

May 2003

Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When "Fears and Prejudices are Aroused"

Tania Cruz

Follow this and additional works at: <http://digitalcommons.law.seattleu.edu/sjsj>

Recommended Citation

Cruz, Tania (2003) "Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When "Fears and Prejudices are Aroused"," *Seattle Journal for Social Justice*: Vol. 2: Iss. 1, Article 54.
Available at: <http://digitalcommons.law.seattleu.edu/sjsj/vol2/iss1/54>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized administrator of Seattle University School of Law Digital Commons.

**JUDICIAL SCRUTINY OF
NATIONAL SECURITY:
Executive Restrictions of Civil Liberties When
“Fears and Prejudices Are Aroused”**

Tania Cruz¹

As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees . . . that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability . . . that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

Judge Marilyn Hall Patel²

I. INTRODUCTION

Shortly after the Twin Towers collapsed before the world’s eyes, President George W. Bush declared to Americans that in the quest for justice, “we go forward to defend freedom and all that is good and just in our world.”³ Despite those resounding words, the United States immediately arrested 1,200 Arab and Muslim men with no direct links to terrorism.⁴ It also held secret deportation hearings in cases dubbed “special interest,”⁵ and designated American citizens “enemy combatants,” indefinitely detaining them absent fundamental liberties.⁶ Thus began America’s “war on terror.”⁷

In the war's early stages, Americans watched as the nation's leaders retaliated against those who devastated the country. As the war on terror evolved, however, many executive actions appeared unrelated to protecting America's people and institutions from another attack. Rather, according to observers, those actions were integral to an executive plan to extend its power beyond constitutional boundaries under the mantle of national security.⁸ So began what some are calling the executive's attack on civil liberties.⁹

Central to this claimed constitutional excess is the executive's concerted effort to abolish meaningful judicial review of its actions. According to prominent retired federal judges and attorneys, this effort represents "one of the gravest threats to the rule of law, and to the liberty our Constitution enshrines, that the nation has ever faced."¹⁰

This article observes that during times of national security fears, the judiciary often embraces the executive's arguments of minimal judicial review and fails to closely scrutinize government national security actions. Historically, this excessive judicial deference has led to numerous civil liberties disasters.¹¹

After September 11, 2001, through the use of newly created threshold security designations, the executive devised a method to effectively strip Americans of fundamental liberties.¹² The executive argues that these threshold designations, including enemy combatant status, when coupled with a minimalist evidentiary standard, are immune from meaningful judicial review.¹³ The potential for a present day civil liberties disaster is therefore at hand.

To ensure meaningful and independent review of executive restrictions that curtail civil liberties during times of national stress, this article contends that a rigorous framework of judicial review is warranted. The article then offers a national security civil liberties framework of judicial review that applies heightened scrutiny to national security threshold designations and the evidence used to support such designations.¹⁴

As a foundation for this assertion, Section II of this article briefly examines *Korematsu v. United States* and the U.S. Supreme Court's failure to engage in meaningful judicial review of Executive Order 9066 that led to the internment of 120,000 Japanese American citizens.¹⁵ To demonstrate the need for heightened judicial scrutiny, Section also discusses the subsequent *coram nobis* litigation that unearthed government documents proving that the executive order to intern Japanese Americans was in fact based on racial animus and not military necessity,¹⁶ thereby vindicating those the government interned.

Section III studies the enemy combatant / indefinite detention cases. The section begins by discussing the World War II case, *Ex Parte Quirin*,¹⁷ to demonstrate that the executive's reliance on it as legal precedent is misplaced. The section then examines the first two enemy combatant cases, *Hamdi v. Rumsfeld*¹⁸ and *Padilla v. Bush*,¹⁹ to illustrate the new form of deference some federal courts are giving the executive.

Section IV will first assess the judiciary's proper role during times of national fears and upheaval by examining judicial history and contrasting approaches to judicial review of executive actions. The section will then offer a national security civil liberties framework of judicial review for analyzing contemporary executive actions that will prevent the unnecessary curtailment of civil liberties in the name of national security. In doing so, Section IV will illustrate how the executive is using threshold designations and a highly deferential evidentiary standard to avert heightened judicial scrutiny of its substantive liberty deprivations. Applying the proposed framework, the section will then demonstrate why heightened judicial review of the enemy combatant designation is appropriate and how it accommodates both national security concerns and civil liberties—as distinguished from deferential review and the imbalance it tolerates.

Section V concludes the article discussing how the executive is at times subverting American fundamental liberties by using a newly developed analysis.

II. NATIONAL SECURITY RESTRICTIONS OF CIVIL LIBERTIES AND THE ABSENCE OF MEANINGFUL JUDICIAL REVIEW—LESSONS FROM *KOREMATSU*

A. *Korematsu and the Japanese American Internment*

In 1942, the U.S. government convicted Fred Korematsu for refusing to obey its military wartime exclusion orders. These orders precipitated the mass internment of 120,000 Japanese Americans without individualized determinations that any of them posed a threat to national security.²⁰ In its review of Executive Order 9066, which mandated the Japanese American exclusion leading to the internment, the U.S. Supreme Court in *Korematsu v. United States* began its opinion by stating that “all legal restrictions which curtail civil liberties of a single racial group are *immediately* suspect,” such that “courts must subject them to *the most rigid scrutiny*.”²¹ Rather than review the government’s exclusion orders under “strict scrutiny,” however, the Court proceeded to do the opposite.

The Court relied on *Hirabayashi v. United States*, an earlier decision that upheld the conviction of Gordon Hirabayashi, another Japanese American who had refused to obey a racial curfew order.²² Although the Supreme Court in *Hirabayashi* claimed that its holding was narrow and applied only to the curfew issue, the *Korematsu* Court later cited to *Hirabayashi* to justify Fred Korematsu’s conviction and, ultimately, the Japanese American internment.²³

The Court in *Korematsu* claimed it would strictly scrutinize Executive Order 9066, but it failed to review the order under even “rational basis.” Rather than providing a meaningful review of the factual record, the Court took judicial notice of all the government’s conclusions concerning racial stereotypes and the danger of espionage and sabotage that west coast Japanese Americans allegedly posed.²⁴ Despite published rumors that the government shielded intelligence reports showing there was no threat of espionage or sabotage by Japanese Americans and that mass internment was

unnecessary, the U.S. Supreme Court simply took judicial notice of the falsified documents the government used to advance its position that Japanese Americans posed a threat to U.S. security.²⁵

B. Reopening Korematsu: The 1980s Coram Nobis Cases

Years later, de-classified documents were obtained through Freedom of Information Act requests, revealing two extraordinary facts. First, all of the government intelligence services investigating the so-called “Japanese Problem” on the west coast and allegations of Japanese American espionage and sabotage unequivocally informed the heads of the military and War and Justice Departments that the west coast Japanese, as a group, posed no national security danger, and there existed no need for mass exclusion.²⁶ Second, the War and Justice Departments deliberately misled a highly deferential Supreme Court about the ostensible “military necessity” basis of the *Korematsu* decision.²⁷

Based on this newly discovered information, on January 19, 1983, Fred Korematsu filed a Writ of Error of Coram Nobis.²⁸ Korematsu sought to reopen his World War II case and vacate his forty year-old conviction. On November 11, 1983, Judge Marilyn Hall Patel, finding “manifest injustice,” granted the petition on the merits,²⁹ ultimately determining that the War and Justice Departments during World War II had altered, suppressed, and destroyed key evidence that demonstrated the absence of military necessity for the mass racial internment.³⁰

The government’s misrepresentations to the Court in the original *Korematsu* case and the Court’s deferential acceptance of the government’s falsified position endorsed the mass incarceration of innocent people because of their race. In accepting as fact the government’s assertion that Japanese Americans posed a threat to national security, “the Court not only legitimized the dislocation and imprisonment of loyal citizens without trial solely on account of race, but it also weakened a fundamental tenet of American democracy—government accountability for military control over

civilians.”³¹ The Court’s deference, despite its pronouncement of heightened scrutiny, has been sharply criticized as subverting civil liberties to falsified claims of national security.³² Thus, the *coram nobis* cases cogently demonstrate the imperative of applying heightened judicial scrutiny in cases where fundamental liberties are at stake.

Almost sixty years after the Supreme Court’s now infamous *Korematsu* opinion, the executive is once again attempting to limit judicial review of fundamental liberty restrictions ostensibly justified by national security concerns.³³ Many of its arguments mirror those offered in *Korematsu*—national security threats and military necessity mandate extreme judicial deference to the executive branch.³⁴ In fact, even the evidence used to justify current executive actions—a declaration by an unknown government official named Mobbs—resembles the DeWitt Report the *Korematsu* Court had relied on.³⁵ However, rather than simply demanding absolute deference as in *Korematsu*, the executive has devised a new means to potentially shield its actions from judicial review.³⁶

III. CIVIL LIBERTIES OF AMERICAN CITIZENS UNDER ATTACK: THE *HAMDI* AND *PADILLA* ENEMY COMBATANT CASES

In a deeply disturbing dimension of the war on terror, the executive has pursued American citizens and detained them indefinitely absent charges, access to counsel, habeas corpus proceedings, or trial, all on the government’s “say-so.”³⁷ These executive actions call into serious question the executive’s power to unilaterally declare U.S. citizens enemy combatants. By labeling these citizens “enemy combatants,” a term used historically to classify offenders of the laws of war,³⁸ the executive proffers that it can deny these individuals fundamental liberties during times of war and peace.³⁹ According to the executive’s tortured logic, enemy combatants are not criminals who are guilty of wrongdoing. This is precisely why the government can indefinitely detain them without habeas proceedings, the

Sixth Amendment right to counsel, the Seventh Amendment right to a trial by jury, or the Fifth and Fourteenth Amendments' right to due process.⁴⁰

For nearly two years, the executive has detained American citizens Yaser Esam Hamdi⁴¹ and Jose Padilla⁴² as enemy combatants.⁴³ Challenges to their detention have fallen mainly on deaf ears as members of the federal judiciary have deferred almost entirely to the executive's unilateral determination that these men are enemy combatants, a label that supposedly makes them ineligible for constitutional protection.⁴⁴ Relying primarily on *Ex Parte Quirin*, a World War II German saboteur case that allowed U.S. enemy belligerents to be tried and punished by military tribunals even though the civil courts were open, the executive claims that the United States has a history of designating its citizens enemy combatants and detaining them indefinitely without charges.⁴⁵ However, a closer reading of *Ex Parte Quirin* reveals that the executive's reliance on this case is misplaced and that there exists no legal or historical precedent—outside of *Korematsu*—for the executive's extraordinary actions.⁴⁶

A. *What is an Enemy Combatant*

In *Ex Parte Quirin*,⁴⁷ eight German nationals and possibly one U.S. citizen originally from Germany were captured by the United States as they attempted to enter the country for purposes of “sabotage, espionage, hostile or warlike acts, or violations of the law of war.”⁴⁸ The executive maintained that because they were not lawful combatants fighting for an enemy army, they could be tried before a military tribunal under the Articles of War.⁴⁹ The eight petitioners challenged the government's authority, arguing that under the U.S. Constitution, Art. III, § 2, and the Fifth and Sixth Amendments, they had a right to a jury trial at common law in the civil courts.⁵⁰ Furthermore, they argued that under *Ex Parte Milligan*,⁵¹ they were entitled to a civil trial because the civil courts were open and functioning normally.⁵² The U.S. Supreme Court rejected these arguments, holding that petitioners were unlawful belligerents and that

under the Articles of War they were not entitled to be tried in civil proceedings or by jury.⁵³ The Court also determined that trying the petitioners before a military tribunal did not violate the Fifth and Sixth Amendments because they were not charged with “crimes” or involved in “criminal prosecutions.”⁵⁴

Quirin is notable for the proposition that the government can try U.S. citizens through military tribunals when they have violated the laws of war, notwithstanding that the civil courts are open. Most recently, however, it has become significant for its use of the label “enemy combatant”—words not found in the American lexicon until now.⁵⁵ In defining enemy combatant, the *Quirin* Court differentiated this new class of individuals from lawful combatants who are “subject to capture and detention as prisoners of war by opposing military forces.”⁵⁶ Enemy combatants are thus unlawful combatants who, in addition to being subject to capture and detention, “are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”⁵⁷

The spy . . . 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, but to be offenders against the law of war subject to trial and punishment by military tribunals.⁵⁸

Thus, *Quirin* stands for the proposition that the executive can deem a U.S. citizen an enemy combatant, and then attempt to punish him in a military court rather than in a civil court, which would provide a full range of procedural and constitutional protections. It does not, however, stand for the “sweeping proposition”⁵⁹ the executive is presently asserting—that it can unilaterally designate a U.S. citizen an enemy combatant and then hold the individual without charges, access to counsel, habeas proceedings, trial, and judicial review.⁶⁰ *Quirin* explicitly stated that enemy combatants must be charged and tried before they are punished. In *Quirin*, the petitioners

had at least a rudimentary form of due process, unlike petitioners Hamdi and Padilla.⁶¹

As discussed below, in the present enemy combatant cases, the executive does not seek to charge Hamdi or Padilla, let alone try or punish them based on their guilt.⁶² Although indefinite detention in solitary confinement, as Hamdi and Padilla are currently facing, is clearly a form of punishment, the executive explicitly states that these men are not criminals and argues that their detention is not punitive.⁶³ Instead, the executive claims that the purpose of their indefinite—and possibly perpetual—detention⁶⁴ is to prevent them from rejoining enemy forces or, at a minimum, to hold them pending further investigation.⁶⁵

Moreover, the executive claims that *Quirin* provides it with the legal precedent to take these actions.⁶⁶ However, the executive's reliance on *Quirin* is misplaced because the case stands only for a change in tribunal, not for indefinite detention. Furthermore, *Quirin* does not stand for the proposition that the executive may detain American citizens incommunicado without access to counsel. The defendants in *Quirin* were afforded counsel, and the Court clarified that enemy combatants have standing to contest convictions for war crimes by habeas proceedings.⁶⁷

Quirin arose in the context of World War II, providing little question about who the enemy was or whether the petitioners were in fact enemy combatants. As the district court in *Padilla* recognized, the decision in *Quirin* turned not on whether the detainees were enemy combatants, but on whether enemy combatants—even if U.S. citizens—could be detained and tried by the military.⁶⁸

In the war on terror, where the United States is fighting an illusive and undeclared enemy, battle lines are hazy, making the executive's power to label an American citizen as an enemy combatant especially broad.⁶⁹ As numerous former and sitting federal judges and legal practitioners have recognized, it is the judiciary's role to review the executive's designation of Americans as enemy combatants, particularly since the executive's

designation strips them of fundamental liberties, including freedom itself.⁷⁰ Even the deferential *Quirin* Court recognized that the courts' duty "in time of war, as well as in time of peace, [is] to preserve unimpaired the constitutional safeguards of civil liberty."⁷¹ As the following *Hamdi* and *Padilla* cases demonstrate, absent independent judicial review, the executive wields "far too broad power to imprison a citizen declared to be an 'enemy' of the state; [it is] power alarmingly akin to that routinely exercised by totalitarian governments over dissidents."⁷²

B. Hamdi: An American Captured on Foreign Soil

Yaser Esam Hamdi, a U.S. citizen born in St. Louis and raised in Saudi Arabia, was captured by Northern Alliance forces in Afghanistan and brought to Guantanamo Bay, Cuba for detention.⁷³ Upon discovering he was an American citizen, U.S. forces transferred him to the Norfolk Naval Station Brig.⁷⁴ He has remained in government custody since April 2002.⁷⁵ Although Hamdi's habeas petition⁷⁶ acknowledged that Northern Alliance seized him in Afghanistan during a time of active military conflict, it also asserted that "as an American citizen . . . Hamdi enjoys the full protections of the Constitution,"⁷⁷ and that the government's current detention of him in this country without charges, access to a judicial trial, or to counsel "violates the Fifth and Fourteenth Amendments of the U.S. Constitution."⁷⁸

On June 11, 2002, before the executive had an opportunity to respond to Hamdi's petition, the U.S. District Court for the Eastern District of Virginia appointed Hamdi a public defender and ordered the executive to allow Hamdi unmonitored access to counsel.⁷⁹ On July 12, 2002, the Fourth Circuit Court of Appeals reversed the district court's order allowing Hamdi access to counsel and castigated the lower court for not deferring to the executive in national security matters.⁸⁰

The executive also attempted to dismiss Hamdi's petition on the merits, claiming it had the power to unilaterally declare any U.S. citizen an enemy combatant without judicial oversight.⁸¹ The Fourth Circuit, however,

denied the executive's motion, stating its reluctance to "embrace [the] sweeping proposition . . . that with no meaningful review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."⁸²

The Fourth Circuit then remanded the case to the district court to determine Hamdi's status. In doing so, however, the court was pre-saging the outcome on remand by noting "that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the executive's present detention of him is a lawful one."⁸³

On remand, the district court proceeded to follow the Fourth Circuit's instructions by attempting to determine whether the executive's designation of Hamdi as an enemy combatant was in fact justified.⁸⁴ As its sole support, the executive offered a two-page, nine-paragraph declaration written by Special Adviser Michael H. Mobbs.⁸⁵ On August 13, 2002, in accordance with the Fourth Circuit's instructions, district court Judge Doumar conducted a hearing focusing on the central issue of "whether the Mobbs Declaration, standing alone, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, without access to counsel on U.S. soil."⁸⁶ On August 16, 2002, Judge Doumar issued an order finding that the Mobbs Declaration, standing alone, was insufficient to permit meaningful judicial review of Hamdi's detention.⁸⁷

Most importantly, Judge Doumar carefully defined the appropriate judicial role in national security related cases: "a meaningful judicial review must at the minimum"⁸⁸ determine if the government's classification was determined pursuant to appropriate authority, the screening criteria used to make and maintain that classification is consistent with due process, and the basis of the continued detention serves national security.⁸⁹ Based on its preliminary review, the district court found that the Mobbs Declaration fell "far short of even these minimum criteria for judicial review."⁹⁰ The district court arrived at this conclusion because the allegations in the Mobbs

Declaration were, in large part, drawn from hearsay supplied by relatively unknown members of Northern Alliance forces alleged to have acted as bounty hunters.⁹¹ Rather than exclude the Mobbs Declaration entirely, however, the court ordered the executive to produce complete copies of any other statements made by Hamdi in order to conduct a proper judicial review of his classification.⁹² The court noted that the Mobbs Declaration was “little more than the government’s ‘say so’ regarding the validity of Hamdi’s classification as an enemy combatant”⁹³ and that by accepting it at face value, the court would be “abdicating any semblance of the most minimal level of judicial review . . . acting as little more than a rubber stamp.”⁹⁴

On interlocutory appeal, the Fourth Circuit reversed, ruling that the Mobbs Declaration standing alone was sufficient to sustain Hamdi’s indefinite detention as an enemy combatant and that Hamdi’s petition should be dismissed. Even though Judge Wilkinson, writing for the Fourth Circuit, acknowledged that the hearsay-laden Mobbs Declaration could be challenged for inconsistency and incompleteness, he severely chastised the district court for not showing the government the proper level of deference:

To be sure, a capable attorney could challenge the hearsay nature of the Mobbs declaration and probe each and every paragraph for incompleteness and inconsistency, as the district court attempted to do. The 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.⁹⁵

Judge Wilkinson, somewhat disingenuously, criticized Judge Doumar for indicating that he was “challenging everything in the Mobbs Declaration and that he intended to ‘pick it apart’ ‘piece by piece.’”⁹⁶ In fact, the district court did as the Fourth Circuit had instructed. It considered “the sufficiency of the Mobbs declaration as an independent matter before proceeding further.”⁹⁷ And, although the Fourth Circuit maintained that

“the detention of U.S. citizens must be subject to judicial review,”⁹⁸ those words appeared to be little more than lip service since the court deferred entirely to the executive’s determination that Hamdi was in fact an enemy combatant, asking for no further evidence. The Fourth Circuit instead relied on the unprecedented “zone of active combat” test in finding that the executive’s decision to detain Hamdi indefinitely as an enemy combatant was constitutional.

