9-1-2003

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Recommended Citation
Available at: http://digitalcommons.lmu.edu/ilar/vol26/iss1/3
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I. INTRODUCTION

In June 2002, while in Alexandria, Virginia, preparing for a motions hearing in the John Walker Lindh case, I noticed in a press report that Chief Justice Rehnquist had addressed federal judges in Virginia on the theme that "[i]n time of war, the laws are silent." 1 Ironically, one of the pending motions on behalf of Lindh relied on the international law of war to argue that Lindh could not be prosecuted for conspiracy to commit murder (one of the charges pending against him) based merely on having been a soldier on one side of a military conflict. 2

The government argued in response to this motion that Lindh had been conclusively determined by the President to be an "unlawful enemy combatant" not entitled to lawful combatant immunity, and that the government's determination was not subject to review by the courts. 3 In support of that position, the

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3. Government's Opposition to Defendant's Motion to Dismiss Count One of the Indictment for Failure to State a Violation of the Charging Statute (Combat Immunity)
government relied on a two-page fact sheet that Presidential Press Secretary Ari Fleischer provided at a press conference in February 2002; the fact sheet announced that the President had determined that all Taliban detainees were unlawful combatants.4

It is the opinion of some, and apparently the prevailing view in the current Administration, that our ordinary criminal justice system is not adequately equipped to cope successfully with the current threat of terrorism.5 As a result, the Administration’s anti-terrorism effort has moved from a criminal justice model to a war model, with the emphasis on prevention rather than conviction or punishment. One aspect of this approach has been to assert executive discretion to detain terrorism suspects without criminal charges under the President’s war power. In the Executive’s view, it has at least three strategic options to deal with suspected terrorists: (1) to detain the suspected terrorist in military custody as an “enemy combatant” indefinitely without judicial review (e.g. in the Hamdi, Padilla and Al-Marri cases), (2) to bring charges and try non-citizen suspects in military tribunals (as will apparently be done to some of the Guantanamo detainees),6 or (3) to charge the suspect in federal court and treat the suspect as an “unlawful enemy combatant” not entitled to normal protections of international law (e.g. the Lindh case).

This policy raises important questions, including: What are the respective roles of the judiciary, executive, and legislature in determining the lawfulness of the detention of suspected terrorists? Does the Executive’s determination to use military force and to treat the 9/11 attacks as acts of war remove the detention of terrorism suspects by the Defense Department from

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ordinary oversight by the judiciary, including habeas review? Should any judicial oversight be circumscribed by significant deference to the executive's war power? Whatever the wisdom of the government's current policy regarding terrorism suspects—whether it is necessary or even effective in combating terrorism is an important question for another forum—this policy, and the war model that animates it, both jeopardize principles fundamental to our criminal justice system, including: (1) the separation of power between the judiciary and the executive, (2) the presumption of innocence, and (3) the principle of individual culpability rather than guilt by association.

This Article explores the Administration's application of the unlawful enemy combatant doctrine to terrorism suspects and the resulting implications for our criminal justice system. Part II describes current executive policy toward terrorism suspects. Part III looks at historical precedent for the Executive's use of the unlawful enemy combatant doctrine. Part IV analyzes current published decisions bearing on the detention of alleged enemy combatants. Part V describes an American Bar Association (ABA) task force report and a bill introduced in Congress to address the enemy combatant issue. Finally, Part VI concludes that the government's legitimate interest in gathering intelligence from terrorism suspects can be accommodated without abandoning the basic principles of our criminal justice system.

