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Jailing Ourselves:

Standards Used for Declaring United States Citizens to Be Enemy Combatants

Joseph Carl Storch

“We have met the enemy and he is us”
Walt Kelly, “Pogo”

On a clear, blue September morning in 2001, nineteen men hijacked four commercial airplanes headed toward the West Coast. They crashed two into the World Trade Center in New York City, one into the Pentagon in Northern Virginia, and one into a Pennsylvania field. In the wake of the shocking attack, Congress authorized President Bush to use military force against those who committed the attack, commencing a “war on terror” that still rages today.

The government has fought the “war on terror” on many fronts. The military is engaged in Afghanistan and Iraq; diplomatic overtures have been made to Libya and Pakistan; domestic security is tighter; and safety procedures and citizen values have changed, perhaps permanently. American spies gather intelligence all over the globe while even conversations by United States citizens are monitored by the National Security Agency for their content.¹ During the course of the “war on terror,” the United States military and the executive branch have declared hundreds of individuals to be “unlawful enemy combatants.” One of these individuals is an American citizen captured overseas, and one is an American citizen captured at an airport in Chicago.

The government has standards for declaring citizens to be enemy combatants. There is a system to determine whether to subject such combatants to the federal courts, or to military tribunals, or to indefinite detention without charge.

Unfortunately, for the judiciary and the public, the government has chosen to this point not to share those precise factors, not even with the Supreme Court.² The government has declared in a brief to a circuit court that such standards do, in fact, exist.³ The standards may be classified for national security reasons.⁴ Alternatively, the government may have simply failed to make the standards public to this point. In the more than five years since the September 11, 2001 terrorist attacks, we have moved little closer to understanding what factors the executive weighs in calculating whether to detain a United States citizen indefinitely as an enemy combatant. Until the government chooses to share this information with the public, an educated guess of what standards the government uses must be deduced from the few statements thus far made on the subject.

This paper will attempt to determine those standards. The decision likely involves four factors: (1) association with or direct support of terrorist organization(s); (2) possession of intelligence that would aid the United States if divulged via interrogation; (3) continuing threat to the safety of United States citizens or the national security of the United States; and (4) it is in the interest of the United States to detain the person as an enemy combatant.

The government should openly acknowledge and publish its standards. The United States has a storied tradition of making punishment fit the crime and of publishing the standards to which citizens are held. The standards that the United States uses to determine that one of its citizens is an enemy

Footnotes

1. David E. Sanger, *Bush Says He Ordered Domestic Spying*, N.Y. TIMES (Dec. 18, 2005), at 1.
2. “There is some debate as to the proper scope of this term (enemy combatant), and the Government has never provided any court with the full criteria that it uses in classifying individuals as such.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).
3. The government offered the Fourth Circuit to submit an ex parte supplemental attachment to its brief of a sealed declaration discussing determination of enemy combatant status that “specifically delineates the manner in which the military assesses and screens enemy combatants to determine who among them should be brought under Department of Defense Control’ and ‘describes how the military determined that petitioner Hamdi fit the eligibility requirements applied to enemy combatants for detention.” The court rejected the declaration and ruled that it should have been submitted to the district court. *Hamdi v. Rumsfeld*, 296 F.3d 278, 284 (4th Cir., 2002). Two *Newsweek* correspondents, Michael Isikoff and Daniel Klaidman, quoting anonymous sources, insist alternatively that there was an “informal system” for detaining American citizens as enemy combatants that was not

planned out, but “evolved in fits and starts.” Michael Isikoff and Daniel Klaidman, *The Road to the Brig*, NEWSWEEK (Apr. 26, 2004), at 26. They quote an anonymous source, a “top government attorney,” as saying, “There is a sense in which we were making this up as we went along, . . . ‘You have to remember we were dealing with a completely new paradigm: an open-ended conflict, a stateless enemy and a borderless battlefield.’” *Id.* This article will take the government at its word that such standards do exist and are used in determining whether to detain American citizens as enemy combatants, but have not yet been published for national security or other reasons.

4. Some writers believe that the hidden standards are part of a Bush Administration veil of unprecedented secrecy related to government acts and proceedings. Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619, 1621 (2004) citing *Detroit Free Press v. Ashcroft*, 303 F.3d. 681 (6th Cir. 2002); *N.J. Media Group v. Ashcroft*, 308 F.3d. 198 (3d Cir. 2002); *Ctr. for Nat’l Security Studies v. United States Dep’t of Justice*, 331 F.3d. 918 (D.C. Cir. 2003).

combatant are not merely important as a diagnostic legal exercise. At stake is America's example to developing democracies of an open, honest, and fair balance of freedom and security. Many nations look to the United States as a model. If the United States hides the standards used to detain citizens, other nations may use that secrecy to justify their own actions.

This article does not analyze the Supreme Court's decisions in *Hamdi* and *Padilla* to determine whether the Court made the right calculus or found the right balance. Nor does this article attempt to parse whether the United States may detain non-citizens indefinitely as enemy combatants or the complex issue of military tribunals. Rather this paper attempts to reveal how the United States justifies detaining her own citizens, sometimes captured on United States soil and sometimes showing little or no signs of imminent harm. If these detentions occur in the shadows, gaining strength and legitimacy in current and future administrations, more and more American citizens may find themselves risking loss of civil liberties. When those who govern have absolute power to detain those that are a threat to their government, they may take liberties with that power. The United States has not yet published the calculus it uses before detaining its own citizens. By determining what those standards are, the public can hold government to the correct application of the standards. Sunlight on the standards may be our "best disinfectant."⁵

I. THREE UNITED STATES CITIZEN ENEMY-COMBATANT CASES

Although there have been hundreds of declared enemy combatants, only two announced detainees are United States citizens. The comparison of the two, Yaser Hamdi and Jose Padilla, as well as John Walker Lindh, a citizen who was not detained as an enemy combatant, may reveal the standards used to determine whether to declare a citizen to be an enemy combatant.

