

ENEMY ALIENS, ENEMY PROPERTY,  
AND ACCESS TO THE COURTS

by  
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*Critics of the assertive role the federal judiciary has thus far played in the “war on terrorism” argue that it is well established that the courts have never previously been open during “wartime” to individuals identified by the Executive Branch as “enemies.” Based upon a largely unexplored body of case law, this Article suggests that such a contention is a historical myth. To the contrary, U.S. courts have a long and rich history of hearing wartime cases where the government alleged that a private party was an “enemy,” and the private party maintained that he was not. The common law “enemy alien disability rule,” to whatever extent it remains viable, simply has no application to cases where there is a colorable question as to whether the relevant individual is, in fact, an enemy. To be sure, the courts have shown broad deference to the government in these cases, as a result of which the government has usually prevailed. But such outcomes have come only after thorough and searching analysis of the underlying jurisdictional fact—of whether the individual is, in fact, an “enemy” under the relevant definition.*

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## I. INTRODUCTION

A frequent refrain in the contemporary debate over the role of the federal judiciary in the war on terrorism is that the courts have never before been open during “wartime” to individuals identified by the Executive Branch as “enemies.”<sup>1</sup> Critics allege that by so thoroughly involving themselves in the current disputes, federal courts have become unwitting accomplices in “lawfare”<sup>2</sup> by questioning—and sometimes invalidating aspects of—the Bush Administration’s conduct of (and in) the war on terrorism. According to this view, the corresponding attempts by the political branches to restrict judicial review of various aspects of the Bush Administration’s terrorism-related policies are both necessary to suppress this “lawfare,” and are sufficient because the preclusion of review raises no constitutional difficulties. They who might be “injured” by the constriction of judicial review quite simply do not have the right to complain,<sup>3</sup> both because they have no substantive rights to enforce on the merits, and because they have no right of access to the courts in the first place.<sup>4</sup>

<sup>1</sup> See, e.g., James Taranto, Editorial, *The Truth About Guantanamo*, WALL ST. J., June 26, 2007, at A15; cf. *Rasul v. Bush*, 542 U.S. 466, 506 (2004) (Scalia, J., dissenting) (decrying the holding that habeas jurisdiction extends to Guantánamo Bay, Cuba as “judicial adventurism of the worst sort”). Justice Scalia went even further in a 2006 speech at the University of Freiburg. See *No Legal Rights for Enemy Combatants*, *Scalia Says*, WASH. POST, Mar. 27, 2006, at A3.

<sup>2</sup> For a summary of this view—and a counterargument—see Phillip Carter, *Legal Combat: Are Enemies Waging War in Our Courts?*, SLATE, Apr. 4, 2005, <http://www.slate.com/id/2116169/>. See also Editorial, *Round Up the Usual Lawyers*, N.Y. TIMES, Jan. 13, 2007, at A14 (reacting to the suggestion by a Defense Department official that law firms are profiting off of the Guantánamo litigation).

<sup>3</sup> See, e.g., *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (“However unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court.” (footnote omitted)); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 339 (1993) (“When there is no right to a constitutional remedy, it would seem to follow that there can be no right to judicial review.”).

<sup>4</sup> For two recent judicial decisions holding that the Suspension Clause does not confer a right to judicial review for non-citizens detained at Guantánamo Bay, see *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. granted, 127 S. Ct. 3078 (2007); and *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006). But see *Boumediene*, 476 F.3d at 995–98 & n.3 (Rogers, J., dissenting) (concluding that the Suspension Clause applies to the Guantánamo detainees); Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. (forthcoming 2008) (arguing that the current

Although I elsewhere attempt to assess (and critique) the more theoretical implications of this view,<sup>5</sup> the purpose of this Article is to demonstrate, based upon a largely unexplored body of case law,<sup>6</sup> that the conventional wisdom described above is neither “conventional” nor “wisdom,” but is instead a historical myth. To the contrary, U.S. courts have a long and rich history of hearing wartime cases where the government alleged that a private party was an “enemy,” and the private party maintained that he was not. The common law “enemy alien disability rule,” to whatever extent it remains viable,<sup>7</sup> simply has no application to cases where there is a colorable question as to whether the relevant individual is, in fact, an enemy alien.

To be sure, the courts have shown broad deference to the government in these cases, as a result of which the government has usually prevailed. But such outcomes have come only after thorough and searching analysis of the underlying jurisdictional fact—of whether the individual is, in fact, an “enemy” under the relevant definition.

As I survey in Part II, the federal courts entertained dozens of cases during the First and Second World Wars arising under the Alien Enemy Act of 1798,<sup>8</sup> pursuant to which the U.S. government detained and deported thousands of “natives, citizens, denizens, or subjects” of those countries with which the United States was at war.<sup>9</sup> Moreover, the jurisprudence of the Alien Enemy Act is not limited to these two conflicts, but dates back to the War of 1812, during which Chief Justice Marshall himself, riding circuit, freed a detained enemy alien—a British

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debate over the Suspension Clause is based on an historical misunderstanding of the provision).

<sup>5</sup> See Stephen I. Vladeck, *Access to Courts and the Separation of Powers* (Nov. 26, 2007) (unpublished manuscript, on file with author).

<sup>6</sup> The only other sustained contemporary discussion of the body of law summarized herein can be found in the amicus brief of Professor Gerald Neuman in the Fourth Circuit in the case of non-citizen “enemy combatant” Ali Saleh Kahlal al-Marri. See Brief for Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae Supporting Appellants, *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) (No. 06-7427), available at <http://www.law.harvard.edu/news/brief.pdf> [hereinafter Neuman Brief]. See generally Susan Schmidt, *Trail of an “Enemy Combatant,” From Desert to U.S. Heartland*, WASH. POST, July 20, 2007, at A1.

<sup>7</sup> Compare, e.g., *Ex parte Kawato*, 317 U.S. 69 (1942) (rejecting application of the common law disability rule to resident enemy aliens), with *Ex parte Colonna*, 314 U.S. 373 (1942) (per curiam) (sustaining application of the rule to non-resident enemy aliens). See generally E.M.B., *The Right of Alien Enemies To Sue in Our Courts*, 27 YALE L.J. 104 (1917).

<sup>8</sup> Act of July 6, 1798, ch. 66, 1 Stat. 577 (current version at 50 U.S.C. §§ 21–24 (2000)).

<sup>9</sup> J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402 (1992); and Stephen I. Vladeck, *Ludecke’s Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT’L SEC. L. & POL’Y 53, 77 n.106 (2006).

subject named Thomas Williams—because the marshal who arrested Williams had exceeded his authority.<sup>10</sup>

There have also been cases raising a comparable jurisdictional fact question under the Trading with the Enemy Act of 1917,<sup>11</sup> which authorizes the seizure and confiscation of enemy property during wartime, and broadly empowers the President to restrict trade and other commercial intercourse with (and in) enemy commerce.<sup>12</sup> And a handful of decisions have raised a variation of the same issue with respect to the so-called “enemy property” doctrine, pursuant to which the United States is not answerable for takings claims arising out of the confiscation or destruction of “enemy” property during wartime.<sup>13</sup>

Finally, in the aftermath of September 11, U.S. courts have also grappled with the question of whether individuals are “enemy combatants,” even though the term was initially defined solely by presidential order.<sup>14</sup> This question has arisen most prominently in the Guantánamo detainee cases<sup>15</sup> and in *Hamdi v. Rumsfeld*<sup>16</sup> and *Padilla v.*

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<sup>10</sup> See Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG 2D 39, 41–43 (2005).

<sup>11</sup> 50 U.S.C. app. §§ 1–44 (2000).

<sup>12</sup> See, e.g., *id.* §§ 3, 5, 8–12. Although the Trading with the Enemy Act has been largely superseded by the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1706 (2000), see *Regan v. Wald*, 468 U.S. 222, 227–28 & n.8 (1984), it remains on the books today, and would still apply, at a minimum, during times of declared war, see *Kalantari v. NITV, Inc.*, 352 F.3d 1202, 1204 n.2 (9th Cir. 2003) (citing 50 U.S.C. app. § 5).

<sup>13</sup> See generally *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004) (discussing the history and evolution of the doctrine), *cert. denied*, 545 U.S. 1139 (2005). Surveys of the case can be found in several student notes that have focused on the Federal Circuit’s takings analysis. See, e.g., Paul A. LaFata, Note, *Time to Overturn Turney*, 15 WM. & MARY BILL RTS. J. 335 (2006); Nathaniel Segal, Note, *After El-Shifa: The Extraterritorial Availability of the Takings Clause*, 13 CARDOZO J. INT’L & COMP. L. 293 (2005). Only one article, however, has delved more deeply into the court’s discussion of the “enemy property” doctrine. See Ilana Gorenstein Tabacnic, Note, *The Enemy Property Doctrine: A Double Whammy?*, 62 U. MIAMI L. REV. (forthcoming 2008).

<sup>14</sup> As of this writing, the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, comes close to providing a statutory definition of the term, providing, in new 10 U.S.C. § 948a(1)(a), that an “unlawful enemy combatant” is “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaeda, or associated forces) . . .” *Id.* § 3(a)(1), 120 Stat. at 2601 (emphasis added).