II. THE GOVERNMENT'S CURRENT POLICY TOWARDS TERRORISM SUSPECTS

To what degree is the apprehension and detention of suspected terrorists a matter of criminal justice and to what degree is it part of a war effort? Remarks at the sentencing of shoe-bomber Richard Reid help to frame that issue. Reportedly, Reid sought to justify his actions as part of a broad war against the United States. U.S. District Judge William G. Young told Reid that to consider himself a "righteous soldier" in a global war between Islam and the West would give him "far too much stature," because he was neither an enemy combatant nor a soldier in any war, but a terrorist.7

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On the other hand, Jose Padilla, who, like Reid, has apparently never been on an actual battlefield, has been classified as an "enemy combatant" based on his alleged association with al Qaeda and, on that basis, has been held in a military brig without charges or access to a lawyer for more than a year. Yaser Hamdi came out of a basement of the Qala-I-Janghi fortress in Mazar-e-Sharif, Afghanistan on December 1, 2001 with John Lindh and eighty-two other Taliban prisoners. Hamdi was first held by Northern Alliance warlord General Rashid Dostum in Afghanistan, then at the U.S. detention camp at Guantanamo, and, after discovery of his U.S. citizenship, at a military brig in Norfolk, Virginia since April of 2002. As in the case of Padilla, no charges have ever been filed against him, and he has had no access to lawyers or to his family.


12. Some believe that John Lindh received favorable treatment in comparison to Hamdi and have suggested that this is the result of racism, i.e. treating an Arab-American differently than a white kid from Marin County, California. See Jonathan Turley, Commentary, Camps for Citizens: Ashcroft's Hellish Vision, L.A. TIMES, Aug. 14, 2002, at B11; David Rosenzweig & John Johnson, The Region; Fellow Prisoner is Charged with Assault on Lindh, L.A. TIMES, July 4, 2003, at B8. The better explanation is, however, evidence and expedience. The evidence against John Lindh consisted almost entirely of his own alleged statements to government interrogators. On that basis, he was charged with crimes that could have resulted in three life sentences plus ninety years. Ultimately, he entered into a plea bargain for twenty years. Indictment, United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002), available at http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.pdf; Jane Mayer, Lost in the Jihad; Why Did the Government's Case Against John Walker Lindh Collapse?, THE NEW YORKER, Mar. 10, 2003, at 50, 59. It remains to be seen how long Mr. Hamdi will be held in custody. Moreover, in the Lindh case, the government took the position in plea negotiations that Lindh could have been acquitted of criminal charges, but still held as an unlawful enemy combatant in the sole discretion of the Executive. The government gave up that right only as part of the plea bargain in which nine of the original ten charges against Lindh were dismissed. See Plea Agreement, Lindh, 227 F. Supp. 2d 565, available at http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf; Jane Mayer, supra at 50; Katharine Q. Seelye, The American in the Taliban; Regretful Lindh Gets 20 Years in Taliban Case, N. Y. TIMES, Oct. 5, 2002, at A1.
What distinguishes Padilla and Hamdi from Reid? The likely answer is as simple as it is pragmatic—lack of evidence. If there were enough credible evidence to indict and convict Padilla\(^\text{13}\) or Hamdi, it is likely they would have been charged long ago. All indications are that the government's exercise of its assumed discretion to choose between military detention and criminal charges is driven by practicality and expediency. Those against whom the government believes it has sufficient evidence (including Lindh, the Lackawanna defendants, and the Portland defendants) have been charged with crimes;\(^\text{14}\) those against whom there is apparently insufficient evidence, including Padilla and Hamdi, have been held by the Defense Department without charges as enemy combatants.\(^\text{15}\)

The Administration justifies its current policy toward suspected terrorists on the basis that the current threat of terrorism requires an emphasis on prevention rather than justice. In his decision in the Padilla case, Judge Mukasey of the Southern District of New York recognized this emphasis, quoting Secretary of Defense Donald Rumsfeld at length:

Here is an individual who has intelligence information... our interest really in this case is not law enforcement, it is not punishment because he was a terrorist or working with the terrorists. Our interest at the moment is to try to find out everything he knows so that hopefully we can stop other terrorist acts... .

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13. The allegations against Padilla are apparently based on statements of al Qaeda leaders in U.S. custody, including Abu Zubaydah, who was captured in Pakistan in May 2002. See James Risen & Philip Shenon, U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb, N.Y. TIMES, June 11, 2002, at A1 (“Mr. Zubaydah did not identify Mr. Padilla by name, but provided enough information to allow the Central Intelligence Agency to check with other sources... to narrow the search to Mr. Padilla, officials said.”); see also Philip Shenon & James Risen, Terrorist Yields Clues to Plots, Officials Assert, N.Y. TIMES, June 12, 2002, at A1.