A. Yaser Hamdi

Yaser Esam Hamdi, a Saudi national who was born in Louisiana but left for Saudi Arabia as a young boy, was captured in late 2001 by the Northern Alliance in Afghanistan and was subsequently turned over to the United States military.⁶ Hamdi was interrogated and then transported to a United States Naval Base in Guantanamo Bay, Cuba.⁷ When the government learned that Hamdi was a United States citizen, it transferred him to a naval brig in Virginia, then to a naval brig in South Carolina.⁸ Never charged with a crime, Hamdi remained in confinement until his October 11, 2004, release to

Saudi Arabia under a plea agreement.⁹ The United States military determined Hamdi to be an unlawful enemy combatant, and the government never brought criminal or civil charges against him.

Hamdi's father, Esam Fouad Hamdi, filed a habeas petition as next friend.¹⁰ In response, the government filed a declaration from Michael Mobbs, special advisor to the undersecretary of defense for policy.¹¹ The government chose not to provide the specific standards used to determine that Hamdi was an enemy combatant. The only clue to those standards comes from the Mobbs declaration.

After declaring himself familiar with the rules and policy of detention and combatant status and Hamdi's situation in particular, Mobbs wrote that Hamdi traveled to Afghanistan in July or August 2001, affiliated with the Taliban, and received weapons training.¹² Hamdi's unit was captured by the Northern Alliance, to whom he surrendered a Kalashnikov rifle.¹³ Hamdi, who spoke English, was interviewed by the United States military and determined to be an enemy combatant, an assessment affirmed by a military screening team.¹⁴ In January 2002, the Commander, U.S. Central Command's Detainee Review and Screening Team found that Hamdi met established enemy-combatant criteria.¹⁵ The declaration does not state what those standards and criteria are.

The Eastern District of Virginia ordered the government to produce certain documents that would validate holding Hamdi as an enemy combatant.¹⁶ The government appealed this decision to the Fourth Circuit, which reversed and dismissed Hamdi's habeas-corpus petition.¹⁷ Hamdi's petition for a rehearing or a rehearing *en banc* was denied, but the Supreme Court granted a writ of certiorari to the Fourth Circuit to hear his appeal.

The Supreme Court's majority opinion in *Hamdi* does not conclusively determine whether the Constitution always provides the executive with detention power. In *Hamdi*, the Court ruled that Congress authorized detention by its Authorization for the Use of Military Force (A.U.M.F.).¹⁸ Though the A.U.M.F. does not specifically authorize detention, "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war" authorized by the A.U.M.F.¹⁹ Necessary and appropriate force includes detaining Taliban

If the United States hides the standards used to detain citizens, other nations may use that secrecy to justify their own actions.

5. LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933).

6. *Hamdi*, 542 U.S. at 510.

7. *Id.*

8. *Id.*

9. Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST (Oct. 12, 2004), at A2.

10. *Hamdi v. Rumsfeld*, 243 F. Supp.2d 527 (E.D. Va., 2002).

11. *Hamdi*, 542 U.S. at 512-513.

12. *Declaration of Michael H. Mobbs, Special Advisor to the Undersecretary of Defense for Policy (Hamdi)*, CBS NEWS WEBSITE

(Jul. 24, 2002), available at <http://www.cbsnews.com/htdocs/pdf/hamdimobbs2.pdf> (last visited Feb. 25, 2007).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Hamdi v. Rumsfeld*, 243 F. Supp.2d at 528.

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

18. *Hamdi*, 542 U.S. at 517.

19. *Id.* at 519.

Mobbs's declaration reveals the information given to President Bush before he determined Padilla to be an enemy combatant.

members.²⁰ Detained citizens must receive notice of the reasons for their classification and be heard before a neutral decision maker in a meaningful time and manner to satisfy due-process requirements.²¹

Not long after the Supreme Court reversed and remanded, Yaser Hamdi was freed to Riyadh, Saudi

Arabia, as part of a plea bargain that required that he renounce terrorism, surrender his United States passport, agree not to sue the United States government, and refrain from traveling to the United States and other denoted areas for some time.²²

B. Jose Padilla

Jose Padilla, also known as Abdullah al-Mujahir, the so-called “dirty bomber,”²³ was arrested May 8, 2002, at O’Hare International Airport on a federal material-witness warrant after stepping off of a flight from Pakistan to Chicago.²⁴ Apparently, Padilla was carrying a valid passport at the time, which he had received two months earlier.²⁵ He cleared immigration and had his passport stamped “admitted.”²⁶ He was detained at the customs area, where customs agents and then Federal Bureau of Investigation agents questioned him.²⁷ After declining to continue the interview without the representation of an attorney, he was presented with a subpoena issued in the Southern District of New York.²⁸ Padilla was brought to New York under federal custody.²⁹ On June 9, 2002, President Bush directed Secretary of Defense Donald Rumsfeld to designate Padilla an enemy combatant and have him detained.³⁰

The government vacated the material-witness warrant and informed the court it was taking Padilla into military custody.³¹ The military transported Padilla to the Consolidated Naval Brig in South Carolina.³² Padilla’s attorney, Donna Newman, sought a writ of habeas corpus as next friend, and the district court determined that Padilla had the right to monitored access to counsel and that the government had the right to

detain a combatant captured in the United States, in review of which it would apply a “some evidence” standard.³³ The Second Circuit Court of Appeals affirmed the district court ruling on jurisdiction over Secretary of Defense Donald Rumsfeld, but reversed on the merits, stating that although it would grant the executive great deference, the President did not have congressional authority to detain Padilla; the Second Circuit remanded with instructions to transfer Padilla to civil authorities for criminal charges.³⁴ On certiorari, the Supreme Court did not reach the merits of whether the President could detain American citizens captured within the United States as enemy combatants, but instead remanded to the district court to dismiss without prejudice due to lack of jurisdiction.³⁵ The Court ruled that the commander of Padilla’s brig was the proper respondent to a habeas-corpus motion.³⁶

Like in Hamdi’s petition, the government submitted a declaration from Michael Mobbs. Mobbs recited his qualifications within the government and said that he had reviewed Padilla’s file.³⁷ Mobbs’s declaration reveals the information given to President Bush before he determined Padilla to be an enemy combatant. Padilla was born in New York, convicted of murder in approximately 1983, and imprisoned until age 18, after which he was convicted of a handgun charge and imprisoned.³⁸ Padilla converted to Islam in prison.³⁹ He traveled to Egypt, Pakistan, Saudi Arabia, and Afghanistan, where he associated with members and leaders of Al Qaida and met with Abu Zubaydeh (a senior lieutenant of Osama bin Laden).⁴⁰ Along with an unnamed associate, Padilla “approached Zubaydeh with their proposal to conduct terrorist operations within the United States. Zubaydeh directed Padilla and his associate to travel to Pakistan for training from Al Qaida operatives in wiring explosives.”⁴¹ Padilla researched uranium-enhanced explosives and planned to “build and detonate a ‘radiological dispersal device’ (also known as a dirty bomb) within the United States, possibly in Washington, DC.”⁴² This plan was still in the planning stages and Padilla had other plans to explode gas stations and hotel rooms.⁴³ The declaration does not reflect Padilla’s ability to actually carry out any of the discussed operations, how close he was to beginning his operations, or whether the information and training he had received

20. *Id.* at 521.