<sup>15</sup> See, e.g., *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), *rev’d on other grounds sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007); cf. *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) (holding that the government cannot hold a non-citizen arrested while legally within the United States as an “enemy combatant”), *reh’g en banc granted*, No. 06-7427 (4th Cir. Aug. 22, 2007).

<sup>16</sup> 542 U.S. 507 (2004) (plurality).

*Hanft*,<sup>17</sup> both of which arose out of the detention of a U.S. citizen as an “enemy combatant.”<sup>18</sup> Taking all of these cases together, this Article identifies only *one* instance where courts have held that the question whether an individual is an “enemy” is nonjusticiable: a 2004 Federal Circuit decision<sup>19</sup> that is simply irreconcilable with the other cases discussed herein, most notably the Supreme Court’s decision two months earlier in *Hamdi*.<sup>20</sup> In Part III, I turn to this decision, and to its origins and shortcomings. As Part III concludes, otherwise, the courts have endorsed, usually without comment, the notion that alleged enemies are entitled to access to the courts at least for resolution of the underlying jurisdictional fact.

Especially given the infrequency with which the Alien Enemy Act and the Trading with the Enemy Act are invoked today,<sup>21</sup> and given the nature of the “enemy” in the war on terrorism, one might conclude that the jurisprudence surveyed in this Article is anachronistic, dating back to a time when wars were fought against proper nouns, rather than common nouns—or at least against countries, rather than non-state organizations.<sup>22</sup> But as the conclusion suggests, to the extent that substantive U.S. law continues to distinguish between individuals who are “enemies” and those who are not (including, as a prominent current example, the Military Commissions Act of 2006<sup>23</sup>), it is undeniably important to accurately document the role that the courts have historically played.

## II. “ENEMIES” AND ACCESS TO THE COURTS

### A. “Enemies” and the Alien Enemy Act of 1798

As J. Gregory Sidak writes, “The Alien Enemy Act was enacted on July 6, 1798, eleven days after Congress enacted the notorious Alien Act and

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<sup>17</sup> 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006); *see also* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev’d on other grounds*, 542 U.S. 426 (2004).

<sup>18</sup> *See also* *Al-Marri*, 487 F.3d 160 (raising the legality of the stateside detention of a non-citizen as an “enemy combatant”).

<sup>19</sup> *See El-Shifa*, 378 F.3d at 1362 (holding that the question whether a Sudanese pharmaceutical plant was “enemy property” was a political question, and therefore nonjusticiable).

<sup>20</sup> The Supreme Court did not squarely reach the question of whether Hamdi’s claims were justiciable. However, the government *did* argue initially that Hamdi’s suit raised political questions incapable of judicial resolution, an argument expressly rejected by both the district court and the Fourth Circuit, *see, e.g.*, *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002), and implicitly repudiated by Justice O’Connor’s plurality opinion for the Supreme Court, *see Hamdi*, 542 U.S. at 535–39 (plurality).

<sup>21</sup> For example, arguably only a formal declaration of war, which Congress has not issued since World War II, can trigger the Alien Enemy Act. *See* Sidak, *supra* note 9.

<sup>22</sup> *See, e.g.*, Grenville Byford, *The Wrong War*, FOREIGN AFF., July/Aug. 2002, at 34.

<sup>23</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10 and 28 U.S.C.).

eight days before it enacted the even more infamous Sedition Act.”<sup>24</sup> Passed during the “quasi-war” with France, the Act was meant to give the President broad authority over potential spies and saboteurs at home during a conflict overseas.<sup>25</sup> Specifically, the significant grant of power came in section 1:

[W]henever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States, . . . all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies.<sup>26</sup>

The President’s authority under section 1 was almost unfettered,<sup>27</sup> but the Act explicitly provided for judicial review, allowing a “full examination and hearing” into whether “sufficient cause . . . appear[ed]” to conclude that the individual was actually an “alien enem[y].”<sup>28</sup> Thus, the text of the Act itself explicitly suggested that judicial review was always available to review whether an alleged “enemy alien” actually fell within the Act’s purview. As clarified by the landmark early case of *Lockington v. Smith*, however, a court order was not a mandatory prerequisite to the executive detention of an alien enemy; judicial review need only be available subsequent to incarceration.<sup>29</sup>

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<sup>24</sup> Sidak, *supra* note 9, at 1406 (footnotes omitted). For an excellent overview of the political history, see ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1791–1801* (1966).

<sup>25</sup> Unlike the Alien and Sedition Acts, the Alien Enemy Act was largely bipartisan. See Sidak, *supra* note 9, at 1407 (“Its constitutionality was never seriously questioned contemporaneously by Jefferson or Madison, the two prominent critics of the Federalists’ ignominious ‘Friendly Alien Act,’ or subsequently by a majority of any court.” (footnote omitted)). For a comprehensive discussion of the Act, see JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 35–49 (1956) (recapping the “[b]iography of [the] bill”). See also DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 254–55 & nn.141–47 (1997).

<sup>26</sup> Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577, 577 (current version at 50 U.S.C. § 21 (2000)). The Act has been amended only once—during World War I to include women. See Act of Apr. 16, 1918, ch. 55, 40 Stat. 531.

<sup>27</sup> Sidak, *supra* note 9, at 1407 (characterizing the Act as “[o]ne of the most sweeping delegations of power to the President to be found anywhere in *Statutes at Large*”).

<sup>28</sup> Alien Enemy Act of 1798 § 2, 1 Stat. at 577–78 (codified as amended at 50 U.S.C. § 23 (2000)).

<sup>29</sup> See *Lockington’s Case*, Bright. (N.P.) 269 (Pa. 1813); see also *Lockington v. Smith*, 15 F. Cas. 758 (C.C.D. Pa. 1817) (No. 8448) (Washington, J.). For a useful modern summary of the proceedings, especially those before the Pennsylvania Supreme Court, see Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 993–94 (1998). *Lockington* was not the first case to discuss the Act, though it was the first to discuss it in detail. Shortly after the passage of the Act, Justice Iredell, riding circuit, briefly passed on the validity of the

1. *The Alien Enemy Act and the War of 1812*

*Lockington*, as it turns out, was one of only two significant cases arising under the Alien Enemy Act during the War of 1812. And whereas *Lockington* resolved several important questions of first impression, including the availability of habeas corpus to test the lawfulness of confinement under the Act, the Pennsylvania Supreme Court<sup>30</sup> ultimately concluded that *Lockington* was lawfully detained, and denied his habeas petition on the merits.<sup>31</sup>

It is the second important case from the War of 1812, recently unearthed by Gerald Neuman and James Hobson, that provides perhaps the more significant precedent. The case arose out of the confinement as an enemy alien of Thomas Williams, a British subject. Williams challenged his confinement in the Circuit Court for the District of Virginia, where Chief Justice Marshall, riding circuit, issued a writ of habeas corpus and subsequently ordered Williams released. As Neuman and Hobson describe, the surviving records of the case:

demonstrate John Marshall's agreement with the position taken by the majority in *Lockington's Case*—that detention of a conceded enemy alien under the purported authority of the Alien Enemies Act was not per se immune from judicial inquiry on habeas corpus. The actual grant of the writ on behalf of an enemy alien provides even stronger evidence for this proposition than the discussion in *Lockington's Case*, where the majority exercised jurisdiction but denied relief on the merits. Second, it appears that counsel for Williams raised an issue concerning the interpretation of the Alien Enemies Act that was also addressed in *Lockington's Case*, whether the judicial proceedings authorized by the second section of the act were the exclusive means of implementation, or whether the President's orders could also be enforced directly by executive officials. Marshall's disposition of the *Williams* case made it unnecessary to answer that question, but the Pennsylvania court held that judicial enforcement was not required. Third, Marshall ordered Williams released because "the regulations made by the President" (actually, by the State Department) did not authorize his confinement. The news report clarifies the reason: the marshal had not designated a place to which Williams should remove, as the official instructions required, and given him the opportunity to remain at liberty. Thus, the writ protected the individual's liberty against a subordinate official's action in excess of delegated authority, not a constitutional or statutory violation.<sup>32</sup>

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Act and its application in criminal proceedings. See *United States v. Fries*, 3 U.S. (3 Dall.) 515, 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 5126).

<sup>30</sup> Before *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858), and *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), it was not unheard of for state courts to inquire into the legality of federal detention. See Neuman & Hobson, *supra* note 10, at 41 n.11.

<sup>31</sup> See *Lockington's Case*, Bright. (N.P.) at 279–82; *id.* at 288–292. See generally Neuman, *supra* note 29, at 992–93.

<sup>32</sup> Neuman & Hobson, *supra* note 10, at 42–43 (footnotes omitted).

