YOU SAY DEFENDANT, I SAY COMBATANT: OPPORTUNISTIC TREATMENT OF TERRORISM SUSPECTS HELD IN THE UNITED STATES AND THE NEED FOR DUE PROCESS[A1]

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"[S]hould the Government determine that the *defendant* has engaged in conduct proscribed by the offenses now listed . . . the United States may . . . capture and detain the defendant as an unlawful *enemy combatant.*"[1]

— Plea Agreement of "American Taliban" John Walker Lindh

"You are not an *enemy combatant*—you are a *terrorist.* You are not a soldier in any way—you are a *terrorist.*"[2]

— U.S. District Court Judge William G. Young to "shoe bomber" Richard Reid

"[Enemy combatants] are not there because they stole a car or robbed a bank. . . . They are not *common criminals.* They're *enemy combatants* and *terrorists* who are being detained for acts of war against our country and this is why different rules have to apply."[3]

— U.S. Secretary of Defense Donald H. Rumsfeld

[A1] EDITOR'S NOTE: After this article was completely written and accepted for publication, the Supreme Court ruled in *Hamdi v. Rumsfeld*, as author Radack proposed with great foresight, that the *Mathews v. Eldridge* balancing test provides the appropriate analysis for the type of process that is constitutionally due to a detainee seeking to challenge his or her classification as an "enemy combatant." See Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004).

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1. Plea Agreement at ¶ 21, United States v. Lindh, Crim. No. 02-37A (E.D.Va 2002) (emphasis added).

2. Pamela Ferdinand, *Would-Be Shoe Bomber Gets Life Term*, WASH. POST, Jan. 31, 2003, at A1 (quoting U.S. District Court Judge William G. Young during sentencing of Reid) (emphasis added).

3. Secretary of Defense Donald H. Rumsfeld, Remarks to Greater Miami Chamber of Commerce (Feb. 13, 2004), http://www.globalsecurity.org/military/library/news/2004/02/mil-040213-dod01.htm (emphasis added).

I.
INTRODUCTION

Nearly any discussion of terrorism—whether it is legal, academic or political—is likely to wrestle with terminology. Traditionally, terrorist acts have been treated as civil crimes rather than acts of war,[4] but the labeling of terrorism as warfare has gained tremendous political currency since the attacks of September 11, 2001.[5] The amorphous war on terrorism has produced an equally indefinite vocabulary for terrorism suspects held in the United States. Material witness? Enemy combatant? Criminal defendant? Terrorist? The status of a detainee by any other name would be just as unclear and uncertain. The multitude of terms speaks volumes about the indecision of the executive and judicial branches over what to call terrorism detainees being held in the United States,[6] and consequently how to treat them. It also leaves the impression that the government is labeling them according to how it wants the detainees to be treated.

For an Administration with a record of practicing secrecy and silence,[7] neither the Bush White House nor the Ashcroft Justice Department are short on words. But years after the Administration re-introduced the term "enemy combatant" into the public lexicon, it is still unclear what the label means.[8] The infi-

4. *See* Charles Lane, *War on Terrorism's Legal Tack Is Rejected*, WASH. POST, Dec. 19, 2003, at A22 ("'The Second Circuit [in its December 18, 2003, *Padilla* decision] has struck a body blow to the whole theory of fighting the war on terrorism, which was to move it out of the criminal justice system and treat it as a war,' said John C. Yoo, a former Justice Department official who helped design the administration's approach. 'The Second Circuit essentially said, no, this is like crime. And if that sticks, many other pieces that underlie what the government does in the war on terror will collapse as well.'"). *Id. But see* John Dean, *Appropriate Justice for Terrorists: Using Military Tribunals Rather Than Criminal Courts*, FINDLAW (Sept. 28, 2001), *at* http://www.news.findlaw.com/dean 20010928.html (last visited Apr. 6, 2004) (arguing that treating acts of terror as ordinary crimes would trivialize the attacks of September 11).

5. In this article, I submit that being an accused terrorist should not be synonymous with being an enemy combatant. There is a distinction, or at least there should be, between a "crime" and an "act of war." Such a distinction used to exist. The government's characterization of terrorist suspects as "enemy combatants" collapses civil crimes and acts of war, as does the conflation of the phrases "war on terrorism" and "war crimes." We are fighting an international criminal organization, al Qaeda, and those who aid it, such as the Taliban. Blending the idioms of justice and war only blurs the issue, an obfuscation the executive appears to embrace.

6. The foreign detainees being held at Guantánamo Bay, Cuba, are beyond the scope of my discussion in the article. *See generally* Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that enemy aliens who *have not entered the United States* are not entitled to access to courts). The issue of access to courts by those who have not entered the United States is being reconsidered by the Supreme Court this term. *See* Rasul v. Bush, No. 03-334 and Al Odah v. U.S., 03-343.

7. For example, the Department of Justice has defended the government's blanket closure of September 11-related deportation hearings as necessary, despite the fact that individual immigration judges already have the authority to close immigration proceedings if they choose. On June 17, 2003, the District of Columbia Circuit Court of Appeals affirmed the government's authority to keep secret basic information concerning the hundreds of people detained after the September 11 terrorist attacks. Center for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003); *see also* Mark J. Rozell, *Executive Privilege Revived? Secrecy and Conflict During the Bush Presidency*, 52 DUKE L. REV. 403, 407 (2002).

8. This question is headed for the Supreme Court in Hamdi v. Rumsfeld, 316 F.3d 450 (4th

nite elasticity of the term "enemy combatant," and the ease with which individuals are shuffled back and forth between the military justice system and the civilian justice system, belie the government's confidence about how to proceed with this new class of individuals.

"American Taliban" John Walker Lindh was transferred from the military system to the civilian legal system, with a promise to return him to the military system if he violates his plea agreement.[9] U.S. citizen and "dirty bomb" suspect Jose Padilla was arrested on a material witness warrant, detained in a federal jail and appointed counsel, declared a "military combatant" a month later, and then ordered released by a federal appeals court a year and a half later. British national Richard Reid, the convicted "shoe bomber," received the benefits of the civilian legal system[10] while U.S. citizen Yaser Hamdi faced the military system. The criminal justice system was used to convict Iyman Faris, a truck driver from Ohio who admitted in June 2003 that he was involved in a conspiracy by al Qaeda to destroy the Brooklyn Bridge,[11] yet the government is considering dropping the criminal case against French national Zacarias Moussaoui, the alleged "20th hijacker," in order to re-designate him as an enemy combatant and try him before a military tribunal.[12] Most recently, Qatari graduate student Ali Saleh Kahlah al-Marri, described by federal prosecutors as an al Qaeda "sleeper operative,"[13] was designated an enemy combatant. The government dropped criminal charges against him less than a month before his trial,[14] making him the first terrorism suspect in the U.S. to be declared an enemy combatant after being criminally charged. This followed an unsuccessful attempt by the prosecution to get al-Marri's case dismissed without prejudice so they would have the option to

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Cir. 2003), *cert. granted* 124 S.Ct. 981 (U.S. Jan. 9, 2004) (No. 03-6696) and Rumsfeld v. Padilla, 352 F.3d 695 (2d Cir. 2003), *cert. granted* 124 S.Ct. 1353 (U.S. Feb. 20, 2004) (No. 03-1027). *See* Charles Lane, *Justices to Plunge into Legal Issues Raised by War on Terror*, WASH. POST, Jan. 5, 2004, at A15.

9. Plea Agreement, *supra* note 1.

10. On January 30, 2003, Richard Reid, the British drifter and Muslim fundamentalist who attempted to detonate bombs in his shoes during a transatlantic flight, was imprisoned for life as the first admitted member of al Qaeda sentenced in the U.S. since the terrorist attacks on September 11. *See* Ferdinand, *supra* note 2.

11. *See* Eric Lichtblau, *Bush Declares Student an Enemy Combatant*, N.Y. TIMES, June 24, 2003, at A15.

12. *The Moussaoui Experiment*, WASH. POST, Jan. 27, 2003, at A18 (editorial). Moussaoui is the only person charged in this country with a role in the September 11 terrorist attacks, and the government is seeking the death penalty. *See* Tom Jackman, *Moussaoui Asks to Call Three More al Qaeda Witnesses*, WASH. POST, Mar. 22, 2003, at A18.

13. Under the "sleeper" theory, the fact that a suspicious person has done nothing illegal only underscores his dangerousness. Al Qaeda is said to have "sleeper cells" around the world, groups of individuals living quiet and law-abiding lives, but ready and willing to commit terrorist attacks once they get the call. It should be noted that this theory is remarkably similar to the government's World War II argument that the fact that Japanese aliens and citizens had taken no subversive action yet only underscored how dangerous they were. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 963, 992 (2002).

14. Susan Schmidt, *Qatari Man Designated an Enemy Combatant*, WASH. POST, June 24, 2003, at A1.

move him back to the civilian justice system at some point.[15]

After detailing the checkered history and current use of the term "enemy combatant," I document the constant shuttling of various individuals back and forth between the military authorities and the civilian authorities, and submit that the "enemy combatant" label is being used as a term of convenience, making its usage a tool for forum-shopping and selective justice, and ultimately undermining the legitimacy and integrity of both systems. While acknowledging that the government is entitled to considerable deference in detention decisions during hostilities,[16] I argue that the porous wall between the civilian justice system and the military system is itself a denial of due process of law under the Fifth Amendment.[17] I conclude by proposing that there be a procedure—an evidentiary hearing designed to determine enemy combatant status for both citizens and non-citizens[18] detained on U.S. soil—in an effort to fully comport with due process.

II.
ENEMY COMBATANT STATUS

A. A Brief History of the Term "Enemy Combatant"

One of the most controversial legal disputes resulting from the global war against terrorism is the unilateral and categorical classification of individuals as "enemy combatants." This classification allows the U.S. government to hold these individuals indefinitely, without charges, in solitary confinement and in-

15. *See* Order of Dismissal, United States v. Al-Marri, Crim No. 03-10044 (C.D. Ill. filed June 23, 2003) (with handwritten correction) (on file with author).

