear legislative authorization, for the detention. After *Howe*, U.S. citizens are either detained under a congressional grant of authority, or they are detained illegally. *Howe*, a case completely forgotten about prior to September 11, further reaffirms the understanding of the President’s power to detain as not deriving from the Constitution, but from Congress. Otherwise, § 4001(a) would have raised significant constitutional questions, a claim pursued neither in *Howe* nor in any of the instant cases.

C. The Detention Power Before September 11

In sum, prior to September 11, if the executive sought to detain U.S. citizens as anything other than prisoners of war (and, indeed, quite possibly as POWs as well), such detention required unambiguous congressional authorization. Under *Brown*, no declaration of war or other authorization for military action could implicitly authorize such; under *Bollman* and *Merryman*, the executive lacked the independent power to suspend the writ of habeas corpus (though the Militia Act probably delegated such authority in areas under martial law); and, perhaps most importantly, under *Quirin*, the power to detain and try “enemy combatants,” whatever they may be, was held as deriving from Congress’s constitutional authority, belonging to the executive only to the extent to which he took care to ensure that the laws were faithfully executed—

153. 18 U.S.C. § 4001(a) (2000). As was noted immediately after its passage, § 4001(a) would not interfere with the Suspension Clause since only Congress could suspend the writ. See *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1313-17 (1972).

154. Longaker, *supra* note 129, at 406.

155. 452 U.S. 473 (1981).

156. *Id.* at 479 n.3. For a more detailed discussion, see Vladeck, *supra* note 10, at 962-63.

The Detention Power

the President could only act pursuant to preexisting legislative authorization. Prior to September 11, the power to detain was clearly the province of the legislature, a power over which Congress had dramatically and forcefully reasserted its domain in 1971. The law was clear and the precedents unambiguous.

IV. THE DETENTION POWER AFTER SEPTEMBER 11

A. Yasser Esam Hamdi, Jose Padilla, and U.S. Citizen “Enemy Combatants”

A few months after September 11, Yasser Esam Hamdi, a Louisiana-born U.S. citizen, was picked up by the Northern Alliance somewhere in Afghanistan. Allegedly carrying an AK-47 assault rifle at the time of his capture, Hamdi was subsequently turned over to U.S. authorities, who transferred him to Guantánamo Bay, Cuba, the holding place for non-citizen “enemy combatants,” in January 2002. Between January and April, the government determined that Hamdi was indeed a U.S. citizen, and transferred him stateside to a Navy brig, where he has remained ever since.¹⁵⁷ Hamdi filed a habeas petition in the U.S. District Court for the Eastern District of Virginia on June 11, 2002,¹⁵⁸ a petition that was formally dismissed by the Fourth Circuit on January 8, 2003,¹⁵⁹ after several rounds of interlocutory appeals.¹⁶⁰ On July 9, the court voted 8-4 to deny rehearing en banc.¹⁶¹

On May 8, 2002, by which point Hamdi had been in U.S. custody for nearly six months, Jose Padilla was arrested by the FBI on a material witness warrant issued by the U.S. District Court for the Southern District of New York as he got off a plane at Chicago’s O’Hare International Airport. On May 15, Padilla appeared before Southern District Chief Judge Michael B. Mukasey—who had issued the material witness warrant—at which time he was appointed counsel. Padilla again appeared in court one week later, where he moved to vacate the material witness warrant. After briefs were submitted on June 7, the question was set down for argument on June 11. On June 9, however, President Bush signed an order declaring Padilla to be an “enemy combatant,” at which time he was transferred to military custody and moved to the floating Navy Brig at Goose Creek, South Carolina, where he has remained since.¹⁶²

157. See *Hamdi v. Rumsfeld (Hamdi III)*, 316 F.3d 450, 459-62 (4th Cir.), *petition for cert. filed*, No. 03-6696 (U.S. Oct. 1, 2003).

158. See *Petition for Writ of Habeas Corpus, Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002) (No. 2:02cv439), <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums61102pet.pdf>.

159. *Hamdi III*, 316 F.3d 450.

160. See *Hamdi v. Rumsfeld (Hamdi II)*, 296 F.3d 278 (4th Cir. 2002); *Hamdi v. Rumsfeld (Hamdi I)*, 294 F.3d 598 (4th Cir. 2002).

161. *Hamdi v. Rumsfeld (Hamdi IV)*, 337 F.3d 335 (4th Cir. 2003).

162. For the factual background, see *Padilla ex rel. Newman v. Bush (Padilla I)*, 233 F. Supp. 2d 564, 569-73 (S.D.N.Y. 2002). See also Paula Span, *Enemy Combatant Vanishes Into a “Legal Black*

On June 11, the previously scheduled date to argue the motion to vacate, Donna Newman—Padilla's court-appointed counsel—filed a petition for a writ of habeas corpus.¹⁶³ Judge Mukasey released an opinion and order on December 4 finding that he did properly have jurisdiction over Padilla, that Secretary of Defense Donald Rumsfeld was a proper respondent, that the detention was facially lawful, and that Padilla should have access to counsel in order to fully adjudicate the remaining questions vis-à-vis the government's basis for detaining him.¹⁶⁴ On January 9, 2003, the day after the Fourth Circuit's decision in *Hamdi III*, the government filed a motion for reconsideration of the ruling on Padilla's access to counsel. Judge Mukasey granted the motion, but then adhered to his original opinion in an order issued on March 11,¹⁶⁵ and, on April 9, certified the case for interlocutory appeal to the Second Circuit.¹⁶⁶

Though the two cases raise myriad and complex procedural and substantive issues, the Southern District in *Padilla I* and the Fourth Circuit in *Hamdi III* each made short work out of the requirements of § 4001(a) by invoking the Authorization for Use of Military Force (AUMF) and 10 U.S.C. § 956(5), an appropriations provision for military detention.