The *Williams* case thus provided an important precedent, not just because of the identity of the jurist who decided it—Chief Justice Marshall—but because of the nature of the review it embodied and anticipated. Under *Williams*, habeas was available to detained enemy aliens for *regulatory* violations, even where the statute otherwise applied. More significantly, *Williams* suggests that U.S. courts were in fact open to enemies during wartime, at least for claims to which the existence of a state of war was not fatal.<sup>33</sup> Thus, under *Lockington* and *Williams*, “Executive detention of enemy aliens may be authorized, but habeas corpus lies to determine the boundaries of that authorization.”<sup>34</sup>

The War of 1812 would provide America’s only nineteenth-century experience with the Alien Enemy Act.<sup>35</sup> Nevertheless, although the much-maligned Alien and Sedition Acts both expired soon after they were enacted,<sup>36</sup> the Alien Enemy Act remained on the books. Because *Lockington* eliminated the requirement for an antecedent court order, the next time the Act would come before the courts would be in habeas petitions filed by detained enemy aliens after the entry of the United States into the First World War, in April 1917.

## 2. *The Alien Enemy Act and the First World War*

In the first significant World War I-era decision interpreting the Act, the U.S. District Court for the Northern District of Alabama rejected a habeas petition filed by Oscar Graber, a Croatian, holding that, although he had declared an intent to become a naturalized U.S. citizen when he entered the United States in 1903, he never actually followed through, and was thus a citizen of an alien enemy—Austria-Hungary.<sup>37</sup> The court refused to inquire into Graber’s loyalty, finding sufficient basis for his detention in the Alien Enemy Act once his citizenship was established.<sup>38</sup>

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<sup>33</sup> See *id.* at 44 (discussing R.J. Sharpe’s summary of the long-standing uncertainty in English law over whether the denial of habeas to prisoners of war “rests on an incapacity based on status or on the absence of merit to the claim”). As Neuman and Hobson summarize, “Sharpe explains that the practice is best explained as merits-based: admission of enemy status demonstrates that detention is within Crown prerogative and thus lawful, whereas prisoners of war and detained non-combatants do have capacity to sue on other claims.” *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> For two other encounters, see *Clarke v. Morey*, 10 Johns. 69 (N.Y. 1813) and *Bagwell v. Babe*, 22 Va. (1 Rand.) 272 (1823). For an interesting discussion of the issue of “alien” enemies during the American Civil War, see *Lamar v. Browne*, 92 U.S. 187 (1875). As Sidak notes, the War of 1812 saw the only nineteenth-century implementation of the Act because it was the only conflict during which the President actually invoked his powers under the Act by proclamation. See Sidak, *supra* note 9, at 1412 & nn.49–50.

<sup>36</sup> See generally JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* (1951); SMITH, *supra* note 25. For the text of the Alien and Sedition Acts, respectively, see Act of June 25, 1798, ch. 58, 1 Stat. 570 (expired 1800) and Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

<sup>37</sup> *Ex parte Graber*, 247 F. 882 (N.D. Ala. 1918).

<sup>38</sup> See *id.* at 885–87.



Curiously, the court concluded that the President's "determination that Graber is an alien enemy, who should be restrained or interned, is final and conclusive, and is not subject to review by the courts,"<sup>39</sup> even though the court did review Graber's citizenship claim.<sup>40</sup> *Graber* thus suggests, in a departure from the review that Chief Justice Marshall had conducted in *Williams* (but one that other contemporary courts would follow<sup>41</sup>), that limited review was available to detained enemy aliens solely to review their citizenship—to review the threshold jurisdictional fact.<sup>42</sup>

A little over three months after *Graber*, a federal district court in Chicago expanded the breadth of the citizenship distinction, rejecting a habeas petition filed by an Italian citizen arguing that, although his parents were German and he was born in Germany, his Italian citizenship foreclosed application of the Act.<sup>43</sup> Specifically, in *Minotto v. Bradley*, the district court relied upon the language of the Act, applying to "natives, citizens, denizens, or subjects," to argue that the petitioner was a "native" of Germany because he was born there.<sup>44</sup> As Judge George Carpenter concluded, "As I view the situation, the sole question to be determined is whether, under [the Act], the petitioner comes within the description 'natives, citizens, denizens or subjects' of a hostile nation. I believe that he does, and that therefore the President had a right to issue the warrant."<sup>45</sup> Though the court read the Act expansively to cover anyone loosely fitting under the terms "native," "citizen," "denizen," or "subject," it was still compelled to inquire into whether the petitioner so qualified.

The nature of the citizenship inquiry is difficult to discern from the *Graber* and *Minotto* decisions themselves, but in early 1919,<sup>46</sup> the Southern District of New York gave at least some indication of the standard of

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<sup>39</sup> *Id.* at 887.

<sup>40</sup> *See id.* at 884.

<sup>41</sup> *See, e.g., Ex parte Fronklin*, 253 F. 984 (N.D. Miss. 1918) (examining and rejecting claim that petitioner was born in the United States to gypsy parents, in favor of government's claim that he was born in Hamburg, Germany, and was thus an alien enemy). In early 1919, the U.S. District Court for the Northern District of Georgia granted a habeas petition and ordered the release of a petitioner who was born in Germany, became a naturalized citizen, went to Berlin, then returned to the United States. *Banning v. Penrose*, 255 F. 159 (N.D. Ga. 1919). The government had argued that the voluntary expatriation nullified the petitioner's citizenship, but the court found the citizenship issue dispositive and ordered Banning released. *Id.* at 160–62.

<sup>42</sup> A handful of World War I-era courts also inquired into the constitutionality of the Act, though none ever seriously questioned it. *See, e.g., De Lacey v. United States*, 249 F. 625 (9th Cir. 1918).

<sup>43</sup> *Minotto v. Bradley*, 252 F. 600 (N.D. Ill. 1918).

<sup>44</sup> *Id.* at 602–03.

<sup>45</sup> *Id.* at 604.

<sup>46</sup> The date may seem puzzling, given the end of the war on November 11, 1918. The end of the war, however, did not terminate the President's authority under the Alien Enemy Act, a point the Supreme Court would explicitly reach in *Ludecke v. Watkins*, 335 U.S. 160 (1948). *See generally* Vladeck, *supra* note 9, at 62–81 (summarizing the Supreme Court's jurisprudence concerning when wars "end" leading up to—and including—*Ludecke*).

proof in its decision in *Ex parte Risse*.<sup>47</sup> Considering a habeas petition filed by a detainee born in Mexico, District (later Circuit) Judge Julius Mayer noted:

At the outset, it is important to determine whether the burden is on the relator or the government, the one of proving that he is not an alien enemy, the other that he is. The statute was enacted to safeguard the country in war time. It was necessarily summary. It would have been ineffective if, prior to apprehension, the fact as to enemy alienage were made the subject-matter of judicial proceedings or determination.

It must be presumed that the President has acted lawfully and that the relator is properly in custody; and, of course, as the President cannot himself physically act in every case, those who act for him represent him. Hence the warrant of arrest is the presidential warrant, and the arrest is the presidential act. The burden is therefore on relator to show illegal restraint, and, on habeas corpus, he must satisfy the court that he is not a native, citizen, denizen,<sup>48</sup> or subject of the hostile nation or government . . . .

After conducting what could only be characterized as a rigorous factual and legal analysis, including significant discussion of the provisions of Mexican law pertaining to citizenship and statements made by the detainee himself, the court denied the petition, concluding:

In such circumstances, and on all the facts, it must be decided that, whatever may be relator's status, he has not satisfied the court that he is not a German citizen or subject. To safeguard his rights (which may become important in some property or other relation), such is all that is necessary for the purposes of this writ. I do not find affirmatively that he is not a citizen of Mexico, nor do I find affirmatively that he is a citizen or subject of Germany. He may be one or both. But I do find that he has not shown that he is not a citizen or subject of Germany.<sup>49</sup>

Thus, the *Risse* court held that the burden was on detainees to prove that they did not fall under the Act, but the court also allowed the introduction of a seemingly unlimited amount of evidence to make such a claim.

Eleven days later, Judge Mayer granted a habeas petition to release a petitioner who the government alleged was a German citizen, but who was able to prove his naturalization. Rejecting the government's argument that its error was not reviewable, Judge Mayer concluded that "[t]he decisions in which the courts have declined to review the determination of executive officials have been [*only*] in cases where the executive or administrative act followed as the result of some hearing,

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<sup>47</sup> 257 F. 102 (S.D.N.Y. 1919).

<sup>48</sup> *Id.* at 104.

<sup>49</sup> *Id.* at 109–10.

sometimes formal, sometimes informal, but nevertheless a hearing.”<sup>50</sup> Conducting a significant evidentiary hearing (and allowing the detainee to testify),<sup>51</sup> Mayer concluded that the detainee was indeed a citizen and subject of the United States, and therefore not subject to detention as an alien enemy.<sup>52</sup>

These few cases are only a small window into what was a deep and voluminous case law arising out of World War I-era suits by alien enemies,<sup>53</sup> but they comprehensively represent the extent to which courts conducted meaningful review into the Alien Enemy Act’s application. Only Judge Mayer, in *Risse* and *Gilroy*, attempted to define the nature of the inquiry courts should conduct (and his definition was limited at best), but for the most part, the courts were clear that at least some hearing was required when status was at issue, and that status as an “alien enemy” was, without any doubt, a judicial—and justiciable—question.

