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Appropriate Adjective: Executive Authority and the Classification of Enemy Combatants

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APPROPRIATE ADJECTIVE: EXECUTIVE AUTHORITY AND THE CLASSIFICATION OF ENEMY COMBATANTS

by

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ABSTRACT

Is the term enemy combatant an established legal category of persons under international law? Has the President exceeded his constitutional authority in classifying United States citizens who are suspected terrorists as enemy combatants?

In 2018 a U.S. citizen was released after being held for 13 months as an enemy combatant. He was detained without being charged with a crime and without the ability to challenge the legality of his detention. This thesis serves two purposes. First, it will seek to trace the history of the term enemy combatant and highlight the evolution of its use by the executive branch. This thesis then examines whether the executive has exceeded his constitutional authority to classify a United States citizen as an enemy combatant. While most of the literature focuses on the treatment and detention of enemy combatants, existing scholarship largely overlooks the issue of authority to *classify* enemy combatants. This thesis will argue that the executive is overstepping the boundaries of its presidential power when the executive branch creates the criteria (a legislative function) for enemy combatants and applies the criteria in the classification of enemy combatants (a judicial function). This qualitative study will use normative legal research focusing on the principles of the law in classifying a suspected terrorist as an enemy combatant as well as the legal history of the term. The analysis of the legal history of the term enemy combatant will be completed by content analysis using Nvivo 12 software of various government documents as well as case studies of enemy combatant cases.

This thesis dedicated to those who stood in the arena with me. To those who have watched me strive valiantly and who have seen me err. To those who have cheered me on with great enthusiasm and now celebrate the triumph of this high achievement of daring greatly.

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LIST OF ACRONYMS OR ABBREVIATIONS

AUMF	Authorization for Use of Military Force
CSRT	Combatant Status Review Tribunal
DOD	Department of Defense
DOJ	Department of Justice
DTA	Detainee Treatment Act
EC	Enemy Combatant
EO	Executive Order
EPW	Enemy POW
FBI	Federal Bureau of Investigation
GWOT	Global War on Terror
IACHR	Inter-American Commission on Human Rights
ISIS	Islamic State in Iraq and Syria
JP 3-63	Joint Doctrine for Detainee Operations
LOAC	Law of Armed Conflict
MCA	Military Commissions Act
NDA	Non-Detention Act
POW	Prisoner of War
SOTU	State of the Union
UCMJ	Uniform Code of Military Justice
WWII	World War I

CHAPTER ONE: INTRODUCTION

Summary

After the terrorist attacks on the World Trade Center on September 11, 2001, the United States found itself in uncharted territory. It sought to fight terrorism as a war instead of prosecuting transnational crimes.[1] The country was at war, not with another state, but a war against terrorism. On September 16, 2001, President George Bush described the United States' crusade as a "war against terrorism." This crusade came to be known as the Global War on Terror. Congress, in turn, authorized the use of military force on September 20, 2001:

> "That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons"[2]

Government rhetoric has been that in indefinitely detaining a suspected terrorist, the United States is abiding by the guidelines of the law of war. However, those detained at the outset of the Global War on Terror were declared not to be protected by Geneva Conventions. At

[1] Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 Texas International Law Journal (2007).
[2] Authorization for Use of Military Force Joint Resolution 224 (2001).

the beginning of 2002, the White House circulated memoranda that asserted that "terrorism renders obsolete the [Geneva Conventions]."[3]

The president used his power to formulate the term "enemy combatant" as a legal convenience. This status removes most of the rights of an individual under both domestic and international law. In essence, the executive is using "war rules" when "criminal law rules" would suffice. This paper will trace the origin of the term "enemy combatant" and how it has become a tool of the government to hold suspected terrorists indefinitely without charging them with a crime. This paper will then argue that the executive is overstepping the boundaries of its presidential power when the executive branch creates the criteria for enemy combatants (a legislative function) and applies the criteria in the classification of enemy combatants (a judicial function).

The law of war was a set of norms and customary practices of nations and became codified in treaties that the United States signed known as the Geneva Conventions.[4] Under the Geneva Convention in 1949, there are only two designations for individuals: civilian and combatant. The Convention distinctly declined to create a third class of persons. Even with presented with the opportunity again in 1977 at Additional Protocol I there was not a third status created.[5] Scholars who are experts in the laws of war argue that "every person in enemy hands must have some status under international law; he is either a prisoner of war… a civilian…or…a member of the medical personnel…There is no intermediate status; nobody in enemy hands can

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[3] Carl Christol, The American Challenge (University Press of America, Inc. 2009).
[4] M. C. Dorf, *The Detention and Trial of Enemy Combatants: A Drama in Three Branches*, 122 Political Science Quarterly (2007).
[5] Mark David 'Max Maxwell & Sean M. Watts, *'Unlawful Enemy Combatant': Status, Theory of Culpability, or Neither?*, 5 Journal of International Criminal (2007).

be outside the law."[6] In regards to prisoners of war under Common Article 3, both the civilian and combatant have the right to counsel, an impartial court, confront witnesses, and regular judicial procedures. Due process for individuals captured on the battlefield is the same regardless of their status as civilian or combatant. A combatant has the right to participate directly in the hostilities. If captured they cannot be tried for taking part in the hostilities. However, when civilians take up arms, they are not immune like combatants and may be tried under the laws of war or domestic law.[7] The term "enemy combatant" or "unlawful enemy combatant" is not a term of art in the law of war. There are two distinct differences between lawful and unlawful combatants. Lawful combatants have combat immunity and are given prisoner of war status if captured. They may be tried by domestic courts or an international tribunal for war crimes. Lawful combatants are not tried for participating in the hostilities. Unlawful combatants are not privy to combat immunity and can be prosecuted for participating in the hostilities by the domestic laws of the country who has jurisdiction over them. If their actions rise to a serious breach of the Geneva conventions they can be tried for those war crimes under domestic or international law.

Importance of Topic

The following are two cases that highlight the difference in how a suspected terrorist that can be tried by the United States' government and treated based on whether they are designated an enemy combatant. Both cases also highlight the significance in the classification of a

[6] J.S. Pictet (ed.). Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War. International Committee of the Red Cross: Geneva 1958
[7] Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4(2), Aug. 12, 1949, 75 U.N.T.S. 135

suspected terrorist as an enemy combatant. In September of 2017, John Doe, a U.S. Citizen, was detained after his capture in Syria. The U.S. government has accused John Doe of being a member of and fighting for ISIS. After his initial detention, the Pentagon declared that John Doe was an enemy combatant. The government detained John Doe for over a year without charging him with a crime or a ruling on whether or not his designation as an enemy combatant or detention is legal.[8] This case demonstrates the ability of the United States government to detain a U.S. citizen for 13 months without charging him with a crime. The government released John Doe to Bahrain where reportedly his wife and child are residing. How can a citizen of the United States be held for that long without due process afforded to a citizen under the Constitution? According to court documents, the government tried to release him back into Syria, but the court ruled that government could not forcefully send him to Syria without proving they had the authority to keep him under military detention.[9] His release caused the question of whether or not the government had the authority to detain John Doe to remain unanswered; however, the government has set precedence in their ability to hold a U.S. Citizen for a significant amount of time without charging them.

In October of 2017, Sayfullo Saipov, a permanent U.S. resident, drove a truck in a terror attack in New York City killing eight people on a bike path only blocks away from the World

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[8] Charlie Callimcahi Savage, Rukmini Schmitt, Eric, *American ISIS Suspect Is Freed After Being Held More Than a Year*, The New York Times(2018), *available at* https://www.nytimes.com/2018/10/29/us/politics/isis-john-doe-released-abdulrahman-alsheikh.html.

[9] *Doe v. Mattis*, 889 F.3d 745, (United States Court of Appeals for the District of Columbia Circuit May 7, 2018)

Trade Center.[10] In the days following the attack, there was a call from Senators, including John McCain, to classify Saipov, the attacker as an enemy combatant.

"The terrorist attack in New York is the latest brutal, horrific example of the war that radical Islamist extremists are waging against our nation and our way of life. From Orlando to San Bernardino and Boston to Manhattan, we must not consider these attacks on our homeland in isolation, but rather recognize them for what they are: acts of war. As such, the New York terror suspect should be held and interrogated—thoroughly, responsibly, and humanely—as an enemy combatant consistent with the Law of Armed Conflict. He should not be read Miranda Rights, as enemy combatants are not entitled to them. As soon as possible, the administration should notify Congress how it plans to proceed with the interrogation and trial of this suspect."[11]

The White House agreed with McCain and stated it considered Saipov, an enemy combatant. However, prosecutors charged Saipov in federal court with eight counts of murder, twelve counts of attempted murder, racketeering, and providing material support to the Islamic State group. The court set Saipov's trial for October 2019.

Is the term enemy combatant included anywhere in the LOAC as McCain states? Why is Saipov not classified and treated as an enemy combatant like John Doe?

The United States needs to have an actual detention policy that values the policy over politics. Our values as a nation make it imperative that Congress passes legislation that addresses

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[10] Robert Chesney, et al., *Back to the Future on Detention and Military Commissions*, Lawfare (2017).
[11] https://www.mccain.senate.gov/public/index.cfm/press-releases?ContentRecord_id=47259DC1-98E3-41D7-8D59-3A539022DB98

citizen and non-citizen suspected terrorists and whether they are apprehended domestically or internationally.

At the heart of the importance of this issue is the status of enemy combatant violates both the Fourth and Fifth Amendment rights for the accused. The only command that the U.S. Constitution repeats is the Due Process Clause. This clause is violated with the classification of a U.S. citizen as an enemy combatant when that designation results in the denial of due process. Persons must be afforded due process before the government deprives them of their liberty. The Fourth Amendment declares that people have the right to be secure in their persons against unreasonable seizures. If the government arrests a person without a warrant, they are required to be brought before a neutral magistrate to determine probable cause, typically within 48 hours. The Fifth Amendment guarantees that a person cannot be held to answer for a crime unless indicted by a grand jury. It also holds that the government cannot deprive a person of life, liberty, or property without due process of law. Judge Henry Friendly of the 2nd circuit court listed the elements of due process:

"1. An unbiased tribunal;

2. Notice and grounds for the proposed action;

3. An opportunity to show why the proposed action should not be taken;

4. The right to call witnesses;

5. The right to know opposing evidence;

6. The right to have the decision based only on the evidence presented;

7. The opportunity to be represented by counsel;

8. A record of the proceeding;

9. A statement of reasons;

10. Public attendance; and

11. Availability of judicial review"[12]

Classifying and labeling a suspect as an enemy combatant gives the executive power to indefinitely detain, try by military commission, and use targeted killing.

Rumsfeld v. Padilla is an example of a case that raises legal issues when the executive classifies a suspect as an enemy combatant:[13]

Table 1: Decisions in Rumsfeld v. Padilla

Date	Court	Decision
12/4/02	Southern District Court for New York	The President has authority to detain citizens as enemy combatants captured on American soil during times of war.
12/18/03	United States Court of Appeals for the Second Circuit	The President does not have the authority to detain Padilla militarily because …
6/28/05	United States Supreme Court	Dismissed because Padilla should have filed in South Carolina.
2/28/05	United States District Court for the District of South Carolina	The President does not have the authority to detain Padilla because …, Padilla must either be released or criminally charged.

[12] Edward D. Re, *Due Process, Judicial Review, and the Rights of the Individual*, Cleveland State Law Review (1991).
[13] *Rumsfeld v. Padilla*, 542 U.S. 426 (Supreme Court of the United States June 28, 2004, Decided).

Date	Court	Decision
9/9/05	United States Court of Appeals for the Fourth Circuit	The President has the authority to detain Padilla under the AUMF
11/17/05	United States District Court for the Southern District of Florida	Indictment against Padilla
12/21/05	United States Court of Appeals for the Fourth Circuit	Denied the Government's motion to authorize Padilla to be transferred to civilian law enforcement custody.
1/4/06	United States Supreme Court	Granted request to transfer Padilla to civil law enforcement custody.
4/22/07	United States District Court for the Southern District of Florida	Trial
8/16/07	United States District Court for the Southern District of Florida	Jury convicted Padilla of providing material support to terrorists and terrorism conspiracy
1/22/08	United States District Court for the Southern District of Florida	Sentenced to 17 years in prison

Date	Court	Decision
9/5/14	United States District Court for the Southern District of Florida	Re-sentenced to 21 years in prison

In 2009 President Obama publicly committed to governance by the rule of law and constitutional values. "I took an oath to preserve, protect, and defend the Constitution as Commander-in-Chief, and as a citizen, I know that we must never, ever, turn our back on its enduring principles for expedience sake."[14] He also declared that prolonged detention should not be left to the decision of one man, claiming it was imperative that there be a system that involves both congressional and judicial oversite. Obama announced his intentions to close the prison at Guantanamo Bay and in March of 2009 filed in federal District Court for the District of Columbia that it was withdrawing the enemy combatant definition, publicly stopping the use of the term enemy combatant.[15]

On December 25, 2009, Farouk Abdulmutallab, a Nigerian was apprehended in the United States after attempting to bomb an airplane headed for Detroit, Michigan. The Obama administration decided for Abdulmutallab to be tried in federal court:

[14] Barack Obama, Remarks by the President on National Security (National Archives 2009).
[15] Department of Justice, Department of Justice Withdraws Enemy Combatant Definition for Guantanamo Detainees (Office of Public Affairs 2009).