At the core of the Fourth Circuit's January 8 decision in *Hamdi III* was the conclusion that "the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution."¹⁶⁷ After noting *Quirin*'s general statement about the president's powers under the Commander-in-Chief Clause, the opinion then concludes that "[t]hese powers include the authority to detain those captured in armed struggle,"¹⁶⁸ yet the only precedent the court cites to support that conclusion is one of its *own* earlier decisions in *Hamdi*.¹⁶⁹

This is a recurring theme in the January 8 opinion, which repeatedly cites the Fourth Circuit's two earlier rulings in *Hamdi*, especially *Hamdi II*, as the primary support for a number of its contentions. Indeed, the opinion cites only one Supreme Court precedent, and a shaky one at that, to support the broad judicial deference claim that underscores most of the court's argument, a claim otherwise based entirely on *Hamdi II*.¹⁷⁰

Hole," WASH. POST, July 30, 2003, at A1.

163. See Amended Petition for Writ of Habeas Corpus, *Padilla I* (No. 02-CIV-445), <http://news.findlaw.com/hdocs/docs/terrorism/padillabush61902apet.pdf>.

164. See *Padilla I*, 233 F. Supp. 2d 564.

165. *Padilla ex rel. Newman v. Rumsfeld (Padilla II)*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

166. *Padilla ex rel. Newman v. Rumsfeld (Padilla III)*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003).

167. *Hamdi v. Rumsfeld (Hamdi III)*, 316 F.3d 450, 459 (4th Cir. 2003), *petition for cert. filed*, No. 03-6696 (U.S. Oct. 1, 2003).

168. *Id.* at 463.

169. *Id.* (citing *Hamdi v. Rumsfeld (Hamdi II)*, 296 F.3d 278, 281-82 (4th Cir. 2002)).

170. *Hamdi III*, 316 F.3d at 463 ("Thus the Supreme Court has lauded '[t]he operation of a healthy deference to legislative and executive judgments in the area of military affairs.'" (quoting *Rostker v.*

The Detention Power

After presenting the judicial deference argument, the court considered, and summarily rejected, the § 4001(a) argument by concluding that both statutes satisfied the 1971 provision's requirement.¹⁷¹ For the AUMF, the court noted that "capturing and detaining enemy combatants is an inherent part of warfare; the 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops."¹⁷²

In addition to the AUMF, the Fourth Circuit also concluded that 10 U.S.C. § 956(5), which authorizes the use of appropriated funds for "the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined . . . to be similar to prisoners of war,"¹⁷³ also authorizes the detention. As the panel wrote, "[i]t is difficult if not impossible to understand how Congress could make appropriations for the detention of persons 'similar to prisoners of war' without also authorizing their detention in the first instance."¹⁷⁴

The court, however, was quick to highlight the difference between *Hamdi* and *Padilla*, and the limited scope of its holding in the former:

We have no occasion . . . to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding. We shall, in fact, go no further in this case than the specific context before us—that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces.¹⁷⁵

In their opinions concurring in the denial of rehearing en banc in *Hamdi IV*, Judges Traxler and Wilkinson only reaffirmed the above argument. As Judge Wilkinson wrote, "[t]o compare this battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges."¹⁷⁶

The four opinions concurring and dissenting from the Fourth Circuit's denial of rehearing en banc only further suggest the extent to which the underlying authority for the detentions was not a significant issue for the *Hamdi* court. Instead, the opinions focused on whether Hamdi's capture was

Goldberg, 453 U.S. 57, 66 (1981))). *Rostker* only took notice of other cases showing deference to *joint* decisions of the executive and the legislature, and the "military affairs" at issue were purely the government's authority over its *own* armed forces. See *Rostker*, 453 U.S. at 66-67.

171. *Hamdi III*, 316 F.3d at 467-68.

172. *Id.* at 467.

173. 10 U.S.C. § 956(5) (2000).

174. *Hamdi III*, 316 F.3d at 467-68.

175. *Id.* at 465 (citation omitted).

176. *Hamdi v. Rumsfeld (Hamdi IV)*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring in denial of rehearing en banc); see also *id.* at 352 (Traxler, J., concurring in denial of rehearing en banc) ("Our decision . . . addresses only the appropriate level of deference to be observed when the President exercised his power to detain an American citizen found within the boundaries of Afghanistan during our military efforts to overthrow its governing regime.").

clearly “in the zone of active combat,” or if that was even an open question,¹⁷⁷ assuming that there was no question as to the President’s underlying authority to detain U.S. citizens captured on the battlefield.

Similarly, in *Padilla*, Judge Mukasey, unwilling to accept the argument relied upon by the government in its briefs—that § 4001(a) does not apply to enemy combatants such as Padilla¹⁷⁸—instead accepted the government’s weaker assertion, that, even applying § 4001(a), Padilla’s detention was authorized by statute, relying, as the Fourth Circuit had in *Hamdi III*, on the AUMF.¹⁷⁹ In the opinion’s most critical passage, Judge Mukasey read the AUMF to “authorize[] action against not only those connected to the subject organizations who are directly responsible for the September 11 attacks, but also against those who would engage in ‘future acts of international terrorism’ as part of ‘such . . . organizations.’”¹⁸⁰ Like the Fourth Circuit judges concurring and dissenting from the denial of rehearing en banc in *Hamdi IV*, Mukasey was not subsequently confronted with the underlying authority for Padilla’s detention. Instead, on reconsideration, the questions focused entirely on Padilla’s access to counsel.¹⁸¹

Thus, the Fourth Circuit, with very little rigorous analysis, affirmed the underlying legality of Hamdi’s detention by passing reference to both statutes proffered by the government for just such a purpose. Similarly, the Southern District, though conducting a slightly more thorough examination of the statutes themselves, still found sufficient authorization in one—the AUMF. A closer look at both statutes, however, along with the arguments invoking them, proves both courts distressingly wrong.