15. When it appeared that the judge in the Lackwanna case might grant bail to the defendants, the government made it known that it might choose to transfer them to the custody of the Defense Department as enemy combatants. See Stewart M. Powell, Presidential Action Possible in Terror Case; Bush Could Designate Lackwanna Suspects as “Enemy Combatants,” TIMES UNION ALBANY, Sept. 21, 2002, at A4.
It seems to me that the problem in the United States is that we have — we are in a certain mode. Our normal procedure is that if somebody does something unlawful, illegal against our government, that the first thing we want to do is apprehend them, then try them in court and then punish them. In this case, that is not our first interest.

Our interest is to — we are not interested in trying him at the moment. We are interested in finding out what he knows. . . .

Given the power of weapons and given the number of terrorists that exist in the world, our approach has to [be] to try to protect the American people, and provide information to friendly countries and allies, and protect deployed forces from those kind of attacks.

I think the American people understand that, and that notwithstanding the fact that some people are so locked into the other mode that they seem not able to understand it, I suspect that . . . the American people will.16

Secretary Rumsfeld and other administration spokespersons articulate two main prongs to the prevention rationale. First, preventing future attacks requires gathering intelligence from the suspect. Treating the detainee as a criminal suspect, including the requirements of probable cause for continuing detention and advice of right to counsel, would interfere with this effort. Second, the government asserts the general prisoner of war (POW) rationale—detention prevents the suspect from rejoining the enemy and replenishing the enemy's ranks.17 Implicit in the prevention rationale is the conclusion that principles fundamental to our criminal justice system (including due process, the presumption of innocence, and the right to counsel) are inconsistent with, and encumber too much, the goal of preventing future acts of terrorism.


17. Id. at 603. ("The government has argued that affording access to counsel would 'jeopardize the two core purposes of detaining enemy combatants—gathering intelligence about the enemy, and preventing the detainee from aiding in any further attacks against America.'"); Yaser Esam Hamdi v. Donald Rumsfeld, 316 F.3d 450, 465 (4th Cir. 2003) ("'[D]etention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies.'").
III. HISTORICAL PRECEDENT

There is little legal precedent bearing on the Executive's detention of alleged enemy combatants. What precedent exists comes from World War II and is set against a traditional war with a clearly defined enemy and conflict.

For use of the unlawful combatant doctrine in the present context, the government relies primarily on the U.S. Supreme Court's 1942 decision in *Ex Parte Quirin*. In that case, eight German saboteurs, one of whom claimed to be a U.S. citizen, allegedly landed on U.S. soil from submarines, with the intention of blowing up U.S. installations. The saboteurs were tried in a military tribunal, convicted and executed, all within about ninety days. Those ninety days included a stop at the U.S. Supreme Court, which upheld the use of a military tribunal against constitutional challenges. The Court relied heavily on the fact that the alleged offenses were violations of the law of war, "which the Constitution does not require to be tried by jury." Emphasizing the alleged actions of the individuals and not the status of the group, the Court used the term "unlawful combatants" to describe those who had engaged in espionage or other war crimes. Since the defendants allegedly had gone behind enemy lines "contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts"—acts that, if proven, constituted war crimes—the Court held the jurisdiction of the military tribunal was proper. The Padilla Court admitted, "Quirin offers no guidance regarding the standard to be applied in making the threshold determination that a habeas corpus petitioner is an unlawful combatant."

To support its current policy, the government also relies on another World War II case, *In re Territo*, decided by the Ninth Circuit in 1946. In that case, the defendant, who was not only a permanent resident of Italy, but also a U.S. citizen by virtue of his

18. See Padilla, 233 F. Supp. 2d at 607 ("[I]t would be a mistake to create the impression that there is a lush and vibrant jurisprudence governing these matters. There isn't.").
22. *Id.* at 36 (describing the charges against the petitioners).
24. *In re Territo*, 156 F.2d 142 (9th Cir. 1946).
birth in the United States, was captured while fighting for the Italian army. The Ninth Circuit held that the United States could detain him as a prisoner of war until the end of hostilities. There were no allegations of war crimes and no allegation that the detainee, Territo, was an unlawful combatant. Territo, like the defendants in *Quirin*, was afforded the right to counsel and full judicial review.