Because it is undisputed that Hamdi was captured in a zone of active military combat in a foreign theater of conflict . . . the submitted declaration is sufficient basis upon which to conclude that the commander in chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him in the United States Constitution.⁹⁹

In sum, the Fourth Circuit ruled that when the executive branch asserts it has seized an American citizen in a zone of active combat, that citizen might not challenge or otherwise dispute those assertions. Thus, the executive can indefinitely incarcerate a U.S. citizen even though an official with no personal knowledge of the underlying facts made the assertions supporting the detention.¹⁰⁰

The Fourth Circuit did not ascertain how the U.S. military determined that Hamdi was allied with enemy forces or the sufficiency of the Mobbs Declaration standing alone, although it had previously instructed the district court to make the determination. Instead, the court boldly concluded that “the factual averments in the affidavits, if accurate, are sufficient to confirm Hamdi’s detention,”¹⁰¹ without considering whether the factual averments were indeed accurate. In fact, the court declined completely to evaluate the accuracy of the factual averments.

In support of its contention that no further factual inquiry was necessary, the executive advocated that courts apply the highly deferential “some evidence” standard in evaluating habeas petitions in “areas where the executive has primary authority.”¹⁰² Recognizing that the “standard has

indeed been employed in contexts less constitutionally sensitive than the present one,¹⁰³ the Fourth Circuit declined to adopt the deferential some evidence standard because it deemed any factual inquiry into the Mobbs Declaration unnecessary. The Court stated, “It is not necessary for us to decide whether the ‘some evidence’ standard is the correct one to be applied in this case because we are persuaded for other reasons that a factual inquiry into the circumstances of Hamdi’s capture would be inappropriate.”¹⁰⁴

In denying Hamdi the right to counsel and his request for habeas relief, the Fourth Circuit clarified that its holding was narrow and limited to Hamdi’s situation because he was captured in a zone of active combat in a foreign theater of war.¹⁰⁵ Replete with deferential language, the court cited several times to the government’s war-making powers, explaining that “delving into Hamdi’s status and capture would require [the court] to step so far out of its role . . . that [it] would abandon the distinctive deference that animates this area of law.”¹⁰⁶ Referring to the then pending *Padilla* case, the court asserted that it would not proclaim “any broad or categorical holdings on enemy combatant designation”¹⁰⁷ and would not “address the designation as an enemy combatant of an American citizen captured on American soil or the role counsel might play in such a proceeding.”¹⁰⁸

Hamdi sought rehearing by the original panel or in the alternative rehearing en banc.¹⁰⁹ By a ruling of eight to four, the Fourth Circuit denied rehearing.¹¹⁰ In her dissenting opinion, Judge Motz sharply criticized Judge Wilkinson and the original panel for “abrogat[ing] . . . constitutional rights” in declaring Hamdi an enemy combatant based solely on “a short hearsay declaration by Michael Mobbs—an unelected, otherwise unknown, government ‘advisor.’”¹¹¹

Despite the executive’s apparent lack of evidentiary support, Judge Wilkinson fittingly observed that the judiciary has traditionally afforded the executive great deference when it makes decisions in the theater of war.¹¹² However, what if the executive captures an American citizen on U.S. soil, completely outside the theater of war, where there are no hindrances to

collecting evidence or impracticalities to making officials justify their actions? In that case, should the executive be afforded unlimited deference in claiming that any U.S. citizen, regardless of where, when, and how he was captured is an enemy combatant and is therefore ineligible for constitutional protections? Federal courts are currently addressing this question in the ongoing *Padilla* case.

C. Padilla: An American Captured on U.S. Soil

Jose Padilla, a U.S. born Puerto Rican American who converted to Islam, was arrested at the Chicago airport in May 2002 as a “material witness” in an investigation related to September 11.¹¹³ Following his removal on May 15, 2002, from Chicago to New York, he appeared before the district court, which appointed him counsel.¹¹⁴ Following a conference on May 22, 2002, with his attorney, Donna Newman, Padilla moved to vacate his material witness warrant.¹¹⁵ On June 9, 2002, the government notified the court *ex parte* that it was withdrawing the subpoena, and the court vacated the warrant.¹¹⁶ The executive then immediately designated Padilla an enemy combatant, took custody of him, and transferred him to a South Carolina prison where he was no longer permitted to speak to his counsel.¹¹⁷ Although the executive informed his counsel that she could write to Padilla, it indicated that he might not receive the correspondence.¹¹⁸

Immediately after designating Padilla an enemy combatant, Attorney General John Ashcroft and Secretary of Defense Donald Rumsfeld claimed publicly that Padilla had planned to steal radioactive material within the United States to build and detonate a radiological dispersal device, or “dirty bomb,” on U.S. soil.¹¹⁹ In support of its contention, the executive once again offered only a conclusory seven paragraph Mobbs Declaration contending that Padilla is “closely associated with Al Qaeda,”¹²⁰ engaged in “hostile and war-like acts,”¹²¹ including “preparation for acts of international terrorism”¹²² directed at this country.¹²³

On June 11, 2002, through his “next friend” Donna Newman, Padilla filed a petition for habeas corpus in the U.S. District Court for the Southern District of New York.¹²⁴ The executive moved to dismiss Padilla’s habeas petition on jurisdictional grounds. First, the executive asserted that the district court lacked jurisdiction because Donna Newman did not qualify as a next friend.¹²⁵ Second, the executive contended that the district court lacked jurisdiction over the case because no proper respondent with custody over Padilla was present within the court’s jurisdiction.¹²⁶ The habeas petition named President Bush, Secretary of Defense Rumsfeld, Attorney General Ashcroft, and Commander M.A. Marr as respondents. According to the executive, Commander Marr, the commanding officer in the Naval Brig in South Carolina where Padilla was being detained, was the only proper respondent.¹²⁷ Thus, the executive argued that only the South Carolina district court had habeas jurisdiction.¹²⁸ In response to the court’s request that the parties submit additional briefing on the issues of petitioner’s right to counsel, the executive contended that Padilla did not have the right to consult with counsel because he was being held as enemy combatant pursuant to the laws and customs of war, rather than as a criminal.¹²⁹

On December 4, 2002, Judge Mukasey granted Padilla limited access to counsel to present facts in support of the habeas petition. The court began its opinion by holding that Donna Newman had standing to bring the habeas petition on Padilla’s behalf.¹³⁰ Next, the court addressed who the proper respondent was. Finding that the court lacked jurisdiction over President Bush and Commander Marr, the court dismissed the petition against them.¹³¹ However, the court found that Secretary Rumsfeld was the proper respondent and that the district court had jurisdiction over him.¹³² Finally, the court concluded that because Padilla’s attorney, Donna Newman, was in New York and had begun working to secure his release before the executive removed Padilla to South Carolina, it would not transfer the case to South Carolina.¹³³

In addressing the substantive merits of the case, the district court reviewed whether the executive had the power to designate a U.S. citizen captured on American soil as an enemy combatant, detain him without access to counsel, and withhold trial for the duration of the war on terror. Relying primarily on a strained reading of *Quirin*, the district court ruled that the President has the unilateral power to designate American citizens enemy combatants.¹³⁴ The district court, however, never addressed the issue of whether Padilla was indeed an enemy combatant. Instead, the court took great lengths to explain that the executive receives due deference in its war making capacity. The court failed to acknowledge that Padilla's case falls outside the executive's express war powers, because government officials did not apprehend Padilla in a zone of active combat, and he is an American citizen initially detained as a material witness on U.S. soil.¹³⁵

The court conceded that no "lush and vibrant jurisprudence"¹³⁶ exists governing whether an enemy combatant can be held indefinitely, agreeing that *Quirin* really does not offer the "proper precedential value for the government's determination."¹³⁷ To justify its deference in light of this admission, the court instead relied on Justice Jackson's words regarding deference to the executive.¹³⁸ This was the same justice who, in his ringing dissent in *Korematsu*, warned that the majority's opinion stood as a "loaded weapon" to be used at a later time "for the hand of any authority that can bring forward a plausible claim of urgent need."¹³⁹

1. The "Some Evidence" Standard

Although the district court ultimately allowed Padilla access to counsel, the ruling was so narrow that it amounted to little more than a pretense.¹⁴⁰ In *Padilla*, the court granted Padilla access to counsel for the limited purpose of presenting facts to the court regarding his habeas petition.¹⁴¹ On its face, it appears the court was not excessively deferential to the executive, which argued that the court should deny Padilla access to counsel entirely.

Upon closer examination, however, to defer is precisely what the court chose to do.

Judge Mukasey stated that Padilla's access to counsel would be limited solely to presenting facts to the court.¹⁴² Rather than basing his ruling on the broad Sixth Amendment right to counsel, Judge Mukasey granted access to counsel narrowly based on the All Writs Act,¹⁴³ which "permits a court to which a § 2241 [habeas] petition is addressed to appoint counsel for petitioner if the court determines that 'interests of justice so require.'"¹⁴⁴ This statutory, rather than constitutional, ruling excluded Padilla from using counsel to conduct discovery, cross-examine witnesses, and meaningfully rebut the executive's testimony.¹⁴⁵ Coupled with the new "some evidence" standard for establishing the executive's enemy combatant designation, the ruling assured that the habeas proceedings would be little more than a show.

In *Padilla*, the executive argued that courts should review its enemy combatant designation under the highly deferential and improperly applied some evidence standard.¹⁴⁶ Although earlier the Fourth Circuit in *Hamdi* had declined to adopt it, finding no necessity for further factual inquiry,¹⁴⁷ the district court in *Padilla* did adopt the standard.

The deferential some evidence standard is an administrative agency tribunal standard inapplicable to first impression judicial proceedings, because it "presupposes there has been some underlying adversarial hearing at which a record was created . . ." ¹⁴⁸ and procedural due process afforded. Civil and criminal proceedings for pretrial detention in which the government is presenting its initial case apply, at a minimum, the "clear and convincing standard."

Courts have traditionally applied the some evidence standard in reviewing prison disciplinary proceedings and immigration hearings after due process has been afforded.¹⁴⁹ The purpose of the standard is to ensure that there is some evidence to support a factual determination that the executive has not arbitrarily deprived a person of liberty.¹⁵⁰ Because courts have applied the some evidence standard following adversarial proceedings,

they have found it unnecessary to examine the entire record to ensure that the deprivations of liberty are not arbitrary.¹⁵¹ Thus, according to Supreme Court precedent, the some evidence standard “does not require examination of the entire record, independent assessment of witnesses’ credibility, or weighing of the evidence . . .”¹⁵²

Under the some evidence standard, courts will permit exculpatory evidence to determine whether the executive has met the standard, but only if such evidence directly undermines the reliability of the executive’s evidence.¹⁵³ In the present case, Padilla would only have the opportunity to present evidence that undermines the executive’s Mobbs Declaration.¹⁵⁴

The some evidence standard that the executive advocates is analogous to the “scintilla of evidence” standard formerly used to defeat summary judgment motions. By using the scintilla of evidence standard, the smallest amount of evidence in opposition to the motion was sufficient to defeat it.¹⁵⁵ Commentators severely criticized that standard because it predetermined that summary judgment motions would be continually denied.¹⁵⁶

Likewise, in the enemy combatant cases, the executive can virtually always meet the some evidence standard.¹⁵⁷ The Mobbs Declaration supporting the executive’s assertion that a U.S. citizen is an enemy combatant is *some* evidence and sufficient to withstand judicial review under the new evidentiary standard, since the court is not scrutinizing the facts contained in the declaration for accuracy.¹⁵⁸ Masquerading as meaningful judicial review, the some evidence standard the executive advocates “would eviscerate the concept of independent judicial scrutiny.”¹⁵⁹

Careful analysis of the district court’s language in *Padilla* indicates that Padilla’s access to counsel for presenting facts in the habeas proceeding was essentially a façade.¹⁶⁰ The court had already predetermined that the executive’s designation of him as an enemy combatant would withstand judicial review. By eliminating and manipulating procedural safeguards, the court prevented Padilla from effectively developing and presenting his

ongoing case. Most important, the district court predetermined that the executive would prevail through the invocation of a practically nonexistent standard. The court disingenuously granted Padilla limited access to counsel to present facts in a case where it had already decided that Padilla would lose. It did so in order to appear as though it was weighing the facts and not deferring to the executive entirely. Nevertheless, although the court's adoption of the some evidence standard assured the executive's victory in *Padilla*, the executive's subsequent overreaching cost it one of its most ardent allies.

2. Motion for Reconsideration

Despite Judge Mukasey's indication that the executive would prevail, on January 9, 2003, the executive filed an untimely motion for reconsideration of the district court's order to allow Padilla limited access to counsel.¹⁶¹ Although the court ultimately granted the motion for reconsideration in order to hear the executive's recycled arguments, it adhered to its previous ruling, writing a new opinion to chastise the executive for its duplicitous procedural maneuvering.¹⁶²

Ordinarily, motions for reconsideration are pro forma and dispensed with quickly by the courts. Nevertheless, the executive's procedurally and substantively flawed motion for reconsideration and Judge Mukasey's strident response warrant discussion.¹⁶³ Local Civil Rule 6.2, applicable to motions for reconsideration, requires that "such motion be made within ten days after determination of the original motion, and bars affidavits unless authorized by the court."¹⁶⁴ The executive, however, filed its motion more than one month after the original opinion and included the Jacoby Declaration—an affidavit without the benefit of court order.¹⁶⁵

Attacking the executive's legal justification for filing an untimely motion for reconsideration, Judge Mukasey, who earlier appeared solicitous toward the executive, asserted that "[t]he government's arguments . . . are permeated with the pinched legalism one usually encounters from non-

lawyers.”¹⁶⁶ Most important, Judge Mukasey’s opinion addressed the executive’s duplicity in ostensibly justifying Padilla’s continued detention without counsel. In an inappropriate attempt to add to the record, the executive submitted the Jacoby Declaration, implicitly conceding to the insufficiency of the Mobbs Declaration.¹⁶⁷ The Jacoby Declaration, produced by an Admiral Jacoby, asserted that the court should not grant Padilla access to counsel because the interrogators had created an atmosphere of dependency and trust and access to counsel could disrupt that relationship.¹⁶⁸ Criticizing the highly speculative nature of the declaration,¹⁶⁹ Judge Mukasey highlighted the executive’s failure to provide any facts or examples to justify the assertions.¹⁷⁰

Judge Mukasey then addressed the executive’s argument that the district court’s earlier adoption of the some evidence standard “moots any requirement in the [habeas] statute that Padilla be heard.”¹⁷¹ According to the executive, the some evidence standard requires courts only to consider the facts known by the President, as set forth in the Mobbs Declaration, at the time he designated Padilla an enemy combatant.¹⁷² The executive maintained that any factual showing Padilla could produce (regardless of whether it unequivocally proved that the executive’s designation of him is incorrect) is “beside the point.”¹⁷³

Even under the highly deferential some evidence standard, Judge Mukasey maintained that he could not prohibit Padilla from presenting facts to the court.¹⁷⁴ Presentation of facts was necessary to confirm that Padilla had not been arbitrarily detained.¹⁷⁵ Furthermore, application of the some evidence standard requires that Padilla be given an opportunity to respond to the executive’s allegations because there had been no prior adversarial proceedings allowing Padilla the opportunity to present his case. Judge Mukasey stated, “No court of which I am aware has applied the ‘some evidence’ standard to a record that consists solely of the government’s evidence, to which the government’s adversary has not been permitted to respond.”¹⁷⁶

In important respects, Judge Mukasey's statements about Padilla's need and right to present evidence represent less than they initially appear. The court indicated that its earlier ruling allowing Padilla access to counsel to present facts to the court was a "pro forma requirement"¹⁷⁷ to avoid the appearance that it had dispensed with due process entirely. Coupled with the court's adoption of the some evidence standard, Judge Mukasey suggested throughout the opinion that he had already predetermined the executive would prevail in the habeas proceedings.¹⁷⁸ The court therefore admonished the executive for its overreaching in not allowing the court to satisfy its pro forma due process requirement without affecting the ultimate result.¹⁷⁹

In its analysis of the precedent supporting the some evidence standard, the court concluded that earlier prison disciplinary cases made it practicable for petitioners to obtain exculpatory evidence against the government.¹⁸⁰ Given the sensitive nature of Padilla's case, however, the court suggested that it would be more deferential to the executive in reviewing Padilla's evidence than past courts applying the some evidence standard had been:

Those cases which dealt with evaluation of evidence gathered in the relatively accessible setting of a prison, cannot be applied mechanically to evaluate evidence gathered in the chaotic and less accessible setting of a distant battlefield. What allowances will have to be made in the logic of those cases will have to abide whatever submission Padilla may choose to make.¹⁸¹

Thus, only by allowing Padilla access to counsel under a some evidence standard could it appear that the district court had not abdicated its judicial role while still allowing the executive to prevail.

