

ENEMIES OF THE STATE: RATIONAL CLASSIFICATION IN THE WAR ON TERRORISM

by
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In this Article, Professor Yin proposes a new solution to the classification of suspected terrorists in the War on Terrorism—that national identity should be the determining factor in deciding whether combatants are criminally prosecuted or detained by the military. Currently, the Bush Administration does not seem to be following any discernible rubric in classifying enemy combatants. Professor Yin proves this point by examining disparate classifications arrived at by the Executive Branch since the War on Terrorism began. He argues against such modalities of classification as citizenship, geography, and utility because they produce both unreasonable and unsatisfactory results. Finally, Professor Yin lays out guidelines by which his national identity solution can be practically implemented, arguing that the Executive Branch can most effectually institute his proposal.

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The two primary weapons that the United States government has to use against specific persons suspected of being terrorists are criminal prosecution and military force. Since the 9/11 terrorist attacks, federal prosecutors have indicted hundreds of persons on criminal charges such as providing material support to designated terrorist organizations.¹ At the same time, the United States military has killed or captured thousands of suspected terrorists, detaining hundreds of the latter at the U.S. naval base on Guantanamo Bay, Cuba.

In practice, the government's decisions of whether to treat a given suspected terrorist as a criminal defendant or as an enemy combatant has not followed any easily discernable algorithm. Distinctions such as citizenship or geography fail to explain the actual classification decisions, even when both distinctions are considered together. Not surprisingly, the lack of clear and transparent rules has fueled suspicion that the government's decisions were predicated on more nefarious motives, including racial discrimination and vindictive prosecution. The best example of the lack of transparency, followed by suspicions of racist treatment of apparently similarly situated persons, is the juxtaposition of John Walker Lindh and Yaser Esam Hamdi. Both were American citizens captured while allegedly fighting with the Taliban against U.S. military forces, yet Lindh (the Caucasian) was treated as a criminal defendant, while Hamdi (the one of Arab descent) was detained as an enemy combatant. Numerous critics of the Bush Administration have argued that the differential treatment reflects racism, or at best, bigotry.²

¹ See generally Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1 (2005), available at http://www.law.harvard.edu/students/orgs/jol/vol42_1/chesney.php; see also Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 LEWIS & CLARK L. REV. 851 (2007).

² See, e.g., Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 10 n.41 (2006) ("Hamdi's situation is identical to that of John Walker Lindh, except that Lindh was indicted and plead guilty to crimes."); Frank W. Dunham, *Where Hamdi Meets Moussaoui in the War on*

Moreover, the absence of transparency regarding why certain persons are treated as criminal defendants while others are treated as enemy combatants makes it easier for the government to leverage its military detention power to extract guilty pleas from criminal defendants.³

In this Article, I propose a rational scheme for classifying enemies of the state as criminal defendants or as enemy combatants. At the outset, I want to note that my analysis and proposal assumes the validity of the use of military force against non-state actors such as al-Qaeda. Those who reject that assumption will necessarily disagree with my analysis and proposal, but I do not intend to pursue that argument here.⁴ The Supreme Court's decision in *Hamdan v. Rumsfeld* implicitly accepts

Terror, 53 DRAKE L. REV. 839, 844 (2005) (suggesting that Hamdi was not prosecuted, despite identical circumstances to Lindh's, because "he did not look like he was born in the United States[, h]e looked like he was Saudi Arabian, he spoke Arabic; he was not, on the surface of it, an American citizen"); Dennis Jett, *The Politics of Fear*, CHRISTIAN SCI. MONITOR, June 17, 2002, at 9; Charles I. Lugosi, *Rule of Law or Rule By Law: The Detention of Yaser Hamdi*, 30 AM. J. CRIM. L. 225, 241 (2003) (questioning whether difference in treatment is due to "a lack of evidence to convict Hamdi, the need for isolation to conduct daily interrogation or from some other circumstance such as Hamdi's ethnic or racial origin"); Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 559 (2006) ("While the cases of these individuals may be more complex than the above suggests, the disparate treatment of three similarly-situated individuals allows critics of the judicial system to raise questions concerning the motivations behind and basis for the disparate treatment."); Natsu Taylor Saito, *Interning the "Non-Alien" Other: The Illusory Protections of Citizenship*, LAW & CONTEMP. PROBS., Spring 2005, at 173, 208 (attributing difference in treatment to Hamdi's "perceived foreignness"); James F. Smith, *United States Immigration Law As We Know It: El Clandestino, the American Gulag, Rounding Up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747, 801 (2005) (attributing the different treatment to racial profiling); Leti Volpp, *Divesting Citizenship: On Asian-American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 472–77 (2005) (arguing that the government treated Hamdi and Lindh differently because it perceived Hamdi as having a "less deserving" class of citizenship); Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, LAW & CONTEMP. PROBS., Spring 2005, at 285, 314 (2005) (suggesting that "differential treatment" was based on white vs. non-white status). But see Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 97–98 (2004) (recognizing that "[i]t is difficult to ignore in this regard that Hamdi was born in the United States to Saudi parents and spent most of his life in Saudi Arabia"); Michel Rosenfeld, *Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror*, 27 CARDOZO L. REV. 2079, 2115 (2006) (arguing that because Lindh "fell into American hands," while Hamdi did not, "the Government may have felt that it lacked a sufficiently solid case to meet the requirement of proof beyond a reasonable doubt").

³ See Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 BYU L. REV. 1255, 1274 (2006) [hereinafter Yin, *Coercion*].

⁴ For detailed justifications for the validity of the military model, see Tung Yin, *Ending the War on Terrorism One Terrorist At a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149 (2005) [hereinafter Yin, *Noncriminal Detention*]; see also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2133 (2005).

Congress's power to authorize the President to detain suspected al-Qaeda members as enemy combatants.⁵

Part I discusses the backgrounds of Lindh and Hamdi, followed by an analysis of the difference between criminal punishment and military detention. Part II argues that citizenship, while seductively attractive as a basis for distinguishing those who should be punished from those who should be detained, is both underinclusive and overinclusive. National identity—meaning the country or countries that a person reasonably identifies with—is a better proxy for determining the appropriate course of action with respect to any particular suspected terrorist. Part III elaborates the proposal and critiques three other key classification decisions of suspected al-Qaeda members. Finally, Part IV offers some cautionary observations about the national identity proposal.

I. ENEMIES OF THE STATE

On September 17, 2001, six days after the 9/11 terrorist attacks, Congress authorized the President to use all appropriate force against those “nations, organizations, or persons [who] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”⁶ This military force authorization provided the President with a new tool to combat terrorists; in the past, terrorists such as Timothy McVeigh were simply prosecuted as mass murderers.⁷

The immediate consequence of the military force authorization was the initiation of American and British air strikes in October 2001 in Afghanistan, the country in which the terrorist group al-Qaeda, believed responsible for the 9/11 attacks, had based itself.⁸ The ground campaign followed shortly afterward, and hundreds, if not thousands, of Taliban or suspected al-Qaeda fighters were captured in the country by U.S. or allied forces.⁹ Numerous Taliban or suspected al-Qaeda fighters were killed during this time in air strikes or ground assaults. Of those who were captured, a number were transported to the U.S. naval base on

⁵ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796, 2798 (2006) (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135). In brief, *Hamdan* concluded that Common Article 3 of the Geneva Convention applied to the armed conflict between the United States and al-Qaeda, as that conflict was one “not of an international character.” *Id.* at 2846. It is therefore reasonable to conclude that *Hamdan* recognized a state of armed conflict between the United States and al-Qaeda.

⁶ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) [hereinafter *Military Force Authorization*].

⁷ See, e.g., *United States v. McVeigh*, 153 F.3d 1166, 1176 (10th Cir. 1998).

⁸ Patrick E. Tyler, *A Nation Challenged: The Attack; U.S. and Britain Strike Afghanistan, Aiming at Bases and Terrorist Camps; Bush Warns “Taliban Will Pay a Price,”* N.Y. TIMES, Oct. 8, 2001, at A1.

⁹ See, e.g., Bill Dedman, *U.S. to Hold Most Detainees at Guantanamo Indefinitely*, BOSTON GLOBE, Apr. 25, 2004, at A1.

Guantanamo Bay, Cuba, for detention; two detainees were brought to the United States. Some other persons charged with having ties to al-Qaeda, however, were not treated as enemy combatants. Appendix 1 identifies a number of major Taliban or suspected al-Qaeda members, their citizenship, their place of capture, their alleged conduct, and their disposition, whether prosecuted in federal court or placed in military detention.

As can be seen, the cases do not submit to easy categorization. Many American citizens have been treated as criminal defendants, but two—Jose Padilla and Yaser Esam Hamdi—were placed in military detention.¹⁰ Many aliens were placed in military detention, but two—Richard Reid and Zacariah Moussaoui—were prosecuted in federal court for criminal offenses. Similarly, while most persons captured in Afghanistan were treated as enemy combatants, one—John Walker Lindh—was brought to the United States to stand trial as a criminal defendant. And while most persons arrested in the United States were indicted as criminal defendants, Padilla and Ali Saleh al-Marri, a Qatari citizen living in Peoria, Illinois, were both caught in the United States, yet detained as enemy combatants.

A. *Similar Circumstances, Different Treatment?*

As mentioned earlier, two American citizens—John Walker Lindh and Yaser Esam Hamdi—are known to have been captured in November 2001 in Afghanistan while purportedly fighting on behalf of the Taliban. Lindh was taken into custody by the FBI and arraigned in federal court, while Hamdi was detained as an enemy combatant, first at the detention facility at Guantanamo Bay, Cuba, and later in a navy brig in the United States.¹¹ Their paths thus curiously started in the United States and converged again in this country during the war on terrorism, but were quite different in the intervening years.

Lindh, dubbed the “American Taliban” by the mass media,¹² was born in the Washington, D.C. area in 1981 but grew up just north of San Francisco in Marin County.¹³ His father was a lawyer and his mother was a

¹⁰ In early 2006, the Department of Defense obtained permission from the Supreme Court to transfer Padilla to the custody of the Department of Justice to be prosecuted under a criminal indictment. *Hanft v. Padilla*, 546 U.S. 1084 (2006). For more details of the litigation, see Tung Yin, *Dodging the Jose Padilla Case*, NAT’L SEC. L. REP., July 2006, at 6 (A.B.A., Wash., D.C.).

¹¹ Yin, *Coercion*, *supra* note 3, at 1274.

¹² See, e.g., Kenneth R. Bazinet, *Bush Rallies U.S. in Terror Fight*, N.Y. DAILY NEWS, Jan. 30, 2002, at 6; Jim Doyle, *Californians Have No Mercy for John Lindh*, S.F. CHRON., Jan. 28, 2002, at A1; Elise Banducci, *Community Leader Joins Taliban Defense*, SAN JOSE MERCURY NEWS, Jan. 26, 2002, at 1B.

¹³ Evelyn Nieves, *A U.S. Convert’s Path From Suburbia to a Gory Jail for Taliban*, N.Y. TIMES, Dec. 4, 2001, at B1.

photographer.¹⁴ Childhood was not an easy time for Lindh, between his parents' strained marriage and an embarrassing, chronic intestinal disorder.¹⁵ At 16, Lindh converted to Islam, changed his name to Suleyman Al-Lindh, and even persuaded his parents to send him to Yemen so that he could "study a pure form of Arabic and be immersed in Islamic culture."¹⁶ From 1997 to 1999, Lindh lived in Yemen, appearing to view himself as an American expatriate.¹⁷ During a visit home in 1999, he told his parents that he wanted to get a medical degree and "then move permanently to Pakistan, where he would continue his spiritual path while ministering to the poor."¹⁸

Instead, Lindh ended up attending a military training camp in Pakistan run by a designated terrorist organization in mid-2001.¹⁹ There, Lindh decided that he wanted to fight for the Taliban rulers of Afghanistan,²⁰ so the terrorist organization leaders provided Lindh with a letter of introduction to the Taliban.²¹ Lindh reached Kabul, the capital of Afghanistan, and was accepted by the Taliban. He received further weapons training and then traveled to Kandahar, where he attended an al-Qaeda training camp.²² Lindh claimed however that, after the 9/11 attacks, he became "disillusioned" but was afraid to leave al-Qaeda and the Taliban for fear of being killed.²³ This is consistent with his statement during his plea hearing; the conduct to which he admitted was that "I provided my services as a soldier to the Taliban last year and in the course of doing so, I carried a rifle and two grenades."²⁴

After the U.S. launched military strikes in Afghanistan, Lindh reportedly hid in Taliban barracks until he was captured with dozens of

¹⁴ *Id.*

¹⁵ Timothy Roche et al., *The Making Of John Walker Lindh*, TIME, Oct. 7, 2002, at 44, 48.

