



Defense, Security and Strategies

U.S. DETAINEES AND ENEMY BELLIGERENTS LEGAL CASES, CONSIDERATIONS AND PROVISIONS

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NOVA

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DEFENSE, SECURITY AND STRATEGIES

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AND ENEMY BELLIGERENTS
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AND PROVISIONS**

DEFENSE, SECURITY AND STRATEGIES

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PREFACE

As part of the conflict with Al Qaeda and the Taliban, the United States has captured and detained numerous persons believed to have been part of or associated with enemy forces. Over the years, federal courts have considered a multitude of petitions by or on behalf of suspected belligerents challenging aspects of U.S. detention policy. Although the Supreme Court has issued definitive rulings concerning several legal issues raised in the conflict with Al Qaeda and the Taliban, many others remain unresolved, with some the subject of ongoing litigation. This book analyzes the existing law and authority to detain U.S. persons, who are suspected of being members, agents or associated of Al Qaeda or possibly other terrorist organizations as "enemy combatants." This book also offers a brief background of the salient issues raised by the detainee provisions of the FY2012 NDAA and provides a section-by-section analysis; and discusses major judicial opinions concerning suspected enemy belligerents detained in the conflict with Al Qaeda and the Taliban.

Chapter 1 – The detainee provisions passed as part of the National Defense Authorization Act for FY2012, P.L. 112-81, affirm that the Authorization to Use Military Force (AUMF), P.L. 107-40, in response to the terrorist attacks of September 11, 2001, authorizes the detention of persons captured in connection with hostilities. The Act provides for the first time a statutory definition of covered persons whose detention is authorized pursuant to the AUMF. During debate of the provision, significant attention focused on the applicability of this detention authority to U.S. citizens and other persons within the United States. The Senate adopted an amendment to clarify that the provision was not intended to affect any existing law or authorities relating to the detention of U.S. citizens or lawful resident aliens, or any other persons captured or arrested in the United States. This report analyzes the existing law and authority to detain U.S. persons, including American citizens and resident

aliens, as well as other persons within the United States who are suspected of being members, agents, or associates of Al Qaeda or possibly other terrorist organizations as “enemy combatants.”

Chapter 2 – The National Defense Authorization Act for FY2012 (2012 NDAA, P.L. 112-81) contains a subtitle addressing issues related to detainees at the U.S. Naval Station at Guantanamo Bay, Cuba, and more broadly, the disposition of persons captured in the course of hostilities against Al Qaeda and associated forces. Much of the debate surrounding passage of the act centered on what appears to be an effort to confirm or, as some observers view it, expand the detention authority that Congress implicitly granted the President via the Authorization for Use of Military Force (AUMF, P.L. 107-40) in the aftermath of the terrorist attacks of September 11, 2001.

The 2012 NDAA, as enacted, largely adopts the detention provisions from the Senate bill, S. 1867, with several modified provisions from the House bill, H.R. 1540, along with a few modifications inserted at conference in an effort to avoid a presidential veto. It authorizes the detention of certain categories of persons and requires the military detention of a subset of them (subject to waiver by the President); regulates status determinations for persons held pursuant to the AUMF, regardless of location; regulates periodic review proceedings concerning the continued detention of Guantanamo detainees; and continues current funding restrictions that relate to Guantanamo detainee transfers to foreign countries. The act continues to bar military funds from being used to transfer detainees from Guantanamo into the United States for trial or other purposes, although it does not directly bar criminal trials for terrorism suspects (similar transfer restrictions are found in the Consolidated and Further Continuing Appropriations Act, 2012 (P.L. 112-55) and the Consolidated Appropriations Act, 2012 (P.L. 112-74)).

During floor debate on S. 1867, significant attention centered on the extent to which the bill and existing law permit the military detention of U.S. citizens believed to be enemy belligerents, especially if arrested within the United States. A single amendment was made to the detainee provisions (ultimately included in the final version of the act) to clarify that the bill’s affirmation of detention authority under the AUMF is not intended to affect any existing authorities relating to the detention of U.S. citizens or lawful resident aliens, or any other persons captured or arrested in the United States. When signing the FY2012 into law, President Obama stated that he would “not authorize the indefinite military detention without trial of American citizens.”