3. Petition for Interlocutory Appeal

In response to Judge Mukasey's reaffirmation that the executive grant Padilla limited access to counsel, the executive filed a motion for interlocutory appeal with the Second Circuit Court of Appeals.¹⁸² The

executive, however, did not ask the court to certify questions regarding the executive branch's authority to designate U.S. citizens as enemy combatants or the propriety of the some evidence standard. Rather, the executive only challenged the district court's initial ruling that Secretary Rumsfeld was the proper respondent, and that the New York district court had jurisdiction to hear the case.¹⁸³

The executive's challenge to the court's jurisdiction appears to have been part of its larger legal strategy to remove Padilla from the Second Circuit's jurisdiction. The record suggests the executive feared that the Second Circuit, one of the more liberal circuits in the country, might rule that the executive does not have the authority to unilaterally designate an American citizen detained on U.S. soil an enemy combatant, or at a minimum that the executive must produce more than some evidence to support the designation.¹⁸⁴

Since the Fourth Circuit exhibited extreme deference to the executive in *Hamdi*, adjudicating *Padilla* in conservative South Carolina, where Fourth Circuit law controls, might prove strategically advantageous. Thus, the district court's decision in South Carolina would most likely be in the executive's favor and on appeal, the case would go to the Fourth Circuit. Given that court's earlier reluctance to award Hamdi access to counsel, the likelihood is that the Fourth Circuit would deny Padilla access as well, notwithstanding its previous reluctance to proclaim any "broad or categorical holdings."¹⁸⁵

Judge Mukasey's order certifying the interlocutory appeal strongly suggested that he understood and disagreed with the executive's legal strategy.¹⁸⁶ In addition to certifying the two procedural questions the executive submitted, Judge Mukasey certified *sua sponte* three substantive questions: (1) whether the President has the authority to label American citizens enemy combatants; (2) whether some evidence is the proper evidentiary standard in assessing the designation; and (3) whether the district court's decision to grant Padilla limited access to counsel under the

All Writs Act was proper.¹⁸⁷ Thus, the executive's failure to adhere to Judge Mukasey's initial ruling led to exactly what it appears the executive was attempting to avoid—adjudication of the substantive merits by the more liberal Second Circuit. At the same time, the executive succeeded in bringing before the federal appellate court a highly deferential, if not predeterminative, standard of judicial review of executive pronouncements of national security.¹⁸⁸

IV. FRAMEWORK FOR ANALYZING NATIONAL SECURITY RESTRICTIONS OF FUNDAMENTAL LIBERTIES

As a means of defeating or (perhaps more aptly stated) avoiding heightened scrutiny of actions that curtail civil liberties, the executive has devised an artifice for extreme judicial deference. Using threshold designations and a deferential evidentiary standard, the executive is assuring that when courts reach the substantive issue—for example, whether the executive has the authority to label an American citizen an enemy combatant—the level of scrutiny is so low that the judiciary is rubber-stamping the executive determination.¹⁸⁹ Employing this novel method ensures that courts will not exercise close judicial review and permits the executive to further expand its power. Moreover, this method of designation creates a safe haven; insulating courts from the type of criticism the U.S. Supreme Court received after its World War II Japanese American internment decisions where it pronounced strict scrutiny yet gave extreme judicial deference to government excesses.

In light of the executive's demand that courts defer to its national security assertions, the following section will examine the judiciary's historical role in reviewing executive policy during times of ostensible national security threats. The existing tensions, as to the level of judicial scrutiny courts should apply to assert national security restrictions of fundamental liberties, will also be explored. This section will then analyze a particular method for selecting the appropriate standard of judicial review in the context of

national security and civil liberty tensions. Using this method as a foundation, the section will then offer a preliminary framework for courts to apply in current national security civil liberties cases, particularly those that employ threshold designations and procedural maneuvers in an attempt to evade judicial review and public accountability. To demonstrate how the framework would treat executive designations like enemy combatant, the section will conclude by applying the framework to *Hamdi* and *Padilla*.

A. The Judiciary's Historical Role in Reviewing Executive Policy During Times of National Security Threats

Lurking beneath the surface of nearly every war powers and national security decision is the question of what role, if any, the judiciary should have in adjudging executive actions that restrict civil liberties.¹⁹⁰ When the executive advances arguments for minimal judicial scrutiny of its national security measures, it is in essence saying that its constitutional liberty restrictions warrant special deference because they are being undertaken during exceptional circumstances. Conceding that although its actions would not normally pass constitutional muster, the executive asserts that the courts should ultimately legitimize its actions when there is a bona fide threat to the nation's security.¹⁹¹

The judiciary's competence in scrutinizing national security claims has long been debated. Two prevalent views have emerged to address the federal judiciary's role during times of national threat. The "interventionist view" contends that in a constitutional democracy, the judiciary is best positioned to safeguard constitutionally protected liberties from the tyranny of the majority because it is insulated from the pressure of political constituencies.¹⁹² Since federal judges are appointed for life, they are free to render decisions based on the law, rather than on the whims of the public. According to the interventionist view, the judiciary provides "watchful care" over the rights of individuals,¹⁹³ particularly during times of national

threat or crisis when “fears and prejudices”¹⁹⁴ are aroused and the system of democracy is at its most vulnerable.¹⁹⁵

The opposing “non-interventionist view” holds that decisions affecting the liberties of individuals should be left to the majoritarian and politically accountable executive and congressional branches.¹⁹⁶ Implicit is the notion that the judiciary should pay substantial deference to the executive and congressional branches—particularly when their actions arise in the context of national security threats.¹⁹⁷ Under this rationale, the judiciary’s role is to uphold the laws of the land, rather than take an active part in shaping them.¹⁹⁸ Broadly stated, if the executive or legislature oversteps the bounds of its power, an informed electorate is later capable of checking government excesses through the political process.¹⁹⁹

For the political process to work, however, government actions must be open for the American people to scrutinize. But what happens when the American people do not know what their government is doing? If the government has shrouded its actions from the public, how then can the public provide the “ultimate check against an arbitrary government?”²⁰⁰ In light of the recurring history of executive branch civil liberties abuses during times of national stress,²⁰¹ the question then emerges: when, not if, the judiciary should intervene to protect fundamental liberties from government actions in times of ostensible national security threats?

In practice, when a citizen’s fundamental liberties are at stake, some courts have applied a heightened scrutiny analysis to determine whether the government’s self-protective measures are legitimate. The court first examines whether a bona fide threat to national security exists.²⁰² If this inquiry yields a positive answer, then the analysis turns to determining whether the government’s means of securing the nation are the most carefully tailored.²⁰³ The determination is essentially factual and commonly left to the realm of the courts. However, some legal scholars, including Chief Justice Rehnquist, argue that while the strict scrutiny analysis is appropriate during times of peace, the judiciary should defer to the

executive and legislative branches and attenuate the standard of review during times of national security threat.²⁰⁴ These scholars contend that during times of national crisis, there is sensitive information that the judiciary, and thus, the public, should not be privy to for the sake of the nation's security.²⁰⁵ In response, other scholars reason that courts must ensure that the government has compelling legal justification for its actions. They point to the government's historical misuse of national security arguments to deprive specific groups of fundamental liberties in cases like *Korematsu*.²⁰⁶

B. Ascertaining the Standard of Review in National Security Civil Liberties Cases

To help resolve the debate of whether courts should apply heightened or deferential scrutiny to national security civil liberty restrictions, in 1986 Professor Eric Yamamoto proposed a method for courts to determine the appropriate standard of judicial review.²⁰⁷ Professor Yamamoto suggested, "Except as to actions under civilly-declared martial law, the standard of review of government restrictions of civil liberties of Americans [should] not [be] altered or attenuated by the government's contention that 'military necessity' or 'national security' justifies the challenged restrictions."²⁰⁸ Rather than deferring to the government's national security assertions where fundamental liberties are restricted, Professor Yamamoto advocated that courts look at the government's substantive claim and apply the heightened standard of judicial review prescribed by ordinary constitutional doctrine for non-national security cases.

While contending that the government's national security claims should not attenuate judicial review,²⁰⁹ Yamamoto recognized that national security concerns would indeed be important "ingredients in the application of the fixed constitutional calculus."²¹⁰ For example, if the *Korematsu* court had employed Professor Yamamoto's method, it would not have merely pronounced strict scrutiny as the general standard to review the racial

incarceration and then deferred to the government's specific claim of national security. Instead, the court would have strictly scrutinized the government's claim of Japanese American disloyalty, carefully examining the factual basis for the claim, including the substantially falsified DeWitt Report offered in support.²¹¹ If the government had declared martial law, which it did not, or if fundamental liberties had not been implicated, which they were, then the court would have been correct in fully deferring to the government's military necessity claim as it did.

C. Critiquing and Expanding the Method

Professor Yamamoto's proposed method for determining the standard of judicial review in national security cases appears workable in cases like *Korematsu*, where the government grounded racial incarceration on substantive claims of unlawful conduct—espionage and sabotage. The method, however, did not contemplate apparent executive attempts to evade heightened judicial scrutiny by using threshold designations, like enemy combatant, and inapplicable evidentiary standards, like the some evidence standard. Broadly applied, Professor Yamamoto's method would not treat the enemy combatant threshold designation as implicating a fundamental liberty because that designation is preliminary to any chargeable substantive claim of, for example, espionage, or sabotage. Strict scrutiny would not be triggered until the substantive claim is raised, even though the ultimate effect of the executive's preliminary designation would be an impingement on fundamental rights. Professor Yamamoto's standard also presumed that courts would review executive evidence under the proper evidentiary standard. Therefore, his proposed method, which provides apt guidance in many situations, requires expansion to accommodate new developments such as the executive's use of threshold designations and inapplicable, highly deferential evidentiary standards.

Given the current ambiguity and the number of cases challenging executive actions arising out of America's "war on terror,"²¹² numerous

judges and legal practitioners have observed that a workable framework of judicial review is needed.²¹³ The following section suggests a two-tiered framework for reviewing national security civil liberty restrictions, particularly those that employ a “threshold designation method” to avert heightened judicial scrutiny. More specifically, the first tier builds upon Professor Yamamoto’s approach for determining the appropriate level of judicial scrutiny by examining whether, according to law and facts, heightened judicial scrutiny of executive national security civil liberty restrictions is appropriate. Where heightened judicial scrutiny is appropriate, the second tier articulates the executive’s burden of evidentiary proof.

1. The “Threshold Designation Method” for Averting Heightened Judicial Scrutiny

In response to scholars’ and historians’ harsh criticism of the Court’s duplicity in *Korematsu*,²¹⁴ the executive has devised a novel method to escape judicial review. The executive has created new threshold designations—such as “enemy combatant,” “material witness,” and “special interest”—that precede substantive determinations and are immune from heightened judicial scrutiny when applied by the executive for national security reasons. As prominent federal judges have recognized, the executive has devised a method “to do indirectly what it cannot do directly.”²¹⁵

A threshold designation appears to differ from an explicit racial directive, such as the military internment orders in *Korematsu*. The designation also appears to serve process goals in the interest of national security, such as holding potential terrorists pending investigation or shielding sensitive national security information from the public eye.²¹⁶ The executive, therefore, contends that courts should not scrutinize a preliminary and discretionary designation because the executive has not yet made the substantive determination as to whether the person is actually dangerous;

for example, whether an “enemy combatant” is actually engaged in terrorist activity.²¹⁷ Yet, by making the threshold designation, the executive is in fact depriving the designated individual of fundamental liberties and is treating him as “guilty” of disloyalty.

When the government labels a U.S. citizen an enemy combatant, it is in essence stripping the individual of all constitutional rights. For example, if the government charged Hamdi or Padilla as a criminal, certain fundamental liberties would be implicated. The individuals would have a Sixth Amendment right to confer with counsel in an unmonitored setting. In addition to presenting facts to a court, access to counsel includes conducting discovery, knowing the evidence, having the ability to rebut the evidence, and cross-examining witnesses. The Fifth Amendment self-incrimination clause would also apply, requiring adequate protection to ensure government interrogation conforms to the dictates of the privilege.²¹⁸ Most important, the Due Process Clause of the Fifth Amendment would apply, forbidding the government from depriving any American of life, liberty, or property “without due process of law.”²¹⁹

By designating U.S. citizens as enemy combatants, however, important constitutional liberties are rendered moot. As currently applied, the designation does not mean that U.S. citizens will receive even a scaled down version of these liberties as *Quirin* suggested. It means that they will not receive them at all. They will not be criminally charged because, according to the executive, they are not criminals.²²⁰ They will not be tried because the purpose of their enemy combatant designation is not to punish or deter them, but rather to prevent them from rejoining the enemy pending investigation, even though there is no proof they are allied with the enemy.²²¹ Stripped of fundamental liberties, they will be held indefinitely in legal limbo until the executive decides it no longer wants to hold them. Coupled with the highly deferential some evidence standard the executive is advocating, meaningful judicial review is eviscerated.²²² Absent any meaningful judicial review, what then would stop the government from

designating, for example, all Arab Americans in an area as enemy combatants, and thereby stripping them of civil liberties? The government could create *de facto* a new internment, once again shielded from judicial review.

2. Proposed National Security Civil Liberties Framework of Judicial Review

In order to account for the executive's attempt to subterfuge heightened scrutiny, the following section provides a preliminary sketch for a two-tiered framework of judicial review of national security civil liberties restrictions that would first scrutinize the executive's threshold designation, then closely examine the executive's evidentiary proof.

Under the first tier of the framework, judicial review would focus on the executive's preliminary threshold designation to determine its implications. For example, when the executive designates a U.S. citizen an enemy combatant, heightened judicial scrutiny would be triggered where it appears that the designation results in depriving the individual of fundamental liberties, such as the lack of a hearing or access to counsel.²²³ Next, courts would look to legal precedent to determine whether, as a matter of law, the executive has the authority to label U.S. citizens enemy combatants and to deprive them of specific fundamental liberties, such as access to counsel and habeas proceedings during exigent circumstances.²²⁴ If so, courts would apply heightened scrutiny to determine whether current circumstances warrant similar extreme measures and whether the means are appropriately tailored.²²⁵

If the executive's national security civil liberty restriction withstood the first level of judicial scrutiny, courts would proceed to the second tier of analysis that focuses on the burden of proof the executive must meet in order to deprive the individual of fundamental liberties. Given the often complex nature of the legal system, the analysis presupposes that the

individual would have access to counsel to assist in the presentation of evidence.

In the second level of analysis, the designated individual would be apprised of the executive's evidence against him. In addition, the individual could conduct discovery and cross-examine the executive's witnesses. Courts would then examine the evidence the executive offers to sustain its designation of the individual, such as the Mobbs Declaration, alongside the individual's evidence. When warranted by seemingly legitimate national security concerns, courts could review executive evidence under seal or *in camera*. In addition, parties to the litigation could be subject to carefully tailored gag orders.

Next, to the extent practicable, courts would assess the reliability of both the executive's and the individual's evidence. Assessing the reliability of the evidence would include focusing on the means either party used to obtain it, whether the evidence is hearsay, and if so, allowing challenges to the reliability through witness testimony, or if unavailable, through affidavit. Then, courts would hear full arguments by both sides. Finally, in light of the liberty interests at stake, courts would review the evidence, at a minimum, under a clear and convincing standard.²²⁶

This proposed framework of judicial review advocates a significantly higher level of judicial scrutiny than that applied by Judge Wilkinson in *Hamdi* or Judge Mukasey in *Padilla*. Despite the executive's ostensible claims of a national security threat, the substantial deprivation of American liberty and imminent harm to the Constitution warrants nothing less.

