Safeguarding the Enemy Within: The Need for Procedural Protections for U.S. Citizens Detained as Enemy Combatants Under Ex Parte Quirin

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INTRODUCTION

On September 11, 2001, terrorist attacks took the lives of more than 3,000 people in New York City, Washington, D.C., and rural Pennsylvania. The federal government reacted swiftly. On September 18, Congress authorized President George W. Bush “to use all necessary and appropriate force against those nations, organizations, or persons he determine[d] planned, authorized, committed, or aided the terrorist attacks.” Two months later, President Bush issued a military order authorizing the creation of military tribunals to try non-U.S. citizens who belonged to the al Qaeda terrorist group and “engaged in, aided or abetted, or conspired to commit” certain acts of terrorism against the United States. Both the military order and the September 18 Congressional Authorization were designed with an eye toward the war in Afghanistan. At the same time, law enforcement officials were forced to deal with domestic threats that lacked precedent in recent history. In response to these threats, a “parallel system” of justice has developed wherein the government has claimed the authority to detain indefinitely individuals suspected of terrorist activity, including U.S. citizens, as “enemy combatants.”

The most visible application of this doctrine thus far has been the case of Jose Padilla. In early May 2002, the FBI arrested Padilla in

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4. See Charles Lane, *In Terror War, 2nd Track for Suspects; Those Designated 'Combatants' Lose Legal Protections*, Wash. Post, Dec. 1, 2002, at A01 (“[I]t is different than the criminal procedure system we all know and love. It's a separate track for people we catch in the war.” (quoting a Bush administration official)).
5. See infra Part II.B.
Chicago at O’Hare International Airport for his alleged participation in an al Qaeda plot to detonate a radiological bomb in the United States. The rough outlines of Padilla’s life are well known by now. An American citizen, Padilla was born in Brooklyn, New York, and moved to Chicago with his family when he was four years old. While some neighbors knew him as “Pucho,” an affable child and good student, he became familiar to Chicago law enforcement authorities in the 1980s as a local gang member, according to government officials. In 1983, when Padilla was twelve years old, a jury convicted him of murder in Chicago. He was imprisoned until his eighteenth birthday. In 1991, he went to prison in Florida on charges of aggravated assault and firing a handgun. After his release, he began referring to himself as Ibrahim Padilla and moved to Egypt. His mother reportedly feared he had joined a cult.

According to the government, Padilla afterwards traveled to Pakistan, Saudi Arabia, and Afghanistan. In Afghanistan in 2001, he met with al Qaeda lieutenant Abu Zubaydah, with whom he developed a plan to build and detonate a radiological bomb in the United States. The plan allegedly included stealing radioactive material from within the United States once Padilla had returned.


8. Id.


10. Government Brief, supra note 9, at 2. News reports following Padilla’s detention put his age at 31. See, e.g., Herguth, supra note 7, at 3. Thus, if these figures are accurate, in 1983, at the time of his conviction, Padilla would have been 12 or 13 years old.


12. Id.; see also Herguth, supra note 7, at 3.

13. Government Brief, supra note 9, app. at 2. Subsequent to Padilla’s moving to Egypt in 1998, he became known as Abdullah Al Muhajir, according to the Mobbs Declaration. Id.


15. Government Brief, supra note 9, app. at 3.

16. Id.

17. Id.
Federal agents arrested Padilla immediately upon his arrival in Chicago on May 8, 2002. The U.S. Marshals Service held him as a material witness in a grand jury investigation until June 9, when he was transferred to a Charleston, South Carolina, Navy brig, where he has remained without access to counsel and without being formally charged. The government has justified curtailing Padilla’s Fifth and Sixth Amendment rights by declaring him an “enemy combatant,” a term that has lain dormant in the United States judicial system for the last sixty years, and whose meaning is extremely unclear. Under the enemy combatants doctrine, the government claims the right to detain U.S. citizens indefinitely without charging them.

This Note addresses the government’s application of the enemy combatants doctrine to detain suspected terrorists. Part I explores the judicial origins of the term “enemy combatants” and its cognate in international law, “unlawful combatants.” Part I also examines the Foreign Intelligence Surveillance Act as an example of a congressional attempt to provide detailed procedural safeguards against executive abuse in national security matters. Part II discusses the main questions posed by two recent enemy combatant cases, Hamdi v. Rumsfeld and Padilla v. Bush: What procedural protections should suspected enemy combatants have, and by what standard should the government’s determination that an individual is an enemy combatant be reviewed? Part II also discusses the benefits and pitfalls of the clear alternative to enemy combatant detentions: affording suspects the full protections of the normal rules of civil procedure. Finally, Part II examines civilian trials, such as the trials of the 1993 World Trade Center bombing conspirators and the 1998 embassy bombers. Part III proposes a set of procedural safeguards to the unsettled questions presented by Hamdi and Padilla. It does so by using the law of war and the procedures codified in the Foreign Intelligence Surveillance Act as models. Detainees, this part argues, should have rights in accordance with those models, including the

18. Id. app. at 4.
19. Id.
21. See infra Part I; see also notes 152-55 and accompanying text.
22. See infra notes 33-81 and accompanying text.
23. See infra notes 82-106 and accompanying text.
24. 316 F.3d 450 (4th Cir. 2003); see also infra notes 109-46 and accompanying text.
25. 233 F. Supp. 2d 564 (S.D.N.Y. 2002); see also infra notes 147-65.
26. See infra notes 169-90 and accompanying text.
27. See infra notes 173-87 and accompanying text.
28. See infra notes 191-210 and accompanying text.
right to a fair hearing, the right to counsel, and the right to sue in tort for unlawful detentions. Moreover, this Note concludes that the government should be required to justify detentions by a showing of probable cause.\textsuperscript{29}

\section{I. The History of the Enemy Combatants Doctrine}

Nobody knows the exact definition of an enemy combatant. The term first appeared in \textit{Ex parte Quirin},\textsuperscript{30} a case in which the Supreme Court upheld the government's authority to prosecute eight Nazi saboteurs in a military court.\textsuperscript{31} It seems to derive from the term "unlawful combatants," a label long used in international law to help distinguish between conventional and unconventional prisoners of war.\textsuperscript{32} Section A of this part describes the brief and murky history of the term "enemy combatants" in American courts. Section B discusses how its cognate, "unlawful combatants," has functioned with far greater precision in international law. Finally, Section C will introduce the Foreign Intelligence Surveillance Act as an example of a statutory response to the same problem presented by \textit{Quirin}—the problem of national security—in the area of wiretapping.

\subsection{A. Judicial Origins of the Enemy Combatants Doctrine in \textit{Ex Parte Quirin}}

\textit{Quirin} is the cornerstone of the enemy combatants doctrine. The handful of subsequent Supreme Court decisions invoking \textit{Quirin} have developed this doctrine little, if at all.\textsuperscript{33} Unfortunately, the doctrine produced by \textit{Quirin} itself is hazy and highly fact-specific.

\textit{Quirin} involved eight German-born men, all of whom had lived in the United States at some point, and one of whom was believed to be a naturalized American citizen.\textsuperscript{34} The men had attended a Berlin sabotage school and received training in the use of explosives.\textsuperscript{35} They...
traveled clandestinely to the United States via submarine with the mission of destroying transportation facilities and key elements of the American aluminum industry.\textsuperscript{36} Four of these men landed via submarine at Amagansett, Long Island, on the night of June 12, 1942.\textsuperscript{37} The four others landed days later at Ponte Verde Beach, Florida.\textsuperscript{38} All the men alighted wearing German military uniforms, but they buried their uniforms and explosives upon landing and dispersed to various parts of the country in civilian clothes.\textsuperscript{39} By June 27, FBI agents had taken all eight men into custody in New York and Chicago.\textsuperscript{40}

The Federal Bureau of Investigation quickly publicized these arrests to a public hungry for positive news on the war in Europe.\textsuperscript{41} President Roosevelt ordered that the saboteurs be tried by a military court, and he issued a proclamation on July 2 declaring that anyone acting under the direction of hostile foreign powers was within the jurisdiction of military tribunals.\textsuperscript{42} On July 8, a military commission convened in secret to try the saboteurs.\textsuperscript{43}

\textsuperscript{36} Belknap, supra note 31, at 62.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Quirin, 317 U.S. at 21.
\textsuperscript{40} Belknap, supra note 31, at 62.
\textsuperscript{41} Id. The circumstances surrounding FBI Director J. Edgar Hoover's announcement of the capture of the saboteurs bears some resemblance to the mood in June, 2002, when Attorney General John Ashcroft announced the detention of Padilla. See Ashcroft Text, Associated Press Newswires, June 10, 2002. Bush Administration officials, who had come under fire for failing to recognize clues leading up to the September 11 attacks on the World Trade Center, stressed that Padilla's arrest was the product of cooperation between federal agencies like the FBI and the CIA. See id. (noting that "[b]ecause of the close cooperation among the FBI, the CIA, Defense Department and other federal agencies, [the government was] able to thwart this terrorist"); see also Eggen & Schmidt, supra note 6. Some observers noted that Padilla's detention was fortuitously timed considering the Congressional inquiry into the government's intelligence lapses. See, e.g., Patrick E. Tyler, Al-Qaida Menace Very Much Alive, S. Fla. Sun-Sentinel, June 11, 2002, at 12A.

