CLASSIFICATION OF ENEMY COMBATANTS AND THE USURPATION OF JUDICIAL POWER BY THE EXECUTIVE BRANCH

MICHELLE MASLOWSKI*

INTRODUCTION

> The accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.[1]

Recently, the President's authority to fight the war on terror has come under attack from all directions. In December 2005, the President disclosed a secret domestic eavesdropping program that allowed the Executive Branch to listen to domestic calls without a warrant.[2] This revelation produced more than just new lawsuits. Members of Congress, including members of the President's own political party, publicly criticized the President's alleged by-pass of the Foreign Intelligence Surveillance Act ("FISA") Court which was created for this very purpose.[3] Hearings were set to ascertain the legality of the program and to inquire why the Executive failed to fully notify Congress of the program.[4] The President strongly supported the program as essential to fighting the war on terror and cited the Authorization for Use of Military Force ("AUMF") as the basis of his authority.[5]

The courts also started to question the broad exercise of power the President has been using in the name of fighting terrorism. In July 2005, the Fourth Circuit upheld the President's authority to hold an American citizen, Jose Padilla, as an

---

* J.D. Candidate, 2007, Indiana University School of Law—Indianapolis; B.A., 2002, Wake Forest University, Winston-Salem, North Carolina. Thank you to Dr. David Orentlicher, Matt Besmer, and Rebecca Ballard for all of their helpful comments and suggestions. I would like to give a special thanks to Katherine Cates for her time and discerning eye. I would also like to thank my fantastic husband, Christian, for his enduring love and support.

1. THE FEDERALIST NO. 47, at 244 (James Madison) (Buccaneer Books 1961).

2. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

3. Eric Lichtblau & Scott Shane, *Basis for Spying in U.S. Is Doubted*, N.Y. TIMES, Jan. 7, 2006, at A1.

4. Douglas Jehl, *Specter Vows a Close Look at Spy Program*, N.Y. TIMES, Jan. 16, 2006, at A11.

5. Eric Lichtblau, *Gonzales Invokes Actions of Other Presidents in Defense of U.S. Spying*, N.Y. TIMES, Jan. 25, 2006, at A19. Congress passed the AUMF days after the September 11 attacks and allows the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

enemy combatant.[6] In an attempt to preempt the Supreme Court from hearing Padilla's appeal, the Executive filed criminal charges against him in Florida alleging facts far less serious than those asserted in the argument in support of Padilla's enemy combatant status.[7] The Executive asked that the Fourth Circuit vacate its own opinion and transfer Padilla into Florida's custody.[8] The Fourth Circuit demanded that the Executive reconcile the discrepancy in facts alleged in the Florida criminal case and those that were alleged in July 2005.[9] Upon the Executive's failure to respond, the court denied the Executive's motion to vacate and transfer, arguing that the President could not thwart the judicial process by classifying and de-classifying enemy combatants when it suited the Executive's will.[10] Even though history leans in favor of the President's ability to detain any individual during a time of war,[11] the President's authority to detain individuals captured on American soil is vulnerable.[12] The courts' waning patience with the Executive could subject the presidential classification of individuals detained outside the combat zone to a separation of powers attack in the future.

This Note attempts to analyze the Executive's ability to classify individuals captured away from the battlefield using the separation of powers doctrine. In Part I of this Note, the doctrine of separation of powers is briefly discussed. Specifically, it examines violations of the doctrine of separation of powers and the policies underlying these determinations. Part II compares the executive classification of enemy combatants with criminal preventative detention determinations, a traditionally judicial function. Part III analyzes how the presidential classification violates the separation of powers doctrine by having an executive branch official act in a judicial manner. Part IV addresses the arguments that the Authorization for Use of Military Force and the President's war powers authorize the classification. Part V addresses the policy implications of this violation of separation of powers. Part VI concludes by calling for a neutral third party to classify individuals captured away from the battlefield, attempting to preserve the separation of powers while simultaneously guarding against infringements on the fight against terrorism.

I. AN ANALYSIS OF THE SEPARATION OF POWERS DOCTRINE

When debating the formation of the U.S. Constitution, the founding fathers differed as to the potential roles of the Executive Branch. The framers of the

---

6. *See* Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).

7. *See* Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005).

8. *Id.* at 583.

9. *Id.* at 584.

10. *Id.* at 587.

11. *See* Korematsu v. United States, 323 U.S. 214 (1944) (upholding the President's power, in 1944, to detain 120,000 citizens of Japanese ancestry in an effort to curb the fears of sabotage related to the attack on Pearl Harbor).

12. *The President's Wartime Powers Under Challenge*, ECONOMIST, Jan. 14, 2006, at 70.

Constitution were well aware of abuses by a strong Executive Branch.[13] However, the attempt to shift the power to the Legislature under the Articles of Confederation did not solve the problem—abuses still existed within the Legislature.[14] Ultimately, the Framers decided to prevent future abuses by distributing power between three independent branches that could work within their own spheres of power and provide checks against the usurpation of power by another branch.[15]

However, the framers of the Constitution did not specifically indoctrinate the separation of powers concept in the text of the Constitution. The modern conception of separation of powers states that the federal government is divided into three branches, "each with specific duties on which neither of the other branches can encroach."[16] Textual support of a theory of separation of powers includes: "All legislative Powers herein granted shall be vested in a Congress of the United States;"[17] "[t]he executive Power shall be vested in a President of the United States of America;"[18] and "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[19] However, the Constitution has no provision that explicitly announces the separation of powers doctrine. A handful of Supreme Court cases have found the doctrine to be implied by the language and distribution of power found within the Constitution.

Separation of powers analysis can flow from two schools of thought: a functionalist/pragmatic theory, and a formalist theory. Historically, the analysis swings like a pendulum between the two schools.[20] The functionalist theory, summed up in the "workable government" standard created by the Court in *United States v. Nixon*,[21] argues that the boundaries between the branches are fluid and should be interpreted to allow the government to function efficiently.[22] The formalist theory argues that the boundaries of the branches are "functionally identifiable"[23] and are more rigid than the functionalist school claims. Courts have been reluctant to analyze the separation of powers doctrine due to the traditional deference given to executive decisions during times of war and have instead favored a more pragmatic approach. However, the presidential classification of individuals detained outside the combat zone is vulnerable to attack from a separation of powers analysis should the pendulum swing back towards a formalist view.

---

13. INS v. Chadha, 462 U.S. 919, 960 (1983) (Powell, J., concurring).
14. *Chadha*, 462 U.S. at 961.
15. *Id.* at 962.
16. BLACK'S LAW DICTIONARY 1369-70 (8th ed. 2004).
17. U.S. CONST. art. I, § 1.
18. U.S. CONST. art. II, § 1, cl. 1.
19. U.S. CONST. art. III, § 1.
20. NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 77-78 (2004).
21. 418 U.S. 683, 707 (1974).
22. *See id.*; *see also* DEVINS & FISHER, *supra* note 20, at 77.
23. INS v. Chadha, 462 U.S. 919, 951 (1983); DEVINS & FISHER, *supra* note 20, at 77.