B. Statutory Authorization, Part I: The Authorization for Use of Military Force

The AUMF was passed on September 18, 2001, just one week after the September 11 attacks.¹⁸² In vague terms, it authorized the President:

177. See generally *Hamdi IV*, 337 F.3d at 341-45 (Wilkinson, J., concurring in the denial of rehearing en banc); *id.* at 345-57 (Traxler, J., concurring in the denial of rehearing en banc); *id.* at 357-68 (Luttig, J., dissenting from denial of rehearing en banc); *id.* at 368-76 (Motz, J., dissenting from denial of rehearing en banc).

178. See Respondents’ Reply in Support of Motion To Dismiss the Amended Petition for a Writ of Habeas Corpus at 18, 24-27, *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02-CIV-445), <http://news.findlaw.com/hdocs/docs/terrorism/padillabush101102grply.pdf> (arguing that § 4001(a) cannot impinge on the president’s constitutional authority to detain enemy combatants during wartime).

179. See *Padilla*, 233 F. Supp. 2d at 598 (“Although the government struggles unsuccessfully to avoid application of the statute, the government is on firmer ground when it argues that even if § 4001(a) applies, its terms have been complied with.”).

180. *Id.* at 598-99 (citations omitted). Mukasey did not consider the § 956(5) argument, but he did not need to. Following from his discussion of the AUMF, Congress had authorized Padilla’s detention, and § 4001(a) was satisfied.

181. See *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

182. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C.A. § 1541 note (West 2003)).

The Detention Power

[T]o use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.¹⁸³

Despite the quick turnaround between the attacks and the AUMF, and although the language of the AUMF, as passed, was somewhat ambiguous, it was far less of a *carte blanche* than what the Bush Administration had originally asked for, since the Senate *removed* from the final version of the Act the phrase “and to deter and pre-empt any future acts of terrorism or aggression against the United States,” which originally came between “September 11, 2001” and “or harbored.”¹⁸⁴ Further, as the text plainly shows, the AUMF said nothing about the detention of anyone in connection with the use of military force, let alone the detention of U.S. citizens, such as Padilla, arrested *stateside* by civilian authorities. Additionally, there is the semantic argument—that “the language of the Authorization suggests that it applies to future acts only to the extent that the capture of those responsible for the September 11th attacks would prevent future attacks by those persons.”¹⁸⁵ Thus, if § 4001(a) requires an unambiguous congressional grant of authority to detain U.S. citizens, it is hard—if not impossible—to see how the AUMF is such a legislative measure.

Second, even if § 4001(a) could be satisfied by implicit congressional authorization, there is *Brown v. United States*, the Supreme Court’s 1814 holding that congressional declarations of war are not, as a general matter, independent legislative grants of substantive authority.¹⁸⁶ Under *Brown*, an executive’s power during a declared war is either inherent in the Constitution, is delegated by a separate Act of Congress, or does not exist—it cannot come from the declaration of war itself. Thus, it should only follow that use of force authorizations, though not strictly “declarations of war,” should be read with a similar presumption, especially in light of *Ex parte Endo*.¹⁸⁷ Yet, as Parts I, II, and III have clearly established, with one possible exception for prisoners of war, no inherent executive power to detain U.S. citizens during wartime has ever been sustained, let alone the detention of U.S. citizen “enemy combatants,” whatever that category of persons may actually be.

This is not to suggest that the President *may* lawfully detain Hamdi and

183. *Id.* § 2(a).

184. See 147 CONG. REC. S9950-51 (daily ed., Oct. 1, 2001) (statement of Sen. Byrd) (providing the text of the Administration’s proposal); see also *id.* at S9949 (“[T]he use of force authority granted to the President extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the President unbridled authority . . . to wage war against terrorism writ large without the advice and consent of Congress. That intent was made clear when Senators modified the text of the resolution proposed by the White House to limit the grant of authority to the September 11 attack.”).

185. Vladeck, *supra* note 10, at 967 n.40.

186. See *supra* notes 36-46 and accompanying text (discussing *Brown*).

187. See *supra* Section II.D (highlighting *Endo*’s take on legislative authorization during wartime).

Padilla as POWs on his own constitutional authority. Because of *Territo*, however, this question is not as easily resolved as the question of whether he can detain them on any other basis. If Hamdi actually was captured in the “zone of active combat,” and if he was fighting for the Taliban, then he probably could be lawfully detained as a prisoner of war until the cessation of hostilities, so long as the detention conformed to the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.¹⁸⁸

This, however, is a far cry from the Fourth Circuit’s assertion, in *Hamdi III*, that “[t]here 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.”¹⁸⁹ As argued above, to whatever extent such a “longstanding rule” exists, it derives from *Quirin*, it does not inherently authorize indefinite detention without trial, and it still requires legislative authorization, which is clearly lacking here. Further, the category “enemy combatant” has, except for *Quirin* and two other World War II-era cases, no history.¹⁹⁰ The argument that “capturing and detaining enemy combatants is an inherent part of warfare” distorts the truth. Capturing and detaining belligerents *is*, and always has been, an inherent part of warfare. However, even during the Second World War, when the precedents on which the Fourth Circuit’s decision relied were created, belligerents were lawful, in which case they were detained as prisoners of war, or unlawful, and thus subject to mandatory trial by congressionally authorized military commissions for crimes *proscribed by Congress*. “There was no middle ground for ‘enemy combatants’ to be held indefinitely without a judicial remedy.”¹⁹¹

188. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention]; see also *supra* note 101 (discussing the POW distinction). Detaining Padilla as a POW would raise a separate range of issues, since he was most decidedly *not* captured in a “zone of active combat,” since he was initially arrested by the FBI, and since he was not actively fighting against the United States at the time of his capture. Cf. NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (2d ed. 1999) (surveying the legal requirements of the treatment of all prisoners—military and otherwise—under international law).