21. *Id.* at 533.

22. See Markon, *supra* note 9, at A2.

23. Tony Karon, *Person of the Week: Jose Padilla*, TIME, Online Edition (Jun. 14, 2002) available at <http://www.time.com/time/pow/article/0,8599,262269,00.html> (last visited Feb. 25, 2007).

24. *Rumsfeld v. Padilla*, 542 U.S. 426, 430-431 (2004).

25. Joseph Kubler, *U.S. Citizens as Enemy Combatants; Indication of a Roll-Back of Civil Liberties or a Sign of our Jurisprudential Evolution?*, 18 ST. JOHN’S J.L. COMM. 631, 645-646 (2004), citing Bob Drogin, *Dirty Bomb Probe Widens*, L.A. TIMES (Jun. 11, 2002), at 1; Chisun Lee, *Sticking Up for the Dirty Bomber*, VILLAGE VOICE (Oct. 15, 2002), at 25.

26. *Padilla v. Hanft*, 389 F. Supp.2d. 678, 681 (D.S.C., 2005).

27. *Id.*

28. *Id.*

29. *Padilla*, 542 U.S. at 430-431.

30. *Padilla v. Rumsfeld*, 352 F.3d 695, Appendix A (2d Cir., 2003).

31. *Padilla*, 542 U.S. at 431.

32. *Id.* at 432.

33. *Padilla v. Bush*, 233 F. Supp.2d 564, 581-599 (S.D.N.Y. 2002).

34. *Padilla*, 352 F.3d at 710-724.

35. *Padilla*, 542 U.S. at 451.

36. *Id.* at 442.

37. *Declaration of Michael H. Mobbs, Special Advisor to the Undersecretary of Defense for Policy* (Padilla) (Aug. 27, 2002) CBS NEWS WEBSITE, available at <http://www.cbsnews.com/htdocs/pdf/padillamobbs.pdf> (Last visited Feb. 25, 2007).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

**In August 2007,
Padilla was
convicted in a
federal jury trial
in Florida on
terrorism
conspiracy charges.**

from Al Qaeda was anything more than common knowledge about explosives.

In July 2004, Padilla filed a petition for habeas corpus in the District of South Carolina, where he was still being held in a military brig.⁴⁴ The district court found that while the A.U.M.F. made Hamdi's

detention on the battlefield of Afghanistan appropriate, detaining Padilla in a United States airport was not equally appropriate.⁴⁵ Padilla, captured domestically, had his terrorist plans thwarted by the capture, and there "were no impediments whatsoever to the government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing."⁴⁶ The court listed several federal laws that the government could use to prosecute Padilla, instead of endless detention.⁴⁷ The district court thus concluded that the A.U.M.F. did not authorize detention of an American citizen captured domestically and that this enemy-combatant detention violated the non-detention act.⁴⁸

The Fourth Circuit disagreed. In reversing the district court, the circuit concluded that the President possesses authority to detain a United States citizen captured domestically as an enemy combatant pursuant to the A.U.M.F.⁴⁹ The court went on to find no "difference in principle" between Hamdi and Padilla.⁵⁰ In reversal, the circuit court denied that the simple availability of the criminal laws cited by the district court is determinative of the detention power "if for no other reason than that criminal prosecution may well not achieve the very purpose for which detention is authorized in the first place—the prevention of return to the field of battle."⁵¹ The court added that requiring the government to use the criminal-justice system would "impede the Executive in its efforts to gather intelligence from the detainee and to restrict the detainee's communication with confederates so as to ensure that the detainee does not pose a continuing threat to national security even as he is confined."⁵²

Padilla appealed to the Supreme Court, and the case seemed

on a sure track to consideration when the government indicted Padilla in a federal court in Miami, Florida, and sought his transfer from military detention to the federal prison system. The indictment did not repeat the familiar accusation that Padilla would attempt to detonate a "dirty bomb" in an American city, but instead argued that he was part of a "North American support cell" to send "money, physical assets and new recruits overseas to engage in acts of terrorism and that he had traveled abroad himself to become 'a violent jihadist.'"⁵³

The Fourth Circuit did not take kindly to the government's decision to place Padilla in the civilian criminal-justice system after its strong opinion upholding the government's right to detain United States citizens as enemy combatants. The judges refused to approve Padilla's transfer, calling that transfer and the request that the Fourth Circuit withdraw its opinion a compounding of "what is, in the absence of explanation, at least an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court."⁵⁴ The opinion excoriated the government at several different points for an apparent effort to avoid the potential that the Supreme Court would reverse the earlier Fourth Circuit decision and further restrict the government's power to detain United States citizens.⁵⁵ The Supreme Court reversed and ordered that the unopposed request to transfer Padilla to civilian custody be approved; the Court said that it would "consider the pending petition for certiorari in due course," but later denied certiorari.⁵⁶ In August 2007, Padilla was convicted in a federal jury trial in Florida on terrorism conspiracy charges.⁵⁷

C. John Walker Lindh

American citizen John Walker Lindh was captured in Afghanistan on December 1, 2001, fighting for the Taliban against the Northern Alliance, a United States ally.⁵⁸ Lindh grew up in affluent Marin County, California, and was named after Beatles singer John Lennon and United States Supreme Court Justice John Marshall.⁵⁹ Between the ages of 16 and 18, Lindh converted to Islam, referred to himself as Sulayman Al-Lindh, and left for Yemen to learn the language of the Koran.⁶⁰ Lindh's parents supported him on this journey.⁶¹

A month after the U.S.S. Cole was bombed,⁶² Lindh left

44. Padilla, 389 F. Supp.2d. at 682.

45. *Id.* at 686.