### 3. *The Alien Enemy Act and the Second World War*

Whereas the Alien Enemy Act generated a limited body of jurisprudence during World War I, courts during the Second World War received dozens—in some cases *hundreds*—of habeas petitions from alien enemies challenging their confinement.<sup>54</sup> For the most part, courts followed the World War I precedents and reviewed only the determination of citizenship. Separately, the Second,<sup>55</sup> Third,<sup>56</sup> Seventh,<sup>57</sup>

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<sup>50</sup> *Ex parte Gilroy*, 257 F. 110, 112–13 (S.D.N.Y. 1919) (emphasis added). For this rather sophisticated distinction, Mayer relied on Justice Holmes’s opinion for the Court in *Chin Yow v. United States*, 208 U.S. 8 (1908), itself an early version of the “some kind of hearing” argument more forcefully enunciated in the Second Warren Court’s due process jurisprudence. See generally Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267 (1975).

<sup>51</sup> See *Gilroy*, 257 F. at 114–26.

<sup>52</sup> See *id.* at 128.

<sup>53</sup> See also, e.g., *Halpern v. Commanding Officer of Nat’l Army*, 248 F. 1003 (E.D.N.Y. 1918); *United States ex rel. Pascher v. Kinkead*, 248 F. 141 (D.N.J. 1918), *aff’d*, 250 F. 692 (3d Cir. 1918); *United States v. Kamm*, 247 F. 968 (E.D. Wis. 1918), *aff’d sub nom. Grahl v. United States*, 261 F. 487 (7th Cir. 1919). A number of state courts also confronted questions pertaining to alien enemies, although, after *Ableman* and *Tarble*, see *supra* note 30, the state courts could not inquire into the lawfulness of the federal detentions. For a sampling of the state cases, see *Lutz v. Van Heynigen Brokerage Co.*, 80 So. 72 (Ala. 1918); *Taylor v. Albion Lumber Co.*, 168 P. 348 (Cal. 1917); *Breuer v. Beery*, 189 N.W. 717 (Iowa 1922); *State ex rel. Brewster v. Covell*, 175 P. 989 (Kan. 1918); *Mittelstadt v. Kelly*, 168 N.W. 501 (Mich. 1918); *State ex rel. Constanti v. Darwin*, 173 P. 29 (Wash. 1918); and *Hughes v. Techt*, 176 N.Y.S. 356 (Sup. Ct.), *aff’d*, 177 N.Y.S. 420 (App. Div. 1919), *aff’d*, 128 N.E. 185 (N.Y. 1920).

<sup>54</sup> Indeed, roughly 10,000 people were detained as enemy aliens during World War II. See Sidak, *supra* note 9, at 1417. For contemporary literature on the Act, see Michael Brandon, *Legal Control over Resident Enemy Aliens in Time of War in the United States and in the United Kingdom*, 44 AM. J. INT’L L. 382 (1950); and Robert M.W. Kempner, *The Enemy Alien Problem in the Present War*, 34 AM. J. INT’L L. 443 (1940).

<sup>55</sup> The Second Circuit handled a veritable flood of alien enemy cases. For a representative sampling, see *United States ex rel. Bejeuhr v. Shaughnessy*, 177 F.2d 436 (2d Cir. 1949); *United States ex rel. Hoehn v. Shaughnessy*, 175 F.2d 116 (2d Cir. 1949);

Eighth,<sup>58</sup> and D.C.<sup>59</sup> Circuits all sustained detentions under the Act upon a showing that the detainee was a “native, citizen, denizen, or subject,” usually of Germany or Italy. The courts may have fought (often bitterly)<sup>60</sup> over the meaning of the terms, but the cases were, for the most part, limited to application of the statute, and not discussion of its intent or purpose.

Similarly, most of the district courts considering detentions inquired only into whether the detainee fit into one of the Act’s four categories,<sup>61</sup> though in one exceptional case, the D.C. District Court considered whether detainees initially arrested in South America were also subject to the Act following transfers stateside.<sup>62</sup> Courts nevertheless conducted detailed inquiries into whether individuals qualified for detention under the Act, even, in some cases, as part of a collateral challenge to denaturalization.<sup>63</sup> And the Second Circuit, on several occasions, considered whether the government had provided the detained enemy alien an adequate opportunity to depart the country before his detention.<sup>64</sup>

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*United States ex rel. Dorfler v. Watkins*, 171 F.2d 431 (2d Cir. 1948); *United States ex rel. Zeller v. Watkins*, 167 F.2d 279 (2d Cir. 1948); *United States ex rel. Kessler v. Watkins*, 163 F.2d 140 (2d Cir. 1947); *United States ex rel. Schlueter v. Watkins*, 158 F.2d 853 (2d Cir. 1946); *United States ex rel. D’Esquivia v. Uhl*, 137 F.2d 903 (2d Cir. 1943); *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898 (2d Cir. 1943); and *United States ex rel. Zdunic v. Uhl*, 137 F.2d 858 (2d Cir. 1943).

<sup>56</sup> *E.g.*, *United States ex rel. Jaegeler v. Carusi*, 187 F.2d 912 (3d Cir. 1951), *rev’d on other grounds*, 342 U.S. 347 (1952); *United States ex rel. Reichel v. Carusi*, 157 F.2d 732 (3d Cir. 1946).

<sup>57</sup> *E.g.*, *United States ex rel. Hack v. Clark*, 159 F.2d 552 (7th Cir. 1947); *United States ex rel. Knauer v. Jordan*, 158 F.2d 337 (7th Cir. 1946).

<sup>58</sup> *E.g.*, *United States ex rel. Umecker v. McCoy*, 54 F. Supp. 679, (D.N.D. 1944), *appeal dismissed*, 144 F.2d 354 (8th Cir. 1944) (per curiam).

<sup>59</sup> *E.g.*, *Citizens Protective League v. Clark*, 155 F.2d 290 (D.C. Cir. 1946). The D.C. Circuit paid particular attention to the underlying constitutionality of the Act. *See id.* at 293–94.

<sup>60</sup> *See Sidak, supra* note 9, at 1423–24 & n.105 (surveying the debate over the location/nationality question).

<sup>61</sup> For just a small sampling of representative cases, see *Ex parte Tadayasu Abo*, 76 F. Supp. 664 (N.D. Cal. 1947), *rev’d in part sub nom. Barber v. Tadayasu Abo*, 186 F.2d 775 (9th Cir. 1951); *Ex parte Gregoire*, 61 F. Supp. 92 (N.D. Cal. 1945); *United States ex rel. Umecker v. McCoy*, 54 F. Supp. 679 (D.N.D. 1944), *appeal dismissed*, 144 F.2d 354 (8th Cir. 1944); *United States ex rel. De Cicco v. Longo*, 46 F. Supp. 170 (D. Conn. 1942).

<sup>62</sup> *Citizens Protective League v. Byrnes*, 64 F. Supp. 233 (D.D.C. 1946). The issue was also raised in the Second Circuit in *United States ex rel. Von Heymann v. Watkins*, 159 F.2d 650 (2d Cir. 1947).

<sup>63</sup> *See, e.g.*, *United States ex rel. Stabler v. Watkins*, 168 F.2d 883 (2d Cir. 1948).

<sup>64</sup> *See, e.g.*, *United States ex rel. Hoehn v. Shaughnessy*, 175 F.2d 116 (2d Cir. 1949) (holding that there was an adequate opportunity to depart and denying the writ); *United States ex rel. Ludwig v. Watkins*, 164 F.2d 456 (2d Cir. 1947) (granting the writ); *United States ex rel. Von Heymann v. Watkins*, 159 F.2d 650 (2d Cir. 1947) (granting the writ). *See also* Neuman Brief, *supra* note 6, at 15 n.16.

Even where the government attempted to deport detained enemy aliens pursuant to federal immigration law, rather than the Alien Enemy Act itself, courts conducted searching habeas review into whether such actions were authorized.<sup>65</sup> At the same time, none of the myriad courts to apply the Act ever spoke to the burden of proof, and courts were left, for the most part, without any direction from the Supreme Court, which did not consider an alien enemy case until April 1948,<sup>66</sup> when it granted certiorari in the case of German enemy alien Kurt Ludecke.<sup>67</sup>

*Ludecke* raised a plethora of questions concerning the Alien Enemy Act, including its constitutionality, its post-hostilities operation (since, by the time the Court heard argument, it had been well over three years since Germany's unconditional surrender), and the nature of the review courts would conduct under the Act. The last question was what set *Ludecke* apart, for the district court had initially held that the government lacked "substantial evidence" to establish Ludecke's dangerousness.<sup>68</sup> Although the Second Circuit held that such a legal conclusion was foreclosed by precedent, it nevertheless equivocated, concluding:

We see no reason for discussing the nature or weight of the evidence before the Repatriation Hearing Board, or the finding of the Attorney General for the reason that his order is not subject to judicial review. However, on the face of the record it is hard to see why the relator should now be compelled to go back. Of course there may be much not disclosed to justify the step; and it is of doubtful propriety for a court ever to express an opinion on a subject over which it has no power. Therefore we shall, and should, say no more than to suggest that justice may perhaps be better satisfied if a reconsideration be given him in the light of the changed conditions, since the order of removal was made eighteen months ago.<sup>69</sup>

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<sup>65</sup> See, e.g., *United States ex rel. Sommerkamp v. Zimmerman*, 178 F.2d 645 (3d Cir. 1949); *United States ex rel. Bradley v. Watkins*, 163 F.2d 328 (2d Cir. 1947).