189. *Hamdi v. Rumsfeld (Hamdi III)*, 316 F.3d 450, 468 (4th Cir. 2003) *petition for cert. filed*, No. 03-6696 (U.S. Oct. 1, 2003).

190. See ROBERT K. GOLDMAN & BRIAN D. TITTEMORE, AM. SOC’Y OF INT’L L., UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW (2002), <http://www.asil.org/taskforce/goldman.pdf>; see also Richard R. Baxter, *So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323 (1951).

191. Vladeck, *supra* note 10, at 967; see also *Ex parte Quirin*, 317 U.S. 1, 31 (1942); GOLDMAN & TITTEMORE, *supra* note 190, at 23-39 (discussing the historical distinction between lawful and unlawful combatants in international law). But see *Hamdi v. Rumsfeld (Hamdi IV)*, 337 F.3d 335, 341 n.1 (4th Cir. 2003) (Wilkinson, J., concurring in denial of rehearing en banc) (“The government does not concede that Hamdi is a prisoner of war, but rather asserts that he is an unlawful combatant. For purposes of the present case, the distinction is irrelevant because the decision to detain until the end of hostilities belongs to the executive in either case.”).

True, the *decision* to detain belongs to the executive, but not if there is no underlying authority—no

The Detention Power

Because neither Padilla nor Hamdi are detained *as POWs*, the AUMF cannot, as a matter of law under *Brown*, independently authorize their detentions. Thus, the AUMF does not satisfy § 4001(a).

C. Statutory Authorization, Part II: 10 U.S.C. § 956(5)

Of course, both *Brown* and § 4001(a) are still satisfied if authorization for the detentions of Hamdi and Padilla can be found in 10 U.S.C. § 956(5), the other statute invoked by the government as authorizing the detentions. Inasmuch as the case for the AUMF satisfying § 4001(a) fails to persuade, however, the arguments in support of 10 U.S.C. § 956(5) are completely irreconcilable with both a long-accepted canon of statutory interpretation and with the provision's history itself.

As to the statutory interpretation, to read 10 U.S.C. § 956(5) the way the Fourth Circuit suggests would lead to an absurd result, since it would effectively overrule 18 U.S.C. § 4001(a) and its requirement of an explicit grant of authority, yet no mention of § 4001(a) is made in the Act enacting 10 U.S.C. § 956,¹⁹² nor in the legislative history accompanying it.¹⁹³ Since repeals by implication are generally disfavored,¹⁹⁴ and “the policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act,”¹⁹⁵ it is dubious at best to read 10 U.S.C. § 956(5), which, in its plain language, merely appropriates funds for the detention of POWs and persons similar to such, and which does not explicitly authorize the detention of *anyone*, as implicitly authorizing the detention of U.S. citizens in satisfaction of the auspices of § 4001(a).¹⁹⁶

Yet, it is the history of § 956(5) that provides an even more forceful argument for why the provision could never satisfy § 4001(a). The government,

power thereto. Further, under Article 5 of the 1949 Geneva Convention, Hamdi cannot be detained as anything but a POW unless his status has been so determined by a “competent tribunal.” See 1949 Geneva Convention, art. 5, 75 U.N.T.S. at 140, 142; see also 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, 1409 n.6 (2002); Melysa H. Sperber, Note, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting With Enemy Forces*, 40 AM. CRIM. L. REV. 159, 164 n.28 (2003). No such determination has been made here; thus, to put it as simply as possible, either Hamdi is detained as a POW, with all the rights and privileges appertaining thereto, or his detention is illegal.

192. Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, § 1401(b)(1), 98 Stat. 2492, 2614 (1984).

193. H.R. REP. NO. 98-691 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4174.

194. See *Morton v. Mancari*, 417 U.S. 535, 549 (1974).

195. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978).

196. As importantly, Congress has explicitly authorized the detention of persons who might be “similar to prisoners of war” elsewhere in Title 10, specifically in Chapter 47, the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2000), which criminalizes a wide range of conduct both by U.S. soldiers and by enemy belligerents, lawful or otherwise. Codified in Chapter 48 of Title 10, § 956 applies to “such military correctional facilities as are necessary for the confinement of offenders against chapter 47 of this title.” 10 U.S.C. § 951.

in both *Hamdi* and *Padilla*, has argued that § 956(5) was codified in 1984, and should thus be read with the presumption that Congress knew about § 4001(a) when it passed the provision. Indeed, the language in 10 U.S.C. § 956(5) appropriating funds for “expenses incident to the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy, or Air Force whose status is determined . . . to be similar to prisoners of war, and persons detained in the custody of the Army, Navy, or Air Force pursuant to Presidential proclamation”¹⁹⁷ was codified by the Department of Defense Authorization Act of 1985.¹⁹⁸ However, similar language had been included in the annual Defense Department appropriations act every year, dating back well before the 1971 enactment of § 4001(a), all the way to the Second World War.¹⁹⁹

Specifically, most of the language in § 956(5), including that authorizing the use of funds for “persons detained . . . pursuant to Presidential proclamation” was first codified in an emergency supplemental appropriations act passed by the Seventy-Seventh Congress on December 17, 1941, just ten days after Pearl Harbor. The Act, which supplemented the 1942 Military Appropriation Act,²⁰⁰ authorized the Secretary of War

[T]o utilize any appropriation available for the Military Establishment, under such regulations as he may prescribe, for all expenses incident to the maintenance, pay, and allowances of prisoners of war, other persons in Army custody whose status is determined . . . to be similar to prisoners of war, and persons detained in Army custody pursuant to Presidential proclamation.²⁰¹

Such appropriations were necessary because, just five days earlier, President Roosevelt had issued Executive Order 8972, in which he “authorize[d] and direct[ed] the Secretar[ies] of War [and the Navy] . . . to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities.”²⁰²

The December 12 Executive Order was superseded, two months later, by the now-infamous Executive Order 9066, which authorized the creation of “military areas” from which “any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be

197. 10 U.S.C. § 956(5).

