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Jose Padilla: Enemy Combatant or Common Criminal

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JOSE PADILLA: ENEMY COMBATANT OR COMMON CRIMINAL?

I. INTRODUCTION

On September 11, 2001, the United States faced an unprecedented attack against civilians on U.S. soil. Since the attacks, many scholars have criticized the government’s responses in fighting terrorism, particularly the detention of Jose Padilla. Jose Padilla is an American citizen, yet the government seized him as he disembarked from a plane at Chicago O’Hare International Airport and has since held Padilla at a military base in South Carolina. Even more disturbing is the government’s argument that Padilla is an enemy combatant and therefore has no right to a lawyer.


2. See Jodi Walgreen & Jo Thomas, The Bomb Suspect; From Chicago Gang to Possible Al Qaeda Ties, N.Y. TIMES, June 11, 2002, at A19 (reporting on arrest and subsequent transfer of Jose Padilla to military base). There are numerous legal issues arising from September 11th, all of which cannot be reviewed in this Note. These issues include the federal government’s power to investigate involvement in terrorism, the status of prisoners caught in Afghanistan, the President’s power to wage war, the President’s power to require military commissions to try detainees, the President’s power to detain hundreds of people without revealing their identities, the status of the armed conflict with Afghanistan as a war and, finally, the power of the President to classify U.S. citizens as enemy combatants and detain them indefinitely. For further reading on these topics, see generally Jeffrey F. Addict, Legal and Policy Implications for a New Era: The “War on Terror”, 4 SCHOLAR 209 (2002) (discussing whether conflict is war and whether detainees are prisoners of war); Jordan J. Paust, Antiterrorism Military Commissions: The Ad Hoc Rules of Procedure, 23 MICH. J. INT’L L. 677 (2002) [hereinafter Paust, Ad Hoc Rules] (discussing constitutionality of military commissions, constitutionality of Presidents Order and jurisdiction of federal courts over Guantanamo Bay); Juan R. Torruella, On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power, 4 U. PA. J. CONST. L. 648 (2002) (discussing problems of President’s Order, presidential power, whether conflict is war and whether detainees are enemy combatants); Ruth Wedgwood, Agora: Military Commissions: Al Qaeda, Terrorism, and Military Commissions, 96 Am. J. Int’l L. 328 (2002) (discussing constitutionality of President’s Order, whether conflict is war, constitutionality of military commissions and whether Taliban and al-Qaeda are prisoners of war); Christopher M. Evans, Note, Terrorism on Trial: The President’s Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission, 51 DUKE L.J. 1831 (2002) (discussing President’s authority to issue order for military commissions, constitutionality of Presidents Order and whether international law applies).

3. See Wilgoren & Thomas, supra note 2, at A19 (describing Padilla’s arrest). In this Note, the use of the word “government” refers to the executive branch, including the President, his advisors and government agencies acting upon the President’s orders.
no right to seek civilian court remedies and no right to have charges brought against him.\textsuperscript{4}

Strong governmental reactions to national security emergencies are not without precedent.\textsuperscript{5} Nevertheless, it is important for the government to exercise proper restraint in order to protect the liberties of American citizens.\textsuperscript{6} It is a fundamental precept of living in a free society that the government cannot seize an American and detain him without any charges brought against him and without a lawyer to protect his rights.\textsuperscript{7}

\textsuperscript{4} See id. (describing government's argument for Padilla's detention).

\textsuperscript{5} See Hirabayashi v. United States, 320 U.S. 81, 104 (1943) (upholding curfew order of Japanese descendants); Yasui v. United States, 320 U.S. 115, 117 (1943) (upholding curfew order of Japanese descendants); \textit{Ex parte Quirin}, 317 U.S. 1, 47-48 (1942) (upholding sentencing and execution of U.S. citizen, under military tribunal); Korematsu v. United States, 140 F.2d 289, 299-300 (9th Cir. 1943) (upholding internment of citizens of Japanese descent), \textit{aff'd}, 323 U.S. 214 (1944). \textit{But see Ex parte Endo}, 323 U.S. 283, 297-305 (1944) (holding that Japanese woman could not be detained absent evidence of disloyalty); \textit{Ex parte Milligan}, 71 U.S. 2, 141-42 (1866) (holding military tribunals unconstitutional for trial of civilians during peace and when courts were functioning); Scherzberg v. MADEIRA, 57 F. Supp. 42, 47-48 (E.D. Pa. 1944) (holding that in absence of impending and imminent danger, Congress could not abridge person's constitutional rights); Schueller v. Drum, 51 F. Supp. 988, 987-88 (E.D. Pa. 1943) (holding that there was no rational basis for exclusion of German citizen from military zone).


\textsuperscript{7} See U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures); U.S. CONST. amend. V (guaranteeing due process of law); U.S. CONST. amend. VI (guaranteeing right to counsel). Justice Murphy wrote in a dissent:

The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive popular passion or
This Note considers three questions. First, whether Padilla's detention is legal. Second, whether the government is accurate in proposing that they do not have to defend Padilla's detention in a civilian court. Third, whether there are any legitimate arguments why Padilla should be subject to different treatment than are other suspected terrorists.

Part II of this Note describes the context of Padilla's detention, including measures taken by the President and Congress in response to September 11th, and the particular facts of Padilla's detention. Part III reviews the historical grounds for military detention and trial by military tribunals as well as discussing whether habeas corpus review is available in those circumstances. Part IV tests Padilla's detention under each of the historical grounds for detention and asks whether Padilla is entitled to judicial review. Part V presents government inconsistencies that lend credence to the concern that Padilla is being held illegally and questions whether there are any legitimate reasons to treat Padilla differently in spite of precedent. This Note concludes that the government's detention of Jose Padilla is illegitimate under precedent and that, even if Padilla's detention is legitimate, he at least has the right to challenge his detention in civilian courts. Additionally, this Note concludes that the government's extra-legal arguments do not justify Padilla's inconsistent treatment.

frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States. The existence of these rights ... cannot be ignored by any branch of Government, even the military, except under the most extreme and urgent circumstances. In re Yamashita, 327 U.S. 1, 26-27 (1946) (Murphy, J., dissenting) (arguing for primacy of universal rights for all persons and against all branches of government).

8. For a further discussion on Padilla's detention, see infra notes 21-27 and accompanying text.

9. For a further discussion on the historical grounds for military detentions and habeas corpus review under those circumstances, see infra notes 28-121 and accompanying text.

10. For a further discussion of whether Padilla's detention is legal under historical grounds and whether he is entitled to judicial review, see infra notes 122-76 and accompanying text.

11. For a further discussion of the inconsistent treatment of Padilla in contrast to other suspected terrorists and possible explanations for that inconsistent treatment, see infra notes 177-98 and accompanying text.

12. For a summary of why Padilla's detention is illegal under the historical precedent, see infra notes 125-65 and accompanying text.

13. For a summary of why the government's arguments in favor of military detention fail, see infra notes 177-98 and accompanying text.
II. BACKGROUND

A. Measures Taken by Congress and the President in the Aftermath of September 11th

On September 11, 2001, members of the terrorist organization al-Qaeda hijacked four planes and crashed them into the World Trade Center, the Pentagon and a field in Pennsylvania. Immediately, the U.S. government and the American citizens realized that this was an attack that required a military response. On September 14, 2001, Congress passed

14. See Serge Schemann, President Vows to Exact Punishment for 'Evil', N.Y. TIMES, Sept. 12, 2001, at A1 (describing events of September 11). American Airlines Flight 11, en route to Los Angeles departing from Boston crashed into the South Tower of the World Trade Center. See id. (same). United Airlines Flight 175, also departing from Boston en route to Los Angeles, crashed into the North Tower of the World Trade Center. See id. (same). American Airlines Flight 77, also bound for Los Angeles but departing from Washington Dulles International Airport, crashed into the Pentagon. See id. (same). Finally, United Airlines Flight 93, flying from Newark en route to San Francisco, crashed in a field in Pennsylvania. See id. (same). About an hour after the planes hit the World Trade Center Towers, they collapsed, burying hundreds of rescue workers along with thousands of people who worked in the Towers. See id. (same). Al-Qaeda is a terrorist organization headed by Osama bin Laden, whose primary goals are to engage in jihad, or holy war, against the United States and its citizens. See Torruella, supra note 2, at n.12 (describing al-Qaeda).

a Joint Resolution authorizing the use of military force in response to the terrorist acts.\footnote{16} Pursuant to this authorization, U.S. troops began a sustained military campaign against the Taliban and al-Qaeda.\footnote{17} On November 13, 2001, President Bush issued a military order (the Order) authorizing the detention and trial by military commission of all those involved in the terrorist attacks and anyone associated with them.\footnote{18}


17. See David Rohde, \textit{Thunderous Blasts and Bright Flashes Mark Kabul Strikes}, N.Y. Times, Oct. 8, 2001, at A1 (reporting that air strikes had begun over Afghan city of Kabul). The Taliban is a fundamentalist Islamic group who assumed control of Afghanistan in the early 1990s. See Torruella, \textit{supra} note 2, at 693 (describing how Taliban government’s history bolsters argument that members of Taliban are subject to President Bush’s military order). The Taliban received recognition only from Pakistan and Saudi Arabia. See \textit{id.} (stating that Taliban’s lack of diplomatic recognition supports view that members of Taliban are terrorists within military order’s definition).