<sup>66</sup> In January 1948, a plurality of the Court held that a detained alien enemy *could* use habeas corpus to collaterally attack a conviction on Sixth Amendment grounds, but did not devote any discussion to the relevance *vel non* of the Alien Enemy Act. See *Von Moltke v. Gillies*, 332 U.S. 708 (1948) (plurality).

<sup>67</sup> As I have previously noted, see Vladek, *supra* note 9, at 78 n.108, the Court initially denied certiorari in *Ludecke*, only to change course four months later and grant certiorari upon rehearing, in similar fashion to the Supreme Court's curious disposition of the current *Boumediene* case. Compare *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (denying certiorari), with *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (granting rehearing and granting certiorari).

<sup>68</sup> See *Ludecke v. Watkins*, 335 U.S. 160, 165 n.8 (1948).

<sup>69</sup> *United States ex rel. Ludecke v. Watkins*, 163 F.2d 143, 144 (2d Cir. 1947), *aff'd*, 335 U.S. 160 (1948). The decision may also have received the Supreme Court's attention because of the composition of the panel, which included Judges Learned and Augustus Hand (the latter of whom authored the opinion) and Judge Thomas Walter Swan.

Notwithstanding the Second Circuit's suggestion to the contrary, the Supreme Court affirmed the lower court, 5–4, holding that the Act survived the end of the war, that it was constitutional as so construed, and that judicial review was limited only to the construction and validity of the statute's application to the jurisdictional facts. As Justice Frankfurter wrote for the majority:

Nor does it require protracted argument to find no defect in the Act because resort to the courts may be had only to challenge the construction and validity of the statute and to question the existence of the "declared war," as has been done in this case. The Act is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights. The fact that hearings are utilized by the Executive to secure an informed basis for the exercise of summary power does not argue the right of courts to retry such hearings, nor bespeak denial of due process to withhold such power from the courts.<sup>70</sup>

Although I have elsewhere criticized the *Ludecke* majority's resolution of the question whether the authority under the Alien Enemy Act continued after the end of hostilities,<sup>71</sup> and although Justice Black's dissent harped upon the limitlessness of the majority's due process holding,<sup>72</sup> of most relevance here is the third holding—that habeas was only available to challenge jurisdictional facts, including alienage, citizenship of a country with which the United States was at war, and age (as Frankfurter noted, the statute only applied to individuals fourteen years of age or older<sup>73</sup>). Justice Douglas, who joined in Justice Black's principal dissent, wrote separately to emphasize his disagreement with the majority over the proper scope of judicial review. As he concluded,

The inquiry in this type of case need be no greater an intrusion in the affairs of the Executive branch of government than inquiries by habeas corpus in times of peace into a determination that the alien is considered to be an "undesirable resident of the United States." Both involve only a determination that procedural due process is satisfied, that there be a fair hearing, and that the order be based upon some evidence.

The needs of the hour may well require summary apprehension and detention of alien enemies. A nation at war need not be detained by time-consuming procedures while the enemy bores from within. But with an alien enemy behind bars, that danger has passed. If he is to be deported only after a hearing, our constitutional requirements are that the hearing be a fair one. It is foreign to our thought to defend a mock hearing on the ground

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<sup>70</sup> *Ludecke*, 335 U.S. at 171–72 (footnotes omitted).

<sup>71</sup> See, e.g., Vladeck, *supra* note 9, at 77 & n.106.

<sup>72</sup> See *Ludecke*, 335 U.S. at 173–84 (Black, J., dissenting).

<sup>73</sup> *Id.* at 171 n.17.

that in any event it was a mere gratuity. Hearings that are arbitrary and unfair are no hearings at all under our system of government. Against them habeas corpus provides in this case the only protection.

The notion that the discretion of any officer of government can override due process is foreign to our system. Due process does not perish when war comes. It is well established that the war power does not remove constitutional limitations safeguarding essential liberties.<sup>74</sup>

Whatever the merits of Justice Douglas's impassioned dissent, Justice Frankfurter's opinion suggested an extremely narrow review, especially as compared with the review employed by Chief Justice Marshall in *Williams*. As Neuman and Hobson conclude,

It might be that the more limited character of the authority exercised by President Madison and Secretary Monroe in 1813 explains the different scope of review. Or it might be that judicial deference to the exercise of executive war powers by subordinate officials has increased since the early nineteenth century.<sup>75</sup>

Regardless, *Ludecke* nevertheless suggests that the courts remain open to enemy aliens during wartime, even if the review is somewhat narrower than that embraced by early jurists (and perhaps preferred by contemporary commentators). For persons whose status as alien enemies was genuinely in doubt, access to the courts—and meaningful judicial review—was never seriously contested, in *Ludecke* or elsewhere.

B. *“Enemies” and the Trading with the Enemy Act of 1917*

Whereas the Alien Enemy Act implicitly defined an “alien enemy” by stressing its applicability to “all natives, citizens, denizens, or subjects of the hostile nation or government,” the Trading with the Enemy Act of 1917 was far more explicit. As provided by section 2 of the Act, an “enemy,” within the meaning of the statute, included:

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

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<sup>74</sup> *Id.* at 186–87 (Douglas, J., dissenting) (citations omitted). Curiously, Justice Black did not join Justice Douglas's dissent, even though Justices Murphy and Rutledge joined the dissenting opinions of both Justices.

<sup>75</sup> Neuman & Hobson, *supra* note 10, at 44.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."<sup>76</sup>

Perhaps unsurprisingly, challenges to "enemy" status under the Trading with the Enemy Act looked quite similar to analogous challenges under the Alien Enemy Act, and courts often borrowed from the older statute's jurisprudence to guide their review. The vital difference between the statutes is that nothing in the Trading with the Enemy Act purported to limit judicial review of claims by enemy aliens. To the contrary, the Act embraced judicial review as the means by which to settle the alteration and disruption of property rights at the heart of the Act; indeed, the Act was enacted *in order to* allow resident enemy aliens to press certain civil claims in U.S. courts.<sup>77</sup> Thus, in an important early decision under the Act, then-District Judge Learned Hand upheld the statute from constitutional challenge while vigorously reviewing the question whether equity interpleader could lie for securities held in trust by the Alien Property Custodian.<sup>78</sup>

Other cases arising out of the First and Second World Wars were to similar effect.<sup>79</sup> Indeed, the only issue of jurisdictional fact that courts confronted on a routine basis was the application of section 7, which generally barred suits by non-resident enemy aliens or by enemy aliens "wherever residing" included by presidential proclamation. And as a unanimous Court emphasized in *Ex parte Kawato*, "the Trading with the Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all."<sup>80</sup>

Thus, in perhaps even stronger terms than the jurisprudence of the Alien Enemy Act, the Trading with the Enemy Act itself buttresses the conclusion that there simply is no tradition in American jurisprudence of

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<sup>76</sup> Trading with the Enemy Act § 2, ch. 106, 40 Stat. 411 (codified as amended at 50 U.S.C. app. § 2 (2000)).

<sup>77</sup> See *Ex parte Kawato*, 317 U.S. 69, 75–78 & n.7 (1942).

<sup>78</sup> See *Kahn v. Garvan*, 263 F. 909 (S.D.N.Y. 1920).

<sup>79</sup> See, e.g., *Vowinkel v. First Fed. Trust Co.*, 10 F.2d 19 (9th Cir. 1926); *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 F. 746 (2d Cir. 1922); *Nortz v. Miller*, 285 F. 778 (S.D.N.Y. 1921); *Salamandra Ins. Co. v. N.Y. Life Ins. & Trust Co.*, 254 F. 852 (S.D.N.Y. 1918).

<sup>80</sup> See *Kawato*, 317 U.S. at 76; see also *id.* at 78 n.14 ("The determination by Congress and the Executive not to interfere with the rights of resident enemy aliens to proceed in the courts marks a choice of remedies rather than a waiver of protection.").



excluding enemy aliens from the courts. As Justice Black explained in *Kawato*,

The original English common law rule, long ago abandoned there, was, from the beginning, objectionable here. The policy of severity toward alien enemies was clearly impossible for a country whose lifeblood came from an immigrant stream. In the war of 1812, for example, many persons born in England fought on the American side. Harshness toward immigrants was inconsistent with that national knowledge, present then as now, of the contributions made in peace and war by the millions of immigrants who have learned to love the country of their adoption more than the country of their birth.<sup>81</sup>

In assessing the jurisprudence of the Alien Enemy Act and the Trading with the Enemy Act, one last point bears mention: Although the Supreme Court in *Kawato* embraced a distinction between resident and non-resident enemy aliens, a distinction that tracked section 7 of the Trading with the Enemy Act, several of the Alien Enemy Act cases focused more on the nature, rather than the location, of the detention. Thus, individuals who were initially detained *outside* the United States were nevertheless entitled to judicial review, even where their contact with the United States was entirely involuntary.<sup>82</sup> In other words, at least in detention cases, the courts were entirely unaffected by whether the detainee was lawfully present within the United States or not.