Monday's disclosure may well galvanize Americans once again behind the president and the notion that the country remains at war even as Congress carries forward with its review of U.S. intelligence failures that allowed Osama bin Laden and his al-Qaeda cohorts to catch the country napping on Sept. 11. . . . Since Congress began its inquiry into intelligence lapses, the White House has pursued a more muscular strategy to demonstrate it is moving aggressively to deal with the ongoing threats. Id.

\textsuperscript{42} See Belknap, supra note 31, at 65 (citing Franklin D. Roosevelt, Proclamation Denying Certain Enemies Access to the Courts of the United States, Exhibit B, Ex parte Quirin, July Special Term—1942, Ex parte and Miscellaneous Case Files, 1925-1953, Records of the Supreme Court of the United States, Record Group 267, National Archives).
\textsuperscript{43} Id. at 66. Belknap argues that while the preservation of national security was the conventional explanation for excluding the public and press, there were also less flattering reasons why federal authorities would have wanted the proceedings to take place in secret. Id. at 66-67. These reasons included the fact that the quick capture of
On July 29, the Supreme Court agreed to gather for a special session to hear the saboteurs' habeas petitions. The case was argued for nine hours on July 29 and July 30. The weightiest argument made by the defense was the applicability of the Court's decision eighty years earlier in *Ex parte Milligan*. In *Milligan*, the Court struck down the government's attempted use of a military tribunal to try an American citizen during the Civil War. *Milligan* involved an Indiana resident arrested in his home state and put on trial before a military commission on charges that included conspiracy against the government, inciting insurrection, and violating the laws of war. The *Milligan* Court stated that military tribunals could not be used to try "citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."

The *Quirin* Court was not swayed. Less than twenty-four hours after arguments concluded, it issued a per curiam opinion stating that the petitioners had failed to show cause for discharge by writ of the eight men was due not to any investigative work by the FBI, but to the betrayal of his comrades by George John Dasch, the leader of the four-man team that landed in Amagansett. Convinced that he would be captured after being sighted by the Coast Guard, Dasch initially telephoned the FBI, then traveled to Washington on his own, where he made a full confession. *Id.* at 65. Another potential embarrassment for the FBI was its treatment of Dasch's initial call as a crank call. *Id.* at 67. Trial testimony revealed that FBI officials had told Dasch they would arrange for a presidential pardon if he pleaded guilty and did not testify about his participation in his own apprehension. *Id.* at 67 (citing E. Rachlis, *They Came to Kill* 143-45, 150-55, 198-200 (1961); Wash. Post, June 29, 1942, at 6; N.Y. Times, June 29, 1942, at 4, and July 7, 1942, at 7).

44. Belknap, supra note 31, at 69.
45. *Id.* at 75.
46. *Id.* at 73; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
47. 71 U.S. (4 Wall.) at 2. *Milligan* fits within a long history of domestic military tribunals in the United States, a history that ended shortly after *Quirin* and the end of World War II. See Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 Cal. W. L. Rev. 433, 452-79 (2002) [hereinafter Balknap Pedigree]. Belknap describes the record of injustice produced by such trials as the Dakota War Trials, where the Union condemned to death more than 300 Dakota Sioux Indians during the Civil War; the 1863 conviction of Clement L. Vallandigham, a pro-Southern Democrat who was openly critical of the Lincoln Administration's suspension of the writ of habeas corpus, for violating a military order making it illegal to declare sympathy for the enemy; the 1865 trial of eight civilians accused of conspiring with John Wilkes Booth to assassinate Lincoln (Belknap notes that this trial would have been "clearly unconstitutional had *Milligan* been decided a year earlier"); and the 1865 conviction and execution of Captain Henry Wirz for murdering and conspiring to injure POWs, crimes allegedly committed as commander of a Confederate POW camp. *Id*; see also *Ex parte Vallandigham*, 68 U.S. (1 Wall) 243, 249 (1863); Benn Pitman, *The Assassination of President Lincoln and the Trial of the Conspirators* (1974); Carol Chomsky, *The United States—Dakota War Trials: A Study in Military Injustice*, 43 Stan. L. Rev. 13 (1990); Lewis L. Laska & James M. Smith, *'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz*, C.S.A., 1865, 68 Mil. L. Rev. 77 (1975).
49. *Id.* at 121.
habeas corpus.\(^{50}\) The military trial of the saboteurs ended the next
day, and a few days later, the commission found all defendants guilty
and sentenced them to death.\(^{51}\) Six of the defendants in Quirin had
already been executed by the time the Quirin Court issued its full
opinion.\(^{52}\)

In its opinion, the Court distinguished the facts of Quirin from
Milligan. It reasoned that the Milligan Court had found that Milligan
"was not an enemy belligerent either entitled to the status of a
prisoner of war or subject to the penalties imposed upon unlawful
belligerents."\(^{53}\) Identified as an implied exception to Milligan's
general rule, the concept of "enemy combatants" thus became the
dispositive factor in the Quirin Court's analysis.

Importantly, the Quirin Court tied its definition of enemy
combatants very closely to these facts. It wrote:

\[
\text{[E]nemy combatant[s] who without uniform [come] 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.}\(^{54}\)
\]

We can quickly identify three elements in this analysis: An enemy
combatant is a belligerent who (1) does not wear a uniform, (2)
secretly passes through the lines of battle, and (3) does so during
wartime. These elements fit neatly with the facts of Quirin. First, the
eight defendants had abandoned their German Marine Infantry
uniforms upon arriving in the United States. Second, they arrived
clandestinely "during the hours of darkness."\(^{55}\) Third, the saboteurs
took these actions in the context of the United States' formal
declaration of war against Germany, on whose behalf they brought
explosives "for the purpose of waging war by destruction of life or
property."\(^{56}\)

These elements constitute the bulk of the doctrine on enemy
combatants that arises from Quirin. They represent the full extent of
the Supreme Court's efforts to define the term "enemy combatant."\(^{57}\)

For a more functional understanding of the term, one must look to
international military law.

\(^{50}\) Belknap, \textit{supra} note 31, at 76.
\(^{51}\) \textit{Id.} at 77.
\(^{52}\) \textit{Id.}
\(^{53}\) \textit{Ex parte} Quirin, 317 U.S. 1, 45 (1942).
\(^{54}\) \textit{Id.} at 31.
\(^{55}\) \textit{Id.} at 21.
\(^{56}\) \textit{Id.} at 31.
\(^{57}\) \textit{See infra} text accompanying note 166.
B. “Unlawful Combatants” in the Law of War

The term “enemy combatants” seems to have derived from “unlawful combatants,” a term that, although not included in the 1949 Geneva Conventions, has long been recognized in international military law. Unlike the uncertainty surrounding enemy combatants, there is general agreement about what unlawful combatants are and how they should be treated. Unlawful combatants are combatants who directly join in hostilities outside the limits imposed by the international law of armed conflict. They include persons who have “fallen into the power of the enemy” yet fail to meet the four criteria necessary for prisoner-of-war status. First, prisoners of war must have been “commanded by a person responsible for his subordinates.” Second, they must have worn a uniform, or have “a fixed distinctive sign recognizable at a distance.” Third, they must have carried arms openly. Lastly, they must have conducted “their operations in accordance with the laws and customs of war.” Persons not meeting all four of these criteria do not enjoy prisoner-of-war status.

This does not necessarily mean, however, that persons who fail to meet these criteria are automatically and immediately considered unlawful combatants. Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War provides that in cases of “any doubt,” captured combatants should be given the opportunity for a hearing before a tribunal. Under the law of war, then, the United

58. See, e.g., A. Rosas, The Legal Status of Prisoners of War 64 (1976) (noting the attitude during the French and American Revolutionary Wars that “persons taking part in hostilities with no authorization from the state ... were not entitled to be treated as lawful combatants and prisoners of war”).


60. Id.

61. Id.

62. Id.

63. Id.

64. Id.

65. See id.

66. Geneva Convention, supra note 59, art. 5 (emphasis added). Article 5 states: Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Id. However, the government, in its brief in the Padilla case, ignored the rights of detainees to Article 5 status hearings, arguing instead that the law of war confers no due process rights upon detainees.

There has never been an obligation under the laws and customs of war to charge an enemy combatant with an offense .... Nor is there any general right of access to counsel for enemy combatants under the laws and customs of war. Even the Third Geneva Convention—which does not afford any
States must give detainees in an armed conflict a hearing to determine their status under the Geneva Convention in cases where their status appears to be even slightly uncertain.