18. See Military Order (the Order) of November 13, 2001, Title 3, The President, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) (authorizing detention of non-citizens found to have participated in terrorist acts or associated with members of al-Qaeda, and authorizing trial by military commission). This Order subjects those who are non-U.S. citizens and who have either been a member of al-Qaeda, engaged in or have in their aim to engage in acts of terrorism, or harbored any of the above, to detention pursuant to the Order and to trial by military commissions. See \textit{id.} § 2(a)(1)(i-iii) (defining jurisdiction of military order as limited to non-U.S. citizens). The Order also denies individuals falling within this Order any remedy in any other courts. See \textit{id.} § 7(b)(2) (removing privilege to seek remedies, not only in U.S courts but in foreign courts and international tribunals). Although the Order seems to suspend the privilege to seek a writ of habeas corpus, White House Counsel Alberto Gonzalez has said that a writ of habeas corpus would be allowed. See Alberto R. Gonzales, \textit{Martial Justice, Full and Fair}, N.Y. Times, Nov. 30, 2001, at A27 (stating that anyone detained under military order would not be denied opportunity to challenge lawfulness of commission’s jurisdiction in federal court). To date, hundreds of foreigners captured in Afghanistan, mostly of Arab descent, have been detained on military bases outside the U.S. pursuant to the Order. See Katherine Q. Seelye, \textit{Prisoners; U.S. Treatment of War Captives Is Criticized}, N.Y. Times, Apr. 15, 2002, at A12 (reporting detention of almost 300 prisoners at U.S. Naval base in Guantanamo Bay, Cuba). Commentators and scholars have hotly debated the constitutionality of the use of military commissions. Compare Curtis A. Bradley & Jack L. Goldsmith, \textit{The Constitutional Validity of Military Commissions}, 5 Green Bag 2d 249, 249-55 (2002) (defending constitutional validity of military commissions), and Torruella, \textit{supra} note 2, at 653-85, 710-24 (discussing underlying power to execute order and policy consideration needed to implement it), and Wedgwood, \textit{supra} note 2, at 330-35 (supporting use of military commissions but advocating policy considerations for their implementation), with George P. Fletcher, \textit{War and
Problems applying the Order arose during the subsequent discovery that two of the captured Taliban were American citizens, a significant fact due to the Order’s express exclusion of American citizens from its jurisdiction. Although other suspected terrorists have been arrested since Sep-


19. See Military Order of November 13, 2001, Title 3, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 2(a) (Nov. 16, 2001) (referring only non-citizens to Order’s jurisdiction). The two captured men, John Walker Lindh and Yasir Hamdi, were transferred from detention in Afghanistan and Cuba respectively, to detention in the United States. See Evelyn Nieves, A U.S. Covert’s Path from Suburbia to a Gory Jail for Taliban, N.Y. TIMES, Dec. 4, 2001, at B1 (reporting Lindh’s background and path to involvement with al-Qaeda); Katherine Q. Seelye, The American Prisoner: Walker Is Returned to U.S. and Will Be in Court Today, N.Y. TIMES, Jan. 24, 2002, at A15 [hereinafter Seelye, Walker Is Returned] (describing Lindh’s return to United States and charges facing him); Katharine Q. Seelye, Prisoners; Believed to Be a U.S. Citizen, Detainee Is Jailed in Virginia, N.Y. TIMES, Apr. 6, 2002, at A7 [hereinafter Seelye, Detainee Is Jailed] (reporting that Yasir Hamdi was transferred to detention in U.S. after discovery of his U.S. citizenship). Lindh was charged with conspiring to kill Americans and supporting terrorist groups. See David Johnston, Walker Will Face Terrorism Counts in a Civilian Court, N.Y. TIMES, Jan. 16, 2002, at A1 (reporting charges against Lindh and Lindh’s background with Taliban). Lindh’s case ended with a plea-bargain, in which Lindh agreed to cooperate with investigators in return for a reduced sentence of twenty years in prison. See Katherine Q. Seelye, Regretful Lindh Gets 20 Years in Taliban Case, N.Y. TIMES, Oct. 5, 2002, at A1 [hereinafter Seelye, Regretful Lindh] (reporting on final sentencing of Lindh to twenty years in prison under plea agreement); 20-Year Sentence Recommended for Lindh, N.Y. TIMES, Sept. 28, 2002, at A11 (reporting on Lindh’s plea-bargain and Justice Department’s recommendation of twenty year sentence). In contrast, Hamdi has been held at a military base without any access to the outside, including access to a lawyer. See Katherine Q. Seelye, U.S. Argues War Detainee Shouldn’t See a Lawyer, N.Y. TIMES, June 1, 2002, at A10 [hereinafter Seelye, U.S. Argues] (reporting on government’s position in denying Hamdi access to counsel). Unlike Lindh, Hamdi has not been charged with a crime. See id. (reporting on government’s arguments for detaining Hamdi). The government argues that Hamdi is an enemy combatant and can therefore be held by the military, in accordance with the Geneva Conventions, until the current hostilities have ended. See Marcia Coyle, Taking Offense Wrestling with Court Access for Captured Citizens, Nat’l L.J., July 29, 2002, at A1 (reporting on grounds government gives for justification of detention). If Hamdi indeed fought with the Taliban and was captured on the battlefield, his U.S. citizenship likely would not bar his detention in a manner similar to other detainees. See Ex parte Quirin, 317 U.S. 1, 47-48 (1942) (holding that U.S. citizens fighting for enemy were subject to same treatment as non-citizens). It is troubling, however, that Lindh, caught in similar circumstances, received his full constitutional rights, yet Hamdi has not. See Seelye, Regretful Lindh, supra, at A1 (reporting Lindh’s plea-bargain). The United States Court of Appeals for the Fourth Circuit overruled a
January 11th, in May 2002, the government made its most controversial arrest, that of Jose Padilla.\textsuperscript{20}
B. Jose Padilla's Plight

On May 8, 2002, Jose Padilla, also known as Abdullah al-Muhajir, was arrested at Chicago O'Hare International Airport. The government suspects that Padilla, a U.S. citizen, was plotting a “dirty bomb” attack on the United States. On June 9, 2002, the government transferred Padilla to detention at a military base in Virginia pursuant to an order by the President. Padilla was neither charged with a crime nor allowed access to a lawyer.

The government argues that Padilla is an enemy combatant and therefore subject to detention by the military until hostilities end. Furthermore, the government has openly admitted that it has no interest in

21. See Anthony Dworkin, Detention of U.S. Citizen May Open Anti-Terrorism Campaign to Legal Scrutiny, at http://www.crimesofwar.org/onnews/news-almuhajir.html (last visited Oct. 14, 2002) (describing facts surrounding Padilla's arrest); see also Lev Grossman, The Accidental Advocate, TIME, Sept. 9, 2002, at 96 (describing facts of Padilla's arrest and overview of legal battle); Wilgoren & Thomas, supra note 2, at A19 (reporting on arrest and subsequent transfer to military detention of Jose Padilla). Jose Padilla was born in New York and spent most of his childhood growing up in Chicago, where he was a member of a gang. See id. (describing Padilla's childhood). Padilla was arrested on May 8, 2002, on a material witness warrant at Chicago O'Hare International Airport and was then transferred to the military brig. See id. (describing Padilla's arrest).

22. See Tom Brune et al., Arrest in Terror Plot; Feds: American, al-Qaeda Sought to Set Off 'Dirty Bomb' in U.S., NEWSDAY (New York), June 11, 2002, at A5 (reporting on why Padilla was transferred to military base); Bush Calls Accused Plotter 'Would-Be Killer,' Lawyer Says Rights Violated, GUELPH MERCURY (Toronto), June 12, 2002, at A10 [hereinafter Bush Calls] (stating that Padilla is suspected of planning to activate radioactive weapon). According to government sources, a detained al-Qaeda leader, Abu Zubaydah, informed American officials that Padilla had a plan to detonate a dirty bomb. See Benjamin Weiser & Dana Canedy, Lawyer Plans Challenge to Detention of Suspect, N.Y. TIMES, July 12, 2002, at A24 (discussing evidence leading to Padilla's arrest). It is generally acknowledged, however, that Padilla did not have the means to carry out any such plot and that there is no evidence that the plot even reached the initial planning stage. See id. (discussing status of plans to detonate dirty bomb). A “dirty bomb” or radioactive bomb is “a conventional explosive device containing radioactive material toxic to humans that can be fatal to people in the vicinity of the blast. It is also seen as an effective weapon for disseminating panic.” Lawyer Says 'Dirty Bomb' Suspect's Detention Unconstitutional, AGENCE FRANCE PRESSE (New York), June 11, 2002, at Lexis, News Group File, All (describing possible effects of "dirty bomb").

23. See Weiser & Canedy, supra note 22, at A24 (discussing facts of Padilla's detention).

24. See Benson & Woods, supra note 6, at Lexis, Newsgroup File, All (stating lack of formal charges against Padilla); Wilgoren & Thomas, supra note 2, at A19 (listing rights that may have been violated).

25. See Benson & Woods, supra note 6, at Lexis, Newsgroup File, All (reporting that government is holding Padilla as enemy combatant under principles of Geneva Convention). The government is relying on a 1942 Supreme Court case as precedent for the military detention of Padilla. See Ex parte Quirin, 317 U.S. 1, 47-48 (1942) (upholding use of military tribunals for captured German saboteurs); see
charging or punishing him and only wants him for information purposes.  

26 Donna Newman, a lawyer previously appointed to represent Padilla while he was detained as a material witness, has filed a petition for a writ of habeas corpus seeking Padilla's release.  

27 In order to determine whose argument is strongest, it is best to examine historical precedent.

III. HISTORICAL REVIEW OF THE USE OF MILITARY TRIBUNALS AND MILITARY DETENTIONS

Historically, military detentions and trials have replaced civilian courts in the following circumstances: (1) during the existence of martial law;  


26. See Dworkin, supra note 21 (quoting interview with Donald Rumsfeld). In the interview, Secretary of Defense Donald Rumsfeld stated, "[w]e are not interested in trying him at the moment; we are not interested in punishing him at the moment. We are interested in finding out what he knows." Id. (quoting Donald Rumsfeld admitting government does not want to try Padilla). Prior to Padilla's designation as an enemy combatant, Padilla was being held as a material witness. See Weiser & Canedy, supra note 22, at A24 (describing facts of Padilla's arrest and progress of case in courts). In April of 2002, a federal judge in the district court for the Southern District of New York ruled that detaining material witnesses for grand jury investigations was illegal. See United States v. Awadallah, 202 F. Supp. 2d 55, 74 (S.D.N.Y. 2002) (holding that people could not be held indefinitely for purpose of grand jury investigations). But see Benjamin Weiser, U.S. Judge Clears Detention of Witnesses for Grand Jury, N.Y. TIMES, July 12, 2002, at B4 (reporting that judge on same court decided that prosecutors may detain witnesses to testify in grand juries, in contradiction of Awadallah decision).

27. See Weiser & Canedy, supra note 22, at A24 (explaining status of case with respect to federal courts). Most recently, Judge Michael Mukasey in a federal district court in New York has allowed lawyers to meet with Padilla solely to enable him to present his petition, and will likely decide on the merits of the case in 2003, at which point it will likely proceed up through the federal court system. See Padilla v. Bush, 2002 U.S. Dist. LEXIS 25086 (S.D.N.Y. Dec. 4, 2002) (holding that Padilla may consult with attorneys regarding his petition). For current developments in this case, see http://news.findlaw.com/legalnews/us/terrorism/cases/index.html (last visited Jan. 13, 2003) (cataloging developments in Padilla case and other terrorism-related cases).