A. INS v. Chadha

INS v. Chadha presented differing interpretations of the same action. In a unicameral process, the House of Representatives passed a resolution denying permanent resident status to a handful of aliens after the Attorney General had determined that they should remain in the United States.[24] The plaintiffs argued that Congress's action violated the separation of powers because it was performing a non-legislative function.[25] The majority agreed that the aliens should remain in the country but did not strike down the congressional action as a violation of separation of powers. The Court invalidated the House of Representative's resolution because it violated the principles of bicameralism and presentment.[26] Chief Justice Burger argued that the House was acting in a legislative nature and therefore did not present a separation of powers issue.[27] However, because bicameral passage and presentment of the resolution had not occurred, the House ran afoul of the Constitution and the legislative veto provision was declared unconstitutional.[28]

Although the majority characterized Congress's actions as legislative in nature, Justice Powell characterized them as judicial in his concurrence. Justice Powell was bothered by Congress making a determination of the applicability of a statute to individuals.[29] He characterized the action as judicial because the resolution made a determination that six specific persons did not comply with certain statutory criteria.[30] In Justice Powell's opinion, Congress's determination interpreted the law and applied the law to individuals, which lay within the scope of the Judiciary's power, but not the Legislature's power.[31] He noted that Congress had not exercised a power that could "possibly be regarded as merely in aid of the legislative function of Congress."[32] Thus, Congress exceeded its power by usurping the power of the judiciary, independent of the procedural problems identified by the majority.[33]

The main thrust of the majority opinion is the rejection of the functionalist theory of separation of powers. Justice Burger specifically spoke to the theory when he stated that the "fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of the government, standing alone, will not save it if it is contrary to the Constitution."[34] The Court instead

---

24. INS v. Chadha, 462 U.S. 919, 924 (1983).
25. *Id.* at 928.
26. *Id.* at 952-54.
27. *Id.*
28. *Id.* at 959.
29. *Id.* at 960 (Powell, J., concurring).
30. *Id.*
31. *Id.* at 966.
32. *Id.* at 965 (quoting Buckley v. Valeo, 424 U.S. 1, 138 (1976)).
33. *Id.* at 967.
34. *Id.* at 944.

adopted a more rigid and formalistic construction of the boundaries of each branch of government and pointed out that "convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."[35] It noted that the boundaries of each branch can be "functionally identifiable" and the "hydraulic pressure inherent" in each branch "to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[36] The Court thus abandoned its "workable government" standard that it had laid out five years earlier in *United States v. Nixon*[37] in favor of a more restrained government.[38]

B. Hamdi v. Rumsfeld

The functionalist versus formalist debate also took place in the enemy combatant arena. In *Hamdi v. Rumsfeld*,[39] the Judiciary first addressed the rights of an American citizen who had been classified as an enemy combatant. Yaser Hamdi was an American citizen captured in Afghanistan suspected of taking up arms against the United States.[40] The Executive classified him as an enemy combatant and held him at a military base in South Carolina.[41] Hamdi challenged his detention and argued that the indefinite detention without due process violated his constitutional rights as an American citizen.[42] The Executive argued that it had evidence against Hamdi to support the enemy combatant status and that judicial review of his status was improper.[43]

The district court in Virginia found the evidence supporting Hamdi's classification woefully inadequate. The court recognized "the delicate balance that must be struck between the Executive's authority in times of armed conflict and the procedural safeguards that our Constitution provides."[44] It also acknowledged the great deference shown to the Executive in cases involving

---

35. *Id.*

36. *Id.* at 951.

37. 418 U.S. 683, 707 (1974).

38. The Supreme Court reaffirmed this formalist approach in *Bowsher v. Synar*, 478 U.S. 714 (1986). The Gramm-Rudman-Hollings Act aimed at reducing the deficit and required the Comptroller General to make recommendations to the President regarding spending cuts that were then to be implemented by the President. *Id.* at 717-19. In *Bowsher*, the Supreme Court found this violated the separation of powers because a legislative agent was acting in an executive manner. *Id.* at 732. The Court reiterated its position in *Chadha*, emphasizing "[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others." *Id.* at 725 (quoting Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935)).

39. 542 U.S. 507 (2004).

40. *Id.* at 510.

41. *Id.*

42. *Id.* at 511.

43. *Id.* at 513.

44. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 531 (E.D. Va. 2002), *rev'd on other grounds*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

foreign policy, national security and military matters.[45] However, the court found that the justification given by the Executive in support of the enemy combatant classification[46] failed to meet even the minimum requirements for meaningful judicial review.[47] Judge Doumar of the Eastern District of Virginia argued that the "Mobbs Declaration" was merely a "government say-so" that would amount to the rubber-stamping of the Executive's determination.[48] The court found this to be incompatible with the principles governing the war on terror: "[T]he concept of national defense cannot be deemed an end in itself, justifying any exercise of [executive] power . . . [i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."[49] The court ordered that the "screening criteria" and all other evidence relied upon by the Executive in classifying Hamdi as an enemy combatant be handed over to the court.[50]

The Fourth Circuit agreed with the Executive and reversed the district court's order to produce documents and witnesses to support the classification.[51] The court held that because the military captured Hamdi in a zone of active military engagement and the war powers solely lay within the realm of the Executive and Legislative Branches, review of the classification was not proper.[52] The court emphasized the compelling state interest in keeping combatants from rejoining their comrades and further endangering American lives.[53] Hamdi appealed and the Supreme Court granted certiorari,[54] taking up the issue of whether judicial review of an enemy combatant's status was proper.[55]

Justice O'Connor wrote the plurality opinion vacating the Fourth Circuit judgment. Justice O'Connor avoided a separation of powers analysis by finding that the AUMF,[56] passed by Congress following the September 11 attacks, authorized the President to detain Hamdi as an enemy combatant. The AUMF authorized the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11 attacks.[57] The Court also cited previous detainments of individuals in connection with war activities.[58] The Court reasoned that the classification and detainment of enemy

---

45. *Id.*

46. The Executive offered evidence through an affidavit called the "Mobbs Declaration." The affidavit was used in several enemy combatant cases and is described in more detail in Part II, *infra*.

47. *Hamdi*, 243 F. Supp. 2d at 533.

48. *Id.* at 535.

49. *Id.* at 532 (quoting United States v. Robel, 389 U.S. 259 (1967)).

50. *Id.* at 536.

51. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

52. *Id.* at 473.

53. *Id.* at 466.

54. Hamdi v. Rumsfeld, 540 U.S. 1099 (2004).

55. Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004).

56. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

57. *Hamdi*, 542 U.S. at 517 (quoting Pub. L. No. 107-40, 115 Stat. 224 (2001)).

58. *Id.* at 518-19. The Court cited *Ex parte Quirin*, 317 U.S. 1 (1942), as support for

combatants were "important incident[s] of war"[59] and therefore authorized under the AUMF.

However, Justice O'Connor did provide for a mechanism within the courts for an enemy combatant to challenge his classification. Justice O'Connor created a rebuttable presumption in favor of the enemy combatant classification, requiring that Hamdi receive notice of his enemy combatant status and an opportunity to challenge his status.[60] Should the Executive produce credible evidence in favor of the classification, the burden shifted to Hamdi to produce "more persuasive evidence that he falls outside the criteria."[61] The Court created a system with a presumption in favor of the Executive's evidence.[62] Justice O'Connor emphasized that favoring the Executive would not be unfair if Hamdi had a fair opportunity to rebut the evidence.[63]

Justices Souter and Ginsburg dissented on the issue of authorization under the AUMF.[64] Their opinion argued that the AUMF did not authorize with specificity the classification and indefinite detentions of enemy combatants.[65] Justice Souter relied on the Non-Detention Act[66] to reason that whenever an American citizen is detained without due process, Congress must give a clear statement of authorization.[67] Congress had the choice to repeal the Non-Detention Act but instead let the law remain.[68] Because a clear statement of authorization was not given in the AUMF, Justice Souter argued that Hamdi should have been released.[69] However, the courts narrowly defined the rule in

---

detainment of American citizens. Quirin was a German citizen during World War II captured in New York who was suspected of plans to sabotage war industries and war facilities in the United States. *Id.* at 20. The Supreme Court rejected Quirin's petition for habeas corpus after being denied access to the courts by a presidential proclamation. *Id.* at 48. The Court held that the detainment of Quirin was incidental to the President's power as Commander-in-Chief and was authorized by Congress with the declaration of war against Germany. *Id.* at 28-29.