While Congress deliberated over the competing House and Senate bills, the White House expressed strong criticism of both bills' detainee provisions, and threatened to veto any legislation "that challenges or constrains the President's critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the Nation." A few modifications were made during conference to assuage some of the Administration's concerns. Notably, the conferees added a statement to confirm that the provision mandating the military detention of certain categories of persons does not affect existing authorities of domestic law enforcement agencies, even with respect to persons held in military custody. President Obama ultimately lifted the veto threat and signed the 2012 NDAA into law, though he issued a statement criticizing many of the bill's detainee provisions. He declared that his Administration would implement the mandatory military detention provision so as to preserve a maximum degree of flexibility, and that it would not "adhere to a rigid across-the-board requirement for military detention." He also criticized the restrictions placed on Guantanamo detainee transfers, arguing that some applications might violate constitutional separation of powers principles.

This report offers a brief background of the salient issues raised by the detainee provisions of the FY2012 NDAA and provides a section-by-section analysis.

Chapter 3 - As part of the conflict with Al Qaeda and the Taliban, the United States has captured and detained numerous persons believed to have been part of or associated with enemy forces. Over the years, federal courts have considered a multitude of petitions by or on behalf of suspected belligerents challenging aspects of U.S. detention policy. Although the Supreme Court has issued definitive rulings concerning several legal issues raised in the conflict with Al Qaeda and the Taliban, many others remain unresolved, with some the subject of ongoing litigation.

This report discusses major judicial opinions concerning suspected enemy belligerents detained in the conflict with Al Qaeda and the Taliban. The report addresses all Supreme Court decisions concerning enemy combatants. It also discusses notable circuit court opinions addressing issues of ongoing relevance to U.S. detention policy. The report also summarizes a few notable decisions by federal district courts, which have addressed whether the executive may lawfully detain only persons who are "part of" Al Qaeda, the Taliban, and affiliated groups, or also those who provide a sufficient degree of support to such entities in their hostilities against the United States and its allies; adopted a functional approach for assessing whether a person is "part of" Al Qaeda; decided that a preponderance of evidence standard is appropriate for detainee

habeas cases, but suggested that a lower standard might be constitutionally permissible, and instructed courts to assess the cumulative weight of evidence rather than each piece of evidence in isolation; determined that Guantanamo detainees have a limited right to challenge their proposed transfer to the custody of a foreign government, but denied courts the authority to order detainees released into the United States; and held that the constitutional writ of habeas does not presently extend to noncitizen detainees held at U.S.-operated facilities in Afghanistan. Finally, the report discusses several criminal cases involving persons who were either involved in the 9/11 attacks (Zacarias Moussaoui) or were captured abroad by U.S. forces or allies during operations against Al Qaeda, the Taliban, and associated entities (John Walker Lindh and Ahmed Ghailani).

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Chapter 1

DETENTION OF U.S. PERSONS AS ENEMY BELLIGERENTS*

Jennifer K. Elsea

ABSTRACT

The detainee provisions passed as part of the National Defense Authorization Act for FY2012, P.L. 112-239, affirm that the Authorization to Use Military Force (AUMF), P.L. 107-203, in response to the terrorist attacks of September 11, 2001, authorizes the detention of persons captured in connection with hostilities. The Act provides for the first time a statutory definition of covered persons whose detention is authorized pursuant to the AUMF. During debate of the provision, significant attention focused on the applicability of this detention authority to U.S. citizens and other persons within the United States. The Senate adopted an amendment to clarify that the provision was not intended to affect any existing law or authorities relating to the detention of U.S. citizens or lawful resident aliens, or any other persons captured or arrested in the United States. This report analyzes the existing law and authority to detain U.S. persons, including American citizens and resident aliens, as well as other persons within the United States who are suspected of being members, agents, or associates of Al Qaeda or possibly other terrorist organizations as “enemy combatants.”

* This is an edited, reformatted and augmented version of the Congressional Research Service Publication, CRS Report for Congress R42337, dated February 1, 2012.