28. See, e.g., Moyer v. Peabody, 212 U.S. 78, 85-86 (1909) (upholding establishment of military tribunals); State ex rel. O'Connor v. Dist. Court in Shelby County, 260 N.W. 73, 84-85 (Iowa 1935) (upholding existence of martial law); In re McDonald, 143 P. 947, 954-55 (Mont. 1914) (holding that, during martial law, military may arrest and detain people but may not punish them); see also 53A AM. JUR. 2D Military and Civil Defense §§ 437-46 (2d ed. 2002) (describing generally jurisdiction of military over civilians during martial law). The scope of martial law is as follows: Martial law . . . presupposes the existence of a state of actual war and the occupation of the district where it exists by a hostile or lawless force interrupting the civil courts in the administration of law in their accustomed mode. Martial law can only exist and military power can only be exercised over the property of the citizen when the civil arm of the government becomes powerless because of invasion, insurrection, or anarchy. It does not arise from threatened invasion; the necessity must be actual and present and the invasion real, such as effectually closes the courts and deposes the civil administration. It can never exist where the courts are open and in the proper and uninterrupted exercise of their jurisdiction.
(2) in occupied territories; and (3) to detain enemy combatants during hostilities and try those who violate the law of war. Additionally, from

Id. § 438. Nevertheless, there is limited application to civilians:

While . . . martial law supersedes all civil authority during the period, and within the territorial limits, of its operation, the power of the military under martial law over persons not in the military service is limited by the reasonable necessities of the occasion, and this is true even where the term "martial law" is used in its strict sense. The same rule applies where a modified form of martial law is declared in cases of internal insurrection or disorder, which is beyond the power of the civil authorities to quell.

Id. § 442. Under martial law, the military has power to arrest and detain civilians in certain circumstances. See id. § 445 ("It is the general rule that the military authorities, in the enforcement of martial law, may cause the arrest and detention of civilians when such action appears to be necessary for the restoration or maintenance of public order or the protection of persons or property against unlawful acts."). These cases must be distinguished from the system of courts-martial, which is the justice system in place within the military to try and punish its own members.


time to time, the President, acting via congressional authorization or ostensibly under his own power as Commander-in-Chief, has ordered the military detention of certain individuals or classes of individuals. As a secondary matter, the representative cases also demonstrate that the civilian courts have jurisdiction to determine the legality of these detentions via a writ of habeas corpus.

The government justifies Padilla’s detention by arguing that, because he is an enemy combatant, he has no right to a lawyer and can be held without charges. Additionally, the government insists that the President of civilians by armed forces during war). In the notes to section 821 of the U.C.M.J., law of war is defined as “[including] at least that part of [the] law of nations which defines powers and duties of belligerent powers occupying enemy territory pending establishment of civil government.” See U.C.M.J., 10 U.S.C. § 821, n.1 (citing Madsen v. Kinsella, 343 U.S. 341 (1952)).

31. See Hirabayashi v. United States, 320 U.S. 81, 104-05 (1943) (upholding validity of curfew order limiting movement of U.S. citizens of Japanese descent under President’s war powers); Yasui v. United States, 320 U.S. 115, 117 (1943) (stating validity of curfew order applicable to U.S. citizens of Japanese descent under President’s broad power to wage war under constitution); Korematsu v. United States, 140 F.2d 289, 290 (9th Cir. 1943) (upholding evacuation order applicable to U.S. citizens of Japanese descent because U.S. government has power to do all that is necessary in prosecuting war), aff’d, 323 U.S. 214 (1944). But see Ex parte Endo, 325 U.S. 283, 301-02 (1944) (holding invalid detention of woman of Japanese descent because, in absence of disloyalty, she posed no threat of sabotage or espionage and therefore her detention was not related to any reasonable objective); Scherzberg v. Madeira, 57 F. Supp. 42, 47 (E.D. Pa. 1944) (condemning abridgement of person’s rights and liberties in absence of situation fraught with impending and imminent danger); Schueller v. Drum, 51 F. Supp. 382, 387 (E.D. Pa. 1943) (“Direct interference with liberty and property and abridgement of constitutional guaranties of freedom can be justified under the ‘war power’ only where the danger to the government is real, impending and imminent.”).

32. See Yamashita, 327 U.S. at 8 (noting that Court’s job was to consider legality of military commission); Quirin, 317 U.S. at 27 (rejecting argument that Court could not decide whether military commissions overstepped constitutional boundaries); Ex parte Milligan, 71 U.S. 2, 33 (1866) (holding that Court would always have jurisdiction to determine whether those individuals subject to military trial were legally detained). See generally George Rutherglen, Structural Uncertainty over Habeas Corpus and the Jurisdiction of Military Tribunals, 5 Green Bag 2d 397 (2002) (surveying granting of habeas corpus review in situations of detention by military tribunal). For a fuller discussion of habeas corpus in general, see 39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §§ 1-226 (2d ed. 2002) (providing overview of habeas corpus). It is important to note, but beyond the scope of this Note to explore in detail, that military detentions and tribunals have always been supported by authorization from the President, Congress or military commanders in the field. See generally Bradley & Goldsmith, supra note 18 (surveying use and authorization of military commissions in history). For the purposes of this Note, it is assumed that, in relation to the conflict in Afghanistan, the President has the power to authorize military commissions to try those captured on the battlefield. For opposing opinions, see supra note 18.

33. See Wilgoren & Thomas, supra note 2, at A19 (describing government’s argument for Padilla’s detention).
dent's power to detain someone during war in the name of national security is not challengeable. Nevertheless, limits have been imposed.

A. Enemy Combatants and Violations of the Law of War

Under international law, members of opposing forces may be held in military detention until the cessation of the armed conflict. After World War II, the use of congressionally authorized military tribunals was widespread in the trials of enemy combatants who violated the law of war. In

34. See Grossman, supra note 21, at 96 (quoting U.S. government brief in Padilla's case stating, "A court of the United States has no jurisdiction... to enjoin the President in the performance of his official duties").

35. See Endo, 323 U.S. at 301-02 (holding that detention of woman of Japanese descent was not related to reasonable objective of preventing sabotage and espionage); Schenbarg, 57 F. Supp. at 47 (holding that German born citizens' detention was illegal because no rational basis for exclusion order existed); Schueller, 51 F. Supp. at 387 (holding that neither President nor Congress may abridge person's freedom in absence of impending and imminent danger).

36. See Geneva-Prisoners of War, supra note 30, art. 118 (providing for repatriation of prisoners of war at end of hostilities). It is beyond the scope of this Note to delve into the complexities of international law regarding the eligibility of terrorists for prisoner of war status. It is sufficient to note that in armed conflicts, one side may detain captured enemies and hold them until the end of hostilities. See id. (discussing detention of captured enemies). The Treaty of Versailles, signed after the First World War, recognized the right of the Allies "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." Treaty of Peace with Germany, art. 228, reprinted in 13 Am. J. INT'L L. 151, 250-51 (Supp. 1919) (authorizing use of military tribunals). For opposing views on whether terrorists, including members of al-Qaeda, should be accorded prisoner of war (POW) status, compare Marc Cogen, Terrorism and the Laws of War: September 11 and its Aftermath, Nov. 7, 2001, at http://www.crimesofwar.org/expert/attack-cogen.html (arguing that terrorists are not privileged combatants and are not entitled to prisoner of war status because they act independently of states), and Michael Noone, POWs or Unlawful Combatants? September 11 and its Aftermath, at http://www.crimesofwar.org/expert/pow-noone.html (last visited Oct. 14, 2002) (agreeing with administration that al-Qaeda are not POWs because they do not satisfy conditions under Geneva Conventions), with Curtis Doebbler, POWs or Unlawful Combatants? September 11 and its Aftermath, at http://www.crimesofwar.org/expert/pow-doebbler.html (last visited Oct. 14, 2002) (arguing that until tribunal declares otherwise, those captured in Afghanistan are POWs), and H. Wayne Elliott, POWs or Unlawful Combatants? September 11 and its Aftermath, at http://www.crimesofwar.org/expert/pow-elliott.html (last visited Oct. 14, 2002) (arguing that members of al-Qaeda caught in Afghanistan are POWs because of their relationship with Taliban army), and Robert Goldman, POWs or Unlawful Combatants? September 11 and its Aftermath, at http://www.crimesofwar.org/expert/pow-goldman.html (last visited Oct. 14, 2002) (distinguishing between members of al-Qaeda caught in Afghanistan, who are considered POWs and those captured in third world countries, who act individually and are therefore common criminals).

37. See Yamashita, 327 U.S. at 5 (subjecting General Yamashita to trial by military tribunal for violations of law of war in Philippines). The Constitution authorizes Congress to define and punish offenses against the law of nations. See U.S. CONST. art. I, § 8, cl. 10 (Congress has power to "define and punish... offences against the Law of Nations"). The law of nations is international law, including treaties and customary international law. See MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW CASES AND COMMENTARY 1 (2d ed. 2001) (describing origin of
both In re Yamashita\textsuperscript{38} and Ex parte Quirin,\textsuperscript{39} the Supreme Court considered petitions for a writ of habeas corpus from individuals who were tried and sentenced to death by congressionally authorized military tribunals.\textsuperscript{40} In both cases, the Court upheld the jurisdiction of the tribunals, but protected the Court's role to inquire into the constitutionality of each detention.\textsuperscript{41}

In Yamashita, the Court considered a writ of habeas corpus filed on behalf of General Yamashita, the Commanding General for the Imperial Japanese Army in the Philippine Islands during World War II.\textsuperscript{42} The military commission found General Yamashita guilty of violating the law of war and sentenced him to death.\textsuperscript{43} Yamashita filed a petition for habeas corpus, arguing that the military commission did not have jurisdiction to try him.\textsuperscript{44}
The Court pointed to Congress's constitutional power to define and punish offenses against the law of nations and its ability to grant military commissions jurisdiction to try these offenses. Thus, the Court concluded that the commission had jurisdiction to try Yamashita. Nevertheless, it is important to note that the Court considered Yamashita's petition for a writ of habeas corpus, despite the fact that he was an enemy alien captured outside the jurisdictional territory of the U.S. courts. The Court explained that its job was not to assess guilt or innocence but only to consider the legality of the commission.

In Ex parte Quirin, a group of German soldiers, one of whom was a U.S. citizen, petitioned for a writ of habeas corpus after being tried and sentenced by a military tribunal. The petitioners had entered the U.S. via submarine, discarded their uniforms and proceeded to their respective tasks assigned by the German government. They were captured carrying explosives, fuses, timing devices and large sums of U.S. currency. A series of presidential proclamations appointed military commissions to try the petitioners for offenses against the law of war; these proclamations also declared who would be subject to the commissions.

45. See id. at 7 (reviewing jurisdiction of military commissions over violations of law of war). For a discussion on the law of war, see supra note 30. For a discussion on the jurisdiction of military commissions, see supra note 37.

46. See Yamashita, 327 U.S. at 25 (stating conclusion).

47. See id. at 8-9 (stating that Congress, by sanctioning trials of enemy aliens by military commission, had not foreclosed their right to challenge authority of trial under Constitution). For an argument that the detainees at Guantanamo Bay in Cuba are under the jurisdiction of the United States and should receive constitutional rights, see Paust, Courting Illegality, supra note 18, at 24-25 (stating that U.S. military base is part of U.S. jurisdiction under international law); Paust, Ad Hoc Rules, supra note 2, at 690-91 (stating that U.S. court decision denying habeas corpus review to detainees held at Guantanamo Bay in Cuba is violation of international law); Torruella, supra note 2, at 704-05 (stating that United States has sovereign power over base and has previously exercised criminal jurisdiction over citizens and aliens on base). For a discussion of cases that deny jurisdiction to aliens outside of U.S. territory, see infra note 168.