59. *Hamdi*, 542 U.S. at 518 (quoting *Ex parte Quirin*, 317 U.S. at 28) (brackets in original).

60. *Id.* at 533.

61. *Id.* at 534.

62. *Id.*

63. *Id.*

64. *Id.* at 541 (Souter, J., concurring).

65. *Id.* at 542.

66. 18 U.S.C. § 4001(a) (1950). The Non-Detention Act states "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *Id.* The Act was passed after the decision in *Korematsu v. United States*, 323 U.S. 214 (1944), was handed down. Congress feared that citizens would be subject to "arbitrary executive action, with no clear demarcation of the limits of executive authority." 1971 U.S.C.C.A.N. 1435, 1438 (Apr. 6, 1971). The Act was also considered "the only existing barrier against the future exercise of executive power which resulted in" the Japanese internment. *See Hamdi*, 542 U.S. at 543 (Souter, J., concurring) (quoting 117 Cong. Rec. 31544).

67. *Hamdi*, 542 U.S. at 550-51 (Souter, J., concurring).

68. *Id.* at 542-43.

69. *Id.* at 541. Justice Scalia and Stevens dissented, arguing that the appellate court decision

Hamdi to the facts of that particular case and specifically acknowledged that the rule could become inapplicable for those captured on American soil.[70]

C. Padilla v. Hanft

The Supreme Court reversed and remanded *Padilla v. Rumsfeld* due to lack of jurisdiction, however some of the Justices hinted that they would find the detainment of an individual detained outside the zone of military operations unconstitutional.[71] The majority held that Padilla named the wrong respondent and filed in the wrong jurisdiction.[72] The Court held that only the immediate custody of the enemy combatant could be named as a respondent and that the complaint must be filed in the jurisdiction holding the detainee.[73] The Court dismissed the case without prejudice so that Padilla could file in the proper jurisdiction against the proper respondent.[74]

Justices Stevens, Souter, Ginsburg, and Breyer dissented as to the jurisdictional question and spoke directly to the merits of Padilla's detention. In the dissent's conclusion, the Justices acknowledge that detainment could be justified to prevent future attacks against the country.[75] But the dissent was quick to point out that such prevention cannot be obtained through the use of "unlawful procedures."[76] Justice Stevens concluded: "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."[77] The language in the final two paragraphs of the dissent signifies the possible use of the separation of powers doctrine to depart from the deferential review given to the Executive since September 11 and to swing the pendulum back towards the formalist view of *Chadha*.[78]

A formalist swing of the pendulum would devastate an executive classification of those captured outside the combat zone. The formalist construction of the separation of powers requires restraint by the branches of government and only allows extension of power by a clear and concise

---

should be reversed because the AUMF acted as an implementation of the Suspension Clause. *Id.* at 554 (Scalia, J., dissenting). In a separate dissent, Justice Thomas argued that the Executive was fully empowered to indefinitely detain Hamdi without judicial review. *Id.* at 579 (Thomas, J., dissenting).

70. Hamdi v. Rumsfeld, 316 F.3d 450, 465 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004) ("We have no occasion . . . to address the designation as an enemy combatant of an American citizen captured on American soil.").

71. Rumsfeld v. Padilla, 542 U.S. 426, 451 (2004).

72. *Id.* at 442, 447.

73. *Id.*

74. *Id.* at 451.

75. *Id.* at 465 (Stevens, J., dissenting).

76. *Id.*

77. *Id.*

78. *Id.*

authorization by statute. The amorphous and vague language of the statute cited by the Executive may not be enough to save it from a formalist court if that court determines that an executive classification is essentially a judicial function being carried out by an executive agent.

II. PREVENTATIVE DETENTION

A separation of powers analysis of executive classifications first requires an analysis of the nature of that action. Should the action be characterized as a judicial action taken by an executive agent, the action would be extremely vulnerable to a separation of powers attack.

A. The Classification of Enemy Combatants Is Preventative Detention

Criminals in the U.S. justice system can be held without bail pending trial. The process, called preventative detention, protects the community from criminals who would commit other crimes if released on bail. The policy for detaining enemy combatants parallels the policy favoring the detention of suspects who have committed a crime. The goals of preventative detention and detaining enemy combatants are the same—to protect the community from future harm. The terminology may be different—"safety of the community" in the former case and "national security" in the latter case—however, the language does not change the ultimate goal.

Looking to the procedure of classifying an enemy combatant sheds some light on the general purpose of the classification and detainment. Two individuals have been captured within the United States[79] and the procedure for classifying them as enemy combatants was similar. Both Jose Padilla and Ali Saleh Kahlah al-Marri were detained in the United States pursuant to material witness warrants.[80] The Executive held al-Marri on criminal charges until a month before his trial when he was classified as an enemy combatant and transferred to military custody.[81] The Executive never charged Padilla with any criminal misconduct, but classified him as an enemy combatant approximately one month after being detained on the material witness warrant.[82]

Based on the "evidence," President Bush sent a letter to the Secretary of Defense regarding each man and directed the Secretary to take the detainees into military custody.[83] The President "hereby determine[d]" that the detainee was "closely associated with al Qaeda" and "engaged in conduct that constituted hostile and war-like acts."[84] The letter further stated that the detainee

---

79. Jose Padilla was captured exiting a plane in Chicago's O'Hare International Airport and Ali Saleh Kahlah al-Marri was arrested in Peoria, Illinois. *See* Padilla v. Hanft, 423 F.3d 386, 388 (4th Cir. 2004); al-Marri v. Hanft, 378 F. Supp. 2d 673, 674 (D.S.C. 2005).

80. *See Padilla*, 423 F.3d at 388; *al-Marri*, 378 F. Supp. 2d at 674.

81. *al-Marri*, 378 F. Supp. 2d at 674.

82. *Padilla*, 423 F.3d at 388.

83. *Id.*

84. *Id.*

"possesse[d] intelligence . . . that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda," and "represent[ed] a continuing, present and grave danger to the national security of the United States."[85] The President concluded, "it is . . . consistent with U.S. law and the laws of war for the Secretary of Defense to detain [the detainee] as an enemy combatant."[86] The letter then ordered the Secretary of Defense to take custody of Padilla and classify him as an enemy combatant.

When asked by the courts to present the evidence that the Executive relied upon to classify the men as enemy combatants, the Executive produced one affidavit, known as the "Mobbs Declaration."[87] Michael H. Mobbs, a special advisor to the Under Secretary of Defense for Policy, authored the affidavit.[88] The affidavit laid out the evidence presented to the President regarding both men that led to their classification as enemy combatants. It briefly summarized[89] the circumstantial evidence against each detainee and paralleled the same conclusory language that found its way into the President's letter to the Secretary of Defense.[90] It failed to provide the "screening criteria" used to make the classifications[91] and did not provide the qualifications of Mr. Mobbs or what procedures he used to determine the classification of the individuals.[92] Nothing within the statement addressed intelligence gathering, and it was also silent on what level of "affiliation" the individual had with al Qaeda.[93] The declaration lacked any substantive information and contained only conclusory statements regarding the men.[94] Based on this information, both men were indefinitely detained pending the end of hostilities.

In comparison, the Bail Reform Act of 1984 was a response to the growing problem of suspects committing additional crimes while out on bail.[95] The Act allowed suspects to be held without bail if a judge determined there were no conditions or combination of conditions that would reasonably assure the safety

---

85. *Id.*

86. *Id.*

87. Padilla v. Bush, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002), *rev'd on other grounds*, Rumsfeld v. Padilla, 542 U.S. 426 (2004).

88. *Id.*

89. The document was nine paragraphs long.

90. *Padilla*, 233 F. Supp. 2d at 572.

91. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 535 (E.D. Va. 2002), *rev'd on other grounds*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

92. *Id.* at 533.

93. *Id.* at 534.

94. *See id.* at 535.

95. *See* United States v. Salerno, 481 U.S. 739, 742 (1987). The Bail Reform Act of 1984 specifically states: "If, after a hearing . . . , the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and *the safety of any other person and the community*, such judicial officer shall order the detention of the person before trial." 18 U.S.C. § 3142(e) (2000) (emphasis added).

of the community.[96] The purpose of the statute was to use the bail system to protect the community from crimes committed by individuals who had been released on bail. This triggered the era of preventative detention, the determination of which has largely been a judicial function.

The Executive continually argues that the classifications and indefinite detainment of enemy combatants is necessary to prevent the combatants from returning to the battlefield where they would continue to threaten American lives.[97] This goal—the goal of national security—is of the same basic nature as preventative detention. Both protect Americans against harm. Both have a forward-looking component in that they assume that the person detained has the propensity to cause additional destruction if released. The language differs only because the scale of potential destruction increases from an individual to a national scale.

B. Preventative Detention Has Primarily Been a Judicial Determination

In *United States v. Salerno*,[98] the U.S. Supreme Court upheld a challenge to the Bail Reform Act because significant judicial procedures were available to the suspect. The defendant was charged with numerous racketeering violations, extortion, and various criminal gambling violations.[99] The trial court denied bail after it determined that the defendant posed a threat to the safety of the community if released.[100] The defendant argued that the only legitimate purpose for detaining a suspect was if there were no conditions that would secure the suspect's appearance at subsequent hearings.[101] He argued that any pretrial detention necessarily violated the Fifth Amendment's prohibition of the denial of liberty without due process of law.[102] He further argued that he was being punished prematurely for a crime he had yet to commit.[103]

The majority rejected the defendant's arguments because it believed that the state interest in protecting the safety of the community outweighed the potential violation of individual rights.[104] The Court emphasized that the extensive procedural protections of the adversarial hearing afforded to the defendant sufficiently protected him against unwarranted detention.[105] These procedural safeguards included the right to counsel, the detainee's right to testify on his own

---

96. *Salerno*, 481 U.S. at 742.

97. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004); Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005); al-Marri v. Hanft, 378 F. Supp. 2d 673, 676 (D.S.C. 2005).

98. 481 U.S. 739 (1987).

99. *Id.* at 743.

100. *Id.*

101. *Id.* at 744.

102. *Id.* at 746.

103. *Id.* at 745.

104. *Id.* at 749.

105. *Id.* at 750-52.

behalf, and the right to cross-examine witnesses.[106] The Court also noted that "statutorily enumerated factors" guided the judicial officers, including the nature and circumstances of the charge, the weight of the evidence, the characteristics of the offender, and the potential danger to the community.[107] The Court found that the numerous protections given by Congress and the judicial process adequately balanced the individual's right to liberty with the compelling government interest in the safety of the community.[108]

Justice Marshall, joined by Justice Brennan, dissented from the majority opinion. Justice Marshall argued that pretrial detention without a conviction violated the fundamental principle of presumption of innocence "implicit in the concept of ordered liberty."[109] While the presumption of innocence can be difficult to accept, Justice Marshall noted that the presumption exists to protect the innocent from unwarranted detention.[110] "[T]he shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and ultimately, ourselves."[111]

Similarly, in *Denmore v. Kim*, a divided Supreme Court upheld the detention of deportable aliens for the period necessary for removal.[112] Because of statistics indicating that aliens who are released on bail while deportation is pending committed additional crimes,[113] Congress passed a statute requiring their detainment pending a determination of removability.[114] The majority noted that immigration regulations necessarily involved issues of foreign relations and the war powers—powers that normally receive high deference from the courts.[115] In a 5-4 decision, the Court held that an alien could be detained during deportation proceedings without an individualized determination of the alien's dangerousness.[116] Chief Justice Rehnquist argued that Congress is not limited to

---

106. *Id.* at 751.

107. *Id.* at 751-52.

108. *Id.* at 752.

109. *Id.* at 763 (Marshall, J., dissenting).

110. *Id.* at 767.

111. *Id.*

112. Denmore v. Kim, 538 U.S. 510, 513 (2003).

113. *See id.* at 518-20. At that time, criminal aliens constituted twenty-five percent of the federal prison population. *Id.* at 518. Given the rate of deportation, it would have taken twenty-three years to deport all of the aliens within the United States that were determined to be deportable. *Id.* After being determined to be removable and released on bail, seventy-seven percent were arrested once again and forty-five percent were arrested multiple times before deportation proceedings were completed. *Id.* Additionally, twenty percent of deportable aliens who were released pending deportation failed to appear at their subsequent removal proceedings. *Id.* at 519.

114. *Id.* at 513. The statute stated, "[t]he Attorney General shall take into custody any alien who is removable from this country because he has been convicted of one of a specified set of crimes." *Id.* (quoting 8 U.S.C. § 1226(c) (2000)) (internal quotations omitted).

115. *Id.* at 522.

116. *Id.* at 528; *see also* Reno v. Flores, 507 U.S. 292, 313-14 (1993) (holding that alien juveniles set for deportation could be detained unless released to a parent, close relative or guardian

the "least burdensome means" when trying to attain a particular goal and that sufficient evidence was before Congress to indicate that deportable aliens in general were a threat to the community.[117] The Court justified the balance between an alien's due process rights and the government's interest in protecting the community by indicating that the detention was limited in duration to only that time necessary to determine removability.[118]

Justices Stevens, Souter, Ginsburg and Breyer vigorously dissented. The Justices argued that the alien contested his deportable status under the statute and thus presented a legal argument against detainment.[119] The dissent argued that legally admitted aliens contributed in a number of different ways to society and thus should be afforded the same due process rights as citizens of the United States.[120] Such due process rights can only be protected with a hearing and a neutral third party determination that detention is necessary.[121] The dissent pointed to precedent in criminal law that required a determination of a compelling state interest in detainment and that the detainment must be limited to a narrow class of individuals.[122] The Justices argued that no precedent allowed the government to avoid the Due Process Clause by "selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the necessity of putting them away."[123]

However, subsequent decisions have limited the duration of the preventative detention. In *Zadvydas v. Davis*, the Supreme Court limited the amount of time the INS could detain a deportable alien, protecting the alien from indefinite detention.[124] The alien detainee challenged the government's ability to detain him pending removal beyond the ninety days prescribed by statute.[125] The majority noted that pretrial detention had been upheld only when Congress narrowly tailored the statute to permit the detention of specific dangerous individuals and provided "strong procedural protections."[126] The Court was also

---

without an individualized hearing on the suitability of other custodians); Carlson v. Landon, 342 U.S. 524, 538 (1952) (upholding the detention of aliens accused of being Communists because "[d]etention is necessarily a part of this deportation procedure").

117. *Denmore*, 538 U.S. at 528.

118. *Id.*

119. *Id.* at 541-42 (Souter, J., dissenting).

120. *Id.* at 544.

121. *See id.* at 551.

122. *Id.* at 550.

123. *Id.* at 551-52.

124. Zadvydas v. Davis, 533 U.S. 678, 689 (2001).

125. *Id.* at 686. The post-removal-period statute stated that after a final removal order has been signed ordering the deportation of an alien, the alien must be held during the ninety-day removal period. 8 U.S.C. § 1231(a)(2) (2000). It further stated that after this removal period expires, the government may continue to detain the alien if removal had not taken place. *Id.* § 1231(a)(6).