198. See *supra* note 193 and accompanying text.

199. See, e.g., Department of Defense Appropriation Act, 1982, Pub. L. No. 97-114, § 706, 95 Stat. 1565, 1578 (1981); Department of Defense Appropriation Act, 1972, Pub. L. No. 92-204, § 705, 85 Stat. 716, 727 (1971); Department of Defense Appropriation Act, 1963, Pub. L. No. 87-577, § 504, 76 Stat. 318, 328 (1962); Department of Defense Appropriation Act, 1954, ch. 305, § 610, 67 Stat. 336, 350 (1953); Military Appropriation Act, 1945, ch. 303, § 15, 58 Stat. 573, 595-96 (1944). Similar provisions can be found in each year's Act. For brevity's sake, I have here only included a range.

200. Military Appropriation Act, 1942, ch. 262, 55 Stat. 66 (1941).

201. Third Supplemental National Defense Appropriation Act, 1942, ch. 591, tit. III, § 103, 55 Stat. 810, 813-14 (1941).

202. Exec. Order No. 8972, 6 Fed. Reg. 6420 (Dec. 12, 1941).

The Detention Power

subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.”²⁰³ Executive Order 9066, which was ratified by Congress on March 21, 1942,²⁰⁴ became the basis for the Japanese-American internment camps.²⁰⁵ Though a number of Japanese Americans were convicted for violating exclusion orders, a measure that the 1942 Act criminalized, most were detained under the orders themselves,²⁰⁶ and were thus “persons detained in Army custody pursuant to Presidential proclamation,” funds for which were available under the December 17 Act, the predecessor to § 956(5).

It is unlikely—and nothing in the *Congressional Record* supports the notion—that this provision was enacted with internment in mind. Nevertheless, it is certainly ironic that the provision that was eventually used to appropriate funds for the detention of Japanese-American internees during World War II is today being cited as satisfying § 4001(a), a statute passed to explicitly repudiate the internment camps and to require unambiguous congressional authorization for the detention of all U.S. citizens.²⁰⁷ If anything, the history of § 956(5) is written in the very tears § 4001(a) was meant to wipe away.

To argue that § 956(5) authorizes the detention of U.S. citizens as enemy combatants is thus not only to argue that it authorizes the detention of *anyone* detained pursuant to a presidential proclamation, but also to argue that it rendered § 4001(a) moot, ab initio, for it is a contention that Congress, in enacting § 956(5)—and in codifying it in 1984—delegated its *entire* detention authority to the President. If this is not an absurd result, what is? If § 956(5) does authorize the detention of U.S. citizens as “enemy combatants,” as the Fourth Circuit plainly held it does,²⁰⁸ then the slope for others who might be detained is not just slippery; it is downright vertical.

Thus, no compelling argument exists that either the AUMF or 10 U.S.C.

203. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

204. Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (repealed 1948).

205. See Grossman, *supra* note 120, at 651-52.

206. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); see also Gudridge, *supra* note 122, at 1947 & n.73 (discussing the distinction between the exclusion cases and *Ex parte Endo*, 323 U.S. 283 (1944), and citing the numbers of persons believed to fit under either scheme).

207. See *supra* notes 146-156 and accompanying text (discussing the background of § 4001(a) and the importance of repudiating the internment camps).

208. *Hamdi v. Rumsfeld (Hamdi III)*, 316 F.3d 450, 467-68 (4th Cir. 2003). It is no small wonder, based on the Fourth Circuit’s summary disposition of this critical question, that Judge Motz was so critical in her dissent from the denial of rehearing en banc:

I fear that the panel may also have opened the door to the indefinite detention, without access to a lawyer or the courts, of any . . . citizen, even one captured on American soil, who the Executive designates an “enemy combatant,” as long as the Executive asserts that the area in which the citizen was detained was an “active combat zone,” and the detainee, deprived of access to courts and counsel, cannot dispute this fact.

Hamdi v. Rumsfeld (Hamdi IV), 337 F.3d 335, 373 n.5 (4th Cir. 2003) (Motz, J., dissenting from denial of rehearing en banc). Indeed, the holding is even broader than what Judge Motz portrays.

§ 956(5) satisfy the requirements of § 4001(a). Even if § 4001(a) does not require *explicit* congressional authorization (which the legislative history seems to suggest it does), neither statute serves to implicitly authorize the detentions either. Hamdi and Padilla are both detained in violation of § 4001(a), and all of the secondary questions that the courts have thus far been preoccupied with—e.g., where Hamdi was captured; whether his next friend should have standing; whether Padilla should have access to counsel; whether the Southern District should have jurisdiction over his habeas petition; and so on—should never have been reached in the first place. This is not to suggest that these issues are unimportant or easily resolved;²⁰⁹ rather, though this Note has focused much more on the baseline legality of the detentions than on the due process afforded to the detainees, I have not meant to imply that the latter is any *less* important than the former. Certainly, if Congress *had* authorized the detentions of Hamdi and Padilla, the inquiry would not end there, but would rather turn to the process by which they, as U.S. citizens, were designated “enemy combatants,” and the availability of judicial review to challenge that determination. Because Congress has *not* so acted, however, these questions need not be reached.