This provision establishes a bulwark against the old practice of making Article 5 determinations arbitrarily and without scrutiny. Detainees automatically enjoy prisoner-of-war status "until such time as their status has been determined by a competent tribunal." Therefore, Article 5 creates what is effectively a presumption of innocence on the part of the detainee. Moreover, the power to determine whether "any doubt" exists as to the status of a detainee does not lie solely with the military. Article 45(1) of the 1977 Protocol I to the 1949 Geneva Conventions provides that a detainee is presumed a prisoner of war if, among other things, "he claims the status of prisoner of war." Article 5 thus codifies in the law of war a detainee's right to argue in his own defense.

Article 5 also provides for the establishment of "competent tribunals" to hear status disputes, although it does not specify the composition of a "competent tribunal," or what procedures it should follow. Generally speaking, this silence is not a serious problem in conventional armed conflicts, where distinguishing between lawful and unlawful combatants is not a very complicated matter. In a conventional war, most prisoners taken are uniformed, carrying arms, and part of a group under the immediate command of a single officer. Thus, an informal and ad hoc procedure for classifying lawful and enemy combatants is less problematic in a conventional conflict than in one where, for example, one side does not wear uniforms. American forces in World War II made Article 5 status determinations in the following manner: Typically, persons of low rank were responsible for making determinations that a detainee was not entitled to prisoner-of-war status, and these determinations were usually made with little deliberation. Such an informal classification protections to unlawful enemy combatants like the detainee in this case—confers no right to counsel to prisoners of war for challenging their wartime detention, but provides counsel only in the event that formal charges are initiated in a trial proceeding.

Government Brief, supra note 9, at 23 n. 6 (citations omitted). One wonders what a "lawful enemy combatant" might be in the domestic context.

67. See supra note 66 and accompanying text.
69. See id. at 55-56.
70. See George H. Aldrich, New Life for the Laws of War, 75 Am. J. Int'l. L. 764, 768-69 (1981) (arguing that Article 4's requirements were written in contemplation of full-time soldiers in a conventional war, not guerilla combatants).
71. The rights of detainees to a status hearing were not recognized by the previous Convention. See Levine, supra note 68, at 55. Article 5 of the 1949 Convention
procedure, imported by analogy to the domestic setting by the contemporaneous Quirin Court, may have worked in its context. But an irregular conflict such as the “War on Terror” demands something much more formal.

Vietnam was such an irregular conflict. There, the Army faced the problem of how to make POW status determinations in an unconventional war that made the Article 5 threshold of “any doubt” seem much lower than it did in World War II.\textsuperscript{72} The Army responded by issuing a directive laying out a procedure for status hearings.\textsuperscript{73}

The directive provided that when a detainee had committed a belligerent act, he would be referred to an Article 5 tribunal if (a) any doubt about his status existed or (b) the detainee or someone on his behalf claimed the detainee deserved POW status despite a determination that the detainee was not a POW.\textsuperscript{74} The tribunal consisted of at least three officers, a majority of whom must have voted in favor of denying POW status for the detainee to lose that status.\textsuperscript{75} The detainee himself had a number of rights. He had the right to a competent interpreter, a right to present his case with the help of counsel, and the right to be present with his counsel at open sessions of the tribunal.\textsuperscript{76}

The detainee had the right to select as counsel “anyone reasonably available, including a fellow detainee.”\textsuperscript{77} If no counsel were reasonably available, the tribunal would appoint “a judge advocate or other military lawyer familiar with the Geneva Conventions as counsel” for him.\textsuperscript{78} The detainee's counsel could present a range of evidence: affidavits, real evidence, documents, and statements of the detainee himself.\textsuperscript{79} He could call and cross-examine witnesses.\textsuperscript{80} He had free access to visit and interview the detainee in private, and also to confer privately with “essential witnesses,” including POWs.\textsuperscript{81}

The international law of war, then, provides detailed procedures for making determinations about the status of unlawful combatants. It

\textsuperscript{72} See Levy, supra note 68, at 57 (describing “the problem of the need to have a formalized procedure for deciding the doubtful cases of entitlement to prisoner-of-war status of individuals captured by [U.S.] forces”).


\textsuperscript{74} Id. at 768-69.

\textsuperscript{75} Id. at 771.

\textsuperscript{76} Id.

\textsuperscript{77} Id.

\textsuperscript{78} Id. at 772.

\textsuperscript{79} Id. at 773.

\textsuperscript{80} Id. at 772. The right to call and cross-examine witnesses was subject to “such reasonable restrictions as the tribunal may impose.” Id.

\textsuperscript{81} Id.
also includes safeguards to ensure status determinations are not made unilaterally without regard for detainees' ability to argue on their behalf, either on their own or through counsel. In comparison, the judicial doctrine on enemy combatants is sparse and undeveloped.

Judicial doctrine is not the only way the law regarding executive powers in situations involving national security has developed, of course. This law may also take statutory form, as it has in the area of wiretapping. Part C will show how, in contrast to the confusion surrounding enemy combatants, the law regarding electronic surveillance in situations involving national security is extremely detailed.

C. Electronic Surveillance Law Compared

Wiretapping law was not always highly developed. Indeed, it was once as murky as the enemy combatants doctrine. Before Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968, wiretapping was effectively unregulated. In 1928, the Supreme Court in *Olmstead v. United States* held that the Fourth Amendment's protections against unreasonable searches and seizures did not apply to electronic eavesdropping. Government wiretapping continued essentially without restrictions for the next forty years. It was not until 1967 that the Supreme Court held in *Katz v. United States* that wiretaps were "searches" within the meaning of the Fourth Amendment, and consequently that the government must meet the Constitution's warrant and probable cause requirements when conducting electronic surveillance. Nevertheless, the Court specifically declined to extend its holding to cases involving national security.

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86. *Id.* at 358 n. 23 ("Whether safeguards other than prior authorization by a
A year later, Congress enacted Title III, the first federal statute to regulate wiretapping in criminal investigations. Title III provided that the government must meet a twofold probable-cause standard to obtain a wiretap in a criminal investigation: (1) probable cause to believe the individual targets of surveillance are committing one of the crimes listed in the statute, and (2) probable cause that the telephone or facility the government wants to tap is being used in connection with that criminal activity, and that the wiretap will yield "communications concerning" the activity. To obtain a wiretapping warrant under Title III, the government must also show that other investigative procedures, such as the use of informants, are not likely to work.

Following Katz's lead, Title III explicitly exempted from its coverage the government's foreign intelligence gathering activities. However, demand for restrictions on the wiretapping authority of the Central Intelligence Agency and Executive branch took root amidst the widespread public distrust engendered by the Watergate scandal.
In 1976, the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities published a harshly critical report on the government’s use of electronic surveillance. The Committee compiled a litany of abuses of executive power, including President Franklin D. Roosevelt’s authorization of wiretaps of “persons suspected of subversive activities against the Government of the United States,” and Attorney General Robert Kennedy’s wiretapping of news reporters, Malcolm X, and the Rev. Martin Luther King, Jr. In 1978, responding to the perceived need to curb such executive abuses, Congress passed the Foreign Intelligence Surveillance Act (“FISA”).

The foreign intelligence version of Title III, FISA uses a probable cause standard that is more relaxed than that of Title III. Under FISA, agents must make a showing that there is probable cause that the target of surveillance is a “foreign power” or an agent of a foreign power. In cases involving U.S. citizens, the government must show that the target is acting for or on behalf of a foreign power, or is aiding or conspiring with any person acting for or on behalf of a foreign power. Unlike Title III, FISA does not require a showing of criminal activity on the part of the target unless the target is an

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93. The Committee wrote:
Since the 1930’s, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant . . . . [P]ast subjects of these surveillances have included a United States Congressman, Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam War protest group.

The application of vague and elastic standards for wiretapping and bugging has resulted in electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment Rights of both the targets and those with whom the targets communicated. The inherently intrusive nature of electronic surveillance, moreover, has enabled the Government to generate vast amounts of information—unrelated to any legitimate government interest—about the personal and political lives of American citizens. The collection of this type of information has, in turn, raised the danger of its use for partisan political and other improper ends by senior administration officials. Senate Report, supra note 84, at 10, reprinted in 1978 U.S.C.C.A.N. 3904, 3909 (citations omitted).

94. See It’s Official: Government Snooping Has Been Going On for 50 Years, supra note 92, at 66.


96. 50 U.S.C. § 1804(a)(4)(A) (agent must produce facts to justify the belief that the surveillance target is a foreign power or an agent of a foreign power); id. § 1805(a)(3)(A) (reviewing judge must find there is probable cause to believe the surveillance target is a foreign power or an agent of a foreign power).

97. Id. § 1801(b)(2)(A)-(E).
American citizen suspected of spying for a foreign power; in those cases the government must only show the target’s activities “may involve” a violation of U.S. criminal law.  