Table 2: Decisions in United States of America v. Umar Farouk Abdulmutallab

Date	Court	Decision
1/6/10	United States District Court for the Eastern District of Michigan	Indictment
10/12/11	United States District Court for the Eastern District of Michigan	Abdulmutallab pleads guilty
2/16/12	United States District Court for the Eastern District of Michigan	Sentenced to four consecutive life sentences plus 50 years
1/13/14	United States Court of Appeals	Upheld conviction

The Department of Defense (DOD) Joint Doctrine for Detainee Operations no longer includes the term enemy combatant. However, the current administration overturned the closure of the prison in Guantanamo Bay via Executive Order #13823.[16] In his state of the Union Address in 2018, President Trump resurrected the term unlawful enemy combatant.[17] In a tweet in March of 2018, he declared that enemy combatants were pouring into the country from Mexico.

> " Because of the $700 & $716 Billion Dollars gotten to rebuild our Military, many jobs are created, and our Military is again rich. Building a great Border Wall, with drugs (poison) and enemy combatants pouring into our Country, is all about National Defense. Build WALL through M!"[18]

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[16] Executive Office of the President, Executive Order 13823 Protecting America Through Lawful Detention of Terrorists (Office of the Federal Register 2018).
[17] Donald Trump, *State of the Union Address* (2018), *available at* https://www.cnbc.com/video/2018/01/30/trump-terrorists-are-unlawful-enemy-combatants-and-should-be-treated-like-the-terrorists-they-are.html.
[18] Donald J. Trump, (@realDonaldTrump ed., Twitter 3:33 a.m. March 25, 2018).

Research Question

As it stands, the Executive has the power to use its discretion in determining the status of a suspected terrorist. Even after designating a suspected terrorist, the executive can change that status when they discover new facts about the suspected terrorist's activities, such as in the case of Padilla. The two main issues to address in this study are how the government created and used the term enemy combatant and how the government claimed we are at war but did not adhere to the "laws of war" in classification and treatment for suspected terrorists.

Is the term enemy combatant an established legal category of persons under international law? Does the president have the authority to classify a United States citizen suspected of terrorism as an enemy combatant? In creating the term and classifying a United States citizen as an enemy combatant, the executive is saying it has the right to *make law* by defining and creating the criteria for an enemy combatant and the right to *adjudicate* by classifying those suspects as enemy combatants all while claiming to adhere to U.S. laws and the laws of war.[19]

[19] Louis Fisher, *Detention and Military Trial of Suspected Terrorists: Stretching Presidential Power*, 2 Journal of National Security Law & Policy (2006).

Prior Research

The bulk of scholarly research on the term enemy combatant deals with whether the president has the authority to detain those whom the government has designated as enemy combatants, rather than whether or not the executive has the authority to classify suspected terrorists as an enemy combatant. However, many scholars argue for the use of enemy combatant classification based on precedence set in *Ex parte Quirin* and the fact that the United States is a participant in the Global War on Terror.

Precedence for the Term Enemy Combatant

The term "unlawful combatant" was first used in 1942 in the U.S. Supreme Court case of *Ex parte Quirin*. During World War II, eight Nazi spies entered the United States and after they were detained challenged their denial of prisoner of war protections. From this case the following precedent was given:

> "By universal agreement and practice, the law of war draws a distinction between…lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants …are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[20]

[20] *Ex parte Quirin*, 317 U.S. 1, (Supreme Court of the United States July 31, 1942, Decided. Per Curiam decision filed, July 31, 1942. Full Opinion filed, October 29, 1942.)

The court ruled 24 hours after the argument that the saboteurs could be tried via military commission, and gave its full opinion three months later. Six of the eight saboteurs were executed eight days after the ruling was given by the Court.[21] On November 13, 2001, President Bush issued a military order for detention and trial by military commission of non-U.S. citizens who offer assistance to or who are a part of al Qaeda. The military order is strikingly similar to President Franklin D. Roosevelt's Proclamation 2561 from 1942. FDR's gave his proclamation after the FBI captured the spies from the *Quirin* case. Both the proclamation in 1942 and 2001 required an only two-thirds vote of the military commission for conviction, and both called for a "full and fair trial."[22] In the plurality opinion in *Hamdi v. Rumsfeld* the *Quirin* case was "the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances."[23]

Global War on Terror

A week after the attacks on September 11, 2001, Congress passed the AUMF but did not "declare" war under Article I of the Constitution. This joint resolution became what the executive would use to justify the "War on Terror legally." The key to this resolution was it stated that the President had the authority to "deter and prevent acts of international terrorism against the United States[24]" Congress clearly yields to the president the first zone that Justice Jackson speaks of in the *Youngstown* case: "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in

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[21] Stephen Dycus, et al., Counterterrorism Law (Aspen Publishers. 2007).
[22] Louis Fisher, *Detention and Military Trial of Suspected Terrorists: Stretching Presidential Power*, 2 Journal of National Security Law & Policy (2006).
[23] *Hamdi v. Rumsfeld*, 542 U.S. 507 (Supreme Court of the United States June 28, 2004, Decided),
[24] Authorization for Use of Military Force Joint Resolution 224 (2001).

his own right plus all that Congress can delegate."[25] Based on this authorization many scholars would argue that the president does have the authority to detain those suspected terrorists whom they classified as enemy combatants. This detention could be continued through the end of the hostilities. While the U.S. military killed Osama Bin Laden in 2011, there have been other terrorist attacks such as the ones in Libya, Paris, San Bernardino. The threat of terrorism is still a national security concern, and the United States finds itself in an unending war.[26] With hostilities still at bay, the argument could be made that it is in the best interest of national security to make sure that the terrorists that are still detained should not be returned to the "battlefield." Justice O' Connor agreed with this sentiment in the opinion outlined in *Hamdi*.[27]

With the zone of authority that the executive is acting in being explicit expresses by Congress, there was much disagreement of executive staff such as John Yoo in the Supreme Court "injecting" itself into military matters.[28] He also argued that while al Qaeda was not a nation-state that terrorism was a matter of war, not crime. Terrorism is an enemy, not just a tactic and not an issue of criminal law.[29] The theory that the United States is at war yields another argument that the president is acting as Commander in Chief and within his authority to detain enemy combatants as part of this waging war.

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[25] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, (Supreme Court of the United States June 2, 1952, Decided)
[26] Justin A. Thatch, *The Lesser of Two Evils: Exploring the Constitutionality of Indefinite Detentions of Terror Enemy Combatants Following the End of "Combat Operations" in Afghanistan*, 24 William & Mary Bill of Rights Journal (2016).
[27] Brian J. Foley, *Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 The Journal of Criminal Law and Criminology (2007).
[28] Peter Berkowitz, Terrorism, the Laws of War, and the Constitution: Debating the Enemy Combatant Cases (Hoover Institution Press. 2005).
[29] *Id.*

Scholars who are against the term enemy combatant and its implications cites its violation of due process and separation of powers.

Due Process

The Fifth Amendment states that the government may not deprive a person of liberty without "due process of law." The Fourteenth Amendment prohibits the government from depriving anyone of "life, liberty, or property, without due process. The government is using the label as "terrorist" to deprive citizens of the requirements of due process. The executive from the outset of the war on terror had determined that enemy combatants not be privy to due process. Justice Souter during oral arguments in *Hamdan v. Rumsfeld*, interrupted the Solicitor General when he tried to say the writ did not apply to enemy combatants outside the U.S. "The writ is the writ…. There are not two writs of habeas corpus for some cases and for other cases" (*Hamdan v. Rumsfeld*, oral argument 59, lines 3-7). In fighting the Global War on Terror, the United States is at risk of going against its long-standing commitment to due process.[30]

Separation of Powers

While not expressively written in the constitution there is a constitutional relationship between the different branches of government. Text from the constitution that supports the separation of power doctrine stem from the first three articles, "All legislative Powers herein granted shall be vested in a Congress of the United States,"[31] "the executive Power shall be

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[30] J. L. Mashaw, *Due Processes of Governance: Terror, the Rule of Law, and the Limits of Institutional Design*, 22 Governance – An International Journal of Policy Administration and Institutions (2009).
[31] U.S. Const. art. 1

vested in a President of the United States of America,"[32] and "the judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[33] In forming the government, the framers were well aware of the danger of centralized power in a single branch.[34] In *Duncan v. Kahanamoku,* the Supreme Court reiterated that the "framers were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws."[35] Also in *Reid v. Covert* Justice Black warned that if the Executive "can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials."[36]

According to Justice Powell in *INS v. Chada*, there are ways to violate the separation of power doctrine, "One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that properly is entrusted in another."[37]

The main breach of norms in the classification of enemy combatants is that the executive makes a decision that does not give the opportunity for judicial review.[38] The argument in

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[32] U.S. Const. art. 2
[33] U.S. Const. art. 3
[34] Louis Fisher, *Detention and Military Trial of Suspected Terrorists: Stretching Presidential Power*, 2 Journal of National Security Law & Policy (2006)
[35] *Duncan v. Kahanamoku,* 327 U.S. 304, (Supreme Court of the United States February 25, 1946, Decided)
[36] *Reid v. Covert,* 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148, 1957 U.S. LEXIS 729 (Supreme Court of the United States June 10, 1957, Decided)
[37] *Immigration & Naturalization Service v. Chadha,* 459 U.S. 1097, 103 (Supreme Court of the United States January 10, 1983)
[38] Louis Fisher, *Detention and Military Trial of Suspected Terrorists: Stretching Presidential Power*, 2 Journal of National Security Law & Policy (2006)
Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 Journal of National Security Law & Policy (2005).

classifying a suspected terrorist as an enemy combatant that is a judicial function likened to preventative detention. The prosecution keeps this process secret from the suspect and the judiciary branch. This paper will use the separation of power doctrine and due process clause to argue that the executive does not have the authority to classify suspected terrorists as enemy combatants.

Research Approach

There is a gap in addressing the president's authority to *classify* enemy combatants. A variety of methods will be used to fill this gap and seek to answer the question of whether the executive should have the authority to classify a U.S. citizen. This qualitative study will use normative legal research. The normative legal research process examines legal rules, doctrines, and principles to address the legal issue at hand in the case of classification of enemy combatants. The focus will be on the principles of the law in classifying a U.S. citizen as an enemy combatant as well as the legal history of the term.[39] The analysis of the legal history of the term enemy combatant will be completed by content analysis using Nvivo 12 software of documents such as the Geneva Convention, Executive Orders, Federal Court Cases, Joint Publication of Detainee Operations, the DTA and MCA, Army Field Manual, DOD Law of War Publication, and Senate Floor Speeches. This software will help identify patterns of the use of the term enemy combatant across all the different data sources and help analyze how it became to be seen as a norm of U.S. detention policy and help identify inter-branch dialogue on the issue.

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[39] Theresia Anita Christiani, *Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object*, 219 Procedia - Social and Behavioral Sciences (2016).

This study will also include as case studies the different enemy combatant cases. These cases include *Hamdi, Padilla, Rasul v. Bush, Al-Marri, Hamdan, Lindh, Moussaui*, *Saipov,* and *Dzhokhar Tsarnaev.*

Each case study will observe the date, background, whether the defendant is a U.S. citizen. The analysis will also look at where they were apprehended, where their apprehension was of military origin, if the government classified the suspect as an enemy combatant, where the government is detaining the suspect, what charges if the government brought any charges against the accused, and how the court ruled in each case in regards to their treatment, detention, and status as a suspected terrorist. The case studies will also be analyzed to see if the treatment and prosecution of suspected terrorists fall more along the spectrum of an act of war or transnational crime.