16. *See* Hirabayashi v. United States, 320 U.S. 81, 99 (1943) (noting that under this deferential standard, Court could not "reject as unfounded the judgment of the military authorities," that many Japanese Americans were disloyal for various cultural reasons, that the disloyal ones posed a significant threat of sabotage and espionage, and that it was difficult to distinguish disloyal from loyal); Korematsu v. United States, 328 U.S. 214, 218 (1944); *see also* Michael C. Dorf, *Who Decides Whether Yaser Hamdi, or Any Other Citizen, is an Enemy Combatant?*, FINDLAW, *at* http://www.writ.news.findlaw.com/dorf/20020821.html (Aug. 21, 2002) (noting that "deference does not, and should not, mean rolling over and playing dead"); Jonathan Lurie, *Military Justice in America* 8 (2001) (contending that far too often civilian courts have responded to announcements of military interests with "supine deference").

17. U.S. CONST. amend. V. This idea was developed initially in a spirited class on "Metaprocedure" taught by Professor Owen M. Fiss, Sterling Professor of Law at Yale Law School, on April 23, 2003; *see also* Sara Aliabadi, *Citizen Terrorists Deserve the Right to a Jury Trial*, THE TIMES, Mar. 9, 2003, at A11, from which I also drew inspiration.

18. Due process rights are explicitly granted without regard to citizenship or immigration status. In 1896, the Supreme Court ruled in *Wong v. United States*, 163 U.S. 228 (1896) that non-citizens as well as citizens enjoy rights guaranteed by the U.S. Constitution. This principle was reaffirmed recently when the Court ruled in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that the due process clause applies to all persons within the boundaries of the United States, including deportable aliens. The abuses that have occurred post-September 11 cannot be explained away by the immigration status of the detainees.

communicado.[19] The executive branch argues that its ability to detain citizens under the enemy combatant label is based on past actions of Congress and the Supreme Court.[20] In this brief history, I focus on the cases upon which the government relies as precedent to justify the "enemy combatant" designation in the war on terrorism,[21] and the dubious pedigree of those cases.[22]

In the 1866 landmark case *Ex parte Milligan*,[23] the Supreme Court granted a writ of habeas corpus to an Indiana man who had been convicted by a military commission of treason committed during the Civil War.[24] It held that trying a citizen who was not a member of the armed forces before such a tribunal (rather than in a civilian federal court authorized by Congress) in an area where civilian federal courts were open and satisfactorily administering criminal justice, violated both the Sixth Amendment guarantee of a speedy and public trial before an impartial jury and the Fifth Amendment requirement that all prosecutions not involving members of the military be initiated by a grand jury indictment.[25] The Court rejected the contention that the emergency created by war justified using

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19. COMM. ON FED. CTS., THE ASS'N OF THE BAR OF THE CITY OF N.Y., THE INDEFINITE DETENTION OF "ENEMY COMBATANTS": BALANCING DUE PROCESS AND NATIONAL SECURITY IN THE CONTEXT OF THE WAR ON TERROR (Mar. 18, 2004 revision):

[T]he President claims the authority, in the exercise of his war power as "Commander in Chief" under the Constitution (Art. II, § 2), to detain persons he classifies as "enemy combatants":

- indefinitely, for the duration of the "war on terror";
- without any charges being filed, and thus not triggering any rights attaching to criminal prosecutions;
- incommunicado from the outside world;
- specifically, with no right of access to an attorney;
- with only limited access to the federal courts on *habeas corpus*, and with no right to rebut the government's showing that the detainee is an enemy combatant.

Id. at 1–2; *see also Hamdi*, 316 F.3d at 463 ("[The war powers] include the authority to detain those captured in armed struggle. These powers likewise extend to the executive's decision to deport or detain alien enemies during the duration of hostilities, and to confiscate or destroy enemy property.") (internal citations omitted).

20. *See* Brief for the Respondents at IV–IX, Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (No. 03-6696).

21. For a detailed listing of cases upon which the government relies to justify its detentions, *see* Brief for the Respondents, *supra* note 20; *see also* William Glaberson, *The Tribunals: Closer Look at New Plan for Trying Terrorists*, N.Y. TIMES, Nov. 15, 2001, at B6; Jake Kreilkamp, *The Justice Department Finally Debates Post-9/11 Terror Policies, But Won't Admit How Profoundly It Is Changing the Law*, FINDLAW, *at* http://writ.news.findlaw.com/student/20021112 kreilkamp.html (Nov. 12, 2002) [hereinafter *Changing the Law*].

22. For a more detailed historical overview from one of the nation's experts on this issue, see Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433 (2002).

23. 71 U.S. 2 (1866).

24. Although convicted of treason, Milligan and those tried with him almost certainly were not guilty of that offense. The defendants, all of whom were Democrats, were the victims of a highly political prosecution, initiated by the Republican governor of Indiana for partisan purposes. *See generally* Frank L. Klement, *The Indianapolis Treason Trials and* Ex Parte *Milligan, in* AMERICAN POLITICAL TRIALS 99–118 (Michal R. Belknap ed., 2d ed. 1994).

25. *Milligan*, 71 U.S. at 120–24.

military commissions in geographic areas not within a theater of operations.[26] In an oft-quoted passage of its opinion, the Court declared:

> The Constitution of the United States is the law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.[27]

This decision, holding it unconstitutional to suspend the writ of habeas corpus and to establish a system of military detentions and trials in any locality where the civilian courts are open and functioning, has long been considered "one of the bulwarks of American liberty."[28]

A lesser known legal precedent upon which the government today relies is the 1909 Supreme Court case of *Moyer v. Peabody*.[29] Charles Moyer, the rabble-rousing president of the Western Federation of Miners,[30] sued the governor of Colorado for imprisoning him for over two months.[31] The miners' union had gone on strike and the governor declared a state of insurrection in an attempt to suppress the "trouble . . . with the members of that organization."[32] The governor called out the Colorado National Guard, had them round up the strikers, and jailed them until the crisis had passed.[33] The Court found that the governor's mere declaration that a state of insurrection existed was conclusive of that fact,[34] and that the governor, as commander-in-chief, had the right, in a state of insurrection, to "kill persons who resist, and, of course . . . use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace."[35] In the words of one commentator, "Given this bloody starting point, it took little for the Court to condone the 'milder measure' of arrest and detention."[36] The opinion's most dangerous quote is that "what is due process of law depends on the circumstances."[37] Moyer, one of numerous union leaders who were detained, spent two and a half months in military custody without any

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26. *Id.* at 119.

27. *Id.* at 120–21; *see also* Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Murphy, J., quoting same in his concurrence).

28. 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 149 (1923).

29. 212 U.S. 78 (1909). The last published decision to rely heavily on this case was that of a lower court dismissing a lawsuit brought by survivors of the students killed by the Ohio National Guard at Kent State University in 1970. Krause v. Rhodes, 471 F.2d 430 (1972).

30. *Id.* at 84.

31. *Id.*

32. *Id.*

33. Joanne Mariner, *Indefinite Detention: Using Outdated Precedents to Defend Unjust Policies*, FINDLAW, *at* http://writ.news.findlaw.com/mariner/20020917.html (Sept. 17, 2002).

34. 212 U.S. at 83.

35. *Id.* at 84.

36. Mariner, *supra* note 33.

37. *Moyer*, 212 U.S. at 84.

showing of probable cause.[38] Upon release, he sued and lost in every court that heard his case.[39]

It was not until World War II that the executive branch designation of "enemy combatant" was officially coined for individuals suspected of committing offenses in the United States.[40] In *Ex parte Quirin*,[41] German soldiers, later nicknamed by history the "Nazi saboteurs," smuggled themselves into the United States to blow up industrial plants.[42] After landing in two groups, they disposed of their military uniforms[43] thus forfeiting the right to be treated as prisoners of war.[44] President Franklin D. Roosevelt issued an Executive Order and Proclamation authorizing a military commission to try the men, two of whom had a plausible claim of U.S. citizenship and six of whom were unquestionably German nationals.[45]

In a suit to determine the propriety of military jurisdiction, the Court sided with the Roosevelt administration. Taking the position that *Milligan* did not apply because the petitioners were "unlawful belligerents,"[46] it held that the acts of which they were accused—entering or remaining in U.S. territory out of uniform for the purpose of destroying war materials and utilities—constituted "an offense against the law of war which the Constitution authorizes to be tried by military commission."[47] The Court also unanimously agreed that the President's order did not conflict with the statutory requirements of the Articles of War,[48] but as Chief Justice Stone acknowledged in his opinion, "a majority of the full Court are not agreed on the appropriate grounds for decision."[49]

What is lost in revisionist accounts of *Quirin* is that it is a hurried and questionable *ex post facto* decision written to validate the legality of Roosevelt's

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38. Mariner, *supra* note 33.

39. *Id.*

40. *See* Gary Solis, *Even a "Bad Man" Has Rights*, WASH. POST, June 25, 2002, at A19. The term appears to have been appropriated from *Ex parte Quirin*, the 1942 Nazi saboteurs case, in which the Supreme Court wrote that "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property [would exemplify] belligerents who are generally deemed not to be entitled to the status of prisoner of war, but to be offenders against the law of war subject to trial and punishment by military tribunals." *Id.* (quoting *Ex parte* Quirin, 317 U.S. 1, 40 (1942)).

41. 317 U.S. at 1.

42. *See generally* George Lardner, Jr., *Nazi Saboteurs Captured! FDR Orders Secret Military Tribunal*, WASH. POST, Jan. 13, 2002, at A12.

43. *See* David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 63–64 (1996).

44. *See* Convention on Multilateral Protection of War Victims, *opened for signature* Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 135.

45. Danelski, *supra* note 43, at 65.

46. *Quirin*, 317 U.S. at 30–31(characterizing as unlawful belligerents—in contrast with lawful belligerents who must be treated as POWs—those who, for the purpose of committing hostile acts, secretly pass through the defenses of the United States in civilian dress).

47. *Id.* at 46.

48. *Id.* at 47.