The Supreme Court in 2004 affirmed the President's power to detain "enemy combatants," including those who are U.S. citizens, as part of the necessary force authorized by Congress after the terrorist attacks of September 11, 2001. In *Hamdi v. Rumsfeld*, a plurality held that a U.S. citizen allegedly captured during combat in Afghanistan and incarcerated at a Navy brig in South Carolina is entitled to notice and an opportunity to be heard by a neutral decision maker regarding the government's reasons for detaining him. On the same day, the Court in *Rumsfeld v. Padilla* overturned a lower court's grant of habeas corpus to another U.S. citizen in military custody in South Carolina on jurisdictional grounds, leaving undecided whether the authority to detain also applies to U.S. citizens arrested in the United States by civilian authorities. Lower courts that have addressed the issue of wartime detention within the United States have reached conflicting conclusions. While the U.S. Court of Appeals for the Fourth Circuit ultimately confirmed the detention authority in principle in two separate cases (one of which was subsequently vacated), the government avoided taking the argument to the Supreme Court by indicting the accused detainees for federal crimes, making their habeas appeals moot and leaving the law generally unsettled.

This report provides a background to the legal issues presented, followed by a brief introduction to the law of war pertinent to the detention of different categories of individuals. An overview of U.S. practice during wartime to detain persons deemed dangerous to the national security is presented. The report concludes by discussing Congress's role in prescribing rules for wartime detention as well as legislative proposals in the 112th Congress to address the detention of U.S. persons (H.R. 3676, H.R. 3785, H.R. 3702, S. 2003).

The detainee provisions passed as part of the National Defense Authorization Act for FY2012, H.R. 1540, affirm that the Authorization to Use Military Force (AUMF)¹ in response to the terrorist attacks of September 11, 2001, authorize the detention of persons captured in connection with hostilities. The Act provides for the first time a statutory definition of covered persons whose detention is authorized pursuant to the AUMF.² During consideration of the detention provision, much of the debate focused on the applicability of this detention authority to U.S. citizens and other persons within the United States.³ Congress ultimately adopted a Senate amendment to clarify that the provision is not intended to affect any existing law or authorities relating to the detention of U.S. citizens or lawful resident aliens, or any other persons captured or arrested in the United States.⁴ This report analyzes the existing law and authority to detain, as "enemy combatants,"⁵

U.S. persons, which, for the purpose of this report means persons who are generally understood to be subject to U.S. territorial jurisdiction or otherwise entitled to constitutional protections; that is, American citizens, resident aliens, and other persons within the United States.

BACKGROUND

In June, 2004, the Supreme Court handed down a series of opinions related to wartime detention authority.⁶ In *Hamdi v. Rumsfeld*,⁷ a plurality of the Court held that a U.S. citizen allegedly captured during combat in Afghanistan and incarcerated at a Navy brig in South Carolina could be held as an enemy combatant as part of the necessary force authorized by Congress after the terrorist attacks of September 11, 2001, but that he was entitled to notice and an opportunity to be heard by a neutral decision maker regarding the government's reasons for detaining him. The government instead reached an agreement with the petitioner that allowed him to return to Saudi Arabia, where he also holds citizenship, subject to certain conditions. On the same day, the Court in *Rumsfeld v. Padilla*⁸ overturned a lower court's grant of habeas corpus to another U.S. citizen in military custody in South Carolina on jurisdictional grounds, sending the case to a district court in the Fourth Circuit for a new trial. The vacated decision of the U.S. Court of Appeals for the Second Circuit had held that the circumstance of a U.S. citizen arrested in the United States on suspicion of planning to carry out a terrorist attack there was fundamentally different from the case of a citizen captured on the battlefield overseas,⁹ and that the detention of such a citizen without trial was therefore precluded by the Non-Detention Act, 18 U.S.C. § 4001(a),¹⁰ which provides that no U.S. citizen may be detained except pursuant to an act of Congress. A plurality of the Court found in *Hamdi* that the President's detention of a U.S. citizen captured on the battlefield is not foreclosed by the Non-Detention Act because an act of Congress, the AUMF, explicitly authorized such detention, but emphasized the narrow limits of the authority it was approving:¹¹

The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible

for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.¹²

The plurality went on to describe the kind of detention it had in mind was the traditional practice of detaining prisoners of war¹³ under longstanding law of war principles:

Further, we understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who “engaged in an armed conflict against the United States.” If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of “necessary and appropriate force,” and therefore are authorized by the AUMF.¹⁴

Justice Souter, joined by Justice Ginsburg joined the plurality opinion to provide sufficient votes to vacate the decision below and remand the case to give Hamdi an opportunity to contest his detention. However, finding no explicit authority in the AUMF (or other statutes) to detain persons as enemy combatants, they would have determined that 18 U.S.C. § 4001(a) precludes the detention of American citizens as enemy combatants altogether. They rejected the theory that the detention was authorized as a necessary incident to the use of military force because “the Government’s stated legal position in its campaign against the Taliban . . . is apparently at odds with its claim here to be acting in accordance with customary law of war and hence to be within the terms of the Force Resolution in its detention of Hamdi.”¹⁵ In other words, the two Justices appeared to agree in principle that the AUMF could authorize the

detention of prisoners of war, but took the view that the government's failure to accord the Taliban detainees rights under the Geneva Convention vitiated that authority.