Limitations

This study will be limited to addressing policy regarding classifying suspected terrorists as enemy combatants regardless of where the government is detaining the suspect as well as the nature of their alleged terrorist activities. The study will not focus on whether the president has the authority to militarily detain a suspected terrorist once the government has classified the suspect as an enemy combatant. The current study will also be limited it will not address the detainees that the U.S. is still holding at the prison in Guantanamo Bay, Cuba or whether or not the prison should close. The main focus is on what guidelines the United States should adhere to when a suspect is accused of terrorism.

Description of Proposed Chapters

Chapter II will look at the origins of the term enemy combatant. Using content analysis of various text sources the origin of the term and the frequency of use through 2018 will be

analyzed. In a preliminary analysis, the term enemy combatant originates in statements from George Bush in 2001 and makes its way into the DOD joint doctrine manuals on detainee operations in 2004 and 2008. By 2014 the term enemy combatant is no longer in the detainee operations manual and is replaced by the term *belligerent*.

Chapter III will briefly look at how the federal courts have ruled regarding the term enemy combatant. This chapter will highlight the cases of *Hamdi, Padilla, Rasul v. Bush, Hamdan v. Rumsfeld* as well as other more recent District Court cases.

Chapter IV will look at how the separation of powers doctrine speaks to whether the executive should have the unilateral power to classify U.S. citizens as enemy combatants. Regardless of whether the global war on terror is an actual war, the case of *Youngstown Sheet & Tube Company v. Sawyer* addresses the power of the executive. A state of war is not a "blank check" when it comes to the rights of United States citizens. Here it will also be discussed how the Due Process Clause is violated and how classifying as an enemy combatant can be likened to preventative detention. In this case, the executive is acting as all three branches in establishing the criteria, classification, and application of a suspect as an enemy combatant. It will also present a suggestion for a codifiable policy when someone is detained as one who is accused of terrorism that takes into consideration both the security of the United States and the individual rights of the accused. It will also argue how having such a policy that adheres to the values of human rights will help the United States strengthen its National Security.

CHAPTER TWO: HISTORY OF THE TERM ENEMY COMBATANT

Introduction

To argue whether or not the executive has the authority to classify a United States citizen as an enemy combatant, we first must understand where the term came from and whether or not it differs from precedence. The following chapter will look at how the term "enemy combatant" first started to be used by the United States government and how it evolved to its present-day use.

History of the Term Enemy Combatant Pre-9/11

> "I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that: (1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant…it is REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as enemy combatant."[40]

One would assume that based on this quote from President George W. Bush that the classification of enemy combatant is, in fact, a part of an established term in international law. However, as the next section will show that all uses of the term enemy combatant before 9/11 in published case law were inconsistent in who and where they were applied. Leading up to this designation of Jose Padilla there were only two types of combatants established in international law, lawful combatants (those who were entitled to POW status under the Geneva Conventions) and unlawful combatants (those who were not entitled to POW status.)

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[40] *Padilla v. Hanft*, 423 F.3d 386, (United States Court of Appeals for the Fourth Circuit September 9, 2005, Decided)

Use of the term Enemy Combatant in *ex parte Quirin*

The term enemy combatant was used only once in the Supreme Court case *Ex Parte Quirin* in 1942.

> "The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an ***enemy combatant*** who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."[41]

The use in *Quirin* is against a clearly defined enemy (Germany) with a clearly defined conflict (WWII). In the one sentence that it the term is used, the court is addressing the question of whether or not the president has authority to try these spies via a military tribunal because of the violations of the laws of war. The government applied the term enemy combatant to non-citizens and one naturalized citizen. Throughout the opinion, the terms "unlawful combatant," "enemy belligerent," and "enemy combatant" seemed to be used interchangeably as a descriptive term for those spies who had violated the laws of war. The terms "enemy belligerent" and "unlawful combatant" appear more than ten times. The opinion would offer up a definition for the term "unlawful combatant."

> "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[42]

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[41] *Ex parte Quirin*, 317 U.S. 1, (Supreme Court of the United States July 31, 1942, Decided. Per Curiam decision filed, July 31, 1942. Full Opinion filed, October 29, 1942.)
[42] *Ex parte Quirin*, 317 U.S. 1 at 31

In the main holding whether or not the government could try the spies by military tribunal did not depend on how the term "enemy combatant" was used or how it was defined. It is interesting to note that the term "unlawful combatant" become an established term in international law as it is referred to in the 1949 Geneva Convention.

Use of the term Enemy Combatant in *Yamashita* and other case law

Between 1946 and 2001 the term "enemy combatant" was used in varied contexts in seven different cases. In *re Yamashita*, the court addressed the question as to whether or not there was the authority to try the captured Commanding General of the Japanese Army on the Philippine Islands after the hostilities had ended. The term "enemy combatant"' was used 11 times describing those foreign captured soldiers who had violated the laws of war.[43]

> "The trial and punishment of ***enemy combatants*** who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war."[44]

This case did not give a formal definition to the term enemy combatant, and the government applied the term to a non-citizen who was a member of a part of an armed force that the United States had declared war. In *Madison v. Kinsella* the term "enemy combatant" was used from a quote from the decision in *Yamashita*, "by thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction as we held in *Ex Parte Quirin*, to any use of military commission contemplated by the common law of war." Madsen was a widow who was charged by the

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[43] *In re Yamashita*, 327 U.S. 1, (Supreme Court of the United States February 4, 1946, Decided)
[44] *In re Yamashita*, 327 U.S. 1 at 11-12

German government with killing her husband in 1949 violating Germany's criminal code. The court allowed the German military tribunal to try Madsen for killing her husband. There is no mention of the term "enemy combatant" in case law between 1952 and 1991.

In the Court of Military Review, the term enemy combatant is used in three cases between 1991-2001. In *U.S. v. Peri, U.S. v. Rankins, and U.S. v. McMonagle* "enemy combatant" is used as a descriptive term for enemy fighters or soldiers.[45] The uses of the term "enemy combatant" in case law prior to September 11, 2001, in no way, establishes uniform meaning or legal significance. In each instance, the government used the term enemy combatant to apply to different circumstances that in do not set a precedent to how it was used in the application of those who were accused of terrorism after the September 11th attacks.

History of the Term Enemy Combatant Post-9/11

After the attacks in the United States on September 11, 2001, the first time the term "enemy combatant" appears is in a Chicago Law Bulletin titled, "Rules of Engagement." Referring to the attacks, "last week's terrorism was not a crime but an act of war, its perpetrators are not criminals to be prosecuted but ***enemy combatants*** to be shot"[46] Nowhere does it appear to be used by the government or in case law until February 2002 in the case *Coalition of Clergy v. Bush.*[47] The case was a habeas petition to identify the detainees that the government was holding in Guantanamo Bay. The court ruled plaintiffs did not have standing.

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[45] *United States v. Peri,* 33 M.J. 927, (United States Army Court of Military Review November 26, 1991) [add other cases in footnotes]
[46] Cassel Douglass W., *Rules of Engagement,* 147 Chicago Daily Law Bulletin (2001).
[47] *Coalition of Clergy v. Bush,* 189 F. Supp. 2d 1036, (United States District Court for the Central District of California February 21, 2002, Decided).

> "In all key respects, the Guantanamo detainees are like the petitioners in *Johnson*: They are aliens; they were ***enemy combatants***; they were captured in combat; they were abroad when captured; they are abroad now; since their capture, they have been under the control of only the military; they have not stepped foot on American soil; and there are no legal or judicial precedents entitling them to pursue a writ of habeas corpus in an American civilian court."[48]

Judge Matz notes that the detainees were "aliens" and "enemy combatants." In all filed documents and arguments the government used the term "enemy aliens" to refer to those whom the U.S. government was holding at Guantanamo Bay, not "enemy combatants." In the opinion, Judge Matz does not address anything about the designation of the detainees just that they had no standing to seek the writ.

The first time the government uses the term in on March 21, 2002. William Lietzau, Special Advisor to the General Counsel in the Office of the Secretary of Defense, was helping Paul Wolfowitz prepare for an interview on the United States detention policy. According to Lietzau, there was the discussion that it would be wise to stop using the term "unlawful combatant" so frequently because it suggested there was already judgment as to the detainee's guilt. The United States was holding detainees because they were enemies, not because they were criminals. When Wolfowitz inquired as to what other terms could be used Lietzau answered that perhaps he should use enemy combatant:

> "because it then designates them with the appropriate adjective to describe why we're holding them. We're holding them because they're the enemy not because they've done something unlawful. A lawful combatant or an unlawful combatant can be held just as well."[49]

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[48] *Coalition of Clergy v. Bush,* 189 F. Supp. 2d at 32.
[49] https://www.huffingtonpost.com/peter-jan-honigsberg/the-real-origin-of-the-te_b_4562216.html

After the meeting, Lietzau ran the term by the Deputy General Counsel for International Affairs, Chuck Allen, and to General Counsel to the Department of Defense, William Haynes and they all agreed that it should be the term that the government should use. It was not until after Lietzau brought up the term to this group that it the DOD found it in *Quirin*. The executive cited *Quirin* as both the "origin and the justification for the use of the term enemy combatant, happened after the term was adopted. *Quirin* was a post hoc rationalization." Lietzau stated in an interview, "I'd like to say I was so well-versed in *Quirin* that I pulled it directly from the case, but no. It was logic. It was the English language. I was thinking in terms of what the American people would understand." While it was intended to be a descriptive term at the outset of its introduction, it evolved into something much more.

Later on that day on the PBS News Hour, Deputy Secretary of Defense Paul Wolfowitz agreed to be interviewed to discuss the rules governing military tribunals.

> "I think it's important to recognize that the people who are in Guantanamo are there because they're ***enemy combatants*** seized in a war, a war on terrorism. Most of them probably– I don't know the exact legal term, but they are not normal combatants in a sense of being in uniform. There's a lot that's very unique about this conflict. Some of them are in fact criminals. They're not only ***enemy combatants***, they're people who are guilty of being involved probably or possibly in serious crimes of terrorism."[50]

In this interview, the term enemy combatant is used to address detainees that the government seized in the war on terrorism. Wolfowitz even after receiving coaching from Lietzau is not clear on what the legal term is for those held in Guantanamo. If they are not the usual combatants in the sense of being in uniform, then one could assume they were unlawful

[50] https://www.pbs.org/newshour/show/newsmaker-deputy-secretary-of-defense-paul-wolfowitz

combatants. It is confusing how he declares the detainees could be both criminals **and** enemy combatants.

That same day in a Pentagon briefing General Counsel to the Department of Defense William Haynes used the term enemy combatant, "we may hold ***enemy combatants*** for the duration of the conflict," to which he added even if the enemy combatants were tried and acquitted in a military tribunal.[51]

On June 8, 2002, the U.S. Department of Justice Office of Legal Counsel published a memo giving their opinion to the Attorney General as to whether Jose Padilla qualified as an enemy combatant "under the laws of armed conflict."[52] The memo claimed that the President has authority as Commander in Chief to seize and detain "enemy combatants" beyond uncertainty. It also goes on to argue that "this authority to seize enemy combatants has been exercised in conflicts throughout the history of the Nation, from the time of the Founding to the present."[53]Then the memo continues to quote Jefferson Davis "have been heretofore and are yet held as *prisoners of war."* The next day President George W. Bush signed the order to officially designating Padilla as an enemy combatant, claiming it was consistent with the law of war.[54]

In June and July, different members of the executive branch began to use the term enemy combatant freely. June 12, 2002, Deputy Commander of the Joint Task Force in Guantanamo

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[51] Peter Jan Honigsberg, *The Real Origin of the Term "Enemy Combatant"* (2014), *available at* https://www.huffingtonpost.com/peter-jan-honigsberg/the-real-origin-of-the-te_b_4562216.html.
[52] Memorandum for Attorney General, Office of Legal Counsel, from: Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Determination of Enemy Belligerency and Military Detention* (June 8, 2002).
[53] *Id.*
[54] *Padilla v. Hanft,* 423 F.3d 386, (United States Court of Appeals for the Fourth Circuit September 9, 2005, Decided)

identifies Hamdi as an enemy combatant. In July 2002, Michael Mobbs, Special Advisor to the Under Secretary of Defense for policy also identified Hamdi as an enemy combatant. On July 15, 2002, in the United States Report to the Inter-American Commission on Human Rights (IACHR), "[t]he unchallenged state practice of detaining ***enemy combatants*** in time of armed conflict was not subject to review by the Commission."[55] DOD issued on July 17, 2002, "News About the War on Terrorism," featuring a member of the Coast Guard whose job it was to "patrol waters around Guantanamo Bay, Cuba, to support Joint Task Force 160." The Joint Task Force was "a multiservice command in charge of detention operations here of captured ***enemy combatants***."[56]

After the summer of 2002, Congress started to question this expansion of executive authority in detaining United States citizens. In September, the Armed Services Committee Chairman Senator Carl Levin and Judiciary subcommittee Chairman Senator Russ Feingold sent a letter demanded information on why the government was detaining two United States citizens (Hamdi and Padilla) as "enemy combatants." The letter also admonished Attorney General John Ashcroft for ignoring their five earlier congressional inquiries. Some of the questions asked in the letter were:

"What is the operative definition of ***'enemy combatant'*** and what are the criteria used to determine whether a United States citizen will be designated an enemy combatant?