### C. “Enemy Combatants”

It would be easy, of course, to dismiss all of the cases discussed above as dealing with a statutory definition of the word “enemy,” and therefore implicating the most straightforward form of judicial review. On such a view, all that the courts were doing in the cases summarized above was deciding whether a statute applied to a particular case, without in any way reaching more sensitive questions about the political branches’ resort to the war powers. Congress identified the countries with which the United States was at war, and the courts merely determined whether the relevant individual or company was a citizen thereof. It would also be easy to distinguish the above cases on the ground that both the Alien Enemy Act and the Trading with the Enemy Act were directed toward civilians—nationals of enemy countries, to be sure, but non-combatants under any definition of belligerency.

Thus, the harder case would be one where an individual or entity was identified by the Executive Branch as an “enemy” without the aid of any statutory definition, and where, at least according to the Executive Branch, the individual was not a “civilian.” Such a case—indeed, a

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<sup>81</sup> *Id.* at 73 (footnote omitted).

<sup>82</sup> *See, e.g.*, *United States ex rel. Von Heymann v. Watkins*, 159 F.2d 650, 652–53 (2d Cir. 1947).

number of such cases—arose soon after September 11, as the Bush Administration invoked a combination of its statutory and constitutional authority to detain terrorism suspects as “enemy combatants,” a term that, until recently,<sup>83</sup> has existed entirely devoid of statutory elaboration.<sup>84</sup> Moreover, the Authorization for Use of Military Force (AUMF),<sup>85</sup> enacted one week after the September 11 attacks, was no more specific, empowering the President to “use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>86</sup>

The first lawsuits challenging the detention of “enemy combatants” reached the federal courts in early 2002. Whereas the habeas petitions brought by non-citizens detained at Guantánamo Bay, Cuba were dominated from the start (as they remain today) by complicated jurisdictional issues,<sup>87</sup> the three suits brought by stateside detainees—*Hamdi*, *Padilla*, and *Al-Marri*—raised, from the beginning, the reviewability of the President’s determination that the detainee was, in fact, an “enemy combatant.” Because it was first chronologically, the case of U.S. citizen Yaser Esam Hamdi raised most prominently the threshold question of justiciability.

Hamdi, a U.S. citizen born in Louisiana in 1980, was captured by the Northern Alliance in Afghanistan sometime after the onset of hostilities in the fall of 2001. After his transfer to American custody, he was sent first to the detention facility at Guantánamo Bay before the government determined that he was a U.S. citizen, at which point he was transferred to a naval brig in Norfolk, Virginia.<sup>88</sup> Acting through his father and the Federal Public Defender as his next friends, Hamdi subsequently filed a habeas petition in the U.S. District Court for the Eastern District of

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<sup>83</sup> See *supra* note 14.

<sup>84</sup> See, e.g., Stephen I. Vladeck, Comment, *A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen “Enemy Combatants,”* 112 YALE L.J. 961, 961 n.5 (2003). The first publicly codified definition was contained within the July 2004 order establishing the Combatant Status Review Tribunals, which defined “enemy combatant” as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.” See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761 n.1 (2006).

<sup>85</sup> Pub. L. No. 107-40, 115 Stat. 224.

<sup>86</sup> *Id.* § 2(a) (to be codified at 50 U.S.C. § 1541 note) (emphasis added).

<sup>87</sup> Compare, e.g., *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002), *aff’d in part, rev’d in part*, 310 F.3d 1153 (9th Cir. 2002), and *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff’d sub nom. Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev’d*, 542 U.S. 466 (2004), with *Gherebi v. Bush*, 262 F. Supp. 2d 1064 (C.D. Cal.), *rev’d*, 352 F.3d 1278 (9th Cir. 2003), *vacated*, 542 U.S. 952 (2004), and *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004).

<sup>88</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–16 (2004) (plurality) (summarizing the background).

Virginia. What followed were a series of exchanges between the district court and the Fourth Circuit, which entertained three separate interlocutory appeals by the government after various district court orders finding standing, compelling unmonitored access to counsel, and ordering discovery.<sup>89</sup> Although the third such Fourth Circuit decision disposed of the petition on the merits—and gave rise to the Supreme Court’s involvement in the case<sup>90</sup>—it was the Court of Appeals’ *second* decision, in the summer of 2002, that is of the most significance here.

Specifically, the government’s argument on appeal was not just that the district court erred in granting Hamdi unmonitored access to counsel, but that the petition should be dismissed outright. As then-Chief Judge Wilkinson summarized:

In its brief before this court, the government asserts that “given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military’s determination that an individual is an enemy combatant and should be detained as such.” The government thus submits that we may not review at all its designation of an American citizen as an enemy combatant—that its determinations on this score are the first and final word.<sup>91</sup>

Concluding that “dismissal of the petition at this point would be as premature as the district court’s June 11 order,”<sup>92</sup> the Fourth Circuit remanded with instructions to “consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi’s case and make more intrusive measures unnecessary.”<sup>93</sup> The Fourth Circuit thus rejected the government’s argument that Hamdi’s claim that he was not an “enemy combatant” was not subject to judicial review, although it urged broad deference to the Executive Branch upon remand. The respite would prove only temporary, for the Fourth Circuit *would* order the dismissal of Hamdi’s petition after the district court, on remand, held that the government had not adduced sufficient evidence to support Hamdi’s classification and detention, and ordered further discovery.<sup>94</sup>

At the heart of the Fourth Circuit’s decision ordering dismissal of Hamdi’s petition was its conclusion that the government had a very low

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<sup>89</sup> See, e.g., *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002); *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir. 2002); *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002).

<sup>90</sup> See *Hamdi*, 316 F.3d 450 (4th Cir. 2003); see also *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (denying rehearing en banc).

<sup>91</sup> *Hamdi*, 296 F.3d at 283.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 284.

<sup>94</sup> See *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002). The district court certified to the Fourth Circuit the question whether the government’s affidavit, “standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi’s classification as an enemy combatant.” See *Hamdi*, 316 F.3d at 466.

evidentiary burden to surmount, and that the so-called “Mobbs Declaration,” an affidavit by a mid-level government official, was sufficient to carry that burden:

[B]ecause Hamdi was indisputably seized in an active combat zone abroad, we will not require the government to fill what the district court regarded as gaps in the Mobbs affidavit. The factual averments in the affidavit, if accurate, are sufficient to confirm that Hamdi’s detention conforms with a legitimate exercise of the war powers given the executive by Article II, Section 2 of the Constitution and, as discussed elsewhere, that it is consistent with the Constitution and laws of Congress. Asking the executive to provide more detailed factual assertions would be to wade further into the conduct of war than we consider appropriate and is unnecessary to a meaningful judicial review of this question.<sup>95</sup>

After concluding that Hamdi was not entitled to challenge the allegations in the Mobbs Declaration,<sup>96</sup> the court ordered dismissal of his petition, rather than remand. Thus, although the court rejected the government’s assertion that Hamdi could not seek review of his detention as an “enemy combatant,” it held that the government need only proffer an un-rebuttable affidavit to satisfy that review. Over two blistering dissents,<sup>97</sup> the Fourth Circuit denied rehearing en banc, and the Supreme Court granted Hamdi’s petition for certiorari in the fall of 2004.<sup>98</sup>

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<sup>95</sup> *Hamdi*, 316 F.3d at 473 (citations omitted).

<sup>96</sup> *See id.* at 473–76. Specifically, the court concluded that:

Where, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in a[] zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner’s detention. Because these circumstances are present here, Hamdi is not entitled to habeas relief on this basis.

*Id.* at 476.

<sup>97</sup> *See, e.g.*, *Hamdi v. Rumsfeld*, 337 F.3d 335, 357–68 (4th Cir. 2003) (Luttig, J., dissenting from the denial of rehearing en banc); *id.* at 368–76 (Motz, J., dissenting from the denial of rehearing en banc). Judge Luttig, in particular, was scathing in his criticism of the *Hamdi* panel, mocking its “decisional paralysis,” in resting its holding on a “ground . . . that is transparently indefensible—holding that Hamdi cannot challenge, and the court cannot question, the facts proffered by the government in support of Hamdi’s particular seizure and detention as an enemy combatant, for the asserted reason that Hamdi has *conceded* that he was seized in a foreign combat zone.” *Id.* at 358; *see also id.* (“In resting its decision on this factually and legally untenable ground, the panel reneged on the promises it hastily made to the parties at the litigation’s inception. It promised the citizen seized by the government ‘meaningful judicial review’ of his claim that he was not an enemy combatant. . . . But it ultimately provided that citizen a review that actually entailed absolutely no judicial inquiry into the facts on the basis of which the government designated that citizen as an enemy combatant.” (citation omitted)).

<sup>98</sup> *Hamdi v. Rumsfeld*, 540 U.S. 1099 (2004).