3. The Threshold Designation Method in Other Situations

The threshold designation method is not limited to enemy combatants. The executive has utilized the method in other national security situations to abolish or severely limit judicial review. For example, of the 1,200 Arab and Muslim noncitizens detained post-September 11, many were initially held as material witnesses pending criminal investigations of others

involved in the attacks.²²⁷ The executive, however, used the material witness statute for another purpose—as a threshold discretionary designation to detain noncitizens, without evidence of wrongdoing, while investigating those particular individuals. The executive was not actually holding these individuals so they could testify in ongoing criminal proceedings as statutorily required.²²⁸ Because the executive did not criminally charge the individuals, the threshold material witness designation was shielded from judicial scrutiny; the executive implied it was simply holding the aliens in order to secure their possible testimony about terrorism and was not punishing them for in fact being terrorists.²²⁹

In actuality, the Immigration and Naturalization Service (INS) first detained noncitizens as material witnesses on improper grounds pending its terror investigation of those individuals.²³⁰ The INS then used the detention to uncover minor immigration violations and initiate often secret deportation proceedings unconnected to terrorism.²³¹ According to a Human Rights Watch report, “many of the detainees were never required to testify in court proceedings, their depositions were not sought to secure their testimony, raising serious doubts about the legitimacy of the government’s assertions that they were held as material witnesses.”²³²

The executive utilized the material witness threshold designation to avoid judicial scrutiny of its blanket detention of noncitizens while it investigated them, even though the executive lacked evidence connecting them to terrorism.²³³ The executive resorted to this subterfuge, it appears, because the USA PATRIOT Act requires the government to charge detained noncitizens with criminal wrongdoing within seven days or release them.²³⁴ Yet, by detaining noncitizens as material witnesses, ostensibly to secure their possible testimony in grand jury proceedings, the executive circumvented legislative safeguards that prohibit indefinite detention of noncitizens absent criminal charges. The outcome of this executive maneuver was first detention and then, upon finding no connection to terrorist activity, deportation for minor immigration violations adjudicated

in secret “special interest” proceedings. The cumulative effect was the misuse of the material witness designation to excise unwanted groups of individuals from the country.²³⁵

As with enemy combatants, by not charging material witness detainees with a crime, the executive could assert that constitutional liberties were not implicated and that courts should therefore avoid closely scrutinizing the threshold designation. But the ultimate effect of the threshold material witness designation was to deprive the individual of fundamental liberties—often through prolonged detention under horrendous prison conditions without probable cause, charges, or trial.²³⁶ Under these circumstances, and consistent with the national security civil liberties framework of judicial review, future courts should exercise heightened scrutiny of threshold material witness designations to prevent the illegitimate deprivation of fundamental liberties.²³⁷

In a variation of the threshold designation method, the executive closed deportation hearings of Arabs and Muslims it contended were “suspected terrorists” en masse, limiting judicial review by designating the cases “special interest.”²³⁸ By denying noncitizens the fundamental right to open proceedings in the absence of individualized determinations that they posed national security threats, the designation created a presumption of the noncitizens’ guilt.²³⁹ Furthermore, this blanket closing injured the public because potential government malfeasance was shielded from accountability.²⁴⁰

Despite over one hundred years of open proceedings, INS regulations, and numerous court rulings recognizing a presumption of openness, the executive contended that there is no history of open deportation proceedings and therefore no First Amendment right of public access.²⁴¹ The effect of applying the executive’s method was that courts would review whether the executive could close deportation hearings en masse by labeling them “special interest” under rational basis analysis, thereby assuring the

executive's victory in most cases, and shielding its actions from public accountability.²⁴²

Although the fundamental liberty implicated differs from the enemy combatant and material witness examples, the method is essentially the same. In using the threshold designation special interest to close deportation proceedings, the effect was to limit judicial scrutiny by attenuating the standard of review. Although designating a case as special interest did not directly affect the substantive outcome of whether the alien was deportable, closing public access allowed the executive to secretly, and perhaps wrongfully, target individuals for deportation absent judicial review and public accountability. As the Sixth Circuit in *Detroit Free Press* recognized:

There seems to be no limit to the Government's argument. . . . By the simple assertion of 'national security,' the Government seeks a process where it may, *without review*, designate certain classes of cases as 'special interest' and, *behind closed doors, adjudicate the merits of these cases to deprive noncitizens of their fundamental liberties.*²⁴³

In applying the proposed framework of judicial review to assure the proper balance between national security and civil liberties concerns, courts would first scrutinize the threshold special interest designation. If the effect were to deprive the noncitizen or the press on the public's behalf of fundamental liberties, then courts would review the executive's rationale and supporting evidence for the threshold designation under heightened scrutiny to determine if the national security interests are genuine and compelling, and if the restrictions are appropriately tailored.

Meaningful review when a fundamental liberty is at stake will not only prevent the politically powerless from being swept up in the tide of public opinion, but it will also assure that the judiciary is not rubber-stamping executive actions.²⁴⁴ It will guarantee that the system of checks and balances functions properly and that any one branch is not gaining

excessive power.²⁴⁵ The courts' role would not be expanded, because heightened scrutiny would only be applied in the same situations that it is applied today. If the situation in the country becomes so ominous that the government must truly restrict civil liberties in the name of national security, as Professor Yamamoto has suggested, then it can declare martial law.²⁴⁶

By maintaining heightened review absent martial law, targeted individuals and the public are assured that the threat the government is asserting is real and imminent. By delineating the standard courts will apply to government actions ostensibly justified by national security, the executive and the legislature will know the bounds of their power and what type of justification is demanded when enacting laws to combat threats to the nation's safety. Americans will be on notice as to exactly what rights they have during times of perceived crisis. Given that current courts are applying conflicting standards of judicial and evidentiary review when scrutinizing national security cases,²⁴⁷ courts will have workable guiding principles in determining how much deference to give the political branches when adjudicating cases that restrict our most fundamental of liberties. Finally, clear standards will decrease inconsistent district and circuit court rulings and ultimately provide predictability within the legal system.

By recognizing that national security assertions are "ingredients in the constitutional calculus,"²⁴⁸ the judiciary will not likely undermine legitimate executive efforts to safeguard the nation's institutions. Rather than disregard such assertions, the judiciary will carefully examine the basis for the executive's position and meaningfully review the evidence it offers to substantiate it. Using judicially accepted methods with due concern for confidentiality, such as reviewing executive evidence *in camera*, courts can decipher whether executive assertions are warranted.²⁴⁹ Courts would neither be involved in military and foreign policy decisions nor would they be assessing the execution of America's war on terror. They would merely be assuring that when "troublesome times arise" and our "rulers . . . seek by

sharp and decisive means to accomplish ends deemed just and proper . . . that the principles of constitutional liberty” are not in peril.²⁵⁰ By not giving the executive carte blanche in such matters, courts are assured that there is in fact justification for the executive’s position. Most important, courts are assured that they are not repeating the same mistakes of the *Korematsu* Court.²⁵¹

D. Expanded Framework Applied: Hamdi and Padilla

This section applies the national security civil liberties framework of judicial review to specific national security cases. As stated above, the framework applies two tiers of analysis.²⁵² In the first tier of analysis, for example, courts would examine the executive’s enemy combatant threshold designation. If the designation’s effect was to deprive the individual of fundamental liberties, heightened judicial scrutiny would be triggered and courts would then turn to applicable legal precedent to determine whether, as a matter of law, the executive has the authority to designate U.S. citizens as enemy combatants. If courts determined that the executive does have such authority, then courts would review the executive’s use of the enemy combatant designation within the current national security context to determine if the security interest is genuine and compelling and the means are appropriately tailored.

If the executive’s enemy combatant designation withstood the first level of heightened review, courts would proceed to the second tier. In this level, the analysis would focus on the executive’s evidentiary burden in designating specific individuals as enemy combatants. The executive would be required to produce the evidence it relied upon in making its determination, which the designated individual would be entitled to meaningfully rebut. Courts would hear full legal arguments from both sides and would review all the evidence under a clear and convincing evidentiary standard.

1. First Tier of Analysis

In applying the national security civil liberties framework to *Hamdi* and *Padilla*, the first step is to examine the enemy combatant designation itself. What are its implications? Does the threshold designation itself significantly restrict fundamental liberties? Does the designation appear to be an artifice for avoiding heightened judicial scrutiny on the ostensible grounds that the ultimate government action is still pending? In *Hamdi* and *Padilla*, the implication of the executive's threshold enemy combatant designation of the defendants is indefinite detention, absent fundamental liberties, pending investigation to determine substantive wrongdoing. Once designated enemy combatants, Hamdi and Padilla lost the rights to counsel, trial, and judicial review. However, the executive maintained that because they were not yet charged as criminals, they had no fundamental liberties, and heightened judicial scrutiny should not apply.

In applying the framework, the executive's denial of their criminal status is not determinative, because the framework requires courts to look at the effect the enemy combatant designation has on the individual. Calling Hamdi or Padilla criminals or enemy combatants is irrelevant to whether courts should apply heightened judicial scrutiny, since the effect of the executive's threshold enemy combatant designation is to incarcerate them indefinitely, in solitary confinement, and without access to counsel. Therefore, being labeled an enemy combatant becomes worse than being charged as a criminal. According to the executive, the latter has far more rights than an enemy combatant. Furthermore, by contending that these individuals are allied with Al Qaeda and that the purpose of their detention is to prevent them from rejoining the enemy, the executive has in reality concluded that they are, at a minimum, guilty of supporting a terrorist organization. In the present cases, fundamental liberties are implicated, notwithstanding that Hamdi and Padilla are not charged as criminals. Thus, heightened judicial scrutiny is triggered to determine whether, as a matter of law, the executive has the authority to detain Hamdi or Padilla.

The framework then looks to legal precedent to determine whether courts have historically permitted similar deprivation of liberties in other exigent circumstances. Today, the executive cites primarily to the World War II case *Quirin*, which first employed the term enemy combatant, as its primary source of authority for indefinitely detaining Hamdi and Padilla and depriving them of fundamental liberties. As previously discussed, however, *Quirin* does not stand for the proposition that the executive can unilaterally declare a U.S. citizen an enemy combatant and then indefinitely detain the individual without charges, access to counsel or judicial review.²⁵³ In *Quirin*, there was no question that the designated individuals were indeed enemy combatants. Therefore, the case did not hold that the executive could unilaterally label a U.S. citizen an enemy combatant. To the contrary, the high court recognized that even in times of war judicial scrutiny is necessary. Finally, the enemy combatants had access to counsel, were charged, tried, and convicted before they were punished. Thus, *Quirin* stands solely for the proposition that the executive can try a U.S. citizen as an enemy combatant in a military tribunal, notwithstanding that the civil courts are open. Even District Judge Mukasey in *Padilla* recognized that *Quirin* does not offer the “proper precedential value for the government’s determination.”²⁵⁴

Applying the first tier of the framework to the executive’s enemy combatant designation, therefore, reveals that the effect of the threshold designation is to deprive the individual of fundamental liberties, notwithstanding that the individual is not charged as a criminal or terrorist. If no other supporting legal precedent exists, the enemy combatant designation fails as a matter of law. However, should courts discover legal precedent to support the designation, the framework requires courts to review the executive’s rationale under heightened judicial scrutiny. Courts will thereby determine the legitimacy of the asserted national security justification for designating U.S. citizens as enemy combatants. Next, courts would consider whether the executive’s means are the most

appropriately tailored means to accomplish its purpose. In assessing the legitimacy of the designation, as District Judge Doumar established in *Hamdi*, courts must scrutinize factors such as the executive's basis for designating the individual an enemy combatant, the screening criteria used, and the national security purpose the individual's continued detention serves.²⁵⁵

2. Second Tier of Analysis

If the executive's enemy combatant designation withstood the first tier, courts would proceed to the second tier of analysis. In this level, the focus shifts to the designated individual, who would be afforded full access to counsel. Courts would also permit Hamdi and Padilla to present evidence to counter the Mobbs Declaration. In addition to presenting facts, Hamdi and Padilla would be permitted to conduct discovery in order to meaningfully rebut the executive's evidence.

Next, to the extent practicable, courts would assess the reliability of the executive's evidence alongside Hamdi and Padilla's evidence. Courts would begin by addressing the hearsay-laden nature of the Mobbs Declaration. The executive would be required to respond to claims, such as that Special Adviser Mobbs lacked personal knowledge in producing the Mobbs Declaration. In Hamdi's case, the courts would focus on the allegations that Northern Alliance forces, responsible for Hamdi's alleged capture, were paid bounties to capture Taliban prisoners and that many of the prisoners the Northern Alliance forces captured were wrongfully accused.²⁵⁶ In Padilla's case, courts would focus on the apparent inconsistencies between Secretary Rumsfeld's initial statements, in which he accused Padilla of being a terrorist with plans to detonate a "dirty bomb," and subsequent reports by the Deputy Secretary of Defense that "there wasn't really a plan."²⁵⁷

In addition, courts would consider allegations by the executive that Padilla is being detained solely for interrogation purposes and to prevent

him from rejoining the enemy. Hamdi and Padilla would be permitted to present witnesses to rebut the executive's Mobbs Declaration, as well as cross-examine the executive's witnesses. Courts would review evidence from both sides, under seal or *in camera*, if necessary, including the sufficiency of the Mobbs Declaration, standing alone, as justification for designating an American citizen an enemy combatant. Finally, courts would hear full arguments on both sides and review the evidence, at a minimum, under a clear and convincing standard.

In *Hamdi* and *Padilla*, the executive maintained that courts should review the threshold enemy combatant designation under the some evidence standard. As previously discussed, the effect of adopting the some evidence standard is to guarantee the executive will prevail, because courts are not scrutinizing the executive's supporting evidence to determine its probity. The framework would require courts to reject new and inapplicable evidentiary standards, such as the some evidence standard.

Moreover, in applying the framework, courts would not apply a deferential zone of active combat test as the Fourth Circuit did in *Hamdi*, in lieu of meaningfully reviewing the executive's supporting evidence. The executive's "national security" assertions would also not attenuate the standard of judicial review of the executive's threshold designations and supporting evidence. Were future courts to agree with Fourth Circuit Judge Wilkinson's assertions in *Hamdi* that the executive's national security decisions are accorded full deference, and therefore immune from heightened scrutiny,²⁵⁸ the executive could assert national security as a justification at any time it wanted to speciously target individuals and "deprive [them] of fundamental liberties."²⁵⁹ Assured that courts would defer, and its restrictions would withstand—or not undergo—judicial scrutiny, the executive could once again legally target groups on account of race, religion, ethnicity, nationality, or political opinion without accountability. District Judge Doumar in *Hamdi* recognized this danger and the significance of meaningful judicial scrutiny.

While it is clear that the executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens. . . . The standard of judicial inquiry must also recognize that the concept of ‘national defense’ cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term ‘national defense’ is the notion of defending those values and ideals which sets this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the nation worthwhile.”²⁶⁰

For similar reasons, the Supreme Court in *Ex Parte Milligan* observed that during times of commotion, “when passions of men are aroused and the restraints of law weakened,”²⁶¹ rather than defer to claims of national security, the judiciary should intervene and provide “watchful care”²⁶² over cherished constitutional liberties.

The above analysis of *Hamdi* and *Padilla*, therefore, suggests that the executive’s sole evidence in support of its threshold designation of Hamdi and Padilla as enemy combatants, the conclusory Mobbs Declaration that relied primarily on hearsay, would be insufficient to support their indefinite detention absent further evidence and criminal charges. Without additional proof to justify their continued detention as enemy combatants, the executive’s threshold enemy combatant designation of Hamdi and Padilla would fail according to the national security civil liberty framework of judicial review.²⁶³

V. CONCLUSION: REFRAMING JUDICIAL SCRUTINY—NATIONAL SECURITY AND CIVIL LIBERTIES

In *Korematsu*, the Supreme Court first pronounced that it would strictly scrutinize the Japanese American exclusion orders and then deferred

entirely to the government's national security and military necessity assertions. As a result, that Court has been severely criticized for its pronouncement of strict scrutiny in principle and for its extreme deference to governmental excesses in fact.²⁶⁴ To similar criticism of judicial hypocrisy, courts today are practicing a new form of deference.

If the courts permit the executive to create labels that strip Americans of fundamental liberties, the courts would be once again abdicating their role of "watchful care."²⁶⁵ Executive threshold designations like enemy combatant, material witness, and special interest appear to be little more than a method for circumventing constitutional protections. The designations also create a way for a potentially deferential judiciary to review excesses of executive power using standards that masquerade as meaningful judicial review but that actually predetermine executive success.

By allowing the executive to deploy a new framework of analysis and by alluding to ostensible precedent to support the executive's unilateral threshold designations, the judiciary would threaten to undermine the very liberty the war on terror seeks to protect. This assault on the Constitution would have real and resounding impact as lives are ruined. If the Constitution does not stand for the principle that the executive cannot, at its word, deprive individuals of their freedom, then the document Americans cherish means little.

As the executive continues to expand its reach into the personal lives of all Americans, heightened judicial scrutiny is imperative. For if the judiciary does not demand justification of current civil liberty restrictions, no branch of government will. Today, the judiciary needs to be the final arbiter and protector of fundamental liberties of citizens and noncitizens alike. If it abdicates this role, as it did in *Korematsu*, then the very democratic foundation of the country is at risk. If the executive's expansive authority over American civil liberties is not checked, the excesses of today will haunt us tomorrow.

The executive needs to explain its basis for detaining someone as an enemy combatant.²⁶⁶ It should explain what procedures it will employ to ensure that these detentions are consistent with “due process, American tradition and international law.”²⁶⁷ It should ensure that detainees have access to counsel and that whatever actions it takes when the civil courts are open are subject to careful judicial review.²⁶⁸

As revealed in Section IV, the executive is seeking to avoid judicial review and therefore public accountability. The national security civil liberties framework of judicial review, proposed here, demonstrates that in precisely these circumstances, it is the judiciary that must ensure executive adherence to constitutional standards. Today, as in *Korematsu*, the judiciary must intervene and “exercise authority to protect all citizens from the petty fears and prejudices that are so easily aroused.”²⁶⁹

¹ William S. Richardson School of Law, University of Hawaii, J.D. 2004. I would like to extend sincerest thanks to Professor Eric K. Yamamoto for his deep inspiration and continued guidance. This piece would not have been possible without his assistance. I want to thank my husband, Michael J. Frei, for his continued love, patience, and support. I want to offer thanks to Professors Kevin Johnson, Virginia Hench and John Barkai for sharing their expertise. I would also like to thank Cheryl Little, Executive Director of the Florida Immigrant Advocacy Center, for sharing her field experience and research. In addition, special thanks to Professors Faith Sparr and Margaret Chon for their insight and advice and the editors of the *Seattle Journal for Social Justice*.