"What is the process for designating a person an "***enemy combatant***"? What agency or individual has the responsibility to make such a designation? Is the ultimate authority to designate a United States citizen as an ***enemy combatant*** reserved for the president?

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[55] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *U.S. Additional Response to the request for precautionary measures --detention of enemy combatants at Guantanamo Bay, Cuba, IACHR*(2002), *available at* https://www.state.gov/s/l/38642.htm.

[56] Rudi Williams, *Special Coast Guard Unit Patrols Waters Around Gitmo*, DOD News(2002), *available at* http://archive.defense.gov/news/newsarticle.aspx?id=43719.

"Do the criteria for determining ***enemy combatant*** status vary depending upon whether an individual is a citizen of the United States? Do the criteria vary if the person is taken into custody outside the United States? Do they vary if the person is taken into custody on the battlefield?

What rights does a United States citizen designated as an ***enemy combatant*** have to challenge that designation other than the right to habeas corpus review? What is the scope of the detainee's right to counsel if the detainee seeks to challenge the ***enemy combatant*** designation?

What are the time limits on the government's authority to detain United States citizens designated as ***enemy combatants***?

Are any other U.S. citizens besides Hamdi and Padilla being held as ***enemy combatants***?"[57]

On November 26, 2002, Haynes responded to the letter from Senator Carl Levin and Senator Russ Feingold inquiring as to the designation of enemy combatants. Haynes writes that the operative definition of enemy combatant "is an individual who, under the laws and customs of war, may be detained for the duration of the armed conflict. "[t]he United States may detain enemy combatants throughout the conflict (and thereafter if they are convicted of war crimes or other criminal offenses)." Again in December of 2002 Haynes then says, "'Enemy Combatant' is a general category that subsumes two sub-categories: lawful and unlawful combatants. See Quirin. He then indicates that the President has determined that al Qaeda members and Taliban detainees are "unlawful combatants "who "do not receive POW status and do not receive the full protections of the Third Geneva Convention."[58] This is a confusing clarification. In referring to al Qaeda and Taliban detainees as unlawful, Haynes is allowing the possibility that some of the enemy combatants could be lawful combatants (which would make them entitled to POW status.)

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[57] https://www.upi.com/Senators-demand-info-on-enemy-combatants/15021031391913/

[58] Peter Jan Honigsberg, Our Nation Unhinged : The Human Consequences of the War on Terror (Berkeley : University of California Press, 2009).

In October of 2002 a bill was introduced in Congress titled the Detention of Enemy Combatants Act, HR 5684.[59] It sought to give "broad latitude" to the Executive in regards to the detention of enemy combatants.

> "The term "**enemy combatant**" has historically referred to all of the citizens of a state with which the Nation is at war, and who are members of the armed force of that enemy state. **Enemy combatants** in the present conflict, however, come from many nations, wear no uniforms, and use unconventional weapons. **Enemy combatants** in the war on terrorism are not defined by simple, readily apparent criteria, such as citizenship or military uniform. And the power to name a citizen as an "**enemy combatant**" is therefore extraordinarily broad."

Here it seems as if Congress is applying the term enemy combatant for both lawful combatants (members of an armed force of an enemy state) and unlawful combatants (wear no uniforms). The Geneva Conventions clearly state what category a person is in when they do not wear a uniform. It is not clear as to why extraordinarily broad power is necessary to be delegated to the President by Congress. However, this bill was only authorizing the executive to detain those enemy combatants that were members of al-Qaeda. The bill goes on to also say,

> "Nothing in this Act permits the Government, even in wartime, to detain American citizens or other persons lawfully in the United States as **enemy combatants** indefinitely without charges and hold them incommunicado without a hearing and without access to counsel on the basis of a unilateral determination that the person may be connected with an organization that intends harm to the United States… The Congress has a responsibility for maintaining vigorous oversight of detention of United States citizens and lawful residents to assure that such detentions are consistent with due process."

This bill never made it to a committee, but one can infer that if Congress proposed legislation to give authority to the executive, then that authority was not there before Congress

[59] H.R.5684 - Detention of Enemy Combatants Act 107th Congress (2001-2002)

gave it. Another critical thing to note was that this proposed legislation had an expiration date of December 5, 2005, in Congress' eyes detention was not meant to be indefinite.

By 2004 federal courts were weighing in on cases that had the term enemy combatant. The following chapter discusses the details and backgrounds of each case. This chapter will focus solely on the evolution and use of the term enemy combatant in these court cases. In the *Hamdi* case, the court used the following definition of enemy combatant when it was ruling on the authority of the executive to detain. [F]or purposes of this case, the "enemy combatant" that it [the United States] is seeking to detain is an individual who, it alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in armed conflict against the United States" there."[60]

Even though the government was using the term enemy combatant from the beginning of 2002, it did not appear in published military operation manuals until 2004. In the Joint Publication 2-01 Military Doctrine Joint and National Intelligence Support to Military Operations. In the responsibilities section, it describes, "[s]service component interrogators collect tactical intelligence from EPWs [Enemy POWs] and ECs [enemy combatants] based on joint force J-2 criteria." The manual lists two categories of detainees listed EPW's are "lawful combatants" and ECs are "unlawful combatants." The glossary section contains the following EC = "[a]ny person in an armed conflict who could be properly detained under the laws and customs

[60] *Hamdi v. Rumsfeld*, 542 U.S. 507,(Supreme Court of the United States June 28, 2004, Decided).

of war." The field manual was inconsistent with what the government rhetoric up until this point. This definition could include both lawful and unlawful.

In March of 2005 the Joint Doctrine for Detainee Operations (JP 3-63) created a new category of detainee, "Following the events of September 11, 2001, a new category of detainee, enemy combatant (EC), was created for personnel who are not granted or entitled to the privileges of the Geneva Convention"[citation] it goes on to say in regards to detainees:

> "Any person that US or allied forces could properly detain under the laws and customs of war. For purposes of the war on terror, an ***enemy combatant*** includes, but is not necessarily limited to, a member or agent of Al Qaeda, Taliban, or another international terrorist organization against which [the] United States is engaged in an armed conflict. This may include those individuals or entities designated in accordance with references E or G, as identified in applicable Executive Orders approved by the Secretary"(insert citation)

In this operations manual, the four categories of detainees that are protected under the Geneva Conventions are an Enemy Prisoner of War, Civilian Internees, Retained Persons, and Other Detainees. It goes on to describe an "additional classification of enemy combatant.

> "[i]n reference to the Global War on Terror there is an additional classification of detainees who, through their own conduct, are not entitled to the privileges and protections of the Geneva Conventions. These personnel, when detained, are classified as ***enemy combatants***."

The JP 3-63 contradicts itself in saying that an enemy combatant is a type of detainee that the government can properly detain under the law and customs of war, yet it then says that an enemy combatant is a new category of a detainee that is not entitled to the privileges of the Geneva Convention. Moving on to the detainee classification section, the definition of enemy combatant is solely by reference to Executive Order 13224, which applies to "anyone detained that is affiliated with [terrorists and terrorist groups identified under this order]"(citation) It further classifies enemy combatants into five sub-categories including Low-Level Enemy Combatant,

High-Value Detainee, Criminal Detainee, High-Value Criminal, and Security Detainee. In the glossary of JP 3-63 defines enemy combatant as "any person in an armed conflict who could be properly detained under the laws and customs of war. Also called EC."

In the Second Periodic Report of the United States of America to the Committee Against Torture dated May 6, 2005, the government used enemy combatant and unprivileged combatant interchangeably. This stance reverts to an earlier declaration that an enemy combatant is the same as an unlawful or unprivileged combatant.

> "After the President's decision [not to grant POW status to the Taliban and al Qaeda detainees] the United States concluded that those who are part of al-Qaeda, the Taliban or their affiliates and supporters, or support such forces are ***enemy combatants*** whom we may detain for the duration of hostilities; these *unprivileged combatants* do not enjoy the privileges of POWs (i.e., privileged combatants) under the Third Geneva Convention."

This definition is inconsistent with DOD definitions in JP 3-63 and Haynes definition in December of 2002.

For the Combatant Status Review Tribunal (CSRT), which were created in response to the rulings in *Hamdi v. Rumsfeld* and *Rasul v. Bush*, the term enemy combatant, was defined:

> "'***enemy combatant***' shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has *committed a belligerent* act or has directly *supported* hostilities in aid of enemy armed forces."

Under the Geneva Conventions, a person that commits a belligerent act can either be lawful or unlawful, so this could include lawful combatants who are entitled to POW status. The CSRT is inconsistent with Article 5 of the Third Geneva Convention which "requires that a competent tribunal make the decision as to stats. The decision making power of the CSRT panel members are limited to whether the detainees are enemy combatants. The panel members are not given

authority to determine whether any of the detainees are lawful combatants and therefore protected by POW status.

In *Hamdan v. Rumsfeld* Justice Stevens applied the government's definition of enemy combatants to those detainees that were being held in Guantanamo, "[a]n 'enemy combatant' is defined by the military order as 'an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[61] Later that year in the Military Commissions Act of 2006 (MCA 2006) enemy combatant is defined as an unlawful enemy combatant:

> "(1) Unlawful enemy combatant.--(A) The term unlawful enemy combatant' means-- "(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or "(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense."[62]

The MCA differentiates between "unlawful enemy combatant" and "lawful enemy combatant." A lawful enemy combatant is a member of the regular forces of a State party engaged in hostilities against the United States." At first glance, it may seem that Congress is reiterating classifications of persons that are included in the Geneva Conventions. However, it also states that no "unlawful enemy combatant" may "invoke the Geneva Conventions as a source of rights."[63] The MCA in 2006 amended the Title X 948(a) to include this definition of "unlawful

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[61] *Hamdan v. Rumsfeld*, 548 U.S. 557, (Supreme Court of the United States June 29, 2006, Decided).
[62] MILITARY COMMISSIONS ACT OF 2006, 109 P.L. 366, 120 Stat. 2600, 2006 Enacted S. 3930, 109 Enacted S. 3930 (October 17, 2006)
[63] *Id.*

enemy combatant. In 2009 948a was amended again. The terms "unlawful enemy combatant" and "lawful enemy combatant" were replaced with "unprivileged enemy belligerent" and "privileged belligerent."[64] In Title X 948c "alien unprivileged enemy belligerents" are subject to military commissions.

In *Boumediene v. Bush*, the court "delegated the decision as to which definition of enemy combatant should govern those proceedings."[65] The government did not use the definition that was adopted by the MCA, it mimicked the definition used in *Hamdan*, "an "enemy combatant" is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[66]

In the spring of 2009, the Department of Justice under the Obama administration issued a memo with a distinct change in policy regarding the term enemy combatant. "It provides that individuals who supported al Qaeda or the Taliban are detainable only if the support was substantial. Moreover, it does not employ the phrase "enemy combatant."[67] The memo states clearly that the president's authorization does not come from the authority as Commander-in-Chief separate from Congress' authorization. The goal was to develop a new policy regarding the detainees that fell in line with American values, strengthen national security, and governed by law.[68]

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[64] § 948a. Definitions, 10 USCS § 948a.
[65] *Boumediene v. Bush*, 553 U.S. 723, (Supreme Court of the United States June 12, 2008)
[66] *Id.*
[67] https://www.justice.gov/opa/pr/department-justice-withdraws-enemy-combatant-definition-guantanamo-detainees
[68] *Id.*

Something interesting that was found during the content analysis using Nvivo was proposed legislation H.R. 4415 from 2010. “To amend title 10, United States Code, to authorize the President to determine that certain individual are ***unlawful enemy combatants*** subject to trial by military commissions, and for other purposes.” The fact that this bill seeks to give authorization to the president to classify enemy combatant could mean that the authorization is not there. This bill never made it past committee. However the definitions changed in title 10 in 2009 to enemy belligerent, so it is confusing why the proposed legislation was worded in this way.