In applications for FISA warrants, the government must also certify that a significant “purpose of the surveillance” is “to obtain foreign intelligence information,” and that this information “cannot reasonably be obtained by normal investigative techniques.” The government must also include its basis for these certifications. It must state how long it will need to maintain surveillance, and if it wants to continue surveillance indefinitely, the government must produce facts supporting its belief that it will obtain additional information of the same type as the information it seeks immediately. Surveillance applications are reviewed by the FISA court, made up of eleven federal district court judges nominated by the Chief Justice of the United States. By statute, the FISA court cannot approve the government’s request unless it finds probable cause supporting the government’s belief that the surveillance target “is a foreign power or an agent of a foreign power.”

Unlike the law regarding physical detentions of enemy combatants within the U.S., which has remained murky and undeveloped over the last fifty years, the law regarding electronic surveillance for foreign-intelligence gathering purposes is clear. As opposed to Quirin’s enemy combatants doctrine, FISA provides a detailed set of procedural safeguards. These safeguards are designed to curb abuse of executive power without hampering the government’s ability to conduct wiretaps in national security cases.

98. Id. § 1801(b)(2)(A) (defining as an agent of a foreign power any U.S. citizen who “knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States”).

99. Id. § 1804(a)(7)(B). Section 218 of the Patriot Act amended FISA to provide that “foreign intelligence” need only be a “significant purpose” of investigations. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). The United States Foreign Intelligence Surveillance Court of Review, assembling for the first time, ruled that the FISA court and Justice Department’s previous understanding that the purpose of the investigation need be the “primary” purpose was an incorrect reading of the FISA statute itself. In re Sealed Case, 310 F.3d 717 (Foreign Intelligence Surveillance Ct. Rev. 2002). See also Neil A. Lewis, Court Overturns Limits on Wiretaps to Combat Terror, N.Y. Times, Nov. 19, 2002, at 1.

100. 50 U.S.C. § 1804(a)(7)(C).
101. Id. § 1804(a)(7)(E).
102. Id. § 1804(a)(10).
103. Id.
104. Id. § 1803(a).
105. Id. § 1804(a)(4)(A).
106. See supra note 90 and accompanying text; Part III.B.
Difficult questions arise in the case of enemy combatant detainees. How long may the government hold suspects without charging them? May detainees have access to counsel or the right to a hearing? Is the government’s determination that an individual is an enemy combatant reviewable by courts? If it is, by what standard? Part II explores the ways two contemporary cases have raised, and largely failed to answer, these questions.

II. QUIRIN RESURRECTED IN HAMDI V. RUMSFELD AND PADILLA V. BUSH

Compare the situation of an enemy belligerent detained in South Vietnam with that of an enemy combatant detainee such as Jose Padilla. For more than nine months, Padilla has been held incommunicado, with no access to counsel, or, for that matter, access to anyone. He has not been charged with a crime, and the government has given him no status hearing. The distinction is clear—a U.S. citizen detained as an enemy combatant has significantly fewer rights than a hostile enemy belligerent captured in foreign territory by U.S. troops during an armed conflict.

The rights of enemy combatant detainees will be settled in upcoming litigation. Padilla v. Bush and Hamdi v. Rumsfeld are parallel enemy combatants cases, one of which may well become the first “enemy combatants” case to reach the Supreme Court in sixty years. If the government succeeds in its use of this undefined term to detain U.S. citizens indefinitely, it will have a weapon of extremely broad reach.

A. Hamdi v. Rumsfeld: A Circular Trap

Like Padilla, Yaser Esam Hamdi is a U.S. citizen. American and allied forces captured Hamdi in Afghanistan as part of the military operation authorized by Congress following the attacks on the World Trade Center and Pentagon on September 11, 2001. American troops transferred Hamdi in the fall of 2001 to Camp X-Ray in Guantánamo Bay, Cuba, where he was held along with other

110. Hamdi's lawyer, federal public defender Frank Dunham, has indicated his plans to appeal the decision. Jess Bravin, Court Upholds Indefinite Jailing of U.S.-Turncoat Combatants, Wall St. J., Jan. 9, 2003, at A4 (“Since I can't talk to my client and give him a chance to decide whether to appeal, I think I have to do everything in my power to protect his rights,' [Dunham] said.
111. Hamdi v. Rumsfeld, 296 F.3d 278, 280 (4th Cir. 2002) (noting that the government believes Hamdi has retained his U.S. citizenship).
112. See Authorization, supra note 2; see also supra notes 2-3 and accompanying text.
113. Hamdi, 296 F.3d at 280.
prisoners captured in the Afghanistan conflict.\textsuperscript{114} In January 2002, when it became clear that he had been born in Louisiana, and was therefore a U.S. citizen, authorities brought Hamdi to the Norfolk Naval Station Brig, where the government sought to detain him indefinitely as an enemy combatant.\textsuperscript{115}

Hamdi's father, Esam Fouad Hamdi, filed a petition for a writ of habeas corpus on behalf of his son.\textsuperscript{116} The trial court appointed the Federal Public Defender as counsel.\textsuperscript{117} The court also granted the Public Defender access to Hamdi in a meeting that would be "private between Hamdi, the attorney, and the interpreter, without military personnel present, and without any listening or recording devices of any kind being employed in any way."\textsuperscript{118} Moreover, the meeting was to occur at least three days before the government filed its response to Hamdi's brief.\textsuperscript{119}

On interlocutory appeal, the Fourth Circuit reversed and remanded.\textsuperscript{120} In reaching its decision, the Hamdi court focused on what it saw as the exceptional circumstances that made the order unlike the "garden-variety appointment of counsel in an ordinary criminal case," a decision that would have been well within the discretion of a trial court.\textsuperscript{121} The Fourth Circuit focused on Hamdi's characterization as an enemy combatant:

There is little indication... that the [district] court gave proper weight to national security concerns. The peremptory nature of the proceedings stands in contrast to the significance of the issues before

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 279. Prior to this filing by Hamdi's father, the Federal Public Defender for the Eastern District of Virginia had filed a habeas petition naming himself as a "next friend" of Hamdi. \textit{Id.} The district court granted the Public Defender's request to meet with Hamdi privately and without being monitored by the government. \textit{Id.} However, the Fourth Circuit reversed this order in \textit{Hamdi v. Rumsfeld}, 294 F.3d 598 (2002). The Fourth Circuit held that the Public Defender failed to meet the two-pronged test from \textit{Whitmore v. Arkansas}, 495 U.S. 149 (1990). Under Whitmore, a next friend must first supply an explanation why the real party in interest cannot prosecute the action on his own behalf. \textit{Id.} at 163. Second, a next friend must show that he is "truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest." \textit{Id.} at 163-64 (citations omitted). While the Hamdi court was satisfied that the petition met the first criterion—Hamdi's detention rendered him inaccessible—it found that the second criterion was lacking, because the Public Defender had no prior relationship with Hamdi before he filed a habeas writ on his behalf. \textit{Hamdi}, 294 F.3d at 604. To put Hamdi's treatment of the next-friend issue into a broader context, see Stacey M. Studnicki & John P. Apol, \textit{Witness Detention and Intimidation: The History and Future of Material Witness Law}, 76 St. John's L. Rev. 483, 524-27 (2002).

\textsuperscript{117} Hamdi, 296 F.3d at 281.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 279.
\textsuperscript{121} Id. at 282.
ENEMY COMBATANTS

the court. The June 11 order does not consider what effect petitioner's unmonitored access to counsel might have upon the government's ongoing gathering of intelligence. The order does not ask to what extent federal courts are permitted to review military judgments of combatant status. Indeed, the order does not mention the term enemy combatant at all.

Instead, the June 11 order apparently assumes (1) that Hamdi is not an enemy combatant or (2) even if he might be such a person, he is nonetheless entitled not only to counsel but to immediate and unmonitored access thereto.122

The Fourth Circuit also noted that because the trial court had allowed Hamdi to meet with his lawyer before the government had an opportunity to present its arguments, the order failed to create "even a modest foundation" for review at the appellate level.123

On remand, the district court held a hearing in which it asked the government a series of fundamental questions about the nature of the hostilities pursuant to which Hamdi was being detained.124 Relating to the indefinite nature of the detention, the court asked, "will the war never be over as long as there is any member [or] any person who might feel that they want to attack the United States of America or the citizens of the United States of America?"125 The court directed the government to answer these questions in a response to Hamdi's petition.126 The government filed a response that included an affidavit from Michael Mobbs, the Special Advisor to the Under Secretary of Defense for Policy.127 The Mobbs declaration confirmed that the government had declared Hamdi to be an "enemy combatant," and gave the government's account of Hamdi's seizure128 and his subsequent transfers to Camp X-Ray and the Norfolk Navy brig.129 The district court then held a hearing to review the sufficiency of the Mobbs declaration.130

122. Id.
123. Id. at 282-83.
125. Id.
126. Id.
127. Id.
128. The court wrote:
According to Mobbs, the military determined that Hamdi 'traveled to Afghanistan in approximately July or August of 2001' and proceeded to 'affiliate[] with a Taliban military unit and receive[] weapons training.' While serving with the Taliban in the wake of September 11, he was captured when his Taliban unit surrendered to Northern Alliance forces with which it had been engaged in battle. He was in possession of an AK-47 rifle at the time of surrender.
Id. (alterations in original).
129. Id.
130. Id. at 462.
At this hearing, the district court noted, in accordance with the Fourth Circuit’s instructions, that “the government is entitled to considerable deference in detention decisions during hostilities.” Nonetheless, it issued an opinion finding that the Mobbs declaration fell “far short” of supporting the detention, and ordered the government to turn over a list of materials to supplement its response to Hamdi’s petition. These materials included copies of all statements by Hamdi and the notes taken from all interviews with him; a list of every person who had interrogated Hamdi; copies of any statements made by Northern Alliance members regarding Hamdi’s surrender; “the name and title of the individual within the United States Government who made the determination that Hamdi was an illegal enemy combatant”; and the screening criteria that the government used to determine Hamdi’s status.