49. *Id.*

military commission.[50] The Court had little choice but to affirm the President's order (and consequently uphold the secret proceeding that had already concluded) because, by the time it published its full opinion in *Quirin*,[51] six of the eight defendants had been executed.[52] Their trial had already begun when defense counsel petitioned the Supreme Court for a writ of habeas corpus, at which point the trial adjourned temporarily for the Supreme Court hearing.[53] Less than twenty-four hours after the conclusion of oral argument, the Court issued a terse per curiam order. The underlying trial resumed the next day and, two days later, the military commission sentenced the defendants to death, with a recommendation that the two who had cooperated with the government have their sentences commuted to life in prison. Only after this drama concluded did the Supreme Court, with the benefit and burden of hindsight, set out to write a full opinion in the case.[54]

The result was an opinion tantamount to judicial fiat.[55] The opinion appeared influenced by "some highly questionable ex parte arm-twisting by the executive,"[56] had no clear legal basis, did not state which statute conferred jurisdiction, cited analogous cases rather than ones directly on point,[57] and created an unprincipled exception to *Milligan*. In the words of Justice Frankfurter, it was "not a happy precedent."[58] The Court, apparently recognizing these problems on some level, carefully limited its holding by explaining that it had "no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals[,]"[59] or "commissions," as the Pentagon calls them.

B. Resurrection of the "enemy combatant" label in the war on terrorism

In a peculiar example of history repeating itself, President Roosevelt's ques-

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50. *See generally* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002).

51. *Quirin*, 317 U.S. at 1.

52. Edward Lazarus, *The History and Precedential Value of the Supreme Court Case Cited in Support of the Bush Administration's Military Tribunals*, FINDLAW, *at* http://writ.news.findlaw.com/lazarus/20011211.html (Dec. 11, 2001). "[W]hile Stone was fashioning his draft, the government executed six of the saboteurs." *Id.*

53. *See generally* Ira Glass, *The Facts Don't Matter*, This American Life, Mar. 13, 2004, *at* http://www.kcrw.com/show/ta.

54. Lazarus, *supra* note 52. "Stone promised that a full opinion in support of this ruling would follow later. As it turned out, however, Stone (who assumed drafting responsibility for the opinion) found the task of justifying the Court's ruling rather more difficult than he had hoped. But there was no turning back; the result had already been announced." *Id.*

55. Belknap, *supra* note 22, at 477.

56. Katyal & Tribe, *supra* note 50, at 1291 (citing HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION 118 (1992)).

57. Belknap, *supra* note 22, at 477.

58. Danelski, *supra* note 43, at 80 (quoting Memorandum by Felix Frankfurter, Rosenberg v. United States (June 4, 1953) (available at Harvard Law School in Frankfurter Papers, Box 65).

59. *Quirin*, 317 U.S. at 45–46.

tion, "Should they be shot or hanged?"[60] (referring to the defendants in *Quirin*) is now being echoed sixty years later in President George W. Bush's presumed-guilty "dead or alive" rhetoric.[61] The World War II Axis powers of Germany, Japan, and Italy have been replaced by Iran, Iraq, and North Korea. Secretary of War Henry Stimson's concern that the would-be saboteurs might be convicted of only a minor offense is paralleled by that of Secretary of Defense Donald Rumsfeld. The FBI's publicity-seeking Director, J. Edgar Hoover, finds his modern day counterpart in Attorney General John Ashcroft.[62] The bumbling Coast Guard and FBI in *Quirin* are paralleled by the FBI's failure to "connect the dots"[63] in the terrorist attacks of September 11. Indeed, both situations have been manipulated by masterful strokes of political spin.

The current war on terrorism has also resurrected the "enemy combatant" label from its World War II roots and has revived the controversy surrounding its legality as an executive designation. The label has been used in the case of Jose Padilla, one of two United States citizens held by the Defense Department as illegal enemy combatants. Michael B. Mukasey, chief judge of the federal district court in the Southern District of New York, ruled on April 9, 2003, that the legality of President Bush's "enemy combatant" designation could be appealed immediately to a higher court, even before Mukasey ruled on the merits of a challenge to Padilla's detention.[64] The government asked the district court to reconsider its December 4, 2002, order permitting Padilla to consult counsel and, in an opinion issued on March 11, 2003, Judge Mukasey reaffirmed Padilla's right of access to counsel, despite his enemy combatant status.[65] On December 18, 2003, a three-judge panel of the Second Circuit Court of Appeals ruled two to one in Padilla's favor that "the President's inherent constitutional powers do not extend to the detention as an enemy combatant of an American citizen . . . without express congressional authorization."[66] In other words, only Congress can grant the president such an extraordinary expansion of powers. The court

60. Danelski, *supra* note 43, at 71.

61. For a recent example of this rhetoric, *see* Mike Allen, *Bush Vows 'American Justice' for Bombers in Saudi Arabia*, WASH. POST, May 14, 2003, at A5; *see also* Barton Gellman and Mike Allen, *The Week that Redefined the Bush Presidency; President Sets Nation on New Course*, WASH. POST, Sept. 23, 2001, at A1.

62. David Cole, *We've Aimed, Detained and Missed Before*, WASH. POST, June 8, 2003, at B1.

63. *See* Greg Miller, *Agencies 'Failed to Connect' 9/11 Dots*, L.A. TIMES, July 26, 2003.

64. Padilla v. Rumsfeld, 256 F. Supp. 2d 218 (S.D.N.Y. 2003); *see also* Benjamin Weiser, *New Turn in 'Dirty Bomb' Case*, N.Y. TIMES, Apr. 10, 2003, at B15.

65. *See* Padilla v. Rumsfeld, 243 F. Supp. 2d 42, 57 (S.D.N.Y. 2003); *see also Judge Says Padilla May See Lawyers*, WASH. POST, Mar. 12, 2003, at A8.

66. Padilla v. Rumsfeld, 352 F.3d 695, 724 (2nd Cir. 2003); *see also* Michael Powell & Michelle Garcia, *Seized Citizen is Ordered Released*, WASH. POST, Dec. 19, 2003, at A1 (quoting *Padilla* opinion). Previously, the Fourth Circuit Court of Appeals ratified the conditions under which another enemy combatant, Hamdi, has been held. The Second Circuit said in its ruling that it was not addressing Hamdi's case. *Id.*

gave the Administration thirty days to release Padilla.[67] The Administration sought a stay and appealed the decision to the Supreme Court.[68] If the decision had not been stayed, the Justice Department would have had three choices: to hold Padilla as a material witness, charge him with a crime, or set him free.[69] On February 11, 2004, the Bush administration reversed course by saying it would permit Padilla to consult with a lawyer.[70] On February 20, 2004, the Supreme Court granted the stay and announced that it would hear the administration's appeal.[71] On March 3, 2004, after nearly two years, Padilla was finally allowed to meet with his attorney, albeit under severe restrictions.[72]

The *Padilla* case[73] joins a companion case[74] granted a month earlier by the Supreme Court.[75] In the case of Yaser Hamdi, the other citizen being held as an unlawful enemy combatant, a three-judge panel of the conservative Fourth Circuit Court of Appeals[76] held in a unanimous opinion that "the submitted [Defense Department] declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution."[77] Even though the Fourth Circuit emphasized that it "earlier rejected the summary embrace of 'a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefi-

67. 352 F.3d at 724.

68. *See* Anne Gearan, *Court May Hear Case of Terror Suspect*, WASH. POST, Jan. 17, 2004, at A3; *see also Appeals Court Stays Order to Free Padilla*, WASH. POST, Jan. 23, 2004, at A2.

69. *See* Powell & Garcia, *supra* note 66.

70. Thomas E. Ricks & Michael Powell, *2nd Suspect Can See Lawyer*, WASH. POST, Feb. 12, 2004, at A16. The decision was limited to the case. A Pentagon statement said the access is "a matter of discretion and military authority" and "is not required by domestic or international law and should not be treated as a precedent." *Id.*

71. Rumsfeld v. Padilla, 124 S.Ct. 1353 (U.S. Feb. 20, 2004) (No. 03-1027); *see also* Charles Lane, *Court Accepts Case of 'Dirty Bomb' Suspect*, WASH. POST, Feb. 21, 2004, at A4. "The justices outlined an expedited briefing schedule that would enable them to hear the case by the last week of April and decide it by July." *Id.*

72. Michael Powell, *Lawyer Visits 'Dirty Bomb' Suspect*, WASH. POST, Mar. 4, 2004, at A10. "She [the attorney] and Padilla talked through a glass security window, while two government officials listened to the conversation and videotaped the meeting." *Id.*

73. Rumsfeld v. Padilla, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S.Ct. 1353 (U.S. Feb. 20, 2004) (No. 03-1027).

74. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S.Ct. 981 (U.S. Jan. 9, 2004) (No. 03-6696).

75. *See generally* Charles Lane, *High Court to Weigh Detention of Citizens*, WASH. POST, Jan. 10, 2004, at A3. *Padilla* tests the legal rights of an American citizen seized on U.S. soil and held as an enemy combatant. *Hamdi* tests the legal rights of a U.S.-born terrorist suspect captured overseas and now held in the U.S. as an enemy combatant. Hearing the cases together will address whether the President can hold an American citizen as an "enemy combatant," the difference between the two cases being that one man was captured abroad and one was captured at home.

76. The Fourth Circuit, which includes Virginia, West Virginia, Maryland, North Carolina and South Carolina, "is considered the shrewdest, most aggressively conservative federal appeals court in the nation." Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES MAG., Mar. 9, 2003, at 38.

77. Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003).

nitely without charges or counsel on the government's say-so,'"[78] it declared that Hamdi was being held lawfully. The full Fourth Circuit voted eight to four not to rehear the case.[79] On December 2, 2003, the Bush administration changed direction, foreshadowing a similar move in the *Padilla* case, and announced that Hamdi would be allowed access to a lawyer because it had finished collecting intelligence from him.[80] "The change in policy came on the eve of a government filing due . . . at the U.S. Supreme Court, which had been asked by a federal public defender in Virginia to review Hamdi's detention."[81] Although the decision did not moot the Supreme Court petition, commentators speculate that it was designed to at least improve the government's position before the Court.[82]

The American Bar Association (ABA) Board of Governors has also undertaken to examine the legality of both the "enemy combatant" designation and the corresponding treatment of detainees implied by the designation. At the request of then-President Robert Hirshon, the ABA created a Task Force on Treatment of Enemy Combatants to "examine the framework surrounding the detention of United States citizens declared to be 'enemy combatants' and the challenging and complex questions of statutory, constitutional, and international law and policy raised by such detentions."[83] The Task Force notes "that the [Sixth] Amendment right to counsel does not technically attach to uncharged enemy combatants,"[84] but finds it "both paradoxical and unsatisfactory that uncharged U.S. citizen detainees have fewer rights and protections than those who have been charged with serious criminal offenses."[85]

At the ABA Midyear Meeting in February 2003, its policy-making body voted overwhelmingly to adopt its task force's recommendations that U.S. citizens held as enemy combatants have access to lawyers and judicial review of

78. *Id.* at 476 (quoting Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002)). The court did, however, carefully and explicitly limit its decision to the facts, *id.* at 465, and specifically disavowed the decision having any bearing on a situation analogous to Padilla's. *Id.*

79. Neil A. Lewis, *Court Affirms Bush's Power to Detain Citizen as Enemy*, N.Y. TIMES, July 10, 2003, at A16. However, it should be noted that the panel's opinion was attacked by two dissenting judges on the full Fourth Circuit, one of whom considered it too deferential to the administration and one who considered it not deferential enough.

80. Jerry Markon & Dan Eggen, *U.S. Allows Lawyer for Citizen Held as 'Enemy Combatant,'* WASH. POST, Dec. 3, 2003, at A1. The statement emphasized that the decision "should not be treated as precedent." *Id.*

81. *Id.*

82. *Id.*

83. AMER. BAR ASS'N, TASK FORCE ON TREATMENT OF ENEMY COMBATANTS PRELIMINARY REPORT 4–5 (2002) [hereinafter TASK FORCE REPORT]. The report was not the work of civil libertarians. The Task Force was chaired by a former assistant United States attorney and included a retired brigadier general who spent twenty-six years as an Army Judge Advocate, as well as the current president of the National Institute of Military Justice. *Id.* at 27. The repressive measures of the Bush administration, however, so undermine basic democratic structures that they are even cause for concern for sections of the judiciary and in mainstream institutions, such as the ABA.

84. *Id.* at 23.

85. *Id.* at 18.

their status.[86] It also urged Congress to establish clear standards for detentions.[87] Though the Task Force limited its scope to U.S. citizens declared to be enemy combatants (e.g., Lindh, Hamdi, and Padilla), it provided a courageous and principled counterpoint to the Bush administration's aggressive assertion of executive authority in the war on terrorism.

The use of the term "enemy combatant" in the war on terrorism, at least as it pertains to U.S. citizens being detained on American soil, will ultimately be resolved by the Supreme Court, which heard the companion Padilla and Hamdi cases on April 28, 2004.[88] A decision is expected by July.

III.

A. The Revolving Door Between the Military System and the Criminal Justice System

Not only does the enemy combatant designation rest on shaky ground legally, but its use in practice as part of a revolving door between the military and civilian systems also has disturbing policy implications.

John Walker Lindh, a U.S. citizen, has the dubious distinction of being the first individual in the ongoing war on terrorism who was threatened with the enemy combatant label. In high school, he converted to Islam and traveled from California to Yemen the following year to learn Arabic. Lindh returned to the U.S. in 1999, living with his family for about eight months before returning to Yemen in February 2000. Lindh is believed to have entered Afghanistan in the spring of 2001, where he was turned over to U.S. troops in December.[89]

Lindh was not the only American citizen captured in Afghanistan. Yaser Hamdi, who was born in Louisiana and raised in Saudi Arabia, was captured on the same day and at the same place in Afghanistan.[90] While the facts of the two cases are strikingly similar, right down to parental intervention on behalf of their sons, the government's treatment of the two men has varied drastically.[91] While the government transferred Walker to the criminal system and successfully negotiated a plea agreement, Hamdi remains in the military system. In the case of Hamdi,[92] the Fourth Circuit held that "[b]ecause it is undisputed that Hamdi was

86. *ABA Supports Access to Counsel for Alleged Enemy Combatants*, ABA NEWS RELEASE, *at* http://www.abanet.org/media/feb03/021103.html (Feb. 11, 2003).

87. *See* Gina Holland, *ABA Demands Legal Rights for Enemy Combatants*, THE ASSOCIATED PRESS, Feb. 11, 2003 (on file with author).

88. Charles Lane, *Presidential Authority at Issue for Detainees*, WASH. POST, Apr. 29, 2004, at A3.

89. *See generally* Jane Mayer, *Lost in the Jihad*, THE NEW YORKER, Mar. 10, 2003, at 50.

90. Amy Tübke-Davidson, *Measuring Betrayal*, NEW YORKER ONLINE, ¶ 20 (Mar. 10, 2003), *at* http://www.newyorker.com/printable/?online/030310on_onlineonly02.

91. *See generally* Joanne Mariner, *Hamdi, Lindh, Terrorism and the Courts*, FINDLAW, *at* http://writ.news.findlaw.com/mariner/20020722.html (July 22, 2002).

92. There are over 650 foreign citizens from more than 40 countries similarly detained at the U.S. naval base on Guantánamo Bay, Cuba, *see* Neely Tucker, *Detainees Are Denied Access to*

captured in a zone of active combat in a foreign theater of conflict," the circumstances justify his status as an enemy combatant.[93] Although the Bush administration eventually decided to allow him access to counsel,[94] it did not change Hamdi's designation as an enemy combatant, which the Supreme Court has agreed to review.

Jose Padilla, the other U.S. citizen being held as an enemy combatant, was initially arrested in the U.S. on May 8, 2002, pursuant to a material witness warrant.[95] He was detained in federal prison for a month until June 9, 2002, when he was declared to be an "enemy combatant" and transferred to the control of the U.S. military. Judge Mukasey ruled that the individuals Bush deems "enemy combatants" have the right to a lawyer[96] and that the legality of President Bush's designation of Padilla as an enemy combatant may be appealed immediately to a higher court.[97] The government asked the court to reconsider and Judge Mukasey reaffirmed Padilla's right to counsel.[98] The government appealed, and a three-member appeals court panel of the Second Circuit ruled that President Bush does not have the power to declare an American citizen seized on U.S. soil an "enemy combatant" and hold him indefinitely in military custody—a decision the Supreme Court is considering this term.

In contrast to the government's decision to treat Padilla as an enemy combatant, it decided to prosecute foreign nationals Zacarias Moussaoui and Richard Reid on criminal charges in federal district court. All three men allegedly came to the U.S. to carry out acts of violence (in Padilla's case, the detonation of a radioactive "dirty bomb," and in Moussaoui's and Reid's cases, hijacking/crashing passenger airplanes) at the direction of Afghanistan-based al Qaeda operatives.[99]

U.S. Courts, WASH. POST, Mar. 12, 2003, at A1, but there has been far more public outcry about the detention of Padilla and Hamdi than about all the other detainees combined.

93. Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003). "We have no occasion, for example, 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." *Id.* at 465.

94. Dan Eggan, *Decision to Allow Lawyer for 'Enemy Combatant' Is New Policy*, WASH. POST, Dec. 4, 2003, at A10.

95. Two U.S. District Court judges in New York have analyzed the government's exercise of the heretofore little-used material witness statute, 18 U.S.C. § 3144 (1984), in post-September 11 cases and have reached very different results. Compare United States v. Awadallah, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) and United States v. Awadallah, 202 F. Supp. 2d 82 (S.D.N.Y. 2002), both decided on April 30, 2003, with *In re* Application of U.S. for a Material Witness Warrant, 213 F. Supp. 2d 287 (S.D.N.Y. 2002).

96. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002). Judge Mukasey based his decision not on the Constitution, but on the habeas corpus statute. *Id.* at 599–605.

97. Weiser, *supra* note 64.

98. *See* Padilla v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003); *see also Judge Says Padilla May See Lawyers*, WASH. POST, Mar. 12, 2003, at A8.

99. *See* Indictment of Zacarias Moussaoui, Dec. 11, 2001, *at* http://www.yale.edu/lawweb/avalon/sept_11/indict_001.htm; Indictment of Richard Colvin Reid, Crim. No. 02-10013-WGY, Jan. 16, 2002, *at* http://www.yale.edu/lawweb/avalon/sept_11/reid_indictment.htm. Jose Padilla has not been indicted because of his status as an enemy combatant, but much has been written about his story. *See, e.g.*, David Stout, *Courts Deal Blow to Bush on Treatment of Terror Suspects*,

Attorney General Ashcroft also chose to indict in federal court the members of an alleged al Qaeda sleeper cell in Detroit, as well as another alleged al Qaeda abettor, James Ujaama, in Seattle.[100] The sleeper cell defendants include foreign citizens; Ujaama is a U.S. citizen.[101] Most recently, foreign national al-Marri, held originally as a material witness, then charged with making false statements, was designated an enemy combatant and transferred to military custody.[102]

The government asserts that domestic courts have no authority to question the President's unilateral designation and subsequent detention of enemy combatants,[103] making the executive power to detain absolute. The Constitution allows for such a draconian measure only in wartime, when Congress has the power to suspend "the great writ" of habeas corpus, which permits a court to examine the lawfulness of the executive detention. However, Congress clearly has not taken that drastic step. Nor has President Bush attempted, as President Lincoln did, to suspend habeas corpus unilaterally.[104]

Do any of those designated as enemy combatants properly fall within this category? Why were John Walker Lindh, Zacarias Moussaoui, and Richard Reid all ultimately brought up on criminal charges, while Jose Padilla, Yaser Hamdi, and al-Marri are being held as enemy combatants? It cannot be based on whether they were "captured in a zone of active combat in a foreign theater of conflict,"[105] or else the treatment of Lindh and Hamdi would have been more similar,[106] and Padilla and al-Marri (who morphed from material witnesses into

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N.Y. TIMES, Dec. 18, 2003, *at* http://www.nytimes.com/2003/12/18/politics/18CND-DETA.html?ex=1101272400&en=a1f7be15761cf640&ei=5070&oref=login&hp.

100. Douglas Farah and Tom Jackman, *Six Accused of Conspiracy to Aid in Terror Attacks*, WASH. POST, Aug. 29, 2002, at A1.

