THE DETENTION TRILOGY: STRIKING THE PROPER BALANCE BETWEEN NATIONAL SECURITY AND INDIVIDUAL LIBERTY IN AN ERA OF UNCONVENTIONAL WARFARE

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I. INTRODUCTION

Hundreds of aliens and two United States citizens have been detained by the country’s military forces without criminal charges on the ground that they are unlawful enemy combatants in the War on Terror. The legality of these detentions was challenged in three separate cases. Taken together, these cases raised three issues: (1) Whether the executive branch has any authority to detain unlawful enemy combatants; (2) whether United States courts have jurisdiction to consider claims by aliens detained outside United States sovereign territory that they are not unlawful enemy combatants; (3) and what process, if any, must be afforded detainees to challenge their unlawful enemy combatant status.1 Resolution of these issues required the federal judiciary to confront the age-old problem of protecting national security while preserving individual freedoms. When these two fundamental values clash, as they do in the detention trilogy, the judiciary must strike the proper balance.

Osama bin Laden and his transnational terrorist organization al Qaeda declared war on the United States in 1996 and again in 1998.2 These declarations of war were preceded by a 1993 bomb attack on the World Trade Center in New York City that killed or wounded many people but did not destroy the center. Even then, there were calls to treat the attack as an act of war and use military action to destroy the terrorist network behind the attack. Instead, the Clinton administration chose to treat the attack as a criminal case and successfully prosecuted individuals involved directly in the attack.3 Criminal

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1. These cases do not involve lawful enemy combatants. Under international law, specifically the Third Geneva Convention, a captured soldier of a signatory state who had a commanding officer, wore a uniform, carried arms openly, and complied with the laws of war is designated a “lawful combatant.” Such a combatant must be treated as a prisoner of war and accorded the same protection afforded the soldiers of his captor. An unlawful enemy combatant, on the other hand, lacks one or more of the characteristics of a lawful combatant, such as not wearing a uniform or not carrying weapons openly. Such combatants need not be treated as, or be given the protections due to, prisoners of war. See generally Kenneth Anderson, What to do with Bin Laden and Al Qaeda Terrorists? A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base, 25 Harv. J.L. & Pub. Policy 591, 613-16 (2002); Emanuel Gross, Democracy in the War Against Terrorism – The Israeli Experience, 35 Loy. L.A. L. Rev. 1161 (2002). Despite this crucial distinction between lawful combatants and unlawful enemy combatants, these three cases are often referred to as the “enemy combatant” cases without any reference to this distinction. See e.g. Alan Raphael, The Decisions Regarding Alleged Enemy Combatants Leave Many Questions, 8 Preview U.S. S. Ct. Cases 499 (2004); David G. Savage, Executive Decisions: Not Since Nixon Has the High Court Offered so Many Rulings on Presidential Power, 90 ABA J. 18 (Aug. 2004). The failure to make this distinction can lend to the incorrect conclusion that every enemy combatant who is captured is entitled to prisoner of war status. That is not so. Only lawful combatants have that status. As is clear from the discussion infra, members of terrorist organizations such as al Qaeda do not wear uniforms or carry weapons openly; they operate in secrecy, and thus are unlawful enemy combatants and need not be accorded prisoner of war status. Infra nn. 38-50 and accompanying text. Thus, the term “enemy combatant,” as used in this article, refers to unlawful, not lawful, combatants.


prosecution did nothing, however, to deter or prevent other attacks. Al Qaeda’s declarations of war in 1996 and 1998 were followed by the 1998 bombings of two United States embassies in Africa, and the 2000 attack on the USS Cole in Yemen. The Clinton administration, however, either continued its policy of treating these attacks as criminal offenses or, at most, responded with ineffectual military measures. The destruction of the World Trade Center and partial destruction of the Pentagon by hijacked jetliners on September 11, 2001, with the loss of over 3,000 lives, came only four months after the criminal convictions in the embassy bombing prosecution. The September 11 attacks were the most destructive attacks on United States territory since the Japanese attack on Pearl Harbor on December 7, 1941.

The Bush administration responded to the September 11 attacks by treating them as acts of war by the transnational al Qaeda terrorist network and those who harbor them, and declaring war in his constitutional capacity as commander in chief of American armed forces. Congress followed suit with a joint resolution, the Authorization for Use of Military Force (AUMF), conferring legislative authority on the President to use military force against this network. It was well known that bin Laden and al Qaeda were based in Afghanistan, then ruled by the Taliban regime, so President Bush demanded that the regime hand over bin Laden and members of al Qaeda to American authorities. The Taliban leader, Mullah Mohammed Omar, freely admitted that bin Laden and al Qaeda members were under Taliban protection and, for that very reason, refused to surrender them.