The evolution of the term enemy combatant continues to this day. As discussed in chapter one, regarding the suspected terrorist in October of 2017 there was dialogue as to the fact that Saipov should be declared an enemy combatant. There were calls for the suspect to be interrogated as an enemy combatant consistent with the Law of Armed Conflict.

In the State of the Union address in 2018, President Donald Trump declared, “Terrorists are not merely criminals, they are unlawful enemy combatants.” Trump also has tweeted that enemy combatants are pouring over the border from Mexico. Most recently a U.S. citizen was declared by the Pentagon to be an enemy combatant and held for 13 months without charges being filed.

As shown in the table below the definition and use of the term enemy combatant is inconsistent in both its definition and how it applied. Even though it is no longer in Title X of the U.S. code, the term enemy combatant is still being used by both members of Congress and the Executive branch. Before 9/11 the term was used as a descriptive term and used interchangeably with the term "unlawful combatant." There was no international meaning before the government began using it after the attacks in 2001.

Table 3: History of the Use of Enemy Combatant Post 9/11

Date	Source	Use
2/2002	*Coalition of Clergy v. Bush*	***enemy combatants***; they were captured in combat; they were abroad when captured
3/2002	Lietzau, General Counsel DOD	Appropriate adjective to describe why we're holding them. We're holding them because they're the enemy not because they've done something unlawful.
3/2002	Wolfowitz, DOD	On the detainees in Guantanamo- ***enemy combatants*** seized in a war, a war on terrorism
3/2002	Haynes, General Counsel DOD	"We may hold ***enemy combatants*** for the duration of the conflict"
6/2002	Jay S. Bybee DOJ OLC	Padilla qualifies as an ***enemy combatant*** under the laws of armed conflict.
6/2002	George W. Bush	Designates Jose Padilla as an ***enemy combatant***.
6/2002	Deputy Commander of the JTF in Guantanamo	Designates Hamdi as an ***enemy combatant***.
7/2002	Michael Mobbs, Special Advisor to the Under Secretary of Defense	Also designates Hamdi as an ***enemy combatant***.
7/2002	U.S. report to IACHR	Detaining ***enemy combatants*** is not subject to review by the commission.
7/2002	DOD	Described detainees being held at Guantanamo as ***enemy combatants***.
9/2002	Levin & Feingold, Senate	Questioned the detention of American citizens as ***enemy combatants***.
10/2002	Proposed Legislation HR 5684	***Enemy combatant*** that are U.S. citizens can only be detained if they are members of or supported al-Qaeda
11/2002	Haynes, General Counsel DOD	***Enemy combatants*** can be held throughout the conflict
12/2002	Haynes, General Counsel DOD	***Enemy combatants*** include sub-categories of lawful and unlawful combatants
2004	*Hamdi v. Rumsfeld*	***Enemy combatant*** is a part of or supporting forces hostile to the United States or coalition partners who engaged in armed conflict against the United States
2004	JP 2-01	***Enemy combatant*** any person in an armed conflict who could properly be detained under the laws and customs and war
2004	CSRT	***Enemy combatant*** individual who was part of or supporting Taliban or al Qaeda forces, or

Date	Source	Use
		associated forces that are engaged in hostilities against the United States or its coalition partners
2005	JP 3-63	Enemy Combatant is a new category of detainee who is not privy to Geneva Convention protections
5/2005	Report to CAT	Any person who could properly be detained under the laws and customs of war
2006	*Hamdan v. Rumsfeld*	'an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners
2006	MCA	Changed to "unlawful enemy combatant" a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant
2008	*Boumediene v. Bush*	Uses the same definition as *Hamdan*
2009	Title X 948a	"unlawful enemy combatant" changed to "unprivileged enemy belligerent"
2009	Department of Justice	Withdraws enemy combatant definition for Guantanamo Detainees
2010	Proposed Legislation H.R. 4415	authorize the President to determine that certain individuals are unlawful enemy combatants
2017	Senator John McCain	Suspected terrorist should be interrogated as an enemy combatant consistent with the Law of Armed Conflict. Does not have Miranda Rights
2018	President Donald Trump	Terrorists are enemy combatants; they are pouring over the Mexican border
2018	Pentagon	Declares U.S. citizen an enemy combatant and held for 13 months.

CHAPTER THREE: CASE STUDIES

Introduction

Each of the following cases will investigate court rulings in reference to the term enemy combatant. Through the use of Nvivo 12 this paper will analyze the pattern of use and the level inter-branch dialogue. Each case study will observe include the general background of the court case as well as how the term enemy combatant is used. The term "enemy combatant" was coded in the documents in the following contexts:

Unlawful	Law of war	Al-Qaeda
Lawful	Torture	Battlefield
Alien	Strikes	Military Commission
Unprivileged	Geneva Convention	Due Process

Hamdi v. Rumsfeld, **542 U.S. 507 (2004)**

Background

Hamdi was detained during military action against the Taliban by the United States in Afghanistan. The government declared him an enemy combatant, the only "due process" afforded Hamdi was the screening process (which was unspecified) and military interrogations. In 2002 Hamdi was transferred to a U.S. Naval brig in Virginia. Hamdi's father filed a habeas corpus petition alleging that the government was improperly holding Hamdi without access to legal counsel or informing of what charges were being held against him. Hamdi's father also claimed that Hamdi had gone to Afghanistan to do relief work, and could not have been militarily trained. Hamdi asserts that he had been trapped in Afghanistan once the military

conflict began.[69] In both *Hamdi* and a subsequent case discussed later, *Padilla,* the government asserts that the United States was at war with terrorist organizations and the executive had unreviewable discretion under his war power to detain suspected of harboring, supporting or associating with those terrorist organizations (Taliban or al-Qaeda). The Supreme Court's main task was to determine whether the executive had the authority to *detain* a U.S. citizen as an enemy combatant. With four different opinions and no majority, the Court held that the AUMF did authorize the executive branch to detain a U.S. citizen as an enemy combatant. However, Hamdi did have the right to due process that would allow him the opportunity to rebut that he was an enemy combatant.[70] Hamdi after denouncing his U.S. citizenship was released in Saudi Arabia.[71]

Use of the Term Enemy Combatant in *Hamdi v. Rumsfeld*

As stated in the prior chapter, the Court determined what definition they would use for enemy combatant: "those who are a part of or supporting forces hostile to the United States or coalition partners" in Afghanistan, and who "engaged in armed conflict against the United States" there."[72] In finding that the executive had the authority to detain an "enemy combatant",

> "The plurality, however, qualifies its recognition of the President's authority to detain enemy combatants in the war on terrorism in ways that are at odds with our precedent. Thus, the plurality relies primarily on Article118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S. T. 3406, T. I. A. S. No. 3364."[73]

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[69] *Hamdi v. Rumsfeld,* 542 U.S. 507, (Supreme Court of the United States June 28, 2004, Decided)
[70] *Id.*
[71] A. D. Lauer, *The Easy Way out?: The Yaser Hamdi Release Agreement and the United States' Treatment of the Citizen Enemy Combatant Dilemma*, 91 Cornell Law Review (2006).
[72] *Hamdi v. Rumsfeld,* 542 U.S. 507
[73] *Hamdi v. Rumsfeld,* 542 U.S. 507 at 588

If this is the perspective of the judicial branch on matters of the treatment and detention of enemy combatants it makes sense why they are hesitant to weigh in. The lower courts made clear that there is a distinct separation of powers in military affairs. In the Fourth Circuit decision,

"Indeed, Articles I and II prominently assign to Congress and the President the shared responsibility for military affairs. *See* U.S. Const. art. I, § 8; art. II, § 2. In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs"[74]

In another Fourth Circuit ruling,

> "No evidentiary hearing or factual inquiry was necessary because Hamdi was captured in active combat zone in a foreign country. The Defense Department can detain Hamdi via the Executives war powers from the constitution stemming from the AUMF against al Qaeda (316 F.3d at 463) Because no charges have been brought Hamdi has no need or write to counsel (475) Same as *Territo*[75] A U.S. Citizen captured with enemy forces can be detained until the hostilities cease. (*See In re Territo*, 156 F.2d at 147)[76]

Article III courts in the *Hamdi* case defer to both the executive and legislative because they see enemy combatant under the guise of a prisoner of war under the Geneva Conventions. In the plurality decision, there is also discussion that reveals the justices' understanding "based on longstanding law-of-war principles." They go on to say, "If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel."[77] Based on this statement, any other circumstance of a

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[74] *Hamdi v. Rumsfeld,* 296 F.3d 278 (United States Court of Appeals for the Fourth Circuit July 12, 2002, Decided)

[75] However Territo had counsel and not held in isolation and incommunicado

[76] *Hamdi v. Rumsfeld,* 316 F.3d 450, (United States Court of Appeals for the Fourth Circuit January 8, 2003, Decided)

[77] Id. At 518 (in all of their references in *Hamdi* the Court cites instances of *prisoner of war* detention)

suspected terrorist not apprehended during active combat operations on the battlefield, the executive would not have the same authority.

Thomas in his dissent in the Supreme Court opinion stated that the President and Congress, not the courts should decide the appropriate means of determining enemy combatant status and exercise their respective war powers. In Scalia's dissent, he argues the law of war does not apply to citizens when the courts are open.[78] Justice Scalia also argues that the "our constitutional tradition has been to prosecute [U.S. citizens accused of waging war against the government] in federal court for treason or some other crime."[79] His stance is that Hamdi's detention is unconstitutional if the Writ was not properly suspended.

While their ruling was limited to authority to detain American citizens, the plurality opinion and dissent both reveal that in analyzing the issue before them, the court is leery of the executive detaining for the sake of detaining (or interrogating) without seeking to punish wrong. The justices also make it clear that Hamdi in their eyes is considered a prisoner of war, not a separate category of person as an enemy combatant.

***Rumsfeld v. Padilla*, 542 U.S. 426 (2004)**

Background

Rumsfeld v. Padilla was another habeas challenge brought before the Supreme Court. Jose Padilla was taken into custody on U.S. soil as a material witness issued by the Justice Department for being allegedly being involved in a plot by al Qaeda to detonate a "dirty bomb."

[78] *Hamdi v. Rumsfeld*, 542 U.S. 507
[79] *Id.* At 554

In June of 2002, Padilla was designated by Bush as an enemy combatant and transferred to military custody. Padilla argued this detention violated 18 U.S.C. §4001(a), the Non-Detention Act "no citizen shall be imprisoned or otherwise detained by the U.S. except pursuant to an Act of Congress."[80] The Court ruled that the habeas petition was not filed in the proper venue. They did not decide on the merits of whether the President had the authority to detain U.S. citizens apprehended or captured on American soil. However, four justices would have affirmed that the detention is prohibited under the Non-Detention Act, 18 U.S.C. §4001(a) (prohibiting the detention of U.S. citizens unless authorized by an act of Congress).[81]

Use of the Term Enemy Combatant in *Rumsfeld v. Padilla*

One of the early rulings in the U.S. District Court for the Southern District of New York summarized the issue at hand. "The central issue presented in this case: whether the President has the authority to designate as an unlawful combatant an American citizen, captured on American soil, and to detain him without trial."[82] Unfortunately, because of the jurisdiction issue, the central issue was never addressed in the Supreme Court.

[80] *Rumsfeld v. Padilla,* 542 U.S. 426 (Supreme Court of the United States June 28, 2004, Decided).
[81] Judicial activity concerning enemy combatant detainees: major court rulings. (2012).
[82] *Padilla v. Bush*, 233 F. Supp. 2d at 593 (United States District Court for the Southern District of New York December 4, 2002, Filed)

Rasul v. Bush, 542 U.S. 466 (2004)

Background

The *Rasul* case was different from *Hamdi* and *Padilla* in that the petitioners were not U.S. citizens, four of them were British citizens, and one was an Australian citizen. The military captured the suspects in Afghanistan during the armed conflict. The detainees then were transferred to Guantanamo Bay, Cuba. Their families filed a habeas corpus petitions citing that the detainees' Fifth Amendment due process rights were being violated by their indefinite detentions and their denial to access to a lawyer. It is important to note that the detainees, in this case, are not nationals of countries that the United States was at war. They were not given the outlet in any court or tribunal to deny that they were engaged in or plotted acts of aggression against the United States. The court ruled 6-3 that based on the federal habeas corpus statute, 28 U.S.C. §2241 that federal courts could consider habeas corpus petitions from (or on behalf of) persons who are detained on at the U.S Naval Station in Guantanamo Bay, Cuba. The government argued that the courts did not have jurisdiction based on the location of the U.S. Naval Station, they failed to argue that under the executive's constitutional war powers, the court would not have jurisdiction. There had been multiple opinions during the *Hamdi* case that stated that Congress and the Executive shared war powers, not the court. The Court did not address the non-citizens burden of proof.