¹⁶ *Id.* at 50; see also Nieves, *supra* note 13, at B1.

¹⁷ Roche et al., *supra* note 15, at 51 (noting that in late 1998, Lindh wrote his mother that "[a]lthough I'm not particularly fond of the idea of returning to America, I do have a four-month vacation in about six months. This means you'll probably be seeing me again before you expected.").

¹⁸ Nieves, *supra* note 13, at B1.

¹⁹ See *United States v. Lindh*, 212 F. Supp. 2d 541, 545 (E.D. Va. 2002).

²⁰ At his sentencing hearing, Lindh explained that he was motivated to stop "the atrocities committed by the Northern Alliance against civilians" and that "I went to Afghanistan because I believed there was no way to alleviate the suffering of the Afghan people aside from military action. I did not go to fight against America, and I never did." Katharine Q. Seelye, *Regretful Lindh Gets 20 Years in Taliban Case*, N.Y. TIMES, Oct. 5, 2002, at A1.

²¹ *Lindh*, 212 F. Supp. 2d at 545.

²² *Id.*

²³ Philip Shenon, *A Nation Challenged: The American Prisoner; U.S. Taliban Soldier Says He Was Disillusioned but Feared Reprisals*, N.Y. TIMES, Mar. 16, 2002, at A9, available at <http://query.nytimes.com/gst/fullpage.html?res=9E00E7DA1F39F935A25750C0A9649C8B63&sec=&spon=&pagewanted=print>.

²⁴ Neil A. Lewis, *Admitting He Fought in Taliban, American Agrees to 20-Year Term*, N.Y. TIMES, July 16, 2002, at A1.

other Taliban fighters by the Northern Alliance.²⁵ During Lindh's captivity there, a number of Taliban fighters attempted a jailbreak, and a CIA interrogator named Johnny Spann was killed during the uprising.²⁶ After the jailbreak was quelled, U.S. military forces took custody of Lindh and handed him over to FBI agents.²⁷ The government indicted Lindh on ten terrorism-related charges, including conspiracy to murder U.S. citizens and providing material support to foreign terrorist organizations.²⁸ Lindh and the government reached a plea agreement, and Lindh was sentenced to 20 years in prison.²⁹

Reaction to the ending of the Lindh saga ran the full spectrum. Some observers were outraged that Lindh had not been stripped of his U.S. citizenship.³⁰ Others were troubled by allegations that the FBI agents deliberately refused Lindh access to the prominent San Francisco criminal defense attorney whom Lindh's father had retained to represent him, thereby more easily inducing Lindh to waive his *Miranda* rights.³¹

Meanwhile, Yaser Hamdi was born in Baton Rouge, Louisiana; his father was Saudi citizens who was temporarily employed in the United States.³² When Hamdi was three years old, his family moved back to Saudi Arabia.³³ He did not consider himself an American, as he claimed in a post-release interview that he did not even know he had U.S. citizenship until "they sent me to Virginia from Guantanamo."³⁴ When he turned 18, he obtained a Saudi identity card under the belief that he was a Saudi citizen.³⁵

²⁵ Roche et al., *supra* note 15, at 54; *see also Lindh*, 212 F. Supp. 2d at 547.

²⁶ *Lindh*, 212 F. Supp. 2d at 546.

²⁷ Yin, *Coercion*, *supra* note 3, at 1274.

²⁸ *See* Indictment, United States v. Lindh, Crim. No. 02-37A (E.D. Va. Feb. 5, 2002).

²⁹ Lewis, *supra* note 24, at A1.

³⁰ *See, e.g.,* Jonathan Turley, Commentary, *Sever Lindh Ties to His Homeland*, L.A. TIMES, Jan. 23, 2002, at B13; Richard A. Serrano, *Response to Terror; Lindh's Plea is 'Not Guilty, Sir'*, L.A. TIMES, Feb. 14, 2002, at A5 ("The presence of Shannon Spann and her husband's parents at the courthouse for his arraignment underscored the belief of many Americans that, because Lindh allegedly rebuked his U.S. citizenship and chose to fight with the Taliban in Afghanistan, he should be tried for betraying his country . . ."); *see also* PetitionOnline.com, Strip John Walker Lindh of his Citizenship, <http://www.petitiononline.com/sjwlohc/petition.html>.

³¹ Tom Jackman, *Miranda Rights Read Too Late, Lindh Says; Defense Claims Duress and Wants Statements to U.S. Interrogators Discarded*, WASH. POST, June 15, 2002, at A11; Edward Epstein, *Lindh's Lawyers Ask Court to Toss His Statements; Defense Says Interrogators in Afghanistan Violated Rights of Tired, Frightened Soldier*, S.F. CHRON., June 15, 2002, at A13.

³² Joel Brinkley, *A Father Waits as the U.S. and the Saudis Discuss His Son's Release*, N.Y. TIMES, Oct. 10, 2004, at A15.

³³ Joel Brinkley, *From Afghanistan to Saudi Arabia, via Guantanamo*, N.Y. TIMES, Oct. 16, 2004, at A4.

³⁴ *Id.*

³⁵ *Id.*

In 2001, Hamdi got his Saudi passport and headed over to Afghanistan through Pakistan.³⁶ According to a friend, Hamdi wanted to “reconnect with Islam.”³⁷ According to the U.S. government, however, the Taliban gave him weapons training, and he joined a Taliban unit, remaining with it even after the 9/11 attacks.³⁸ His unit was captured by the Northern Alliance, and he ended up in the same detention camp as Lindh before being turned over to U.S. forces.³⁹ Unlike Lindh, he was transferred to the detention facility on Guantanamo Bay. When his captors discovered that he had U.S. citizenship by virtue of having been born in Louisiana, he was moved to a naval brig in Norfolk, Virginia.⁴⁰

After the Supreme Court held that Hamdi was entitled to a hearing in which to contest his classification as an enemy combatant,⁴¹ the government reached an agreement with him where he would be deported to Saudi Arabia in exchange for relinquishing his U.S. citizenship, for agreeing not to leave Saudi Arabia for five years, and for promising to inform Saudi and U.S. officials of any terror plots he learns of.⁴² As it was to Lindh’s disposition, reaction to the end of Hamdi’s saga was mixed, with some arguing that the government imposed an unconstitutional condition by requiring Hamdi to renounce his U.S. citizenship.⁴³

B. Classifying a Person as a Criminal Defendant or an Enemy Combatant

In order to determine a rational scheme for classifying enemy persons as criminal defendants or enemy combatants, it is necessary to delineate the purposes of criminal prosecution and military detention. The differences between those two approaches will in turn inform the

³⁶ Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004 at A15.

³⁷ *Id.*

³⁸ See Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002) (No. 2:02CV439), available at <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/mobbshamdi.html>.

³⁹ *Id.*

⁴⁰ See *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 529 (E.D. Va. 2002).

⁴¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

⁴² See Agreement, *Hamdi v. Rumsfeld*, No. 2:02CV439 (E.D. Va. Sept. 17, 2004), available at <http://news.findlaw.com/hdocs/hamdi/91704stlagrmnt.html> (search “Search News” for “Hamdi v. Rumsfeld”) [hereinafter *Hamdi Settlement*].

⁴³ See, e.g., Vincent-Joël Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 867 (2005); David R. Dow, Letter to the Editor, *Yaser Hamdi, U.S. Citizen*, N.Y. TIMES, Oct. 15, 2004, at A24 (“The United States government has no authority to compel such a renunciation, and Mr. Hamdi’s proclamation that he is no longer an American is legally meaningless. Mr. Hamdi was born in Louisiana. The United States Constitution defines anyone who is born in the United States as a citizen. Neither the State Department, the Justice Department nor the president has the authority to alter the Constitution unilaterally.”).

guidelines that most rationally determine which approach is appropriate to any given person. The starting point for the analysis is straightforward: criminal prosecution is the method used to justify the infliction of punishment upon people, while military detention is the method used to justify incapacitation of persons deemed dangerous on the basis of loyalty to an enemy force.

1. *Criminal Prosecution*

When the government seeks to inflict punishment—whether a criminal fine, a term of imprisonment, or execution—it must comply with a rigorous set of procedural rules set forth in the Constitution.⁴⁴ Defendants may be prosecuted only for conduct that was clearly proscribed at the time it was committed.⁴⁵ They are entitled to the assistance of counsel,⁴⁶ which must be “effective,”⁴⁷ and indigent defendants must be provided counsel at government expense.⁴⁸ The government bears the burden of proving every element of the offense beyond a reasonable doubt.⁴⁹

Punishment is meant to serve a number of purposes, typically retribution, deterrence (specific and general), and incapacitation.⁵⁰ For my purposes, the interesting question is why we, as a society, would feel the desire to seek retribution against criminals. Retribution as a justifying goal of punishment has long vexed criminal law scholars, and a full appreciation of the nature of that debate is far beyond the scope of this Article.⁵¹ One reason put forward in support of retribution, though, has relevance to the distinction that I want to draw between Lindh and Hamdi, and that is the theory of retribution as reprobation, specifically, as an expression of society’s “public expression of condemnation of the offender by punishment of his offense.”⁵² We punish convicted criminals

⁴⁴ See RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 56–57 (2006).

⁴⁵ U.S. CONST. art. I, § 9, cl. 3.

⁴⁶ U.S. CONST. amend. VI.

⁴⁷ See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁴⁸ *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963).

⁴⁹ *In re Winship*, 397 U.S. 358, 364 (1970).

⁵⁰ See, e.g., MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 233–38 (1984). Historically, rehabilitation was also a purpose of sentencing, but generally this is no longer true. See *Mistretta v. United States*, 488 U.S. 361, 365–66 (1989); ANDREW VON HIRSCH ET AL., THE SENTENCING COMMISSION AND ITS GUIDELINES 3–4 (1987).

⁵¹ H.L.A. Hart provides a useful summary of the criticisms of retribution: (1) it seems “to be a mysterious piece of moral alchemy in which the combination of the two evils of moral wickedness and suffering are transmuted into good”; and (2) it confuses “the principles of punishment with . . . [what] should govern the different matter of compensation to . . . the victim.” H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 234–35 (1968).

⁵² *Id.* at 235.

in part to make a statement that they have committed a “wrong” against society.⁵³

Before September 11, 2001, the government treated terrorism as a matter for prosecution. Ramzi Yousef and Sheikh Omar Abdel-Rahman, the terrorists primarily responsible for truck bombing the World Trade Center in 1993, and Timothy McVeigh and Terry Nichols, the ones who bombed the Murrah Federal Building in Oklahoma City in 1995, were prosecuted in federal courts.⁵⁴ Even when the terrorist act occurred outside the United States, criminal prosecution was called for, as with the simultaneous truck bombing attacks against American embassies in Kenya and Tanzania.⁵⁵ After terrorists bombed the warship *U.S.S. Cole*, FBI agents, not members of the Armed Forces, headed to Yemen to investigate.⁵⁶

That we used the criminal justice system against perpetrators such as Rahman, Yousef, McVeigh, and Nichols was not surprising. When Ramzi Yousef was sentenced to life imprisonment, the district judge castigated him: “You would have others believe that you are a soldier, but the attacks on civilization for which you stand convicted here were sneak attacks which sought to kill and maim totally innocent people.”⁵⁷ The Oklahoma City bombing was particularly heinous: the attack killed 168 people, including six children in the daycare center. McVeigh reportedly “recognized that the deaths of innocent children would overshadow the political message of his bombing” when he learned that there had been a daycare center in the building.⁵⁸ When law enforcement officials moved McVeigh to Oklahoma City to be arraigned, a crowd member notably shouted out, “Baby killer! Look me in the eye!”⁵⁹ Of course, I do not mean to suggest that the societal retributive instinct kicked in only

⁵³ See Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1553 (2007) (“For retributivists, punishment is not an evil justified only by its production of greater good; rather, punishment of deserving offenders is an intrinsic good in its own right.”).