This refusal prompted President Bush to launch a joint military campaign in Afghanistan with the Afghan Northern Alliance, the main indigenous resistance to the Taliban. The goals were to oust the Taliban regime and kill or capture as many al Qaeda members as possible. The campaign succeeded in defeating the Taliban forces, ousting the Taliban regime and installing an interim regime headed by Hamad Kharzi. It is worth noting that it was not a goal of the Afghan campaign to destroy al Qaeda. President Bush explicitly warned that the al Qaeda network was global in scope and that a single military success in one nation would not destroy it. Instead, the goal of this campaign was to begin the process of al Qaeda’s destruction by removing a regime that harbored it, and by killing or capturing as many members of al Qaeda as possible. Many al Qaeda members, as well as Taliban soldiers, were in fact killed or captured in the Afghan campaign.

Of those captured, United States military authorities determined which ones remained a threat to the country. Those determined not to be a continuing threat were released. Those determined to be a continuing threat—hundreds of them—were declared to be enemy combatants, and transferred to a prison on the United States naval base in Guantanamo Bay, Cuba. All were aliens with one exception. It was discovered that one Guantanamo detainee, Yaser Hamdi, was a United States citizen because he was born there to Saudi immigrant parents, and he might not have renounced his citizenship when he left the United States for the Middle East. Naval authorities thereupon transferred him to a naval prison in the United States, but continued to classify him as an enemy combatant.

The other detention with which this article is concerned arose when agents of the Federal Bureau of Investigation (FBI) seized United States citizen Jose Padilla in the United States, on a material witness warrant issued in connection with a grand jury investigation into the attacks of September 11. He moved

4. Id. at 98-99, 144-46, 202-23, 287-321.
5. Laura Taylor Swain, Liberty in the Balance: The Role of the Third Branch in a Time of Insecurity, 37 Suffolk U. L. Rev. 51, 52 (2003). The FBI’s chief counterterrorism official in the 1990s, John O’Neill, was one person who had warned that bin Laden was waging war against the U.S. and urged stronger measures against his organization. After leaving the FBI, John O’Neill became head of security at the World Trade Center. Tragically, he died in the September 11 attack. He is, thus, a casualty of the war the U.S. is now engaged in. Weiss, supra n. 3, at 355-88.
6. Weiss, supra n. 3, at 393-96. See also Swain, supra n. 5, at 53.
to vacate the warrant, but the President then designated him an enemy combatant. Padilla was transferred from criminal to military custody and transported to a naval brig in South Carolina.11 Thus, it was that a United States citizen arrested in the United States was placed under military detention as an enemy combatant.

The three issues raised by these detentions have not been addressed by the federal judiciary since World War II. With respect to the first issue—authority to detain—the Supreme Court had previously held in *Ex parte Quirin*, a World War II-era case, that detention of unlawful enemy combatants for trial before a military commission is within the authority of the President and Congress.12 The Court further held that this ruling applied not only to aliens but also to United States citizens.13 The Supreme Court reaffirmed *Quirin* in the *Hamdi* case, ruling that the AUMF provides the President with authority to detain any person, including a United States citizen who is part of or supports the al Qaeda network that launched the attacks of September 11, 2001.14

The second issue—jurisdiction—arose because the hundreds of detainees who remained at Guantanamo Bay were not incarcerated on United States territory, but on territory leased from the nation of Cuba.15 In *Johnson v. Eisentrager*, another World War II-era case, the Supreme Court held that civilian courts in the United States do not have jurisdiction to review the actions of United States military authorities against enemy aliens outside United States territory, other than to determine whether such aliens are properly within military jurisdiction.16 In *Eisentrager*, it was undisputed that the aliens had engaged in hostile acts against United States forces in the service of a hostile nation.17 In the Guantanamo Bay case, on the other hand, the aliens who challenged their detentions are from nations friendly to the United States and they deny engaging in hostile acts against the United States.18 Thus, the central question in the Guantanamo Bay case was whether *Eisentrager* is still good law and, if so, whether it should be extended to aliens who dispute their enemy combatant status. The Supreme Court ruled that United States courts have jurisdiction to consider the legality of the detention of aliens at the naval base. Although it is not entirely clear, this decision strongly suggests that *Eisentrager* may no longer be good law. If so, then any alien detained by the United States military anywhere in the world may be able to challenge his detention in United States courts.19