126. *Zadvydas*, 533 U.S. at 691 (quoting Kansas v. Hendricks, 521 U.S. 346, 356 (1997)); *see also Hendricks*, 521 U.S. at 348 (holding that preventative detention was permissible if it was

concerned that the determination of continued detainment was made in an administrative hearing where the detainee had the burden of proof in proving he was not dangerous.[127] The majority required special justification for indefinite detention that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'"[128] The requisite special justification and adequate procedural protections were lacking in this case and thus the Court overturned the detention order.[129]

Justice Breyer also spoke to the language of the statute. He found that the word "may" does not grant the Executive unfettered discretion.[130] If Congress had intended for the indefinite detentions of aliens who were being deported, Justice Breyer argued that the language of the statute would have been specific to that purpose.[131] The Court thus limited the amount of time the Government could detain deportable aliens to that period of time "reasonably necessary" to secure removal.[132]

Justices Scalia, Thomas, Kennedy, and Chief Justice Rehnquist dissented, arguing that the statute established "clear statutory authority" for the Executive to indefinitely detain deportable aliens.[133] They argued that the detainee's argument was internally flawed because he was arguing that he had a right to be free in a country that had decided to expel him.[134] For Justices Scalia and Thomas, as soon as the removal order was signed, it "totally extinguished" the detainee's right to be free in the United States.[135] The Executive could detain the alien until it accomplished removal.[136] Justice Kennedy and Chief Justice Rehnquist agreed partially with Justices Scalia and Thomas but in a separate dissenting opinion argued that there are some instances when a court can order the release of a removable alien.[137]

All three cases point to the need for a neutral, judicial determination of indefinite detention. In each case, an executive agent argued that detention determinations made by the Executive were constitutional without regard to the judicial review of the determinations. The Court disagreed. The *Salerno* Court

---

limited to "a small segment of particularly dangerous individuals" and subject to "strict procedural safeguards"); Foucha v. Louisiana, 504 U.S. 71, 81-83 (1992) (striking down preventative detention statute that shifted the burden of proof to the detainee); United States v. Salerno, 481 U.S. 739, 747 (1987) (insisting that procedural protections were necessary to uphold pretrial detention).

127. *Zadvydas*, 533 U.S. at 692.

128. *Id.* at 690.

129. *Id.*

130. *Id.* at 697.

131. *Id.*

132. *Id.* at 689.

133. *Id.* at 702 (Scalia, J., dissenting).

134. *Id.* at 703.

135. *Id.* at 704.

136. *Id.* at 705.

137. *See id.* at 721 (Kennedy, J., dissenting) (arguing that the court may order a release of a removable alien when the detention is "arbitrary or capricious").

upheld the detentions specifically because extensive judicial protections were available to the detainee before the detention commenced.[138] The *Denmore* Court upheld the detention of deportable aliens but premised its decision on the fact that the detention would be limited in duration to the time necessary to determine deportability.[139] The *Zadvydas* Court then limited the discretion of the Executive in detaining deportable aliens to a reasonable time, thereby rejecting the Executive's argument that the Executive could indefinitely detain deportable aliens.[140] When it comes to indefinite detention, the Supreme Court has been adamant about the necessity of a judicial review of that detention to avoid abuses by the Executive.

III. EXECUTIVE CLASSIFICATION VIOLATES THE SEPARATION OF POWERS

Justice Powell explained it best when he stated: "Functionally, the doctrine [of separation of powers] may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another."[141] The executive classification of enemy combatants captured away from the battlefield violates the separation of powers in both distinct ways. First, the executive classification usurps core judicial functions—fact-finding and the application of the law to an individual to determine his legal status under the law. Second, it assumes another traditionally judicial function—the indefinite detention of an individual who poses a potential threat to society.

A. Executive Classification Takes on a Function That Is a Core Judicial Function

The core functions of the judicial system lie in fact-finding and determinations of law. The Supreme Court declared that it alone had the power to determine "what the law is."[142] Any encroachment on these fundamental functions of the Judiciary would necessarily be a violation of separation of powers.[143]

The *Chadha* Court rejected an analysis of the form of a branch's action but instead looked to the substance of the action.[144] A violation occurs when the actions of one branch "contain matter which is properly to be regarded . . . in its

---

138. United States v. Salerno, 481 U.S. 739, 750-52 (1987).

139. Denmore v. Kim, 538 U.S. 510, 528 (2003).

140. *Zadvydas*, 533 U.S. at 682.

141. INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring) (internal citations omitted).

142. Marbury v. Madison, 5 U.S. 137, 177 (1803).

143. Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. NAT'L SECURITY L. & POL'Y 73, 86 (2005) (arguing that indictment, trial and conviction are core functions of the courts and judicial deference to executive detention of individuals undermines those functions).

144. *See Chadha*, 462 U.S. at 952.

character and effect" as actions of another branch.[145] Just as Congress had attempted in *Chadha*, the Executive had determined the legal rights of individuals in *Padilla*. Both men detained in the United States were initially detained on material witness warrants. The executive classification that changed their status from a material witness to an enemy combatant occurred after the arrest. In effect, the executive action was an application of the law to both men and determination of their legal rights under the law.

Additionally, no congressional check on executive classifications exists. In *Chadha*, Congress had passed statutory criteria to guide the Attorney General in deciding who should remain in the country.[146] Here, no statutory criteria exist. If the Executive's interpretation of its own power is to be upheld, it would have the power to arrest the individual (an executive function), determine the criteria that must be met to be classified as an enemy combatant (a legislative function), and apply those criteria to individuals to determine whether an individual meets those criteria (a judicial function). Neither the congressional check found in *Chadha* nor a judicial check is found in the present case.

The language of the letter from the President to the Secretary of Defense ordering the classification of enemy combatant status and military detention further indicates that an executive agent is performing judicial functions. The President *determined* that the detainee was "closely associated with al Qaeda" and "engaged in conduct that constituted hostile and war-like acts."[147] According to the letter, the President also determined that the detainee "possesse[d] intelligence . . . that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda," and "represent[ed] a continuing, present and grave danger to the national security of the United States."[148] The facts asserted were those that are normally left for a jury to decide and the conclusory language regarding those facts closely parallels a statement of fact written by a judge when granting a party summary judgment.

The President then went on to interpret the criteria created by his own branch and found that "it is . . . consistent with U.S. law and the laws of war for the Secretary of Defense to detain [the detainee] as enemy combatant."[149] This language is dangerously close to a finding of law given by a judge in a summary judgment decision or at the conclusion of a bench trial. The letter from the President engaged in fact-finding and application of the law when classifying individuals as enemy combatants—two functions that are at the core of the judiciary's purpose.

Justice Powell noted that the doctrine of separation of powers reflected "the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power."[150] The statement equally applies to the Executive.

---

145. *Id.*

146. *Id.* at 963 (Powell, J., concurring).

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

148. *Id.*

149. *Id.*

150. *Chadha*, 462 U.S. at 962 (Powell, J., concurring).

The concerns Justice Powell had about Congress's action are present in the Executive's classification of enemy combatants. Like Congress, the President is "not subject to any internal constraints" preventing him from "arbitrarily depriving" any individual of their liberty rights.[151] Also, no "established substantive rules" bind the President.[152] The criteria used to determine whether to classify an individual as an enemy combatant are not only secret, but completely the creation of the Executive Branch. No guidance has been given by Congress or the courts as to what the criteria should be. The Executive is also not constrained by "procedural safeguards."[153] No procedure exists in which an individual can avoid being classified as an enemy combatant before the label attaches itself. The only remedy available is after the classification has already been determined. All of the dangers that Justice Powell considered inherent in a violation of the doctrine of separation of powers are present in executive classification of enemy combatants.

B. Executive Classification Assumes a Function That Has Traditionally Been Entrusted to the Judiciary

Executive classification of enemy combatants completely divests the courts of the power to determine the need for preventative detention. The procedural protections built into judicial determination of preventative detention do not exist in executive classifications. Additionally, the purposes for vesting the determination of preventative detention in the Judiciary are not served by executive classifications of those individuals captured away from the battlefield.