² *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (1984).

³ President George W. Bush, Address to the Nation (Sept. 11, 2001), available at <http://www.whitehouse.gov>.

⁴ Just as Japanese Americans were racialized as foreign and disloyal during World War II to justify the subsequent assault on their fundamental liberties, Arabs and Muslims have also been racialized as foreign and imminently threatening. “Racialization is the social, legal, and political process by which categories, such as Black or Asian American, acquire racial meaning.” Susan Akram and Kevin Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: Targeting of Arabs and Muslims*, 58 NYU ANN. SURV. AM. L. 295 (2002). See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1998) (defining processes of racial formation and racialization); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN L.J. 1 (2002). Even before September 11, Arabs and Muslims were occasionally stereotyped in popular culture as violent terrorists obsessed with launching a holy war on America. *Id.* at 12.

Arabs and Muslims have not been the only groups to feel the brunt of post-September 11 racialization. The racialization of Arabs and Muslims as terrorists has been extended to encompass Latinos/as and Southeast Asians. In the racially and religiously motivated attacks after September 11, numerous Latinos/as and Southeast Asians were also targeted for violent hate crimes as if they were terrorists. See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, & the Construction of Race Before & After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 2 (2002).

⁵ *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (closing immigration hearings designated special interest en masse and using secret evidence to deport non-citizens); *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (closing immigration hearings designated special interest en masse and using secret evidence to deport noncitizens).

⁶ *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (designating U.S. citizen Yaser Esam Hamdi an enemy combatant, thereby stripping him of constitutional liberties), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Oct. 1, 2003) (No. 03-6696); *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (designating U.S. citizen Jose Padilla an enemy combatant and stripping him of constitutional liberties).

⁷ “The war on terror is a global campaign against a global adversary. The war on terrorism began in Afghanistan . . . but it will not end there. It will not end until terrorist networks have been rooted out, wherever they exist.” *Testimony of U.S. Secretary of Defense Donald H. Rumsfeld before the Senate and Services Committee on Progress in Afghanistan* (July 31, 2002) at <http://www.defenselink.mil/speeches/2002/s20020731-secdef.html>.

⁸ *Nightline with Ted Kopell: The Plan* (ABC television broadcast, March 5, 2003). (The report contends that key individuals in the Bush Administration, including Vice President Cheney, Secretary of Defense Rumsfeld, and Deputy Secretary of Defense Wolfowitz, are members of a neo-conservative think tank called the Project for a New American Century (PNAC) devised plans to attack Iraq long before 9/11. According to the September 2000 PNAC report, a “new Pearl Harbor” was necessary for the group to legitimately expand its global power—acts that included ousting Iraqi leader Saddam Hussein and protecting American foreign interests. The report alleges that hours following 9/11, Secretary of Defense Rumsfeld handed President Bush plans to invade Iraq. The Bush Administration devised allegations that Iraq was producing weapons of mass destruction and that it was connected to the 9/11 attacks later to justify invading Iraq.); see generally *Project for A New American Century*, at <http://www.newamericancentury.org>.

⁹ See Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269 (2003) (critiquing the Bush Administration’s claim to moral authority to fight a preemptive war on terror internationally while subverting civil liberties domestically and ignoring claims to repair the continuing harm of America’s historical war on terror against some of its own people—African Americans); Michael Powell, *Domestic Spying Pressed: Big-City Police Seek to Ease Limits Imposed After Abuses Decades Ago*, WASH. POST, Nov. 29, 2002, at A1 (“City officials argue that officers need more elbow room to

photograph, tape and infiltrate political and social organizations to uproot terror networks. But civil libertarians warn of a return to the unsavory days of old, when New York's police department acquired a reputation for police 'black bag' break-ins and spying on political dissidents."); Eric Schmitt, *Traces Of Terror: Immigration: U.S. Will Seek To Fingerprint Visa Holders*, N.Y. TIMES, June 5, 2002, at A1 (initiating special registration program requiring nonimmigrant males from primarily Arab and Muslim countries to register with the Bureau of Citizenship and Immigration Services [formerly the Immigration and Naturalization Service]); William Safire, *Privacy Invasion Curtailed*, N.Y. TIMES, Feb. 13, 2003, at A41 (discussing bipartisan efforts to combat executive's Total Information Awareness Program that, in the name of terrorism, would track an individual's "lifetime paper trail" including bank records, medical files and credit card purchases); Eric Lichtblau & Adam Liptak, *Threats and Responses: On Terror, Spying and Guns, Ashcroft Expands Reach*, N.Y. TIMES, Mar. 15, 2003, at A1.

With the addition of nearly 5,000 law enforcement officials from the firearms bureau, Mr. Ashcroft has again expanded the policing authority of the Justice Department, a hallmark of his tenure as attorney general. And with the fight against terrorism as his soapbox, he has pushed the powers of federal law enforcement in directions few thought possible before the Sept. 11 attacks. His reach extends not only to counterterrorism, but also to issues like the death penalty and gun policy, which he attacks with equal aggressiveness. Despite a years-long effort as a senator from Missouri to shrink government, Mr. Ashcroft has significantly broadened the reach of the attorney general, legal scholars and law enforcement officials agree.

Id. Dan Eggen, *Report Questions Some 9/11 Detentions*, WASH. POST, May 31, 2003, at A8 (examining Inspector General post-September 11 report that found that many foreign nationals with no links to terrorism were detained for months because of delays in routing information between immigration and FBI); Amy Goldstein, *Fierce Fight Over Secrecy, Scope of Law: Amid Rights Debate, Law Cloaks Data on Its Impact*, WASH. POST, Sept. 8, 2003, at A01 (examining bi-partisan criticism of various executive actions under the USA PATRIOT Act, including the FBI's power to seek permission from secret federal courts to covertly inspect library records and creating a total information black out of numerous executive actions).

¹⁰ Brief of Amici Curiae Hon. John Gibbons et al., at 1, *Padilla v. Rumsfeld*, 256 F. Supp. 2d 218 (S.D.N.Y. April 9, 2003), *appeal docketed*, No. 03-2235 (2nd Cir. June 10, 2003) [hereinafter *Gibbons Brief*].

¹¹ Eugene Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945) (describing the internment cases as a civil liberties disaster).

¹² See Section IV(C)(1) *infra*.

¹³ *Id.*

¹⁴ See Section IV(C)(2) *infra*.

¹⁵ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁶ *Korematsu v. United States*, 584 F.Supp.2d 1406 (N.D.Cal. 1984). *Korematsu* was the lead *coram nobis* case. *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) and *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985), were companion *coram nobis* cases. The government documents supporting the *coram nobis* litigation were discovered jointly by *Korematsu coram nobis* legal team members Peter Irons and Aiko Herzig Yoshinaga, a researcher for the U.S. Congressional Commission on Wartime Relocation and Internment of Civilians (“CWRIC”). See U.S. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED, GPO (1982).

¹⁷ 317 U.S. 1 (1942).

¹⁸ *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

¹⁹ *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002)

²⁰ Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess & Lax Judicial Review: Time for a Better Accommodation of Nat’l Security Concerns & Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

²¹ *Korematsu*, 323 U.S. at 215 (emphasis added).

²² *Hirabayashi v. United States*, 320 U.S. 81 (1943).

²³ *Korematsu*, 323 U.S. at 218.

²⁴ Yamamoto, *supra* note 20, at 2.

²⁵ *Id.*

²⁶ Lieutenant Commander K.D. Ringle, “Report on Japanese Question,” at 3 (Jan. 26, 1942) (the “Japanese Problem” has been “magnified out of its true proportion . . . [and] should be handled on the basis of the individual regardless of citizenship, and not on a racial basis”).

²⁷ *Id.*

²⁸ A writ of *coram nobis* is an extraordinary writ that operates to correct fundamental errors and to prevent manifest injustice in completed criminal proceedings after the petitioner is no longer imprisoned. See 28 U.S.C. § 1651 (1970); see also *United States v. Morgan*, 346 U.S. 502 (1954) (explaining it is the rough substantive equivalent of a writ of habeas corpus, which applies to petitioners still in custody).

²⁹ *Korematsu*, 584 F. Supp. at 1417.

³⁰ *Id.*

³¹ Yamamoto, *supra* note 20, at 3.

³² See Rostow, *supra* note 11; Nanette Dembitz, *Racial Discrimination and Military Judgment: The Supreme Court’s Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945); M. WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA’S CONCENTRATION CAMPS* (1976); PERSONAL JUSTICE DENIED, *supra* note 16; ERIC K. YAMAMOTO ET AL., *RACE RIGHTS AND REPARATION—LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001).

³³ See Section III, *infra*. Furthermore, current political justifications for the Japanese American internment, predictions of a potential Arab American internment by a President Bush appointee to the U.S. Civil Rights Commission, and public support for racial profiling reveal that a new group internment is possible. See Niraj Warikoo, *Arabs in U.S. Could Be Held, Official Warns Rights Unit Member Foresees Detainment*, DETROIT FREE PRESS, July 20, 2002, at http://www.freep.com/news/metro/civil20_20020720.htm

(describing Civil Rights Commissioner Peter Kirsanow's prediction of a popular Arab American internment in the event of another World Trade Center-type attack).

³⁴ See Sections III(B) and III(C) *infra*; the executive has argued for great judicial deference in its enemy combatant cases. "The government thus submits that we may not review at all its designation of an American citizen as an enemy combatant—that its determinations on this score are the first and final word." *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002). "Because the President's determination that Padilla is an enemy combatant of an American citizen as an enemy combatant represents a core exercise of the Commander-in-Chief authority, that determination is entitled to great deference. At most, the President's determination can be reviewed to ensure the existence of 'some evidence' supporting it." Appellant's Opening Brief at 14, *Padilla v. Rumsfeld*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003), *appeal docketed*, No. 03-2235 (2nd Cir. June 10, 2003).

³⁵ The "Mobbs Declaration," prepared by Michael H. Mobbs, Special Advisor to the Undersecretary of Defense for Policy, served as the government's determination of Padilla's status. An unclassified version of the Mobbs Declaration is available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702mobbs.pdf>. [hereinafter *Unclassified Mobbs Decl.*] Similarly, for Hamdi, Mobbs also prepared a declaration, which served as the legal determination. These declarations were the sole support the executive offered to sustain its indefinite detention of Hamdi and Padilla. The declarations were based entirely on hearsay, and Mobbs has no first-hand knowledge of any of the facts contained in the declaration. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 528 (E.D.Va. 2002).

Northern Alliance forces were the primary source government officials used in producing the declaration to support Hamdi's detention. *Id.* at 535. The district court in *Hamdi* voiced concerns over the government's use of the hearsay-laden Mobbs Declaration to support Hamdi's indefinite detention. *Id.* at 528. According to reports, "Northern Alliance commanders could receive \$5,000 for each Taliban prisoner and \$20,000 for a[n] [al] Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess." See Jan McGirk, *Fighting Terror*, BOSTON GLOBE, Nov. 17, 2002, at A30.

In the Mobbs Declaration supporting Padilla's detention, Mobbs admitted that some of the sources are of dubious credibility. In citing interviews with two individuals, Mobbs explained the following:

It is believed that these confidential sources *have not been completely candid about their association with Al Qaeda and their terrorist activities*. Much of the information from these sources has, however, been corroborated and proven accurate and reliable. *Some information provided by sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials. One of the sources, for example, in a subsequent interview with a U.S. law enforcement official recanted some of the information that he has provided, but most of this information has been independently corroborated by other sources.* In addition, at the time of being interviewed by U.S. officials,

one of the sources was being treated with various types of drugs to treat medical conditions.

Unclassified Mobbs Decl., at ¶ 3, n.1 (emphasis added).

³⁶ See Section IV(C)(1) *infra*. As a result of the executive and military orders resulting in the deprivation of Japanese Americans' fundamental liberties in *Korematsu*, Congress passed 18 U.S.C. §4001(a) to ensure that the executive could never again detain American citizens under the mantle of national security and military necessity absent specific legislative authorization. The statute states, "No citizen shall be detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). According to The Cato Institute et al.:

By this language, Congress made clear that henceforth, congressional silence should no longer be construed as acquiescence in unauthorized executive detentions. Congress passed § 4001(a) to avoid exactly what has happened [in the enemy combatant cases]: statutorily groundless detention of . . . American[s] justified by the Executive's talismanic invocation of the terms "enemy combatant" and "national security."

Brief of Amici Curiae The Cato Institute et al. at 4, *Padilla v. Rumsfeld*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003), *appeal docketed*, No. 03-2235 (2nd Cir. June 10, 2003).

To justify its unconstitutional detention of Hamdi and Padilla despite the § 4001(a) restriction, the executive is currently contending that the "Authorization of Military Force" ("AUMF") resolution passed after September 11, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001), and an appropriations statute for the Department of Defense, 10 U.S.C. § 956(5) (2002), constitute congressional authorization for the indefinite detention of American citizens as enemy combatants. Brief of Amici Curiae The Cato Institute et al. at 4, *Padilla* (No. 03-2235). Although the author believes that based specifically on § 4001(a), the executive branch likely lacks statutory authority to detain American citizens as enemy combatants, the issue is beyond the scope of this article, which focuses on the executive's ostensible constitutional authority.

³⁷ *Hamdi*, 296 F.3d at 283 ("with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges of counsel on the government's say-so").

³⁸ *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

³⁹ See Section IV(A)(2) and (3) *infra*.

⁴⁰ *Id.*

⁴¹ *Hamdi*, 316 F.3d at 460.

⁴² *Padilla*, 233 F. Supp. 2d at 564.

⁴³ The enemy combatant designation is not limited to Hamdi and Padilla. The executive also labeled "American Taliban," John Walker Lindh an enemy combatant. *United States v. Lindh*, 212 F. Supp. 2d 541, 545 (2002). However, the executive charged Lindh, a white American, as a criminal, and Lindh received the full panoply of Constitutional protections, including the right to counsel and presentation of evidence. Following capture and interrogation by U.S. forces, the executive charged Lindh in a ten count indictment alleging, *inter alia*, (1) conspiracy to murder nationals of the United States, including American military personnel and other government employees serving in

Afghanistan following the September 11, 2001, attacks; (2) conspiracy to provide material support to a foreign terrorist organization; (3) conspiracy to provide material support and resources to Al Qaeda; and (4) contributing service to Al Qaeda. Lindh simply could not have a change in venue. *Id.* at 547–48.

In addition, the executive has also labeled Qatari national Ali Saleh Kahalh al-Marri an enemy combatant, and according to reports, the executive is detaining him in the same South Carolina facilities where Hamdi and Padilla are held. *See Al Marri v. Bush*, 274 F. Supp. 2d 1003, 1004 (C.D. Ill. 2003) (dismissing habeas petition for improper venue after criminal charges were dismissed and petitioner declared an enemy combatant and moved to South Carolina). Furthermore, the numerous noncitizen prisoners the executive has detained at Camp X-Ray, Guantanamo Bay since the conflict in Afghanistan began have also been labeled enemy combatants and therefore ineligible for the protections of the Geneva Convention. Editorial, *Wronged at Guantanamo*, BOSTON GLOBE, Oct. 25, 2003, at A14.

Indicating an intention to label additional American citizens enemy combatants, the executive has erected a special facility in South Carolina designed to hold citizens designated “enemy combatants.” Jess Bravin, *More Terror Suspects May Sit in Limbo*, WALL ST. J., Aug. 8, 2002, at A4.

⁴⁴ On interlocutory appeal, Judge Wilkinson maintained that the Fourth Circuit had “already emphasized that the standard of review of enemy combatant detentions must be a deferential one when the detainee was captured abroad in a zone of combat operations.” *Hamdi*, 316 F.3d at 471–72. Similarly, Judge Mukasey explained that deference to the President “extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle.” *Padilla*, 233 F. Supp. 2d at 606; *But see Hamdi*, 243 F. Supp. 2d at 535. (Judge Doumar refused to “rubber-stamp” the executive’s enemy combatant designation of Hamdi and proceeded to strictly scrutinize the Mobb’s Declaration that the executive used to support its position); *See also Hamdi v. Rumsfeld*, 337 F.3d 335, 373 (4th Cir. 2003), (rehearing en banc denied) (sharply criticizing the Fourth Circuit panel’s reasoning as “dizzingly circular” arguing the panel’s review of Hamdi’s case did not “constitute the ‘meaningful judicial review’ the panel promised”) (Motz, J., dissenting).

⁴⁵ *See Part III(A) infra.*

⁴⁶ *Gibbons Brief, supra* note 10, at 5. (“Although the Executive will not cite it, the only precedent in this nation’s history for the prolonged detention of American citizens with so little due process is the discredited decision in *Korematsu*, 323 U.S. 214. Unless the courts are now to become rubber-stamps for executive overreaching, the government’s position must be rejected.”)

⁴⁷ *Ex Parte Quirin*, 317 U.S. 1 (1942).

⁴⁸ *Id.* at 10.

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 39.

⁵¹ *Ex Parte Milligan*, 71 U.S. 2 (1866) (holding that U.S. citizens cannot be tried in a military tribunal when the civil courts are open).

⁵² *Quirin*, 317 U.S. at 20.

⁵³ *Id.* at 20.

⁵⁴ *Id.* at 19.

⁵⁵ *Gibbons Brief*, *supra* note 10, at 16. (“Before September 11, 2001, the phrase ‘enemy combatant’ appeared only in a handful of court decisions, none of which support the Executive’s refusal to grant Padilla access to counsel or to provide with a meaningful adversarial hearing on his status.”). In cases where the government might be termed “enemy combatants,” defendants were provided with counsel. *Id.* at 17, *citing In re Territo*, 156 F.2d 142 (9th Cir. 1946) (defendant afforded access to counsel and permitted to present evidence at habeas trial in federal court) and *In re Application of Yamashita*, 327 U.S. 1 (1946) (reaching the U.S. Supreme Court after overseas trial in which Yamashita was afforded six defense counsel). As in *Quirin*, the individuals detained in these cases were afforded access to counsel and a formal hearing on the record. Thus, none of these cases “remotely support the government’s position that [enemy combatants] may be detained indefinitely without access to counsel and without any sort of adversarial trial with the accoutrements of due process.” *Gibbons Brief*, *supra* note 10, at 17.