46. *Id.*

47. *Id.* at 691-692.

48. *Id.* at 688.

49. Padilla v. Hanft, 423 F.3d. 386, 389 (4th Cir., 2005).

50. *Id.* at 391.

51. *Id.* at 394-395.

52. *Id.* at 395.

53. David Stout, *U.S. Indicts Padilla After 3 Years in Pentagon Custody*, N.Y. TIMES (Nov. 22, 2005) available at <http://www.nytimes.com/2005/11/22/politics/22cnd-terror.html?ex=1136610000&en=827b54a3132d12fb&ei=5070> (last visited Feb. 25, 2007).

54. Padilla v. Hanft, 432 F.3d 582, 583 (4th Cir., 2005).

55. *Id.* at 583-587.

56. Hanft v. Padilla, 546 U.S. 1084 (2006); Padilla v. Hanft, 547 U.S.

1062 (2006).

57. Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES (Aug. 17, 2007), available at <http://www.nytimes.com/2007/08/17/us/17padilla.html> (last visited Dec. 15, 2007).

58. United States v. Lindh, 212 F. Supp.2d 541, 547 (E.D. Va. 2002).

59. Josh Tyrangiel, *The Taliban Next Door: At 16, John Walker Was a Quiet California Kid. At 20, He Was a Taliban Warrior. How Did He Get from Marin County to Mazar-i-Sharif?* TIME ONLINE EDITION (Dec. 9, 2001), available at, <http://www.time.com/time/nation/article/0,8599,187564,00.html> (last visited Feb. 25, 2007).

60. *Id.*

61. *Id.*

62. The United States Navy Destroyer Cole was bombed while refueling in Yemen. Jose Martinez, *MIDEAST CRISIS; Tight-knit Naval Community Reels from Sad News*, THE BOSTON HERALD (Oct. 13, 2000), at 34.

Yemen to attend an Islamic Madrasah in Bannu, Pakistan.⁶³ Lindh trained in a camp in Pakistan of the Harakat ul-Mujahideen (designated in 1997 by the United States as a foreign terrorist organization) as well as other training camps.⁶⁴ He met and spoke with Osama bin Laden, but when asked, chose to decline an offer to participate in bombing operations against the United States, Israel, and Europe.⁶⁵ Lindh received weapons training and training in “orientating, navigation, explosives, and battlefield combat.”⁶⁶ When he was captured, Lindh was interrogated but was not declared an enemy combatant. Instead, he was transported to the United States and charged with a 10-count federal indictment in the Eastern District of Virginia.⁶⁷ The district court denied Lindh’s motion to be treated as a lawful combatant, reasoning that on February 7, 2002 (after Lindh’s capture), the President had declared all members of the Taliban to be unlawful combatants as he was authorized to do by the “Authorization for Use of Military Force.”⁶⁸ Rather than go to trial, Lindh and the government reached a plea bargain reflected in his October 4, 2002 sentencing.⁶⁹

II. STANDARDS AND CRITERIA USED BY THE U.S. TO DETERMINE ENEMY-COMBATANT STATUS

After the September 11, 2001, attacks, the executive established rules and standards for detaining enemy combatants. It had been many years since a citizen was declared an enemy combatant, and that was a different situation. In World War II, America had clear enemies with uniformed armies and territory. Conversely, the “war on terror” is linguistically a war on a tactic (terrorism), not a war against a nation or people (Afghanistan or Southern Confederates).

The government has admitted that “given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement.”⁷⁰ The “war on terror” is a war that will have no clear end. Soon after the attacks, the White House made a clear statement on detention, treatment, and trial of

noncitizens captured as part of the “war on terror,”⁷¹ but did not publish standards about detention, treatment, or trial of similarly captured citizens. The executive branch’s only other published standards also involve only noncitizen enemy combatants.⁷² In the Military Commissions Act of 2006,⁷³

Congress defined unlawful enemy combatants⁷⁴ for the purpose of exposure to trial by military commissions⁷⁵ and removal of habeas-corpus jurisdiction,⁷⁶ but only as applied to alien unlawful-enemy combatants.

The President’s advisors likely constructed the authority to detain citizens as enemy combatants based on the Court’s *Quirin* decision, which stated “[c]itizenship in the United States of an enemy belligerent does not relieve him of the consequences of a belligerency which is unlawful because in violation of the law of war.”⁷⁷ While the standards for declaring a citizen to be an enemy combatant have not been published, former Attorney General and Counsel to the President Alberto Gonzalez discussed the system in place to determine status of citizens. The Department of Justice “first reviews each case to determine whether a citizen meets the criteria to be an ‘enemy combatant.’ After that . . . the secretary of defense and the CIA both review the case, and then turn it back to the attorney general for a second review” by Justice.⁷⁸ There is a separate factual review by the Criminal Division of the Justice Department, after which the attorney general provides legal advice to the defense secretary on enemy-combatant classification.⁷⁹ A package is sent to the President for a final decision on enemy-combatant status.⁸⁰ Gonzalez claimed in his speech that there was no “rigid process for making [enemy-combatant] determinations.”⁸¹ Though Gonzalez described the system for making

It had been many years since a citizen was declared an enemy combatant, and that was a different situation.

63. *Id.*

64. *United States v. Lindh*, 227 F. Supp.2d 565, 567-569 (E.D. Va. 2002).

65. *Id.*

66. *Lindh*, 212 F. Supp.2d at 546.

67. *Id.* at 546-547. The ten counts, including charges of conspiracy, providing material support and resources to three terrorist groups, and using and carrying firearms are listed at 547.

68. *Id.* at 554-555.

69. *Lindh*, 227 F. Supp.2d at 572. Lindh was sentenced to 240 months in federal prison in or near California, less time served, plus three years of supervised release.

70. Hamdi, 542 U.S. at 520, quoting Brief For Respondent at 16.

71. George W. Bush, *President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, The White House, Office of the Press Secretary (Nov. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (last visited Feb. 25, 2007).