Executive classification completely usurps the judicial role of determining the need for preventative detention. In the cases involving Ali Saleh Kahlah al-Marri and Jose Padilla, each man was detained by civilian authorities on material witness warrants.[154] Only later were they classified as enemy combatants because the Executive independently determined that they would further endanger American lives.[155] This determination was made entirely outside the realm of the Judiciary. The Executive has yet to reveal to the courts the process or criteria used when making the determination. Not only were al-Marri and Padilla unable to challenge the classification during the determination, the men were not even aware that the determination was being made until the label had attached and they were transferred into military custody. The entire classification process is secret from both the judiciary and the suspect himself. Executive classifications assume the role of the courts and make an independent determination of the dangerousness of the detainee. This action amounts to a commandeering of the Judiciary's role in determining the potential threat an

---

151. *Id.* at 966.

152. *Id.*

153. *Id.*

154. *See* Padilla v. Hanft, 423 F.3d 386, 388 (4th Cir. 2005); al-Marri v. Hanft, 378 F. Supp. 2d 673, 674 (D.S.C. 2005).

155. *Padilla*, 423 F.3d at 388; *al-Marri*, 378 F. Supp. 2d at 674.

individual poses to society, ignoring all of the policies served by judicial determinations.

The purpose of judicial determination of the potential threat a person poses to society is to avoid unwarranted detention.[156] The adversarial hearing, in which the suspect participates, provides a backstop to prevent the incarceration of an innocent man or the incarceration of a person who would commit no crime if released. The suspect's ability to present evidence on his behalf, the ability to cross-examine adverse witnesses and the burden of proof resting on the government to prove dangerousness all allow the suspect to fight to retain his liberty interest. When dealing with the unpredictability of the forecasting of future action, the government should prove that such drastic current action is necessary. The Supreme Court has repeatedly insisted that such burden lies with the government to preserve the long-held presumption of innocence.

The Executive has played to the emotions of the courts by emphasizing the United States's compelling interest in detaining enemy combatants as justification for abandoning the presumption of innocence in support of executive classification. However, the compelling nature of this interest neither justifies an abandonment of this presumption nor cures the separation of powers violation inherent in the classification. The importance of the Executive's purpose does not by itself justify a separation of powers violation. Such a theory would create limitless power for the government to disregard all constitutional rights of individuals during a time of war. The protection of American lives and national security is a powerful state interest but it is not a blank check for any action that might potentially further those interests.

The Supreme Court has also determined that a compelling state interest does not remedy separation of powers violations. The *Chadha* Court held that the "fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of the government, standing alone, will not save it if it is contrary to the Constitution."[157] Responsibility for national security is shared between the President and Congress and each branch must restrain itself to only those powers granted to them by the Constitution. Even with the gravest threat to national security, the President may not take on the powers of Congress to prevent the threat from becoming a reality. Similarly, the President may not take on judicial functions to prevent threats to national security. The compelling nature of the state interest is simply that—a compelling state interest. It cannot be a justification for the violation of other provisions of the Constitution. To allow a compelling state interest to cure constitutional defects would be "consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state."[158]

---

156. *See* United States v. Salerno, 481 U.S. 739, 750-52 (1987).

157. *Chadha*, 462 U.S. at 944.

158. United States v. Salerno, 481 U.S. 739, 755 (1987) (Marshall, J., dissenting).

IV. NEITHER STATUTORY NOR CONSTITUTIONAL POWERS GRANT AUTHORITY FOR EXECUTIVE CLASSIFICATION OF INDIVIDUALS CAPTURED OUTSIDE THE BATTLEFIELD

A. The AUMF Does Not Grant Authority

The Executive relies on the authorization of the AUMF as the basis for the classification of enemy combatants. The text of the AUMF states:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[159]

Although the Court held in *Hamdi* that the detainment of individuals is necessary and incidental to the statutory powers granted by the AUMF,[160] the analysis cannot extend far enough to cover those detained outside the zone of military activity.

Presidential action has been scrutinized during a time of war before. At the beginning of the twentieth century, the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer* emphasized that the President's power to walk outside the boundaries of his inherent power must stem from either the Constitution or an act of Congress.[161] During World War II, President Truman nationalized the steel industry to ensure that steel production necessary for the war efforts would not be interrupted.[162] The steel companies argued that the President's order to the Secretary of Commerce to take control of the mills amounted to lawmaking that was expressly reserved for the Legislative Branch.[163] The Executive argued that the President was acting within his authority as Commander in Chief in a time of war.[164]

The Court ultimately rejected the Executive's argument that the President possessed the inherent power to nationalize the steel mills. Justice Black wrote the opinion of the Court and reasoned that the President's power can only be derived from an act of Congress or the Constitution.[165] No authorization from Congress was apparent because Congress had impliedly rejected the nationalization of industries as resolutions to labor disputes.[166] Thus, authorization had to come from the Constitution. Justice Black held the

---

159. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
160. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).
161. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).
162. *Id.* at 582-83.
163. *Id.* at 583.
164. *Id.* at 584.
165. *Id.* at 585.
166. *Id.* at 586.

nationalization of steel mills was not an execution of congressional policy.[167] "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."[168] Because the presidential order was considered legislative in nature and not authorized by Congress or the Constitution, the order was vacated.

Justice Jackson concurred with the Court's judgment, but he attempted to define a framework in which separation of power issues could be resolved. He set forth three categories that determined the constitutionality of presidential action.[169] First, when the President acts legislatively as a result of an express or implied authorization[170] of Congress, he is at his maximum authority.[171] Second, when the President acts without such authority, a President may only act in a legislative manner when he is authorized to do so by the inherent powers granted to him by the Constitution.[172] However, a problem would be present should the President and Congress hold concurrent power.[173] Third, when the President acts in a legislative manner and that action is contrary to the expressed or implied will of Congress, the President's authority is at its lowest. The only way to defend such an action is to rely on inherent powers granted to the President by the Constitution and argue that such powers are exclusive given the situation.[174] Justice Jackson believed that the President had overstepped his bounds because he acted in direct opposition to the will of Congress and the inherent powers of the Presidency did not warrant such action. He noted that "the Constitution did not contemplate that the title of Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants. He has no monopoly of 'war powers,' whatever they are."[175]

Justices Vinson, Reed, and Minton dissented from the majority because they believed that the circumstances justified the President's actions. Justice Vinson argued that the consequences of an interruption of steel production for the war

---

167. *Id.* at 588.

168. *Id.*

169. *Id.* at 635-37 (Jackson, J., concurring).

170. The Supreme Court examined implicit congressional authorization in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Justice Rehnquist wrote the opinion for the Court and stated that the lack of a statute granting authorization is not fatal to presidential action. The Court reasoned that Congress cannot specifically authorize all presidential action, especially in the areas of foreign policy and national security. "The enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.'" *Id.* at 678 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

171. *Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring).

172. *Id.* at 637.

173. *Id.*

174. *Id.* at 637-38.

175. *Id.* at 643-44.

effort necessitated drastic action by the President.[176] The dissenting opinion argued that a lack of a statute should not bar action[177] and that the President has wide discretion when executing a "mass of legislation."[178] The Justices argued that the President should not be reduced to an "automaton" that is "impotent to exercise the powers of government at a time when the survival of the Republic itself may be at stake."[179]

Here, the President acted under the guise of a statute, the AUMF, and according to Justice Jackson's three part test in *Youngstown*, the President's power should be at its pinnacle. The *Hamdi* Court agreed and justified the classification of enemy combatants detained on the battlefield as necessary and incidental to the authority granted to the President by the AUMF. Justice O'Connor argued that because detention of enemy combatants is a "fundamental incident of waging war," Congress "clearly and unmistakenably authorized detention" when it granted all powers of "necessary and appropriate force."[180] The Court dismissed the argument that the language of the statute needed to be specific in regards to detention.[181] Such an authorization carries with it the presumption that those captured were necessarily engaged in combat against the United States and would threaten the lives of Americans if released. This presumption is strong for those captured on the battlefield and thus the Court deferred to the determination of the Executive as long as the detainee had adequate opportunity to rebut the presumption.[182] However, this presumption is far weaker when the individual is captured outside the zone of military operations and could fall outside the authority contemplated by Congress when passing the AUMF.