101. *But see* Joanne Mariner, *Fear of Lawyers: The Cautionary Tale of a Post-September 11 Detainee*, FINDLAW FORUM, *at* http://edition.cnn.com/2002/LAW/08/columns/fl.mariner.detainees/ (Aug. 19, 2002) (detailing the false confession by Abdallah Higazy, an Egyptian graduate student wrongly detained on a material witness warrant for allegedly having a radio in his hotel room across from the World Trade Center, who later was cleared when someone else came forward to claim the radio).

102. *See* Schmidt, *supra* note 14.

103. *See* Gherebi v. Bush, 352 F.3d 1278, 1283 (9th Cir. 2003) (stating, "[It is] the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even to access to counsel, regardless of the length or manner of their confinement.").

104. *See generally* Justice William J. Brennan, Jr., The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis, Address at the Law School of Hebrew University, Jerusalem, Israel (Dec. 22, 1987), *at* http://www.brennancenter.org (discussing how easily the United States forgets important historical lessons on how perceived threats to national security, in hindsight often exaggerated or unfounded, have motivated the sacrifice of civil liberties).

105. Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003). *Cf.* Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003). The Second Circuit majority specifically noted that Padilla, who was unarmed when he was picked up by the FBI in Chicago, had been detained "outside a zone of combat." *Id.*

106. This article gives the administration the benefit of the doubt that their different treatment was not based on the difference in the men's ethnicities. *But see* Jake Kreilkamp, *A Year of Rapid*

enemy combatants) would not have been treated like either of the first two.[107]

Some scholars have insisted vehemently that "we have selectively sacrificed noncitizens' liberties while retaining basic protections for citizens,"[108] yet this argument simply fails in the context of enemy combatants. The designation cannot be based on the citizen/alien distinction (which, it should be noted, raises Equal Protection problems as well),[109] or else U.S. citizens Padilla and Hamdi would be prosecuted like Lindh, and foreign nationals Moussaoui and Reid would be designated "enemy combatants" like al-Marri.[110]

The designation also cannot be based on U.S. residency; if it were, Padilla and al-Marri would be distinguished from all the others. Even under the *Quirin* definition of "unlawful combatants,"[111] only a few of the enemy combatants (the ones who blended in with the civilian population, could not be identified with an enemy army, and were coming to this country bent on sabotage) would properly qualify.[112] Meanwhile, foreign nationals Zacarias Moussaoui and Richard Reid,

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Constitutional Evolution: The Only Plausible Explanation for the Bush Administration's Mix-and-Match Legal Tactics Is a Highly Disturbing One, FINDLAW, *at* http://writ.news.findlaw.com/student/20020909 kreilkamp.html (Sept. 9, 2002) [hereinafter Krielkamp, *Constitutional Evolution*] ("Especially since Hamdi was of Arab descent, and Lindh was not, certainly Hamdi should be treated just as Lindh had been, to show that Arab-Americans are in no way second-class." *Id.*).

107. *See* Kreilkamp, *Changing the Law*, *supra* note 21 (noting that "Padilla appears to be the first U.S. citizen ever arrested on U.S. soil openly to be denied his constitutional rights." *Id.*).

108. David Cole, *supra* note 13, at 955. While I agree with Cole that "we have imposed on foreign citizens widespread human rights deprivations that we would not likely tolerate if imposed on ourselves," *id.* at 965, I think it is inaccurate to say that "[c]itizens are not subject to . . . detention under extreme secrecy, are not penalized for their speech, cannot be detained on the Attorney General's say-so . . . and . . . are not subject to military [jurisdiction]." *Id.* at 977.

109. The embodiment of the central precepts of Equal Protection are found in the Due Process Clause of the Fifth Amendment. It should be noted that even enemy *aliens* within the U.S. are entitled to judicial review.

110. It is interesting to note that initially, the citizen/alien distinction was offered as a reason: "[S]omebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans—men, women, and children—is not a lawful combatant . . . . They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process." Elisabeth Bumiller & Steven Lee Myers, *Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, N.Y. TIMES, Nov. 15, 2001, at B6 (quoting Vice President Dick Cheney).

111. *Quirin*, 317 U.S. at 12 (1942).

112. U.S. citizens Lindh and Hamdi would not qualify. They were captured in the combat arena in Afghanistan and should be treated like prisoners of war and entitled to protection as such. *See In re* Territo, 156 F.2d 142 (9th Cir. 1946). In *Territo*, which arose during World War II, a U.S. citizen was captured in Italy while serving in the enemy Italian army and held as a POW in the U.S. The court upheld the denial of his petition for a writ of habeas corpus, stating, "all persons who are active in opposing an army in war may be captured and[,] except for spies and other non-uniformed plotters and actors for the enemy[,] are prisoners of war." *Id.* at 145. There are two different theories on Moussaoui. The government has charged him with participating in a conspiracy with al Qaeda members that led to the Sept. 11 attacks, which would meet the "unlawful combatant" definition. Moussaoui, however, contends he was not a Sept. 11 participant, but instead was slated to take part in a later al Qaeda mission outside the U.S., which would take him outside the *Quirin* definition. *See* Jerry Markon, *Judge Rejects Bid to Block Access to Sept. 11 Planner*, WASH. POST, May 16, 2003, at A3.

confessed al Qaeda members, have more rights[113] than American citizens Padilla and Hamdi.

The only common denominator of the "enemy combatants" detained on American soil is membership (or perceived membership[114]) in al Qaeda or the Taliban,[115] but their entitlement to basic due process protections still differs. Indeed, if al Qaeda or Taliban membership is the litmus test, under international law Taliban members may be lawful combatants while al Qaeda members may be unlawful combatants. Nevertheless, the bottom line is that the government is not treating terrorist suspects the same way with its "mix-and-match tactics."[116] In this article, I argue that due process demands more evenhanded treatment by the government and that singling out certain people in this country as beyond the shelter of the Bill of Rights is unjustified, unconstitutional, unethical, unwise, and illegal.[117]

There seems to be no rhyme or reason to the current crop of "enemy combatant" classifications. "Almost every possible variation of combinations of facts has been explored—with completely inconsistent results."[118] The benign answer to the disparate classifications is that the government is holding certain suspects, like Padilla and Hamdi, only for intelligence-gathering and national security purposes. The more cynical answer is that "when the Administration has sufficient evidence to bring a case in federal court that they know they can win, they do so. . . . Ironically, those who can easily be convicted are offered full due process. . . . Only the most plainly guilty receive the benefit of the presumption of innocence, and the chance to mount a counsel-assisted defense."[119] Under

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Padilla was not captured on the battlefield, in the combat arena, or in a zone of military operations; in fact, he was being held in this country on a material witness warrant to enforce a subpoena to secure his testimony before a grand jury. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 568–69 (S.D.N.Y. 2002). His case is the most transparent attempt by the Executive to manipulate the label "enemy combatant."

113. These include the benefit of the constitutional protections afforded all defendants in American criminal prosecutions. The protections include the right to counsel, the right to confront and cross-examine adverse witnesses, the right to remain silent, search and seizure protections, protection against self-incrimination, and the right to trial by jury. *See infra* notes 194–201 and accompanying text.

114. *See* Jane Mayer, *supra* note 89, at 52–53. The government's indictment of Lindh charges that he went to camp at an al Qaeda facility, "knowing that America and its citizens were the enemies of bin Laden and [a]l Qaeda and that a principal purpose of [a]l Qaeda was to fight and kill Americans." *Id.* at 53. But Lindh was in fact part of al Ansar (military training to fight the Northern Alliance), not al Qaeda (terrorist training to fight civilians). *Id.*

115. Taliban fighters repressed the people of Afghanistan. The al Qaeda forces benefited from Taliban protection while providing substantial resources to support the Taliban forces.

116. Krielkamp, *Constitutional Evolution*, *supra* note 106, at 1.

117. *See* Robert A. Destro, "By What Right?": The Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters "Touching Religion," 29 Ind. L. Rev. 1, 14 (1995) ("Federal control over the substance of individual rights is precisely the situation the framers of the Bill of Rights sought to avoid. . .").

118. *Id.* at 4.

119. *Id.* at 5.

this theory, the government does not have enough evidence to try Padilla, Hamdi and al-Marri criminally and the enemy combatant route provides a way to sidestep the requirements and protections of the criminal justice system—but as U.S. citizens, Padilla and Hamdi would not even be eligible for trial by a military commission.

An even more disturbing explanation is that the enemy combatant label is being used to coerce the criminal process. In the Buffalo "Lackawanna Six" case involving defendants accused of belonging to a terrorist sleeper cell, a defense attorney explained, "We had to worry about the defendants being whisked out of the courtroom and declared enemy combatants if the case started going well for us."[120] U.S. Attorney Michael Battle, whose region encompasses the Yemeni community in Lackawanna, "said his office never explicitly threatened to invoke enemy combatant status but that all sides knew the government held that hammer."[121] In explaining the defendants' heavy-handed plea bargain, he admitted, "You had a new player on the block [the Defense Department], and they had a hammer and an interest . . . . These are learned defense counsels, and they looked at the landscape and realized that, you know, they could have a problem."[122] According to government officials, Iyman Faris also is said to have "cooperated with the FBI because he sought to avoid being declared an enemy combatant."[123]

Whether the motivation for the myriad enemy combatant permutations is innocent or suspect, the label cannot shed its aura of illegitimacy because it is not derived in accordance with a specific, defined procedure.

B. Implications of an ad-hoc, revolving door policy

The revolving door between the two systems is dizzying and dangerous. It gives new meaning to the term "forum-shopping" and makes the holding of "enemies" look like situational detentions of convenience, rather than detentions on the merits. It undermines the legitimacy of the criminal justice system for judges to throw up their hands and pawn a case off to the military when the civilian courts cannot handle it.[124] It undermines the integrity of the military system to treat someone as an enemy combatant with no constitutional rights, and then to use the fruits of that intelligence-gathering for criminal prosecution in the civilian courts.[125]

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120. Michael Powell, *No Choice but Guilty*, WASH. POST, July 29, 2003, at A1 (quoting Patrick J. Brown).

121. *Id.* ("'I don't mean to sound cavalier, but the war on terror *has* shifted the whole [legal] landscape,'" [Battle] said. "'We are trying to use the full arsenal of our powers.'").