Use of the Term Enemy Combatant in *Rasul v. Bush*

The term "enemy combatant" is used zero times in the published Supreme Court decision. The government did not argue that the military was detaining the petitioners because they were enemy combatants. The country of citizenship (Britain and Australia) could be the reason that the government showed restraint in this case, but then the government has no issue declaring

United States citizens enemy combatants. However, decisions in both *Hamdi* and *Rasul* limited but calculated check on the expansion of executive power and reaffirmation of the judicial role in protecting individual rights even in times of national emergency.

***Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)**

Background

The petitioner in *Hamdan* was a Yemeni national who was also Osama Bin Laden's driver and an active participant in al Qaeda. Hamdan was apprehended in Afghanistan and was held at Guantanamo Bay, Cuba and classified by the DOD as an enemy combatant. He filed for a writ of habeas corpus and challenged how the executive branch sought to prosecute him for conspiracy to commit offenses that violated the laws of war. The offenses that the government accused Hamdan of conspiring were to attack civilians, destruction of civil property, terrorism, and delivery of weapons to al Qaeda training camps. The court held that the military tribunals did not comply with the Uniform Code of Military Justice (UCMJ) or the law of war. The Court also held that Common Article 3 did apply to detainees captured in the conflict with al Qaeda. This ruling gave the detainees a minimum amount of protections such as "the passing of sentences and the carrying out of executions without previous judgment pronounce by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The plurality also concluded that conspiracy to violate the law of war was not a crime under the law of war or the UCMJ.[83]

[83] *Id.*

Use of the Term Enemy Combatant in *Hamdan v. Rumsfeld*

The government uses the term enemy combatant interchangeably in its argument in the *Hamdan* case:

> "The common law of war establishes that Hamdan's willful and knowing membership in al Qaeda is a war crime chargeable before a military commission. Hamdan, a ***confirmed enemy combatant*** and member or affiliate of al Qaeda, has been charged with willfully and knowingly joining a group (al Qaeda) whose purpose is "to support violent attacks against property and nationals (both military and civilian) of the United States." Id., at 64a; 344 F. Supp.2d, at 161. Moreover, the allegations specify that Hamdan joined and maintained his relationship with al Qaeda even though he "believed that Usama bin Laden and his associates were involved in the attacks on the U.S. Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001." App. to Pet. for Cert. 65a. These allegations, against a ***confirmed unlawful combatant***, are alone sufficient to sustain the jurisdiction of Hamdan's military commission."[84]

The Court does not examine the term enemy combatant and could have ruled that the term did not exist as a term in international or constitutional law. They could have addressed that the executive that the administration could not lawfully designate someone as an enemy combatant, and that the executive must follow international and constitutional law and norms when speaking to the issue of conspiracy to commit acts of war not being a crime under the law of war. The justices did speak to the separation of powers issue in regards to enemy combatants. Kennedy, Souter, Ginsberg, and Breyer expressed concern that trying crimes via military commissions would make it possible for the executive and its officials to define, prosecute, and adjudicate without independent review. The three-part system of the Constitution was designed

[84] *Id.*

to avoid this. They were also concerned that "the government claimed authority to continue to detain him on the basis of his status as an enemy combatant."[85]

***Boumediene v. Bush*, 533 U.S. 723 (2008)**

Background

The principal petitioner in *Boumediene v. Bush* was a native Algerian who was apprehended by military officials in Bosnia in 2002. The government suspected Boumediene and five others of plotting to bomb the United States Embassy in Bosnia. The petitioners were designated enemy combatants and were held at the United States Naval Station in Guantanamo Bay, Cuba. Congress passed the Military Commissions Act in 2006 in an attempt to bar Article III courts from hearing habeas corpus applications. However, the MCA did not suspend the writ, and the Suspension Clause still applied in Guantanamo Bay.[86]

The Court ruled that the constitutional writ of habeas extends to non-citizens and that the federal government is subject to the constitution even when it acts outside of U.S. borders. The Detainee Treatment Act of 2005 does not provide procedures that are adequate replacements for a writ of habeas corpus. Thus, the MCA is an unconstitutional violation of the Suspension Clause. The court's ruling points to the essence of the dilemma in classifying suspected terrorists as enemy combatants. "The Court therefore agrees with petitioners that there is considerable risk of error in the tribunal's findings of fact. And given that the consequence of error may be detention for the duration of hostilities that may last a generation or more, the risk is too

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[85] *Hamdan v. Rumsfeld*, 548 U.S. at 725 (Supreme Court of the United States June 29, 2006, Decided).
[86] *Boumediene v. Bush*, 553 U.S. 723 (Supreme Court of the United States June 12, 2008)

significant to ignore."[87]Chief Justice Roberts in his dissent was highly critical of Justice Kennedy's for not ruling on whether the CSRTs violated due process.

Use of the Term Enemy Combatant in *Boumediene v. Bush*

The term "enemy combatant" is used multiple times in *Boumediene.* The Executive branch designated the petitioners as enemy combatants. In this case, enemy combatant was used as the petitioners' status.

> "In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners' designation by the Executive Branch as ***enemy combatants***, or their physical location, i.e., their presence at Guantanamo Bay.[88]

We can glean from the follow up federal district court ruling by Judge Richard J. Leon in the use of the term enemy combatant. Here Judge Leon ruled that the court would use the CSRT definition for the term enemy combatant.

"An "***enemy combatant***" is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy forces."[89]

In the *Boumediene v. Bush* case before the District Court for the District of Columbia the government argued that petitioners are lawfully detained because they are "enemy combatants," who can be held pursuant to the Authorization for the Use of Military Force and the President's powers as Commander in Chief. The government also argued that the petitioners planned to

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[87] *Id.* at 18
[88] *Id.* at 32
[89] http://jnslp.com/2008/10/27/judge-leon-on-the-meaning-of-enemy-combatant/

travel to Afghanistan (Government dropped the issue of the plan to bomb the embassy which is why they were originally detained.) Judge Leon ordered their release because there was just one source of evidence (that was classified from and unnamed source).[90]

***Al-Marri v. Spagone,* 555 U.S. 1220 (2009)**

Background

Even though the judiciary dismissed this case before arguments were heard in the Supreme Court, the *al-Marri* case is an excellent example of the challenges posed because there is not a consistent way to prosecute suspected terrorists. Al-Marri was a Qatari citizen who was legally admitted into the United States. In 2001 he was arrested by civilian law enforcement for being involved in the September 11th attacks. In February 2002 and January 2003 he was charged with possessing counterfeit credit card numbers, making false statements to the FBI, lying on a bank application. Al-Marri plead not-guilty. Right before his trial the government dismissed the criminal charges and the President designated al-Marri as an enemy combatant. The government held al-Marri in military custody in a Naval brig off the coast of South Carolina.

Use of the Term Enemy Combatant in the *al-Marri* Cases

The question that the Fourth District Court sought to answer was whether the AUMF and the law of war permitted the detention of a resident alien who had the government accused of aiding al Qaeda, not on the Afghanistan battlefield but United States' soil. Four judges believed that al-Marri did not fit the legal category of "enemy combatant" from *Hamdi*. They felt that the

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[90]*Boumediene v. Bush*, 579 F. Supp. 2d 19 (United States District Court for the District of Columbia November 20, 2008, Filed)

government must either charge him with a crime, deport him, or get a material witness warrant for the grand jury proceedings. The judges did not agree on a common definition in this case. They did find that the AUMF gave the President to detain "sleeper agents" on behalf of al Qaeda. The case was remanded to the district court to determine if the government had given enough evidence that al-Marri was, in fact, was a sleeper agent. Another important consideration of the en banc panel was how much of an evidentiary burden the government would need to detain al-Marri. Judge Traxler stated that there was an error in the lower court in applying the relaxed evidentiary standards of *Hamdi* when it is a suspect that the government apprehends in the United States.

> "*Hamdi* does not, however, provide a cookie-cutter procedure appropriate for every alleged ***enemy-combatant***, regardless of the circumstances of the alleged combatant's seizure or the actual burdens the government might face in defending the habeas petition in the normal way. Al-Marri clearly stands in a much different position from Hamdi. He was not captured bearing arms on the battlefield of Afghanistan, but was arrested within the United States by the FBI…"[91]

Al-Marri did not fit within "limited category" from Hamdi. His detention was not "necessary and appropriate force. " In *Hamdi* the reasoning was to "prevent a combatant's return to battlefield."[92]

The al-Marri case reveals a few issues. First, there is no agreed-upon definition or circumstances for an enemy combatant. Second, the fate of those who are suspected terrorists or "enemy combatants" get bounced around the federal court system. Third, in al-Marri, there is a clear distinction that there is a difference in a person who is picked up "on the battlefield" and

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[91] I*d.* at 221
[92] *Hamdi v. Rumsfeld,* 542 U.S. 507

one whom the government apprehends in the United States. Lastly, al-Marri was first criminally charged. Then the government dropped those charges in favor of declaring him an enemy combatant. After that, the government decided to drop that distinction and again charge al-Marri criminally. The inconsistency on how the Executive uses the term enemy combatant calls into question whether it has the authority to use it in the first place.

Civilian Justice System

John Walker Lindh

John Walker Lindh was a U.S. citizen who joined the Taliban and fought against the Northern Alliance in Afghanistan. The United States' government apprehended Lindh and placed him into military custody at the same time and place as Hamdi. While in custody he had no contact with lawyers for over 50 days. In February Lindh was flown to the Alexandria City Jail in Alexandria, Virginia. The government charged John Walker Lindh in criminal court and sentences could have carried multiple life sentences. The trial was set to begin in August later on that year. Before a suppression hearing, there was a deal struck. The government dropped nine of the ten charges and Lindh plead guilty to violating economic sanction imposed by a 1999 Executive Order by President Clinton and a weapons charge. The prosecution dropped the sentence to twenty years. The Department of Justice claimed they could classify John Walk Lindh as an enemy combatant at any point of the process.[93]

[93] Peter Jan Honigsberg, Our Nation Unhinged: The Human Consequences of the War on Terror (Berkeley : University of California Press, c2009. 2009).

Richard Reid

Richard Reid was born in London and had traveled to both Pakistan and Afghanistan where he allegedly received training from al Qaeda. On a flight from Paris to Miami he attempted to detonate a shoe bomb. He was charged in a criminal court and plead guilty to eight counts of attempted use of a weapon of mass destruction. He is currently serving life imprisonment (in the same prison as John Walk Lindh).[94]

Zacarias Moussaoui

Zacarias Moussaoui commonly referred to as the "20th hijacker" was a French national of Moroccan descent. He was arrested one month before the attacks on September 11th on an immigration violation after a flight school in Minnesota contacted the FBI. The flight school reported that Moussaoui was interested only in learning how to fly a plane, not take off or land. The government never classified Zacarias Moussaoui as an enemy combatant, and the prosecution charged Moussaoui in criminal court. After pleading guilty, The court sentenced Moussaoui to life without parole.