The problem with the *Youngstown* and *Hamdi* analysis lies in the fact that the Court in each analyzed the President's actions as to whether they were legislative in nature. Neither Court entertained the idea that the Executive's action could be judicial in nature. Justice O'Connor justified the Executive's ability to detain enemy combatants while avoiding the analysis of whether the Executive had the authority to *classify* enemy combatants. The Justice continually cited "longstanding law-of-war principles" including preventing captured individuals from "further participation in the war."[183] Yet, these longstanding law-of-war principles justify the Executive's compelling interest in detention, not the classification itself. Even if the AUMF authorizes the Executive to classify individuals captured on the battlefield, nothing within the plain language of the statute authorizes the exercise of judicial powers and the complete circumvention of due process for those captured within the United States.

---

176. *Id.* at 668 (Vinson, C.J., dissenting).
177. *Id.*
178. *Id.*
179. *Id.* at 682.
180. Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).
181. *Id.*
182. *Id.* at 532-33.
183. *Id.* at 518.

Subsequent action by Congress also indicates that executive classification of enemy combatants was not intended to be authorized by the AUMF. If Congress had contemplated executive classification of enemy combatants under the AUMF, many proposed statutes would have been rendered redundant or inconsistent with that purpose.[184] After passing AUMF, Senators Levin and Feingold asked for clarification from the Executive regarding the exact meaning of the label "enemy combatant" and who was authorized to make such a determination.[185] Representative Schiff proposed legislation specifically authorizing the President to classify enemy combatants.[186] Had such an authorization existed in the AUMF, Representative Schiff's bill and the Senators' requests for clarification would not have been required.[187]

In the weeks following the passage of the AUMF, Attorney General Ashcroft promulgated a "Discussion Draft" that was the precursor to the Patriot Act.[188] The draft included the authorization for the Executive to indefinitely detain any non-citizen that the Executive determined "endanger[ed] the national security of the United States."[189] Congress condemned the provision as an unconstitutional violation of due process rights and a substantial encroachment on civil liberties.[190] Congress is now contemplating the passage of the Detention of Enemy Combatant's Act that would assert congressional authority to limit detention of enemy combatants to a narrow set of circumstances.[191] The move has been viewed as a response to the growing due process concerns that have been raised by detainees.[192] All of these actions indicate Congress never intended for executive classification of enemy combatants.

B. The President's War Powers Do Not Authorize the Classification

The President argues that the Executive's power to classify enemy combatants is inherent in the War Powers conferred by Article II of the

---

184. *See* Zadvydas v. Davis, 533 U.S. 678, 697 (2001); *see also* Danielle Tarin, Note, *Will an Attack on America Justify an Attack on Americans?: Congressional and Constitutional Prohibitions on the Executive's Power to Detain U.S. Citizens as Enemy Combatants*, 44 VA. J. INT'L L. 1145, 1169 (2004).

185. Tarin, *supra* note 184, at 1169.

186. *Id.* at 1170.

187. *Id.*

188. Mark Bastian, Note, *The Spectrum of Uncertainty Left by* Zadvydas v. Davis*: Is the Alien Detention Provision of the USA Patriot Act Constitutional?*, 47 N.Y.L. SCH. L. REV. 395, 399 (2003).

189. *Id.*

190. *Id.*

191. ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CRS REPORT RL31724, DETENTION OF AMERICAN CITIZENS AS ENEMY COMBATANTS 49-50 (2005), *available at* http://www.fas.org/irp/crs/RL31724.pdf.

192. *Id.* at 49.

Constitution.[193] However, the farther away from the battlefield, the weaker the argument becomes that the President possesses the plenary powers to detain the individual.

The Executive argues that the Commander-in-Chief Clause contains an implicit authorization for the classification of enemy combatants during times of crises.[194] The Commander-in-Chief clause gives the President exclusive control of commanding the armed forces, insofar as the use of military force is lawful.[195] However, the President's war powers exercisable in the domestic arena are far more limited because "federal power over external affairs [is] in origin and essential character different from that over internal affairs."[196] Thus, the locus of capture does make a difference when determining the extent and limitations of the exercise of the President's war powers in the domestic arena.

Traditionally, executive decisions exercising the President's Commander-in-Chief powers have been given great deference.[197] In *United States v. Curtiss-Wright Corp.*, the Court upheld a presidential proclamation banning the sale of arms to Bolivia pursuant to the authority granted by the joint resolution.[198] The Court held that the President's power in foreign affairs is not derived from "affirmative grants of the Constitution,"[199] because even if foreign powers were never mentioned in the Constitution, the federal government would still possess the power as a necessary component of a unified nation.[200] The foreign events that the President must respond to are usually complex and necessitate a speedy response.[201] As a result, the President must be afforded "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[202] The joint resolution and the subsequent proclamation were upheld as legitimate exercises of foreign affairs powers.[203]

However, the Court did recognize the fundamental differences between presidential powers in the foreign arena and those powers exercised in the domestic arena.[204] "That there are differences between them, and that these differences are fundamental, may not be doubted."[205] Executive decisions made

---

193. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004); Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005); al-Marri v. Hanft, 378 F. Supp. 2d 673, 676 (D.S.C. 2005).

194. *Padilla*, 432 F.3d at 584.

195. H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION 114 (2002).

196. Padilla v. Rumsfeld, 352 F.3d 695, 713 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004).

197. *Id.* at 712.

198. United States v. Curtiss-Wright Corp., 299 U.S. 304, 329 (1936).

199. *Id.* at 318.

200. *Id.*

201. *Id.* at 319.

202. *Id.* at 320.

203. *Id.* at 329.

204. *Id.* at 315.

205. *Id.*

regarding activities within the United States are limited by constitutional boundaries.[206] The President cannot order troops to be quartered in private homes during times of peace.[207] The President cannot suspend the writ of habeas corpus for individuals being detained in the United States, including Padilla and al-Marri.[208] The President also cannot unilaterally amend the Uniform Code of Military Justice.[209] Even though all of these actions could fall under a broad interpretation of "commanding the armed forces," all of these actions affect domestic concerns in which Congress has exclusive authority under the Constitution.[210] Thus, the President's war powers are not all-encompassing of military action—some limitations exist.

If executive classification of individuals captured outside of the combat zone were allowed on the war powers theory, it would lead to a result that is directly in conflict with the Court's decision in *Youngstown*. There, the Court rejected the Executive's argument that the Commander-in-Chief power allowed the President to nationalize steel mills in order to prevent an obstruction in the production of steel.[211] The Court recognized that the concept of the "theater of war" was expanding and that broad powers of military leaders were needed, but ultimately held that the Constitution would not allow the confiscation of private domestic property.[212] Thus, the Court restricted the exercise of the President's war powers within the domestic sphere to only actions that would be constitutional otherwise. Executive classifications of individuals captured within the United States would not be constitutional in times of peace. The Due Process Clause and the case law regarding preventative detention would necessarily prevent the detention of individuals without a judicial hearing.