122. *Id.*

123. *Id.*

124. *See* Jerry Markon, *Moussaoui Prosecutors Defy Judge*, WASH. POST, July 15, 2003, at A1.

125. John Walker Lindh, who started in the military system and then was moved to the criminal system, is a case in point.

The label indiscriminately takes some of these men outside both the benefits of the Geneva Convention[126] (granted to all prisoners of war) and the constitutional protections of the criminal justice system[127] (granted to all criminal defendants). Enemy combatants are in legal limbo, a "black hole,"[128] a netherland devoid of *any* discernable rights.

Moreover, it undermines government legitimacy and confidence in the U.S. justice system to keep taking an ad-hoc approach. If the government withdraws the federal indictment in the Moussaoui case and moves it to a military commission, the government will be perceived, correctly, as conceding its inability to secure a conviction in federal court.

The label also imperils cooperation between domestic law enforcement and foreign law enforcement when other governments do not trust the U.S. to respect basic human rights.[129] Our government's credibility on matters of international law and human rights is at an all-time low.[130] For example, in November 2001, Spain refused to extradite eight suspected terrorists without assurances that their cases would be kept in civilian court;[131] thus, "even without a single military trial, the order is already undermining our ability to bring terrorists to justice."[132] In July 2003, President Bush halted, and subsequently watered-down, military legal proceedings against two Britons and an Australian being held as enemy combatants on Guantánamo Bay.[133] While the move was applauded worldwide,

126. Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950 [hereinafter Geneva Convention].

127. *See infra* notes 194–201. Basic constitutional protections accorded criminal defendants include the right to counsel, the right to confront and cross-examine adverse witnesses, the right to remain silent, search and seizure protections, protection against self-incrimination, and the right to trial by jury.

128. Schmidt, *supra* note 14, at A14 (quoting Jamie Fellner of Human Rights Watch).

129. James Orenstein, *Rooting Out Terrorists Just Became Harder*, N.Y. TIMES, Dec. 6, 2001, at A35.

130. *See* David E. Sanger, *A Nation Challenged: The Treatment; Prisoners Straddle an Ideological Chasm*, N.Y. TIMES, Jan. 27, 2002, at A16; Katharine Q. Seelye & David E. Sanger, *Bush Reconsiders Stand on Treating Captives of War*, N.Y. TIMES, Jan. 29, 2002, at A1; Katharine Q. Seelye, *Criticized, U.S. Brings Visitors to Prison Camp*, N.Y. TIMES, Jan. 26, 2002, at A8; *see also* Mike Allen & Glenn Frankel, *Bush Halts Military Proceedings Against [Three]*, WASH. POST, July 19, 2003, at A15. "Human rights groups and some European governments have complained bitterly about the tribunals and the indefinite captivity of their citizens in Guantánamo Bay, where they have no access to the U.S. federal court system." *Id.*

131. *See* T.R. Reid, *Europeans Reluctant to Send Terror Suspects to U.S.*, WASH. POST, Nov. 29, 2001, at A23.

132. Orenstein, *supra* note 129. More recently, a German court approved the extradition to the U.S. of two Yemenis suspected of links to al Qaeda who were arrested at our request because the U.S. had guaranteed that the men would not be tried by a military or any other special court. *See Germany May Extradite Two Al Qaeda Suspects*, WASH. POST, July 22, 2003, at A10.

133. *See* Allen & Frankel, *supra* note 130. The three were among the first six foreign nationals (the other three are a Sudanese, a Yemeni and a Pakistani) designated by Bush for trial by military tribunals; *see also* Pauline Jelinek, *Pentagon Under Fire on Terror Trial Rules*, THE ASS'D PRESS, Aug. 13, 2003. The Pentagon says the three men in controversy will be afforded several exceptions to tribunal rules, including eliminating the death penalty, allowing lawyers from their

it exacerbated the image that justice for enemy combatants in the U.S. is selective and politicized.[134] The U.S. certainly expects foreign governments to respect human rights and uphold the rule of law when our citizens are detained in other countries. This is particularly important given the U.S. occupation in Iraq. As Janet Reno noted in a 2003 lecture, "If the United States holds detainees without pressing charges and without due process . . . the country is putting its troops in danger of similar treatment later."[135]

Finally, as numerous critics and legal scholars have pointed out, the administration has not sought a legislated structure setting forth the grounds for detention, the maximum periods of detention, forms of administrative or judicial review, or any other conditions that would help legalize the process.[136] The U.S. Code, in a broad and categorical provision that repealed the Emergency Detention Act, provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[137] The Supreme Court has read this provision expansively to apply to U.S. citizens detained by the government under any circumstances.[138]

The problems created by the Bush administration's actions are seemingly limitless. In this article, however, I focus on the most significant of these problems and one which threatens the strength and stability of one of our most basic rights: the assertion that no process is due to enemy combatants.

IV.
DUE PROCESS IN TIMES OF CRISIS

The Due Process Clause of the Fifth Amendment is in many ways the backbone of the rights guaranteed by the Constitution. Due process is the simple notion that the Constitution requires governmental procedures to be fundamentally

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homelands as "consultants," and not monitoring their conversations with their defense teams. *Id.*

134. *See* Allen & Frankel, *supra* note 130.

135. Maria Di Mento, *Free(dom) Speech*, BROWN ALUMNI MAG., May/June 2003, at 18 (paraphrasing former U.S. Attorney General Janet Reno during a March 17, 2003 lecture entitled "Freedom and Terrorism."). Similarly, by barring other countries' courts from gaining access to people held in incommunicado detention, we hinder their efforts to bring terrorists to justice. *See* Joanne Mariner, FINDLAW, *Witness Unavailable: How the U.S. Hinders Terrorism Prosecutions Abroad*, *at* http://writ.news.findlaw.com/mariner/20040317.html (Mar. 17, 2004).

136. *See generally* Philip Heymann, *The Power to Imprison*, WASH. POST, July 7, 2002, at B07; Katyal & Tribe, *supra* note 50 (discussing the importance of Congressional authorization for military tribunals).

137. 18 U.S.C. § 4001(a) (2002).

138. *See* Howe v. Smith, 452 U.S. 473, 479 n.3 (1981) (finding that "the plain language of § 4001(a) proscribe[s] detention *of any kind* by the United States, absent a congressional grant of authority to detain"). *But see* Hamdi v. Rumsfeld, 316 F.3d 450, 467 (4th Cir. 2003) (holding that Congress' Joint Resolution authorizing the use of military force provided Congressional authorization for his detention); Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 598 (S.D.N.Y. 2002) (holding that § 4001(a) applies and its terms have been complied with by Congress' Joint Resolution).

fair before a person may "be deprived of life, liberty, or property."[139] Generally, due process serves to protect an individual against arbitrary government actions and to prevent abusive governmental power. The Clause has been interpreted and applied with great specificity by court rulings, more of which have been issued "in the half-century or so after *Quirin* than in the century and a half before it."[140]

In this article, I use "due process" to refer to procedural due process—specifically, the constitutional guarantee of a fair hearing before being imprisoned for an unreasonable and indefinite amount of time.[141] While substantive due process issues abound, substantive due process is concerned with the reasonableness of the content of governmental policy and actions. It protects only fundamental rights and suspect classifications, and is generally narrower in scope than procedural due process. Procedural due process focuses on the procedures and methods by which government policies are implemented, and guarantees fairness in carrying out laws.[142] In this article, I submit that enemy combatants' liberty may be curtailed, but only pursuant to at least minimal procedural safeguards.[143]

Under the Bush administration, the due process guarantee is losing force as it has historically in times of national security crises.[144] The unstated corollary of the *Moyer* case is that circumstantial due process[145] means no due process, exemplified in repeated judicial affirmation of governmental excesses as being reasonable and necessary during times of war. During World War I, the government imprisoned people for years for speaking out against the war effort.[146]

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139. U.S. CONST. amend. V. Hereinafter, "liberty" will be a synecdoche for life, liberty and property. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 470 (1985) (stating that fundamental fairness is the touchstone of due process).

140. Katyal & Tribe, *supra* note 50, at 1304.

141. The Supreme Court has held that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." United States v. Salerno, 481 U.S. 739, 755 (1987). Preventive detention is constitutional only in very limited circumstances, where there is a demonstrated need for the detention (current dangerousness, risk of flight, etc.) and only where adequate procedural safeguards ensure a prompt adjudication of whether detention is necessary. *Id.* at 751–55; *see also* Zadvydas v. Davis, 533 U.S. 678, 688–93 (2001) (explaining constitutional limits on preventive detention, and interpreting immigration statute not to permit indefinite detention of deportable aliens); Foucha v. Louisiana, 504 U.S. 71, 80–81 (1992) (holding civil commitment to be constitutional only where individual is mentally ill and poses a danger to the community and adequate procedural protections are provided).

142. Areas in which procedural due process issues have arisen include whether or not courts have jurisdiction over a particular issue; whether laws (especially criminal laws) are unreasonably vague or overbroad; and nearly every procedural aspect of criminal cases ranging from identification of suspects to appeal rights of those convicted.

143. The due process issue for purposes of this article is the constitutionality of *no* process: indefinite detention without charges, access to counsel, or other basic procedural protections.

144. *Gore Vidal on the "United States of Amnesia," 9/11, the 2000 Election and the War in Iraq*, *at* http://democracynow.org/transcripts/gorevidal.html.

145. *Moyer*, 212 U.S. at 84 ("what is due process of law depends on the circumstances").