72. *Guantanamo Detainee Processes*, United States Department of Defense: Combatant Status Review Tribunals available as download (Microsoft Word Format) at <http://www.defenselink.mil/>

[news/Combatant_Tribunals.html](http://www.defenselink.mil/news/Combatant_Tribunals.html) (last visited Feb. 25, 2007).

73. 109 Public Law 366, 120 Stat. 2600 (2006).

74. 10 U.S.C. § 948a (2006).

75. 10 U.S.C. § 948c, 948d (2006).

76. 28 U.S.C. § 2441 (2006).

77. *Ex Parte Quirin*, 317 U.S. 1, 37 (1942).

78. James Park Taylor, *Singularity: We Have Met the Enemy and He Is Us: A Legal Guide to U.S. Citizens as “Enemy Combatants,”* 20 MONTANA LAWYER 8, 30-31 (2004), quoting Alberto Gonzalez, Counsel to the President, *Remarks Before the American Bar Association Standing Committee on Law and National Security*, Washington, DC (Feb. 24, 2004) at 7-10. Available at http://www.abanet.org/natsecurity/judge_gonzales.pdf (last visited, Jan. 5, 2005).

79. *Id.*

80. Alberto Gonzalez, Counsel to the President, *Remarks Before the American Bar Association Standing Committee on Law and National Security*, Washington, DC (Feb. 24, 2004) at 9. Available at http://www.abanet.org/natsecurity/judge_gonzales.pdf (last visited, Jan. 5, 2005).

81. *Id.* at 7.

It is unclear what level of association or support of a terrorist group is necessary to trigger enemy-combatant status.

the determination and how different segments of the executive branch communicate in making the determination, he did not detail the standards that the executive branch uses in making the determinations. That most important aspect still remains veiled from the public's view.

The executive believes that statutory authority to detain citizens as enemy combatants derives from two statutes, the "Authorization for Use of Military Force"⁸² and "Armed Forces General Military Law: Military Correctional Facilities."⁸³ In 1971, Congress amended the United States Code in this area because, in looking back at what happened to Japanese-Americans in internment camps, it wished to declare the intent of Congress that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."⁸⁴ The *Hamdi* Court accepted the argument that detention of individuals declared to be enemy combatants for the duration of the conflict during which they are captured is part of the President's authorized use of military force.⁸⁵ This article, accepting the Court's analysis that the executive has such a power, concentrates on the standards used to apply the power.

Although the standards have not been published or made available, an analysis of the accusations against citizen enemy combatants seems to yield four factors that the executive considers in making a determination that a citizen is an enemy combatant. Those factors are: (1) association with or direct support of terrorist organization(s); (2) possession of intelligence that would aid the United States if divulged via interrogation; (3) continuing threat to the safety of United States citizens or the

national security of the United States; and (4) it is in the interest of the United States to detain as an enemy combatant.

A. Factor I: Association with or Direct Support of Terrorist Organization(s)

It is unclear what level of association or support of a terrorist group is necessary to trigger enemy-combatant status. It is also unclear whether this factor violates the First Amendment right to association.⁸⁶ Padilla is alleged to have met with Al Qaeda leaders and plotted ways to trigger a dirty bomb in an American city. Hamdi is alleged to have fought for the Taliban, but there is no evidence that he affiliated with Al Qaeda. In contrast, Lindh trained with Harakat ul-Mujahideen and met with Al Qaeda leader Osama bin Laden. It is not apparent why Hamdi's association with the Taliban triggered enemy-combatant status while Lindh's association with two declared terrorist groups, one of which attacked America on September 11, did not. Though association with or support of a terrorist organization seems to be a factor that the government considers in determining whether to detain a United States citizen as an enemy combatant, the amount of contact or support necessary to trigger this determination is unclear from the small sample of cases discussed here.

B. Factor II: Possession of Intelligence That Would Aid the United States If Divulged

The Supreme Court, in dicta,⁸⁷ has hinted that the mere possibility of interrogation may not be sufficient for indefinite detention of an enemy combatant: "Certainly, we agree that indefinite detention for the *purpose of interrogation* is not authorized."⁸⁸ This is curious, as the Fourth Circuit understood that it was because the government believed "that Hamdi's detention is necessary for intelligence gathering efforts, [that] the United States has determined that Hamdi should continue to be detained as an enemy combatant in

82. 107 Public Law 40, 115 Stat. 224 (2001). The A.U.M.F. was passed on September 18, 2001, seven days after the attacks. See Stephen I. Vladeck, *The Detention Power* 22 YALE L. & POL'Y REV. 153, 184-187 (2004) (discussing amendments made to the A.U.M.F. by the Senate before passage, which removed the language "to deter and pre-empt any future acts of terrorism or aggression against the United States" and arguing that the A.U.M.F. does not allow for detentions of anyone, especially not U.S. citizens).

83. 10 U.S.C. § 956(5) (2004). See Vladeck, *supra* note 82, at 187-192 (detailing the statutory history of 10 U.S.C. § 956 and revealing that the language used relating to prisoners and persons in custody has been in use since before the 1971 enactment of 18 U.S.C. 4001(a), and, in fact, the language was "first codified in an emergency supplemental appropriations act passed...on December 17, 1941, just ten days after Pearl Harbor," necessary because on December 12, 1941, President Roosevelt had issued an executive order relating to national defense, which would eventually take the form of Executive Order 9066, authorizing the creation of military areas to restrict the movement of Japanese-Americans). That is to say that some of the original prisoners that 10 U.S.C. section 956 were enacted to control were American citizens of Japanese descent being held in internment camps. Half a century later, the government is using the descendent of that statute to validate detention of

American citizens. See Generally Nat Hentoff, *Op-Ed Sweet Land of Liberty* WASH. TIMES (Sep. 9, 2002), at A19; Anita Ramasastry, *Why Ashcroft's Plan to Create Internment Camps for Alleged Enemy Combatants Is Wrong*, FIND LAW FORUM, CABLE NEWS NETWORK WEBSITE (Sept. 4, 2002), available at, <http://archives.cnn.com/2002/LAW/08/columns/fl.ramasastry.detainees/> (last visited, Feb. 25, 2007); Jess Bravin, *More Terror Suspects May Sit in Limbo*, WALL ST. J. (Aug. 8, 2002), at 4 (discussing Attorney General John Ashcroft's short-lived plan in 2002 to create internment camps within the United States to house citizens who would be declared enemy combatants).

