IN CIVILIAN DRESS AND WITH HOSTILE PURPOSE*

THE LABELING OF UNITED STATES CITIZENS CAPTURED ON AMERICAN SOIL AS ENEMY COMBATANTS: DUE PROCESS VS. NATIONAL SECURITY

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INTRODUCTION

The September 11, 2001 attacks on the United States by the terrorist group al Qaeda were unprecedented in both scale and destruction.[1] The events of that day are so ingrained in the memory of the world that recounting them would be superfluous. The attack was not only catastrophic in terms of destruction and loss of life, but also demonstrated that America is vulnerable to large-scale terrorist attacks. There is no reason to believe that the September 11, 2001 attacks were isolated incidents; similar attacks are probable in the future.[2]

With the sobering idea that our borders no longer provide a barrier to acts of terrorism and that we can be attacked without notice, not by a recognizable foreign army, but by an organized group of people that can assimilate into American society, our government has taken steps to minimize the possibility of future terrorist attacks. Visible steps have been taken, including military operations in Afghanistan and Iraq, to limit our exposure to future attacks.

Another step that has been taken is to detain individuals who pose a threat to national security. Attorney General John Ashcroft told U.S. attorneys to "neutralize potential terrorist threats by getting violators off the streets by any lawful means possible, as quickly as possible. Detain individuals who pose a national-security risk for any violations of criminal or immigration laws."[3] When the requisite amount of evidence is not available to formally charge someone with a crime, the government has taken alternative paths to ensure the continued

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* *Ex parte* Quirin, 317 U.S. 1 (1942). This phrase was used by the *Quirin* Court to describe the Nazi saboteurs who had surreptitiously entered the United States to destroy munitions plants.

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1. As of November 17, 2003, there were 2948 confirmed dead, twenty-four reported dead, and twenty-four reported missing. September 11, 2001 Victims, *available at* http://www.september11victims.com./september11victims/statistic.asp.

2. Senator Bob Graham, D-Florida and chairman of the Senate Intelligence Committee, warned, "There is a likelihood almost to the point of certainty . . . that there will be another terrorist attack inside the U.S." Kelly Wallace, *Lawmakers Say New Terrorist Attack Almost Certain*, *at* http://www.cnn.com/2002/ALLPOLITICS/05/20/terror.threats/index.html (May 20, 2002).

3. Jess Bravin & Gary Fields, *Zero-Tolerance Approach to Terrorism Is Being Tested: New Emphasis on Making Pre-Emptive Arrests May Not Meet Tougher Standards in Court*, WALL ST. J., Oct. 8, 2002, at A4.

detention of people who pose a possible threat to our national security.[4]

A more dramatic maneuver, however, has been the President's controversial decision to label American citizens as "unlawful enemy combatants" ("enemy combatants").[5] The President's power to classify an individual as an enemy combatant during a time of war comes under the President's war powers as provided by Article II of the U.S. Constitution.[6] Historically, people who were captured in the theater of war could be classified as enemy combatants and detained without formal criminal charges, without access to an attorney, and without a scheduled trial.[7] President Bush and his administration argue that the magnitude of risk posed by terrorism allows the Executive to label a citizen of the United States that poses a risk to national security an enemy combatant.[8] Further, the Executive Branch argues that there should be no judicial oversight of such determination besides habeas review, even when that individual is captured inside the United States.[9]

The President's power to declare a United States citizen an enemy combatant is disputed due to the evisceration of that person's due process rights.[10] The concern is heightened when the person so labeled is an American citizen captured on American soil. This Note focuses on the case of Jose Padilla, an American citizen by birth, who was arrested at Chicago O'Hare International Airport on May 8, 2002, after returning to the states on a flight from Pakistan.[11]

Padilla's case should be distinguished from the case of Yaser Hamdi, who was captured in Afghanistan fighting with al Qaeda forces. Hamdi was captured in the zone of military combat as opposed to being captured on American soil like Padilla.[12] As the Fourth Circuit stated, "To compare this battlefield capture [of Hamdi] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges."[13] Although the President has only declared two American citizens as

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4. Detaining people as material witnesses is one such alternative the government has implemented in order to detain and question individuals who are deemed possible national security risks. *See* Tom Jackman & Dan Eggen, *Combatants' Lack Rights, U.S. Argues*, WASH. POST, June 20, 2002, at A1.

5. *See id.*

6. *See Ex parte* Quirin, 317 U.S. 1, 26-27 (1942).

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

8. Katharine Q. Seelye, *Threats and Responses: The Detainee*, N.Y. TIMES, Oct. 28, 2002, at A13.

9. *Id.*

10. *See* AM. BAR ASS'N, TASK FORCE ON TREATMENT OF ENEMY COMBATANTS: PRELIMINARY REPORT (Aug. 8, 2002) [hereinafter AM. BAR ASS'N, TASK FORCE], *available at* http://abanet.org/adminlaw/fall02/natl_sec_enemy_combatant_tf_report_rev.pdf; Dan Eggen & Susan Schmidt, *"Dirty Bomb" Plot Uncovered, U.S. Says; Suspected Al Qaeda Operative Held as "Enemy Combatant,"* WASH. POST, June 11, 2002, at A1.

11. Eggen & Schmidt, *supra* note 10.

12. Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003).

13. *Id.* at 344.

unlawful enemy combatants, the administration plans on continuing to do so in the future.[14]

Jose Padilla allegedly trained with al Qaeda forces and made plans to detonate a radioactive device ("dirty bomb") in the United States.[15] Like multiple others after the 11th of September, Padilla was originally detained on a material witness warrant. Prior to the deadline for making formal charges which would allow for the detention of Padilla, President Bush wrote an order stating that Padilla "represents a continuing, present and grave danger to the national security [and] it is in the interest of the United States . . . [to] detain Mr. Padilla as an enemy combatant."[16]

Attorneys, civil rights groups, and other similarly concerned Americans have characterized the President's action in this regard as an impingement on the constitutional rights of U.S. citizens and an over-expansion of the President's powers.[17] These dissenting arguments are based primarily on the constitutional due process rights[18] that all American citizens inherently possess and 18 U.S.C. § 4001, which states that an American citizen cannot be detained by his own government except through an act of Congress.[19]

This Note proposes that the President is acting within his constitutional powers to declare a citizen of the United States an enemy combatant and that 18 U.S.C. § 4001 does not preclude such action. Nevertheless, when the person labeled an enemy combatant is a United States citizen taken captive within our borders, particularly with the amorphous scope and time-frame of the war on terrorism, there needs to be some degree of due process rights accorded to that individual. Part I of this Note focuses on the source of the President's power to

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14. Seelye, *supra* note 8, at A13.

15. Although this is the general assertion of Attorney General Ashcroft, there are other less menacing reports about Padilla's purported plans. An intelligence official said Padilla's research consisted of surfing the internet and "Deputy Defense Secretary Paul Wolfowitz said[, 'There] was not an actual plan. We stopped this man in the initial planning stages.'" Carla Anne Robbins et al., *Homegrown Threat: Arrest of "Dirty Bomb" Suspect Stirs New Fears About al Qaeda*, WALL ST. J., June 11, 2002, at A1.