48. See Yamashita, 327 U.S. at 8 (describing relevant issues of case); see also 28 U.S.C. §§ 451-52 (2002) (stating that purpose of writ of habeas corpus was to inquire into cause of restraint of liberty). The Court felt strongly that enemy aliens accused of offenses in military commissions should retain the right to challenge their detention on constitutional grounds. See Yamashita, 327 U.S. at 9 (noting that executive branch could not prevent courts from making inquiry into authority of military commission).

49. 317 U.S. 1 (1942).

50. See id. at 18-23 (describing facts and procedural history of case).

51. See id. at 21-22 (describing facts of case).

52. See id.

53. See id. at 22-23 (reviewing executive actions that provided jurisdiction for military commission to try petitioners). The President's proclamation stated: [A]ll persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and
The government challenged the petition, stating that petitioners were denied access to the courts because they were enemy belligerents and because the President’s proclamation expressly denied them access.\footnote{54} The Court rejected this argument stating, “neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners’ contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.”\footnote{55} Nevertheless, the Court emphasized that it would give substantial deference to the executive’s decisions.\footnote{56}

In determining whether the petitioners in fact violated the law of war, the Court drew an important distinction between lawful and unlawful combatants.\footnote{57} Unlawful combatants, unlike lawful combatants, were subject to trial and punishment by military tribunals for the acts that rendered them unlawful combatants, namely violations of the law of war.\footnote{58} The Court stated, “those who during time of war pass surreptitiously from enemy charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.\footnote{Id.}

\footnote{54. See id. at 24 (addressing government’s argument that Court could not hear case).}

\footnote{55. Id. at 25.}

\footnote{56. See id. (stating that Court would not set aside detention and trial of petitioners “without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted”). The Court’s reason for this deference was the constitutional grants of power to both the President and Congress in relation to armed conflict. See id. at 26 (reviewing Constitution for evidence of Congressional and Executive power); see also U.S. Const. art. I, § 8, cl. 1 (giving Congress power to provide for common defense); U.S. Const. art. I, § 8, cl. 10 (giving Congress authority to “define and punish . . . [o]ffences against the Law of Nations”); U.S. Const. art. I, § 8, cl. 11 (giving Congress authority to “declare War . . . and make Rules concerning Captures on Land and Water”); U.S. Const. art. II, § 2, cl. 1 (making President Commander in Chief of Army and Navy); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (holding that President has exclusive power in international affairs, and courts must accord higher degree of deference to this power). For a discussion on how Congress has implemented some of its Constitutional powers in defining offenses against the law of nations, see supra note 37. For a discussion of the law of war, see supra note 30.}

\footnote{57. See Quirin, 317 U.S. at 30-31 (distinguishing unlawful combatants from lawful combatants).}

\footnote{58. See id. at 31 (defining unlawful combatant). The Court defined unlawful combatants, stating:}

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.\footnote{Id.}
emy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. The Court found that the petitioners' actions had indeed violated the law of war.

The Court next considered one petitioner's argument that his U.S. citizenship protected him from designation as an unlawful combatant and from the jurisdiction of the military tribunal. The Court held that U.S. citizenship did not relieve a person of the consequences of his actions as an enemy belligerent stating, "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war." Thus, a U.S. citizen was subject to the military commissions by virtue of his unlawful combatant status with the enemy.

As these cases demonstrate, the military has jurisdiction over anyone, including a U.S. citizen, who fights for or acts on behalf of the enemy. The military can detain these belligerents until the cessation of the hostilities and try those who violate the law of war in military commissions and tribunals. These cases also demonstrate that, notwithstanding the lawfulness of these detentions, each individual may challenge his detention before a civilian court.

B. Presidential and Congressional Power to Order the Detention of Civilians

The President may not unilaterally order the arrest of a citizen in the absence of martial law, military occupation or imprisonment of enemy

59. Id. at 35.
60. See id. at 36-37 (finding that petitioner's actions met definitions of unlawful combatants). The fact that the petitioner had not actually committed or attempted to commit the proposed act or entered a zone of active military operations did not diminish the petitioner's status as an enemy belligerent. See id. at 37 (stating that there was no necessity for completed acts). For a discussion of the law of war, see supra note 30.
61. See Quirin, 317 U.S. at 37-38 (discussing whether U.S. citizenship exempted prisoner from designation as unlawful combatant or relieved him from military commission's jurisdiction).
62. Id.
63. See id. at 48 (holding that military commission was lawful).
64. See id. at 37-38 (defining enemy belligerents).
66. See Yamashita, 327 U.S. at 8-9 (stating that Court could determine whether trial was illegal); Quirin, 317 U.S. at 25 (rejecting argument that Court had no jurisdiction to evaluate whether military trial of petitioners was beyond constitutional boundaries).
One of the basic tenets of the Constitution is that no branch of government may detain, arrest or imprison a person without basic guarantees, such as the right to counsel, the right to a trial and the right of due process. World War II severely tested these principles, however, when numerous congressionally authorized presidential proclamations ordered the relocation of citizens and non-citizens of Japanese ancestry to internment camps. Although the courts upheld most of these orders, some limits were later set.

1. General Principals of the Government’s Power to Detain Civilians

Three important cases set general limits on presidential power to order the detention of individuals by the military. In *Ex parte Milligan*, the Supreme Court struck down the sentence of a civilian, finding that a military commission did not have jurisdiction to try him because he was not a member of the armed forces, had not fought in the rebellion and because the courts were open and unobstructed. In *Ex parte Orozco*, a Texas district court held that the President could not detain a civilian with-
out granting him his constitutional rights. Finally, in *Duncan v. Kahanamoku*, the Supreme Court held that the military could not exercise jurisdiction over civilians when the courts were open.

*Milligan* involved a U.S. citizen who was arrested, tried before a military commission and sentenced to death by hanging on charges of conspiracy during the Civil War period. *Milligan* sought a writ of habeas corpus arguing that, because he was a United States citizen and had never been a resident of any State involved in the Rebellion, the military commission did not have jurisdiction to try him. In holding that Milligan's detention was illegal, the Court emphasized the importance of the permanence of inherent constitutional rights, even in exigent circumstances such as war.

The Court relied on a number of factors in holding that the military did not have jurisdiction over Milligan. First, the Court stated that the laws of war did not apply to Milligan because he was a citizen of a state where the courts were open and unobstructed. Second, Milligan was not a member of the armed forces, and therefore was not subject to military law. Third, the Court noted that the area where Milligan was detained was not a place of war, and therefore not subject to military jurisdiction.

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75. See id. at 118 (holding that President could not detain civilian without accordinng him constitutional rights).
76. 327 U.S. 304 (1946).
77. See id. at 324 (holding that military tribunals cannot supplant civilian courts).
78. See *Milligan*, 71 U.S. at 107-08 (reviewing procedural history of case). Milligan was a resident of Indiana, a peaceful territory, and had never served in the military. See id. at 107 (reviewing relevant facts of case). For the significance of whether Milligan had served in the armed forces, see *supra* note 28.
79. See *Milligan*, 71 U.S. at 107-08 (stating Milligan's arguments and reasons for pursuing writ of habeas corpus).
80. See id. at 120-21 (“The Constitution of the United States is a 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.”).
81. See id. at 121-22 (stating reasons for denial of military court's jurisdiction over Milligan).
82. See id. at 121 (“[The laws of war] can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.”). The government argued that the power of the military to assume a judicial role arose from the laws and usages of war. See id. (describing government's contention that law of war applied to Milligan). In Indiana, the state in which Milligan's arrest took place, the courts were open and no rebellion was taking place. See id. (rejecting idea that law of war applied in Indiana).
83. See id. at 121-22 (“[N]o usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise [sic] connected with the military service.”). For the significance of whether Milligan had served in the military, see *supra* note 28.
84. See *Milligan*, 71 U.S. at 122 (discussing Congress's power to establish courts). The Court rejected the argument that martial law existed, emphasizing that martial law may be required in places where there is an “actual and present” necessity such that the courts are closed and the civil administration deposed, but
Finally, the Court noted that Congress had already provided a remedy through legislative action that could bring Milligan before the courts. The Court also rejected the government’s argument that Milligan could not challenge his detention. The Court held that, although Congress may suspend the writ of habeas corpus in times of rebellion, the Court’s role was to receive the petition, and decide whether the petitioner may proceed with it.

In Orozco, the military detained a man for violating neutrality laws when he conducted an unauthorized military expedition to Mexico. The man, however, had never been a member of the military. After deciding that no martial law existed that would justify his detention, the court held that the President could not order the arrest of individuals without granting them their rights under the Constitution. The court made the following important statement regarding the President’s power to detain a person:

not in places where there is only a threat of invasion. See id. at 126-27 (rejecting argument that martial law existed in Indiana at time of Milligan’s arrest).

85. See id. at 122 (setting forth additional reasons for military tribunal’s lack of jurisdiction). The Court noted that if Milligan had in fact conspired against the government, and if leaving him unrestrained was dangerous, there was a law in place to confine him and prevent him from doing further harm. See id. (stressing the availability of civil remedy for Milligan’s actions).

86. See id. at 130-31 (rejecting government’s argument that Milligan could not challenge military’s jurisdiction in civilian courts).

87. See id. (maintaining that Court could still decide on writ of habeas corpus even when privilege of writ of habeas corpus had been suspended). The Court wrote, “[t]he suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.” Id.


89. See id. at 109 (noting that military laws are not at issue because Orozco was never in military service).

90. See id. at 112 (limiting President’s power to detain civilians). The Court stated:

The power to arrest without warrant and to deprive the individual of his liberty without due process of law has no existence in this country. It has not been committed to any official, however high his station, nor to any department of the government, either executive, legislative, or judicial. Every department must act in obedience to the mandates of the Constitution. No one of them may usurp powers forbidden by that instrument, and none of them may perform acts in violation of its commands. When, therefore, an individual is arrested without warrant, in disregard of the fourth amendment, and imprisoned without due process of law, in violation of the fifth, the arrest and imprisonment are unlawful, and cannot be sustained in a court of justice. . . . His arrest upon the mere order of the President was in contravention of the fourth amendment, and his continued detention is repugnant not only to the fifth amendment, but also to the sixth, which guarantees to the accused the right to a speedy and public trial by a jury of the district where the crime shall have been committed.

Id.
[i]f a citizen can be arrested, except upon a charge of violated law, and for the purpose of taking him before some judicial tribunal for investigation, then it is plain that the executive department has usurped the functions of the other two, and the whole theory of our Government, so far as it related to the protection of private rights, is overthrown.91

Finally, in Duncan, the Court decided whether a civilian was subject to military jurisdiction in the state of Hawaii, which was under martial law.92 The Court followed its decision in Milligan, reasoning that to allow the military to have jurisdiction over civilians when the courts are open is obviously contrary to the principles on which this country was founded.93

The above cases demonstrate that the military may not exercise jurisdiction over civilians unless there is an immediate threat to the peace and a clear obstruction to the proper functioning of the courts.94 As such, these cases protect individual rights by setting important limits on government, especially presidential, authority to act through the military.