Justice Scalia, joined by Justice Stevens, dissented, arguing that "our constitutional tradition has been to prosecute [U.S. citizens accused of waging war against the government] in federal court for treason or some other crime"¹⁶ unless Congress has suspended the Writ of Habeas Corpus pursuant to the Constitution's Suspension Clause, Art. I, § 9, cl. 2. They viewed as "unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing." Under their view, even if the AUMF did authorize detention in sufficiently clear language to overcome the prohibition in 18 U.S.C. § 4001(a) (which, in their view, clearly it did not), Hamdi's detention would have been unconstitutional without a proper suspension of the Writ. Justice Scalia described his position as pertaining only to U.S. citizens detained within the United States (regardless of where captured),¹⁷ suggesting that only citizens who were concededly members of enemy forces may be detained as prisoners of war within the United States.¹⁸

Justice Thomas also dissented, essentially agreeing with the government's position that the detention of enemy combatants is an unreviewable aspect of the war powers constitutionally allocated to the political branches.¹⁹ He agreed that the AUMF provides sufficient authority to detain enemy combatants, meaning that a majority of the Court approved that position, but he would have given utmost deference to the Executive branch and accorded little in the way of due process. Finally, he questioned whether other acts of war, such as bombings and missile strikes, would also be subject to due process inquiry.²⁰

Although a bare majority of the Court, led by Chief Justice Rehnquist, declined to decide in *Padilla* whether the detention authority approved in *Hamdi* would apply to a U.S. citizen arrested in the United States, four Justices who dissented on the question of jurisdiction also indicated they would have upheld the Second Circuit's grant of the petition on the merits.²¹ Apparently rejecting the Bush Administration's contention that it had the authority to detain a U.S. citizen who was alleged to be "closely associated with Al Qaeda" and to have "engaged in ... hostile and war-like acts, including ... preparation for acts of international terrorism" against the United States²² in order to extract intelligence and prevent him from aiding Al Qaeda,²³

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, wrote:

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.²⁴

Given Justice Scalia's dissent in *Hamdi*, it appeared in 2004 that a majority of the Supreme Court as it was then constituted would have determined that the Non-Detention Act precludes the detention of a U.S. citizen without trial based on an alleged association with Al Qaeda and participation in a terrorist plot far from any conventional battlefield, at least within the United States. A separate majority of the same Court took the view that the Non-Detention Act does not preclude the detention of a U.S. citizen picked up on the battlefield in Afghanistan, albeit apparently for different reasons.²⁵ There also appears to have been a majority on the Court who believed that indefinite detention solely for the purpose of interrogation would be impermissible even where they agreed the law of war supports detention.²⁶ Finally, a majority took the position that a U.S. citizen detained under the authority of the AUMF would have the right to a meaningful opportunity to be heard before a neutral decision maker in order to contest the factual basis for the detention, although there was disagreement as to the precise level of due process such a hearing would be constitutionally required to provide.²⁷

A majority of the *Hamdi* Court appears to have accepted the view that, in principle, U.S. citizens who join an enemy armed force and engage in hostilities against the United States may be treated as enemy belligerents on the same basis that alien enemy belligerents may be so treated under the laws and usages of war.²⁸ It seems to follow that the same criteria and definition used to determine the status of aliens who are believed to be enemy belligerents would apply equally to U.S. citizens. Thus, there is little reason to suppose that the contours of the legal category of persons subject to detention, as it has been developed by the lower courts interpreting *Hamdi*,²⁹ by the executive branch, and most recently, by Congress, will differ according to citizenship. It may be the case that U.S. citizenship will entitle citizen-