**IV. CURRENT CASES**

The government's detention of U.S. citizens in the United States as allegedly "unlawful enemy combatants" has thus far been addressed in published decisions in two cases, the *Hamdi* and *Padilla* cases. The premise of the government's position in each of these cases has been that we are at war with terrorist organizations, and the President, therefore, has unreviewable discretion under his war power to detain those who are suspected of harboring, supporting, or associating with those terrorist organizations.

**A. The Hamdi Case**

The Fourth Circuit in *Hamdi*, ruling on a habeas petition filed on behalf of Hamdi by the federal public defender for the Eastern District of Virginia, held that no evidentiary hearing or factual inquiry was necessary because it was undisputed that Hamdi was captured in an active combat zone in a foreign country. The court held that his detention by the Defense Department is, therefore, in accord with the President's constitutional war powers in light of Congress's authorization to use military force against al Qaeda. Further, because there was no evidentiary hearing and no charges

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25. Id. at 143.
26. Id. at 148.
27. *Hamdi*, 316 F.3d at 459 ("Because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the petition."); id. at 473 ("[N]o evidentiary hearing or factual inquiry on our part is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country.")
28. Id. at 463 (President's war powers include the authority to "detain alien enemies during the duration of hostilities.").
The Concept of the Unlawful Enemy Combatant had been brought, Hamdi had no need or right to access counsel.29 The court specifically noted, however, that it was expressing no opinion about the circumstances presented by the Padilla case, where a detainee was not captured in a foreign zone of combat but in the United States.30

In response to Hamdi’s claim that the relevant hostilities have concluded, the court suggested that the timing of cessation of hostilities may not be justiciable at all.31 Although noting that American troops are still on the ground in Afghanistan, and finding on that basis that hostilities are not concluded under even the most circumscribed definition of hostilities, the court found it unnecessary to resolve that question.32 For the same reason, it found it unnecessary to address the more difficult issue of whether detention can continue to be justified based on the amorphous, ongoing war on terrorism. Presumably, there will be a point at which hostilities in Afghanistan are concluded and that issue will come into focus. On January 9, 2004, the Supreme Court granted Hamdi’s petition for review of the Fourth Circuit’s decision.33

Putting aside the important issue of how one determines the contours of the war on terrorism and whether that issue is justiciable, the Fourth Circuit’s decision in Hamdi can be read as parallel to the Ninth Circuit’s World War II decision in In re Territo, where an American citizen, captured with enemy forces, can be held until the cessation of hostilities.34 Territo, however, obtained a lawyer and was presumably not held in isolation and incommunicado, as Hamdi has been since December of 2001.

29. See id. at 475 (“As an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime. But as we have previously pointed out, Hamdi has not been charged with any crime.”).

30. Id. at 465 (“We have no occasion, for example, to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding.”).

31. See id. at 476 (“Whether the timing of cessation of hostilities is justiciable is far from clear.”).

32. Id. (“The government notes that American troops are still on the ground in Afghanistan, dismantling the terrorist infrastructure in the very country where Hamdi was captured and engaging in reconstruction efforts which may prove dangerous in their own right. Because under the most circumscribed definition of conflict hostilities have not yet reached their end, this argument is without merit.”).


34. See In re Territo, 156 F.2d at 147-48.
The policy justification for Hamdi’s detention is less clear. Whatever intelligence value there was in his continuing interrogation seems very likely to have been exhausted by this time. Also, the risk of his returning to take part in the hostilities in Afghanistan is unrealistic. One must seriously question whether his “enemy combatant” status is anything more than a rationale for holding him indefinitely, despite insufficient evidence to charge him with a crime. There is apparently no allegation of involvement with terrorism or al Qaeda, or that Hamdi did anything other than take up arms with the Taliban against the Northern Alliance.  