E. *On the Importance of Congress*

Congressional authorization, of course, is not all that is necessary for the detention of U.S. citizens—such authorization must comport with the various protections afforded by the Constitution, whether explicitly or by construction.²¹⁰ Still, as Alexander Bickel argues, “Singly, either the President or Congress can fall into bad errors So they can together too, but that is somewhat less likely, and in any event, together they are all we’ve got.”²¹¹

That Congress has demonstrated a willingness to grant broad authority to the executive branch to fight the “war on terror” is self-evident from a host of post-September 11 enactments, the most wide-ranging of which is, of course,

209. Many of the other pieces discussing *Hamdi* and *Padilla* thus far have indeed focused on several of these questions. See sources cited *supra* note 10.

210. The Supreme Court has, in recent years, consistently been confronted with the due process constraints on non-criminal confinement in a series of cases arising out of the Kansas Sexually Violent Predator Act. See *Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997); see also *In re Crane*, 7 P.3d 285 (Kan. 2000). For an overview of the background of the cases, the decisions in both, and the due process calculus employed by the court, see Peter C. Pfaffenroth, *The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of Kansas v. Crane*, 55 STAN. L. REV. 2229 (2003). Even in the immigration context, the Court has repeatedly encountered—and attempted to prescribe—the due process limits on indefinite detention pending deportation. Compare *Zadvydas v. Davis*, 533 U.S. 678 (2001), with *Demore v. Kim*, 538 U.S. 510 (2003). For additional jurisprudence on the due process limits of other forms of non-criminal detention, see *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987); and *Jones v. United States*, 463 U.S. 354 (1983).

211. *War Powers, Libya, and State Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, International Security, and Science of the House Comm. on Foreign Affairs*, 99th Cong. 88 (1986), quoted in ELY, *supra* note 86, at 9 & 147 n.47.

The Detention Power

the USA PATRIOT Act. USA PATRIOT, the source of significant criticism from civil libertarians, is itself instructive, for it authorizes the executive branch to detain aliens suspected of terrorist ties for up to seven days without charges,²¹² with no similar provision for U.S. citizens. An earlier statute had already made it a crime to provide material support to terrorist organizations,²¹³ a charge the government has used against a number of other terrorism suspects in the aftermath of September 11.²¹⁴ Additionally, the government has detained a number of individuals under a robust reading of the material witness statute, 18 U.S.C. § 3144, that was recently sustained by the Second Circuit,²¹⁵ and that is an explicit congressional authorization in any event. Other congressional action in the aftermath of September 11 only further underscores the role Congress has thus far played in the “war on terror.”²¹⁶

Indeed, it is not as if Congress has been reluctant to arm the executive with a host of weapons to fight the “war.” If anything, it has been too suppliant, deferring to the executive’s insistence that such powers are necessary to prevent future attacks.²¹⁷ This belies the larger point, however, that Congress, in the aftermath of September 11, has not shown the least reluctance to play its constitutional role; certainly, it is not the case that the executive branch is here confronted with a hostile or indifferent legislature refusing to act. If the executive seeks authority to detain U.S. citizen “enemy combatants” as part of the war on terror, Congress must first independently act to authorize such.²¹⁸

212. See *supra* note 11 (outlining USA PATRIOT’s detention provisions).

213. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303(a), 110 Stat. 1214, 1250 (codified as amended at 18 U.S.C. § 2339B (2000)).

214. For an overview of these cases, see Cole, *supra* note 17, at 8-15.

215. *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003). In *Awadallah*, the Second Circuit resolved a conflict between different district judges in the Southern District on the viability of prolonged detentions under the statute. Compare *id.*, with *United States v. Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (Schiendlin, J.), and *In re Application of United States for a Material Witness Warrant*, 213 F. Supp. 2d 287 (S.D.N.Y. 2002) (Mukasey, C.J.). For a useful analysis of the underlying legal issues, see Laurie L. Levenson, *Detention, Material Witnesses & The War on Terrorism*, 35 LOY. L.A. L. REV. 1217 (2002).

216. See, e.g., Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified at 49 U.S.C.A. § 40101 note (West 2003)); Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (same); see also 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-38, 115 Stat. 220.

217. This is hardly a new problem. See ELY, *supra* note 86, at ix (“[D]ecisions [to go to war] have been made throughout the Cold War period by the executive, without significant congressional participation (or judicial willingness to insist on such participation). It is common to style this shift a usurpation, but that oversimplifies to the point of misstatement. It’s true our Cold War presidents generally wanted it that way, but Congress (and the courts) ceded the ground without a fight. . . . [T]he legislative surrender was a self-interested one: Accountability is pretty frightening stuff.”); see also Editorial, *The Moussaoui Law*, WASH. POST, Aug. 4, 2003, at A14 (“Congress has sat on the sidelines far too long as important decisions were made concerning the legal response to 9/11.”).

218. One example of what such authorization might look like is the Detention of Enemy Combatants Act, H.R. 1029, 108th Cong. (2003). Originally introduced in the 107th Congress by California Congressman Adam Schiff, the bill would authorize the detention of U.S. citizen “enemy combatants” in the war on terror under certain, prescribed conditions, and with a whole host of

Especially in the current climate, it is not a major political obstacle, but it is a constitutionally mandated one.