84. 18 U.S.C. 4001 (2004).

85. Hamdi, 542 U.S. at 519-524.

86. See Generally David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003) (discussing the government's tactics in the "war on terror" as an "evolution of political repression" and detailing the manner in which these restrictions may violate the First Amendment right to assemble).

87. Since this is dicta, and not an issue decided in the *Hamdi* ruling, this may not be the final word on the subject.

88. Hamdi, 542 U.S. at 521 (emphasis added).

accordance with the laws and customs of war.”⁸⁹ The government should cite another purpose besides that of interrogation if they are to hold an enemy combatant indefinitely without charge or trial. This dicta was written after both Hamdi and Padilla were declared to be enemy combatants, so it is possible that interrogation was the sole purpose for detaining one or both as enemy combatants, but that standard alone should not be used *prospectively* to detain citizens as enemy combatants.

In the same opinion, the Court acknowledged the “weighty and sensitive governmental interest in ensuring that those who have in fact fought with the enemy during a war *do not return to battle* against the United States.”⁹⁰ This statement values detention in the case of a ticking time-bomb-type detainee over the simple intelligence value of a detainee.

It is noteworthy that there is no public record of other citizens being declared enemy combatants in the years after Hamdi and Padilla were detained, even though others were arrested while planning or attempting to execute attacks or for aiding or supporting terrorist groups.

Though there is no conclusive evidence that this is the case, perhaps the mere threat of being declared an enemy combatant is enough to encourage a captured citizen to cooperate and provide any information the government desires, lest they be swept off to a military brig in South Carolina. Simple human nature may cause a detainee to choose to assist the government and take their chances in the civilian criminal-justice system, rather than risk refusing to cooperate and facing enemy-combatant detention in a military brig.

It is an open question whether such a threat, if it is used or implied, is proper. While citizens faced with the possibility of being held incommunicado may be more likely to provide information that can be used to protect and save lives, there are two dangers that may accompany such protection. One danger is the loss of the Fifth Amendment right to avoid self-incrimination,⁹¹ which is eviscerated by such a threat. While those being interrogated still have the right to remain silent, doing so may cost them other constitutional rights, and so may not be a practical option. The other danger is a creeping expansion of the use of the threat.⁹² There is no clear backstop for which the *threat* of a declaration of enemy combatant status could not be used to soften up a suspect. If the government arrests a petty thief and member of a local Islamic organization that has sent funds to al Qaeda, who possesses intelligence about the organization, the threat of enemy-combatant detention could be used to force an allocution and plea. Although

the charge, burglary or larceny, may have nothing to do with the suspect’s beliefs on terrorism or his financing of terrorist organizations, he would fit all the parameters discussed earlier: association with and support of a terrorist organization, possession of intelligence that would aid the United States if divulged, continued threat to safety of United States citizens, and detention being in the interest of the United States. We must carefully draw the line to ensure that criminals who are not themselves terrorists are not threatened with a declaration of enemy-combatant status.

It is difficult for the government to determine with certainty that a person is a continuing threat, and it is just as difficult to determine when that person is no longer a threat.

C. Factor III: Continuing Threat to the Safety of United States Citizens

It is difficult for the government to determine with certainty that a person is a continuing threat, and it is just as difficult to determine when that person is no longer a threat. This factor, like that of “association” or “support of a terrorist organization,” is mainly gray area. No available standards reveal just how dangerous a threat must be to require detention.

Could it be that the level of threat a person presents requires a crude cost-benefit-type analysis that involves multiplying the number of people in danger by the time remaining until their harm? At a certain level, the amount of harm multiplied by its imminence is so grave that the government must detain the citizen indefinitely. Yet it is not clear how the government could value each factor. Would they first detain a terrorist who will kill ten people in one hour, one who would kill 100 people in a year, or one who would kill 1,000 people in ten years? Which presents the greater threat to society? How can the government determine when the threat has passed?

If the person possesses knowledge that continues to present a danger no matter how long he or she is detained,⁹³ may the government detain that person for life without adjudication? The executive may feel it has no choice. Since presentation of continuing danger is extremely subjective, the government must reveal its standards so as to ensure honest and consistent application.

89. Hamdi, 296 F.3d. at 280.

90. Hamdi, 542 U.S. at 531 (emphasis added).

91. U.S. CONST., amend. V. “. . . nor shall [a person] be compelled in any criminal case to be a witness against himself . . .”

92. See Chemerinsky, *supra* note 4, at 1621-1630, 1642-1643 (2004) (discussing erosion of the bright line between government powers previously used only in foreign operations, and their application by the Bush Administration to domestic actions, and listing examples). See also Taylor, *supra* note 78, at 28-29 (2004) (the government’s position, during oral arguments in *Padilla’s* Second Circuit hearing, was that since al Qaeda attacked in the United

States, the United States should be included in the “war on terror” battlefield); John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 429 (2003) (“In previous American conflicts, hostilities were limited to a foreign battlefield while the United States’ home front remained safe behind two oceans. In this conflict, the battlefield can occur anywhere, and there can be no strict division between the front and home”).

93. For instance, knowledge of chemical, biological, or nuclear weapons and the ability to utilize that knowledge toward imminent destructive ends would represent a continuing threat.

Several other citizens of equal or greater danger and intelligence value were tried in federal courts.

D. Factor IV: Detention Is in the Interests of the United States

This final factor is the scariest for civil libertarians and open-government supporters. It is nearly impossible to quantify when the “interests” of the United

States merit detaining a citizen as an enemy combatant. The fourth factor may even subsume the first three. This factor, when combined with the other abstract factors, provides the government with too much leniency in making a determination. If the President is empowered to determine both *what* the standards are for the interests of the United States and *who* among us fit the standards, he or she acts as legislator, executive, and judiciary. Too much power is concentrated in the executive branch in making such determinations using broad, unpublished standards.

Some argue that the government detained Hamdi and Padilla as enemy combatants because they did not have sufficient evidence to ensure a conviction in an Article III court.⁹⁴ The secrecy that surrounded the two detained citizens leaves no public record of the evidence that the government had on either man outside of the Mobbs declarations. Others who associate or support terrorist organizations, or have intelligence value, or are a continuing threat to the United States, have been tried in federal courts. Yet Hamdi and initially Padilla were not.