146. *See* Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schneck v. United States, 249 U.S. 47

During World War II, the infamous and shameful *Korematsu* case, brought to us by the same Supreme Court that brought us *Quirin*, endorsed the internment of more than 110,000 persons based solely on their Japanese ancestry.[147] During the Cold War, thousands of innocent people lost their jobs, were the subject of congressional investigations, or were incarcerated for their association with the Communist Party.[148]

Today, there is no due process protection for detainees like Padilla and Hamdi. "Enemy combatant" status strips detainees of their judicial due process rights and is defective constitutionally. The executive branch is acting without regard to the Due Process Clause; it is placing "the security of the majority above the constitutional guarantee of liberty protected by due process."[149] Until recently, the judicial branch has been rubber-stamping rather than checking the executive's plenary power and has been upholding the President's war powers as more potent than the Fifth Amendment,[150] which was the same mistake made in *Korematsu*.[151]

The Supreme Court has granted that procedural "due process is flexible and calls for such procedural protections as the particular situation demands,"[152] but eliminating any and all process because we are in an unprecedented and unique war of indeterminate duration is not the answer. Determining the appropriate form of the due process protections depends on the facts of the case, and requires an evaluation of all of the circumstances and competing interests that weigh the individual's right to fairness against the government's need to act quickly, decisively and in the interest of national security. In the current crisis, this balancing of interests has been precariously lopsided. The next section submits a proposal for minimal procedural protection by arguing that the *Mathews v. Eldridge*[153] balancing test should be applied to enemy combatant determinations.

(1919).

147. Korematsu v. United States, 328 U.S. 214, 236 (1944).

148. Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 725 (2003) (citations omitted); *see also* Dennis v. United States, 341 U.S. 494 (1951).

149. Micah Herzig, *Is Korematsu Good Law in the Face of Terrorism? Procedural Due Process in the Security Versus Liberty Debate*, 16 GEO. IMMIG. L.J. 685, 700 (2002).

150. *See* John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427 (2003) (discussing judicial deference to political wartime decisions).

151. *Korematsu*, 328 U.S. at 218.

152. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

153. 424 U.S. at 319.

V.
PROPOSAL

A. The Mathews v. Eldridge *Framework Should Apply to Enemy Combatant Determinations*

In *Mathews v. Eldridge*, the Supreme Court set forth a balancing test to determine whether administrative procedures conform to procedural due process laws.[154] In order to determine what process is due, the Court called for a balancing of private interests, the probable value of additional safeguards, and the government interest, including the cost of the procedure.[155] In this article, I submit that *Mathews v. Eldridge* is the proper test for modern due process jurisprudence in the nebulous terrorism arena and that applying the *Mathews* balancing test provides a justification for requiring a procedure prior to determining a detainee's status.

Accordingly, I challenge the constitutional validity of the quasi-administrative bare bones procedure established by President Bush, as delegated to the Department of Defense, for determining whether someone is an enemy combatant. Instead, I suggest that a U.S. citizen detainee be afforded an opportunity for an evidentiary hearing prior to being designated an enemy combatant. The evidentiary hearing would closely approximate a judicial trial, of the type the Supreme Court held was required in *Goldberg v. Kelly*.[156] *Goldberg* involved the termination of welfare benefits; in the case of U.S. citizen terrorist detainees, there is indisputably even more reason than in *Goldberg* to depart from "the ordinary principle . . . that something less than an evidentiary hearing is sufficient prior to an adverse determination."[157] The "ordinary principle" governs proceedings such as pre-termination hearings for disability benefits, which are not based on financial need and where issues of credibility and veracity do not play a significant role in the entitlement decision.[158] Some circumstances, however, require more stringent procedural safeguards than others; enemy combatant determinations, in particular, involve different administrative burdens and differently weighted constitutional rights than other governmental proceedings.

Enemy combatant status and criminal defendant status should be a threshold determination made at the outset, during a public evidentiary hearing, not after the government tries on each label and decides which is the better fit. "[S]ome form of hearing is required before an individual is finally deprived"[159] of a liberty interest. "The degree of potential deprivation that may be created by a par-

154. *Id.*
155. *Id.* at 321.
156. 397 U.S. 254 (1970).
157. *Mathews*, 424 U.S. at 343.
158. *Id.* at 325.
159. *Id.* at 333.

ticular decision is a factor to be considered in assessing the validity of any . . . decisionmaking process."[160] The potential deprivation for enemy combatants is severe and the impact of official action on the private interest is enormous. Public scrutiny in a public evidentiary hearing is critical to a fair process.[161]

To designate certain individuals as enemy combatants, the U.S. government should demonstrate to a civilian court a clear nexus between that person's activities and the armed conflict with the U.S. in another country. The government should provide an individualized showing to support particular detainee designations. If a court determines that there is a sufficient factual basis to deem the person an enemy combatant, then he may be detained without charges for the duration of active hostilities, but not indefinitely.[162]

The *Mathews v. Eldridge* framework is suggested because judges in the Padilla and Hamdi cases have been careful to point out that what they preside over is not a "criminal proceeding." The *Mathews* due process framework answers this concern by providing something "less" than what the criminal process demands,[163] while still recognizing the gravity of the determination at issue. Assuming, arguendo, that enemy combatant designations are not criminal in nature, they still result in physical detention, separation from friends and family, and forfeiture of property and livelihood that is comparable to criminal punishment. These punishments exceed those typically imposed for civil violations. In *Bridges v. Wixon*,[164] the Supreme Court, in discussing civil deportation proceedings, stated that "[t]hough [such a determination] is not technically a criminal proceeding, it visits a great hardship on the individual and . . . is a penalty. . . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."[165] Fundamental fairness, therefore, would dictate that enemy combatants receive more, not less, due process protection.

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160. *Id.* at 341.

161. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (finding that "[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process"); Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979) ("Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, [and] cause all trial participants to perform their duties more conscientiously . . ."); Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002) ("[d]emocracies die behind closed doors").

162. *See* ART. 5 of the 3rd Geneva Convention (governing repatriation).

163. By way of analogy, in the immigration context, courts have justified a lower standard of due process based on the view that immigration proceedings 1) are civil and do not require the provision of full criminal procedural rights in order to protect aliens' interests, *see* Carlson v. Landon, 342 U.S. 524, 537 (1952) (holding that "[d]eportation is not a criminal proceeding"); and 2) are of "a political character and therefore subject only to narrow judicial review," Hampton v. Mow Sun Wong, 426 U.S. 88, 101–02 n.21 (1976) (stating that "the power over aliens is of a political character and therefore subject only to narrow judicial review").

164. 326 U.S. 135 (1945).

165. *Id.* at 154.

B. *The* Mathews *Balancing Test*

In *Mathews v. Eldridge*, the Supreme Court explained that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth . . . Amendment."[166] It set forth three factors that normally determine whether an individual has received the "process" that the Constitution finds "due."

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[167]

By weighing these concerns, courts can determine whether the government has met the fundamental requirement of due process for detainees: "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[168]

The first prong of the procedural due process balancing test addresses the private interest that will be affected by the official action. In the cases at issue in this article, the private interest at stake is the interest of an individual in his "right to be heard before being condemned to suffer grievous loss of any kind,"[169] a "liberty" interest protected by the Fifth Amendment. "[E]ven [when] it may not involve the stigma and hardships of a criminal conviction, [this] is a principle basic to our society."[170] Being designated an enemy combatant arguably exceeds the adversity of criminal conviction because American enemy combatants are detained in solitary confinement indefinitely, incommunicado, and without charges; they can be interrogated more aggressively; and they are probably among the most despised people in this country.[171] The "grievous loss"[172] here is the detainee's freedom. The enemy combatant's "potential injury"[173] is the deprivation of his right to be heard as to whether or not he should be imprisoned.

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166. *Mathews*, 424 U.S. at 332.

167. *Id.* at 335.

168. *Id.* at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

169. *Id.* (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

170. *Id.*

171. For commentary on the need for protection of the despised and disenfranchised, *see generally Bridges*, 326 U.S. at 166 (Murphy, J., concurring) ("Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land."). *See also* David Cole, *supra* note 13, at 959 ("In the end, the true test of justice in a democratic society is not how it treats those with a political voice, but how it treats those who have no voice in the democratic process.").

172. *Mathews*, 424 U.S. at 333.

173. *Id.* at 340.

The second prong of the balancing test addresses the risk of an "erroneous deprivation" of the individual's liberty interest under the current procedure and the probable value of additional safeguards. The existing procedure, which consists of a brief declaration from a Defense Department functionary,[174] is clearly inadequate under this prong. The risk of erroneous deprivation is extremely high: enemy combatants are put in the impossible situation of proving that they should not be so designated only by *disproving* the merits of the underlying allegation of prohibited conduct. Moreover, there is a reversal of the usual presumptions: enemy combatants are in effect guilty until proven innocent.[175] Thus, the probable value of additional procedural safeguards is great.

The risk of erroneous deprivation is especially high given the subjective and unreviewable nature of the determination. *Mathews* drew a distinction between an objective decision that turns on routine, standard, and unbiased reports[176] and a subjective decision that is driven by certain individuals' policy whims. Classifying someone as an enemy combatant under the current regime is a highly subjective, fact-bound, and politically-motivated decision. The "level of personal involvement by a Cabinet-level officer in the matter . . . is . . . unprecedented."[177] In such circumstances, where "a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process[,]. . . 'written submissions are a wholly unsatisfactory basis for decision,'"[178] especially skimpy "affidavit[s] consist[ing] of two pages and nine paragraphs"[179] from a Defense Department special advisor. What is more, according to the Bush Administration, a person classified as an enemy combatant cannot contest his designation.[180]

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174. *See* Hamdi v. Rumsfeld, 316 F.3d 450, 461–62 (4th Cir. 2003) (describing affidavit from Special Advisor to the Under Secretary of Defense for Policy Michael Mobbs).

175. *See* Joanne Mariner, *Indefinite Detention on Guantanamo*, FINDLAW, *at* http://writ.corporate.findlaw.com/mariner/20020528.html (May 28, 2002).

176. *See Mathews*, 424 U.S. at 344.

177. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 581–82 (S.D.N.Y. 2002) (discussing the court's jurisdiction). Even prior to the Sept. 11 attacks, the Supreme Court recognized a distinction between ordinary detention cases and "terrorism or other special circumstances where special arguments might be made for forms of preventive detention." Zadvydas v. Davis, 533 U.S. 678, 696 (2001).

178. *Mathews*, 424 U.S. at 343–44 (quoting Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (discussing decisionmaking in the typical determination of welfare entitlement)). The decision in *Goldberg* was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to write effectively" and could not afford professional assistance. *Goldberg*, 397 U.S. at 269. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decision maker appears to regard as important." *Id.* In the context of enemy combatant determinations, the procedure used (the Mobbs declaration) does not answer these objections.

179. *Hamdi*, 316 F.3d at 472.