⁵⁶ *Quirin*, 317 U.S. at 12.

⁵⁷ *Id.*

⁵⁸ *Id.* at 31.

⁵⁹ See Part IV(B) and (C) *infra*.

⁶⁰ See Section IV(A)(2) and (3) *infra*.

⁶¹ See *Gibbons Brief*, *supra* note 10, at 17 (“The *Quirin* defendants were given lawyers, informed of the charges against them, and allowed to present evidence on their behalf at a formal hearing. By the time the case reached the Supreme Court on habeas, the facts were longer in dispute.”).

In fact the Supreme Court has never held that a person designated by the Executive as an enemy combatant cannot challenge that designation or that a court cannot require the Executive to substantiate it. In the case on which the majority relies, *Ex parte Quirin*, the Court did not hold that for a violation of the laws of war, even an American citizen could be treated as an “enemy combatant” and held without the full array of Constitutional rights, but only because the citizen, after consultation with legal counsel, stipulated to the facts supporting the enemy combatant designation.

Hamdi, 337 F.3d at 369–70 (Motz, J. dissenting) (citations omitted).

⁶² In *Hamdi*, Judge Wilkinson explained,

As an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime. But as we have pointed out, Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to well-established laws and customs of war.

Hamdi, 316 F.3d at 475. Similarly, in *Padilla*, Judge Mukasey contended that Padilla’s detention is not punitive:

Padilla is not being detained by the military in order to execute a civilian law, notwithstanding that his alleged conduct may in fact violate one or more such

laws. He is being detained in order to interrogate him about the unlawful organization with which he is said to be affiliated and with which the military is in active conduct, and to prevent him from becoming reaffiliated with that organization.

Padilla, 233 F. Supp. 2d at 589.

⁶³ *Id.*; Respondents' Response to District Court's October 21, 2002 Order at 2, *Padilla v. Bush* No. 02 Civ. 4445 (S.D.N.Y. 2002) [hereinafter *Respondents' Response*] ("Padilla has no right to counsel because he is being detained solely as an enemy combatant during wartime, not for any criminal or other punitive purposes").

⁶⁴ In a revealing memo to the Department of Defense, whose contents were leaked to USA Today, Secretary Rumsfeld conceded that winning the war on terror would be "a long, hard slog." American citizens are facing potentially lifetime detention without significant judicial review. Secretary of Defense Rumsfeld stated that these "enemy combatants" may remain in detention "for the duration of the conflict," a conflict he defined as ending "when we feel that there are not effective global terrorist networks war on terrorism is therefore permanent functioning in the world." Thom Shanker, *Rumsfeld Sees Need to Realign Military Fight Against Terror*, N.Y. TIMES, Oct. 23, 2003, at A12.

⁶⁵ According to the executive,

the detention of all enemy combatants in wartime, serves two critical purposes related to the conduct of war: It prevents him [*sic*] from continuing to aid the enemy in executing attacks against the United States, and it assists the military in gathering the intelligence necessary to effectively execute the war. Accordingly, his detention is no sense "criminal," and it has no penal consequences whatsoever.

Respondent's Response to the District Court's October 21, 2002 Order, *Padilla v. Bush* at 5-6 (Oct. 28, 2002) No. 02 Civ. 4445 (MBM) at 2-3 [hereinafter, *Respondent's Response*]. Secretary Rumsfeld has stated, "we are not interested in punishing" them, but in "finding out" what they know. *Padilla*, 233 F. Supp. 2d at 574.

⁶⁶ *Respondent's Response*, *supra* note 65, at 13-14.; *Hamdi*, 316 F.3d at 468; *Padilla*, 233 F. Supp. 2d at 594-95.

⁶⁷ *See generally Quirin*, 317 U.S. 1 (1942) (holding that unlawful belligerents did not have a constitutional right to a civil trial by jury but instead could be tried in a military tribunal without a jury); *Gibbons Brief*, *supra* note 10, at 17; *Respondents' Response*, *supra* note 65, at 13-14; *Hamdi*, 316 F.3d at 468; *Padilla*, 233 F. Supp. 2d at 594-595.

⁶⁸ *Padilla*, 233 F. Supp. 2d at 607.

⁶⁹ *Hamdi*, 337 F.3d at 372. According to dissenting Fourth Circuit Judge Motz:

The ramifications of such a holding are chilling. Pursuant to the panel's decision, for example, any of the "embedded" American journalists covering the war in Iraq or any member of a humanitarian organization working in Afghanistan, could be imprisoned indefinitely without being charged with a crime or provided access to counsel if the Executive designated that person an "enemy combatant."

Id.

⁷⁰ *Gibbons Brief*, *supra* note 10, at 3 (“the federal courts must have meaningful authority to make an independent evaluation whether a person is properly being held”). Brief of American Bar Ass’n at 12, *Padilla v. Rumsfeld*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003), *appeal docketed*, No. 03-2235 (2nd Cir. June 10, 2003) [hereinafter *ABA Brief*] (“these general principles of deference in a military setting should not prevent the court from engaging in meaningful review of the government’s decision to detain Padilla.”); *Hamdi*, 337 F.3d at 375 (“Under our Constitution...it is the responsibility of the courts to ensure that American citizens are not deprived of liberty without due process of law, regardless of the personal belief of any individual judge concerning the integrity of the Executive”) (Motz, J., dissenting).

⁷¹ *Quirin*, 317 U.S. at 6.

⁷² *Gibbons Brief*, *supra* note 10, at 3.

⁷³ *Hamdi*, 316 F.3d at 460.

⁷⁴ *Id.*

⁷⁵ Recent reports indicate that Hamdi has been moved from Norfolk, Virginia to a brig in Charleston, South Carolina where the government has apparently erected a facility to hold American citizens designated enemy combatants. *U.S. Man Caught with Taliban Is Moved to Brig*, L.A. TIMES, Aug. 24, 2003, at 16; Jess Bravin, *More Terror Suspects May Sit in Limbo*, WALL ST. J., Aug. 8, 2002, at A4.

⁷⁶ Hamdi’s habeas petition was submitted by his father acting as “next friend.” *Hamdi*, 316 F.3d at 460.

⁷⁷ *Id.*

⁷⁸ *Id.* As this article was going to press, on December 2, 2003, the Department of Defense (DOD) announced that Mr. Hamdi will be allowed limited access to a lawyer subject to government-determined security restrictions. DOD New Release No. 908-03, DOD Announces Detainee Allowed Access to Lawyer, (Dec. 2, 2003), at <http://www.dod.gov/releases/2003/nr20031202-0717.html>. In its news release, the DOD stated that such access is not required by domestic or international law and should not be treated as precedent. *Id.* The policy regarding its decision is that the DOD will permit access to counsel by an enemy combatant who is a U.S. citizen and who is detained by DOD in the United States after DOD has determined that such access will not compromise the national security of the United States, and after DOD has completed intelligence collection from that detainee or has determined that such access will not interfere with intelligence collection from that detainee. *Id.* Despite DOD’s concession, it has not afforded Mr. Hamdi unfettered access to counsel or authorized his challenge to his enemy combatant designation. The public defender seeking to represent Hamdi said he intends to press forward with the Supreme Court petition that calls for Hamdi to be allowed to contest his combatant designation. Jerry Markon and Dan Eggen, *U.S. Allows Lawyer for Citizen Held as “Enemy Combatant”: Reversal Comes on Eve of Court Filing*, WASH. POST, Dec. 3, 2003, at A1.

Although on its face the DOD’s decision to allow Hamdi conditional access to counsel suggests that the executive may be loosening its civil liberties restrictions, the move is more likely to be another “calculated gesture to help the administration shield its policies from criticism and reversal by the courts.” Neil A. Lewis, *Sudden Shift on Detainee*, N.Y.

TIMES, Dec. 4, 2003, at A1. As the public awaits for the Supreme Court to decide whether it will accept *Hamdi* on certiorari, the Court has already agreed to hear the Guantanamo Bay indefinite detention cases. Linda Greenhouse, *Justices to Hear Case of Detainees at Guantanamo*, N.Y. TIMES, Nov. 11, 2003, at A1. Although the Supreme Court would only resolve the jurisdictional issue of whether the federal courts could hear such a challenge and not whether the detentions are constitutional, the Court's decision "was an unmistakable rebuff of the Bush administration's insistence that the detainees' status was a question 'constitutionally committed to the executive branch' and not the business of the federal courts, as Solicitor General Theodore Olsen argued." *Id.* Within the same week that the executive announced it would grant Hamdi access to counsel, the executive declared that it would release approximately 100 detainees from the Guantanamo Bay prison—"a shift intended to strengthen the Bush administration's contention that it is dealing with detainees in a fair and orderly way so that there is no need for judicial interference in national-security decisions, legal analysts say." Charlie Savage, *Guantanamo Ruling Seen Triggering Shift in Policy on Detainees*, N.Y. TIMES, Dec. 5, 2003, at A6. The administration's decisions come at a time when a number of its post-September 11 national security civil liberties restrictions are coming under severe attack. The Second Circuit Court of Appeals recently heard oral arguments in *Padilla* where two members of the three member panel sharply criticized the executive for its treatment of enemy combatants, and one judge noted that the terrorist attacks of September 11, 2001 "didn't repeal the Constitution." Furthermore, on December 3, 2003, the Ninth Circuit Court of Appeals overturned part of a sweeping 1996 anti-terror law that prohibits financial assistance or "material support" to organizations the Department of State has classified as terrorist. *Humanitarian Law Project v. United States Department of Justice*, 2003 U.S. App. LEXIS 24305 (9th Cir. Dec. 3, 2003). The Ninth Circuit held that it is unconstitutional to criminalize donations of "personnel" or "training" that fall under the "material support" section of the law because it "blurs the line" on protected free speech. *Id.* at 60-63. The ruling is a blow to the executive's primary strategy to prosecute individuals it claims are suspected terrorists. Eric Lichtblau, *Court Casts Doubt on Parts of Antiterrorism Law*, N.Y. TIMES, Dec. 3, 2003, at A1. The executive thus appears to be softening its position in *Hamdi* in another attempt to evade meaningful judicial review of its national security civil liberties restrictions by offering last minute concessions to critics of its anti-civil liberties stance.

⁷⁹ See Order at 2, *Hamdi v. Rumsfeld* (E.D.Va. June 11, 2002) No. 2-02ev.439. (the U.S. District Court appointed Public Defender Frank Dunham as Hamdi's counsel).

⁸⁰ *Id.* at 279. Even though *Quirin* allowed enemy combatants access to counsel, the Fourth Circuit did not address this issue, observing simply that the government is accorded due deference when making decisions in its war making capacity. *Id.*

⁸¹ *Id.* In its brief to the Fourth Circuit Court of Appeals, the government asserted that "given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such. *Id.* at 283.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Hamdi*, 243 F. Supp. 2d at 535.

⁸⁵ See *Unclassified Mobbs Decl.*, *supra* note 35.

⁸⁶ *Hamdi*, 243 F. Supp. 2d at 530. Judge Doumar carefully scrutinized the government's proof and found it severely inadequate in crucial respects.

Paragraph 1 of the Mobbs Declaration states that Mr. Mobbs is a Special Adviser to the Undersecretary of Defense for Policy. Mobbs Decl. at 1. The declaration does not indicate what authority a 'Special Advisor' has regarding classification decisions of enemy combatants. Indeed, the declaration does not indicate whether Mr. Mobbs was appointed by the President, is an officer of the United States, is a member of the military, or even a paid employee of the government. During the August 13, 2002, hearing, when asked to explain Mr. Mobbs' authority and role in Hamdi's classification as an enemy combatant, the Respondents' counsel was unable to do so. Tr. at 10. In a general way, the declaration never refers to Hamdi as an 'illegal' enemy combatant. The term is used constantly in Respondents' Memorandum. Nor is there anything in the declaration about intelligence or the gathering of intelligence from Hamdi. There is a huge amount of this in legal arguments. There is nothing to indicate why he is treated differently than all the other captured Taliban. There is no reason given for Hamdi to be in solitary confinement, incommunicado for over four months and being held for some eight to ten months without any charges of any kind. This is clearly an unreasonable length of time to be held in order to bring criminal charges. So obviously criminal charges are not contemplated.

Id. at 533.

⁸⁷ *Id.* at 532.

⁸⁸ *Id.*

⁸⁹ *Id.* at 533. The district court also considered whether the Geneva Treaty of the Joint Services Regulations required a different process. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 528.

⁹³ *Id.* at 535.

⁹⁴ *Id.* A number of judges share District Judge Doumar's view that the type of review the executive advocates amounts to a rubber-stamp of its enemy combatant designation. See e.g. *Gibbons Brief*, *supra* note 10, at 5 ("Unless the courts are now to become *rubber-stamps for executive overreaching*, the government's position must be rejected.") (emphasis added); *Hamdi*, 337 F.3d at 373 ("the record provides no credible evidence supporting the Executive's designation of Hamdi as an enemy combatant," and that the panel's "*rubberstamp of the Executive's unsupported designation* lacks both the procedural and substantive content of such review.") (emphasis added).

⁹⁵ *Hamdi*, 316 F. 3d at 473.

⁹⁶ *Id.* at 462.

⁹⁷ *Id.*

⁹⁸ *Id.* at 464.

⁹⁹ *Id.* at 476.

¹⁰⁰ *Hamdi*, 337 F.3d 335, 343.

¹⁰¹ *Hamdi*, 316 F.3d at 473.

¹⁰² *Id.*

¹⁰³ *Id.* at 473-74.

¹⁰⁴ *Id.* at 474.

¹⁰⁵ *Id.* at 465.

¹⁰⁶ *Id.* at 473.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Hamdi*, 337 F.3d 335.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 368.

¹¹² *Hamdi*, 296 F.3d at 281.

¹¹³ *Padilla*, 233 F. Supp. 2d at 571.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 572.

¹¹⁹ James Risen & Philip Shenon, *Traces of Terror: The Investigation: U.S. Says it Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1. On June 11, 2002, during a trip to Moscow, Attorney General Ashcroft proclaimed publicly that the U.S. captured “a known terrorist who was exploring a plan to build and explode a radiological dispersion device, or ‘dirty bomb,’ in the United States.” According to Ashcroft, the government obtained information regarding Jose Padilla from Al Qaeda lieutenant, Abu Zubaydah who “did not identify Mr. Padilla by name, but provided enough information to allow the Central Intelligence Agency to check with other sources.” *Id.* According to reports, much of the intelligence information Abu Zubaydah has provided government officials has been discredited. Eric Lichtblau & Adam Liptak, *Threats and Responses: The Suspect; Questioning to be Legal, Humane and Aggressive, The White House Says*, N.Y. TIMES, Mar. 4, 2003, at A13 .

When questioned at a press briefing on June 11, 2002, in Doha, Qatar, Secretary Rumsfeld stated that Padilla was “an individual who unquestionably was involved in terrorist activities against the United States.” Secretary of Defense Donald H. Rumsfeld, News Briefing Re: Media availability at the Emiri Diwan, Qatar (June 11, 2002), at http://www.defenselink.mil/news/Jun2002/t06112002_t0611edq.html.

Despite Ashcroft and Rumsfeld’s initial assertions that Padilla is a terrorist who was involved in a terrorist plot against the United States, later government reports contradicted Ashcroft and Rumsfeld’s statements. Only two days following the executive’s designation of Padilla as an enemy combatant, the Deputy Secretary of Defense stated that “[i]here was not an actual plan. . . . We stopped this man in the initial planning stages” and the “extent of the actual bomb plot amounted only to ‘some fairly loose talk.’” Susan Schmidt & Kamran Khan, *Lawmakers Questions CIA on Dirty Bomb*

Suspect: Administration Officials Wonder if Ashcroft Was Unduly Alarmist in Arrest Announcement,” WASH. POST, June 13, 2002, at A11. Presently, the government has yet to charge Padilla with wrongdoing and claims that it is holding him primarily for interrogation purposes. *Padilla*, 243 F.Supp. 2d at 49-50.

¹²⁰ *Padilla*, 233 F. Supp. 2d at 572.

¹²¹ *Id.*

¹²² *Id.*

¹²³ See *Unclassified Mobbs Decl.*, *supra* note 35.

¹²⁴ Petition for Writ of Habeas Corpus, *Hamdi v. Rumsfeld* (June 11, 2002) No. 2:02cv439.

¹²⁵ *Padilla*, 233 F. Supp. 2d at 576.

¹²⁶ *Id.* at 578.

¹²⁷ *Id.* at 578–79.

¹²⁸ *Id.*

¹²⁹ Respondent’s Response, *supra* note 65, at 5-6.

¹³⁰ Although the Fourth Circuit in *Hamdi* held that the public defender could not act as Hamdi’s next friend because he did not have a significant relationship with Hamdi, Judge Mukasey explained that *Hamdi* was distinguishable. The government seized Hamdi in Afghanistan and, upon learning that he was an American citizen, transferred him to a military base in Norfolk, Virginia. Thus, Hamdi never had the opportunity to meet his public defender, Frank Durham, and establish a “significant relationship” with him. Furthermore, Hamdi’s father was available to act as his next friend. In contrast, Padilla did meet with Donna Newman for a significant period while they were challenging Padilla’s initial detention as a material witness. As a result, she had established a “significant relationship” with Padilla and did have standing to file the habeas petition on his behalf. *Id.* at 576.