2. World War II—Executive Orders for Race-Related Internment and Curfew, and the Limits Imposed on the President’s Power

During World War II, the principles espoused in cases such as Milligan were ignored under the guise of emergency in time of war.95 Two

91. Id. at 116 (citing Johnson v. Jones, 44 Ill. 142, 147 (Ill. 1867)).
92. See Duncan v. Kahanamok, 327 U.S. 304, 324 (1946) (holding that military could not try civilians when civilian courts were open). The two petitioners in Duncan were arrested for assaulting two marines in violation of a military order and embezzling stock in violation of the laws of Hawaii. See id. at 307-11 (describing facts of case).
93. See id. at 317 (“[The] military trial of civilians charged with crime, especially when not made subject to judicial review, [is] so obviously contrary to our political traditions and our institutions of jury trials in courts of law, that the tenuous circumstance offered by the Government can hardly suffice to persuade us that Congress was willing to enact [into statute, authorization] permitting such a radical departure from our steadfast beliefs.”).
94. See id. at 324 (holding that citizen of Hawaii could not be tried by military commission as long as civilian courts were functioning); Ex parte Milligan, 71 U.S. 2, 131 (1866) (holding that military may not try civilians when courts were open and unobstructed); Orozco, 201 F. at 118 (holding that President could not arrest someone without granting his or her constitutional rights).
95. See, e.g., Hirabayashi v. United States, 320 U.S. 81, 104-05 (1943) (justifying encroachment on liberties of U.S. citizens of Japanese descent by government’s broad powers to wage war and protect public); Yasui v. United States, 320 U.S. 115, 117 (1943) (justifying government actions in requiring curfew for citizens of Japanese descent by deferring to broad constitutional power to prosecute war even to extent it encroaches on individual liberties); Korematsu v. United States, 140 F.2d 289, 290 (9th Cir. 1943) (justifying forced internment of whole families of Japanese descent as necessary in prosecution of war and necessary to contain possible espionage), aff’d, 323 U.S. 214 (1944). Justice Murphy described the atmosphere of the times: “The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and
important cases, *Hirabayashi v. United States* and *Korematsu v. United States*, demonstrate the leniency that the courts provided to the government during this dark moment in American history. Nevertheless, despite the seemingly free hand the courts gave to the President in dealing with U.S. citizens of Japanese descent during the war, a trilogy of cases imposed limits on the President's power.

In *Hirabayashi*, the Supreme Court considered the imprisonment of an American citizen of Japanese descent who violated a curfew order. The Court considered whether Congress or the President had any authority to issue the curfew order and punish a violation under it. In answering the dangerous implications of the procedure sanctioned today," *In re Yamashita*, 327 U.S. 1, 28 (1946).

96. 320 U.S. 81 (1943); *see also Yasui*, 320 U.S. at 117 (sustaining conviction of person of Japanese ancestry for violating curfew order).

97. 140 F.2d 289 (9th Cir. 1943), *aff'd*, 323 U.S. 214 (1944).

98. *See Hirabayashi*, 320 U.S. at 104-05 (upholding government’s imprisonment of citizen of Japanese descent for violating curfew order); *Korematsu*, 140 F.2d at 290 (upholding imprisonment of citizen of Japanese descent for violating presidential order excluding Japanese from designated military area); *see also Fletcher*, *supra* note 18 (calling *Korematsu* case part of "disgraceful episodes of World War II jurisprudence").

99. *See Ex parte Endo*, 323 U.S. 283, 301-02 (1944) (limiting circumstances when government could infringe on individual liberties to those where there was evidence of actual disloyalty); *see also Scherzberg v. Madeira*, 57 F. Supp. 42, 47 (E.D. Pa. 1944) (limiting government’s justifications of national defense to situations where there was evidence of type of wrongdoing government was trying to prevent); *Schueller v. Drum*, 51 F. Supp. 383, 387 (E.D. Pa. 1943) (limiting government’s power to interfere with individual rights to those where there was immediate danger requiring use of military rather than civilian authorities).

100. *See Hirabayashi*, 320 U.S. at 83 (stating issue of case). Hirabayashi was convicted of a misdemeanor for violating restrictions made by the military pursuant to a presidential order authorized by Congress. *See id.* (describing particulars of arrest). An Act of Congress made the act of disregarding a military restriction a misdemeanor. *See id.* (describing origin of law under which Hirabayashi was convicted). Additionally, a presidential order authorized military commanders to prescribe military areas from which people could be excluded. *See id.* (describing order authorizing designation of military areas). Pursuant to this order, the commanding general issued a series of proclamations, including the curfew order, which designated time periods when alien Japanese, German, Italian and all people of Japanese ancestry could not enter certain areas. *See id.* at 86-90 (reviewing series of proclamations made by commanding general).

101. *See id.* at 87-88 (stating issues to be considered). The Act of Congress stated:

That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive Order of the President . . . contrary to the restrictions applicable to any such area or zone . . . shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor . . . .

*Id.* (quoting Congressional Act of March 21, 1942). The subsequent executive order stated, "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities . . . ." *Hirabayashi* 320 U.S. at 85 (quoting Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942)).
In answering this question, the Court found that the executive and legislative branches had broad powers to wage war. Furthermore, the Court concluded that it was not any court’s duty to review the executive and legislative branches’ decisions regarding the war effort. In upholding the order’s validity, the Court stated that it was inevitable that an infringement of some constitutional liberties would occur, and likened the orders to the confinement of people in their homes during an air raid. The Court upheld the curfew order, emphasizing the narrowness of its holding.

In *Korematsu*, a decision affirmed by the Supreme Court, the United States Circuit Court of Appeals for the Ninth Circuit upheld the forced internment of thousands of U.S. citizens of Japanese descent, based on a presidential order. In *Korematsu*, the U.S. government detained a citizen of Japanese ancestry for the offense of remaining within a designated military area that excluded Japanese-Americans. The court of appeals again advocated broad war powers, including those that temporarily infringed upon inherent rights under the Constitution. According to the

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102. *See Hirabayashi* 320 U.S. at 92 (granting broad powers to President and Congress to wage war). The Court concluded that “it was within the constitutional power of Congress and the executive arm of the Government to prescribe this curfew order for the period under consideration and that its promulgation by the military commander involved no unlawful delegation of legislative power.” *Id.* at 92-93.

103. *See id.* at 93-94 (deferring to government’s judgment during war based on Constitution’s grant of power).

104. *See id.* at 99 (stating that individual liberty may be constrained in times of danger). The Court stated:

"[I]f it was an appropriate exercise of the war power its validity is not impaired because it has restricted the citizen’s liberty. Like every military control of the population of a dangerous zone in war time, it necessarily involves some infringement of individual liberty, just as does the police establishment of fire lines during a fire, or the confinement of people to their houses during an air raid alarm—neither of which could be thought to be an infringement of constitutional right."

*Id.*

105. *See id.* at 102 (declaring that holding only pertains to specific facts of case).

106. *See Korematsu v. United States*, 140 F.2d 289, 290 (9th Cir. 1943) (upholding presidential order to intern citizens of Japanese descent). The Court followed the prior decisions of *Hirabayashi* and *Yasui* in which the Supreme Court had sustained the validity of a curfew order, also made by the commanding general. *See id.* at 289 (discussing *Hirabayashi* and *Yasui*). Although the Supreme Court in those decisions had not decided the validity of the evacuation order, the Court here relied upon the rationale the Supreme Court used to uphold the curfew order. *See id.* at 290 (relying on Supreme Court rationale).

107. *See id.* at 289 (discussing facts of case). An exclusion order made by the commanding general required exclusion and evacuation from these areas. *See id.* (describing grounds for arrest).

108. *See id.* at 290 (“[U]nder the Constitution the government of the United States, in prosecuting a war, has power to do all that is necessary to the successful prosecution of a war although the exercise of those powers temporarily infringe some of the inherent rights and liberties of individual citizens which are recognized and guaranteed by the Constitution.”).

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court of appeals, the exclusion order, like the curfew order in *Hirabayashi*,
was a necessary part of the war effort. 109

Despite the above cases, courts did impose some limits on the govern-
ment’s power. 110 In *Ex parte Endo*, 111 the Supreme Court held that the
detention of a woman of Japanese ancestry had no relationship to the ob-
jective of protecting the war effort against sabotage, and that without
proof of disloyalty she could no longer be detained. 112 In *Schueller v. Drum*,
the Eastern District of Pennsylvania held that the detention of a
U.S. citizen of German descent was illegal and that, barring situations of
impending and imminent danger, the President or Congress could not
abridge a person’s constitutional guarantee of freedom. 114 Finally, in
*Scherzberg v. Madeira*, 115 the same court held that the detention of a Ger-
man-born U.S. citizen who entered an area of exclusion was illegal be-
because there was no rational basis for the exclusion order. 116 For the
exclusion order, and therefore, the detention to be legal, there had to
have existed in the area an immediate danger to the welfare of the
country. 117

The foregoing discussion suggests limited situations in which the mili-
tary may detain civilians. The military may detain and try people when
martial law exists in such a way that the civilian courts are unavailable for
use. 118 Military detentions and trials are also a valid temporary replace-

109. *See id.* (analogizing exclusion order to curfew order under Supreme
Court rationale).

110. *See Ex parte Endo*, 323 U.S. 283, 295 (1944) (requiring showing of disloy-
alty to justify detention of woman of Japanese descent as relating to proper ob-
jective of protecting U.S. from sabotage and espionage); *see also Scherzberg v. Madeira*, 57 F. Supp. 42, 42 (E.D. Pa. 1944) (requiring evidence of actual activities
related to espionage and actual impending danger in general area to justify deten-
tion of German-born U.S. citizen); Schueller v. Drum, 51 F. Supp. 383, 386 (E.D.
Pa. 1943) (requiring immediate and impending danger and inability of civilian
authorities to secure public safety to justify exclusion order that abridges person’s
liberties and freedoms).

111. 323 U.S. 283 (1944).

112. *See id.* at 295 (holding that War Relocation Authority had no authority to
detain citizens not proven to be disloyal).


114. *See id.* at 387 (limiting President’s war power to situations of impending
and imminent danger).


116. *See id.* at 46 (limiting power to designate military areas and criminalize
breach of those areas to situations where these actions had rational basis to possi-
bile danger).

117. *See id.* at 47 (requiring immediate danger to justify exclusion of citizens).