16. June 9, 2002 Order by President George W. Bush Declaring Jose Padilla an Enemy Combatant, *available at* http://news.findlaw.com/cnn/docs/padilla/padillabush60902det.pdf. Despite President Bush's assertion, there are questions about the veracity of the information gained by informants and the legitimacy of the charges against Jose Padilla. The United States government concedes that its intelligence sources have not been completely candid about his association with al Qaeda and his alleged terrorist activities. The government concedes that some information provided by the sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials. *Alleged but Not Proven*, WASH. POST, Sept. 1, 2002, at B6.

17. *See* Charles Lane, *Debate Crystallizes on War, Rights: Courts Struggle over Fighting Terror vs. Defending Liberties*, WASH. POST, Sept. 2, 2002, at A1. President Bush "stands accused of usurping powers not conferred upon him by the Constitution and of infringing upon individual freedoms." *Id.*

18. U.S. CONST. amend. V, § 1.

19. 18 U.S.C. § 4001 (2000).

declare an individual an enemy combatant and relevant case law that supports such action. Part II looks at the potential limitations to the president's power, including the Fifth Amendment to the Constitution and 18 U.S.C. § 4001. Part III looks at what habeas review has entailed in the cases of Padilla and Hamdi, and what it should entail for a citizen labeled an enemy combatant captured on American soil. Part IV discusses the need for a maximum detention period, with Part V focusing on the appropriate venue for the eventual trial of an enemy combatant such as Padilla.

Henry David Thoreau stated in *Civil Disobedience* that "[t]he government itself, which is only the mode which the people have chosen to execute their will, is equally liable to be abused and perverted before the people can act through it."[20] Although it does not appear that the President is presently abusing his power to declare an individual an enemy combatant, proper legislation will help temper the possibility of any future abuse while also providing adequate due process protection.

I. THE PRESIDENT'S POWERS

A. The Power to Protect

The President can act without a congressional order to protect people, national security, or things of national interest.[21] Under Article II, Section 2 of the Constitution, the President is declared the Commander in Chief of the Army and Navy of the United States.[22] The authorization granted by Article II and further developed by Supreme Court decisions gives the President the power to take necessary actions to protect the United States in times of war as well as in times of peace. Furthermore, the Constitution assigns the "power [to] the executive branch of the government to preserve order and insure the public safety in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety."[23]

The ability to protect American citizens from terrorist attacks must initially

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20. HENRY DAVID THOREAU, CIVIL DISOBEDIENCE 1 (1849).

21. In *In re Neagle,* 135 U.S. 1 (1890), the Court noted that the Constitution confers a duty on the President to "take care that the laws be faithfully executed." *Id.* at 64 (quoting the U.S. Constitution). The court then goes on to question the boundaries of this duty:

> Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

Id. In answering this question, the Court found that the President's power to protect citizens and national interests arose from the Constitution and was not limited by acts of Congress. *Id.*

22. U.S. CONST. art. II, § 2, cl. 1.

23. Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Stone, C.J., concurring).

rest with the President.[24] In *Durand v. Hollis*,[25] the court noted that violence abroad against citizens and their property required prompt and decisive action. The court noted that "[a]cts of lawles [sic] violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for;" and thus, the Executive Branch is empowered to react quickly and effectively in order to protect American interests.[26]

Further, the President's decision regarding how to protect the nation requires significant deference. In the *Prize Cases*, prior to the Civil War, President Lincoln ordered the blockade of southern ports and seizure of several ships in those ports. The Court found that as Commander in Chief, the President had inherent authority to determine what situations necessitated the use of force to protect the nation, even absent Congressional approval.[27]

The Constitution gives the President power to protect the country and its citizens. Moreover, the Supreme Court has determined that the President's determination regarding national safety should be accorded a significant amount of deference. The case law outlines specific examples in which the President has acted within his constitutional authority, even without congressional approval, to ensure that America is protected. In the case of terrorism, the word itself implies acts not fully anticipated or provided for that result in harm. In such case, the President has constitutional authority to respond promptly to protect the citizens of this nation.

B. The President's Power to Declare a United States Citizen an Enemy Combatant

An unlawful belligerent is someone that does not openly carry a weapon, does not wear a fixed symbol that is recognizable at a distance, and does not follow the laws of war.[28] Unlawful belligerents who enter our country under the direction of armed forces of the enemy, for the purpose of inflicting harm upon our property or persons, commit a hostile, war-like act,[29] and they can be subjected to the laws of war.[30] Thus, they can be labeled as enemy combatants regardless of whether they carried conventional weapons or whether they intended to directly oppose the American military.[31]

Although the war on terrorism is not a traditional war, it is a conflict that has involved American troops being deployed to foreign soil to protect the United States and has required homeland security to be ever vigilant. Moreover, when a person begins to take positive steps toward performing a terrorist act, especially

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24. *See* Katyal & Tribe, *supra* note 7.
25. 8 F. Cas. 111, 112 (C.C.N.Y. 1860) (No. 4186).
26. *Id.*
27. The Prize Cases, 67 U.S. 635 (1862).
28. *See* Katyal & Tribe, *supra* note 7, at 1264.
29. *Ex parte* Quirin, 317 U.S. 1, 36-37 (1942).
30. *Id.* at 37.
31. *Id.*

when done with the support of a terrorist organization like al Qaeda, that person is undertaking a war-like act, thus subjecting them to the penalties that come with violating the laws of war.

The President can label foreign or domestic individuals who are bent on inflicting harm through war-like acts as enemy combatants. Nevertheless, the President's authority to exercise his war powers in times of an undeclared war has been questioned recently and in the past. The "Steel Seizure" Case was one of the most famous cases to address this issue. In the Steel Seizure Case,[32] President Truman attempted to take control of the steel mills by Executive order. President Truman claimed that this action was necessary because the impending strike of the steelworkers endangered the making of arms and their shipment to our troops in Korea. The Court rejected the President's argument.[33]

The Court's primary reason for rejecting the President's action was that it was in direct conflict with a specific act of Congress. The Court stated that to allow the President to seize control of the steel mills in direct contradiction of congressional action would "disrespect the whole legislative process and the constitutional division of authority between President and Congress."[34]

The Court did not accept the President's claim that the powers vested in him by the Constitution allowed him to seize the mills. In his concurring opinion, Justice Jackson outlined the spectrum of the President's power. The President's powers are the greatest when Congress has acted conferring upon the President express or implied authority to act. Powers are the least when the President takes measures incompatible with the acts of Congress, and when the President acts in the absence of congressional grant or denial, he can only rely upon his own independent powers obtained from the Constitution.[35]

In the Steel Seizure Case, the President acted in direct contravention of Congress. Congress had already acted and denied the President the power to unilaterally seize control of the steel mills. Even though the production of steel was important to national safety, the Court ruled that he did not have the power to supersede a direct act of Congress.[36]

In the case of enemy combatants, Congress Joint Resolution 107-40 can be seen as either granting the President the authority to act or as remaining silent on this issue, but Congress definitely has not acted to deny the President the power to declare an individual an enemy combatant. The resolution authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided

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32. Youngstown Sheet & Tube Co. v. Sawyer ("The Steel Seizure Case"), 343 U.S. 579 (1952).

33. *Id.* at 710.

34. *Id*. at 609 (Frankfurter, J., concurring). *But cf. In re* Neagle*,* 135 U.S. 1 (1890).

35. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635-36.