The only evidence the government initially provided, even to the Supreme Court, was a declaration that was essentially a hearsay review of the detainee’s files, meaning that it was possible that the government did not have enough evidence on either man to satisfy federal evidentiary requirements. This would be a drastic accusation against the government, but Hamdi’s release soon after the Supreme Court ruled that he had a right to judicial review certainly does not negate it. Padilla’s transfer to a civilian court in Florida to face a federal indictment just before the government’s briefs were due in his appeal to the Supreme Court seemed not to, either, but he has since been convicted of conspiracy to commit several terrorist acts.

In both cases, the government argued vehemently that it must detain these individuals, in military prisons and without

access to counsel, because of their grave danger to society. Yet in both cases, when it appeared as though the courts would find a lack of evidence or force the government to defend these detentions, the government quickly shifted course and either released the detainee or transferred them back to the civilian criminal-justice system that it had previously called unequipped to handle such a detainee. If history proves this theory correct in documents released in the future and memoirs written by today’s decision makers, many Americans may lose faith in our system of justice. Few would trust an executive branch that perversely seeks to indefinitely detain citizens for which it *does not* have evidence sufficient to try and convict in the civilian criminal-justice system.

To this end, Hamdi and Padilla are not the only individuals accused of nefarious acts and attempted acts of terrorism. Several other citizens and noncitizens of equal or greater danger and intelligence value were tried in federal courts. Both Richard Reid, who attempted to destroy an American Airlines flight from Paris to Miami via a crudely made shoe bomb,⁹⁵ and his accomplice, Saajid Badat, who possessed explosives in his home and allegedly assisted Reid while planning his own shoe bombing at a later date,⁹⁶ were arrested and charged in federal court. Ryan Anderson, a member of the National Guard, was arrested before deployment to Iraq on “criminal charges of aiding the enemy by wrongfully attempting to communicate and give intelligence to the al Qaeda terrorist network.”⁹⁷ Yassin Muhiddin Aref and Mohammed Mosharref Hossain, members of a mosque in Albany, New York, who were accused of attempting to sell to terrorists a shoulder-fired grenade launcher, were charged in federal court with “concealing material support for terrorism and participating in a money-laundering conspiracy.”⁹⁸ Gale Nettles, a convicted felon who used the name Ben Laden, was arrested and charged in federal court after filling a rented storage facility with 500 pounds of fertilizer that he intended to use to bomb the Dirksen Federal Courthouse building in Chicago, a clear attempt at domestic terrorism.⁹⁹ Ramzi Yousef, convicted in federal court for masterminding the 1993 truck bombing of the World Trade Center, was never declared to be an enemy combatant, although Deputy Secretary of Defense Paul Wolfowitz wished to have him so declared.¹⁰⁰

It is a mystery why these individuals, some of whom were further along in planning a terrorist act, or even caught in the

94. *Newsweek* correspondents Michael Isikoff and Daniel Klaidman reported based on anonymous sources that after Padilla was arrested at O’Hare airport and transported to New York on a material-witness warrant, “prosecutors soon realized they didn’t have enough evidence to charge him with any crime. To avoid releasing him, Bush decreed on June 9 that Padilla, too, was an enemy combatant. He was sent to a military brig in South Carolina.” Isikoff and Klaidman, *supra* note 3, at 26.

95. Fred Bayles, *Judge to Bomber: You’re No Big Deal*, USA TODAY (Jan. 31, 2003), at 1A.

96. Associated Press, *Alleged Conspirator Charged*, WASH. POST (Oct. 5, 2004), at A02.

97. CBS/Associated Press, *Army: GI Wanted to Help Al Qaida*, CBS NEWS WEBSITE, (Feb. 13, 2004) available at <http://www>

[.cbsnews.com/stories/2004/02/12/national/main599982.shtml](http://www.cbsnews.com/stories/2004/02/12/national/main599982.shtml) (last visited, Feb. 25, 2007).

98. Jonathan Finer and Dan Eggen, *Two Leaders of Mosque Arrested in Albany Sting*, WASH. POST (Aug. 6, 2004), at A03.

99. Matt O’Connor and Glenn Jeffers, *FBI Aids Suspect in Catching Himself: An Ex-Con Is Accused of Plotting to Blow up the Dirksen Building, but U.S. Agents Were Clued in from the Start*, CHIC. TRIB. (Aug. 6, 2004), at 1.

100. Michael Isikoff and Mark Hosenball, *The Enemy Within: How the Pentagon Considered Expanding its Controversial ‘Enemy Combatant’ Label in a Bid to Prove Links between Iraq and Al Qaeda*, NEWSWEEK WEB EXCLUSIVE (Apr. 21, 2004), available at <http://msnbc.msn.com/id/4799686/> (last visited Feb. 25, 2007).

act, like the “shoe bomber” Reid, were not declared enemy combatants. Perhaps an aspect of Padilla’s detention was so dangerous that if revealed, it would present a grave danger. Perhaps that danger has passed, allowing Padilla to be tried in federal court. Perhaps the evidence initially used to hold Padilla as an enemy combatant was insufficient to attain a conviction in federal court. Or perhaps a threat of an enemy-combatant declaration has been sufficient to elicit cooperation from all others arrested in the “war on terror.”

III. SHOULD THE UNITED STATES GOVERNMENT DETAIN CITIZENS AS ENEMY COMBATANTS?

The short answer to this question should be no. The United States has a strong legal and judicial system, a system that is well capable of protecting the state’s interest in safety from terrorism while safeguarding the rights of the detained.¹⁰¹ Justice Scalia’s dissenting opinion in *Hamdi* argued that the A.U.M.F. did not authorize enemy-combatant detention, and it further cited several statutes that federal prosecutors could use against citizen terrorists and suspected terrorists instead of detaining them as enemy combatants.¹⁰² Some accused terrorists captured by the United States or allied governments have been successfully prosecuted in Article III courts. These courts have capably balanced the sensitivity of the defendant’s potentially dangerous knowledge and presentation of continuing danger with their constitutionally guaranteed rights to a fair and speedy trial and representation by counsel.