¹³¹ *Id.* at 578.

¹³² *Id.* at 581-82.

¹³³ *Id.* at 587.

¹³⁴ The court focused heavily on a passage that distinguished the treatment of lawful combatants from unlawful combatants: “[like lawful combatants], [u]nlawful combatants are . . . subject to capture and detention but in addition they are subject to trial and punishment by military tribunals” *Id.* at 594-95. However, rather than conceding that *Quirin*, at a minimum, requires unlawful combatants to be charged and tried in military tribunals, the district court construed the passage to mean that the executive can unilaterally designate an American citizen an enemy combatant and detain him without access to counsel, trial and judicial review.

I read the quoted sentence to mean that as between detention alone, and trial by a military tribunal with exposure to the penalty actually meted out to petitioners in *Quirin*—death—or, at the least, exposure to a sentence of imprisonment intended to punish and deter, the Court regarded detention alone, with the sole aim of preventing the detainee from rejoining hostile forces—a consequence visited upon captured lawful combatants—as certainly lesser of the consequences an unlawful combatant could face. If, as seems

obvious, the Court in fact regarded detention alone as a lesser consequence, then our case is a fortiori from *Quirin* as regards the lawfulness of detention under the law of war.

Id.

¹³⁵ In justifying its failure to meaningfully review the executive's enemy combatant designation of Padilla, Judge Mukasey explained,

The order [under review] arises in the context of foreign relations and national security, where a court's deference to the political branches of national government is considerable. It is the President who wields 'delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.' . . . This deference extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle.

Id. at 605.

¹³⁶ *Id.* at 607.

¹³⁷ *Id.*

¹³⁸ *Id.* at 608 (quoting Justice Jackson in *Dames and Moore v. Regan*, 453 U.S. 654, 661 (1981), "we decide difficult cases presented to us by virtue of our commissions, not our consequences.").

¹³⁹ *Korematsu*, 323 U.S. at 246.

¹⁴⁰ *Gibbons Brief*, *supra* note 10, at 23. ("[T]he Executive proposes a form of review that would completely eviscerate the independent role of Article III courts in our constitutional structure.")

¹⁴¹ *Padilla*, 233 F. Supp. 2d at 599.

¹⁴² *Id.*

¹⁴³ 18 U.S.C. § 3006A(2)(B).

¹⁴⁴ *Padilla*, 233 F. Supp. 2d at 600.

¹⁴⁵ *Id.* at 600-01.

¹⁴⁶ *Id.* at 608.

¹⁴⁷ *See supra* Section III(B).

¹⁴⁸ *Gibbons Brief*, *supra* note 10, at 23.

¹⁴⁹ *See Mass. Corr. Inst. v. Hill*, 472 U.S. 445 (1985).

¹⁵⁰ *Id.* at 456 (there is "some evidence" to support a factual determination when "the record is not so devoid of evidence that the . . . findings [are] without support or otherwise arbitrary").

¹⁵¹ *Id.* at 455.

¹⁵² *Id.*

¹⁵³ *See Meeks v. McBride*, 81 F.3d 717, 720–21 (7th Cir. 1996); *Viens v. Daniels*, 871 F.2d 1328, 1335 (7th Cir. 1989).

¹⁵⁴ *Padilla*, 243 F. Supp. 2d at 56 ("[Padilla] is entitled to present evidence considered alongside the Mobbs Declaration, and to have that evidence considered alongside the Mobbs Declaration.").

¹⁵⁵ See Eric K. Yamamoto et al., *Summary Judgment at the Crossroads: The Impact of the Celotex Trilogy*, 12 UNIV. HAW. L. REV. 1 (1990).

¹⁵⁶ *Id.*

¹⁵⁷ Although there have been rare instances where petitioners have prevailed under the some evidence standard, coupled with Judge Mukasey's limited access to counsel ruling, the court predetermined the executive in *Padilla* would win. See *Bridges v. Wixon*, 326 U.S. 135, 151, 155–56 (1945) (deportation order could not be sustained under some evidence standard when attorney general's decision rested on unsworn statements by cooperating witness who denied making them); *Goff v. Burton*, 91F.3d 1188, 1192 (9th Cir. 1996) (informant's testimony did not meet even minimal standards); *Meeks*, 81 F.3d at 720-21 (urine test showing drug use insufficient under 'some evidence' standard when it bore incorrect prisoner number and inmate established there was more than one person with his name at the institution).

¹⁵⁸ Respondent-Appellant's Brief, *Padilla v. Bush*, at 47 (2d Cir. 2003) (No. 03-2235) [hereinafter *Respondent Brief*]. The Executive advocated that courts defer to the President and conduct no factual inquiry into Padilla's detention:

In view of the great deference owed the President's determination that Padilla is an enemy combatant and the serious separation-of-powers concerns that would attend any searching inquiry into the factual underpinnings of the President's judgment, a factual review of the President's determination can extend no further than ensuring that it has some evidentiary support.

Id. (emphasis added).

¹⁵⁹ *Gibbons Brief*, *supra* note 10, at 24.

¹⁶⁰ *Id.* at 4 (contending "the type of judicial review the executive suggests would be a sham process."). Padilla cannot meaningfully rebut the executive's evidence against him, since he cannot conduct discovery or challenge the credibility of the Mobbs Declaration through cross-examination. According to prominent retired federal judges,

the Executive proposes a form of review that would completely eviscerate the independent role of Article III courts in our constitutional structure. The court's role would be reduced to a rubber-stamp, with the sole criteria for review being whether the government has managed to draft and file an affidavit that was not, on its face, wholly implausible. So long as the affidavit was provided, the court would be barred from hearing the prisoner's side of the story.

Id. at 31.

¹⁶¹ *Padilla*, 243 F. Supp. 2d at 43 (motion for reconsideration granted).

¹⁶² In granting the motion for reconsideration, the district court indicated that the Executive's untimely filing was a sanctionable offense. *Id.* at 48–49.

¹⁶³ *Id.* at 43–44.

Because the government's motion was filed more than a month after the Opinion, and includes an affidavit without the benefit of court order, and because of the casuistry the government has employed in an effort to justify its disregard of the cited rule, there is need to review both the briefing that preceded the Opinion, and the procedural steps that followed it.

¹⁶⁴ *Id.* at 43.

¹⁶⁵ *Id.* at 44 (“Appended to the government’s memorandum in support of the motion is the declaration of Vice Admiral Lowell E. Jacoby, Director of Defense Intelligence Agency, sworn to January 9, 2003 (‘Jacoby Declaration’), supplemented . . . by a sealed version containing additional details (the ‘Sealed Jacoby Declaration’).”). *Id.* at 46.

¹⁶⁶ *Id.* at 47.

¹⁶⁷ *Id.* at 46.

¹⁶⁸ *Gibbons Brief, supra* note 10, at 19.

Indeed, the Executive’s desire to create a “sense of dependency” and hopelessness in Padilla by depriving him of all procedural protections is nothing more than a *modern version of the Star Chamber*. . . . The Executive contends that its intelligence-gathering needs justify departure from these time-tested principles. Invoking the term “enemy combatant,” the Executive asks this court to place its imprimatur on practices that brazenly disregard the protections guaranteed by the Bill of Rights. But prisoners brought before the Star Chamber and accused of plotting against the King also had valuable intelligence information. *Throughout history, totalitarian regimes have attempted to justify their acts by designating individuals as “enemies of the state” who were unworthy of any legal rights or protections. These tactics are no less despicable, and perhaps even more so, when they occur in a country that purports to be governed by the rule of law.*

Id. at 19–20. (emphasis added).

¹⁶⁹ In addressing the Jacoby Declaration, Judge Mukasey contended that the assertions were speculative:

[I]t is important to recognize that that forecast is speculative—as is clear from repeated use of such words as ‘might’ and ‘could.’ . . . Moreover, the forecast speculates not about an intelligence-related matter in which Admiral Jacoby is expert, but about matters of human nature—Padilla’s in particular—in which, most respectfully, there are no true experts.

Padilla, 243 F. Supp. 2d at 52.

¹⁷⁰ Judge Mukasey explained that

both the Jacoby Declaration and the Sealed Jacoby Declaration are silent on the following two subjects: (i) the particulars of Padilla’s actual interrogation thus far, and what they suggest about the prospect of obtaining additional information from him, and (ii) when, if at all, intelligence personnel have ever experienced effects of an interruption in interrogation like the effects predicted in both of the excerpts from the Jacoby Declaration. . . .

Id. at 50-51.

¹⁷¹ *Id.* at 54.

¹⁷² *Respondent Brief, supra* note 158, at 48 (“The some evidence standard suitably addresses that concern by looking *solely* to the evidence *before the Executive at the time of the challenged determination.*”) (emphasis added).

¹⁷³ *Padilla*, 243 F. Supp. 2d at 54.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Gibbons Brief*, *supra* note 10, at 5.

In the Executive's view, an Article III court's role is limited solely to ascertaining whether the government has submitted an *ex parte* affidavit that not facially incredible; so long as the government complies with this *pro forma requirement*, the court cannot even ask to hear the prisoner's side of the case.

Id. (emphasis added).

¹⁷⁸ In response to Admiral Jacoby's argument that access to counsel would afford Padilla hope and cause him not to cooperate with interrogators, Judge Mukasey explained that allowing Padilla access might alert him to the hopelessness of his situation under the some evidence standard:

nowhere does Admiral Jacoby discuss the possibility that if Padilla consulted with counsel, made whatever submission he was inclined to make, if any, and *lost in short order, as he well might under a "some evidence" standard, the assured hopelessness of his situation would quickly become apparent to him.*

Padilla, 243 F. Supp. 2d 42, 52 (2003) (emphasis added).

¹⁷⁹ "It is a paradox of the government's own making that what prevents Padilla from becoming aware of the possibility that his avenues of appeal could be swiftly foreclosed is that he is not permitted to consult with a lawyer." *Id.* at 53 (emphasis added).

¹⁸⁰ *Id.* at 56.

¹⁸¹ *Id.*

¹⁸² See *Padilla v. Rumsfeld*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003) (Judge Mukasey's Order Granting Government's Motion for Interlocutory Appeal).

¹⁸³ *Id.* at 220.

¹⁸⁴ See *id.*

¹⁸⁵ See *supra* Section III(B). Furthermore, if the Second Circuit ruled in Padilla's favor, both *Hamdi* and *Padilla* would be ripe for Supreme Court examination because there would be conflicting circuit court rulings. However, were the Fourth Circuit to decide both cases in the executive's favor, there would be no conflicting rulings. Given the Supreme Court's apparent reluctance to hear cases arising out of the war on terror, the Supreme Court could conceivably deny certiorari on both cases, letting the rulings stand while *Hamdi* and *Padilla* languish in perpetuity. At a minimum, even if the Supreme Court did take *Hamdi* up on certiorari (cert. petition pending), the executive could continue delaying adjudication of *Padilla*, perhaps even until the Supreme Court ruled in *Hamdi*.

¹⁸⁶ Judge Mukasey writes,

The government urges that I certify for interlocutory appeal the determination that Padilla's attorney, Donna Newman, may act as next friend in pursuing the habeas corpus petition that even the government does not deny Padilla may file—a ruling that I cannot imagine will be open to serious question—as well as the determination that Secretary Rumsfeld is a proper respondent here and the ruling that Padilla may confer with his lawyers. The government does not suggest among the issues worthy of certification the core ruling in this

proceeding so far—that President Bush has the power to direct the detention of an American citizen captured in the United States as an enemy combatant—or the court’s determination that the ‘some evidence’ standard will guide the decision as to whether that presidential power has been exercised properly or not in this case, even though the latter holdings might seem to less partisan eyes to present a ‘substantial ground for difference of opinion,’ 28 U.S.C. § 1292(b), and at least as worthy of interlocutory review as the issues the government has proffered.

Padilla, 256 F. Supp. 2d at 221.

¹⁸⁷ *Id.* at 223. In addition, on its motion for reconsideration the executive suggested that the court grant Padilla’s requested preliminary injunction allowing Padilla access to counsel to promote judicial economy. The district court maintained the executive’s after-the-fact suggestion was strategically meant to assure the executive immediate appeal to the Second Circuit, particularly in the event that either the district court or Second Circuit did not grant the discretionary interlocutory appeal: “Although the government has suggested that issuance of an injunction might ‘promote judicial economy,’ *that suggestion invites an order that can have no certain effect other than to assure that the government can appeal. . . .*” *Id.* at 222 (emphasis added).

¹⁸⁸ On November 17, 2003, a three member panel of the Second Circuit of the U.S. Court of Appeals heard oral arguments in *Padilla*. Two of the judges sharply interrogated government lawyers regarding the executive’s policy on enemy combatants. Judge Rosemary S. Pooler questioned the government’s position that Congress had intended to grant the executive such extraordinary powers: “If, in fact, the battlefield is in the United States, I think Congress has to say that, and I don’t think they have yet,” adding that “as terrible as September 11 was, it didn’t repeal the Constitution.” Judge Barrington D. Parker opined that “[w]ere we to construe the Constitution as permitting this kind of power in the executive with only modest judicial review, we would be effecting a sea change in the constitutional life of this country and making changes that would be unprecedented in civilized society.” Michelle Garcia, *Appeals Court Weighs Case of Enemy Combatant: Judge Questions Executive Branch Powers in Patriot Act*, WASH. POST, Nov. 18, 2003, at A3. The third member of the panel, Judge Richard C. Wesley, seemed to side with the government on the jurisdictional issue suggesting that the case should not have been brought in New York: “This should be litigated in South Carolina,” where Padilla is incarcerated. Larry Neumeister, *Court to Rule on ‘Enemy Combatant’ Label*, COMMERCIAL APPEAL, Nov. 18, 2003, at A4.

On December 18, 2003, in 2-1 decision the Second Circuit Court of Appeals held that absent explicit congressional authorization, the executive lacks the power under Article II of the Constitution to detain American citizens as enemy combatants captured on U.S. soil outside a zone of combat. *Padilla v. Rumsfeld*, 2003 U.S. App. LEXIS 25616 at 5 (2d Cir. Dec. 18, 2003). The court also concluded 18 U.S.C. § 4001(a) (2000) (the “Non-Detention Act”) requires explicit congressional authorization and that Congress’ Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2001) (“Joint Resolution”) was not such an authorization. *Id.* The court held that

the Southern District of New York did have jurisdiction to hear the case and that Secretary of Defense Donald Rumsfeld was the proper respondent. *Id.*

The court, however, did not express an opinion on whether the executive had the power to detain as an enemy combatant an American citizen captured in a zone of active combat like Hamdi. *Id.* at 7. In addition, the court contended that its ruling mooted arguments raised by both parties regarding access to counsel, standard of review, and burden of proof. *Id.* The court remanded the case to the district court with instructions to issue a writ of habeas corpus directing Secretary Rumsfeld to release Padilla from military custody within 30 days. *Id.* The court observed that the executive could then either transfer Padilla to the proper civilian authorities to be charged as a criminal or hold him as a material witness in connection with grand jury proceedings, with full constitutional protections. *Id.*

Shortly after the ruling, the Department of Justice commented that it would seek a stay of the ruling as government lawyers consider whether to appeal to the Second Circuit en banc or directly to the Supreme Court. Scott McClellan, White House spokesman, called the ruling “troubling and flawed” and “really inconsistent with the clear constitutional authority of the president and his responsibility.” David Stout, *Courts Deal Blow to Bush on Treatment of Terror Suspects*, N.Y. TIMES, Dec. 18, 2003, at A1.

¹⁸⁹ *Gibbons Brief*, *supra* note 10, at 5 (“Unless the courts are now to become *rubber-stamps for executive overreaching*, the government’s position must be rejected.”) (emphasis added). *Hamdi*, 337 F.3d at 341 (“[T]he record provides no credible evidence supporting the Executive’s designation of Hamdi as an enemy combatant” and that the panel’s “*rubberstamp of the Executive’s unsupported designation* lacks both the procedural and substantive content of such review.”) (emphasis added). *See Hamdi*, 243 F. Supp. 2d at 535. (Opining that by accepting the Mobbs Declaration at face value, the court would be “abdicating any semblance of the most minimal level of judicial review...*acting as little more than a rubber stamp.*”) (emphasis added).

¹⁹⁰ *See Milligan*, 71 U.S. at 8 (noting that the existence of war or generally exigent circumstances, of themselves, do not abrogate the Court’s role in assuring constitutional guarantees); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649–50 (1942) (Jackson, J., concurring); *see generally* William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties In Times of Crises*, 18 ISR. Y.B. HUM. RTS. 11 (1988).

¹⁹¹ *See, e.g., Youngstown*, 343 U.S. at 79; *United States v. Robel*, 389 U.S. 258 (1967); *N.Y. Times v. United States*, 403 U.S. 713 (1971).

¹⁹² *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1981) (advocating a “process” view of the judiciary’s role in guarding the liberties of “discrete and insular minorities”).

¹⁹³ *Milligan*, 71 U.S. at 124 (opining during times of commotion, when “the passions of men are aroused and the restraints of law weakened,” constitutional liberties “need and should receive, the watchful care of those intrusted [*sic*] with the guardianship of the Constitution and laws”—the courts).

¹⁹⁴ *See Korematsu*, 584 F. Supp. 1406.

¹⁹⁵ *See id.*; ELY, *supra* note 192; Edward Keynes, *Democracy, Judicial Review and War Powers*, 8 OHIO N.U. L. REV. 69, 75 (1981) (“since a basic objective of American

constitutionalism is to advance the individuals freedom or liberty, judicial review can serve to protect individuals and minorities against repressive and intemperate majorities.”); *see generally* United States v. Carolene Products, 304 U.S. 144, 153, n.4 (1938) (calling for a “more searching judicial inquiry” of majoritarian political processes that disadvantage “discrete and insular minorities” who have minimal access to political power).