⁵⁴ See, e.g., *United States v. Salameh*, 261 F.3d 271 (2d Cir. 2001) (discussing appeal of terrorists convicted of 1993 bombing of the World Trade Center); *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (discussing conviction of terrorist who bombed the Murrah Federal Building in Oklahoma City in 1995); see also SIMON REEVE, *THE NEW JACKALS: RAMZI YOUSEF, OSAMA BIN LADEN, AND THE FUTURE OF TERRORISM* (1999).

⁵⁵ See, e.g., *United States v. Bin Laden*, 58 F. Supp. 2d 113 (S.D.N.Y. 1999).

⁵⁶ See LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11*, at 320–31 (2006).

⁵⁷ See REEVE, *supra* note 54, at 242. One account of Yousef’s trial noted that “[h]ardened FBI agents sitting in the courtroom had moist eyes by the time” a key witness had testified about the loss of his unborn son, killed along with the witness’s wife. *Id.*

⁵⁸ See LOU MICHEL & DAN HERBECK, *AMERICAN TERRORIST: TIMOTHY McVEIGH & THE OKLAHOMA CITY BOMBING* 245 (2001).

⁵⁹ *Id.* at 257.

because there were six children killed in the blast, merely that societal rage was especially acute in this case.

2. *Military Detention*

Under the laws of war, particularly as codified in the Third Geneva Convention, a nation engaged in armed conflict may detain enemy fighters that it captures for the duration of the conflict.⁶⁰ In traditional armed conflict between nations, such captured fighters are generally treated as prisoners of war (POW), a status that confers both rights and obligations. POWs cannot be punished merely for being members of the armed forces of the enemy nation, though they can be punished for any war crimes they have committed individually.⁶¹

Importantly, detention as a POW is justified purely on preventative incapacitation grounds, not punishment and not retribution.⁶² A POW who has fought in accordance with the laws of war has committed no wrongful act, and any homicides are covered by combatant immunity.⁶³ Although a POW can be detained for the duration of hostilities between the warring parties, the POW is also entitled to a set of rights covering, among other things, interrogation and detention facilities.⁶⁴

Until the war on terrorism, those subject to military detention were members of armed forces of enemy nations. During World War II, for example, the United States detained as many as 2 million German, Italian, or Japanese soldiers as POWs.⁶⁵ Key issues such as the combatant status of the detainee and the duration of detention simply did not arise during that war because the enemy was identifiable by uniform, and the enemy would be detained until the armed conflict was ended by armistice or treaty.

⁶⁰ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

⁶¹ After World War II, the victorious Allied Forces convened war crimes trials for not just the German and Japanese leadership, but also thousands of rank and file soldiers. *See, e.g.*, JOHN L. GINN, SUGAMO PRISON, TOKYO: AN ACCOUNT OF THE TRIAL AND SENTENCING OF JAPANESE WAR CRIMINALS IN 1948, BY A U.S. PARTICIPANT 63–67 (1992) (discussing the trial and execution of Captain Masaaki Mabuchi for willfully ordering a subordinate to kill 2nd. Lt. Darwin Emry, an injured American POW, by decapitation); WALTER B. BEALS, THE FIRST GERMAN WAR CRIMES TRIAL: CHIEF JUDGE WALTER B. BEALS' DESK NOTEBOOK OF THE DOCTORS' TRIAL, HELD IN NUERNBERG, GERMANY, DECEMBER, 1945 TO AUGUST, 1947, at 132, 269 (W. Paul Burnam ed., 1985) (discussing Medical Officer Hermann Becker-Freyseng, who was sentenced to twenty years imprisonment for conducting experiments on concentration camp prisoners for the purpose of finding methods to make seawater drinkable).

⁶² *See* Yin, *Noncriminal Detention*, *supra* note 4, at 166–67.

⁶³ *See* POSNER, *supra* note 44, at 57; MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 42–43 (4th ed. 2006).

⁶⁴ Geneva Convention III, *supra* note 60, arts. 21–38.

⁶⁵ *See* GEORGE G. LEWIS & JOHN MEWHA, HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776–1945, at 244 (Dep't of Army Pamphlet No. 20-213, 1955).

In the global war on terrorism, however, the United States has taken the legal position that suspected al-Qaeda or Taliban fighters are “enemy combatants” who are subject to indefinite military detention but who are not entitled to POW status. Office of Legal Counsel (OLC) lawyers conceded that the Taliban fighters might appear to be covered by the Geneva Convention because they were the militia of the Afghanistan government (even though that government had not been recognized by the vast majority of nations).⁶⁶ However, the OLC lawyers argued that Afghanistan was a “failed state” justifying the suspension of Geneva Convention treaty obligations,⁶⁷ and also that Taliban fighters might have forfeited POW status *en masse* because they failed to comply with the laws of war.⁶⁸ Al-Qaeda fighters, on the other hand, were simply not covered by the Geneva Convention because al-Qaeda is a non-state group incapable of being a signatory to the treaty.⁶⁹

The denial of POW status to suspected Taliban and al-Qaeda fighters detained at Guantanamo Bay in turn apparently led to controversial treatment of detainees, including coercive interrogation.⁷⁰ Some studies have also concluded that a significant number of the detainees were incorrectly classified as enemy combatants.⁷¹ No doubt motivated in part to curb such perceived abuses, various human rights groups, the United Nations, and foreign leaders have called for the United States to close the detention facility at Guantanamo Bay and to charge the detainees with crimes or to release them.⁷²

⁶⁶ Memorandum from Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Dep’t of Defense, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 22, 2002), available at <http://washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> [hereinafter Bybee Memorandum].

⁶⁷ *Id.* at 15–25.

⁶⁸ *Id.* at 30–32.

⁶⁹ *Id.* at 9. The Bybee Memorandum also argued that al-Qaeda fighters forfeited any available Geneva Convention protections by violating the laws of war. *Id.* at 10. For more background on the OLC analysis, see JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* (2006).

⁷⁰ For a fairly graphic account of one such interrogation technique involving sexual humiliation followed by an attempt to deceive the detainee into thinking that he was being smeared with menstrual blood, see ERIK SAAR & VIVECA NOVAK, *INSIDE THE WIRE: A MILITARY INTELLIGENCE SOLDIER’S EYEWITNESS ACCOUNT OF LIFE AT GUANTANAMO* 223–28 (2005).

⁷¹ See MARK DENBEAUX & JOSHUA W. DENBEAUX, *REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA* (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885659 (concluding that 55% of detainees were not accused of taking any hostile action against the U.S. or its allies, and 18% were not alleged to have links to al-Qaeda or the Taliban).

⁷² See, e.g., Press Release, United Nations, United Nations Human Rights Experts Express Continued Concern About Situation of Guantanamo Bay Detainees, U.N. Doc. HR/4812 (Apr. 2, 2005), available at <http://www.un.org/news/Press/docs/2005/hr4812.doc.htm>; Press Release, Human Rights Watch, U.S.: Bush

II. LOOKING BEYOND CITIZENSHIP TO NATIONAL IDENTITY

Previously, I showed that neither citizenship nor geography, either singly or in concert, could explain the government's actual classification decisions of enemies of the state such as Yaser Hamdi, John Walker Lindh, and Jose Padilla. However, even if neither of these distinctions can explain what *has* happened, they nevertheless may appeal to those who think they explain what *should* happen. Either distinction provides an easily applied bright-line rule to determine whether enemies of the state should be treated as criminal defendants or as enemy combatants. In this Part, I discuss why citizenship is an imperfect proxy for the criminal defendant/enemy combatant classification decision. I argue instead that the distinction should be based on a more practical assessment of whether the person in question can be reasonably viewed as having a national identity as an American. If so, criminal prosecution is appropriate; but if not, military detention is called for. To put it another way, suppose that sometime after I turned eighteen years old, the United States and China went to war, I was drafted or enlisted in the U.S. military, and I was captured by the Chinese army. What would be my proper status: POW or treason defendant? If the former, why shouldn't Hamdi be afforded the same treatment?

A. *The Seductive Appeal of Citizenship*

There are a number of reasons to believe that citizenship is often perceived as a key basis of distinction for treatment of enemies of the state. In Justice Scalia's view, for example, whether the government can detain enemies of the state indefinitely depends on the citizenship of the detainee. In *Rasul v. Bush*,⁷³ the Supreme Court held that the Guantanamo Bay detainees had statutory rights to file federal habeas corpus petitions, prompting Scalia to dissent, arguing that under settled precedent, enemy aliens held outside U.S. territory lacked constitutional and statutory access to the writ of habeas corpus.⁷⁴ However, in *Hamdi v.*

Should Close Guantanamo Now (May 9, 2006), *available at* <http://hrw.org/english/docs/2006/05/09/usdom13332.htm>; AMNESTY INT'L, UNITED STATES OF AMERICA—CRUEL AND INHUMAN: CONDITIONS OF ISOLATION FOR DETAINEES AT GUANTANAMO BAY (2007), *available at* [http://web.amnesty.org/library/pdf/AMR510512007ENGLISH/\\$File/AMR5105107.pdf](http://web.amnesty.org/library/pdf/AMR510512007ENGLISH/$File/AMR5105107.pdf); Warren Hoge, *Investigators for U.N. Urge U.S. to Close Guantanamo*, N.Y. TIMES, Feb. 17, 2006, at A6 (statement of Secretary-General Kofi Annan) (“[S]ooner or later there will be a need to close Guantanamo, and I think it will be up to the government to decide hopefully to do it as soon as possible.”); Richard Bernstein, *Merkel, on Visit, Will Try Gingerly to Revive U.S. Ties*, N.Y. TIMES, Jan. 13, 2006, at A10 (statement of Chancellor Angela Merkel) (“An institution such as Guantanamo in its present form cannot and should not exist in the long term Ways and means must be found to handle prisoners differently.”).

⁷³ 542 U.S. 466 (2004).

⁷⁴ *Id.* at 492–98 (Scalia, J., dissenting).

Rumsfeld,⁷⁵ which was issued the same day as *Rasul*, Scalia, again in dissent, argued that a U.S. citizen—even one concededly captured in Afghanistan—was entitled to be charged with a crime, unless the government validly suspended the writ of habeas corpus.⁷⁶

To be clear, the issues in *Rasul* and *Hamdi* were not identical. *Rasul* is best read as engaging in statutory interpretation of the scope of the federal habeas corpus statute,⁷⁷ while *Hamdi*, in Justice Scalia's framework, presented a constitutional question about the scope of the Treason and Suspension Clauses. Nevertheless, had Justice Scalia's analysis prevailed in the two cases, the end result would be that suspected al-Qaeda or Taliban fighters captured in Afghanistan or Pakistan would be treated differently based on their citizenship, with U.S. citizens tried in civilian courts as criminal defendants, and aliens detained outside the United States and subject to whatever process deemed appropriate by the Executive Branch.

A foundation of Justice Scalia's argument is his conclusion that "[c]itizens aiding the enemy have been treated as traitors subject to the criminal process."⁷⁸ Tracing the history of treason through British legal traditions, Justice Scalia added that "[s]ubjects accused of levying war against the King were routinely prosecuted for treason."⁷⁹ Treating citizens as traitors seems reasonable in a world where citizens are presumed to owe loyalty to their nations, but the rule starts to founder in an era of multiple citizenships. It sinks altogether where the citizenship at issue arose by happenstance and was not tempered through cultural upbringing or link to a national identity.

The best way to see the deficiency of citizenship—in an era of multiple citizenships—as the dividing line between criminal defendants and enemy combatants is to look back at a disgraceful time in our past: the Japanese-American internment cases.⁸⁰ There, the Court upheld a curfew order against American citizens of Japanese descent in part on the belief that "[c]hildren born in the United States of Japanese alien parents, and especially those children born before December 1, 1924, are under many circumstances deemed, by Japanese law, to be citizens of Japan."⁸¹ The internment cases are infamous for their naked racism: why

⁷⁵ 542 U.S. 507 (2004).