detainees to more procedural rights in contesting the factual basis for their detention than alien detainees have enjoyed. Moreover, there is no dispute that citizens detained in U.S. custody abroad may seek habeas review, and Congress has not stripped the courts of jurisdiction over non-habeas cases by U.S. citizens detained as enemy belligerents, as it has done with respect to aliens,³⁰ nor has it established jurisdiction in military commissions to try citizens for war crimes.³¹ On the other hand, lower courts have applied the plurality opinion in *Hamdi*, which decision expressly deals with the rights of a U.S. citizen-detainee, as a baseline for determining the procedural rights due to aliens detained at Guantanamo in habeas proceedings, apparently without requiring proof of the existence of “exigent circumstance.”³² Assuming that the Supreme Court jurisprudence establishes that citizens accused of participating in hostilities against the United States may be treated the same as similarly situated aliens, the seemingly relaxed procedural rights and evidentiary burden applicable in the Guantanamo cases may also apply to any habeas cases involving citizen-detainees.³³

The Supreme Court has not yet addressed on the merits whether an alien lawfully present in the United States can be detained under the authority of the AUMF based on activity conducted there. A non-citizen could not invoke the Non-Detention Act, but might nevertheless be able to contest whether the government’s facts support an enemy combatant designation. After all, the *Hamdi* plurality suggested there may be a distinction based on the fact that that case involved a capture on a *foreign battlefield*.³⁴ At about the same time that it issued *Hamdi* and *Padilla*, the Court denied certiorari to review the case of Ali Saleh Kahlal al-Marri, a Qatari student who had been arrested in Peoria, IL in late 2001 but declared an “enemy combatant” prior to trial and transferred to military custody in South Carolina. His petition for habeas corpus was dismissed for lack of jurisdiction by the U.S. Court of Appeals for the Seventh Circuit.³⁵

Both al-Marri and Padilla filed new petitions for habeas corpus in the Fourth Circuit, meaning that the issue of detention authority with respect to citizens and aliens within the United States would have to be relitigated there before the Supreme Court would have another opportunity to address it. As we explain more fully below, the Fourth Circuit ultimately confirmed both detentions, but without establishing a conclusive test for determining which persons arrested within the United States are subject to detention under AUMF authority. Supreme Court review was avoided in both cases after the government filed charges against the petitioners and moved them into the civilian court system. The only opinion left standing, that which affirmed the

detention of Jose Padilla on grounds very different from the original allegations that had been addressed by the Second Circuit, does little to expand the understanding of detention authority beyond that which *Hamdi* already established, that is, that detention is justified in the case of a person who fought alongside enemy forces against the United States on a foreign battlefield.

Assuming, per *Hamdi*,³⁶ that Congress intended in 2001 to authorize the use of force in compliance with the law of war,³⁷ and considering that Congress expressly incorporated the law of war into the detention authority in the 2012 NDAA,³⁸ a survey of international law regarding such detentions may be pertinent to a determination of the detention authority preserved under the 2012 NDAA. Accordingly, this report summarizes wartime detention under international law and surveys relevant U.S. practice before returning to the Fourth Circuit's treatment of the Padilla and al-Marri cases.

STATUS AND DETENTION OF PERSONS IN WAR

The law of war divides persons in the midst of an armed conflict into two broad categories: combatants and civilians.³⁹ This fundamental distinction determines the international legal status of persons participating in or affected by combat, and determines the legal protections afforded to such persons as well as the legal consequences of their conduct.⁴⁰ Combatants are those persons who are authorized by international law to fight in accordance with the law of war on behalf of a party to the conflict.⁴¹ Civilians are not authorized to fight, but are protected from deliberate targeting by combatants as long as they do not take up arms. In order to protect civilians, the law of war requires combatants to conduct military operations in a manner designed to minimize civilian casualties and to limit the amount of damage and suffering to that which can be justified by military necessity. To limit exposure of civilians to military attacks, combatants are required, as a general rule, to distinguish themselves from civilians. Combatants who fail to distinguish themselves from civilians run the risk of being denied the privilege to be treated as prisoners of war if captured by the enemy.

The treatment of all persons who fall into the hands of the enemy during an international armed conflict depends upon the status of the person as determined under the four Geneva Conventions of 1949. Under these conventions, parties to an international armed conflict have the right to capture and intern enemy soldiers⁴² as well as civilians who pose a danger to the