¹⁹⁶ *See Korematsu*, 323 U.S. at 224-25 (noting the adage that the war power of the government ‘is the power to wage war successfully,’ suggesting that courts should refrain from scrutinizing government exercises of its war powers) (Frankfurter, J., concurring); *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (“The case arises in the context of Congress’ authority over national defense and military affairs, and perhaps in no other areas has the Court accorded Congress greater deference.”).

¹⁹⁷ *Id.*; *see* *Green v. Spock*, 249 U.S. 47 (1976) (upholding military ban on civilian political speech on open public sidewalks on military bases); *Haig v. Agee*, 453 U.S. 280 (1981) (upholding secretary of state’s power to revoke passports of citizens deemed threats to national security).

¹⁹⁸ *Rostker*, 453 U.S. at 64-65.

¹⁹⁹ *Melchero v. Federal Open Market Committee*, 836 F.2d 651, 564 (D.C. Cir. 1987) (under a checks and balances constitutional scheme, the courts should not resolve “issues that are appropriately left to the [elective] legislative arena”).

²⁰⁰ Finona Doherty et al., *A Year of Loss: Reexamining Civil Liberties since Sept. 11*, LAWYERS COMMITTEE FOR HUMAN RIGHTS, at 1.

²⁰¹ *See* Amicus Curiae Brief of Fred Korematsu, *Hamdi v. Rumsfeld*, No. 03-6696 (4th Cir. Oct. 7, 2003) (describing executive national security abuses of civil liberties under the 1798 Sedition Act, the 1917 Espionage Act, the 1919-20 Palmer Raids, the 1942 Japanese American Internment, and the 1950s McCarthyism and the Smith Act); *see also* David Cole, *The New McCarthyism: Repeating History in the War on Terror*, 38 HARV. C.R.-C.L. L. REV. 1 (2003).

²⁰² *See Youngstown*, 343 U.S. at 79 (scrutinizing and then rejecting President Truman’s contention that in the prosecution of the Korean War, national security required government seizure of steel mills embroiled in a labor dispute).

²⁰³ *Id.*

²⁰⁴ *See generally* WILLIAM REHNQUIST, ALL LAWS BUT ONE: CIVIL LIBERTIES DURING WAR TIME (1998).

²⁰⁵ *See, e.g., Hamdi*, 316 F.3d 450; *Padilla*, 233 F. Supp. 2d 564; *N. Jersey Media Group*, 308 F.3d 198.

²⁰⁶ *See generally* Yamamoto, *supra* note 20; Saito, *supra* note 4; Letti Volpp, *The Citizen As Terrorist*, 49 U.C.L.A. L. REV. 1575 (2002); PERSONAL JUSTICE DENIED, *supra* note 16; *Hamdi*, 337 F.3d 335. Comparing *Hamdi* to *Korematsu*, Judge Motz reminded the panel that the High Court’s earlier deference to the executive’s DeWitt Report, also prepared by military officials, upheld Fred Korematsu’s conviction for remaining in his home. Similarly, the Fourth Circuit based its ruling in *Hamdi* solely on the Mobbs Declaration. Echoing Justice Jackson’s dissent in *Korematsu*, Judge Motz warned that when the executive “oversteps the bound[s] of constitutionality . . . it is an incident,” but

when a court “review[s] and approve[s], that passing incident becomes doctrine.” *Id.* at 375.

²⁰⁷ Yamamoto, *supra* note 20, at 41–43.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 42.

²¹¹ *See supra* Section II(A).

²¹² *See e.g.*, *Hamdi*, 316 F.3d 450; *Padilla*, 233 F. Supp. 2d 564; American-Arab Anti-Discrimination Comm. v. Ashcroft, 241 F. Supp. 2d 1111 (S.D.Cal. 2003) (challenging the Immigration and Naturalization Service’s special registration procedures targeting primarily Arab and Muslim non-citizen males for registration); Center for Nat’l Sec. Studies v. United States Dept. of Justice, 331 F.3d 918 (D.C. Cir. 2003) (arguing for release of September 11 detainee names); Muslim Community Ass’n of Ann Arbor et al. v. Ashcroft, Complaint for Declaratory & Injunctive Relief, Civil Action No. 03-72913 (E.D.Mi. July 7, 2003), *available at* <http://news.corporate.findlaw.com/hdocs/docs/aclu/mcaa2ash73003cmp.pdf>. (ACLU suit on behalf on Arab American challenging constitutionality of the PATRIOT Act); Electronic Privacy Info. Center v. Office of Homeland Security, Civ. Action No. 02-620 (CKK) (Dec. 26, 2002) (on file with author). (challenging the prohibition of Freedom of Information Act disclosures); Benevolence Int’l Foundation v. John Ashcroft, 200 F. Supp. 2d 935 (N.D.Ill. 2002) (challenging the government’s seizure of Illinois charity proceeds while the government investigates whether organization has ties to terrorism); *Turkmen v. Ashcroft*, 02-CV-02307-JG (E.D.N.Y. 2002), *available at* <http://news.findlaw.com/hdocs/docs/terrorism/turkmenash41702cmp.pdf> (alleging Arab and Muslim men detained after the September 11 attacks were abused in prisons); *United States of America v. Osama Awadallah*, 202 F. Supp. 2d 55, 61 (S.D.N.Y. 2002) (alleging Arab and Muslim men detained after the September 11 attacks were abused in prisons); *N. Jersey Media*, 308 F.3d 198 (challenging government’s blanket closing of deportation proceedings of September 11 detainees); *Detroit Free Press*, 308 F.3d 681 (6th Cir. 2002) (challenging government’s blanket closing of deportation proceedings of September 11 detainees); *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003) (challenging indefinite detention of Guantanamo Bay prisoners); *Coalition of Clergy v. Bush*, 310 F.3d 1153 (9th Cir. 2002) (challenging indefinite detention of Guantanamo Bay prisoners); *M.K.B. v. Warden*, No. 03-6747 (S.Ct. filed July 1, 2003), *available at* <http://news.findlaw.com/hdocs/docs/scotus/mkbwarden62703cpet.pdf> (challenging how far courts can go to seal all legal filings and the entire docket in a federal habeas corpus case, without issuing any findings in support of sealing the file).

²¹³ *See e.g.* *Gibbons Brief*, *supra* note 10; *ABA Brief*, *supra* note 70; Neal R. Sonnett et al., *Preliminary Report*, A.B.A. TASK FORCE ON THE TREATMENT OF ENEMY COMBATANTS (2002), *available at* http://www.abanet.org/leadership/enemy_combatants.pdf; *Hamdi*, 337 F.3d 335 (Motz, J., dissenting).

²¹⁴ In *Korematsu*, the Court gave near absolute deference to the executive’s military necessity claims despite its pronouncement of strict scrutiny. *See generally* Eric K. Yamamoto & Susan Kiyomi Serrano, *The Loaded Weapon*, 28 AMERASIA 51 (2002).

²¹⁵ *Gibbons Brief*, *supra* note 10, at 11.

²¹⁶ *See Hamdi*, 316 F.3d 450; *Padilla*, 233 F. Supp. 2d 564; *Detroit Free Press*, 308 F.3d 681; *N. Jersey Media*, 308 F.3d 198.

²¹⁷ *Hamdi*, 296 F.3d at 283 (“The government thus submits that we may not review at all its designation of an American citizen as an enemy combatant—that its determinations on this score are the first and final word.”); *Respondents’ Response*, *supra* note 65, at 13 (“[W]hether Padilla at some future time may be charged with violating domestic criminal law (or the laws of war) has no bearing on whether he is presently an enemy combatant subject to detention during wartime).

²¹⁸ *Padilla*, 233 F. Supp. 2d at 600-01.

²¹⁹ *Id.*

²²⁰ *See supra* Section III.

²²¹ *Id.*

²²² *Gibbons Brief*, *supra* note 10, at 24.

²²³ Courts are competent to assess the effects of government actions in assessing their validity. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²²⁴ Suggesting that as a matter of law, the executive does not have the power to unilaterally designate an American citizen an enemy combatant and detain him indefinitely absent fundamental liberties, 18 U.S.C. § 4001(a) explicitly states, “No citizen shall be . . . detained by the United States except pursuant to an Act of Congress.” Furthermore, the historic purpose of the writ of habeas was to prevent executive detention of citizens absent judicial review. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *Brown v. Allen*, 344 U.S. 443, 533 (1953). During times of national threat, the Constitution through the Suspension Clause allows suspension of habeas. However, the Suspension clause resides in Article I. Accordingly, only Congress, not the Executive, can suspend judicial scrutiny of executive detention. *Gibbons Brief*, *supra* note 10, at 7; U.S. Const. Art. I, § 9 cl. 2; *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.Md. 1861); *Ex parte Bollman*, 8 U.S. 75, 101 (1807).

²²⁵ In assessing whether the means are appropriately tailored, courts can examine what procedures and standards would govern the executive’s enemy combatant designation of American citizens and ensure that the individual can contest his detention through habeas proceedings and that he has full access to counsel. *Sonnett*, *supra* note 213, at 21–24.

²²⁶ *Gibbons Brief*, *supra* note 10, at 27–28.

Amici submit that the Constitution requires at least clear and convincing evidence before a person may be held in custody for an extended or indefinite period of time, as the Executive has already imposed here . . . Moreover, to the extent that a detention is punitive in nature—as detention of ‘unlawful combatants’ arguably may be—the Constitution requires proof beyond a reasonable doubt.

Id.

²²⁷ 18 U.S.C. § 3144 (2003). The law permits detention of a material witness only to guarantee his testimony in a criminal proceeding and only if the government can show he is a flight risk or his testimony can be obtained only through detention. Material

witnesses are not criminal suspects and, therefore, their detention should not exceed the time necessary to secure their depositions.

²²⁸ Doherty, *supra* note 200 at 16; See also Edward Alden & Caroline Daniel, *Battle Lines Blurred as U.S. Searches for Enemies in the War on Terrorism: LIBERTY AND SECURITY: Technology Provides the Means, September 11 the Justification*. FINANCIAL TIMES (London), January 2, 2003, at 11; Editorial, *A Lesson Learned from Evansville*, BALT. SUN, June 22, 2003, at 4C.

²²⁹ See *Awadallah*, 202 F. Supp. 2d 55; *In re* Application of the United States for a Material Witness, 2002 U.S. Dist. LEXIS 13234 (S.D.N.Y. July 11, 2002).

²³⁰ The government has used preventative detention as a strategy for fighting its war on terror. The theory appeared to be that detention, based primarily on race, religion and ethnicity, would prevent those detained from proving to be a threat—an “arrest and detain first, ask questions later” approach. Doherty, *supra* note 200, at 14. Employing the term “suspected terrorist,” the Attorney General explained,

We will arrest and detain any suspected terrorist who has violated the law. If suspects are found not to have links to terrorism or not to have violated the law, they’ll be released. But terrorists who are in violation of the law will be convicted, in some cases be deported, and in all cases be prevented from doing further harm to Americans.

Department of Justice, *Attorney General Ashcroft Outlines Foreign Terrorist Tracking Task Force*, Oct. 31, 2001, available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_31.htm.

²³¹ *Id.*

²³² UNITED STATES: PRESUMPTION OF GUILT, 14 HUMAN RIGHTS WATCH 16 (2002), available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf>.

²³³ Doherty, *supra* note 200, at 18.

²³⁴ *Id.*

According to lawyers representing a number of detainees, it is now common for the INS to fail to charge individuals within the prescribed 48 hours. The bipartisan effort in Congress to include in the USA PATRIOT Act a seven-day charge requirement to curb abuse of new government powers has been completely ineffectual. Current practice under INS regulations involves detention without charge not only for a week, but for months.

Id.

²³⁵ Doherty, *supra* note 200, at 14–15.

²³⁶ As Human Rights Watch reported, “the detainees were interrogated as if they were accused criminals in conditions that were punitive in nature.” *Id.* at 16.

²³⁷ According to the Lawyers Committee for Human Rights report, [I]n *United States of America v. Osama Awadallah* [202 F. Supp. 2d 55 (S.D.N.Y. 2002)], the use of material witness warrants to detain individuals for potential testimony before a grand jury was rule unlawful. Awadallah is a lawful permanent resident in the United States and was held in solitary confinement in the maximum-security wing . . . for 20 days, based solely on the material witness warrant. The government made several misrepresentations.

tations and omissions in order to get an arrest warrant and during the time Awadallah was imprisoned, the government failed to take steps to secure his deposition. In ordering his release, Judge Shira Scheindlin said that “since 1789, no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation.

Doherty, *supra* note 200, at 16; *But see In re the Application of the United States*, 2002 U.S. Dist. Lexis 13234 (upholding material witness detentions for grand jury testimony).

²³⁸ See generally *Detroit Free Press*, 303 F.3d 681; *North Jersey Media*, 308 F.3d 198.

²³⁹ According to the Lawyers Committee for Human Rights, “lawyers for detainees subject to these measures believe that a secrecy order casts suspicion on their clients which may affect their client’s ability to get a fair hearing.” Doherty, *supra* note 200, at 20. Similarly, the government in *Korematsu* presumed Japanese Americans were disloyal based on their race and denied them individualized hearings to determine disloyalty. *Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting).

²⁴⁰ See *Korematsu*, 323 U.S. 214.

²⁴¹ *Detroit Free Press*, 303 F.3d at 702.

²⁴² The district court in *N. Jersey Media* applied the executive’s method and reviewed the blanket closing under rational basis. *N. Jersey Media*, 308 F.3d 198. The district court in *Detroit Free Press*, however, rejected the executive’s approach and reviewed the blanket closing under strict scrutiny. *Detroit Free Press*, 303 F.3d 608.

²⁴³ *Id.* at 709–10 (emphasis added) (“the government seeks to protect from disclosure the bits and pieces of information that seem innocuous in isolation, but when pieced together with other bits and pieces aid in creating a bigger picture of the Government’s anti-terrorism investigation, i.e., ‘the mosaic intelligence’”). *Id.*

²⁴⁴ See Yamamoto, *supra* note 20.

²⁴⁵ *Gibbons Brief*, *supra* note 10, at 5-11.

²⁴⁶ See *supra* Section IV(B).

²⁴⁷ See *supra* Section IV.

²⁴⁸ *Id.*

²⁴⁹ *Gibbons Brief*, *supra* note 10, at 28 (“Recognizing this [constitutional] safeguard need not damage national security, so long as courts carefully tailor their proceedings to the needs of the situations as they are fully capable of doing.”); *Hamdi*, 337 F.3d at 375 (“The Department of Defense has already compiled and collected [the records Mr. Mobbs relied upon in making his determinations]. Producing them for judicial review, *ex parte* and *in camera* if necessary would not in any way hamper the Executive’s ability to wage war.”) (Motz, J., dissenting).

²⁵⁰ *Milligan*, 71 U.S. at 20.

²⁵¹ *Hamdi*, 337 F.3d at 375.

But one need not refer back to the time of the Framers to understand that courts must be vigilant in guarding Constitutional freedoms, perhaps never more so than in time of war. We must not forget the lesson of *Korematsu*, a case in which the Supreme Court sanctioned the military internment of thousands of American citizens of Japanese ancestry during World War II. In

its deference to an Executive report that, like the Mobbs declaration, was filed by a member of the Executive associated with the military and which purported to explain the Executive's actions, the Court upheld the conviction of Korematsu for simply remaining in his home, in violation of the military internment order.

Id.

²⁵² See *supra* Section IV(B)(2).

²⁵³ See *supra* Section IV(A)(1).

²⁵⁴ *Padilla*, 233 F. Supp. 2d at 564.

²⁵⁵ See *supra* Section IV(A)(2).

²⁵⁶ See McGirk, *supra* note 35.

²⁵⁷ Only two days following the executive's designation of Padilla as an enemy combatant, the Deputy Secretary of Defense stated that "[t]here was not an actual plan. . . We stopped this man in the initial planning stages" and the "extent of the actual bomb plot amounted only to 'some fairly loose talk.'" Susan Schmidt & Kamran Khan, *Lawmakers Questions CIA on Dirty Bomb Suspect: Administration Officials Wonder if Ashcroft Was Unduly Alarmist in Arrest Announcement*, WASH. POST, June 13, 2002, at A11.

²⁵⁸ *Hamdi*, 316 F.3d at 477.

²⁵⁹ *Detroit Free Press*, 303 F.3d at 710.

²⁶⁰ *Hamdi*, 243 F. Supp. 2d at 532 (quoting *Robel*, 389 U.S. 258 at 264. See also *Detroit Free Press*, 303 F.3d at 709–10 ("there seems to be no limit to the Government's argument. . . . The Government could operate in virtual secrecy in all matters dealing, even remotely, with "national security," resulting in a wholesale suspension of [fundamental] rights. By the simple assertion of "national security," the Government seeks a process where it may, without review . . . deprive [Americans] of their fundamental liberties.").

²⁶¹ *Milligan*, 71 U.S. at 12.

²⁶² *Id.* at 8.

²⁶³ *Hamdi*, 337 F.3d at 375 ("[A]nd so in answer to the question certified to us—'[w]hether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow meaningful judicial review of Yasser Esam Hamdi's classification as an enemy combatant?'—the answer must be 'No.'" (Motz, J., dissenting).

²⁶⁴ Yamamoto, *supra* note 20, at 48.

²⁶⁵ *Milligan*, 71 U.S. at 124 (opining during times of commotion, when "the passions of men are aroused and the restraints of law weakened," constitutional liberties need and should receive, the watchful care of those intrusted [*sic*] with the guardianship of the Constitution and laws"—the courts).

²⁶⁶ Sonnett, *supra* note 213, at 20.

²⁶⁷ *Id.* at 21.

²⁶⁸ *Id.* at 22.

²⁶⁹ *Korematsu*, 584 F. Supp. at 1420.