36. *Id.* at 602-03. However, Justice Jackson also stated in his concurring opinion that a state of war may exist without a formal declaration from Congress. Therefore, it is important to recognize that the Court did not rule that the President was without power to determine when a state of war existed. *Id.* at 642.

the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts . . . against the United States."[37] The resolution can be broken down into two relevant parts. First, the nation, organization, or person against whom force is being used had to be involved in the September 11, 2001 attacks. Second, force can be taken against these individuals in order to prevent future acts of terrorism against the United States.

If the President confined Padilla in order to prevent him from committing a future act of terrorism, the *second* part of the Order would be satisfied because the President would be acting to prevent a future act of terrorism. Nevertheless, since there are no allegations that Jose Padilla planned, authorized, committed, or aided in the terrorist attacks on September 11, the *first* part of the Order is not satisfied, and Joint Resolution 107-40 does not apply to him. Therefore, in order to detain an individual as an enemy combatant, the President must rely on his own independent powers because there has been no congressional grant or denial for the President's actions.

Historically, the President had the authority to label individuals as enemy combatants.[38] In *Ex parte Quirin*,[39] the issue was whether the President had the power to order enemy soldiers who had surreptitiously entered the country for the purpose of exploding munitions plants to be tried by military tribunals.[40] The Court found that the President had such power because these combatants had violated the laws of war by entering our country under the guise of being American citizens with intention of inflicting harm on our industry and people.[41] Another issue in *Quirin* was whether a U.S. citizen could be properly tried before a military tribunal, as that forum did not provide the full spectrum of due process rights. However, the Court ruled that U.S. citizenship does not relieve a person from the consequences of his or her actions that were in violation of the laws of war.[42]

The facts of the Padilla case are similar to *Quirin*. Jose Padilla was arrested at O'Hare International Airport in Chicago, Illinois after returning from allegedly training with al Qaeda forces in Afghanistan. Reportedly, while in Afghanistan he had learned how to build and detonate a radioactive dispersive device, or dirty bomb.[43] Upon returning to the states, Padilla allegedly planned to detonate such a bomb in a heavily populated area.[44]

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37. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

38. *See* Katyal & Tribe, *supra* note 7.

39. 317 U.S. 1 (1942).

40. *Id.* at 15.

41. *Id.*

42. *Id*. at 37-38.

43. A dirty bomb is a dispersive device designed to scatter radioactive material into the surrounding environment using conventional explosives.

44. *But see* Robbins et al., *supra* note 15.

> Although some U.S. officials, including U.S. Attorney General John Ashcroft, said that Mr. Padilla researched dirty bombs in Lahore, Pakistan, an intelligence official said his

Similar to the German soldiers in *Quirin*, Padilla had entered the United States, dressed as a regular citizen, allegedly under the direction or influence of al Qaeda. He planned to detonate a dirty bomb that would cause painful deaths and tremendous destruction. Although Padilla had no plans to encounter military forces in performing this terrorist attack, this would not take his actions out of the zone over which the military can exercise its authority. As the Court in *Quirin* stated, "Citizens 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 law of war."[45]

Padilla's situation differs from *Quirin* because the defendants in *Quirin* were soldiers of a recognized army that the United States had formally declared war against, and they made no contrary assertions regarding that fact. Padilla does not belong to a recognized army, thereby making it more difficult to clarify the association. However, intelligence gathering sources provided the government information that revealed Padilla trained with a regime intent on attacking America and her interests through terrorism.[46] Being closely associated with terrorists to the point of training with them and being included in their plans is similar to being part of an organized army intent on destroying its enemies.

In contrast, compare *Quirin* to *Ex parte Milligan*.[47] In *Milligan*, which occurred during the Civil War, a southern sympathizer residing in Indiana was detained and tried by military tribunal for allegedly conspiring against the United States. The Court held that Milligan was not an enemy belligerent and therefore could not be tried by a military tribunal because he was not a part of or associated with confederate forces.[48] By itself, sympathizing with the enemy is not enough to declare an individual an enemy combatant.

Nevertheless, Padilla's close association with al Qaeda significantly departs from the facts in *Milligan.* Padilla is known to have associated and trained with al Qaeda leaders and their associates in Pakistan.[49] Therefore, the necessary foundation exists for which the President can declare Padilla an enemy combatant.

II. POTENTIAL LIMITS ON THE PRESIDENT'S POWER

A. 18 U.S.C. § 4001

Objectors to the President declaring a U.S. citizen an enemy combatant and

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research consisted of "basically surfing the Internet" for information on the crude devices. Deputy Defense Secretary Paul Wolfowitz said, "[T]here was not an actual plan. We stopped this man in the initial planning stages."

Id.

45. *Ex parte* Quirin, 317 U.S. 1, 37-38 (1942).

46. Eggen & Schmidt, *supra* note 10.

47. 71 U.S. 2 (1866).

48. *Id.* at 135-36.

49. Seelye, *supra* note 8, at A13.

the subsequent detainment of such person have relied on 18 U.S.C. § 4001 to assert that the President is acting contrary to an act of Congress.[50] The statute reads, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[51] Opponents say this Act is in direct conflict with the President's actions; therefore, the President's ability to declare a United States citizen an enemy combatant is contrary to an act of Congress and, as such, is invalid.[52]

Section 4001 does not limit the President's ability to classify a U.S. citizen an enemy combatant. First, the statute does not apply to enemy combatants because they are outside of the statute's scope and intended use. Second, it can be argued that the congressional order authorizing the President to use force provides the congressional authorization necessary under the statute; however, this second argument fails for reasons discussed below.

The best argument against the application of this statute, due to the subsequent ramifications and its strength, is that the declaration of a person as an enemy combatant is outside the scope of 18 U.S.C. § 4001. Title 18 is titled "Crimes and Criminal Procedure," and § 4001 is subtitled "Limitation on detention; control of prisons." From its title alone, it is a reasonable interpretation to conclude that Congress intended this statute to apply to criminal detainment, not to military detainment.

The Second Circuit gave considerable weight to the legislative history of § 4001 in concluding that this Act applied to both criminal and military detainment. The court determined that the majority of legislatures favored the act due to the treatment of Japanese-Americans in World War II.[53] Moreover, the court asserted that the legislature considered that this Act would not allow the President to detain an individual that was suspected of possible future acts of sabotage or espionage.[54] Nevertheless, the legislative history of § 4001 does not indicate that Congress intended the President to be stripped of his ability to protect the country from acts of terrorism.

The only time this statute was addressed by the Supreme Court was when a state prisoner was going to be transferred to federal prison.[55] In that case, the Court stated in a footnote, "the plain language of § 4001(a) proscrib[es] detention

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50. The Second Circuit held that 18 U.S.C. section 4001(a) prevents the President from being able to hold Padilla as an enemy combatant and ordered the release of Padilla from military custody within thirty days of their ruling. Padilla v. Rumsfeld, No. 03-2235(L), 2003 WL 22965085, at *16 (2d Cir. 2003). The Justice Department has appealed that case to the Supreme Court and asked the Second Circuit's order to be stayed. *See* Anne Gearan, *White House Appeals Terror Suspect Case*, Jan. 16, 2004, *available at* http://news.findlaw.com/scripts/printer_friendly.pl?page=/ap_stories/a/w/1154/ 1-16-2004/20040116181501_04.html.