⁷⁶ *Id.* at 562 (Scalia, J., dissenting).

⁷⁷ See Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL OF RTS. J. 1061 (2005).

⁷⁸ *Hamdi*, 542 U.S. at 559 (Scalia, J., dissenting).

⁷⁹ *Id.* at 560 (citation omitted).

⁸⁰ *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

⁸¹ *Hirabayashi*, 329 U.S. at 97; see also PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 67–68 (1982) [hereinafter PERSONAL JUSTICE DENIED] (quoting a wartime manifesto as declaring that "those born in this country are American citizens by right of birth, but they are

were Japanese-Americans thought to remain loyal to the Japanese empire, while German-Americans and Italian-Americans were not subjected to such suspicions? General DeWitt, head of Western Defense Command during World War II, stated that “[t]he Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become ‘Americanized,’ the racial strains are undiluted.”⁸²

Consider the named petitioner in *Yasui v. United States*.⁸³ Minoru Yasui was born in Oregon to Japanese parents and raised there, spending one summer in Japan when he was eight years old.⁸⁴ He attended the University of Oregon for his undergraduate and law degrees, achieved the rank of second lieutenant in the Army Reserves, and, following law school, worked in Chicago for the Japanese consulate.⁸⁵ After the surprise attack on Pearl Harbor on December 7, 1941, Yasui quit his job and offered to work for the U.S. military or for the FBI; however, both turned him down. A few months later, he deliberately violated the curfew that had been established earlier that day by General DeWitt’s military order.⁸⁶

The specific issue in *Yasui*—whether the curfew order was unconstitutional—had already been decided in *Hirabayashi v. United States*. *Yasui* focused instead on the district court’s determination that Yasui had forfeited his United States citizenship by voluntarily acting as a “propaganda agent” for Japan until the Pearl Harbor attack.⁸⁷ The district court erred, according to the Supreme Court, because even the government had not relied on such a theory, and the only evidence in the record was that Yasui had in fact *not* renounced his citizenship.⁸⁸

What is interesting about District Judge Fee’s opinion is that he did not base his decision on such facts as Yasui’s having traveled to Japan as a child to visit relatives or his having studied Japanese at a language school in the United States.⁸⁹ Rather, Judge Fee reasoned that Yasui did not have to choose between allegiance to the United States or to Japan until he

also Japanese citizens, liable . . . to be called to bear arms for their Emperor, either in front of, or behind, enemy lines”).

⁸² PERSONAL JUSTICE DENIED, *supra* note 81, at 65–66.

⁸³ 320 U.S. 115 (1943).

⁸⁴ *Id.* at 116.

⁸⁵ *Id.*

⁸⁶ PETER IRONS, JUSTICE AT WAR 81 (1983). In fact, it was not easy for Yasui to get arrested. The first police officer that he approached told him, “Run along home, you’ll get in trouble.” *Id.* at 84. Yasui had to walk into a police station and explain that he wanted to be made a test case to challenge the constitutionality of the curfew. *Id.* at 84–85 (“In his eagerness to institute a test case, Yasui forgot that persons arrested on Friday and Saturday nights languished in the lockup over the weekend.”).

⁸⁷ *United States v. Yasui*, 48 F. Supp. 40, 55 (D. Or. 1942). The district court had concluded that the curfew would have been unconstitutional as applied to a citizen, but that Yasui was properly excluded.

⁸⁸ *Yasui*, 320 U.S. at 117.

⁸⁹ *United States v. Yasui*, 48 F. Supp. 40, 54–55 (D. Or. 1942).

turned 18, at which point his actions as a whole demonstrated that he had aligned himself with Japan.⁹⁰ While noting that Yasui had voted in elections, Judge Fee placed greater emphasis on Yasui's work with the Japanese Consulate.

The distinction may appear trivial, but it is important to note that Judge Fee did not hold that Yasui had forfeited his United States citizenship. Rather, as a person claimed as a citizen by the United States and Japan, Yasui had to elect one or the other. Thus, according to Judge Fee, it was irrelevant that the Japanese Consulate had also employed an American citizen who was Caucasian. That person was deemed a citizen by only one country, and hence had no election to make. Although Judge Fee concluded that the curfew order was unconstitutional as applied against citizens, his conclusion that Yasui had elected Japanese citizenship meant that Yasui could lawfully be punished for violating the curfew.

But this distinction must assume no absolute moral wrongness in working for the Japanese government, for otherwise, it would be highly relevant that a white person had performed the same conduct without being sanctioned at all. In other words, Judge Fee's reasoning was that (1) aliens, but not citizens, could be subject to a curfew and punished for violating it; (2) having to choose between U.S. or Japanese citizenship upon turning 18, Yasui chose the latter; and (3) therefore, Yasui could be punished for violating the curfew. It was a status offense linked to being a Japanese citizen. In other words, despite the fact that Yasui had been raised entirely in the United States, had attended college here, and had served in the U.S. armed forces, Judge Fee determined that Yasui was really Japanese, not American, merely because he had worked for the Japanese consulate.

Now imagine if the Japanese government had also decided to prosecute Yasui for a treason type of crime based on his actions after the surprise attack on Pearl Harbor. Under international law applicable at the time, Japan could claim Yasui as one of its citizens, as he had been born to two Japanese citizens.⁹¹ Regardless of whether it would be considered treason, presumably every country would deem a citizen who voluntarily offered to join the armed forces of an enemy nation to be criminally culpable. This is precisely what Yasui, from the standpoint of Japan, did: on December 7, 1941, after the Pearl Harbor bombing, the United States declared war on Japan, and shortly thereafter, Yasui attempted to rejoin the U.S. military.

What would we think of a claim by Japan that Yasui was *criminally liable* for attempting to help the United States against Japan, given that

⁹⁰ *Id.* at 55.

⁹¹ See Hosokawa Kiyoshi, *Japanese Nationality in International Perspective*, in NATIONALITY AND INTERNATIONAL LAW IN ASIAN PERSPECTIVE 177 (Ko Swan Sik ed., 1990); see also Gerald L. Neuman, *Immigration and Judicial Review in the Federal Republic of Germany*, 23 N.Y.U.J. INT'L L. & POL. 35, 44-45 (1990).

Yasui had been born and raised entirely in the United States? To articulate the idea is to recognize its absurdity. Formally, Yasui (and Hirayabashi, Korematsu, and Endo) may have been Japanese citizens as well as American citizens, but the reality is that they were Americans, not Japanese. Had Yasui been allowed to re-enlist in the U.S. military and had he been captured by the Japanese, he could have been detained properly as a POW, but prosecuting him for aiding the enemy would have been an insult to his true status as an American citizen. The Japanese Internment Cases were “disasters” because they failed to recognize this reality, crediting instead stereotyped and bigoted conceptions of Japanese-Americans as somehow sinisterly loyal to an alien country.⁹²

B. *National Identity*

Citizenship is an imperfect proxy for distinguishing those enemies of the state who merit punishment from those who merit preventative incapacitation. It is overinclusive and underinclusive, because citizens such as Hamdi do not merit punishment based solely on their status as Taliban fighters, and because non-citizens who have lived in this country may merit punishment for joining the enemy.

In essence, the concept that better determines who should be treated as a criminal defendant or an enemy combatant is *national identity*. By that, I mean, to which country (or countries) would the person reasonably identify with regardless of citizenship? In most instances, national identity and citizenship will be congruent. However, there are two instances in which they are not: where citizenship arises essentially unknowingly to the person, and where a person, though not a citizen, has developed strong ties to a nation. It is precisely these two instances where use of citizenship as a bright-line rule would lead to unreasonable results.

1. *A Story*

A personal anecdote may further illustrate the concept that I have in mind. During the summer of 1984, at the same time that the 1984 Summer Olympic Games were being hosted in Los Angeles, my family went on a vacation trip in Northern California with two other families. All of the parents had immigrated from Taiwan and then had become naturalized citizens; all of the children were natural-born citizens. One afternoon, during the men’s medal-round volleyball match-up between the United States and China, the parents all congregated in one room, and the kids were in another room. When the Chinese team won the match, one of the parents called our room and chanted loudly, “We beat you, we beat you!”

⁹² For contemporaneous criticisms, see Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945), and Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court’s Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945).

The sentiment that underlay the “*we beat you*” is a curious one. We—adults and children—were all citizens of the United States, not China, and if anything, the parents, having had to take affirmative steps to become U.S. citizens, might have been expected to have more appreciation of being American. But in making that statement, the parent viewed his group as the “*we*” and the natural-born children as the “*you*.”

What are we to make of the parent’s perception of respective national identities? To begin with, there was no objective reason to think that the parent’s statement was any evidence of *disloyalty* to the United States.⁹³ Rather, it seems most plausible that the parent was noting that the children, who grew up entirely in the United States, would not be expected to have any national identity other than as Americans, while they had dual national identities; and in the particular context of the Olympics, they rooted for one over the other, perhaps favoring the “underdog.” At the same time, it seems entirely reasonable that the children would have been seen only as Americans. Although I naturally have more understanding of Chinese culture than would most Americans not of Chinese descent,⁹⁴ China as a country is essentially as foreign to me as, say, France is.

Still, because my parents were not yet naturalized U.S. citizens when I was born here, it remains possible that China would consider me to be a citizen, having been born to two of its citizens. In certain circumstances, for example, U.S. law would deem a person born outside the country to two American citizens to be automatically naturalized.⁹⁵ Should it have been incumbent on me, upon turning 18, to research Chinese law to determine whether I needed to appear before a consular office to renounce any possible Chinese citizenship that I might have had? Why would it be reasonable to impose such a requirement upon me—indeed, any of us who are children of immigrants? Yet, if it is unreasonable to expect me to research Chinese law, it seems equally unreasonable for us to have expected Hamdi to have researched U.S. law.

National identity is, of course, a malleable concept potentially subject to manipulation. At its core, however, it suggests, as Chief Justice Rehnquist once wrote, “persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”⁹⁶ In that case, the Chief Justice was using the concept to limit the scope of the Fourth Amendment’s prohibition on unreasonable searches and seizures so that a warrantless search conducted in Mexico by U.S. officials of a Mexican citizen’s

⁹³ At the time, my parents both worked for military/aerospace defense companies and held “secret” level clearances from the government, and a couple of the other parents worked for IBM and other high-technology companies.

⁹⁴ Primarily because I can speak, to some extent, Mandarin Chinese.

⁹⁵ See 8 U.S.C. § 1401(c) (2000).

⁹⁶ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

residence was simply not a constitutional violation. Chief Justice Rehnquist argued that the Framers chose to use “people” to denote those entitled to Fourth Amendment protections, in contrast to “person” in the Fifth Amendment and “accused” in the Sixth Amendment: “the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.”⁹⁷ In short, the only persons entitled to Fourth Amendment protections were those with some substantial connection to the United States. Notably, the reason that Verdugo-Urquidez could not suppress the evidence gathered against him through the warrantless search was not due to an absence of United States citizenship, for the Court acknowledged a long line of cases extending constitutional rights to aliens, even ones with illegal immigration status, who were inside the country.⁹⁸ Rather, the problem for Verdugo-Urquidez was that he was an alien who lacked any presence in the country.⁹⁹

2. *National Identity and Doctrine*

National identity as a concept has some rough analogies in domestic and international law. First, consider the reach of U.S. treason law. As defined in the Constitution, treason “shall consist only in levying War against [the United States], or, in adhering to their Enemies, giving them Aid and Comfort.”¹⁰⁰ Importantly, citizenship is *not* an element of treason; rather, any person, citizen or alien, who owes some allegiance, even if only “local” or “temporary,” may be subject to treason law.¹⁰¹ This is an important expansion of potential liability, for it recognizes the reality that even non-citizens can betray the United States.

⁹⁷ *Id.* at 266.

⁹⁸ *Id.* at 270–71.