CONCLUSION: THE ROLE OF COURTS IN THE "WAR ON TERROR"

Much has been made, in the three decades since the end of the Vietnam War, of the extent to which that conflict altered the constitutional relationship between legislative and presidential war power, or, at the very least, highlighted a shift that had already begun to take place.²¹⁹ Yet, as much as Vietnam crystallized the debate over the separation of war-making powers between the executive and Congress, it also saw a reaffirmation of the separation of *detention* powers between the two branches. It is no coincidence that the present incarnation of 18 U.S.C. § 4001(a) was enacted in the midst of the conflict in Southeast Asia, for it was undoubtedly meant to apply as broadly and forcefully in wartime as in peacetime.²²⁰

A number of scholars have challenged various Administration policies and initiatives in the aftermath of September 11 on the grounds that the "war against terror" is not a war, for constitutional purposes, or, at the very least, it is not a war that invokes the war powers allocated to the president by the Constitution.²²¹ In the detention realm, however, such a distinction is wholly unnecessary. Though the Constitution may not be what Justice Davis described in *Milligan* as "a law for rulers and people, equally in war and peace,"²²² it is clear beyond any doubt that § 4001(a) *is*, especially when the 1971 enactment is properly understood as Congress's reclamation and reassertion of a power it alone possessed dating back to the Founding.

Assessing and asserting the force and vitality of § 4001(a), however, is only

procedural safeguards—including legislative oversight. The bill makes explicit reference to § 4001(a) and *Hove v. Smith*, *id.* § 2(11), and guarantees the right to counsel in habeas petitions filed to contest the legality of a detention. *Id.* § 2(14)-(15). As Representative Schiff noted in introducing the bill,

Congress has yet to authorize the detention of citizens in the war on terrorism, yet American citizens have in fact been detained as enemy combatants. For this reason, [Congressman] Frank and I are introducing the Detention of Enemy Combatants Act, . . . [which] will provide for clear standards and procedures under which American citizens or lawful residents believed to be members of al Qaeda or its supporters may be detained as enemy combatants while also provided due process.

149 CONG. REC. E324 (daily ed. Feb. 27, 2003) (statement of Rep. Schiff). Though passage seems unlikely, the bill is an important statement in and of itself—"Congress knows how to authorize the detention of U.S. citizen enemy combatants, if it so desires." Vladeck, *supra* note 10, at 968.

219. See ELY, *supra* note 86; LOUIS FISHER, *PRESIDENTIAL WAR POWER* 185 (1995); see also Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845 (1996) (reviewing FISHER, *supra*).

220. See Longaker, *supra* note 129, at 408 ("Had there not been the use of abundant independent presidential power in Vietnam there is real question whether Congress would have been so eager to reassert its own authority [in repealing the EDA and enacting § 4001].").

221. See, e.g., Fitzpatrick, *supra* note 4, at 346-50.

222. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866). On the problems with Justice Davis's oft-cited elegy, see ROSSITER & LONGAKER, *supra* note 57, at 34-35.

The Detention Power

the beginning, for inasmuch as it may bar unilateral executive action, such a bar is completely meaningless absent judicial enforcement. Here, we run headlong into what Professor Harold Koh has called “the problem of judicial tolerance”—the fact that, especially since Vietnam, “[t]he president almost always seems to win in foreign affairs” because the courts have tended to defer to the political branches when it comes to questions of war and national security.²²³ But why should this matter in the detention realm, where the foreign affairs power is nowhere implicated, and where the traditional source of the authority is *Congress*, and not the President?

Indeed, this is the enigma of the detention of “enemy combatants” after September 11—the fact that the statutes and the judicial precedents are entirely on one side, the government is entirely on the other, and the courts are stuck squarely in the middle, attracted by precedent, yet swayed just as much by politics. This is also the reason why the detention of just two people in the aftermath of September 11 represents such a fundamental apex in the role of the judiciary in the “war on terror” and in the ever-ongoing debate over the proper separation of powers. Both the Fourth Circuit’s opinions in *Hamdi III* (as well as the concurrences in *Hamdi IV*) and the Southern District’s opinion in *Padilla* can be read as manifestations, at their core, of this “problem of judicial tolerance.” Judge Wilkinson’s opinion for the Fourth Circuit is replete with references to—and, indeed, is largely based on the idea of—the “proper” deference owed to the executive in times of conflict, especially with regard to the questionable decision to characterize Hamdi as an “enemy combatant.”²²⁴ Judge Mukasey’s opinion in *Padilla*, which otherwise rejects many of the government’s less significant arguments, defers, in its most critical passage, to the interpretation of the AUMF favored by the Administration, despite evidence in the legislative history that Congress explicitly meant to foreclose such a reading.

Yet, this is not *just* what Professor Koh called the “problem of judicial tolerance,” for tolerance implicitly (and, for Professor Koh, explicitly) suggests passivity. Instead, these decisions are better characterized as highlighting the problem of judicial abdication, for in deferring to what is essentially unilateral

223. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 148 (1990); see also REHNQUIST, *supra* note 49, at 221 (“[T]here is also the reluctance of courts to decide a case against the government on an issue of national security during a war.”); Harold Hongju Koh, *Judicial Constraints: The Courts and the War Powers*, in *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES* 121 (Gary M. Stern & Morton H. Halperin eds., 1994).