51. 18 U.S.C. § 4001(a) (2000).

52. AM. BAR ASS'N, TASK FORCE, *supra* note 10. *See also* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 598 (S.D.N.Y. 2002).

53. *Padilla*, No. 03-2235(L), 2003 WL 22965085, at *14.

54. *Id*.

55. Howe v. Smith, 452 U.S. 473 (1981).

of *any kind* by the United States, absent a congressional grant of authority to detain."[56] However, the sentence should be read within its context; this was a criminal case. The Court could not have intended this sentence to prevent the President from acting under his constitutional duty to protect the nation's security. The Court in this case did not even have reason to contemplate such a drastic proposal; therefore, such an interpretation is not supportable.

Moreover, the statute implicitly exempts matters involving the military. Section (b)(1) gives the Attorney General control over federal penal and correctional facilities, but explicitly exempts military and naval institutions from that control. Therefore, this express limitation of the statute supports the proposition that it does not apply to events or happenings related to the military.

Also, if the statute limited the President's ability to make urgent decisions regarding terrorists, it would impinge on the President's role as Commander in Chief. Where a citizen has taken positive steps towards committing a terrorist attack against the United States, the President must be able to respond appropriately. This statute should not be interpreted to prevent the President from performing his constitutional duties.[57]

The second argument against applying § 4001 is that section 2(a) of the Authorization for Use of Military Force provides the congressional authority necessary to allow the President to detain enemy combatants. The Order allows the President to

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons . . . .[58]

Although this argument provides an easier way to deal with § 4001, and is also the way the court circumvented this problem in *Padilla*,[59] it is incorrect.

This Order does not apply to individuals that did not participate, plan, authorize, or assist in the September 11 attacks. For this Order to apply to

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56. *Id*. at 480 n.3 (emphasis in original).

57. Making a similar argument the government in *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 597-98 (S.D.N.Y. 2002), argued a constitutional avoidance theory. Instead of arguing that the statute was unconstitutional, the government argued that the statute does not apply to the detention of enemy combatants. Judge Mukasey denied this argument and instead relied solely on the plain language of the statute. *Id.*

58. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

59. According to Judge Mukasey, "If the Military Force Authorization passed and signed on September 18, 2001, is an 'Act of Congress,' and if it authorizes Padilla's detention, then perforce the statute has not been violated here." *Padilla*, 233 F. Supp. 2d at 598. The judge found that the Order was an act of Congress and that the detention of Padilla was not barred by 18 U.S.C. § 4001(a). *Id.*

Padilla, the government would have to show that he assisted in the September 11 attacks. The government, however, has not accused Padilla of playing a role in the September 11 attacks; at least, they have not publicly done so.

Also, and more importantly, for possible future cases of domestic terrorism further removed from September 11, it is necessary to interpret 18 U.S.C. § 4001 as either unconstitutionally impinging the Presidential national security powers, or as not applying to citizens that participate in terrorist activities against their country. If the statute is not interpreted in this manner, the statute limits the President's ability to protect the safety of our nation in the future.

B. Due Process v. National Security

Since an enemy combatant can be detained until the end of the war or conflict without formal charges or access to an attorney,[60] one argument against labeling a U.S. citizen an enemy combatant is that it allows indefinite detainment of the individual without due process of law. There are times, however, when constitutional requirements must bend to the necessity of protecting the country. In fact, case law supports that due process rights can be diminished when the magnitude of the situation calls for such action.[61]

In *Moyer v. Peabody*, the Governor of Colorado had the leader of an uprising arrested and detained from March 30 until June 15, the time when the uprising was put down. The detained individual later sued the Governor for detaining him without due process of law. The Supreme Court discussed what due process required. Foremost, the Court noted that due process "varies with the subject-matter and the necessities of the situation."[62] When a state is threatened, individual rights yield to the preservation of the state.[63] Therefore, when an emergency situation arises, the head commander, whether the Governor of a state or the President of the United States, has the ultimate determination what actions are needed to preserve the integrity of their state or country.[64]

Sterling v. Constantin has a fact pattern similar to *Moyer*, but a divergent holding. In *Sterling*, the Governor declared a state of insurrection based upon the fact that he believed if he did not do so there would be an insurrection.[65] In *Moyer*, the court noted that the decision made by the state's executive was unreviewable; however, the court in *Sterling* indicated that the Court could review the Governor's decision. The Court noted that they did not have to accept the Governor's decision just because it is presumed that he acted in good faith,

> [i]t does not follow from the fact that the executive has this range of discretion, deemed to be a necessary incident of his power to suppress

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60. Katyal & Tribe, *supra* note 7.

61. *See* Sterling v. Constantin, 287 U.S. 378 (1932); Moyer v. Peabody, 212 U.S. 78(1909).

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

63. *Id*.

64. There was no claim made that the Governor acted in bad faith or that the imprisonment of the detainee lasted longer than the time it took to put down the insurrection. *Id*.

65. *Sterling*, 287 U.S. at 378.

> disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat.[66]

Therefore, this ruling requires the executive to show some necessity, beyond a good faith subjective belief, to demonstrate the need for detention.

In *United States v. Salerno*, the Court upheld the Bail Reform Act of 1984 which allowed the government to detain an arrestee pending trial if the government demonstrated by clear and convincing evidence, after a hearing, that no conditions of release on bail could assure public safety.[67] The Court stated that being detained is not the same as being punished. Further, the Court noted that in appropriate circumstances community safety outweighs an individual's due process rights. The Court must determine if the circumstance was appropriate for detaining the accused criminal, and the prosecution must prove their allegations by clear and convincing evidence.[68] The Court outlined the factors to consider for detainment which included: the nature and seriousness of the charge, the substantiality of the government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the arrestee's release.[69] *Salerno* shows that due process rights can be abbreviated in situations that create a high probability of danger to the public.

Also, note that *Salerno* involved a criminal trial. It is thought that domestic criminals are afforded the full amount of due process protection under the Constitution. If due process rights can be abridged in a criminal scenario because of concerns of public safety, then due process can be limited to protect national security. The danger and subsequent destruction from another internal terrorist attack far outweighs the possible danger Salerno posed to his local community. The case law does not explicitly state that the President can detain a citizen of the United States without due process of law. The case law, however, demonstrates that the President is acting within his power as Commander in Chief to defend the country from imminent threats.

Nevertheless, due to the incredible power the President wields when he declares a United States citizen apprehended on American soil an enemy combatant, and its ramifications, such determination should be reviewed.

III. THE REVIEW PROCESS

A. Habeas Review and the Role of the Courts

American citizens detained as enemy combatants have been entitled to a writ

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66. *Id*. at 400.

67. 481 U.S. 739, 754-55 (1987).

68. *Id*.