118. *See, e.g.*, Moyer v. Peabody, 212 U.S. 78, 85 (1909) (upholding existence
of martial law); *State ex rel. O’Connor v. Dist. Court in Shelby County*, 260 N.W. 73,
84 (Iowa 1935) (upholding existence of martial law); *In re McDonald*, 143 P. 947,
954 (Mont. 1914) (holding that, during martial law, military may arrest and detain
people but may not punish them); *see also Ex parte Milligan*, 71 U.S. 2, 13 (1866)
(describing conditions under which martial law applies).
ment of a civilian justice system in areas of occupied territory. Finally, military detentions and trials are a valid means of trying enemy belligerents who enter U.S. soil during a war to engage in acts of sabotage or violate the law of war on behalf of the enemy. Absent these situations, neither the President nor Congress may order the detention of a person in contravention of their constitutional rights, unless the degree of exigency in the area is such that there is an imminent or immediate danger threatening the nation and the detention of that person has a rational basis in combating that exigency.

IV. Is Padilla’s Detention Valid Under the Historical Precedents? Must the Government Defend His Detention?

The circumstances of Padilla’s detention involve two questions. First, whether his detention is legal under the historical precedent discussed above, and second, whether Padilla may challenge his detention in a civilian court, a question to which the government answers in the negative. Based on precedent, this Note argues that Padilla’s detention by the military is unlawful. Additionally, this Note suggests that even if his detention was lawful, he must be granted access to a lawyer and the right to challenge his detention via a petition for a writ of habeas corpus.

A. Legality of Padilla’s Detention Under Historical Precedent

In order to determine whether Padilla’s detention is legal, it must be tested under historical precedent. Thus, this section first tests Padilla’s detention under the principles of Quirin. Second, this section tests Padilla’s detention under the principles of In re Yamashita, 327 U.S. 1, 26 (1946) (upholding sentence by military tribunal of General Yamashita for war crimes); Ex parte Quirin, 317 U.S. 1, 36 (1942) (upholding military trials of enemies entering U.S. territory to commit sabotage).

119. See, e.g., Madsen v. Kinsella, 343 U.S. 341, 362 (1952) (upholding establishment of occupation court in Germany to try civilians for crimes under German Criminal Code); Santiago v. Nogueras, 214 U.S. 260, 266 (1909) (holding that because civil courts had not yet extended into occupied territory, military power warranted creation of provisional court); The Grapeshot, 76 U.S. 129, 133 (1869) (holding that President could establish temporary provisional court to try cases during war).

120. See In re Yamashita, 327 U.S. 1, 26 (1946) (upholding sentence by military tribunal of General Yamashita for war crimes); Ex parte Quirin, 317 U.S. 1, 36 (1942) (upholding military trials of enemies entering U.S. territory to commit sabotage).

121. For a survey of case law where the Court actually limited government power to abridge individual rights during war, see supra notes 71-94, 111-17 and accompanying text.

122. See Grossman, supra note 21, at 96 (quoting United States government brief filed in case against Padilla stating "'A court of the United States has no jurisdiction . . . to enjoin the President in the performance of his official duties' ").

123. See infra notes 125-65 and accompanying text.

124. See infra notes 166-76 and accompanying text.

125. See, e.g., Quirin, 317 U.S. at 36 (holding that U.S. citizens may be detained and tried by military for plans to violate law of war on behalf of enemy).
dilla's detention under the principles of Milligan and its progeny. Finally, this section will test Padilla's detention under the general authority of the President to order detention in times of war and exigency.

Padilla's situation is clearly distinguishable from the circumstances present in Quirin. The first difference between Quirin and Padilla is that Quirin was decided during a declared war. However, the absence of a declaration of war has not prevented the U.S. in the past from entering non-declared wars and conducting them under the law of war.

There is some authority that supports the designation of the current conflict as a war. First, Congress authorized the use of the armed forces in a Joint Declaration. Not only did the U.S. government view the conflict as a war, but the international community embraced this conflict as a war in unequivocal terms, never before invoked.

Nevertheless, there are problems with the designation of this conflict as a war. These problems pertain to the detention of individuals as enemy combatants whose detention may last until the cessation of hostilities.

126. See, e.g., Ex parte Milligan, 71 U.S. 2, 13 (1866) (holding that military commission did not have proper jurisdiction to sentence prisoner without congressional mandate); Ex parte Orozco, 201 F. 106, 112 (W.D. Tex. 1912) (holding that President could not arrest civilians without affording them their constitutional rights).

127. See, e.g., Ex parte Endo, 323 U.S. 283, 295 (1944) (holding that detention of Japanese woman did not relate to objective of protecting against sabotage and espionage absent evidence of disloyalty); see also Scherzberg v. Madeira, 57 F. Supp. 42, 42 (E.D. Pa. 1944) (holding that detention was improper because it was not supported by rational basis); Schueller v. Drum, 51 F. Supp. 383, 386 (E.D. Pa. 1943) (holding that there was no imminent danger to justify detention).

128. See Quirin, 317 U.S. at 20 (stating facts). Nevertheless, the law of war applies even in the absence of a declared war. See Talbot v. Seemans, 5 U.S. 1, 28 (1801) (noting that law of war applies in partial wars).

129. See Goldman, supra note 15 (pointing out that World War II was last Congressionally declared war but that U.S. has fought in other "wars" such as Vietnam, Korea, Gulf War and Kosovo); Torruella, supra note 2, at 696 (pointing out that other armed conflicts such as Vietnam, Korean and Gulf Wars were not declared wars yet they were conducted under provisions of Geneva Conventions); see also Talbot, 5 U.S. at 1 (holding that law of war applies in absence of declared war).


131. See Seelye & Bumiller, supra note 15, at A16 (quoting President Bush saying that attacks "were more than acts of terror; they were acts of war"). For a discussion of the factors that lend support to the conclusion that the armed conflict in Afghanistan is a war, see supra note 15 and accompanying text. The difference between the kind of war present in Quirin and the situation in the war on terrorism creates many difficulties. See Dworkin, supra note 21 (arguing differences between Quirin and Padilla's case). Michael Schmitt, a former U.S. military prosecutor, admitted that Padilla's case presents more complex questions than were present in the Quirin case; these differences include questions of the nature of the conflict, the start of the conflict and the end of the conflict. See id. (admitting that Padilla's detention does not fit clearly within Quirin).

The United States is not at war with a State or Nation, but against terrorism, an ideology. This ideology crosses over borders, including our own, and does not always have a host nation whom the U.S. can attack and defeat. Furthermore, due to the nature of the enemy in a war against terrorism, it will be difficult to assess when the conflict has ended. Thus, the danger is that Padilla’s detention could be indefinite.

A second factual difference derives from the Quirin Court’s language defining unlawful combatants. An unlawful combatant is one associated with the military arm of an enemy government, and directed by that government to enter the country secretly to perform hostile acts or otherwise act on its behalf. The petitioners in Quirin were clearly members of the enemy nation’s army and acting on its behalf. Their discarded uniforms, the explosives and the other bomb making material retrieved from them provided sufficient proof that they belonged to the enemy nation and were deployed to carry out acts of sabotage.

Additionally, the Quirin court used language connoting unlawful and secret entry across enemy lines or into enemy territory. The petitioners in Quirin came into the country “surreptitiously” on a submarine. The Quirin Court also referred to definite plans for sabotage, evidenced by the abundance of explosive materials found on the Germans.

The evidence against Padilla pales in comparison. There is no proof that Padilla has participated in al-Qaeda training camps or actively armed himself in alliance with the Taliban against American troops in the

with finding definite end for conflict against terrorism); see also Geneva-Prisoners of War, supra note 30, art. 118 (providing for repatriation of prisoners of war at cessation of hostilities).


134. See Dworkin, supra note 132 (discussing possible criteria for end of conflict against terrorism); Elliott, supra note 36 (stating that there is no guidance on how to decide when hostilities are over). Asked to define the end of the conflict, Donald Rumsfeld stated “when we feel that there are not effective global terrorist networks functioning in the world that these people would be likely to go back to and begin again their terrorist activities.” Dworkin, supra note 132.

135. See Elliott, supra note 36 (stating that on-going war on terrorism means indefinite imprisonment).

136. For pertinent language of the Quirin court, see supra note 58 and accompanying text.

137. See Ex parte Quirin, 317 U.S. 1, 31 (1942) (defining unlawful combatant).

138. See id. at 20-22 (describing facts of case).

139. See id. (describing materials found on petitioners at time of arrest).

140. See id. at 30-31 (describing unlawful combatant as “[t]he spy who secretly . . . passes military lines of a belligerent in time of war”)

141. See id. at 20-22 (describing petitioner’s entry into U.S. territory).

142. See id. (describing evidence found on prisoners when arrested).

143. For differences between evidence found on petitioners in Quirin and that found on Padilla, see infra notes 136-48 and accompanying text.
war in Afghanistan. The evidence suggests, however, that had Padilla succeeded in any bombing plot, he would not necessarily have been acting under al-Qaeda's "aid, guidance or direction, in other words, he was not necessarily acting on behalf of the enemy." Furthermore, Padilla did not sneak into the country "surreptitiously." Instead, he walked freely and openly into the country at a large international airport. According to government admissions, Padilla had no fixed plan and there is no evidence that he had the means to build a radioactive bomb.

Finally, there is a difference in the type of military order given by President Roosevelt in Quirin and the military order made by President Bush in the aftermath of September 11. The Quirin Court relied heavily on the presidential orders for the military's authority for detention. President Bush's Order was largely drafted from President Roosevelt's Order, with one important difference. President Bush's Order expressly excludes U.S. citizens from its jurisdiction. Although President Bush

144. See Human Rights Watch, supra note 20 (stating that in order to hold Padilla as enemy combatant, relationship with al-Qaeda would not be enough, and instead government would need to show nexus between his activities and armed conflict in Afghanistan). The only evidence linking Padilla to either of these organizations is the testimony of a captured al-Qaeda member who met Padilla. See Weiser & Canedy, supra note 22, at A24 (reporting how al-Qaeda leader Abu Zubaydah told American officials he had met with Padilla). However, the reliability of the informant is questionable. Additionally, Padilla could not have been important to al-Qaeda if Abu Zubaydah was so willing to give him up. See Brune et al., supra note 22, at A5 (stating that Padilla is not al-Qaeda insider).

145. See Weiser & Canedy, supra note 22, at A24 (reporting lack of evidence that al-Qaeda had embraced Padilla's plan). It is important to note that Padilla is not acting for any army or government. Under international law, the law of war only applies to state actors, not individuals. See Evans, supra note 2, at 1833 (arguing that presidential order establishing military commissions is inconsistent with international law). Terrorists, therefore, are not subject to punishment under the law of war. See id. (stating that terrorists are not subject to law of war); see also Goldman, supra note 36 (stating that terrorists captured in United States and not sanctioned by state should be treated as common criminals).