The government again appealed to the Fourth Circuit, which reversed the district court’s order and remanded the case with directions to dismiss Hamdi’s petition. In its opinion, the Fourth Circuit rejected Hamdi’s argument that he was entitled to an Article 5 status hearing. It reasoned that the Geneva Convention is not a “self-executing” document that evinces an intent to provide a private right of action to individual petitioners. Moreover, the court wrote, even though unlawful combatants are entitled to a status hearing, “they are also subject to mere detention in precisely the same way that lawful prisoners of war are.” The Fourth Circuit’s rationale for rejecting the district court’s order, meanwhile, focused on the practical problems that the order posed to the government in the context of an ongoing military campaign.

The court based its decision to dismiss Hamdi’s petition on the level of extreme deference due to the President’s exercise of his powers.

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131. See supra note 122 and accompanying text.
132. Hamdi, 316 F.3d at 462.
133. Id.
134. Id. at 470.
135. Id. at 459.
136. See supra notes 61-81 and accompanying text.
137. “Non-self-executing” treaties require implementing legislation to be given effect in United States courts. See Restatement (Third) of the Foreign Relations Law of the United States § 111(3) (1997). Such implementing legislation may be required by the language of the treaty itself, the Senate in giving consent to a treaty or the House of Representatives by resolution, or the Constitution. Id. § 111(4)(a)-(c).
138. Hamdi, 316 F.3d at 468.
139. Id. at 469. “The fact that Hamdi might be an unlawful combatant in no way means that the executive is required to inflict every consequence of that status on him. The Geneva Convention certainly does not require such treatment.” Id.
140. Id. at 469-71. “The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded.” Id. at 471.
141. The court did not reach the question of whether the “some evidence” standard
as Commander-in-Chief in time of war. The court described a two-pronged inquiry: First, the government must have the legal authority to detain Hamdi; and second, the government must have supplied basic facts necessary to support a legitimate use of that authority. The Fourth Circuit found both prongs satisfied, the legal authority stemming from Article II, Section 2 of the Constitution, the source of the President’s war powers, and the necessary factual support supplied by the Mobbs Declaration. Of the district court’s close scrutinizing of the declaration, the court wrote:

To be sure, a capable attorney could challenge the hearsay nature of the Mobbs declaration and probe each and every paragraph for incompleteness and inconsistency... But we are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive’s law enforcement powers. We are dealing with the executive’s assertion of its power to detain under the war powers of Article 1.

The Fourth Circuit’s application of Quirin, then, leaves Hamdi stuck within the circular trap created by the enemy combatants doctrine: The determination that he is an enemy combatant denies him the means—a capable attorney—of challenging that very determination.

B. Padilla v. Bush: No Guidance from Quirin

On December 4, 2002, Judge Michael Mukasey of the U.S. District Court for the Southern District of New York ruled that Jose Padilla must be allowed to meet with an attorney—a right the government had denied him for some six months after transferring him to a naval brig in South Carolina. The Court also ruled that it had the authority to determine whether the government’s classification of Padilla as an enemy combatant was proper. However, because the district court narrowly tailored its ruling to the circumstances of Padilla’s habeas petition, it left open some of the most fundamental questions about the rights of enemy combatants, such as whether all detainees should have such procedural protections as the right to a fair hearing and access to counsel.

of review sought by the government applied. Id. at 474.
142. Id. at 471-72; accord Ex parte Quirin, 317 U.S. 1, 25 (1942).
143. Hamdi, 316 F.3d at 468.
144. U.S. Const., art. II, § 2; Hamdi, 316 F.3d at 471.
145. Hamdi, 316 F.3d at 473.
146. Id. at 473.
In its brief in the *Padilla* case, the government responded to each of Padilla’s constitutional challenges under the Fourth, Fifth, and Sixth Amendments in the same manner: by pointing to his status as an enemy combatant.149 For example, Padilla’s invocation of the Fourth Amendment’s probable cause requirement, the government argued, presupposes that the warrant requirement applies in the first place.150 But the warrant requirement does not apply “in the context of the capture and detention of an enemy combatant in the field of war.”151 This reasoning has an obvious appeal to the government. An executive determination that a citizen is an enemy combatant is immune to all constitutional challenges because that determination places that citizen outside the purview of the Constitution itself.

The district court decided to allow Padilla to present facts through counsel, but based that decision narrowly on the facts of Padilla’s case.152 Rather than looking to the Sixth Amendment rights of enemy combatant detainees in general, Judge Mukasey based his decision on the rights of a petitioner in a habeas proceeding.153 These rights, the court noted, sprang from the statute granting federal district courts the authority to issue habeas writs, and two related statutes outlining procedural guidelines for habeas proceedings.154 The court rejected Padilla’s Sixth Amendment argument on the grounds that the President’s executive determination that Padilla is an enemy combatant placed him outside the protections of the Sixth Amendment.155 However, it took care to note that Padilla’s right to

150. *Id.* at 26.
151. *Id.*
153. *Id.* at 599.
154. *See* 28 U.S.C. § 2241 (2000) (granting district courts, inter alia, the power to issue writs of habeas corpus); 28 U.S.C. § 2243 (outlining procedures to be followed in a § 2241 case); 28 U.S.C. § 2246 (allowing presentation of evidence in habeas cases by deposition, affidavit, or interrogatories). *See also* Padilla, 233 F. Supp. 2d at 600 (“Quite plainly, Congress intended that a § 2241 petitioner would be able to place facts, and issues of fact, before the reviewing court, and it would frustrate the purpose of the remedy to prevent him from doing so.”).
155. The Sixth Amendment states that in criminal prosecutions, “the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const., amend. VI. The *Padilla* court wrote:

Of course, Padilla has no Sixth Amendment right to counsel in this proceeding. The Sixth Amendment grants that right to the “accused” in a “criminal proceeding”; Padilla is in the custody of the Department of Defense; there is no “criminal proceeding” in which Padilla is detained; therefore, the Sixth Amendment does not speak to Padilla’s situation. Beyond the plain language of the Amendment, “even in the civilian community a proceeding which may result in deprivation of liberty is nonetheless not a ‘criminal proceeding’ within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial.”

*See Padilla*, 233 F. Supp. 2d at 600 (citations omitted).
counsel hinged largely on the peculiar facts of his case, which it distinguished from those in *Hamdi*, where the Fourth Circuit had reversed a district court’s grant of unmonitored access to counsel. In *Padilla*, the district court stressed that the government could monitor Padilla’s conversations with his lawyers. Additionally, the court noted that unlike *Hamdi*, Padilla had been granted access to counsel during his initial detention on a material witness warrant before the government designated him an enemy combatant. Therefore, the court reasoned, “no potential prophylactic effect of an order barring access by counsel could have been lost” by granting access to counsel.

Perhaps most importantly, the district court accepted the very deferential standard of review for enemy combatant determinations sought by the government. In its brief, the government had argued

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157. Id. at 603-04.
158. Id. at 605.
159. Id. In a subsequent filing asking Judge Mukasey to reconsider his decision to allow Padilla access to counsel, the Justice Department disclosed that military interrogators had been questioning Padilla for several months in an attempt to turn him into a valuable source of intelligence about al Qaeda. Lyle Denniston, *U.S. Argues Against Counsel for Terror Suspects*, Boston Globe, Jan. 11, 2003, at A2. “Without reporting the details of the questioning, and without discussing anything that Padilla may have said in those sessions, the department said that ‘granting him direct access to counsel can be expected to set back his interrogations by months, if not derail the process permanently.’” Id. Without more information, one may reasonably assume that the government expects the effectiveness of these interrogations to correspond with their unconventionality and harshness. Using a particularly telling phrase, the government argued that allowing Padilla direct contact with an attorney threatened to upset “the sense of dependency and trust” created by interrogators. Id. (citations omitted).