69. *Id*.

of habeas corpus.[70] The two courts that have heard habeas petitions, however, have come to different conclusions on what the court's proper role is in reviewing a habeas petition. The Fourth Circuit Court of Appeals has ruled that the court can only review whether the detention of an American citizen classified as an enemy combatant is in direct conflict with the Constitution or applicable law of Congress.[71] In contrast, the district court for the southern district of New York ruled that Jose Padilla has the right to an attorney in order to help him contest the government's allegations.[72]

Article III courts should limit their review of the enemy combatant label to whether the President acted constitutionally and whether the facts as alleged by the government are enough to detain the individual. The President has the inherent powers given to him by the Constitution that allow him to carry out the duties of his office, which include protecting the country from terrorist attacks.[73]

Article III courts can, however, determine if the President is acting according to the powers vested by the Constitution in the Executive or whether he is overstepping his constitutional boundaries.[74] Therefore, the question for the court reviewing the habeas petition of a U.S. citizen that has been declared an enemy combatant is, "Under these conditions and circumstances was the President's action Constitutional?"[75]

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70. This right has been accorded to both Yaser Hamdi and Jose Padilla. Yaser Hamdi was captured in Afghanistan fighting with al Qaeda forces. After his initial detention in Guantanamo Bay, Cuba, it was realized that Hamdi was an American citizen. Due to that revelation, Hamdi is now being held as an enemy combatant in a naval brigade located in Suffolk, Virginia.

71. Citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers and political branches. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

72. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 605 (S.D.N.Y. 2002). After this ruling, the government has consistently not complied with the court's order to allow Padilla to meet with an attorney. On April 9th, 2003, one issue U.S. District Judge Michael Mukasey certified for interlocutory appeal is whether Padilla is entitled to meet with a lawyer. Padilla v. Rumsfeld, 256 F. Supp. 2d 218, 213 (S.D.N.Y. 2003).

73. *See* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 498 (2002).

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> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

United States v. Nixon, 418 U.S. 683, 704 (1974) (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).

75. *See* Korematsu v. United States, 140 F.2d 289, 306 (9th Cir. 1943). "There is no sanction in our governmental scheme for the courts to assume an overall wisdom and superior virtue and take unto themselves the power to vise the Acts of Congress and the President upon war matters so long as such acts are not in conflict with provisions of the Constitution itself." *Id.*

Article III courts would be usurping Presidential authority if they tried to determine the correctness of the President's determination that an individual is an enemy combatant. For the court to try to make this determination, they would be substituting their independent determination in place of the President's. Article II of the Constitution reserves the power to determine what action or reaction war or imminent threats to national security requires to the President. Whether the President's determination is correct, or whether there is an imminent danger that necessitates the action, is a political question that is not appropriate for an Article III court to determine.[76]

1. Padilla v. Bush.—In *Padilla v. Bush*, the court determined that the President had constitutional authority to declare Jose Padilla an enemy combatant.[77] This court, however, went on to determine that Padilla should have the opportunity to present his own facts and to contest the facts the government had alleged against him.[78] Despite finding that the Sixth Amendment did not apply, the court still relied on the Sixth Amendment and its own "discretion" to determine that Padilla needed an attorney to help him challenge his detention through a habeas petition.[79] The court stated, "It would frustrate the purpose of the procedure Congress established in habeas corpus cases, and of the remedy itself, to leave Padilla with no practical means" to challenge his detention.[80]

The problem with the district court's contentions is that while allowing the President to declare an individual an enemy combatant, the court strips the label of its intended consequences. Enemy combatants are thus labeled to prevent them from having access to a lawyer and the courts. This allows the government to try to extract valuable information about our enemies and their future plans. Also, terrorists in public courts present a safety issue, not only for the possibility of leaking government information, but also for the safety of the judges.[81]

The court in *Padilla v. Bush* overstepped its judicial boundaries in deciding that Padilla should be allowed to have an attorney available to him to challenge the underlying facts that led to his detention. The determination that an individual is an enemy combatant is a military determination based upon classified information that is provided to the President. The President was given

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76. *See* Ochikubo v. Bonesteel, 60 F. Supp. 916 (S.D. Cal. 1945). For a judge to declare that there was no military necessity would be substituting the judge's decision making for

> the combined intelligence and judgment of Congress, the President, the Secretary of War, the combined Chiefs of the Military Staff of the United States . . . all of whom are charged under our constitutional system with the power and responsibility of not only making the decisions growing out of the power to make war, but with executing them.

Id. at 933.

77. *Padilla ex rel. Newman*, 233 F. Supp. 2d at 588-89.

78. *Id*.

79. *Id*.

80. *Id*. at 602.

81. Kenneth Anderson, *What to Do with Bin Laden and al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 609 (2002).

the authority under Article II of the Constitution to determine whom to declare an enemy combatant. The Constitution does not provide Article III courts the same authority regarding war.

2. Hamdi v. Rumsfeld.—In *Hamdi v. Rumsfeld* the lower court had determined that Hamdi[82] should have unlimited access to an attorney to help him prepare for his habeas review. The Fourth Circuit Court of Appeals reversed the lower court's ruling and found its approach, which was similar to the Southern District of New York's approach, to be incorrect. The court stated:

> The [lower] court's approach, however, had a single flaw. We are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers. We are dealing with the executive's assertion of its powers . . . [under] Article II. To transfer the instinctive skepticism, so laudable in the defense of criminal charges, to the review of the executive branch decisions premised on military determinations made in the field carries the inordinate risk of a constitutionally problematic intrusion into the most basic responsibilities of a coordinate branch.[83]

Moreover, the court notes that military actions are not without mistakes; however, these inherent problems are not enough to allow the judiciary to oversee military operations.[84] The Fourth Circuit held that Hamdi was not entitled to challenge the information that the government used to determine that Hamdi was an enemy combatant or to allow him access to an attorney.[85]

An American citizen labeled as an enemy combatant is entitled to habeas review of his or her detention. This review, however, should not include the right to challenge the facts or sufficiency of the President's determination. Besides being an infringement on the President's ascribed constitutional powers, typical Article III courts are not prepared to handle this type of adversarial hearing involving classified information concerning national security. Although Article III courts do not have the power to determine if the President's determination is accurate, they do have the power to determine if the detention of an enemy combatant is lawful under the Constitution and any relevant statutes if the detainee invokes his or her right to habeas review.[86]

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82. As previously discussed, Yaser Hamdi was captured in Afghanistan fighting for al Qaeda. He was originally imprisoned at Guantanomo Bay, Cuba and was transferred to detention in the United States as an enemy combatant after the revelation that he was an American citizen.

83. Hamdi v. Rumsfeld, 316 F.3d 450, 473 (4th Cir. 2000).

84. *Id*.

85. *Id*.

86. *See* Anita Ramasastry, *Do Hamdi and Padilla Need Company?: Why Attorney General Ashcroft's Plan to Create Internment Camps for Supposed Citizen Combatants Is Shocking and Wrong* (Aug. 21, 2002), *at* http://writ.findlaw.com/ramasastry/20020821.html. "At a minimum, Supreme Court precedent shows us that not all military detentions of U.S. citizens that are connected with wartime offenses are lawful; [In Re] Milligan . . . establishes that." *Id.*

B. Establishing an Appropriate Review Process

Although Article III courts should not be able to overrule the President's determination that an individual is an enemy combatant, a review process needs to be established that would provide appropriate safeguards to due process rights and national security. Although the courts do not have the power to decide whether the President was correct in his determination, because the President's and Congress's constitutional war powers overlap, Congress can pass legislation to supplement or curtail the President's power to unilaterally detain an individual indefinitely.

A U.S. citizen captured on American soil should have the ability to have the label of enemy combatant reviewed for the following reasons: first, he or she is a U.S. citizen captured on American soil; second, the zone of armed combat is further removed and less defined on American soil; third, it is more difficult to define an enemy combatant outside the classic theater of war; last, due to these inherent problems it is necessary to provide constitutional, albeit decreased, safeguards to American citizens in this situation.