180. *Id.*

The current "procedure" of an unreviewable unilateral determination by the executive is devoid of any discernible process to which the enemy combatant, unassisted by counsel, has access. Therefore, the value of additional process and additional safeguards is especially high. As noted in *Padilla*, "this [terrorism case involving an enemy combatant] is not the usual case. . . . [W]hen viewed in comparison to past cases, the circumstances present here seem at least 'very special.'"[181]

Furthermore, when in doubt, the government should err on the side of treating detainees as criminal defendants.[182] This additional safeguard is crucial given that it is difficult to "un-ring the bell" once a detainee has been deprived of the protections to which a criminal defendant is normally entitled. These long-standing procedural safeguards guaranteed by the criminal justice system cannot be conferred after the fact. This was precisely the problem in the John Walker Lindh case. Before the Lindh interrogation, the Department of Justice's internal ethics unit advised, "[W]e don't think you can have the FBI agent question [him]. It would be a pre-indictment, custodial overt interview, which is not authorized by law."[183] When the FBI interviewed Lindh despite this warning, the ethics unit then advised that "the confession might 'have to be sealed' and 'only used for national security purposes,'" and not in a criminal capacity.[184] The government again flouted the recommendation and tried to use the confession in precisely this manner, causing commentators to note that "[it] is no coincidence that the Lindh [surprise plea bargain] deal came about on the eve of a scheduled week-long [suppression] hearing that was going to bring into the open the specifics of how Lindh was treated and by whom."[185] The Lindh case illustrated the value of giving detainees due process in case the government decides to try them criminally.

"[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process,"[186] and for a detainee designated as an enemy combatant, the risk is substantial and irreversible. The additional safeguards of an evidentiary hearing, or even an oral presentation to the decisionmaker, and the conferment of criminal due process rights when any doubt exists are substantially valuable given the high-stake circumstances.

Finally, the third prong in assessing the appropriate due process balance re-

181. *Padilla*, 233 F. Supp. 2d at 579, 581–82.

182. *See* Katharine Q. Seelye, *Walker Is Returned to U.S. and Will Be in Court Today*, N.Y. TIMES, Jan. 24, 2002, at A15. In the now-empty words of former White House spokesman Ari Fleischer, referring to John Walker Lindh, "[T]he great strength of America is he will now have [had] his day in court," and received independent judicial review. *Id.*

183. Mayer, *supra* note 89, at 58; *see also* Michael Isikoff, *The Lindh Case E-Mails*, NEWSWEEK, June 24, 2002, at 8.

184. Isikoff, *supra* note 183, at 8.

185. Andrew Cohen, *Lindh Layers Are Peeling Away*, CBSNEWS.COM (Mar. 11, 2003), *at* http://www.cbsnews.com/stories/2003/03/11/news/opinion/courtwatch/main543497.shtml.

186. Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

quires consideration of the public interest.[187] This analysis includes "the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing"[188] in all cases prior to designating someone an enemy combatant.

One obvious cost is the financial burden of providing hearings for everyone. However, these hearings would be required in an infinitesimally small number of cases since, thus far, only two U.S. citizens have ever been labeled enemy combatants.

There may also be administrative costs associated with requiring civilian courts to undertake a new type of adjudication. However, our government has experience and success in using civilian criminal courts to combat organized crime and terrorism[189]—prosecuting Mafia bosses, drug kingpins, so-called domestic terrorists such as Timothy McVeigh and Ted Kaczynski, and foreign terrorists—and the federal criminal courts are well-equipped to handle such cases. Ramzi Yousef, mastermind of the first World Trade Center bombing, was convicted for the 1993 attack in a federal criminal court.[190] Wadih el-Hage, an American citizen, was convicted recently in a civilian court for bombing the American embassies in Kenya and Tanzania.[191]

Furthermore, minimum due process for persons labeled enemy combatants would also not result in substantial additional cost either financially or administratively. Even if heightened due process for enemy combatants did impose a financial burden, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard."[192] There may be a point at which the benefit of an additional safeguard to the individual and to society in terms of "increased assurance that the action is just"[193] may outweigh the monetary cost.

Civilian criminal court provides such assurance and enjoys a legitimacy with which people (including non-U.S. residents) are familiar and upon which they rely. The defendant has a right to an attorney.[194] The proceedings are open to the public.[195] There are important evidentiary standards: hearsay cannot be used as evidence[196] and the defendant has the right to confront accusers,[197] to

187. *Mathews,* 424 U.S. at 347.

188. *Id.*

189. *See* Orenstein, *supra* note 129.

190. *See* U.S. v. Salameh, 152 F.3d 88 (2nd Cir. 1988); *see also* Blaine Harden, *Two Guilty in Trade Center Blast,* WASH. POST, Nov. 13, 1997, at A1.

191. Vernon Loeb and Christine Haughney, *Four Guilty in Embassy Bombings,* WASH. POST, May 30, 2001, at A1.

192. *Mathews,* 424 U.S. at 348.

193. *Id.*

194. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

195. *Id.* ("In all criminal prosecutions, the accused shall enjoy the right . . . to a speedy and public trial.").

196. FED. R. EVID. 801 (barring admission of hearsay evidence except in certain enumerated

call witnesses,[198] to hear the evidence and to challenge it.[199] Guilt must be proved beyond a reasonable doubt[200] and the verdict must be unanimous.[201]

The claim that such procedural protections interfere with intelligence-gathering is a red herring and can be ameliorated by the use of appropriate screening mechanisms, as I have advocated in a previous article.[202] Such examples include erecting a firewall[203] between the lawyer involved with gathering intelligence and the prosecutor; sealing off interviews conducted for intelligence-gathering purposes from those used for criminal prosecution;[204] and obtaining a waiver from the affected client.[205]

Low costs, coupled with the importance of justice and fairness, militate in favor of additional safeguards for the individual facing designation as an enemy combatant.

VI.
CONCLUSION

The President does a disservice to constitutional democracy by claiming that enemy combatant designations are exempt from due process requirements.

The *Padilla* court noted that "it would be a mistake to create the impression that there is a lush and vibrant jurisprudence governing these matters. There isn't."[206] The essence of due process is the requirement that a person in jeop-

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circumstances).

197. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

198. *Id.* ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.")

199. *Id.* The opportunity to cross-examine witnesses satisfies the commands of the Confrontation Clause.

200. The "reasonable doubt" standard is not explicitly mentioned in either the Due Process clauses of the Fifth or Fourteenth Amendments. However, the Court has held that "[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re* Winship, 397 U.S. 358, 364 (1970).

201. Andres v. U.S., 333 U.S. 740, 748 (1948) (stating, "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments [to the Constitution] apply.").

202. Jesselyn A. Radack, *United States Citizens Detained as "Enemy Combatants": The Right to Counsel as a Matter of Ethics*, 12 WM. & MARY BILL RTS. J. 221 (2003).

203. *See, e.g.*, SLC Ltd. v. Branford Group W. Inc., 147 B.R. 586 (Bankr. D. Utah 1992) (to avoid imputation based on hiring of lawyer who brings conflict of interest, firm must implement "Chinese wall" immediately upon hiring lawyer).

204. *See, e.g.*, Kassis v. Teacher's Ins. & Annuity Ass'n v. Civetta/Cousins, 678 N.Y.S.2d 32 (App. Div. 1998) (files would be stored in litigator's office and not file room, new lawyer would be instructed not to touch files, no meetings would be held in new lawyer's presence, and lawyers on case would be told not to discuss it with new lawyer).

205. *See, e.g.*, United States v. Valdez, 149 F.R.D. 23 (D. Utah 1993) (defense counsel's former representation of proposed government witness in unrelated matter did not violate Rule when defendant gave effective waiver).

206. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 607 (S.D.N.Y. 2002).

ardy of serious loss be given notice of the case against him and an opportunity to meet it.[207] Our treatment of citizens suspected of terrorist activity "say[s] much about us as a society committed to the rule of law."[208] Classifying someone as an enemy combatant should not be like stacking the deck against problematic detainees, but rather should be the result of a thorough, open, reasoned process.

Enemy combatants "lucky" enough to be criminally prosecuted will have the benefit of the constitutional protections afforded all defendants in American criminal prosecutions, such as the right to counsel, the privilege against self-incrimination, and the right to a jury trial.[209] But the due process protections normally found in the criminal justice system are the minimum. American enemy combatants are more vulnerable than the average criminal defendant because of the strict and indefinite conditions of their detention. Given the high stakes, there should be just as much, if not more, protection for enemy combatants. If the original intent of the Fifth Amendment is to be honored, enemy combatants must be afforded due process of law. Even Defense Secretary Donald H. Rumsfeld agrees that the idea of process is a vital one. In recent remarks on enemy combatants detained at Guantánamo Bay, he sketched out a review process that the Department of Justice is creating for detainees who cannot be repatriated, freed or tried before military tribunals.[210] A review panel, he said, would examine each case annually, and each detainee would have the ability to "present information on his behalf."[211] Presumably, the same procedures would apply with equal or greater force to enemy combatants detained on U.S. soil. Rumsfeld's acknowledgment that new structures and procedures of review and accountability must govern detentions in this most unusual war is an important start. We must now ensure it is not a false one.

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207. Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171–72 (1951).

208. AMER. BAR ASS'N TASK FORCE REPORT, *supra* note 83, at 4.

209. *See* M.L.B. v. S.L.J., 519 U.S. 102, 139 (1996) ("The Constitution provides for a series of protections of the unadorned liberty interest at stake in criminal proceedings. These express protections include the Fifth Amendment's guarantee of grand jury indictment, and protection against double jeopardy and self-incrimination; the Sixth Amendment's guarantees of a speedy and public jury trial, of the ability to confront witnesses, and of compulsory process and assistance of counsel; and the Eighth Amendment's protections against excessive bail and fines, and against cruel and unusual punishment. This Court has given content to these textual protections, and has identified others contained in the Due Process Clause.").

210. Rumsfeld, Remarks to Greater Miami Chamber of Commerce, *supra* note 3.

211. *Id.* at 3; *see also* John Mintz, *U.S. Outlines Plan for Detainee Review*, WASH. POST, Mar. 4, 2004, at A10.