B. The Padilla Case

Unlike Hamdi, Jose Padilla was not captured in a war zone. He was first taken into custody in the United States on a material witness warrant issued by the Justice Department. He was later designated as an “enemy combatant” and transferred to the Defense Department’s custody.  Judge Mukasey of the Southern District of New York held that Padilla’s detention is not per se unlawful but that Padilla is entitled to counsel in support of his habeas petition.

Padilla argued that his detention by the Defense Department as an enemy combatant violated 18 U.S.C. § 4001 (Non-Detention Act), which provides: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”  The district court held, however, that the joint resolution of Congress authorizing military force against al Qaeda was sufficient to fulfill the demands of that statute and that the authority to detain enemy combatants was inherent in the

35. The blurring of the distinction between Taliban, al Qaeda, and other groups and between terrorism and military action is an issue requiring separate attention. That issue was very much at the heart of the allegations and potential defenses in the Lindh case. See generally Lindh, 212 F. Supp. 2d at 541.
36. Padilla, 233 F. Supp. 2d at 569. A June 9, 2002 Presidential Order addressed to the Secretary of Defense, concluded that Padilla is an enemy combatant. Id. at 571. The Order alleged that Padilla “is ‘closely associated with al Qaeda,’ engaged in ‘hostile and war-like acts’ including ‘preparation for acts of international terrorism’ directed at this country, possesses information that would be helpful in preventing al Qaeda attacks, and represents ‘a continuing, present and grave danger to the national security of the United States.’” Id. at 572.
37. Id. at 599. Because the government pursued an interlocutory appeal and obtained a stay, Padilla was still not allowed access to counsel. Padilla ex rel. Newman v. Rumsfeld, 256 F. Supp. 2d 218, 222 (S.D.N.Y. 2003).
President's exercise of the war power. Therefore, to resolve the issue of whether Padilla is lawfully detained, the district court held that it would "examine only whether the President had some evidence to support the finding that Padilla was an enemy combatant," that is, "some evidence" that he is "associated with al Qaeda" and should "be detained as an unlawful combatant."  

Because the district court held that Padilla, unlike Hamdi, is entitled to assistance of counsel in aid of his habeas petition, many hailed the decision as a civil liberties victory. Less attention was paid to the court's decision on the merits. Since the district court's decision in Padilla could have applied to terrorist suspects arrested anywhere, not only in a combat zone, it had much wider potential application than the Hamdi decision and posed a greater threat to ordinary principles of criminal justice. The standard articulated for indefinite military detention—"some evidence" of association with al Qaeda—essentially would have meant that the Executive could indefinitely imprison anyone suspected of terrorist association. "Some evidence" of association is a far cry from probable cause to believe a crime has been committed, let alone proof beyond a reasonable doubt.

Padilla was taken into custody over a year ago and, as in Hamdi, the government has probably exhausted his use as an intelligence source on potential future attacks. Had reliable evidence of his criminal conduct been found, he would likely have been formally charged by now. But, as an "unlawful enemy combatant," under the district court's decision, Padilla could have been imprisoned indefinitely or at least for the duration of the war on terrorism, based on nothing more than "some evidence" to support a suspicion of terrorist association.

40. Id. at 608–10.
41. As the court defined it, "the central issue presented in [Padilla was] whether the President has the authority to designate as an unlawful combatant an American citizen, captured on American soil, and to detain him without trial." Id. at 593.
43. As in Hamdi, the Padilla court found it unnecessary to address whether the court could limit the duration of detention based on cessation of the relevant conflict. Id. at 590 ("The question of when the conflict with al Qaeda may end is one that need not be addressed. So long as American troops remain on the ground in Afghanistan and Pakistan in combat with and pursuit of al Qaeda fighters, there is no basis for contradicting the President's repeated assertions that the conflict has not ended. . . . At some point in the
In an opinion issued in December 2003, the Second Circuit reversed the district court decision in Padilla and remanded "with instructions to issue a writ of habeas corpus directing the Secretary of Defense to release Padilla from military custody within 30 days."\(^4\) The appellate court held that the President has no inherent constitutional power to detain as an enemy combatant a U.S. citizen seized in the United States, away from a combat zone, and that the Non-Detention Act prohibits such detention without express congressional authorization.\(^45\) The court found no such authorization in Congress' approval of the use of military force against al Qaeda.\(^46\) The government has asked the Second Circuit to stay the effect of its decision\(^47\) and has petitioned the Supreme Court for expedited review.\(^48\)