The possible courts to review the labeling include military tribunals, courts-martial, Article III courts, or another congressionally created court under Article III. The review process should not determine if the individual is actually guilty of terrorist activities. The process should determine if the labeling of the individual is valid. The government should be allowed to detain the individual up to the point of the hearing. This initial detainment period would provide the President means to combat immediate threats to national security. Furthermore, because the President has already acted, presumably in good faith, and because of the magnitude of possible harm from a terrorist attack, the Government should not have to prove its allegations beyond a reasonable doubt.

Prior to the review, the detainee is only an alleged enemy combatant and, theoretically, they have not been found to have violated any laws of war. Because of the location of capture and the extent of his involvement, Hamdi should be considered a combatant in the traditional sense. In *Quirin* it was known prior to the trial by the military tribunal that the individuals were members of the German Army.[87] However, in the case of the U.S. citizen apprehended on American soil, like Jose Padilla, where there is no ongoing combat or a physical attempt at a terrorist attack. The direct connection to the enemy and the battle is more attenuated. Therefore, it becomes necessary to ensure some level of due process to make sure the label is appropriate and was determined by reliance on adequate government information.[88] By reviewing the President's determination that the individual is an enemy combatant, some due process rights are afforded the alleged combatant.

There is an inherent problem in a military tribunal or a courts-martial

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87. *Ex parte* Quirin, 317 U.S. 1, 7 (1942).

88. This begs the question: "What is adequate?" In such a situation, information that can be reasonably relied upon to make determinations of national security is adequate. It would be up to the reviewing judge or officer to determine reasonableness.

reviewing the President's labeling. Neither provides an appropriate forum for review because neither would have jurisdiction over an American civilian at this point. Although military tribunals and courts-martial are created under different constitutional authority,[89] they both require that the individual either be in the military or has violated the laws of war. The review process should be implemented to determine if the President's labeling was valid, therefore, until the label of enemy combatant is verified, the individual cannot be seen to have violated any law of war. There is, however, a presumption created by the President's labeling that the individual is an enemy combatant, but this is not enough to allow a courts-martial or a military tribunal to try the individual.[90] Therefore, neither forum is appropriate for reviewing the labeling of a U.S. citizen as an enemy combatant when that citizen has been apprehended on American soil.

A typical Article III court, although the most independent forum, is not an appropriate forum to review the President's determination, either. According to Kenneth Anderson there are three major reasons why Article III courts are not satisfactory forums to handle terrorism cases.[91] Although Anderson was discussing prosecution of terrorists, the same problems would be applicable to the review process that I am proposing. First, there are evidentiary limitations on what the government would be able to produce at court due to the type of information relied on to make the determination. Also, hearsay statements would not be allowed in an Article III court. This creates practical limitations on admitting information from intelligence gatherers that could not be expected to return for a review hearing or trial. These complications make it more difficult to meet the government's burden of proof, no matter what that standard might be. Second, the government would have to impose restrictions on what they would produce at court because of national security reasons. Information that otherwise might be difficult or impossible for terrorists to obtain would become easily accessible if exposed in open court. This creates a difficult decision for the government, to expose classified information or to fail to protect the nation from a terrorist. Each choice is unacceptable and provides a circular result. Third, Anderson notes that there is a possibility that terrorists or their followers could seek revenge against participants in an Article III proceeding.[92] Due to the preceding reasons, Article III courts do not serve as a good option in reviewing

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89. The constitutional authority for the creation of these two courts came from separate powers. Military tribunals are created by the President through his Article II powers, whereas, Congress was vested with the power to create courts-martial under Article I, Section 8, Clause 14 of the Constitution. Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 ARMY LAW. 19 (Mar. 2002).

90. In a criminal format, there is a presumption of innocence that the government has to overcome, whereas in the situation of alleged enemy combatants, the President's initial labeling should allow a presumption in favor of the President's determination.

91. Anderson, *supra* note 81, at 609.

92. *Id.*

the President's determination.

Moreover, although Article III courts do provide the greatest amount of independence of the review options, this independence is somewhat nullified by the fact that the government would be unable to provide the judges reviewing the matter with classified evidence on which to base their decision because of national security concerns. Thus, the court would have to make a decision based on the following: Assuming the government's allegations are true, can the individual be detained as an enemy combatant? This results in a duplication of what a habeas proceeding would entail.

In order to have a meaningful review process, Congress needs to create a review panel similar to those created under the Foreign Intelligence Surveillance Act (FISA).[93] It would benefit this discussion to look at the historical development of FISA. Prior to the FISA review process established by Congress under 50 U.S.C. §§ 1800-1811, the executive branch, under the "national security exception," began conducting electronic surveillance of foreign enemies or their agents within the United States without warrants.[94] This process continued without any challenges from Congress until the Watergate scandal. Moreover, during the time period prior to Watergate, Congress explicitly refused to address the issue of regulating intelligence gathering that involved national security.[95] After Watergate, the procedures used to initiate intelligence gathering received closer scrutiny and the Supreme Court ruled that "national security" would no longer satisfy domestic electronic information gathering without a proper warrant.[96] Due to this ruling, including the Court inviting Congress to pass legislation to control this area, Congress enacted FISA.[97]

FISA designates eleven district court judges to review and grant orders that provide for electronic surveillance.[98] The judges are appointed by the Chief Justice of the United States Supreme Court.[99] FISA provides that judges will not serve more than seven years in this capacity and after their designated period is served, they are not eligible for re-designation.[100]

A FISA judge can grant an order approving the electronic surveillance of a foreign power or an agent of a foreign power[101] based upon information provided

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93. The Foreign Intelligence Surveillance Act was created by Congress in 1978 to review Justice Department applications for secret warrants and issue such warrants for electronic surveillance. 50 U.S.C. § 1800 (2003).

94. United States v. Falvey, 540 F. Supp. 1306 (E.D.N.Y. 1982) (recognizing that Franklin D. Roosevelt was the first President to assert his executive power in this manner).

95. *Id.* at 1308.

96. *Id*. at 1309.

97. *Id*.

98. 50 U.S.C. § 1803 (2003).

99. *Id.* § 1803(a).

100. *Id.* § 1803(d).

101. 50 U.S.C. § 1801 has multiple ways to define "agent of a foreign power." Section 1801(b)(2)(C) specifically defines "agent of a foreign power" as "any person who knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor for or

by the government.[102] The judge's decision is governed by statutory elements that must be met. Among those is the belief that probable cause exists that the person being targeted is associated with a foreign power. To assist in determining probable cause, the judge may, among other considerations, consider any past or present activities of the target.[103]

FISA and its proceedings have withstood constitutional challenges on Fourth and Sixth Amendment grounds.[104] Furthermore, the statute has withstood challenges that Article III of the Constitution did not give Congress the power to create this type of court because the judges do not have life tenure.[105] However, courts have found that by having life tenure through their federal district court appointments, FISA judges are insulated from political pressure that could improperly affect their impartiality.[106]

Also, FISA judges' neutrality has been questioned and challenged because the FISA courts rarely, if ever, deny a government request.[107] Nevertheless, the federal courts have found the FISA courts to be neutral and effective in the role they play through the procedures legislated by Congress.[108]

Congress should create a court similar to FISA to review the President's determinations that a U.S. citizen is an unlawful enemy combatant. However, there are different individual interests at stake between a person targeted for electronic surveillance and a person that is going to lose all of one's freedoms. FISA involves the targeted individual's privacy interests, whereas in a situation involving enemy combatants, the person's life and liberty interests are involved. Infringing upon a person's freedom of liberty is a more significant infringement on the person's rights than a violation of privacy, which is still a serious violation in its own right. Because this newly legislated court will impact the individual's liberty interests, there may need to be significant changes from how the FISA court functions. The best way to address this due process concern is through a balancing scheme.