⁹⁹ This analysis was not without controversy, and the majority’s crucial fifth vote came from Justice Kennedy, who expressly disavowed the “people”/“person” distinction. *Id.* at 276 (Kennedy, J., concurring) (“[E]xplicit recognition of ‘the right of the people’ to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it”). Instead, he argued that “[t]he restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend, as a consequence, on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of ‘the people.’” *Id.*

¹⁰⁰ U.S. CONST. art. III, § 3, cl. 1.

¹⁰¹ See *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 155–56 (1872); Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 874, 879–94 (2006); see also George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1615 (2004) (noting problems with the use of citizenship as the basis for determining who is subject to treason prosecutions). The federal treason statute, 18 U.S.C. § 2381 (2000), includes an explicit requirement that the defendant “ow[e] allegiance to the United States.”

Of course, the scope of treason is somewhat broader than what I have proposed. The Supreme Court stated in *Carlisle v. United States* that “[a]ll strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection.”¹⁰² That breadth may be appropriate for treason, at least in the sense of permitting the Executive Branch maximum discretion about whether to seek criminal prosecution of a given individual who is located within the United States. Physical presence in the United States gives rise to constitutional rights, even for aliens unlawfully in the country,¹⁰³ and hence military detention of a person found in the country may well be subject to due process requirements similar to those suggested in *Hamdi v. Rumsfeld*.¹⁰⁴ The President might well conclude in individual cases that, given this level of due process, the marginal increase in additional procedural protections required in criminal cases are justified by the prospect of punishment. In any event, the point is that in determining who can be prosecuted for treason, we do not look at citizenship, but rather at more practical realities.

International law similarly does not exalt citizenship above all else, when reality dictates a different result. In *Liechtenstein v. Guatemala (Nottebohm)*,¹⁰⁵ the International Court of Justice (ICJ) disregarded Liechtenstein’s naturalization of Nottebohm, who also held German citizenship, and upheld Guatemala’s right to deport him during World War II because he was the citizen of a belligerent nation. Nottebohm had been born in Germany in 1881 and moved to Guatemala in 1905, where he settled down and built his business. He occasionally visited Germany during the next several decades, including in late 1939. While in Germany on this trip, he applied to Liechtenstein for citizenship, no doubt because Liechtenstein citizenship would be preferred over German citizenship given the winds of war fanning across Europe. Although Liechtenstein required three years of residence as a precondition to citizenship, Nottebohm asked for a waiver, without explaining why an exception would be warranted. He did, however, pay a large sum of Swiss francs to the government, offered to pay an annual

¹⁰² 83 U.S. at 154 (quoting 1 RICHARD WILDMAN, INSTITUTES OF INTERNATIONAL LAW (London, William Benning & Co. 1849)).

¹⁰³ See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); see also *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that children not legally admitted to the United States could not be denied public education solely because of their undocumented status).

¹⁰⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 532–39 (2004). There, the Court held that a citizen-detainee was entitled to “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Id.* at 533. The Court’s emphasis on Hamdi’s citizenship muddles the picture, but there is no strong doctrinal reason to think that those requirements would not be applicable to aliens.

¹⁰⁵ *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6).

tax, and promised never to become a financial burden on Liechtenstein. Liechtenstein naturalized him shortly thereafter, and when Nottebohm returned to Guatemala, he did so using a Liechtenstein passport. In 1943, Guatemala deported him back to Germany as an enemy alien, and subsequently, Liechtenstein filed a claim—on behalf of the wrong inflicted against its putative national—against Guatemala in the ICJ.

The ICJ agreed that for domestic purposes, Liechtenstein's process for conferring citizenship was absolutely conclusive; however, the *international* implications of that conferral were for the ICJ to determine. The ICJ found that Nottebohm's ties to Germany remained extant:

He had always retained his connections with members of his family who had remained in Germany and he had always had business connections with that country. His country had been at war for more than a month, and there is nothing to indicate that the application for naturalization then made by Nottebohm was motivated by any desire to dissociate himself from the Government of his country.¹⁰⁶

Although he was not a citizen of Guatemala, his ties to that country were strong too:

It was the main seat of his interests. He returned there shortly after his naturalization, and it remained the centre of his interests and of his business activities. He stayed there until his removal as a result of war measures in 1943. He subsequently attempted to return there, and he now complains of Guatemala's refusal to admit him. There, too, were several members of his family who sought to safeguard his interests.¹⁰⁷

As for Liechtenstein, the ICJ noted that:

No intention of settling there was shown at that time or realized in the ensuing weeks, months or years—on the contrary, he returned to Guatemala very shortly after his naturalization and showed every intention of remaining there No indication is given of the grounds warranting the waiver of the condition of residence, required by the 1934 Nationality Law, which waiver was implicitly granted to him. There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein, and no manifestation of any intention whatsoever to transfer all or some of his interests and his business activities to Liechtenstein.¹⁰⁸

The ICJ accordingly drew the reasonable conclusion that Nottebohm sought Liechtenstein citizenship “with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal obligations—and exercising the rights pertaining to the

¹⁰⁶ *Id.* at 25.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

status thus acquired.”¹⁰⁹ Therefore, Liechtenstein lacked standing to pursue its claim against Guatemala.

Now, there are some important differences between the subject matter of *Nottebohm* and the criminal defendant/enemy combatant classification decision at issue here. *Nottebohm* concerned one nation’s standing to bring a claim on behalf of a citizen, not an individual’s direct claim of maltreatment, for which the formality of citizenship might be taken more seriously. In addition, the stakes in *Nottebohm*—essentially, tort damages—were less significant compared to those involved in the classification determination, where the difference between being a criminal defendant and an enemy combatant might be quite drastic.¹¹⁰ Nevertheless, the ICJ’s insistence on examining Nottebohm’s true national identity—German, possibly Guatemalan as well, but definitely not Liechtensteinian—is entirely consistent with the approach suggested in this Article.

Perhaps the ICJ would have come to a different result if Guatemala had been in the process of deporting Nottebohm to Germany as a citizen of a belligerent nation, and Nottebohm claimed Liechtensteinian citizenship to resist deportation. However, the reasoning employed in the opinion would seem to compel the same result: Nottebohm had insufficient ties to Liechtenstein to warrant intervention by the ICJ.

C. *Lindh and Hamdi, Reconsidered*

Once we consider the respective purposes of criminal prosecution and military detention in light of the perceived national identity of the enemies of the state, some of the government’s classification determinations make sense. Reconsider the pair of John Walker Lindh and Yaser Esam Hamdi. Many critics of the Bush Administration argued that the two men were similarly situated in every way that mattered: both possessed U.S. citizenship, both were accused of fighting for the Taliban against American soldiers, and both were captured in Afghanistan.¹¹¹ That Lindh was treated as a federal criminal defendant and given access to a defense lawyer while Hamdi was declared an enemy combatant and detained first at Guantanamo Bay, then in a Navy brig on the East Coast was therefore attributed to the one difference between the two men—namely that Lindh was Caucasian, and Hamdi was of Arab descent.¹¹²

This account of the disparate treatment, if accurate, may have resulted for reasons other than mere racial animus. Being Caucasian, Lindh was quickly suspected by his initial captors, Northern Alliance fighters, as being an American, and in fact, parts of the press began to

¹⁰⁹ *Id.* at 26.

¹¹⁰ See Yin, *Coercion*, *supra* note 3, at 1274–81.

¹¹¹ See *id.* at 1274.

¹¹² See *id.*

refer to him immediately as the “American Taliban.”¹¹³ FBI agents flew to Afghanistan to take custody of Lindh, thereby setting into motion the wheels of the criminal justice system. Hamdi, on the other hand, did not generate this sort of notoriety, and he was initially transported to Guantanamo Bay along with hundreds of other Arabs suspected of being members of al-Qaeda. It was during interrogation at Guantanamo Bay that his claim to U.S. citizenship emerged, at which point he was transferred to a Navy brig in the United States.

Wholly apart from the difference in speed with which Lindh and Hamdi were identified as having U.S. citizenship, though, there is another reason that the government could rationally have treated them in the different systems that it used. Although both Lindh and Hamdi were American citizens, only Lindh could reasonably be said to have an American national identity. Of course, Lindh could argue that it was also happenstance that he was born in this country. This observation is undeniably true, but it would miss the point. National identity need not be voluntarily acquired (though it can in the instance where someone acquires naturalized citizenship). Having grown up in the United States, Lindh had, by any objective measures, an American identity. Had he sought to divest himself of that identity, he could have taken objective steps to do so while in Pakistan.¹¹⁴

Hamdi, though, grew up in Saudi Arabia and was raised by Saudi parents. He had no reason to think that he had any connection to the United States. That Hamdi had U.S. citizenship was due to happenstance; it had no bearing on his life after his birth. If Hamdi wanted to help the Taliban fight the Northern Alliance and continued to do so after 9/11, what right did the United States have to insist that he not do so?¹¹⁵

III. APPLICATION OF THE PROPOSAL

In this subpart, I discuss general guidelines for determining whether there are objectively valid reasons to conclude that American national identity is present in given situations. My ultimate goal is not to provide absolute answers, but rather a framework by which classification decisions can be made transparently, even if any individual matter necessarily will involve a degree of judgment as to which reasonable minds might disagree. I then apply the guidelines to some of the higher profile al-

¹¹³ See *id.* at 1263.

¹¹⁴ The most obvious step would have been to renounce his U.S. citizenship before a U.S. consular office.

¹¹⁵ It is an entirely different matter as to whether Saudi Arabia, ostensibly an ally of the United States (*but see* Thomas E. Ricks, *Briefing Depicted Saudis as Enemies*, WASH. POST, Aug. 6, 2002, at A1 (noting a Rand Corp. briefing to a Pentagon advisory board that “described Saudi Arabia as an enemy of the United States”)), might have preferred that its citizen, Hamdi, not irritate the United States. But that is between Saudi Arabia and Hamdi.

Qaeda/Taliban cases, some of which I conclude were properly handled, and others with which I disagree.

A. General Principles

For many people, citizenship and national identity should be identical. Just as citizenship is difficult to lose, requiring an affirmative renunciation before an appropriate U.S. official,¹¹⁶ it is objectively reasonable to view a person as having a national identity consistent with his or her citizenship and residence, absent actions to shed that identity. Natural born U.S. citizens who were raised entirely in the United States cannot reasonably have any national identity other than as American. The more difficult cases generally involve people with dual citizenship, those who became naturalized U.S. citizens, those who are aliens with legal status in this country, and possibly those with U.S. citizenship who were raised outside the United States.

1. U.S. Citizens Raised Outside the United States

First consider the U.S. citizen who spends a significant portion of childhood and adolescence in foreign environments. Even if born outside the United States, such persons are automatically naturalized by statute as U.S. citizens provided that both parents are U.S. citizens and at least one parent lived in the United States prior to the birth.¹¹⁷

The child may have grown up outside the country because the parents were members of the armed forces stationed at a U.S. military base located in a foreign country or were civilians working for either a multinational corporation or a foreign employer. In the first situation—children of soldiers—it is objectively reasonable to conclude that the person's national identity is American. Life on American military bases can approximate life in American suburbs to a surprising degree. For example, despite being surrounded on three sides by hostile Cuban forces, the U.S. naval base on Guantanamo Bay includes grocery stores, fast food restaurants such as McDonald's, movie rentals, and bowling

¹¹⁶ *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967); *Vance v. Terrazas*, 444 U.S. 252, 261 (1980); 8 U.S.C. § 1481(a)(5), (6) (2000).

¹¹⁷ 8 U.S.C. § 1401(c) (2000). Things are more complicated if only one parent is a U.S. citizen. If the child was born in the United States, then the child has U.S. citizenship. If the child was born outside the United States, and the parents were married, the child obtains U.S. citizenship at birth so long as the American parent lived in the United States for the statutorily required time period (either five or ten years, depending on whether the birth took place after or before 1986). 8 U.S.C. § 1401(g) (2000). If the child was born outside the United States and the parents were not married, then the child obtains U.S. citizenship if the mother was a U.S. citizen and had previously lived in the United States or its territories for at least one year prior to the birth; and if the father was a U.S. citizen, the blood relationship is clearly established and the father agrees to support the child financially. 8 U.S.C. § 1409 (2000).

alleys.¹¹⁸ American foods such as candy bars and hot dogs, and mainstream movies on videotape are often available through the military post exchange.¹¹⁹ Military life also has a profound shaping effect on so-called “military brats”; in addition to the unfortunate consequences of increased alcoholism and other societal problems, it instills its own sense of culture tied to the mission of the military: to defend the United States.¹²⁰

Importantly, federal law deems time spent in military or government service abroad to be “in the United States” for the purposes of satisfying the prior U.S. residency requirement.¹²¹ While this rule was no doubt enacted for the convenience of Americans serving their country abroad, it also likely reflects the idea that children born to parents working in that capacity will likely be socialized into the American national identity. In short, there are objective reasons to conclude that a person born and raised overseas to two U.S. citizens, at least one of whom is a member of the U.S. military, has a national identity as an American.