Dzhokhar Tsarnaev

Dzhokhar Tsarnaev, who was born in Kyrgyzstan and became a naturalized U.S. citizen, was apprehended and April 18, 2013, for detonating multiple bombs at the Boston Marathon just days earlier. He was severely injured and had to be hospitalized. In the hospital, special counterterrorism agents, (not the military) were permitted the Obama Administration to question without Mirandizing Dzhokhar. He confessed to planting to bombs at the Boston Marathon. Over

[94] Ibid.

the next two days, Tsarnaev was questioned by the government for over 16 hours. Dzhokhar was read his Miranda rights on April 22, 2013.[95] In this instance, the public safety exception was invoked by those who were questioning Tsarnaev. According to the Department of Justice public safety outweighed Dzhokhar's right to be informed of his Fifth Amendment rights. That same day the White House issued a statement that the government would not classify Dzhokhar Tsarnaev as an enemy combatant. The White House's decision was the opposite of what Republican lawmakers were calling for over the weekend. Senator Graham from South Carolina insisted that Tsarnaev should be held as an enemy combatant. Senator Graham agreed that the government could not try Tsarnaev via military commission, but being held as an enemy combatant "would allow authorities to take their time gleaning information from him."[96] Dzhokhar Tsarnaev was found guilty on all thirty counts (17 of which were charges that carry the death penalty) including:

- Conspiracy to use a weapon of mass destruction, resulting in death
- Use of a weapon of mass destruction resulting in death
- Possession and use of a firearm during and in relation to a crime of violence, resulting in death
- Bombing of a place of public use resulting in death; aiding and abetting
- Conspiracy to maliciously destroy property, resulting in death
- Malicious destruction of property by means of an explosive
- Carjacking, resulting in serious bodily injury
- Interference with commerce by threats and violence[97]

[95] Hannah Lonky, *Revisiting the public safety exception to Miranda for suspected terrorists: Dzhokhar Tsarnaev and the bombing of the 2013 Boston Marathon,* 2017.
[96] https://www.usatoday.com/story/news/politics/2013/04/22/obama-tsarnaev-enemy-combatant/2103635/
[97] https://www.pbs.org/newshour/nation/jury-reaches-verdict-boston-bombing-trial

Conclusion

The United States' government apprehended Hamdi and Lindh from the same prison in Afghanistan, yet their cases unfolded completely differently. John Walker Lindh charged with:

- Conspiracy to murder U.S. citizens or U.S. nationals
- Two counts of providing material support and resources to terrorist organizations
- One count of supplying services to the Taliban
- Conspiracy to contribute services to al Qaeda
- Contributing services to al Qaeda
- Conspiracy to supply services to the Taliban
- Using and carrying firearms and destructive devices during crimes of violence

The government accused Hamdi of fighting with the Taliban against the U.S. and Northern Alliance forces. Another major issue between Hamdi and Lindh is that the United States released Hamdi from custody in 2004 and Lindh is as of 2018 still held in a federal supermax prison. Designation as an enemy combatant is a rationale for holding a suspect indefinitely when the government does not have enough evidence to charge. In the case of al-Marri, the government changed its mind twice with how to charge him. This chapter shows that there is little success in trying citizens as enemy combatants and based on the lack of charges in many cases one could infer that the United States' government had errored in holding prisoners. The government used the classification as an enemy combatant for justification to hold suspects indefinitely without charge even though there are not criteria that any branch of the government agrees on. No final ruling in any of the above cases expressed either way on the constitutionality of the classification of suspected terrorists as enemy combatants.

Table 4: Enemy Combatant Cases

Case	Date	Citizenship	Place of Apprehension	Classification	Where Detained	Charges Filed
Hamdi	2004	United States	Afghanistan	Enemy Combatant	U.S. Naval Brig	No, released
Padilla	2004	United States	United States	Enemy Combatant	U.S. Naval Brig	Yes, in criminal court
Rasul	2004	British & Australian	Afghanistan	None	Guantanamo	No, released
Hamdan	2006	Yemeni	Afghanistan	Enemy Combatant	Guantanamo	Yes, in military tribunal. Later overturned
Boumediene	2008	Algerian native Naturalized Bosnian	Bosnia	Enemy Combatant	Guantanamo	No, released
Al-Marri	2009	Qatari Permanent Resident of the United States	United States	Enemy Combatant	U.S. Naval Brig	Yes, in criminal court

Table 5: Criminal Justice Cases

Case	Date	Citizenship	Place of Apprehension	Classification	Where Detained	Charges Filed
Lindh	2002	United States	Afghanistan	None	Virginia	Yes
Reid	2002	British	United States	None	Massachusetts	Yes
Moussaoui	2002	French National	United States	None	Minnesota	Yes
Tsarnaev	2015	United States	United States	None	Massachusetts	Yes

CHAPTER FOUR: WHY THE EXECUTIVE DOES NOT HAVE THE AUTHORITY TO CLASSIFY U.S. CITIZENS AS ENEMY COMBATANTS

Introduction

The founders of the United States sacrificed for certain rights and protections over 200 years ago. The fear of another terrorist attack is not a valid reason for the United States to turn its back on those values. There can be a balance of both individual freedom, liberty, and national security. The Constitution is where we find the roadmap for this balance.

This paper argues that administrations after the 9/11 attacks have both manipulated and made up the law to protect the nation. The term enemy combatant was created as descriptive term. However, the descriptiveness of the term enemy combatant morphed into a status. This status meant that certain rights for the accused were violated. Many members from different branches of the government used the term enemy combatant like it was a legal term or term of art. The government failed to provide due process to those it designated as enemy combatants under both the Geneva Convention and the Constitution. The following chapter will present six different arguments as to why the executive does not have authority to designate a U.S. citizen as an enemy combatant. Since the September 11th attacks, the executive branch has argued that its authority to designate enemy combatants comes from the AUMF from 2001 and the executive's inherent war powers. It has claimed that these powers give him unreviewable discretion in the classification of U.S. citizens as enemy combatants. The executive has also claimed that since

suspected terrorists have infringed on human rights they have no rights of their own such as due process or POW status.

Executive Use of Enemy Combatant is Against the Expressed and Implied Will of Congress

The executive has argued that the United States is at war with terrorist organizations and the executive has unreviewable discretion under his war power to detain suspected terrorists. However, Congress has passed legislation that established that the Executive does not have the authority to use the term enemy combatant, even in wartime. The formula that is used to determine the scope of constitutional Presidential authority is cited from *Youngstown Sheet and Tube Co. v. Sawyer* where Justice Jackson describes three different zones of authority. The maximum zone is when the President acts "pursuant to an express or implied authorization of Congress."[98] In this zone judicial interpretation gives it widest latitude, for the president is acting under all of his authority *plus* what Congress can delegate. The twilight zone is the second zone of authority Jackson discusses. When Congress neither denies nor grants authority, the President must only use his own "independent powers." The zone of twilight is the place where the President and Congress may have concurrent powers or where the distribution is not certain. In the twilight zone the judiciary will test the level of Presidential power depending on the circumstances rather than "on abstract theories of law."[99] The third zone is when the President's authority is at its lowest ebb. This zone is when the President acts against the implied will of Congress. In this instance the President can act under his authority minus any authority that Congress is given by the Constitution.

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[98] *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
[99] *Id.*

According to Article I of the Constitution, Congress has the power to make rules concerning captures on land and water. Congress used this authority to issue this statute, 18 U.S.C. § 4001(a), the NDA, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[100] Congress was in the realm of its constitutional powers by making rules about not detaining United States citizens accept via an Act of Congress.

Multiple opinions in both Hamdi and Padilla agree that when it comes to a U.S. citizen on U.S. soil the AUMF does not satisfy requirements of the Non-Detention Act (NDA).[101] Justice Souter and Ginsberg in *Hamdi* declare, "In requiring that any Executive detention be "pursuant to an Act of Congress," then, Congress necessarily meant to require a congressional enactment that clearly authorized detention or imprisonment."[102] The NDA prohibits detention of U.S. citizens except in the case of an Act of Congress. The AUMF is not the Act of Congress that fulfills this requirement. Justice Scalia goes as far as to say that there is no constitutional or statutory authority to detain a United States' citizen without trial.[103] In using the status of enemy combatant the President is violated a statute, and therefore the expressed will of Congress.

An example of an act of Congress that would authorize the use of the term enemy combatant and detention of U.S. citizens in that case is proposed legislation H.R. 5684 of the 107th Congress.

> "Detention of Enemy Combatants Act - Authorizes the detention of a U.S. person or resident as an enemy combatant if that individual is an al Qaeda member or knowingly cooperated with an al Qaeda member in planning, authorizing, committing, aiding, or abetting a terrorist act against the United States. Directs the Secretary of Defense to prescribe, publish, and report the standards, process, and criteria: (1) to be used in

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[100] 18 U.S.C. § 4001(a) (2000)
[101] J. Weingarten, *The Detention of Enemy Combatants Act*, 43 Harvard Journal on Legislation (2006).
[102] *Hamdi v. Rumsfeld*, 542 U.S. at 544
[103] *Hamdi v. Rumsfeld*, 542 U.S. 507

> determining that an American citizen or lawful resident is an enemy combatant; and (2) for that individual's detention."[104]

This legislation was not pass and therefore the authority was not given and the expressed will of Congress that United States citizens should not be detained as enemy combatants is still in effect.

The MCA in 2006 codified that an unlawful enemy combatant was "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant."[105] This definition amended Title X and added the term unlawful enemy combatant. When asked by the Court in *Boumediene* in 2008 the executive used its own definition: "an enemy combatant is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[106]

In 2009 Congress amended Title X 948(a) removing "unlawful enemy combatants" and replacing with "unprivileged enemy belligerent." The chapter goes on to say that only an *alien* unprivileged belligerent could be tried by military commission. An alien unprivileged belligerent cannot invoke protections of the Geneva Convention. This is clearly the expressed will of Congress that the term enemy combatant should no longer be given as a status to either send a person to Guantanamo, or try by military commission. Enemy belligerent is similar in its definition but differs in how it is not applied specifically to United States citizens as a status. The executive is now at its lowest ebb in its presidential power to use or designate anyone as an enemy combatant. Justice Jackson explains how serious this is:

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[104] H.R.5684 - Detention of Enemy Combatants Act 107th Congress (2001-2002)
[105] MILITARY COMMISSIONS ACT OF 2006, 109 P.L. 366, 120 Stat. 2600, 2006 Enacted S. 3930, 109 Enacted S. 3930 (October 17, 2006)
[106] *Boumediene v. Bush,* 553 U.S. 723, (Supreme Court of the United States June 12, 2008)

> "Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[107]

Congress was no longer indifferent to this authority exercised by the executive.[108] No longer was classifying U.S. citizens as enemy combatants and "open field," Congress had covered it by "statutory policies inconsistent with this" [designation.][109] The AUMF omits authority to detain and now Title X of the U.S. States code omits the term enemy combatant.

Even with this change in United States law, there have been multiple instances where the executive has sought or threatened to use the enemy combatant status as a weapon. When Saipov was apprehended after being suspected of carrying out a terrorist attack in New York City in 2017 he was considered by the executive branch to be an enemy combatant.[110] Even more concerning was when a United States citizen was held for 13 months as an enemy combatant in 2018.[111] From John Lindt to the petitioner in *Doe v. Mattis*, he executive has used the threat of classifying a suspect as an enemy combatant as a tool of intimidation.

In the case of classifying a United States citizen as an enemy combatant, Congress has expressed its will by the passing of the NDA and amendments to Title X. Secondly, there is no Constitutional authority that the executive can use to classify a U.S. citizen as an enemy

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[107] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 at 637-638(Supreme Court of the United States June 2, 1952.)
[108] *Id.*
[109] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 at 637-638(Supreme Court of the United States June 2, 1952.)
[110] Krishnadev Calamur, *Guantanamo and the Myth of Swift Justice*, The Atlantic(2017), *available at* https://www.theatlantic.com/international/archive/2017/11/saipov-guantanamo/544697/.
[111] Charlie Callimcahi Savage, Rukmini Schmitt, Eric, *American ISIS Suspect Is Freed After Being Held More Than a Year*, The New York Times(2018), *available at* https://www.nytimes.com/2018/10/29/us/politics/isis-john-doe-released-abdulrahman-alsheikh.html.

combatant and therefore not charge a citizen with a crime and indefinitely detain. Thirdly, the Constitution actually authorizes Congress to make rules concerning capture on land and water. There is no authority the Executive can claim to legally justify this treatment of United States citizens.

Executive Use of Enemy Combatant is Not Authorized by the AUMF

In 2018 President Donald Trump issued Executive Order 13823. "The President maintains authority to detain certain persons as part of his Constitutional powers as Commander in Chief and Chief Executive and those provided by the Authorization for Use of Military Force (AUMF) of September 18, 2001."[112] The Authorization for the use of Military Force from 2001 does not authorize executive use of the status of "enemy combatant" because today suspected terrorists are not covered under the umbrella of, "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[113] A suspected terrorist today may be covered only if are a part of the original al-Qaeda. President Barrack Obama stated in 2013:

> "The AUMF is now nearly 12 years old. The Afghan war is coming to an end. Core al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States. Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states. So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations

[112] Executive Office of the President, Executive Order 13823 Protecting America Through Lawful Detention of Terrorists (Office of the Federal Register 2018).
[113] Authorization for Use of Military Force Joint Resolution 224 (2001).

> must continue. But this war, like all wars, must end. That's what history advises. That's what our democracy demands."[114]

It would be hard to justify today how one could use that authority against that group or any other group that was not involved with the attacks on September 11th. The AUMF calls for the President to use all necessary and *appropriate* force for those involved with the attacks that occurred on September 11,2001 .The AUMF does not list detention specifically, yet the Supreme Court ruled in *Hamdi* that the AUMF gives the executive authority detain enemy combatants. [115] Despite the ruling in *Hamdi*, seven justices agreed with Justice O'Connor that indefinite detention with the intent to interrogate is not authorized.[116]

The AUMF does not authorize executive use of the term enemy combatant because indefinite detention is not an *appropriate* force. Classifying a United States citizen as an enemy combatant and then detaining without trial or charge is beyond the scope of what is deemed appropriate.