146. See Weiser & Canedy, supra note 22 (stating facts of Padilla's arrest in Chicago).

147. See id. (same).

148. See Karen Branch, "Dirty Bomb" Plot in U.S. is Thwarted, Ashcroft Says; Man Arrested May 8 at O'Hare is Placed in Military Custody, St. Louis Post, June 11, 2002, at A1 (reporting that officials admitted there was no actual plan). See generally Bush Calls, supra note 22 (reporting that officials said plot went only to planning stage and there was no indication that Padilla had access to nuclear materials); Weiser & Canedy, supra note 22 (reporting that law enforcement officer stated his doubt whether Padilla had means to carry out plan or even had any fixed plan).

149. See Ex parte Quirin, 317 U.S. 1, 22-23 (upholding President's power to make order for military trials and relying on exact language of declaration).


151. See Military Order of November 13, 2001, Title 3, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) (authorizing detention of non-citizens found to have partic-
could amend the Order, public opinion would probably not support that decision, which is a likely reason why the President drafted the Order to explicitly exclude Americans.152

A comparison of Padilla's detention with the detentions at issue in *Milligan* and its progeny, however, illustrates that Padilla's situation is more analogous to Milligan's than to the German saboteurs and, therefore, Padilla's detention, like Milligan's, is illegal. In *Milligan*, the Court held invalid Milligan's detention by a military tribunal during the Civil War.153 The reasons the Court gave for its decision were that Milligan was a U.S. citizen, he had never been in the armed forces, he had never been a resident in any of the States under Rebellion and the courts were open and unobstructed.154 Additionally, the Court found that the existence of an adequate judicial remedy under which to try Milligan precluded the military from usurping this role.155 Although the United States was certainly attacked, neither Illinois nor Chicago was facing an "actual and present" necessity in such a way that the courts were closed and civil administration had been deposed.156

Padilla is a U.S. citizen, and, although Padilla has traveled to Afghanistan, there is no evidence of involvement with the armed forces or the fighting there.157 Additionally, if Padilla has in fact conspired against the United States, there are adequate judicial remedies available under relevant Anti-Terrorist Acts.158 Under this comparison it seems that Padilla's
circumstances are analogous to Milligan's and therefore, under Milligan, Padilla's detention is likely illegal.159

The final ground argued in support of Padilla's detention is under the President's war powers.160 To rely on the Japanese internment cases as precedent for Padilla's arrest would cause an outcry and is unlikely because it is widely recognized that they represent a dark period in American legal history.161 Furthermore, cases such as Endo illustrate that a person may not be detained in the absence of proof of disloyalty.162 The cases discussed above required an immediate danger and a rational basis for the person's detention.163 It would be a stretch, in light of precedent, to suggest that all of America is under immediate danger in such a way that any person could be detained indefinitely without constitutional protection.164

An examination of the principles in the cases described above demonstrates the substantial weight of the argument that no civilian may be detained by the military without very clear evidence he or she was acting on behalf of the enemy. The government cannot easily rely on Quirin. The petitioners' circumstances in Quirin differ significantly from Padilla's cir-

159. For a comparison of Milligan's and Padilla's situations, see supra notes 153-59 and accompanying text.

160. See Grossman, supra note 21, at 96 (quoting United States government brief in Padilla's case stating, "'A court of the United States has no jurisdiction . . . to enjoin the President in the performance of his official duties'")

161. See Torruella, supra note 2, at 668 (calling cases approving of Japanese internment "one of [the Supreme Court's] least glorious moments"). Interestingly, forty years after World War II, the Hirabayashi case convictions were vacated by the district court and Court of Appeals for the Ninth Circuit for procedural errors. See Hirabayashi v. United States, 828 F.2d 591, 608 (9th Cir. 1987) (affirming lower court's vacation of conviction for failure to report to Civil Control Station and reversing lower court's failure to vacate conviction for violation of curfew order).

162. See Ex parte Endo, 323 U.S. 283, 295 (1944) (requiring some evidence of disloyalty relating to reasonable objective in prosecuting war).

163. For a survey of cases that limited rather than broadened government's power to wage war, see supra notes 71-94, 110-17 and accompanying text.

164. For a discussion why circumstances necessary to impose martial law are not present in U.S., see supra note 156 and accompanying text.
cumstances. Additionally, it is not practical to rely on cases upholding
Japanese internment due to their controversial nature.

B. Is Padilla Entitled to Judicial Review by the Civilian Courts?

Even if the government is entitled to detain Jose Padilla as an enemy
combatant, it does not have the right to forbid judicial review of his deten-
tion. Reviewing the significant cases that pertain to Padilla's situation,
it is clear that courts will retain jurisdiction to decide the legality of a
detention. Barring cases of enemy aliens caught outside of the courts’
jurisdictional territory, courts guard their duty to review the legality of mil-
itary detentions so as to balance a substantial deference to the President's
war-making powers with the civil liberties that the Constitution
guarantees.

165. For an examination of the differences between Quirin and Padilla's situa-
tion, see supra notes 128-52 and accompanying text. It is also worth noting that
Justice Frankfurter and Justice Douglas, members of the Quirin Court, later re-
nounced their decision calling it “not a happy precedent.” See Warren Richey,
Military Trial for U.S. Citizen?, CHRISTIAN SCI. MONITOR, June 12, 2002, at 1 (report-
ing on later writings and interviews of Justices).

166. See, e.g., In re Yamashita, 327 U.S. 1, 9 (1946) (noting that Court's job was
to consider legality of military commission); Ex parte Quirin, 317 U.S. 1, 25 (1942)
(rejecting argument that Court could not decide whether military commissions
overstepped constitutional boundaries); Ex parte Milligan, 71 U.S. 2, 10 (1866)
(holding that Court would always have jurisdiction to determine whether those
subject to military trial were legally detained).

167. See, e.g., Yamashita, 327 U.S. at 9 (emphasizing that purpose of Court was
to test legality of military commission’s jurisdiction); Quirin, 317 U.S. at 25 (re-
jecting proposition that Court could never consider whether military commissions
improperly exercised jurisdiction); Milligan, 71 U.S. at 10 (concluding that, despite
government's removal of right to habeas corpus, Court retained authority to re-
view constitutionality of military commission’s jurisdiction). It is also interesting to
note that without the Court’s ability to review the jurisdiction of the military in
these cases, these opinions could never have been written.

168. See Johnson v. Eisentrager, 339 U.S. 763, 768 (1950) (holding that fed-
eral courts had no jurisdiction over enemy alien captured abroad); Coalition of
for writ of habeas corpus for al-Qaeda and Taliban detainees at Camp X-Ray in
Cuba), aff'd in part, rev'd in part, 310 F.3d 1153 (9th Cir. 2002); Rasul v. Bush, 215
F. Supp. 2d 55, 67 (D.D.C. 2002) (concluding that U.S. courts have no jurisdiction
over detainees at Guantanamo Bay in Cuba). For the opinion that the detainees
held at the base in Cuba are within federal court jurisdiction, see Paust, Ad Hoc
Rules, supra note 2, at 681 (arguing that U.S. military base is part of U.S. jurisdic-
tion under international law); Paust, Courting Illegality, supra note 18, at 23-26 (ex-
plaining that U.S. court decision denying habeas corpus review to detainees in
Cuba violates international law); Torruella, supra note 2, at 704 (indicating that
U.S. has sovereign power over base and has previously exercised criminal jurisdic-
tion over citizens and aliens on base). In times of war, habeas corpus is a judicial
remedy for unlawful detention by the executive branch. See generally Rutherglen,
supra note 32 (discussing role of habeas corpus in military commissions). The pur-
pose of habeas corpus is to review the legality of detention, making it the sole
barrier between freedom and executive or military tyranny. See id. (stating impor-
tant purpose of habeas corpus proceedings in balance of power). The President
has no authorization to suspend the writ of habeas corpus and Congress may only
In *Milligan*, the Court retained jurisdiction to consider a writ of habeas corpus to determine whether the military commissions had jurisdiction to try Milligan.\(^{169}\) In *Quirin*, the case on which the current government relies, the Court held that, despite the presidential proclamation’s suspension of court review, persons were not excluded from seeking court review based on contentions that the Constitution forbade their detention.\(^{170}\) In *Yamashita*, the Supreme Court considered General Yamashita’s petition for a writ of habeas corpus even though he was an enemy alien captured outside the jurisdiction of the U.S. courts and there was strong evidence that he had participated in war crimes.\(^{171}\)

More recently, in *Hamdi v. Rumsfeld*,\(^{172}\) the United States Court of Appeals for the Fourth Circuit cautioned against forbidding court review of Hamdi’s detention.\(^{173}\) The court stated that if it decided to dismiss the case and forbid review, it would be “embracing a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so.”\(^{174}\)

suspend it when “in Cases of rebellion or Invasion the public Safety may require it.” U.S. Const. art. I, § 9. Despite this, President Lincoln did suspend the writ during the civil war, but the legality of his action is disputed. See Paust, *Courting Illegality*, supra note 18, at 21-22 (noting that Article I of Constitution gives Congress the power to suspend habeas corpus); Rutherglen, *supra* note 32, at 397-404 (reviewing history of writ of habeas corpus).

\(^{169}\) See *Milligan*, 71 U.S. at 131-32 (“The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.”). For a further discussion on this issue in *Milligan*, see *supra* notes 86-87 and accompanying text.

\(^{170}\) See *Quirin*, 317 U.S. at 25-26 (indicating that aliens could still petition courts for review). For further discussion on this aspect of *Quirin*, see *supra* notes 54-56 and accompanying text.

\(^{171}\) See *Yamashita*, 327 U.S. at 8-9 (“The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts.”). For a further discussion of the *Yamashita* Court’s rationale, see *supra* notes 47-48 and accompanying text.

\(^{172}\) 296 F.3d 278 (4th Cir. 2002).

\(^{173}\) See id. at 283 (rejecting government’s argument to dismiss case from courts).

\(^{174}\) Id. (electing not to discuss case). Hamdi’s detention is more easily justified because he was captured on the battlefield and his designation as an enemy combatant makes more sense. In fact, the court of appeals has since decided that his detention is legal for this very reason. See *Hamdi v. Rumsfeld*, 2003 U.S. App. LEXIS 198 (9th Cir. Jan. 8, 2003) (“We shall, in fact, go no further in this case than the specific context before us—that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces.”). Unlike Hamdi, Padilla was detained on U.S. soil and is not connected to the battlefield. See id. (“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 [Padilla v. Bush, 2002 U.S. Dist. LEXIS 23086 (S.D.N.Y. 2002)].”)
None of the above discussed cases afford any reason why Padilla should not be able to present his arguments in a civilian court. The U.S. government apprehended Padilla on U.S. soil, thus Padilla is unambiguously within the jurisdiction of the civilian courts. Additionally, the above cases do not support the government's argument that the president's power to detain a person is unchallengeable. In order to maintain a system of checks and balances on the government, the courts must be able to review the military's jurisdiction to detain Padilla.