Judge Mukasey responded with a biting opinion reaffirming his decision to allow Padilla to meet with defense lawyers. *Padilla v. Rumsfeld*, No. 02-4445, 2003 U.S. Dist. LEXIS 3471 (S.D.N.Y. Mar. 11, 2003). Mukasey wrote that his order was “not a suggestion or a request that Padilla be permitted to consult with counsel, and is certainly not an invitation to conduct a further ‘dialogue’ about whether he will be permitted to do so. It is a ruling—a determination—that he will be permitted to do so.” Id. at 35. The government subsequently told the court that it would seek an expedited appeal of the order. Benjamin Weiser, *A Nation at War: The Courts U.S. to Appeal Order Giving Lawyers Access to Detainee*, N.Y. Times, Mar. 26, 2003, at B15. The government claimed that the court, “in a district far from the Charleston brig, lacked jurisdiction in the matter.” Id.


> Until the enactment of the 1952 Immigration and Nationality Act, the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by
for a standard of review barely more rigorous than no review at all: 61
"[R]eview is limited to confirming based on some evidence the existence of a factual basis supporting the determination." 62
Accepting the government's separation-of-powers argument that a court's ability to review executive decisions is limited, 63 the district

the Executive.

Government Brief, supra note 9, at 14-15. Regarding selective service determinations, the government quoted Eagles v. United States, 329 U.S. 304, 312 (1946), where the Court wrote: "If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, or that there was no evidence to support the order, the inquiry is at an end." Government Brief, supra note 9, at 15. Notably, the Eagles Court invoked procedural safeguards that do not exist in enemy combatants detentions.

According to the government, because courts used such a deferential standard "in contexts much less constitutionally sensitive than the one" in the Padilla case, they should be no less deferent when reviewing executive determinations of great importance to national security. Id. at 14. Of course, the opposite argument also follows: Because detentions of enemy combatants involve a fundamental right of U.S. citizens—the right to liberty—a much less deferential standard than those regularly used to review decisions of administrative agencies should apply.

161. Cases the government relied upon in its argument for judicial deference in the Padilla case included Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); Ex parte Quirin, 317 U.S. 1, 28-29 (1942) ("An important incident to the conduct of war is the adoption of measures by the military command ... to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."); United States v. Curtiss-Wright Export Co., 299 U.S. 304, 319 (1936) (holding federal power over foreign affairs is entrusted to the President alone); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) (stating the Court must "be governed by" the Executive branch with respect to "[w]hether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents."); and Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998) ("In the military setting ... constitutionally-mandated deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the military had advanced to justify its actions."). Government Brief, supra note 9, at 11-13.

162. Government Brief, supra note 9, at 13 (emphasis added).

163. The Padilla court quoted at length the Fourth Circuit's opinion in Hamdi to this effect:

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. This deference extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle. The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2. As far back as the Civil War, the Supreme Court deferred to the President’s determination that those in rebellion had the status of belligerents. And in World War II, the Court stated in no uncertain terms that the President’s wartime detention decisions are to be accorded great deference from the courts.

Padilla, 233 F. Supp. 2d at 606 (quoting Hamdi v. Rumsfeld, 296 F.3d 278, 282 (4th Cir. 2002) (citations omitted)).
court wrote that it would apply the deferential "some evidence" test once Padilla had presented facts in his favor. It is likely, however, that any facts Padilla might present will have little effect, because the standard of review does not seem to allow for any sort of weighing of evidence. Rather, it would seem there either is or is not "some evidence" to support a determination—contrary evidence notwithstanding.

Significantly, the district court did not attempt to specify what an enemy combatant is. On the contrary, it plainly noted the lack of case law on the subject. "[I]t would be a mistake," the court wrote, "to create the impression that there is a lush and vibrant jurisprudence governing these matters. There isn't. Quirin offers no guidance regarding the standard to be applied in making the threshold determination that a habeas corpus petitioner is an unlawful combatant." Given this lack of guidance, it is safe to say that courts will continue to have difficulty analyzing enemy combatants determinations made by the government. The vagueness of the term "enemy combatants" and the extremely deferential standard of review sought by the government and accepted by the district court in Padilla may well transform judicial review of enemy combatant determinations into rubber-stampings of detentions.

Moreover, whatever analysis courts attempt will likely be hamstrung by the difficult task of construing Quirin in a post-September 11 context. Quirin's discussion of enemy combatants

164. Id. at 608.
165. Even the highly deferential "substantial evidence" standard used by courts to review administrative findings involves some consideration of the quality of evidence. See 5 U.S.C. § 706(2)(E) (2000) (establishing substantial evidence standard of judicial review in cases "subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute"). Courts have interpreted 5 U.S.C. § 706's substantial evidence standard as a qualitative standard that includes consideration of evidence supporting conclusions contrary to those drawn by the administrative agency whose decision is under review. See, e.g., Nibali v. United States, 589 F.2d 514, 516 (Ct. Cl. 1978) (stating that, when determining substantiality of evidence, court must take into account whatever in record detracts from its weight); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 691 (9th Cir. 1949), cert. denied 338 U.S. 860 (1949) (stating substantial evidence includes more than a mere scintilla of evidence and more than uncorroborated hearsay).
166. Padilla, 233 F. Supp. 2d at 607.
167. For one thing, the Supreme Court decided Quirin in accordance with contemporary jurisprudence. Since that case, the Court has vastly increased protections for individuals accused of crimes, most notably in the context of searches and seizures, confessions, and the right to counsel. See Miranda v. Arizona, 384 U.S. 436 (1966) (holding that a suspect in custodial interrogation must be made aware of his right to assistance of counsel and to terminate questioning); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that indigent criminal defendants are entitled to have counsel appointed for them in state court proceedings under the Sixth Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (holding the exclusionary rule barring admission of evidence procured in violation of the Fourth Amendment applicable to the states). A wholesale importing of Quirin's reasoning into today's setting would ignore the significant developments in the Court's understanding of
was rooted in the context of a conventional war very unlike the United States’ current anti-terrorism program. Unlike a conventional war, a “war on terror” does not engage hostile governments with defined borders. This conflict, as the Bush Administration has repeatedly noted over the last year, may extend indefinitely as an ongoing national security effort. In this context, an uncritical importing of Quirin\textsuperscript{168} might support the government’s authority to detain citizens as enemy combatants for years on end with very little scrutiny by courts. Without a set of procedural safeguards—including a detainee’s right to present facts through counsel and a probable-cause standard which the government must satisfy to justify detentions—the category of “enemy combatants” may become a juggernaut for the government.

C. Flawed Alternatives

This is not to say that the government does not have very real concerns. A war on terror is unlike a conventional war. But terrorism is also unlike conventional crime, and it poses very different challenges to both law enforcement and the military. These challenges complicate the viability of the clear alternative to the government’s use of military tribunals and the enemy combatants

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\textsuperscript{168}. How well-suited are the principles of Quirin today? Recall the three elements the Quirin Court used to describe the “familiar example” of a belligerent to be classified as an enemy combatant. An enemy combatant is a belligerent who (1) does not wear a uniform and (2) secretly passes through the lines of battle (3) during wartime. See supra notes 54-56 and accompanying text.

These elements do not square well with Padilla’s case. Padilla, it is true, had no uniform, but neither do most American citizens. Someone who does not wear a uniform is not the same as a belligerent who does wear a uniform but abandons it to slip behind enemy lines. Padilla did not, as did the German belligerents in Quirin, come secretly through enemy lines in the darkness of night, or at any other hour, for that matter. He came openly on a commercial airliner. Government Brief, supra note 9, app. at 2.

Most obviously, the concept of “enemy lines” itself has at best tenuous applicability to Padilla. For the first nine months of Padilla’s detention, the United States was not engaged in anything resembling a formal war with any nation. During that period, it also lacked a formal enemy in any form that could have been anticipated by the Quirin Court.
doctrine: civilian courts applying the normal rules of criminal procedure.