Weighing the government's interest against the magnitude of possible loss of the individual's liberty can help determine the appropriate amount of due process that is required. Clearly, an individual has a significant interest in his freedom. Some argue that due process is intended to protect the individual from the group, especially where the individual's loss benefits the group. However, where the right to due process comes into conflict with other rights, the government can seek a proper accommodation between them.[109]

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on behalf of a foreign power." *Id.*

102. 50 U.S.C. § 1804 (2003).

103. *Id.* § 1805.

104. *See* United States v. Ott, 637 F. Supp. 62 (E.D. Cal. 1986); United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982); United States v. Falvey, 540 F. Supp. 1306 (E.D.N.Y. 1982).

105. United States v. Cavanagh, 807 F.2d. 787, 791-92 (Cal. 1987).

106. *Megahey*, 553 F. Supp. at 1197.

107. *See id.*

108. *Id*.

109. Notes, *Specifying the Procedures Required by Due Process: Toward Limits on the Use*

The government's interest is national security. To recognize only national security, without more, belies the magnitude of that interest when you consider the devastation and destruction terrorists intend to create.[110] It could be asserted that a citizen of the United States should be able to confront the judge reviewing the President's labeling and present a defense to the labeling because he or she will be denied his or her freedom if the judge upholds the President's label. Nevertheless, because the review should only be to determine if the President had a reasonable basis for labeling the individual an enemy combatant, no purpose is served by allowing the accused an opportunity to rebut the government's allegations. The review is not to provide the alleged terrorist a forum to try his case.

Similar to the FISA courts, the review should take place ex parte and in camera and the judge should be allowed to review the documents that the President relied on to make his determination. Moreover, in order to overturn the President's label, the court should be required to find that there is no foundation for the President's labeling or that the decision was clearly erroneous. The factors employed in *Salerno*, along with FISA, would serve as a good guideline as to what the court should consider, including: the nature and seriousness of the charge, the substantiality of the government's evidence against the person detained, the detainee's background and characteristics, and the nature and seriousness of the danger posed by the detainee's release.[111] By allowing the judge to review secured documents, along with weighing the preceding information, this type of court would be able to determine if the President's determination was valid.

Although the preceding review process does not provide the full spectrum of due process procedures that would be afforded to an accused criminal, it does provide some due process protection to the American citizen that is deemed an enemy combatant by the President. Also, the process would alleviate concern over the President unilaterally making a determination of this magnitude. It is easier to accept the labeling of Hamdi, or another citizen captured on the battlefield, as an enemy combatant because this fits into the usual war paradigm. However, the danger of terrorism is that it festers outside of this traditional paradigm, thus requiring proactive measures. If more American citizens are labeled enemy combatants in the future, a review panel, like the one proposed, would not only provide some due process rights to the detainee, but would also give a joint validation from the three branches of government working together.

IV. THE NEED FOR LIMITING THE PERIOD OF DETAINMENT UNDER THE ENEMY COMBATANT LABEL

Due to the fact there is no foreseeable end to the war on terrorism, the detention of an enemy combatant could theoretically be without end. Because

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of Interest Balancing, 88 HARV. L. REV. 1510, 1527 (1975).

110. *See* Wallace, *supra* note 2.

111. *See* 50 U.S.C. § 1800 (2003); United States v. Salerno, 481 U.S. 739 (1987).

this possibility exists, Congress should pass legislation limiting the length of time an individual may be detained.[112] An appropriate amount of time for detention could be difficult to formulate. The purpose of the detention is to try to extract valuable information about the terrorist network and possible plots against the United States. Obtaining this information would not be an easy task, and it undoubtedly involves some tactical and psychological maneuvering.

Therefore, although a limitation on the period of detention should be implemented, it is beyond the scope of this paper to propose what a reasonable amount of time for detention would be. The key in this formulation, however, is that the detention cannot evolve from detention for security and safety reasons to detention as punishment.[113] Once the detention moves into the realm of punishment, the executive branch has crossed its constitutional boundaries.[114] At the end of the detention period, the government would either have to release the detainee or, under the more likely scenario, have to charge the detainee with a war crime.

V. THE APPROPRIATE FORUM FOR A TRIAL OF AN ENEMY COMBATANT WHO IS AN AMERICAN CITIZEN

At the end of the detention period, the enemy combatant will have to be released or brought to trial. Since it is unlikely that the government will want to release an individual that has planned or participated in terrorist attacks against our country, it is logical there will be a trial. Therefore, there is a need to determine what the appropriate forum is in which to try an American citizen labeled an enemy combatant.

As discussed earlier, a typical Article III court provides the most independent judicial body; however, due to the previous explanation, along with the following, this forum is not a viable option. An Article III court does not provide a deterrent to terrorism.[115] As seen in the few trials involving terrorists, it provides a multitude of procedural problems that the system is unable to properly control.[116] Furthermore, it provides a stage upon which the terrorist can continue

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112. A current bill proposes the President be given congressional authority to classify citizens as enemy combatants. The bill proposes that the President certify an individual as an enemy combatant every 180 days, and provide a report to Congress not less than once every twelve months. Also, the bill provides for a termination of the authority provided for on December 31, 2005. H.R. 5684, 107th Cong. (2001). The bill, however, does not clarify if any enemy combatants detained on December 31, 2005 can no longer be detained, or if the termination just applies to any subsequent action. Because the bill, as currently written, could be interpreted as only terminating any future detainments, the enemy combatants already detained could possibly be held indefinitely.

113. *See Salerno*, 481 U.S. at 739; Katyal & Tribe, *supra* note 7.

114. *Salerno*, 481 U.S. at 746-48.