*D. Hamdi in the Supreme Court*

Much has already been written about the Supreme Court's landmark—and thoroughly fractured—decision the following June in *Hamdi*.<sup>99</sup> As relevant here, the otherwise divided Court<sup>100</sup> almost unanimously rejected the Fourth Circuit's conclusions that (1) the Mobbs Declaration was sufficient to justify Hamdi's detention as an "enemy combatant"; and (2) Hamdi should not have a meaningful opportunity to rebut the Declaration. After exhaustively recounting the relevant considerations, including application of the three-pronged due process test of *Mathews v. Eldridge*,<sup>101</sup> Justice O'Connor concluded that Hamdi was entitled to far more of an opportunity to challenge his "enemy combatant" status than that which had been provided:

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. . . . These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant

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<sup>99</sup> For just a few varied examples, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007); Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the post-Hamdi World*, 54 U. KAN. L. REV. 307 (2006); Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411 (2006); and Abigail D. Lauer, Note, *The Easy Way Out?: The Yaser Hamdi Release Agreement and the United States' Treatment of the Citizen Enemy Combatant Dilemma*, 91 CORNELL L. REV. 927 (2006). I have also suggested, in earlier writing, that *Hamdi* is a very dangerous precedent with respect to the post-hostilities issue leftover from *Ludecke*. See Vladeck, *supra* note 9, at 87–90, 93–94. That this Article, in contrast, praises *Hamdi* as an important affirmation of the reviewability of "enemy" determinations, is as much a testament to the little-bit-of-everything nature of the Court's decision in *Hamdi* as it is to my own mixed feelings about the result.

<sup>100</sup> Specifically, four Justices—Justices Stevens, Scalia, Souter, and Ginsburg—would have held that Hamdi's detention was not authorized, albeit for different reasons. See *Hamdi*, 542 U.S. at 539–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 554–79 (Scalia, J., dissenting). Justices Souter and Ginsburg concurred in the judgment solely for the purpose of creating a mandate, but made clear that they also agreed that Hamdi was entitled to greater process than that which he had received. See *id.* at 553–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). And Justice Thomas saw no problem with the decision below, and would have voted to affirm. See *id.* at 579–99 (Thomas, J., dissenting).

<sup>101</sup> 424 U.S. 319, 335 (1976) (holding that, in ascertaining the process due in any given instance, courts should weigh "the private interest that will be affected by the official action," "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the "risk of an erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government.<sup>102</sup>

Thus, although petitioners in Hamdi's position would face a high burden, it would be nowhere near as high as that suggested by the Fourth Circuit. The plurality went on to expressly reject the government's suggestion that judicial review during wartime should be circumscribed, concluding that "the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government."<sup>103</sup>

*Hamdi* therefore unequivocally suggests that, at least where U.S. citizens are concerned, due process requires meaningful access to the courts to challenge determinations of "enemy combatant" status, and a "fair opportunity" to rebut the government's allegations.

#### E. Hamdi and Non-Citizens

On the surface, *Hamdi* does not seem to have much to say about enemy *aliens* and access to the courts. The case, from the start, was narrowed to its specific facts—to the detention of a U.S. citizen captured in a "combat zone" as an enemy combatant.<sup>104</sup> And unlike with respect to

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<sup>102</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34 (2004) (plurality) (citations and footnote omitted).

<sup>103</sup> *Id.* at 535–36; *see also id.* at 536 ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.").

<sup>104</sup> *See, Hamdi v. Rumsfeld*, 316 F.3d 450, 465 (4th Cir. 2003) ("We shall, in fact, go no further in this case than the specific context before us—that of the undisputed

U.S. citizens, it is at least an open question *whether* the Constitution's Suspension<sup>105</sup> and Due Process<sup>106</sup> Clauses protect non-citizens held outside the United States, let alone the extent to which they do so.<sup>107</sup>

The purpose of this Article, though, is not to suggest that non-citizens have similar rights to judicial review as citizens, and that *Hamdi* therefore applies on its face to those "enemy combatants" held at Guantánamo Bay, Cuba.<sup>108</sup> Rather, *Hamdi*'s significance to the argument advanced herein is the extent to which it recognized that even an ill-defined concept of "enemy"—"enemy combatant"—could meaningfully be reviewed by the courts. That is to say, *Hamdi* provides a forceful counterargument to the notion that the judicial review of "enemy" status under the Alien Enemy and Trading with the Enemy Acts is limited to situations where "enemy" is defined by statute, or that the body of cases summarized above exclusively apply to civilians, rather than combatants. Leaving aside the harder—and ultimately more important—question of whether individuals have a *right* to such judicial review, *Hamdi* makes clear that even where "enemy" status is solely a creature of executive prerogative, and even where the detainee is alleged to be a belligerent, meaningful judicial review is not only possible, but in many cases constitutionally necessary.

In addition, *Hamdi* prompted the Bush Administration, shortly after it was handed down, to create Combatant Status Review Tribunals

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detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces."); *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring in the denial of rehearing en banc) ("To compare this battlefield capture to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges.").

<sup>105</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>106</sup> U.S. CONST. amend. V.

<sup>107</sup> This question is at the heart of the current litigation arising out of Guantánamo; the only remotely relevant precedent, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), provides support for the argument that neither the Suspension Clause nor the Due Process Clause confers enforceable rights upon non-citizens outside the territorial United States. *See also* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007); Hamdan v. Rumsfeld, 464 F. Supp. 2d 9 (D.D.C. 2006). *But see* Rasul v. Bush, 542 U.S. 466, 483 n.15 (2004) ("Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" (citation omitted)). For one counterargument focusing on the Suspension Clause, see Vladeck, *supra* note 4.

<sup>108</sup> To be fair, the argument that enemy citizens can be subjected to the same treatment as enemy aliens, a staple of the government's position in the *Hamdi* and *Padilla* cases, may itself cut both ways. *See, e.g.*, Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365 (2007). For reasons explained above, however, this issue is beyond the scope of the current project.

(CSRTs) at Guantánamo Bay, Cuba,<sup>109</sup> even if such proceedings were not made strictly necessary by *Hamdi* itself. The CSRTs are not without their own significant flaws,<sup>110</sup> but the principle for which they purportedly stand—that enemy combatants should have a chance to contest their status—is entirely consistent with prior precedent.

### III. *EL-SHIFA* AND THE ENEMY PROPERTY DOCTRINE

Perhaps surprisingly, the sole outlier, the only case where a federal court has held that the President's determination of "enemy" status is not subject to *any* judicial review, came two months *after* the Supreme Court decided *Hamdi*. In August 2004, the U.S. Court of Appeals for the Federal Circuit, in *El-Shifa Pharmaceutical Industries Co. v. United States*, rejected a takings claim brought by the owners of a Sudanese pharmaceutical plant that had been destroyed by the U.S. military in August 1998.<sup>111</sup> Invoking the "enemy property doctrine," the Federal Circuit held that then-President Clinton's determination that a Sudanese pharmaceutical plant was "enemy property" presented a nonjusticiable political question, even though it was arguably dispositive of the merits of the underlying takings claim.

Although the decision in *El-Shifa* was *sui generis*, the court's invocation of the political question doctrine is immensely significant, especially given its potential ramifications. Thus, before turning to the decision itself, a brief aside to retrace the origins and history of the enemy property doctrine seems warranted.

#### A. *The Enemy Property Doctrine*

The "enemy property doctrine," at its simplest, provides that "the United States does not have to answer under the Takings Clause for the destruction of enemy property."<sup>112</sup> As the Federal Circuit explained in *El-Shifa*, "A contrary rule that, by way of example, would require the government to provide compensation for the destruction of a vehicle (a tank, jet, etc.) used to engage United States armed forces in battle, strikes us as absurd in the extreme."<sup>113</sup>

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<sup>109</sup> For the order creating the CSRTs, see Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (regarding an "Order Establishing Combatant Status Review Tribunal").

<sup>110</sup> See Mark Denbeaux & Joshua Denbeaux, *No-Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* (2006), *available at* [http://law.shu.edu/news/final\\_no\\_hearing\\_hearings\\_report.pdf](http://law.shu.edu/news/final_no_hearing_hearings_report.pdf); see also Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667 (2006).

<sup>111</sup> See *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005).

<sup>112</sup> *Id.* at 1355.

<sup>113</sup> *Id.* at 1355–56.



One obvious point bears mentioning off the top—the example used by the Federal Circuit in *El-Shifa* is inapt; the Takings Clause, on its face, applies only to the taking of *private* property.<sup>114</sup> Nevertheless, it is a simple enough proposition, to be sure, that the capture and/or destruction of private property in an enemy country actively and directly engaged in hostilities against the United States during wartime cannot give rise to a just compensation claim under the Takings Clause. For example, it is difficult to see how a German company whose artillery plant was destroyed by U.S. bombers during World War II could have a legal remedy in American courts against the U.S. government.

Beneath this straightforward formulation of the rule, however, lies a complex and convoluted gray area replete with distinctions that, although difficult to make, are determinative of the applicability of the doctrine—of whether property is, in the first instance, “enemy property.” Can the property of a foreign state be “enemy” property, for instance, if the United States is not actively at war with that state? What about private property located in an “enemy” country with no military value, such as a school? Must the property possess certain characteristics to fall within the scope of the “enemy property doctrine”? Are courts even entitled to review any of the President’s determinations relating to enemy property, including who the “enemy” is? Indeed, the doctrine itself presents a question as to form that may well have substantive significance: Is the destruction of enemy property a taking that is noncompensable,<sup>115</sup> or is it not a taking *per se*?