1. The Problem of Secrecy

The most common objection to giving suspected terrorists the full constitutional protection of civilian courts hinges on the issue of secrecy.\textsuperscript{169} Granting suspects unfettered access to counsel may allow them to pass coded information to other operatives on the outside.\textsuperscript{170} According to the government, access to counsel also may “interfere with—and likely thwart—the efforts of the United States military to gather and evaluate intelligence about the enemy, its assets, its plans, and its supporters.”\textsuperscript{171} This logic relies on the notion that one of the main functions of counsel is to clamp down on the government’s aggressive questioning of criminal suspects, and it is likely correct—that is, a competent attorney will thwart the sort of unconstitutional interrogation techniques that the government might be tempted to use against a suspect it believes has information that could save lives.\textsuperscript{172}

Proponents of military tribunals also point to the problem of classified or sensitive information, which, for security reasons, prosecutors may be reluctant to present as evidence in a civilian trial. In the embassy bombing trial,\textsuperscript{173} for example, prosecutors entered into evidence a 180-page translated document entitled “Military Studies in the Jihad Against the Tyrants.”\textsuperscript{174} This document instructed readers on the use of rifles and pistols for assassinations, on the endurance of torture, and on encryption methods; and gave guidelines for renting safe houses and storing illegal weapons.\textsuperscript{175} Supporters of military tribunals have blasted the publicizing of this “terror manual” in open court.\textsuperscript{176} As one \textit{Wall Street Journal} editorial put it: “By entering the manual into evidence, the U.S. was telling al Qaeda that it knew its operating procedures and inviting it to change course. This was bad enough during peacetime, but in the middle of a war against terrorism it’s akin to disclosing troop movements.”\textsuperscript{177}

\textsuperscript{170} See Benjamin Weiser, \textit{Threats and Responses: Suspect “Enemy Combatant” Fights to Obtain Counsel}, N.Y. Times, Oct. 30, 2002, at A17 (describing opposing briefs filed in the district court in the Padilla case). “A lawyer could also become an unwitting conduit for transmitting information that could damage national security, the government said.” \textit{Id.}
\textsuperscript{171} Government Brief, \textit{supra} note 9, at 24.
\textsuperscript{172} See \textit{supra} note 122 and accompanying text.
\textsuperscript{176} See, e.g., \textit{Terrorists on Trial, supra} note 169, at A18.
\textsuperscript{177} \textit{Id.}
The trial of Zacarias Moussaoui also illustrates the difficulties prosecutors face in this setting. During his trial in federal district court, Moussaoui demanded and received access to an al Jazeera television interview with Ramzi bin al Shibh, a Yemeni who prosecutors believe helped organize the September 11 attacks.178 This development has put prosecutors in a serious bind. Moussaoui’s right to access witnesses who could help prove his innocence, guaranteed under the Sixth Amendment,179 has led his lawyers to demand that four senior al Qaeda leaders in American custody, including bin al Shibh and alleged September 11 mastermind Khalid Shaikh Mohammed, be called to testify at his trial.180 Judge Leonie M. Brinkema of the Eastern District of Virginia has ordered the government to provide Moussaoui with access to bin al Shibh, but indefinitely postponed the trial while the government appeals the order to the Fourth Circuit.181 The government has indicated that if it loses this appeal, it will likely scuttle the trial altogether and try Moussaoui in military court.182

2. Fairness

The question of fairness with regard to defendants goes hand in hand with concerns about secrecy. Leaks plagued the trial of the 1993

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179. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .”).
World Trade Center bombers\(^{183}\) from the onset, possibly prejudicing potential jurors against the defendants, according to defense attorneys.\(^{184}\) Gag orders may ameliorate this problem somewhat. However, relying on gag orders in matters of national security may carry serious risks, especially because such orders are often ineffective or overturned. In the World Trade Center case, for example, Judge Kevin Thomas Duffy issued a sweeping gag order barring attorneys from making statements to the press that might prejudice potential jurors.\(^{185}\) Despite that order, prejudicial documents were leaked to reporters before introduction as evidence, including hundreds of pages of transcripts from telephone surveillance conducted by an FBI informant.\(^{186}\) The Second Circuit eventually overturned Judge Duffy’s gag order as unconstitutionally broad.\(^{187}\)

Proponents of military tribunals may also argue that the problem of leaks undermines the argument that defendants would necessarily receive fairer treatment in civilian courts than in military tribunals. Empirical evidence suggests, however, that the notion that military tribunals serve as little more than rubber stamps for prosecutors may be vastly overstated. While military commissions convicted around 85% of the more than 3000 people tried before them since World War II,\(^{188}\) the conviction rate for civilians tried on criminal charges in the Southern District of New York in 2001 was 97.2%, including guilty pleas and dispositions at trial.\(^{189}\)

The question of how the government and courts should approach the issue of enemy combatants requires a delicate balancing act, then. At the extremes sit two sets of unsatisfactory alternatives. On the one
hand, giving enemy combatants the full protection of the normal rules of criminal procedure may, as the government claims, unduly jeopardize continuing intelligence gathering efforts. On the other hand, the harsh application of the enemy combatants doctrine by executive power may create a perverse system in which individuals lose basic constitutional rights if the government’s case against them is too weak to yield charges. Clearly, the government needs a set of procedural safeguards that provide a framework to guard against executive abuse but still allow broad counter-terrorism authority.

III. PROCEDURAL SAFEGUARDS AND THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

To find an example of such a framework, one need only look to the requirements set out in FISA governing electronic eavesdropping on U.S. citizens. FISA is itself regarded by critics as a draconian measure carried out in such extreme secrecy as to raise serious Fourth Amendment concerns. Yet FISA contains precisely the sort of procedural guidelines and safeguards that are necessary to curb executive abuse—safeguards that, although minimal, the government has sought to avoid in the Hamdi and Padilla cases.

A. FISA’s Baseline Protections

In cases involving electronic surveillance of “United States persons,” the government’s application for wiretapping authority under FISA must include a statement of the facts and circumstances that justify the government’s belief that the surveillance target is “a foreign power or an agent of a foreign power.” The application must certify that the purpose of the wiretap is the gathering of foreign intelligence information and that normal investigative techniques will not be sufficient to obtain this information. The government’s application must also include its factual basis for these certifications.

The question of duration is of particular relevance to enemy combatants detentions. In FISA applications, the government must

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190. If the evidence were stronger, we can assume the government would, in many cases at least, simply prosecute such suspects.
192. See, e.g., Foreign Intelligence Surveillance Act: Oversight Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary, H.R., 98th Cong. 27 (1983) (statement of Mark Lynch, Attorney, ACLU) (“Our principal problem with FISA is that we simply do not know whether it is working well or badly because of the extraordinary secrecy which cloaks the operations of the relevant Executive Branch agencies and the Foreign Intelligence Surveillance Court.”) [hereinafter Hearings].
193. 50 U.S.C. § 1804(a)(4)(A); see supra note 105 and accompanying text.
194. See supra note 99 and accompanying text.
195. 50 U.S.C. § 1804(a)(7)(B), (C); see supra note 100 and accompanying text.
196. 50 U.S.C. § 1804(a)(7)(E); see supra note 101 and accompanying text.
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estimate the time it will need to maintain a wiretap. If it wants to continue a wiretap indefinitely, it must produce specific facts that support its belief that an open-ended time frame is necessary. The standard the government must meet is whether an indefinite time frame will produce additional information of the same type as the information it presently seeks.

B. The Probable Cause Standard and the Ticking Bomb Scenario

FISA's probable cause standard creates an important safeguard against abuse that does not unreasonably interfere with the government's intelligence gathering activity. Recall that the Act provides that the FISA court, which is in charge of reviewing surveillance applications, cannot approve the government's request for a wiretap unless it finds probable cause exists to believe that the surveillance target "is a foreign power or an agent of a foreign power." The statute generally does not require the government to show any criminal activity by the wiretap target, except for wiretaps of American citizens suspected of spying for a foreign power, in which case the government must show that the activities of the target "may involve" a violation of U.S. criminal law.

This standard has hardly hampered the government's ability to conduct surveillance. Because the FISA court operates in extreme secrecy, having issued just one opinion in its twenty-five years of operation, complying with the statute's requirements has never compromised any classified foreign intelligence information. Moreover, the FISA Court approved all 932 of the Justice Department's requests for intelligence warrants in 2001 alone, and has only denied one request since its inception over twenty years ago.

197. 50 U.S.C. § 1804(a)(10); see supra note 102 and accompanying text.
199. Id. § 1803(a)(4)(A).
200. Id. § 1801(b)(2)(A); see supra note 98 and accompanying text.
201. In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (Foreign Intelligence Surveillance Ct. Rev. 2002).
203. Marcia Coyle, Sharp Debate on Surveillance Law: Pick Between Two Little Words Makes a Big Difference, Nat'l L.J., Oct. 8, 2001, at A1 (citing the Center for Democracy and Technology); see also Sharon H. Rackow, Comment, How the USA Patriot Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of "Intelligence" Investigations, 150 U. Pa. L. Rev. 1651, 1666-72 (2002). But see Hearings, supra note 192, at 16 (statement of Mary C. Lawton, Counsel for Intelligence Policy, Office of Intelligence Policy and Review, Department of Justice) (arguing that the government's consistent approval of FISA applications is indicative not of a rubber-stamp policy but a process of careful preparation and rigorous review).
Perhaps the most compelling objection to a probable cause requirement is the hypothetical "ticking bomb" scenario. The phrase "ticking bomb" refers to a scenario in which investigators have credible intelligence about the existence of an imminent threat—usually, as the phrase implies an explosive device—that will take the lives of many civilians unless defused by government authorities. The conventional application of this hypothetical involves the situation where government agents have in custody a suspected terrorist but do not know the bomb's location. Some commentators have concluded that the use of torture is justified in such situations.\textsuperscript{204} A more general use of the ticking bomb hypothetical, however, has achieved prominence in public discourse about the government's anti-terrorism activities.\textsuperscript{205} Its application to the issue of enemy combatant detentions contemplates a situation where investigators have information that a given suspect will soon cause civilian deaths, but lack sufficient cause or time to detain the suspect through the normal rules of the criminal justice system. Should these investigators be powerless to take the necessary action to prevent civilian deaths? To many Americans, after the World Trade Center attacks of 2001, such a result seems anathema.