Executive classification of individuals within the United States would also set precedent for further action by the Executive that would otherwise be unconstitutional but could potentially be justified under the war powers theory. If the only link that had to be made was that the action in some way secured national security, the President would be able to nationalize industries that potentially threaten the supplies for the military engaged in fighting the war on terror. Such an action would be parallel to President Truman's action in *Youngstown*—an action that was specifically found not to be a valid exercise of the President's war powers. Thus, the presidential war powers should not extend to the classification of individuals captured within the United States.

The Supreme Court has yet to determine if executive classification of

---

206. Padilla v. Rumsfeld, 352 F.3d 695, 712-13 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004).

207. *See* U.S. CONST. amend. III; *see also Padilla*, 352 F.3d at 714-15.

208. *See* U.S. CONST. art. I, § 9, cl. 2; *see also Padilla*, 352 F.3d at 714.

209. *See* U.S. CONST. art. I, § 8, cl. 14.

210. *See Padilla*, 352 F.3d at 714-15; *see also* Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When "Fears and Prejudices Are Aroused,"* 2 SEATTLE J. FOR SOC. JUST. 129 (2003).

211. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952).

212. *Id.* at 587.

individuals captured outside the zone of active military operations is authorized within the war powers granted to the President by the Constitution. However, an analysis of those powers indicates that they do not authorize the exercise of executive authority over those detained outside the zone of active military operations.

V. POLICY IMPLICATIONS OF AN EXECUTIVE CLASSIFICATION

The classification of enemy combatants balances two competing interests: the interest of national security versus the interest of individual liberty.[213] Both are extremely important and a proper balance must be struck. This proper balance is best left to the judiciary as it has traditionally been done in the civil criminal preventative detention arena.

The Executive Branch thus far has focused entirely on the interests of national security at the expense of individual liberty interests. The Executive's argument that it retains the unreviewable right to detain individuals labeled as enemy combatants[214] and other controversial exercises of power illustrates the bias. The Executive Branch will strike an improper balance in favor of national security interests because it is highly unlikely that the violations of any individual liberties will affect the people who put the Executive in office. The minority who are the most burdened by the executive classification are not likely to be avid supporters of the Executive anyway. The Executive Branch is a political branch and therefore takes into consideration those issues that most concern its constituency. However, the Constitution does not allow the trampling of the individual rights of the few to satiate the many.[215]

The Executive Branch investigated and captured the individual—its opinion as to the status of the individual is necessarily biased. The Executive Branch has an interest in classifying these individuals as enemy combatants that does not stem from national security—the appearance of action against "terrorists" scores political points for the Executive. The Judicial Branch is more equipped to make the balancing determination. It is apolitical and thus does not bend to the will of the majority and has no need to create an appearance of action. The Judiciary is in a more neutral place to determine the status of the individual. This neutrality was the intent of the Framers and should be preserved in this instance.

Executive classifications also allow the Executive to circumvent judicial review altogether. The Supreme Court has already ruled that a post-classification review of a detainee's status is available.[216] However, this review can be avoided by the Executive because the Executive controls the application of the enemy combatant label. Recently in *Padilla v. Hanft*, the Fourth Circuit held that an American citizen captured on American soil may be held indefinitely as an

---

213. Hamdi v. Rumsfeld, 542 U.S. 507, 528 (2004).

214. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004); Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005); al-Marri v. Hanft, 378 F. Supp. 2d 673, 676 (D.S.C. 2005).

215. *See* INS v. Chadha, 462 U.S. 919, 961 (1983) (Powell, J., concurring).

216. Hamdi v. Rumsfeld, 542 U.S. 507, 528 (2004).

enemy combatant.[217] Padilla applied for certiorari with the Supreme Court,[218] where justices had previously indicated that they were wary of the constitutionality of the Executive's action.[219] To avoid review by an unfavorable court, Padilla was charged with criminal charges in Florida, asserting facts far less severe than those the Executive put forth to the Fourth Circuit for justification of Padilla's detention.[220] Padilla was de-classified and the Florida prosecutor sought the transfer of Padilla to Florida for criminal charges, while the Executive retained the right to re-classify him as an enemy combatant in the future.[221]

This scenario would be avoided altogether with a judicial classification of enemy combatants and highlights the problem with post-classification judicial review. Post-classification judicial review does not protect against the liberty violations of the innocent. This is especially true given the deferential standard of review the courts have been utilized when enemy combatants challenge their status.[222] If the courts continue to refuse to scrutinize the Executive's decision post-classification, then no check exists against executive power and the separation of powers doctrine demands that a pre-classification judicial review take place.

Current infringements on judicial power may lead to future infringements. The United States may have already seen the beginnings of future encroachments by the Executive. Citing the AUMF as authority, the President has recently revealed a domestic wire-tapping program that has questionable constitutional basis.[223] The revelation is the inevitable consequence of a violation of the separation of power. Once a branch has usurped authority and made a power grab that is essentially condoned by the other two branches, the temptation to grab at more power is that much more appealing. It encourages the Executive to test the boundaries of its powers rather than requiring the Branch to exercise restraint. The acquiescence to violations of separation of powers creates a slippery slope that allows future violations to go unchecked.

Executive classification and the Executive's argument against judicial review potentially creates devastating credibility issues with the courts. With the most recent debacle in the *Padilla* case, the Fourth Circuit noted that the Executive's credibility with the courts has been seriously questioned.[224] The court also emphasized the obvious implication that an opportunistic Executive left with the courts. "[I]ts actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake—an impression we

---

217. *See* Padilla v. Hanft, 423 F.3d 386, 397 (2005).

218. *See* Padilla v. Hanft, 432 F.3d 582, 584 (2005).

219. *See* Rumsfeld v. Padilla, 542 U.S. 426 (2004) (Stevens, J., dissenting).

220. *Padilla*, 432 F.3d at 584.

221. *Id.*

222. *See* Cruz, *supra* note 210, at 145-48.

223. Risen & Lichtblau, *supra* note 2.

224. Padilla v. Hanft, 432 F.3d 582, 587 (2005) ("[T]he government's credibility before the courts in litigation ancillary to that war, [has] been carefully considered.").

would have though the government could ill afford to leave extant."[225] The Executive's constant assertion that the classification of enemy combatants should be unreviewable by the courts coupled with the blatant attempt to avoid such review creates an atmosphere of distrust and the courts may be more prone to meticulously scrutinize the power the Executive has under the AUMF.

CONCLUSION

It is essential that a neutral third party determine the status of individuals detained outside the combat zone. The burden of proof should remain on the Executive to convince the third party of the threat the individual poses to the United States. How high the burden of proof should be is still being debated.[226] Regardless of the burden of proof the Executive must meet, the key lies in a neutral determination of the classification.

Congress did empower the President to take necessary action against those suspected of ties to the September 11 attacks and to future terrorist plots. However, the President has used this authorization to exercise power never contemplated by the AUMF. It is important to remember that the tyrannical exercise of power by the Executive can only hurt the innocent. The judicial classification of enemy combatants does not protect those who are involved in terrorist activities—they will be classified as enemy combatants under either scheme of power. The judicial classification protects those who are accused of terrorist ties but who in fact are innocent of all such activity. It prevents the Executive from engaging in a McCarthy-like crusade against individuals miles away from the zone of combat. It avoids the Korematsu-like detention of individuals based on their race but having no connections with terrorist cells. It is the protection of the liberty that the war on terror is seeking to preserve. District Court Judge Doumar reminds everyone of the purpose of retaining the integrity the separation of powers doctrine: "We must protect the freedoms of even those who hate us, and that we may find objectionable. . . . We must preserve the rights afforded to us by our Constitution and laws for without it we return to the chaos of a rule of men and not of laws."[227]

---

225. *Id.*

226. For a discussion of the different standards of review and their supporters, see generally Cruz, *supra* note 210.

227. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 536 (E.D. Va. 2002), *rev'd on other grounds*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).