Similarly, Americans who work overseas often live effectively in a slice of the United States. For example, American employees of Saudi Aramco live in what some describe as “a circa 1950 American suburb,”¹²² complete with satellite TV¹²³ and baseball fields.¹²⁴ To be sure, I do not mean to suggest that a U.S. citizen raised outside the country must necessarily be exposed to McDonald’s or Starbucks. Indeed, undue reliance on such symbols of American ubiquity runs a serious risk of demanding conformity to a cookie-cutter image of what it means to be an American.¹²⁵ The point is that a U.S. citizen who grows up in a foreign country, but in an environment clearly set apart from that country, will

¹¹⁸ See, e.g., SAAR & NOVAK, *supra* note 70, at 128 (describing how the military families on the Guantanamo Bay base live “oddly standard American suburban lives”).

¹¹⁹ Roland Watson, *Lena*, 72, *Volunteers for Iraq to Remind “Her Boys” of Home*, TIMES (U.K.), Nov. 26, 2004, at 49. The military PX (post exchange—essentially a large department store-like shop) even accepts coupons from grocery stores in the United States. See *Donate Expired Coupons to Military Families*, MERRILLVILLE POST-TRIB., Mar. 17, 2006, at E1.

¹²⁰ See generally MARY EDWARDS WERTSCH, *MILITARY BRATS: LEGACIES OF CHILDHOOD INSIDE THE FORTRESS* (1991).

¹²¹ 8 U.S.C. § 1401(g).

¹²² Neil MacFarquhar, *Big Paychecks Are Still Luring Foreigners to Saudi Arabia*, N.Y. TIMES, May 23, 2003, at A16.

¹²³ *Id.*

¹²⁴ Simon Romero, *Aramcons Find Arabia Like Home, Sort Of*, N.Y. TIMES, Mar. 16, 2004, at W1. This is not to say that life in Saudi Arabia for Americans is entirely the same as life in the United States. Once outside the expatriate community, it is quickly apparent that one is in a much different country. *Id.* There are no movie theaters and alcohol is forbidden. MacFarquhar, *supra* note 122.

¹²⁵ See *infra* Part IV.B.

reasonably have his or her American identity reinforced by the contrast.¹²⁶

Of course, not all U.S. citizens raised outside the country are children of members of the armed forces, the government, or American corporations.¹²⁷ Ties to the United States will necessarily be more attenuated in such instances, with someone like Yaser Hamdi situated at one extreme, and such persons could conceivably be seen as not having an American national identity.

2. *Naturalized Citizens and Dual Citizens*

Next, consider two related, occasionally overlapping categories: naturalized citizens and dual citizens. Naturalized citizens are those who acquire U.S. citizenship by statute after satisfying, among other things, specified residency requirements.¹²⁸ In doing so, such persons necessarily demonstrate an intent to assume an American identity, especially since naturalization technically requires that the person renounce all foreign allegiance.¹²⁹ This is not to say that a naturalized citizen can have *only* a national identity as an American; not everyone who grew up as a citizen of a different country can reasonably be expected to shed his or her previous national identity.¹³⁰ It is to say, however, that one who voluntarily and volitionally seeks U.S. citizenship at the minimum adds American national identity, whether such identity supplements or supplants his or her previous national identity.

Dual citizens are persons who are recognized by two (or more) nations as nationals. Dual citizenship can arise when the countries have different or multiple ways in which citizenship is conferred. For example, if the first country treats persons born within its territory as citizens (*jus soli*), and the second country treats persons born to its citizens as citizens (*jus sanguinis*), then a person born in the first country to citizens of the second country would be deemed a citizen of both countries.¹³¹ Note that the Supreme Court has stated regarding dual citizenship that “a person may have and exercise rights of nationality in two countries and be

¹²⁶ This is not to say that such a person might not also develop an affinity, or even a separate identity as belonging to the foreign country. Analytically, this becomes similar to the case of dual citizenship.

¹²⁷ A particular strain of American fiction involves expatriates living abroad for personal reasons that often end up being the focus of the novels, such as ERNEST HEMINGWAY, *THE SUN ALSO RISES* (1926), *reprinted in* THE HEMINGWAY READER 89, (1953); JAY MCINERNEY, *RANSOM* (1986).

¹²⁸ See 8 U.S.C. § 1427(a) (2000).

¹²⁹ 8 U.S.C. § 1448 (2000).

¹³⁰ State citizenship/identity provides a rough analogy. I grew up in California and moved to Iowa to become a law professor. I surrendered my California driver's license, I registered to vote in Iowa, and I am a citizen of Iowa. When strangers ask me where I am from, I answer, “Iowa,” not “California.” Yet, I retain affinity for California, and when it comes to rooting for college sports teams, while I naturally support the Iowa Hawkeyes, my true team remains the California Golden Bears.

¹³¹ This, in fact, is the case with Yaser Esam Hamdi.

subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other.”¹³²

Like the naturalized citizen, the dual citizen may well have multiple national identities if there are sufficiently substantial ties to both countries. For example, a person who lived in each country for reasonably lengthy periods would plausibly be seen as having dual national identities. Unlike the naturalized citizen, however, we cannot necessarily conclude that a dual citizen has an American national identity, because the U.S. citizenship can arise with no substantial connection to the United States, as in the case of Yaser Hamdi.

3. *Aliens with Legal Status in the United States*

The final category is citizens of foreign countries who have legal status in the United States. Generally speaking, an alien wishing to enter the United States must obtain the visa appropriate to his or her purpose, whether visitor, student, immigrant, or other.¹³³ Different visas allow aliens to stay legally in the United States for different periods. Immigrant visas lead to “lawful permanent residency” status, which allows the alien to work toward becoming naturalized.¹³⁴

U.S. immigration law thus already recognizes distinctions between aliens lawfully admitted to the country who are merely visiting and those who seek to become Americans. Those in the first category may owe the United States “temporary allegiance” during the time that they are in the country, in return for the United States’ obligation to protect them during that same time,¹³⁵ but they cannot, based merely on the fact of visitation, be seen as assuming an American national identity, any more than a U.S. citizen takes on a Bahamian national identity by stepping off a cruise ship to visit the Atlantis resort in Nassau. Of course, physical presence in the United States guarantees aliens (even those unlawfully in the country) constitutional rights that may impact the procedural rights available to such aliens in the event they were to be declared enemy combatants.¹³⁶

Those with immigrant visas, however, stand in a unique position. They are still citizens of a foreign nation, but they have demonstrated an

¹³² *Kawakita v. United States*, 343 U.S. 717, 723–24 (1952).

¹³³ See generally U.S. Dep’t of State, Visa Types for Temporary Visitors, http://travel.state.gov/visa/temp/types/types_1286.html (temporary visas); U.S. Dep’t of State, Visa Information for Immigrants, http://travel.state.gov/visa/immigrants/info/info_1339.html (immigrant visas).

¹³⁴ See, e.g., 8 U.S.C. § 1255(a) (2000).

¹³⁵ See Larson, *supra* note 101, at 882–83.

¹³⁶ This is why the status of Guantanamo Bay as U.S. or Cuban territory mattered to Justice Kennedy in *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring); in his view, given the near sovereignty that the United States possessed under the relevant treaty, Guantanamo Bay was effectively U.S. territory and the naval base *was* U.S. territory, which in turn meant that the U.S. Constitution applied there.

intent to become American citizens. They have taken concrete steps that go beyond having mere affinity for this country: a permanent resident who leaves the United States for more than 180 consecutive days can lose that status.¹³⁷

Student visas fall in between visitors and immigrants. On the one hand, an alien who obtains a student visa for, say, law school, is contemplating staying in this country for at least three years. On the other hand, foreign students need not stay in the United States,¹³⁸ and many return to their home countries to work. For example, the man identified by the 9/11 Commission as the architect of the 9/11 attacks, Khalid Sheikh Mohammed (KSM), grew up in Kuwait but spent four years in the United States attending college in North Carolina from 1983 to 1986.¹³⁹ After earning an undergraduate degree in mechanical engineering, KSM returned to the Middle East.¹⁴⁰

Of course, the student alien who wants to remain in the United States after graduation will need an immigrant visa, which provides an objective basis for concluding that the person has adopted an American national identity. Other students who have not yet progressed to that stage might be better lumped together with visitors.

B. Critique of Actual Classification Decisions

In this subsection, I critique the actual classification decisions made by the Bush Administration with regard to a variety of persons captured during the war on terrorism.

1. Jose Padilla—U.S. Citizen Captured in the United States

On May 8, 2002, an American citizen named Jose Padilla stepped off an international flight at Chicago's O'Hare airport and was immediately arrested by federal agents pursuant to a material witness warrant.¹⁴¹ He was taken to New York City, and after his court-appointed lawyer challenged his classification as a material witness, President Bush directed the Secretary of Defense to take Padilla into military custody as an enemy combatant.¹⁴² According to the government's initial allegations, Padilla had conspired with Abu Zubaydah, a top al-Qaeda leader, to set off a radiological "dirty" bomb in an American city.¹⁴³ Later, the

¹³⁷ See 8 U.S.C. § 1255(k)(2)(A) (2000).

¹³⁸ Of course, this depends on how well the U.S. degree translates in foreign countries. The regular law degree (*i.e.*, J.D.) may be more demonstrative of a desire to stay in the United States than an undergraduate degree.

¹³⁹ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U. S., 9/11 COMMISSION REPORT 145–46 (2004).

¹⁴⁰ *Id.* at 146.

¹⁴¹ *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).

¹⁴² James Risen & Philip Shenon, *U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1.

¹⁴³ *Id.* Under interrogation following his capture, Abu Zubaydah identified Padilla as an al-Qaeda operative; however, that interrogation was reportedly coercive,

government alleged that the plot was to destroy apartment buildings using conventional explosives.¹⁴⁴

Then, unexpectedly, on November 22, 2005, the government sought the Fourth Circuit's permission to transfer Padilla from the Defense Department's custody to the Justice Department's in order to bring criminal charges against him.¹⁴⁵ The Fourth Circuit refused to grant such permission,¹⁴⁶ forcing the government to seek permission from the Supreme Court.¹⁴⁷

Whereas the classifications of Lindh and Hamdi as criminal defendant and enemy combatant, respectively, were defensible, the government's treatment of Padilla has been quite troubling. Padilla was born in this country and grew up in Chicago, where he had a lengthy history of run-ins with the law.¹⁴⁸ Following his release from prison in 1992, he began attending mosques in south Florida and formally converted to Islam in 1994.¹⁴⁹ In 1998, Padilla traveled to Egypt, ostensibly to learn Arabic. He later settled down in Pakistan, marrying "the widow of a jihadist."¹⁵⁰ Four years later, Padilla was, according to the government, discussing plans with top al-Qaeda planner Abu Zubaydah to build and detonate a nuclear device in the United States.¹⁵¹

If the government's allegations are true, then Padilla is a violent and dangerous person. Indeed, that much is most likely true based just on his criminal history. But that fact does not necessarily cut in favor of military detention over criminal prosecution. So long as there are criminal prohibitions applicable to Padilla's alleged conduct, society can be protected against his violent and dangerous tendencies through sentencing.¹⁵² Notwithstanding his 1998 to 2002 traveling, Padilla's national identity remains objectively American; there is no evidence, for

involving the withholding of painkilling drugs that had been given after Abu Zubaydah had been shot during his capture. Philip Shenon & James Risen, *Terrorist Yields Clues to Plots, Officials Assert*, N.Y. TIMES, June 12, 2002, at A1; David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, at A1.