The secretive standards for detaining United States citizens as enemy combatants, on the other hand, are filled with pitfalls and dangers to both public safety and civil liberties. Some of the problems with secretive enemy-combatant detention come from denying citizens the civil liberties that we have come to expect in this country. Yet there is the additional public-relations problem, both within the United States and outside of its borders. Even if the government does its utmost to preserve and protect the civil liberties of detainees—and does in fact only detain citizens as enemy combatants when it has impeccable proof—the fear that the system is not so pure, and the government’s reluctance thus far to disprove that fear, compounds this public-relations nightmare and leads some to believe that the government is overstepping its constitutionally granted power and violating citizens’ civil liberties.

IV. THE MATTER OF THE MODEL

One reason the government should detail its process and method used to determine the enemy-combatant status of citizens is to inform those who may commit future acts. Although it seems illogical, terrorists and potential terrorists should know the standards they will be judged by so they can consider both those standards and that judgment before they plan and act.

Open standards and disinterested arbiters of those standards are part of our rule-of-law tradition; this may well be the “freedom” we fight for in the “war on terror.”

Of course, some might argue that muddled, confusing, and shifting standards provide a better deterrent against a shadowy enemy. Perhaps not knowing what they will be arrested for and how they will be treated is more of a deterrent than definitive knowledge that grave actions will carry grave consequences. Yet even if effective, that tactic pulls our government away from its historical tradition of the rule of law. If the government keeps its citizen-detention standards a mystery, it will exchange our inherent moral compass for a tactic that has not been proven effective. As a tactic, mysterious standards may be effective in the short run, but in the long run, they are self-defeating. Shrouding the substantive standards used by the government in mystery may cause us to lose a chance at deterrence and may harm the global view of the United States.

Dean Peter Raven-Hansen has made the important point that “‘you can look it up’ is an Americanism central to the rule of law and lawmaking. Yet, while a non-citizen could look up the November 13 Order in the Federal Register,¹⁰³ United States citizens Hamdi and Padilla, ironically, could not look up the law governing their detention before the *Hamdi* decision.”¹⁰⁴

Sunlight cast on these standards would not really be for the sake of those individual terrorists and potential terrorists (who are not likely to be deterred by reading published standards),

The secretive standards for detaining U.S. citizens as enemy combatants . . . are filled with pitfalls and dangers to both public safety and civil liberties.

101. The District of South Carolina addressed this issue in its *Padilla* opinion. “As for concerns about national security during the judicial process, it is axiomatic that the government has a legitimate interest in the protection of the classified information that may be necessarily be used in the prosecution of an alleged terrorist such as Petitioner. This Court is of the firm opinion, however, that federal law provides robust protection of any such information. E.g. The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III.” *Padilla*, 389 F. Supp.2d. at 692 n.13. The district court added that enemy-combatant detention is not necessary “because the criminal justice system provides for the detention power. Nothing makes that clearer than the facts of this case. There was a warrant issued from a grand jury for Mr. Padilla’s arrest. Mr. Padilla was arrested by law enforcement officials, civilian law enforcement officials. He was

brought before a civilian judge. He was imprisoned in a civilian facility in New York. Everything occurred according to the civilian process in the way it is supposed to. And it’s not only not necessary, but not appropriate. It’s not appropriate because it directly conflicts with the limits on detention that Congress has set by statute and the limits that the framers set on presidential power.” *Id.* at 686.

102. *Hamdi*, 542 U.S. at 560-561.

103. One also could find it on the White House website. The White House, Office of the Press Secretary (Nov. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (last visited Feb. 25, 2007).

104. Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorism*, 64 LA. L. REV. 831, 846-847 (2004).

but should be published for the sake of fledgling and developing democracies, who model their actions and laws after those of the United States. The rule of law and the Constitution are examples to be dispersed across the world. The Court wrote in *Milligan* of the power of punishment through the law “no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.”¹⁰⁵

More than a century later, Ronald Reagan and others spoke of America as a “shining city upon a hill” that is “still a beacon, still a magnet for all who must have freedom, for all the pilgrims from all the lost places who are hurtling through the darkness, toward home.”¹⁰⁶ Even if no law requires the government to publish these standards, the United States—the “shining city upon a hill”—has a moral imperative to share its standards.

Sharing standards also means sharing America’s values. No country stands before the United Nations to argue for the right to declare political dissidents to be enemy combatants based on little proof of wrongdoing simply because the governments of Syria, Iran, or North Korea do so. Yet, if they can make that argument using a United States example, the cause of liberty worldwide is damaged. Additionally, emerging democracies often base their constitution and governmental system at least in part on that of the United States. A clear, open model can shape the detention standards of frail emerging democracies like those in Afghanistan and Iraq. While we can be fairly confident that our executive branch is careful to balance national security with civil liberties, it is all too easy in developing countries for leaders to deal with dissent via the proverbial “knock on the door in the night,” and then to detain citizens based on scant evidence for which the writ of habeas corpus, the most important of rights, is so necessary to protect against.¹⁰⁷

Thus there are two reasons for the United States to release the standards it uses to detain citizens as enemy combatants. The first is the importance to our nation and the world of morally clear rule-of-law decisions. The second reason is for democracies around the world who look to the United States as a model and pattern their actions after ours. In being open and honest about the standards it uses to detain its own citizens, the United States can address and ensure the strength of its own democracy and that of dozens of democracies developing across the globe.

In the century before last, the Court wrote that “it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite

party will make reprisals.”¹⁰⁸ If the United States upholds strict standards, it has the moral force to hold other nations to the same strict standards. If the government were more open about the standards and factors it uses to determine when it has the unilateral right to whisk a citizen away to a military brig, world leaders who detain their citizens could not use our secrecy to justify their own. Whatever the standards are for detaining American citizens as enemy combatants, the United States should publish and clarify those standards so both its own citizens, and those of the rest of the world, will know the standards by which they are judged.



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105. *Ex Parte Milligan*, 71 U.S. 2, 119 (1866).

106. Ronald Reagan, *Farewell Address to the Nation* (Jan. 11, 1989), available at http://www.ronaldreagan.com/sp_21.html (last visited, Feb. 25, 2007).

107. See Zacharias Chafee, Jr., *The Most Important Human Right in the Constitution* 32 BOSTON UNIVERSITY L. REV. 143 (1952).

108. *Brig Amy Warwick*, 67 U.S. 635, 667 (1863).