Executive use of Enemy Combatant is a Breach of the Separation of Powers

"In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security."[117] Judges in both *Hamdi* (Scalia's Dissent) and in the District Court opinion for the case called attention to the separation of powers doctrine and the necessity of more than one

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[114] https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university
[115] Hamdi, 542 U.S. at 521.
[116] Bruce Miller, *Article: No Virtue in Passivity: The Supreme Court and Al-Marri*, 33 W. New Eng. L. Rev. 697, (2011)
[117] *Hamdi v. Rumsfeld*, 542 U.S. at 545

branch being involved in the issue of detainees. Scalia declared, "I frankly do not know whether these tools are sufficient to meet the Government's security needs…It is far beyond my competence, or the Court's competence, to determine that. But it is not beyond Congress's"[118] Scalia agrees with the Fourth Circuit view that Articles I and II of the United States Constitution declare shared powers in military affairs between Congress and the Executive. Article I of the Constitution is even more specific. It gives to Congress the power to make rules concerning captures on land and water.[119] Judge Floyd also shared Scalia's sentiment "If the law in its current status is found by the President to be insufficient to protect this country from terrorist plots…then the President should prevail upon Congress to remedy the problem."[120] The judiciary has made clear that when it comes to war powers Congress and the Executive should work together, not put the Court in the position to deal with these matters. This is another argument that supports the use of a clear and consistent codifiable policy. If the Executive feels that current mechanisms in place in the criminal justice system are insufficient to keep the nation safe domestically, then he should seek to work with Congress to remedy the issue. While the Executive may have broad powers over foreign policy, when it comes to domestic issues the power does not stretch as far.

Applying war powers domestically to United States citizens when war is not declared is a breach of the separation of powers doctrine. The executive has claimed authority from inherent war powers to classify enemy combatants. In *Hamdi* that authority for the executive to exercise its war powers was because the AUMF had been enacted. The *Hamdi* case made it clear that war

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[118] *Hamdi v. Rumsfeld,* 542 U.S. 507
[119] U.S.CONST. Art. I, § 8, cl. 11
[120] *Padilla v Hanft* 389 F. Supp. 2d 678 (D.S.C. 2005)

powers were when both Congress and the Executive worked together. It also discussed in the case that the Executive would not have the same authority if a terrorist was not apprehended on the battlefield of active combat operation.[121] In *Padilla* the government claimed unreviewable discretion. This goes against the standing view of the separation of powers doctrine interfering with both Congress' and the Judicial branch's "performance of its constitutionally designed function."[122] Here the executive is overstepping the boundaries of its presidential power when the executive branch creates the criteria (a legislative function) for enemy combatants and applies the criteria in the classification of enemy combatants (a judicial function). In *Hamdan* multiple justices including Justice Breyer, Justice Kennedy, Justice Souter and Justice Ginsburg voiced concern that the Executive is defining, prosecuting, and adjudicating without independent review.[123] Even when Congress attempted to define enemy combatant in the MCA, the executive used its own definition in Supreme Court cases such as *Boumediene* after that law was enacted. The government reverted back to the definition adopted in *Hamdan* an "enemy combatant" is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[124]

In the past when addressing the Executive's war powers, the United States has fought a proper noun such as Germany not a common noun such as terrorism.[125] When the United States

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[121] *Hamdi v. Rumsfeld*, 316 F.3d 450, (United States Court of Appeals for the Fourth Circuit January 8, 2003, Decided)
[122] Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 Journal of National Security Law & Policy (2005).
[123] *Hamdan v. Rumsfeld*, 548 U.S. at 725 (Supreme Court of the United States June 29, 2006, Decided).
[124] *Boumediene v. Bush*, 553 U.S. 723, (Supreme Court of the United States June 12, 2008)
[125] Stephen I. Vladeck, *Ludecke's Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 Journal of National Security Law & Policy (2006).

has fought wars against common nouns such as crime, poverty, and drugs, the U.S. has been less successful.[126] A proper noun such as Germany can surrender. Terrorism, on the other hand, will likely never surrender or give up. The fight against terrorists is not truly a war when seeking to use constitutional war powers.[127] The government cannot argue that this war against terrorism gives unreviewable discretion under war powers to designate suspected terrorists (or even those suspected of associating with terrorist originations) as enemy combatants to detain indefinitely.

This paper does not argue that the president does not have war powers or that Congress did not authorize specific use of force in 2001. In the fall of 2001, President Bush sent troops to Afghanistan under the authority of the AUMF. Shortly thereafter, Hamdi was captured by the Northern Alliance and taken into U.S. custody afterwards. The government claimed authority to detain Hamdi and the Court agreed. This situation brings up two dilemmas. First, if the U.S. government is compelled to indefinitely hold a U.S. citizen, then why was John Walker Lindh treated completely differently? Lindh was indicted, tried and convicted in civilian court and is *still being held.* Secondly, the court discussed that Hamdi's continued detention was based on the fact that there were ongoing active hostilities in Afghanistan. When active hostilities are over, the authority to still detain a person under Executive war powers wanes. Justice Souter discusses this in the oral arguments of the *Hamdi* case:

> "Is it reasonable to think that the, that the authorization was sufficient at the time that it was passed, but that at some point, it is a Congressional responsibility, and ultimately a constitutional right on [Hamdi's] part, for Congress to assess the situation and either pass a more specific continuing authorization or at least to come up with the conclusion that

[126] *Id.*
[127] *Id.*

its prior authorization was good enough. Doesn't Congress at some point have a responsibility to do more than pass that resolution?"[128]

Executive Use of Enemy Combatant Violates Due Process

Due process provides essential rights for a defendant which is an essential core value of the United States. These essential rights include the right to counsel, to be informed of charges, to confront both evidence and witnesses, and to have a neutral decision maker. The classification of a U.S. Citizen as an "enemy combatant" infringes on due process. The government could wrongly imprison anyone with no accountability. The judiciary must be able to call the jailer into account.[129] There have been various times the United States has provided due process, even in times of war. A state of war is not a "blank check" for the Executive power.[130] The United States can stay true to its values even in the face of terrorism. War is not an excuse to abandon the values of the country. Rumsfeld discussed the same rational that is used for POW (even though enemy combatants are not given POW status). Detaining enemy combatants keeps them from returning to the battlefield. He states that due process, the presumption of innocence, and the right to council encumber the goal of preventing future acts of terrorism.[131] The United States can still prevent a suspected terrorist from "returning to the battlefield" with due process by using preventative detention through the criminal justice system. Suspects would have access to

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[128] *ORAL ARGUMENTS IN THE CASE OF YASER ESAM HAMDI AND ESAM FOUAD HAMDI VERSUS DONALD H. RUMSFELD, ET AL RE: DETENTION OF AMERICAN CITIZENS AS "ENEMY COMBATANTS" PRESIDED OVER BY CHIEF JUSTICE WILLIAM REHNQUIST ARGUING BEFORE THE COURT: FRANK W. DUNHAM JR; PAUL D. CLEMENT, DEPUTY SOLICITOR GENERAL LOCATION: THE SUPREME COURT, WASHINGTON, D.C.*, Federal News Service, April 28, 2004

[129] *Boumediene v. Bush,* 553 U.S. 723, (Supreme Court of the United States June 12, 2008)

[130] *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[131] George C. Harris, *Terrorism, War and Justice: The Concept of the Unlawful Enemy Combatant*, 26 Loyola of Los Angeles International & Comparative Law (2003).

counsel, charges would be filed, and their detention would not be indefinite. However, judicial review would ensure that suspects could not return to the battlefield by holding them without bond.

Executive Use of Enemy Combatant Violates International Humanitarian Law

The Geneva Conventions list two categories of detained persons, civilian and combatant. It makes clear that every person has status under international law. No person falls outside of the law. "Persons protected by the Convention are those who, at a given moment in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[132] Under the law of war and Common Article 3 and article 75 of the additional protocol both civilian and combatant have the right to: counsel, to confront witnesses, an impartial court, and regular judicial procedures. The United States has repeatedly declared that terrorism and members of the Taliban and al Qaeda have made the Geneva Conventions obsolete.[133] The executive has specifically declared that enemy combatants are not protected by the Geneva Conventions. The Joint Doctrine for Detainee Operations created a third category of detainee, an enemy combatant, a person who is not entitled to the privileges of the Geneva Convention.Violating international humanitarian law in executive use of the enemy combatant to circumvent due process puts U.S. citizens both those in the military and civilians at risk oversees. The United States cannot expect the world to treat United States citizens that are either civilian or combatant with the protections of the law of war

[132] Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4(2), Aug. 12, 1949, 75 U.N.T.S. 135
[133] Carl Christol, The American Challenge (University Press of America, Inc. 2009).

or Geneva Conventions when the U.S. is not willing to do the same. Both civilian and combatant are afforded regular judicial procedures regardless of status or crimes.[134]

Executive Use of Enemy Combatant is not Established in International Law

This paper has shown that prior to the September 11th attacks, the term enemy combatant was not a term of art or an established legal category of persons in international law. It is certainly not a legal term that would make a person fall outside of the protections of the Geneva Convention. In published case law prior to 2011, the use of enemy combatant was inconsistent in its definition, who it was applied to, and in what circumstances. In *Quirin*, the case that the government repeatedly cites precedent for its use, the term enemy combatant is used *once*. In its one use enemy combatant was used interchangeably as a descriptive term for the spies who had violated the laws of war. It was used to describe foreign captured soldiers who had violated laws of war in *re Yamashita.*[135] There is no established uniform use or definition that would make the term enemy combatant an established legal category of persons under international law.

Conclusion

After September 11th the government sought to navigate uncharted waters in its war against terrorism. Originally the term "unlawful combatant" was used to categorize the suspected terrorists that were being detained. The term "enemy combatant" was invented to communicate that the United States was holding suspects because they were *enemies*, not because they were

[134] *Id.*
[135] *In re Yamashita*, 327 U.S. 1, (Supreme Court of the United States February 4, 1946, Decided)

criminals. Enemy combatant was the "appropriate adjective," it was used so that they American people could understand why these detainees were being held.[136]

If a United States citizen is classified as this "appropriate adjective" that is no longer in U.S. code they can be held indefinitely without due processes. They can be held incommunicado without access to a lawyer or being charged with a crime. This did not just happen a few times back in 2001, but persists to this day. The fact that the government does not consistently use a definition as to what an enemy combatant actually is, should concern Untied States citizens.

Instead of an inconsistent and arguably unsuccessful application of the term enemy combatant the United States should follow the outlined policy. If a citizen is an enemy to the United States, either fighting on a battlefield or in an armed conflict they can be held as an unlawful combatant. Even with this designation or status they would privy to a level of due process outlined in the Geneva Conventions. They should be treated humanely and "sentences must ... be pronounced by a regularly constituted court."[137] Detaining indefinitely, in solitude with no charges filed or way to dispute their status in not humane treatment. If a United States citizen commits an act of terror on U.S. soil they should be charged in civilian court according to Title XVIII. Terrorism is clearly defined in U.S. code and the penalties also published. U.S. code define "domestic terrorism" as:

> "Activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; appear to be intended—to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping;"

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[136] https://www.huffingtonpost.com/peter-jan-honigsberg/the-real-origin-of-the-te_b_4562216.html
[137] Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4(2), Aug. 12, 1949, 75 U.N.T.S. 135

Specific crimes of terrorism such as use of weapons of mass destruction, bombings of places of public use and infrastructure, missile systems designed to destroy aircraft, radiological dispersal devises, acts of nuclear terrorism, harboring or concealing terrorists, receiving military-type training from a foreign terrorist organization, and providing material support to terrorists all carry possible years to life sentences. Where it is allowed by law the penalty could be punished by death.[138]

As the United States navigates its post-9/11 fight against terrorism, it must adhere to the values that it is seeking to defend. The Constitution, including the separation of powers doctrine, due process, and international humanitarian law can all be adhered to in the face of the threat of terrorism. "Injustice anywhere is a threat to justice everywhere."[139] It is unjust to use a term that was meant as a descriptive term to impute on a United States citizen a status that strips them of their Constitutional rights.

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[138] 18 U.S. Code § 2331

[139] Martin Luther King Jr., Letter from the Birmingham Jail (San Francisco : Harper San Francisco, 1994. 1st ed. 1994).

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