¹⁴⁴ See Abby Goodnough, *Jurors Seated in Terror Trial of Padilla and 2 Others*, N.Y. TIMES, May 9, 2007, at A21.

¹⁴⁵ Hanft v. Padilla, 546 U.S. 1084 (2006).

¹⁴⁶ Padilla v. Hanft, 432 F.3d 582, 583 (4th Cir. 2005).

¹⁴⁷ The Supreme Court granted the government's motion. See Hanft v. Padilla, 546 U.S. 1084 (2006).

¹⁴⁸ See Amanda Ripley, *The Case of the Dirty Bomber*, TIME, June 24, 2002, at 28, 29.

¹⁴⁹ *Id.* at 30.

¹⁵⁰ *Id.* at 31.

¹⁵¹ *Id.* Abu Zubaydah apparently thought that Padilla's plan was too sophisticated for him to pull off, so he recommended constructing a radiological (i.e., "dirty") bomb instead. *Id.* at 28.

¹⁵² For example, the basic material support statutes, 18 U.S.C. § 2339A (2000 & Supp. IV 2006), 18 U.S.C. § 2339B (2000 & Supp. IV 2006), which make criminal the providing of "material support" to terrorist organizations, carry maximum sentences of fifteen years (or life, if the prohibited conduct resulted in death). Treason carries a minimum sentence of five years and a maximum sentence of death. 18 U.S.C. § 2381.

example, that he took steps to renounce his U.S. citizenship,¹⁵³ or to seek some type of immigration status change from Pakistan or Afghanistan.

2. *Richard Reid—Alien Captured Upon Entry*

On December 22, 2001, a British citizen named Richard Reid tried to blow up a trans-Atlantic flight, using explosives concealed in his shoe. Flight attendants and passengers subdued Reid before he could complete his plan, and when the plane landed in the United States, federal agents arrested him.¹⁵⁴ He was subsequently indicted for attempted murder, attempted use of a weapon of mass destruction, attempted wrecking of a mass transportation vehicle, and other charges,¹⁵⁵ to which he pleaded guilty in October 2002.¹⁵⁶ He was sentenced to life imprisonment.¹⁵⁷

Reid does not appear to have had any contact with the United States prior to the flight in question, having grown up in Great Britain. Like Padilla, he drifted into criminal activities early in his life, including his first prison term when he was only seventeen.¹⁵⁸ He converted to Islam in the mid-1990s and in 1998 left Great Britain, possibly for Iran but most likely Pakistan. In the two years before the 9/11 attacks, Reid stayed in Pakistan or Afghanistan.¹⁵⁹ He returned to Great Britain in the summer of 2001, in part to get a new passport, claiming that his old one was destroyed when he accidentally put it through the washing machine;¹⁶⁰ a new passport also concealed evidence of his previous travel to the Middle East and Pakistan. Later, he traveled to Israel, Egypt, Turkey, Pakistan, Amsterdam, and Belgium, where he applied again for a new passport.¹⁶¹ By mid-December 2001, he was in France, ready to board his targeted trans-Atlantic flight.¹⁶²

Under my proposal, Reid might have been appropriately designated as an enemy combatant and placed into military detention.¹⁶³ As an alien with no ties or presence in the United States, and no objective reason to claim national identity as an American, Reid was, in that sense, similarly

¹⁵³ See generally *Baumgartner v. United States*, 322 U.S. 665, 667 (1944).

¹⁵⁴ See Pam Belluck, *Crew Grabs Man; Explosive Feared*, N.Y. TIMES, Dec. 23, 2001, at A1.

¹⁵⁵ Indictment at 1, *United States v. Reid*, Crim. No. 02-10013-WGY (D. Mass. Jan. 16, 2002), available at <http://www.usdoj.gov/ag/reidindictment.pdf>.

¹⁵⁶ Fox Butterfield, *Qaeda Man Pleads Guilty to Flying with Shoe Bomb*, N.Y. TIMES, Oct. 5, 2002, at A11.

¹⁵⁷ *Man Charged as Accomplice in "Shoe" Case*, N.Y. TIMES, Dec. 4, 2003, at A37.

¹⁵⁸ See Michael Elliott, *The Shoe Bomber's World: What Does the Saga of Richard Reid Tell Us About Al-Qaeda? Time Retraces His Trail to Find Out*, TIME, Feb. 25, 2002, at 46, 48.

¹⁵⁹ *Id.* at 49.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Of course, had the United States proceeded as it had prior to September 11, 2001, solely using the criminal justice system, then Reid would necessarily have had to be prosecuted in a civilian court.

situated to Yaser Hamdi. The key issue is whether Reid fit within the definition of the “enemy” set forth in the AUMF: was there reason to believe that Reid was either acting as a member of the Taliban or al-Qaeda when he attempted to blow up the airplane? If not, then Reid likely could not be subject to military detention.¹⁶⁴

A significant difference between Reid and many of those detained at Guantanamo Bay, however, is that the government wanted to punish Reid for direct actions he undertook against its citizens. Reid not only joined the “enemy,” but attempted to carry out a terrorist plot aimed at murdering noncombatants. Even if Reid were entitled to combatant immunity under the war model, his planned attack would have violated the laws of war because it specifically targeted civilians, rather than combatants. Accordingly, the government’s desire to seek punishment (through trial) of Reid stemmed not merely from the fact that he had joined the ranks of the “enemy” but deliberately targeted noncombatants. By contrast, Yaser Hamdi’s “crime” was to join the Taliban and to remain committed to that group after the 9/11 attacks, making the United States his “enemy.”

3. *Ali Saleh Al-Marri—Alien Captured Inside the United States*

On September 10, 2001, Ali Saleh al-Marri, a citizen of Qatar, entered the United States for the ostensible purpose of attending graduate school at Bradley University in Peoria, Illinois.¹⁶⁵ He aroused the government’s suspicion because he had supposedly made telephone calls to someone in the United Arab Emirates suspected of having connections to several 9/11 hijackers,¹⁶⁶ and because 9/11 mastermind Khalid Sheikh Mohammed “identified a man named Ali S. Al-Marri as ‘the point of contact for [al-Qaeda] operatives arriving in the US for September 11 follow-on operations.’”¹⁶⁷ In October 2001, and again in December 2001, federal agents interviewed him at his home. On December 12, 2001, he was taken into custody as a material witness,¹⁶⁸ and subsequently indicted in 2002 for making false statements and for credit card fraud.¹⁶⁹ After al-Marri moved to suppress evidence against him, but before the district judge ruled on the motion, President Bush

¹⁶⁴ Arguably, the President might still have inherent authority to detain someone like Reid under the Commander in Chief’s power to “repel” imminent attacks on the country. See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863); see also JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 6 (1993). This simply transmutes the question into one of whether a single terrorist attack against an airliner rises to the level of “armed attack” against the United States triggering unilateral, heat of the moment executive branch action.

¹⁶⁵ *Al-Marri v. Bush*, 274 F. Supp. 2d 1003, 1004 (C.D. Ill. 2003).

¹⁶⁶ See Benjamin Weiser, *Complaint Says Qatari Lied to Investigators*, N.Y. TIMES, Dec. 24, 2002, at A15.

¹⁶⁷ Evan Thomas, *Al Qaeda in America: The Enemy Within*, NEWSWEEK, June 23, 2003, at 40, 45.

¹⁶⁸ *Al-Marri*, 274 F. Supp. 2d at 1004.

¹⁶⁹ *Man is Tied to Terrorists*, N.Y. TIMES, Mar. 21, 2002, at A19.

ordered Defense Secretary Rumsfeld to take al-Marri into custody as an enemy combatant.¹⁷⁰ According to the President's order, al-Marri was "closely associated with Al Qaeda," "engaged in conduct that constituted hostile and warlike acts, including conduct in preparation for acts of international terrorism," and had to be detained "to prevent him from aiding Al Qaeda."¹⁷¹ Since then, al-Marri has remained in military detention, although the Fourth Circuit recently held that the President lacked legal authority to detain al-Marri as an enemy combatant.¹⁷²

As noted earlier, al-Marri is a citizen of Qatar, not the United States. However, he had more ties to the United States than Moussaoui or Reid: al-Marri had previously lived in the United States in the 1990s when he earned his undergraduate degree at Bradley University, and he had brought his family with him to this country. These facts make al-Marri's case a difficult one, and perhaps one on which reasonable minds could disagree as to whether he could be seen as having an American identity.

IV. SOME CAUTIONARY OBSERVATIONS

Although the rational classification scheme proposed herein fits comfortably with various doctrines of law discussed earlier, some cautionary observations are nevertheless warranted.

A. *Second-Class Citizenship*

To be clear, I am not suggesting that birthright citizenship be limited to "real" Americans.¹⁷³ Yaser Esam Hamdi was born in the United States, and under established judicial precedents and historical practice, he had United States citizenship—and with it, a clear claim to constitutional protection. Yet, though he was indisputably an American citizen, the classification proposal treats him as an enemy combatant rather than as a criminal defendant, relegating him to a kind of military detention that reasonable people might find more brutal and

¹⁷⁰ See Michael Isikoff & Mark Hosenball, *Distorted Intelligence?*, NEWSWEEK, June 25, 2003, <http://www.msnbc.msn.com/id/3067876>; Eric Lichtblau, *Bush Declares Student an Enemy Combatant*, N.Y. TIMES, June 24, 2003, at A15.

¹⁷¹ Richard A. Serrano, *Showdown Nears Over Terrorism Detentions*, L.A. TIMES, Jul. 16, 2003, at A1.

¹⁷² *Al-Marri v. Wright*, 487 F. 3d 160, 164 (4th Cir. 2007).

¹⁷³ Cf. *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 61 (2005) (statement of John C. Eastman, Director, the Claremont Institute Center for Constitutional Jurisprudence), available at <http://ssrn.com/abstract=905570> ("As an original matter, mere birth on U.S. soil . . . was insufficient to confer citizenship as a matter of constitutional right. Rather, birth, together with being a person subject to the complete and exclusive jurisdiction of the United States . . . was the constitutional mandate").

dehumanizing than even criminal incarceration.¹⁷⁴ Hamdi's "citizenship," therefore, appears to be valued "less" than Lindh's, even though they appear to have been similarly situated.¹⁷⁵

Though intuitively understandable, this objection is ultimately specious. As noted earlier, Hamdi and Lindh were not similarly situated; Hamdi was a dual citizen, and his national identity was, under all objectively reasonable measures, Saudi rather than American. One way to think about the relevance of that difference is to ask how we might treat each of them if hypothetically, the armed conflict against al-Qaeda and the Taliban were to end tomorrow. In a traditional war, when the conflict ends, enemy fighters are repatriated to their home nations (unless they are being punished for war crimes). In Lindh's case, if he were an enemy combatant, that would mean that he would be repatriated back to the United States—and released. Given the magnitude of his actions, simply releasing him back in the country without any sort of criminal punishment seems wildly inappropriate. On the other hand, if al-Qaeda were destroyed and the Taliban defeated, what further call would we have to detain someone like Hamdi? Obviously, we would not repatriate him to the United States; his home nation is Saudi Arabia.

Moreover, the mere fact of a differential class of citizenship is not necessarily unconstitutional. After all, the Constitution itself differentiates between "natural born" citizens, who are eligible to become President, and naturalized citizens, who are not.¹⁷⁶ While this provision is of dubious value today,¹⁷⁷ its problem lies less in the differential treatment itself as it does in the validity—today—of the reasons for that differential treatment. When the Constitution was drafted, one purpose of the "natural born" clause was to guard against the feared possibility that the European nations might prop up a "sleeper" naturalized citizen

¹⁷⁴ See Yin, *Coercion*, *supra* note 3, at 1274–81 (comparing military detention to criminal punishment).

¹⁷⁵ See Volpp, *supra* note 2, at 472–77.

¹⁷⁶ U.S. Const. art. II, § 1, cl. 5.