However, the ticking bomb scenario presents a false dilemma. Courts have developed the exigent circumstances doctrine to deal with precisely such a situation in the Fourth Amendment setting. Although the Supreme Court has held that searches made without a

\textsuperscript{204} Alan Dershowitz has argued for the use of so-called "torture warrants" in ticking bomb cases, a legal process by which authorities could obtain a judicial order to subject detainees to non-lethal torture. See Alan M. Dershowitz, Why Terrorism Works: Understanding the Threat and Responding to the Challenge 131-63 (2002). Dershowitz writes:

1 soon discovered that virtually no one was willing to take the "purist" position against torture in the ticking bomb case: namely, that the ticking bomb must be permitted to explode and kill dozens of civilians, even if this disaster could be prevented by subjecting the captured terrorist to nonlethal torture and forcing him to disclose its location. ... If the reason you permit nonlethal torture is based on the ticking bomb case, why not limit it exclusively to that compelling but rare situation? Moreover, if you believe that nonlethal torture is justifiable in the ticking bomb case, why not require advance judicial approval—a "torture warrant"?

\textit{Id.} at 140-41.

\textsuperscript{205} Most famously, in his 2002 State of the Union address, President Bush used the ticking-bomb metaphor to justify the United States' response to the attacks of September 11. Bush told Americans that "[t]housands of dangerous killers, schooled in the methods of murder, often supported by outlaw regimes, are now spread throughout the world like ticking time bombs, set to go off without warning." George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 29, 2002), 38 Wkly. Comp. Pres. Doc. 133, 134 (Feb. 1, 2002), available at http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html; see also, e.g., David Rudge, Targeted Killing—Effective Anti-Terror or Counterproductive?, Jerusalem Post, Jan. 7, 2003, at 2 (quoting source on the propriety of Israel's practice of assassinating suspected terrorists "to prevent an immediate threat to innocent life in the case of so-called ticking bombs").
warrant are presumptively unreasonable under the Fourth Amendment,206 this principle softens in exceptional situations where exigent circumstances justify the warrantless entry of government agents.207 Similarly, in the national security context, FISA specifically outlines procedures for exigent circumstances. FISA allows the Attorney General to approve surveillance for twenty-four hours without a FISA court order if he or she reasonably finds that some emergency exists that prevents the government from obtaining a FISA court order, and that the factual basis that would have been needed to procure an order is present.208

Certainly government agents should have similar emergency powers to take a U.S. citizen into custody when they have good reason to believe that citizen poses an imminent and grave threat to national security. But they should not be allowed to do so without fear of scrutiny. In recognition of the importance of the need for some constraints on governmental discretion, FISA provides for criminal sanctions against persons either engaging in unauthorized surveillance or knowingly disclosing or using information obtained through such surveillance.209 FISA also creates a private right of action against violators, including both actual and punitive damages.210 Similar constraints should be placed on government agents involved in the detention of enemy combatants.

C. Probable Cause and Enemy Combatants

Probable cause is most likely not too high a standard for enemy combatant detentions. This is the standard of grand jury trials, where prosecutors enjoy a phenomenally high success rate of indictments. Statistics published annually by the Department of Justice routinely show grand jury dismissal rates below 1%.211 Prosecutors have compiled these records while seeking indictments in cases where national security is not at risk. One would think that this success rate would not be diminished when the government possesses an interest as compelling as national security.

In cases such as Padilla's, the government should be forced to show probable cause to continue detentions indefinitely. The declaration of

209. Id. § 1809.
210. Id. § 1810. Assuming a good deal of FISA surveillance is never detected by the targets of the surveillance, it seems reasonable to expect a great deal more litigation over the issue of unlawful detention of citizens as enemy combatants, where the detainee can hardly be expected to be unaware of his wrongful detention.
211. See Ric Simmons, Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?, 82 B.U. L. Rev. 1, 30 & n. 135-36 (2002) (citing figures showing dismissal rate of less than 1% for each year between 1990 and 1998, and statistics showing an indictment rate greater than 99.8% in 1993).
Michael H. Mobbs, however, attached to the government’s brief in the Padilla case to support the determination that Padilla is an enemy combatant, suggests Padilla’s extended detention may be unwarranted. The declaration explained that Padilla’s connection to al Qaeda was based largely on reports of interviews with several confidential sources, two of whom the government believes have direct connections to the al Qaeda network. It also acknowledged that “[s]ome information provided by the sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials.”

Upon his release from prison in 1991, Padilla took the name Ibrahim Padilla, according to the Mobbs Declaration. Padilla moved to Egypt in 1998, and afterwards traveled to Pakistan, Saudi Arabia, and Afghanistan. In Afghanistan in 2001 he met with al Qaeda lieutenant Abu Zubaydah, with whom he developed a plan to build and detonate a radiological bomb in the United States. The Declaration alleges that Padilla also met with other senior al Qaeda members in Pakistan in 2000. It does not claim that the threat to the United States posed by Padilla was in any way imminent. The declaration noted, “The ‘dirty bomb’ plan of Padilla and [Abu Zubaydah] allegedly was still in the initial planning stages, and there was no specific time set for the operation to occur.” The plan allegedly included stealing radioactive material from within the United States once Padilla had returned, but federal agents arrested Padilla immediately upon his arrival in Chicago. Moreover, one intelligence official described the research that Padilla conducted regarding the building of a dirty bomb as consisting of “basically surfing the Internet.” Furthermore, Deputy Defense Secretary Paul Wolfowitz told reporters that “there was not an actual plan. We stopped this man in the initial planning stages.”

Even if the government could satisfy a probable cause standard to support Padilla’s detention, as long as Padilla remains confined without benefit of something approximating an Article 5 status hearing, doubts will linger. The Mobbs Declaration raises as many

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212. Appointed by President Bush, Mobbs heads the Detainee Policy Group for the Under Secretary of Defense for Policy. Government Brief, supra note 9, app. at 1.
213. Id. at 2 n.1.
214. Id. at 2.
215. Id.
216. Id. at 3.
217. Id.
218. Id.
219. Id.
220. Id.
221. Id. at 4.
223. Id.
questions as it answers, and the questions it raises suggest that Padilla's status crosses the low threshold that a detainee need pass in order to secure a hearing under the law of war: the existence of "any doubt" about the detainee's status.

CONCLUSION

The government often curtails individual rights during armed conflicts, and courts have often been unwilling to curb the government as long as those conflicts persist. *Milligan* was safely decided more than a year after the Civil War had ended. The Court validated the internment of Japanese Americans in 1944, but two years later, the hysteria of wartime having passed, it invalidated the imposition of a martial law regime in Hawaii. *Quirin*, too, was very much a product of its time. In the words of Chief Justice William Rehnquist:

> It is worth noting that this decision was made in the dark days of the summer of 1942, when the fortunes of war of the United States were just beginning to recover from their lowest ebb. The United States Navy had suffered serious damage to its fleet at Pearl Harbor, and Japanese troops invading the Philippines had pushed the United States troops back onto the Bataan Peninsula, resulting in the grisly Bataan death march. In North Africa, German forces had recaptured Tobruk and were within striking distance of Cairo, threatening the entire Mid East. Civil liberties were not high on anyone's agenda, including that of judges.

One could say the same for the post-September 11 climate in America.

The dismal history of civil liberties in wartime underscores the importance of guaranteeing basic rights. Citizens detained as enemy combatants should have the right to a hearing that approximates an Article 5 status hearing. They should have the right to competent counsel, to present evidence, and to cross-examine key witnesses. These hearings should use a probable cause standard. As under FISA, lengthy or indeterminate detentions should be subject to a renewal procedure wherein the government must show the continued existence of cause to hold the suspect. Lastly, detainees should have recourse to civil liability in cases of unlawful detention.

Such safeguards would not render this process entirely safe from government overreaching. Indeed, turning enemy combatant detentions into a routine administrative procedure similar to obtaining FISA warrants would be a truly harrowing scenario for civil libertarians. But the use of the enemy combatants doctrine to hold U.S. citizens indefinitely in military custody while civilian “courts are open and their process unobstructed”\(^{228}\) threatens to effect a more drastic departure from the rule in *Milligan* than the *Quirin* Court ever imagined. A workable set of procedural safeguards can soften this departure, allowing the government to combat domestic terrorism without the cloud of constitutional illegitimacy.

\(^{228}\) See *supra* note 49 and accompanying text.