Nevertheless, despite what arguments the government may rely on to justify Padilla's detention and its opposition to defending its position in court, the government's arguments cannot stand up to its own contradictory behavior in relation to other suspected terrorists.

V. INCONSISTENT TREATMENT OF PRISONERS BY THE U.S. GOVERNMENT AND POSSIBLE JUSTIFICATIONS FOR THE INCONSISTENT TREATMENT

The position that Padilla's detention is illegal garners support when looking at other detentions of suspected terrorists. There is a substantial difference between the government's treatment of Padilla versus its treatment of John Walker Lindh, Zacarias Moussaoui and Richard Reid, as well as other terrorists that have navigated the judicial system in the past and other suspected terrorists who are now being charged. This Part will briefly point out the inconsistencies and then consider some of the government's possible arguments in justifying this treatment. It will con-
clude that none of the government’s arguments justify treating Padilla differently than any other suspected terrorist.179

The first suspected terrorist is Zacarias Moussaoui, a French citizen arrested for visa violations prior to September 11, and who is widely believed to be the twentieth hijacker.180 The second suspected terrorist is Richard Reid, also known as “the shoe bomber,” a British citizen arrested after attempting to ignite an explosive hidden in his shoe during a trans-Atlantic flight in December 2001.181 There is significant evidence linking both of these men to al-Qaeda.182 These two men are not American citizens, yet they have had access to the courts, lawyers and the rights of due process.183 John Walker Lindh, an American citizen, was caught fighting in Afghanistan.184 He has not been detained indefinitely and has succeeded in receiving a twenty year sentence as part of a plea-bargain.185

One of the government’s possible arguments for treating Padilla differently is that holding a trial for Padilla or defending his detention in court would involve a public dissemination of highly sensitive information, posing a huge national security risk.186 This is a legitimate concern. There is no reason, however, why Padilla’s case presents more of a concern than that of John Walker Lindh, Zacarias Moussaoui or any other terrorist that has been tried in a U.S. court. Traditionally, terrorists are tried in federal courts under federal statutes, and the Classified Informa-

179. See infra notes 186-98 and accompanying text.
180. See Johnston, supra note 20, at A1 (reviewing background of Moussaoui’s arrest and charges against him). Moussaoui is also defending himself in federal court. See Shenon, Sept. 11, supra note 20, at A22 (describing Moussaoui’s numerous court filings).
181. See Cowell, supra note 20, at B5 (describing events leading to Reid’s arrest); Thomas, supra note 20, at 110-11 (chronicling events on plane when Reid attempted to explode shoe-bomb).
182. See Cowell, supra note 20, at B5 (describing Reid as al-Qaeda operative); Johnston, supra note 20, at A1 (discussing link between Moussaoui and September 11 hijackers).
183. See Cowell, supra note 20, at B5 (providing scope of judicial proceedings facing Reid); Shenon, Sept. 11, supra note 20, at A22 (describing Moussaoui’s progress defending himself in court); Thomas, supra note 20, at 110 (noting that Reid faces charges in courts).
185. See Seelye, Regretful Lindh, supra note 19, at A1 (reporting on twenty-year sentence under plea agreement). For a discussion on Lindh, see supra note 19.
186. See Benson & Woods, supra note 6 (reporting on government’s defense of national security concerns); Ruth Wedgwood, Prosecuting Al Qaeda September 11 and its Aftermath, Dec. 7, 2001, at http://www.crimesofwar.org/expert/al-wedgwood.html (stating that criminal prosecutions in federal district court do not adequately safeguard intelligence and technically classified information); Weiser & Canedy, supra note 22 (indicating that government does not want to produce information derived from intelligence sources).
tion Protection Act (C.I.P.A.) is asserted when needed to protect sensitive information. A second possible reason why the government has kept Padilla in military detention is that it may not have enough evidence against Padilla to pursue a prosecution in the courts. The strong evidentiary requirements in the civil courts may be a barrier to any meaningful conviction. There would be no guarantee that Padilla would go to prison for a long period of time. Lack of evidence, however, is not a legitimate reason to hold someone in a military base and deny them access to a lawyer.

A third reason that the government may want to detain Padilla in a military base is because it has no intention of charging him, but wants the more lenient methods of interrogation that military detention would provide. Donald Rumsfeld has openly stated that the government wants him for investigatory purposes only. Nevertheless, detaining someone


188. See Goldstone, supra note 6 (stating that there are numerous ways to safeguard sensitive materials); Michael Ratner, Prosecuting Al Qaeda September 11 and its Aftermath, Dec. 13, 2001, at http://www.crimesofwar.org/expert/al-ratner.html (providing that in criminal prosecutions sensitive evidence can be protected by C.I.P.A.). Ruth Wedgwood of Yale University argues that C.I.P.A.'s usefulness is limited because no matter what safeguards are put to use, the proceedings are always open and available to the public and the media. See Wedgwood, supra note 186 (discussing apprehension surrounding use of civilian courts).

189. See Liptak, supra note 25, at A18 (stating possibility that government may not have enough evidence to charge Padilla); Ratner, supra note 188 (enunciating belief by attorneys that administration fears it does not have sufficient evidence to convict); Weiser & Canedy, supra note 22, at A24 (reporting opinion of law enforcement officer who spoke of lack of formalized plan and doubt that Padilla had means to carry out plan).

190. See Adam Liptak, Accord Suggests U.S. Prefers to Avoid Courts, N.Y. TIMES, July 16, 2002, at A14 (proposing that Lindh's case is bad for civil liberties because government has learned it is easier to do things without due process); Stuart Taylor Jr., Congress Must Set Rules for How We Lock up Potential Terrorists, LEGAL TIMES, July 22, 2002, at 44 (stating that government had to drop some charges because of lack of proof, but wanted higher penalty for Lindh than what it was likely to get).

191. See Liptak, supra note 25, at A18 (quoting Professor Koh of Yale University saying "'[l]ack of hard evidence . . . [does] not strike me as [a] compelling [reason] to label him an enemy combatant").

192. See Benson & Woods, supra note 6 (reporting that Padilla can be held and questioned in military detention in ways criminal justice system would not allow); Ratner, supra note 188 (stating belief by attorneys that administration wants access to information through use of torture, drugs or other improper means).

193. See Weiser & Canedy, supra note 22, at A24 (quoting Donald Rumsfeld who said he was more interested in finding out what Padilla knows than trying him in court). Again, the government argues that national security requires that it find out as much as possible to ward off future attacks, and therefore interrogation, not punishment, is the necessary response. See Bush Calls, supra note 22, at A10 (quoting government officials who used national security and preventative measures to justify Padilla's detention). Nevertheless, the Constitution was written to protect
solely to "find out what they know" is not a legitimate argument under the Constitution.194

Finally, it is likely that the government transferred Padilla to a military base because it could not hold him as a material witness any longer.195 Soon after Padilla's initial arrest, a New York district court judge found it illegal to hold people as material witnesses for grand jury investigations.196 Under this decision, the government would have either had to press charges or release Padilla.197 The government may have had insufficient evidence to press charges. The government did not, however, want to release Padilla and decided instead to designate him an enemy combatant and hold him indefinitely.198

It is likely that every one of these considerations played a role in the government's decision to hold Padilla in a military base. However, none of these reasons are sympathetic, much less legally acceptable, especially in light of the constitutional considerations afforded other suspected terrorists.

See U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures); U.S. CONST. amend. V (guaranteeing due process of law); U.S. CONST. amend. VI (guaranteeing right to counsel).

194. See Human Rights Watch, supra note 20 (quoting Kenneth Roth, Director of Human Rights Watch, stating, "the government's legitimate desire to obtain information about terrorist threats does not entitle the president to assume unlimited powers to place in military custody anyone he identifies as a terrorist"). For Donald Rumsfeld's comments, see supra note 26.

195. See Can We Keep Him? 'Dirty Bomb' Suspect's Confinement Raises Questions About Balancing His Rights Against the Public's Safety, PLAIN DEALER, June 12, 2002, at B10 (noting that transfer from material witness to military detention came soon after ruling that material witnesses could not be held indefinitely); Liptak, supra note 25, at A18 (indicating that move to military detention may have been related to decision by district court judge holding that material witnesses could not be held indefinitely).

196. See United States v. Awadallah, 202 F. Supp. 2d 55, 79 (S.D.N.Y. 2002) (disallowing indefinite detention of witness in grand jury investigation). But see Weiser, supra note 26, at B4 (reporting on district court judge's decision that material witnesses could be detained for grand jury investigations). However, this case was decided after Padilla was moved to military detention. Had this case been decided before Padilla was arrested, he would likely still be in ordinary civilian custody.

197. See Dworkin, supra note 21 (asserting that if government continued to hold Padilla as material witness it would have been pressured to charge him or release him).

198. See id. (stating that pressure on government to charge or release Padilla may have influenced government's decision to detain him as enemy combatant). For discussion on possible lack of evidence, see supra notes 189-91 and accompanying text.
VI. Conclusion

Jose Padilla, an American citizen, is currently detained at a military base in South Carolina. The government argues that Padilla is an enemy combatant and thus has no right to a lawyer and no right to challenge his detention in federal courts.

A civilian is subject to military detention only in very limited circumstances, usually requiring the existence of a war or an imminent danger that obstructs the functions of civilian courts. Additionally, U.S. citizens fighting on behalf of an enemy, or attempting to further the enemy’s war effort on U.S. soil, may be held as enemy combatants and tried by military commissions. The circumstances required for military detention do not currently exist, because there is no war on U.S. soil, no imminent threat of a hostile takeover and the courts are open and unobstructed.

Padilla’s detention is distinguishable from that of the petitioners in Quirin. Furthermore, even if the government is correct in detaining Padilla, the government must defend its position in a federal court against a challenge to the validity of Padilla’s detention. That the government has not indefinitely detained other suspected terrorists, against whom they have much more evidence, supports the conclusion that Padilla’s detention is invalid. In light of the above discussion, it is important for the courts not to allow the government to randomly select citizens, detain them indefinitely, claim they have no rights under the Constitution and claim they have no right to challenge their detention in a court.

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199. For a discussion on Padilla’s arrest, see supra notes 21-27 and accompanying text.

200. For a discussion on the government’s argument, see supra notes 25-26 and accompanying text.

201. For limits on power to detain civilians, see supra notes 67-121 and accompanying text.

202. For a discussion of the government’s authority to detain U.S. citizens as enemy combatants for violating law of war, see supra notes 36-66 and accompanying text.

203. For a discussion why circumstances necessary to impose martial law are not present in U.S., see supra note 156 and accompanying text.

204. For the differences between Padilla’s situation and the petitioners in Quirin, see supra notes 128-52 and accompanying text.

205. For a discussion of why Padilla has the right to challenge his detention, see supra notes 166-76 and accompanying text.

206. For a summary of the inconsistencies in the government’s treatment of suspected terrorists, see supra notes 177-85 and accompanying text.