224. This is a major problem with *Hamdi III* and *Hamdi IV*—the extent to which both the panel opinion in the former and the concurring opinions in the latter repeatedly invoke the need for deference, and yet still reach dubious resolutions on the merits. The *Washington Post* put it best: “Some circles can’t be squared, and the courts must at some point choose between deference to the president’s war powers and protecting the liberty of Americans. Here’s hoping the Supreme Court makes a better choice.” Editorial, *Dissent on Detention*, WASH. POST, July 20, 2003, at B6.

executive action, the judiciary is failing to serve its most fundamental constitutional purpose as a check on such power. As Justice Black opened his dissent in *Johnson v. Eisentrager*, “[n]ot only is United States citizenship a ‘high privilege,’ it is a priceless treasure. . . . This ideal gave birth to the constitutional provision for an independent judiciary with authority to check abuses of executive power and to issue writs of habeas corpus liberating persons illegally imprisoned.”²²⁵

The danger, as Justice Jackson so presciently warned in *Korematsu*, is judicial validation of a policy that is otherwise constitutionally repugnant.²²⁶ That is the danger here.²²⁷ It is slightly more complicated in the case of Yasser Esam Hamdi, but at least insofar as Jose Padilla is concerned, the detention of a U.S. citizen, arrested by domestic authorities within the United States without charge, transferred from civilian to military custody (where he has since been indefinitely confined without access to counsel) solely on the basis of a presidential determination which the government argues is not subject to judicial review, when no statute of Congress has authorized such unilateral executive action, is as deeply chilling to the rights conferred on all U.S. citizens by the Due Process Clause of the Fifth Amendment as any case to come before the federal judiciary in our generation, if not ever.²²⁸

Those who support the government’s position argue that such actions are necessary in order to successfully prosecute the “war on terror” and to prevent future terrorist attacks like those of September 11. As Attorney General John Ashcroft told the Senate Judiciary Committee in December of 2001, “to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies, and pause to America’s friends.”²²⁹ I think that is backwards. It is the sacrifice of freedoms in the name of security that gives pause to our friends—we need look no further for evidence of this than the outrage that the Guantánamo detentions have caused in Great Britain, and the protests that have been leveled at Tony Blair, easily our closest ally in the “war on terror.”²³⁰

225. *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950) (Black, J., dissenting).

226. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (“[O]nce a judicial opinion rationalizes [an executive action] to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an [action], the Court for all time has validated the principle . . . [which] then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”).

227. Cf. Elbert Lin, Case Comment, *Korematsu Continued* . . . , 112 YALE L.J. 1911 (2003) (noting the disturbing parallels between *Korematsu* and a case arising out of the post-September 11 removal of passengers from commercial airline flights allegedly based solely on their race).

228. Indeed, perhaps only *Dred Scott* and the World War II internment cases have implicated similarly fundamental liberty interests.

229. *Anti-Terrorism Policy Review: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong., 1st Sess., 2001 WL 26188084 (2001) (statement of Att’y Gen. John Ashcroft).

230. See, e.g., Nicholas Watt and Vikram Dodd, *MPs’ Fury at Secret US Trials of ‘Terror’ Britons*,

The Detention Power

The power to detain U.S. citizens is very much embedded within the Constitution. The power to do so unilaterally, however, is not. The *government* may have the authority to detain Hamdi and Padilla as “enemy combatants,” but President Bush, acting on his own, simply doesn’t. To date, the Fourth Circuit has used the “zone of active combat” distinction as a means around the otherwise unambiguous precedents; the Southern District of New York relied on its interpretation of an ambiguous and vague congressional Resolution authorizing the war in Afghanistan that certainly did not mean to authorize the detention of U.S. citizens arrested in Chicago. Neither conclusion is convincing, not just because the legal arguments are so overwhelmingly contraindicated, but because the judiciary has an obligation, in such cases, to check the power of a President acting outside the Constitution, and to restore the constitutional role Congress reclaimed for itself in enacting § 4001(a).²³¹

There is nothing ideological or unduly melodramatic about such a concern for the separation of powers in the present context. The voluminous precedents read the same regardless of the reader; what really matters—and what this Note hopes to ensure—is that they are read at all.

Ancient Right unnoticed as the breath we draw—
Leave to live by no man’s leave, underneath the law.²³²

GUARDIAN, July 8, 2003, at 2; see also Harold Hongju Koh, Foreword, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003) (surveying the criticism of America for its abandonment of international law and for its unilateralism); cf. Cole, *supra* note 17 at 29 (“A little more than one year after the United States suffered one of the worst attacks on civilian life in modern history, one might expect to find widespread sympathy and support for the United States around the world. But instead, reports of anti-Americanism suggest that hostility to the United States has grown substantially since September 11.”).

Britain, especially, has a long history of dealing with terrorism, and boasts a sophisticated statutory framework for detaining suspects. For a survey, see Rhiannon Talbot, *The Balancing Act: Counter-Terrorism and Civil Liberties in British Anti-Terrorism Law*, in LAW AFTER GROUND ZERO, *supra* note 4, at 123. Cf. SIMPSON, *supra* note 18; Cornelius P. Cotter, *Emergency Detention in Wartime: The British Experience*, 6 STAN. L. REV. 238 (1954) (surveying detention in wartime England).

231. The warning of Chief Judge William Cranch, dissenting from the D.C. Circuit Court’s decision in *United States v. Bollman*, is very appropriate:

In times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may thereby bring one criminal to punishment, we may furnish the means by which a[] hundred innocent persons may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.

24 F. Cas. 1189, 1192 (C.C.D.D.C. 1807) (No. 14,622) (Cranch, C.J., dissenting); see also *In re McDonald*, 16 F. Cas. 17, 19 (C.C.E.D. Mo. 1861) (No. 8751) (borrowing the *Bollman* language to justify the importance of judicial intervention in Missouri on the eve of the Civil War).

232. RUDYARD KIPLING, *The Old Issue*, in RUDYARD KIPLING’S VERSE 294, 295 (Doubleday, Doran & Co. 1940); see also Hutchinson, *supra* note 127, at 483-84 & n.91 (reprinting Justice Jackson’s draft concurrence in *Endo*, which contained the couplet, and explaining its historical origins). Justice Jackson invoked the passage again in his *Steel Seizure* concurrence on the limits of executive power. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