¹⁷⁷ This provision was selected by Randall Kennedy as the "stupidest" part of the Constitution in response to a symposium created by William Eskridge and Sanford Levinson. See Randall Kennedy, *A Natural Aristocracy?*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 54, 54–56 (William Eskridge & Sanford Levinson eds. 1998). In addition, in the original symposium, Robert Post also selected this provision. See Robert Post, *What is the Constitution's Worst Provision?*, 12 *CONST. COMMENT.* 191, 192 (1995); see also Sarah Helene Duggin & Mary Beth Collins, *"Natural Born" in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 *B.U. L. REV.* 53 (2006). There have been repeated calls to amend the Constitution to eliminate it. See, e.g., H.R.J. Res. 42, 109th Cong. (2005); Natural Born Citizen Act, S. 2128, 108th Cong. (2004); H.R.J. Res. 104, 108th Cong. (2004); H.R.J. Res. 67, 108th Cong. (2003); 150 *CONG. REC.* S1588, 1597–98 (daily ed. Feb. 25, 2004) (statement of Sen. Nickles); 149 *CONG. REC.* S9246, 9251–52 (daily ed. July 10, 2003) (statement of Sen. Hatch).

who would become President.¹⁷⁸ The Framers of the Constitution labored under a belief, consistent with English law of the time, that naturalized citizens were less loyal than natural born citizens.

Next, though the greater due process and transparency afforded by the criminal justice system intuitively makes it seem preferable to military detention, actual outcomes may on occasion suggest otherwise. Lindh received a twenty-year sentence;¹⁷⁹ unless his sentence is commuted or he is pardoned, or he somehow receives post-conviction relief notwithstanding his guilty plea, Lindh will serve a minimum of seventeen years.¹⁸⁰ Hamdi spent three years in military detention before the government agreed to send him back to Saudi Arabia.¹⁸¹ It is far from clear that, as between the two, Hamdi got the worse deal.¹⁸² In fact, Lindh subsequently sought a reduction in his sentence from the President, citing the deal that Hamdi received.¹⁸³ Here, we see how the crime/war distinction matters: if, as seems likely, both young men sincerely persuaded government authorities that they regretted fighting with the Taliban and no longer intended to fight the United States, there would be no more justification under the war paradigm to detain Hamdi, for he no longer posed a danger to this country; but Lindh would still be justifiably incarcerated as punishment for his past actions.

B. Cultural Discrimination

In addition, the proposal must not be misused to discriminate and intimidate Americans from unusual, minority, or unpopular cultures. During World War I, for example, the president of the American Bar Association stated as an aspirational goal that “every man, whether born in this country or out of it, has either become thoroughly and wholly American, or, if he is incapable or refuses to become American, is driven

¹⁷⁸ See, e.g., THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“These most deadly adversaries of republican government [come] chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this than by raising a creature of their own to the chief magistracy of the Union?”); see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1479 (5th ed. 1994).

¹⁷⁹ See Seelye, *supra* note 20, at A1.

¹⁸⁰ The federal sentencing guidelines eliminated parole, but inmates who receive “good time” credit can get up to 15% of their sentences shortened.

¹⁸¹ See Hamdi Settlement, *supra* note 42.

¹⁸² See A. John Radsan, *The Moussaoui Case: The Mess from Minnesota*, 31 WM. MITCHELL L. REV. 1417, 1457 (2005) (“The irony to this case is that this illegal enemy combatant seems to have fared better than a comparable criminal defendant”); Adam Liptak, *In Terror Cases, Administration Sets Own Rules*, N.Y. TIMES, Nov. 27, 2005, at A1 (“Arguably, it may sometimes be preferable for a defendant to be held as an enemy combatant rather than being prosecuted.”).

¹⁸³ Dean E. Murphy, *American Taliban Soldier Seeks Less Prison Time*, N.Y. TIMES, Sept. 29, 2004, at A6.

back to the country from which he came.”¹⁸⁴ Of course, the context in which this statement was made—denouncing anti-war protesters—demonstrates a narrow and rigid view of what the speaker understood as being “American.”

It is almost too obvious to state that, while Muslims are a small minority of the American population, much of which is Christian,¹⁸⁵ it is not “un-American” to be a devout Muslim or to wear a burka. This is true even though there might be some more complicated issues involved when religious customs conflict with laws of general applicability, as was the case where a Florida woman refused to take her head covering off for her driver’s license photograph, claiming that it would violate Islam to expose her face.¹⁸⁶ Such conflicts are not between “American values” and “foreign values”—indeed, the First Amendment recognizes the conflict as, perhaps, a distinctly *American* conflict to be resolved under the Free Exercise Clause.

Similarly, the existence of distinctly ethnic communities such as Monterey Park, California—where street signs are printed in English and Chinese—should not be viewed as an “un-American” zone, even if the residents of those communities do in fact voluntarily segregate themselves.¹⁸⁷

C. *Impact on Intelligence Gathering*

John Yoo has argued that whether one is treated as a criminal defendant or an enemy combatant turns primarily on the quantity and quality of actionable intelligence that the person is believed to have, with military detention reserved for those with significant information.¹⁸⁸ From a utilitarian perspective, this approach is not irrational, if one agrees that the government is more likely to extract useful information from those who are detained as enemy combatants than those indicted as criminal defendants. It does, however, have the drawback of lacking transparency as to the classification decisions. If the government merely asserts that person X has little useful information but that person Y has much useful

¹⁸⁴ See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 182 (2004).

¹⁸⁵ See U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2007*, 60 tbl.75 (2006) (Christian adherents account for 47.4% of the U.S. population), available at <http://www.census.gov/prod/2006pubs/07statab/pop.pdf>.

¹⁸⁶ Dana Canedy, *Lifting Veil for Photo ID Goes Too Far, Driver Says*, N.Y. TIMES, June 27, 2002, at A16.

¹⁸⁷ This is obviously a delicate issue. For example, in June 2007, California Governor Arnold Schwarzenegger caused a stir when, speaking to a group of Latino journalists, he suggested that Latino immigrants “have got to turn off the Spanish-language television’ programs in order to learn English.” Louis Sahagun, *Gov. Aims for Healing, Hits a Snag with Latino Journalists*, L.A. TIMES, June 14, 2007, at B3. Perhaps the Governor overstated matters: a suggestion to watch English language programs in addition to Spanish language programs may have been more appropriate.

¹⁸⁸ YOO, *supra* note 69, at 156.

information, the general public has little basis to satisfy itself that the classifications were proper. Moreover, the government's differential treatment of Lindh and Hamdi cannot be explained under Yoo's approach; as Yoo himself notes, "Lindh and Hamdi could provide information on the structure of al Qaeda and the Taliban . . . knowledge [that] turned stale as the invasion of Afghanistan receded further into the past. Ultimately, they were equivalent to privates in al Qaeda."¹⁸⁹

D. Implementation

Finally, we must confront the practical question of how the classification scheme is to be implemented. Would a person facing military detention, such as Jose Padilla in 2002, be entitled to seek judicial enforcement of the classification proposal?

Federal courts have not shied away from reaching the merits in post-9/11 terrorism cases or from ruling against the government. Of the four 9/11-related cases that the Supreme Court has decided, three were in favor of the detainees,¹⁹⁰ and the fourth was decided on a technical jurisdictional issue that did not preclude further litigation by the detainee.¹⁹¹ Perhaps these cases represent judicial overreaching,¹⁹² or perhaps they demonstrate adherence to the rule of law.¹⁹³

However, those cases involved precisely stated constitutional or statutory challenges to government practices or policies. The Court did not impose any specific solution to the statutory or constitutional problems that it identified—and in fact, Congress's response to *Hamdan* was to pass the Military Commission Act of 2006, which largely reversed the Court's decision.¹⁹⁴

Thus, even if an enemy of the state were to bring a case that his classification as an enemy combatant (or criminal defendant) violated the Constitution or the federal law, and the courts agreed, the result would not be court-ordered implementation of my classification proposal. Rather, the Executive Branch would have to address the legal

¹⁸⁹ *Id.* at 138.

¹⁹⁰ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁹¹ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). But see Tung Yin, *Tom and Jerry (and Spike): A Metaphor for Hamdan v. Rumsfeld, the President, the Court, and Congress in the War on Terrorism*, 42 TULSA L. REV. (forthcoming 2007) (noting that all of the Court's cases are primarily statutory interpretation, rather than constitutional, decisions that leave the final say up to Congress) [hereinafter Yin, *Hamdan v. Rumsfeld*].

¹⁹² See YOO, *supra* note 69, at 159–61; John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld*, 2005–2006 CATO Sup. Ct. Rev. 83, 103–05, available at <http://www.cato.org/pubs/scr/2006/yoo.pdf>.

¹⁹³ See Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in Hamdan v. Rumsfeld*, 2005–2006 CATO SUP. CT. REV. 51, available at <http://www.cato.org/pubs/scr/2006/flaherty.pdf>.

¹⁹⁴ See generally Yin, *Hamdan v. Rumsfeld*, *supra* note 191.

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problems identified by the Court. Accordingly, it is up to the Executive Branch to adopt the proposal.

V. CONCLUSION

Prior to the 9/11 attacks, terrorism had not been equated with armed conflict. But the sheer magnitude of harm—lives lost, injuries suffered, property lost, and businesses disrupted—inflicted by the nineteen hijackers on that terrible day called for more than mere criminal prosecution. The addition of military force as another weapon in the President's arsenal, however, has led to potentially opportunistic behavior on the part of the Executive Branch, and in turn has led critics to claim racism or bigotry in the use of those tools.

Perhaps the early classification decisions—Hamdi and Lindh; Padilla, al-Marri, and Reid—are understandably contradictory because the Executive Branch was still grappling with the novelties of use of armed force against non-state actors. But it is now 2007, and there is still no clear, consistent articulated government policy in place to justify classification of enemies of the state as criminal defendants or enemy combatants.

Citizenship, though, is an imperfect basis for classifying persons as enemy combatants or criminal defendants. Yaser Hamdi may have been a U.S. citizen because we chose to offer him our citizenship; but that alone was not enough to justify punishing him for seeing us as the enemy.

APPENDIX A: Significant suspected al-Qaeda or Taliban fighters

Name	Citizenship	Place of Capture	Alleged Conduct	Forum
John Walker Lindh	U.S.	Afghanistan	Fighting with the Taliban	U.S. District Court
Yaser Esam Hamdi	U.S./Saudi Arabia)	Afghanistan	Fighting with the Taliban	Military detention
Jose Padilla	U.S.	U.S. (Chicago, Illinois)	Plotting with al-Qaeda	Military detention
Richard Reid	U.K.	U.S.	Plotting with al-Qaeda; attempting to set off "shoe" bomb on airplane	U.S. District Court
Zacarias Moussaoui	France	U.S.	Plotting with al-Qaeda, possibly as "20 th hijacker"	U.S. District Court
Ali Saleh al-Marri	Qatar	U.S. (Peoria, Illinois)	Plotting with al-Qaeda	Military detention
Abu Zubaydah	Saudi Arabia	Pakistan	#3 ranking al-Qaeda leader	Military detention
Ramzi Binalshibh	Yemen	Pakistan	Aided 9/11 plot	Military detention
Khalid Sheikh Mohammed	Pakistan	Pakistan	Mastermind of 9/11 plot	Military detention
Mohammed Atef	Egypt	Afghanistan	Suspected senior al-Qaeda leader	Killed in air strike
Qaed Salim Sinan al-Harethi	Yemen	Yemen	Suspected al-Qaeda operative	Killed in air strike
Ahmed Hijazi	U.S.	Yemen		Killed in air strike
Jeffrey Battle, et al. (Portland Cell)	U.S.	U.S. (Portland, Oregon)	Attempting to enter Afghanistan to join al-Qaeda	U.S. District Court
Ernest Goba, et al. (Lackawanna Six)	U.S.	U.S. (Lackawanna, New York)	Training with al-Qaeda in terrorist camps in Afghanistan	U.S. District Court
David Hicks	Australia	Afghanistan	Attending al-Qaeda training camps; serving with the Taliban	Military detention
Adam Yahiye Gadahn	U.S.	at large, possibly in Pakistan	Acting as U.S. spokesperson for al-Qaeda	U.S. District Court

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