V. PROPOSALS

An ABA Task Force on Treatment of Enemy Combatants that convened in March 2002 issued its final report on February 10, 2003.\(^49\) It concluded, among other things, that: (1) detainees should be allowed access to counsel (not a surprising conclusion by a group of lawyers) and (2) Congress should enact legislation establishing clear standards and procedures governing detention. The ABA report did not say what the standards or procedures should be, and was uncritical of the district court decision in Padilla.

While effective procedures for review of military detention of terrorism suspects are certainly important, the substantive

\(^4\) Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003).
\(^45\) Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003).
standard for such review is also crucial from a criminal justice standpoint. If the standard articulated by the district court in Padilla were adopted by Congress, allowing indefinite detention of a suspect based on "some evidence" of terrorist association, fundamental principles of criminal justice (including due process, presumption of innocence, and individual culpability) would not apply whenever allegations of terrorism are made.

At least one bill has been introduced in Congress to address this issue: the Detention of Enemy Combatants Act, HR 5684, introduced in October 2002.\textsuperscript{50} It received little attention, however, and was not reported out of committee. It would have provided for broad executive discretion:

The Executive must be allowed broad latitude to establish by regulation and Executive order the process, standards, and conditions in which a United States citizen or lawful resident may be detained as an enemy combatant. Courts must give broad deference to military judgment concerning the determination of enemy combatant status, POW status, and related questions.\textsuperscript{51}

On the other hand, it would have explicitly rejected the Administration's assumption of unreviewable war power to detain designated "enemy combatants."

Nothing in this Act permits the government, even in wartime, to indefinitely detain American citizens or other persons lawfully in the United States as enemy combatants without charges and hold them incommunicado without a hearing and without access to counsel on the basis of a unilateral determination that the person may be connected with an organization that intends harm to the United States.\textsuperscript{52}

The bill would have authorized the Secretary of Defense to establish standards, processes, and criteria in determining whether a suspect is an enemy combatant, with timely access to challenge the basis for detention by judicial review.\textsuperscript{53}

Like the ABA report, the proposed legislation focused on procedural safeguards, leaving significant uncertainty surrounding the substantive standard for detention. The bill would have

\begin{itemize}
\item \textsuperscript{50} Detention of Enemy Combatants Act, H.R. 5684, 107th Cong., 2d Sess. (2002).
\item \textsuperscript{51} Id. § 2(10).
\item \textsuperscript{52} Id. § 2(14).
\item \textsuperscript{53} Id. §§ 3(b), 4.
\end{itemize}
authorized for detention, as an enemy combatant, a "United States person or resident [who] . . . knowingly cooperated with a member of al Qaeda in the planning, authorizing, committing, aiding, or abetting of one or more terrorist acts against the United States."54 Such conduct would, however, violate existing criminal statutes, and the bill does not address the standard of proof necessary for such detention. Does the bill intend that we should accept a lesser standard of proof for military detention of suspected terrorists than for criminal prosecution? If probable cause and ultimately proof beyond a reasonable doubt are not required, what would be sufficient — "some evidence," as the district court held in Padilla? Assuming that the applicable standard of proof has been met, would indefinite detention without charges be allowed?

The bill also refers to detention of "members of al Qaeda."55 Penalizing mere membership would run afoul of the 1960 Communist party cases, which established that freedom of association does not allow punishment of mere membership without intent to further the organization's unlawful purposes.56 The Communist party may seem benign in comparison to al Qaeda now, but that constitutional principle was established when the Communist party, backed by a Soviet-sponsored international movement, dedicated itself to the violent overthrow of our government. One could argue that al Qaeda is solely a criminal enterprise and that rights of association do not apply. But assuming that is true, how is membership proven without evidence of the defendant's intent to participate in illegal activity? Penalizing "membership" based on any other criteria is a slippery slope, especially considering that the Department of State's