The third issue—what process is due those who challenge their enemy combatant status—arose in the *Hamdi* case. It was undisputed in the World War II *Quirin* case that the detainees were enemy combatants.20 Hamdi, by contrast, denied that he was an enemy combatant when captured in Afghanistan.21 Thus, the *Hamdi* case presented the issue of what process must be afforded a United

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13. *Id.* at 37-38.
14. *Hamdi*, 124 S. Ct. at 2635, 2640-42 (plurality). The Court also ruled that detention is limited to the duration of the relevant conflict. Since there were still active combat operations in Afghanistan, the continued detention of Hamdi was authorized. The Court left open the question whether detention of al Qaeda operatives would be authorized once active combat ceases in Afghanistan. *Id.*
15. The issue of jurisdiction was not present in the *Hamdi* and *Padilla* cases because it was undisputed that U.S. courts have jurisdiction to consider U.S. citizens’ claims that they are detained illegally.
17. *Id.* at 778.
19. For further discussion of this point, consult infra text accompanying notes 136-40 and 244-48.
20. *Ex parte Quirin v. Cox*, 317 U.S. 1, 18-20, 24 (1942) (claiming that they had a right to be tried for their alleged war crimes by a U.S. civilian court rather than a military commission).
States citizen who challenges an executive branch determination that he is an enemy combatant. The Supreme Court ruled that a detainee who is a United States citizen and who denies he is an enemy combatant must be afforded a meaningful opportunity to challenge his detention before a neutral decisionmaker.22

Padilla, like Hamdi, was a United States citizen who was detained as an enemy combatant but proclaimed he was innocent. Unlike Hamdi, however, Padilla was not captured in a zone of active combat, but in the United States. Thus, the Padilla case presented a variation on the first issue: Whether the President has authority to detain a United States citizen captured on United States territory outside a zone of active combat upon a determination that he is an enemy combatant. The Supreme Court, however, did not reach this issue. Instead, it held that the immediate custodian of a habeas petitioner is the proper respondent in the action, and the custodian was not subject to personal jurisdiction in the district in which Padilla filed his action.23 Nevertheless, the rationale of the Hamdi decision—that the AUMF provides authority to detain—strongly suggests that the President has authority to detain a United States citizen captured in the United States as an enemy combatant. Moreover, the immediate custodian rule followed in the Padilla case may severely limit the extent to which United States courts may be able to exercise the jurisdiction afforded by the Hamdi case.24

In all three of these cases, the detainees laid claim to their liberty pursuant to American law. The President justified their detentions on the ground that they are necessary to protect national security in the war with al Qaeda. So it is that the various issues presented in the detention trilogy raise the same fundamental problem: Striking the proper balance between protecting the security of this nation and preserving our individual liberties. In resolving these issues, it is critically important to understand, as fully as possible, the nature of the al Qaeda transnational terror network. Such an understanding is needed in order to assess the threat it poses to the safety of the American people. An accurate assessment of this threat is, in turn, essential to determining whether the Supreme Court has struck the proper balance between security and liberty in the detention trilogy.

Academic commentators disagree on the nature of this threat and, as a result, reach different conclusions on how best to deal with captured al Qaeda operatives and supporters. Some contend that al Qaeda is a criminal enterprise, and therefore, its members should be subject only to criminal prosecution.25 Others argue that a state of unconventional war exists between al Qaeda and the United States, so that detention and military trial of al Qaeda personnel are justifiable war measures.26 Still, others assert that the conflict is neither a criminal matter nor a war, and that our constitutional tradition should be revised so as to allow “short-term emergency” restrictions on our traditional freedoms.27 Part I of this article will therefore discuss the ideology, strategy, and tactics of the al Qaeda network, in order to assess the threat it poses to our national security. Part II will describe the United States’ response to al Qaeda’s attacks, from the 1993 bombing of the World Trade Center to the 2001 destruction of the World Trade Center and part of the Pentagon. Part III will discuss the detention trilogy in detail. Part IV will provide critical analysis of whether the Court’s decisions strike the proper balance between security and liberty. The article concludes that the most important and beneficial holding in the trilogy is that the
President has the power to detain, as an enemy combatant, any person whom he finds was part of the forces hostile to the United States and engaged in active combat against United States forces in Afghanistan. That ruling recognizes the reality that the nation is at war with al Qaeda and properly concludes that detention is a necessary form of military force. The article further concludes that if the process afforded detainees to challenge their enemy combatant status, coupled with the ruling that United States courts have jurisdiction to consider the challenges of aliens detained at Guantanamo Bay results in undue interference with the ability of United States authorities to conduct the war against al Qaeda, Congress should enact legislation abrogating the Guantanamo Bay decision.