115. Anderson, *supra* note 81.

116. *See* Joanne Mariner*, A Fair Trial for Zacarias Moussaoui*, Feb. 3, 2003, *available at* www.cnn.com/2003/LAW/02/03/findlaw.analysis.mariner.moussaoui/index.html. The judge in the lower court ordered Moussaoui, a suspected terrorist co-conspirator in the September 11 attacks,

to voice his or her beliefs or viewpoints to the United States and its people.[117] Our criminal justice system works because there is a respect for the rights that people are allowed to challenge under the Constitution.[118] However, the American criminal system:

> treats crime as a deviation from the domestic legal order, not fundamentally an attack upon the very basis of that order . . . . Terrorists who come from outside this society, including those who take up residence inside this society for the purpose of destroying it, cannot be assimilated into the structure of the ordinary criminal trial.[119]

Regardless, because the detainee was labeled an unlawful enemy combatant, and a reviewing body upheld this labeling, the matter is now appropriately under the laws of war. Violations of the laws of war can be tried by military tribunals or a courts-martial.[120]

Although it can be argued that the President or Congress could determine that a military tribunal should try the enemy combatant, it does not appear to be an appropriate choice. The President's authority to create a military commission is concurrent with Congress; therefore, congressional action or inaction can influence the President's ability to create a military commission[121] to try American citizens as alleged enemy combatants. Although a military tribunal tried the combatants in *Quirin*, America was in a declared war with Germany and those detained were actual members of the German army.[122] Furthermore, and just as important, the Supreme Court did not decide whether the President independently could create a military commission without the support of Congress because in that case Congress had authorized the use of commissions to try crimes against the laws of war.[123] In contrast, the President's order, which Congress supported, to try terrorists by military tribunal did not include U.S. citizens. Accordingly, it cannot be argued that Congress has authorized the President to use military tribunals to try an American citizen for being an unlawful enemy combatant and subsequently, a military tribunal is not an appropriate forum.[124]

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to have access to bin al-Shibh, another terrorist that is being detained, due to Moussaoui's contention that this man could exonerate him. National security did not appear to be an issue in deciding this ruling, which was appealed.

117. *See* Kelli Arena & Phil Hirshkorn, *Suspected Terrorist Wants to Fire His Lawyers*, April 22, 2002, *available at* http://www.cnn.com/2002/LAW/04/22/inv.moussaoui.hearing/index.html. Moussaoui, while in court, called for the destruction of the United States and Israel and reported that he was ready to fight for Allah against America.

118. Anderson, *supra* note 81.

119. *Id.* at 610.

120. Manual for Courts-Martial, United States, R.C.M. 203 (2000).

121. MacDonnell, *supra* note 89, at 19.

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

123. MacDonnell, *supra* note 89, at 19.

124. Note, however, that absent congressional action or inaction, the President has the power

Article I, Section 8 of the Constitution gave Congress the power to create courts-martial and provide procedures for their operation.[125] Congress, through the creation of the Uniform Code of Military Justice, "established courts; defined their jurisdiction; identified crimes; delegated authority to create pre-trial, trial, and post-trial procedures; and created an appellate system."[126]

A person can be tried by a general courts-martial[127] for committing acts against laws of war.[128] If the President classifies an individual as an enemy combatant and a reviewing court, such as a FISA-like court, upholds this classification, the individual has been properly accused of violating the laws of war and should be tried by courts-martial.

A courts-martial offers similar due process protections as an Article III court; however, there is some question as to the system's impartiality, particularly since military judges do not have tenure and their promotions are dependent on their superior officers' reviews.[129] Therefore, since the President is the Commander in Chief of the Armed Forces, it is reasonable to question whether an American citizen labeled as an enemy combatant would have an independent review under this system or just a rubber stamped decision. Some of this concern, however,

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to try U.S. citizens that are engaged in belligerent acts of war. *Id*.

125. This power comes from the following text of Article I, Section 8: "The Congress shall have Power . . . to make Rules for the Government and Regulation of the land and naval Forces . . . ." *Id.*

126. *Id*. at 20. *See* Dynes v. Hoover, 61 U.S. 65 (1857) (confirming the constitutionality of courts-martial); Fedric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 635 (1994).

127. There are three types of courts-martial including: summary, special, and general courts-martial. Summary and special courts-martial are limited in the punishment they can order and in matters over which they can preside. The general courts-martial, which has jurisdiction over all military crimes and violations of the laws of war, can impose any punishment, including death. The accused in a general courts-martial has a choice between a bench trial or can be tried before five service members who serve as a panel which is presided over by a military judge. Lederer & Hundley, *supra* note 126, at 643.

128. Article 18 of the UCMJ allows courts-martial to try civilians that have been accused of violating the law of war. It states "general courts-martial . . . have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." MacDonnell, *supra* note 89, at 20 (citing UCMJ). Although some argue that *Ex Parte Milligan* provides that citizens cannot be tried by military tribunals when the civilian courts are open and functioning, the Supreme Court in *Ex Parte Quirin* distinguished the ability of the tribunal in that case to try an unlawful enemy combatant that was an American citizen. The Court stated that an individual that has associated with the enemy, is under the guidance of the enemy, and is planning to take positive action against our country cannot circumvent trial by military tribunal just because the individual is an American citizen. That person has participated in planning or performing belligerent acts against our country in violation of the laws of war, and appropriately, can be tried by a military tribunal or a courts-martial. *Id*. at 37.

129. *See* Lederer & Hundley, *supra* note 126.

has been diminished by the UCMJ prohibiting "[c]onvening authorities . . . from censuring, reprimanding or admonishing any court-martial member, military judge or counsel concerning that court's findings or sentence."[130]

Also, the courts-martial system has an appellate process that helps alleviate the concern of possible unlawful command influence. The Supreme Court has direct review over the decisions of the highest military appellate court.[131] The fact that appellate courts can make decisions de novo and the Supreme Court has the power to review the decisions of the military courts diminishes the impact of unlawful command influence, if such influence is utilized.

Also, trial by courts-martial allows classified information to be appropriately handled. Rule 505(a) of the Military Rules of Evidence provides: "Classified information is privileged from disclosure if disclosure would be detrimental to the national security."[132] Further, this information can be admitted into evidence without changing its classified status.[133] Therefore, a courts-martial affords the enemy combatant the greatest amount of procedural due process possible without compromising national security or classified information.

A courts-martial proceeding would provide the accused enemy combatant an opportunity to confront the evidence produced against him while protecting the national security interests of our government. While the courts-martial will allow some evidence to be heard, such as hearsay, that a civilian trial would exclude, the accused will have an opportunity to present a defense and confront the evidence against him.

CONCLUSION

The war on terrorism has been a new frontier for all Americans. What was once thought impossible, the penetration of our boundaries by terrorists, has become a palpable reality. In order to deal with attacks against our country, the Constitution gave the President the power to act in a decisive manner. Further, the Constitution did not give the courts the power to determine if the President's actions were correct, only to determine if they were made pursuant to the Constitution. Due to the need for decisive action by the Executive branch and for the maximum security of our homeland, the President must be able to declare an individual an enemy combatant. However, when that person is a U.S. citizen

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130. Lieutenant James D. Harty, *Unlawful Command Influence and Modern Military Justice*, 36 NAVAL L. REV. 231, 233 (1986).

131. "In enacting the Military Justice Act of 1983, 97 Stat. 1393, Congress for the first time in the history of American military law provided for direct Supreme Court review, by writ of certiorari, of certain decisions of the highest military tribunal." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 118 (8th ed. 2002).

132. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 505(a) (2000).

133. *Id*. However, the accused may or may not have access to the classified information. If the government maintains the accused cannot have access to the information, the judge must find that the "information is properly classified and that disclosure would be detrimental to the national security." MILITARY R. EVID. 505(c).

captured on American soil, there needs to be some limitations on the theoretical lifelong detention of this individual and their ability to have the President's determination reviewed. The President has the power to detain individuals such as Padilla for security reasons only, not for punishment. However, when the detainment lingers indefinitely, that detention becomes punishment. Therefore, Congress needs to act to establish a review process and to determine in what forum an enemy combatant should be tried. This Note provides a proposal, which requires the three branches of the federal government to act according to their constitutional duties, to protect American citizens' due process and the Nation's security.