54. Id. § 3(a).
55. Id.
56. See, e.g., Scales v. United States, 367 U.S. 203, 229 (1961) (holding, in the context of alleged association with communist organizations, that the Smith Act's prohibition on organizing, being a member of, or affiliating with an organization that advocates the violent overthrow of the U.S. government should be construed to punish such association only with "clear proof that a defendant specifically intend[s] to accomplish the [aims of the organization] by resort to violence."”) (quoting Noto v. United States, 367 U.S. 290, 299 (1961)), [alteration in original]; Elfbrandt v. Russell, 384 U.S. 11, 17 (1966) (holding unconstitutional an Arizona statute permitting prosecution for perjury and discharge from office who took an oath to United States but knowingly and willfully remained a member of the Communist party: "[I]laws such as this which are not restricted in scope to those who join with the 'specific intent' to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization.").
"foreign terrorist organizations" list has included organizations such as the African National Congress. 57

VI. CONCLUSION

The daunting threat of international terrorism presents serious challenges to our criminal justice system. While the need for an aggressive policy aimed at preventing future terrorist acts can scarcely be questioned, these policy concerns can be accommodated without abandoning our criminal justice system's basic principles.

The need to gather intelligence does not necessitate indefinite detention without judicial oversight. Certainly, the intelligence gathering rationale weakens as time passes. Padilla and Hamdi have both been held for well over a year58 and it seems likely that their intelligence value has been exhausted.

The POW rationale, which prevents return of enemy soldiers, makes little sense in the terrorist context. Once an individual has been identified and detained as a suspected terrorist, that individual loses value to the terrorist organization, at least for any covert activity. Assuming that Padilla has in fact associated with al Qaeda, it seems unlikely, for example, that he could be successfully assigned to a "sleeper cell" after having been in U.S. custody.

Declaring "war" on terrorism should not be a basis for detaining terrorist suspects without probable cause and criminal charges. Ideally, Congress should establish parameters for military detention for intelligence purposes. Absent such legislative action, the courts will have to balance the government's legitimate interest in intelligence gathering against the rights of the accused, and to set proper limits based on established constitutional principles.

57. JAMES X. DEMPSEY & DAVID COLE, TERRORISM AND THE CONSTITUTION 118 (2d ed., New Press, 2002) (Had anti-terrorism laws been in effect in the 1980s, "it would have been a crime to give money to the African National Congress during Nelson Mandela's speaking tours [in the United States], because the State Department routinely listed the ANC as a 'terrorist group.'"'); see also Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 196 (D.C. Cir. 2001) (holding that Secretary's designation process did not meet minimum requirements of due process). But see People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238, 1241-42 (D.C. Cir. 2003) (approving redesignation).

After reasonable opportunity for intelligence gathering, a suspected terrorist, like other crime suspects, should be held only on probable cause supporting criminal charges. Otherwise, concluding that terrorism suspects can be held indefinitely based merely on suspicion and "some evidence" is to conclude that the terrorist threat justifies suspending constitutional principles at the core of our criminal justice system, including the right to due process, the presumption of innocence, the separation of powers between the executive and the judiciary, and the principle of individual culpability rather than guilt by association. To so conclude would be to take a serious step in the direction of a police state and away from a free society.

59. Whether the fruits of "intelligence" interrogations without Miranda warnings (or observation of other rights of the accused) should be available for use in a subsequent criminal prosecution presents a separate and important issue. In Lindh, the government argued for a battlefield exception to Miranda. Government's Opposition to Defendant's Motion to Suppress Statements for Violation of His Fifth Amendment Rights (Miranda and Edwards), United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002) (No. 02-37-A). Because a plea agreement was reached before the suppression hearing began, the court never resolved that issue. Plea Agreement, United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002) (No. 02-37-A), available at http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf. While the need to gain intelligence information to prevent future terrorist acts may justify unwarned interrogations, it does not necessarily follow that the government can use the fruits of those interrogations in a criminal prosecution without violating the Fifth Amendment. See Chavez v. Martinez, 123 S. Ct. 1994, 2000-01 (2003) (Fifth Amendment violation occurs when coerced statements are admitted as testimony in criminal case).