The strange and obscure history of the doctrine provides little help in answering any of these questions. At its core, the enemy property doctrine is, in reality, a derivative of the enemy alien disability rule crossed with the doctrine of military necessity. As the Supreme Court explained after the Civil War<sup>116</sup> in *United States v. Russell*:

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<sup>114</sup> See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

<sup>115</sup> Cf. Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 289 (2001) (noting the difficulties inherent in differentiating between compensable takings and uncompensable exercises of the police power, including the power to tax).

<sup>116</sup> A few significant cases arose before the Civil War raising the application and scope of the military necessity doctrine. See, e.g., *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1852); *Perrin v. United States*, 4 Ct. Cl. 543 (1868), *aff’d*, 79 U.S. (12 Wall.) 315 (1871) (arising out of the 1854 Greytown incident). For contemporary discussions of *Perrin*’s significance, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861*, at 117–21 (2005); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 45 (2d ed., rev. 2004). See also ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 55–56 (1973).

The sheer volume of property confiscated and/or destroyed during the war, especially in the context of the comprehensive legislative property regimes enacted by both the Union and Confederate Congresses, gave rise to its own body of jurisprudence upon the war’s conclusion. For a wonderful modern recounting of the relevant issues, see DANIEL W. HAMILTON, *THE LIMITS OF SOVEREIGNTY: PROPERTY*

Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner.<sup>117</sup>

In such circumstances, however, “the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner.”<sup>118</sup>

### 1. Pacific Railroad

Fifteen years later, the Supreme Court would—perhaps unintentionally—carve out a newfound exception to the notion that takings in the name of military necessity would always be compensable. In *United States v. Pacific Railroad*,<sup>119</sup> the Court was confronted with a case arising out of the destruction of thirteen railroad bridges outside St. Louis in October 1864, either by the Confederate Army, or by the U.S. Army to prevent the advance of the rebel troops. After the war, the Pacific Railroad rebuilt nine of the bridges, and the U.S. Army rebuilt the other four. When the Pacific Railroad brought suit for unrelated funds it claimed it was owed by the U.S. government, the government attempted to offset the claim by the cost of the four bridges it had rebuilt for the railroad.<sup>120</sup> Citing *Russell* and *Mitchell v. Harmony*, Justice Field rejected the government’s argument, concluding that:

In what we have said as to the exemption of government from liability for private property injured or destroyed during war,<sup>[121]</sup> by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it

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CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR (2007). See also Harry N. Scheiber, *Property Rights Versus “Public Necessity”: A Perspective on Emergency Powers and the Supreme Court*, 28 J. SUP. CT. HIST. 339, 340 (2003).

<sup>117</sup> *United States v. Russell*, 80 U.S. (13 Wall.) 623, 627 (1871).

<sup>118</sup> *Id.* at 628.

<sup>119</sup> 120 U.S. 227 (1887); see also *Pac. R.R. v. United States*, 20 Ct. Cl. 200 (1885).

<sup>120</sup> See *Pac. R.R.*, 120 U.S. at 228–29.

<sup>121</sup> See *id.* at 234 (“The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss.”).

has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause.

While the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies.<sup>122</sup>

Thus, even though the Pacific Railroad's suit did not even *raise* the question of whether the destruction of property in conjunction with active combat operations would give rise to a takings claim, Justice Field clearly stated, albeit in dicta, that it would not.

## 2. Caltex

These matters stood until the aftermath of the Second World War,<sup>123</sup> when the Supreme Court expressly approved Justice Field's dicta in another case concerning the destruction of friendly, rather than enemy, property. At issue in *United States v. Caltex*<sup>124</sup> was the U.S. Army's destruction of oil terminal facilities in Manila in December 1941, to prevent the oil reserves from falling into the hands of the advancing Japanese Army. Although the government compensated the affected oil companies after the war for the oil stocks and the transportation equipment that were either used or destroyed by the Army, they refused to compensate the companies for the destruction of the terminal facilities themselves.<sup>125</sup> The oil companies brought suit in the Court of Claims, and prevailed on their Fifth Amendment just compensation claim.<sup>126</sup> On certiorari, the Supreme Court reversed, relying entirely on Justice Field's dicta from *Pacific Railroad*.

Writing for the Court, Chief Justice Vinson explained that:

It may be true that this language also went beyond the precise questions at issue. But the principles expressed were neither novel nor startling, for the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved. And what was said in the Pacific Railroad case

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<sup>122</sup> *Id.* at 239 (citations omitted).

<sup>123</sup> For one significant intervening case, see *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909). See also text accompanying *infra* note 127 (discussing *Juragua*).

<sup>124</sup> 344 U.S. 149 (1952).

<sup>125</sup> See *id.* at 150–52 (describing the background).

<sup>126</sup> *Caltex (Phil.), Inc. v. United States*, 100 F. Supp. 970 (Ct. Cl. 1951).

was later made the basis for the holding in *Juragua Iron Co. v. United States*, where recovery was denied to the owners of a factory which had been destroyed by American soldiers in the field in Cuba because it was thought that the structure housed the germs of a contagious disease.

Therefore, whether or not the principle laid down by Justice Field was dictum when he enunciated it, we hold that it is law today. In our view, it must govern in this case. . . .<sup>127</sup>

Justice Douglas, joined by Justice Black, dissented. In his view, “The property was destroyed, not because it was in the nature of a public nuisance, but because its destruction was deemed necessary to help win the war. It was as clearly appropriated to that end as animals, food, and supplies requisitioned for the defense effort.”<sup>128</sup> Thus, “the public purse[,] rather than the individual, should bear the loss.”<sup>129</sup> Without three more votes, however, Chief Justice Vinson’s view prevailed, and Justice Field’s *Pacific Railroad* dicta became law.

What *Caltex* suggests, then, is that there are two degrees of military necessity: “normal” military necessity, pursuant to which just compensation is available for the appropriation or destruction of *all* property—not just enemy property—during wartime; and “extreme” military necessity, pursuant to which *no* compensation is available for the appropriation or destruction of property as part of active battlefield military operations. Put differently, the relevant question after *Caltex* is not whether the property belongs to an “enemy” or not, but which version of the military necessity doctrine applies.<sup>130</sup> To whatever extent there was a freestanding “enemy property doctrine” prior to *El-Shifa*, such a doctrine was synonymous with the more extreme version of the military necessity doctrine.

### 3. *Turney and Extraterritorial Takings*

Before turning to *El-Shifa*, one final point should be noted: Although such a result may seem anomalous in juxtaposition to current debates over extraterritorial constitutional rights, it is the settled—if not uncontroversial—law of the Federal Circuit that non-citizens are protected by the Takings Clause even for takings that occur overseas. In *Turney v. United States*,<sup>131</sup> the Court of Claims held that the representative of a foreign corporation could recover for a taking by the United States

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<sup>127</sup> *Caltex*, 344 U.S. at 154 (footnote and citations omitted).

<sup>128</sup> *Id.* at 156 (Douglas, J., dissenting).

<sup>129</sup> *Id.*

<sup>130</sup> For a telling example of this bifurcation, see *National Board of Young Men’s Christian Ass’n v. United States*, 396 F.2d 467 (Ct. Cl. 1968), *aff’d*, 395 U.S. 85 (1969). See also *Morrison v. United States*, 492 F.2d 1219 (Ct. Cl. 1974); *Am. Mfrs. Mut. Ins. Co. v. United States*, 453 F.2d 1380 (Ct. Cl. 1972); *Franco-Italian Packing Co. v. United States*, 128 F. Supp. 408 (Ct. Cl. 1955).

<sup>131</sup> 115 F. Supp. 457 (Ct. Cl. 1953).

of the corporation's property located abroad.<sup>132</sup> Moreover, when the jurisdiction of the Court of Claims was divided between the Court of Federal Claims and the Federal Circuit in 1982, the successor courts each adopted its decisions as binding precedent.<sup>133</sup> Thus, *Turney*'s conclusion that the Takings Clause protects non-citizens abroad continues to bind the Federal Circuit today,<sup>134</sup> and required the court in *El-Shifa* to reach the reviewability of the takings claim, rather than holding that no such claim was protected by the Takings Clause.

#### B. El-Shifa

Although some of the specific facts giving rise to the *El-Shifa* litigation remain in dispute, the basic outline does not.<sup>135</sup> On August 7, 1998, a series of terrorist attacks were carried out against the U.S. embassies in Kenya and Tanzania, resulting in the deaths of over 300 individuals. Just under two weeks later, on August 20, President Clinton ordered retaliatory air strikes against purported terrorist targets in Afghanistan and the Sudan. One of those targets was a plant owned and operated by the El-Shifa Pharmaceutical Industries Company. Although President Clinton initially claimed that the plant was controlled by terrorists and was involved in the production of chemical weapons, it soon became clear that such intelligence was likely inaccurate, and that the plant was at least largely—if not entirely—dedicated to the production of consumer pharmaceuticals.

On behalf of the company, its principal owner, Salah El Din Ahmed Mohammed Idris, filed a pair of lawsuits—a takings claim for destruction of the plant in the Court of Federal Claims, and a claim under the Federal Tort Claims Act in the D.C. District Court alleging negligence on the part of the U.S. government.<sup>136</sup> With respect to the takings claim, the

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<sup>132</sup> The court reached a similar conclusion two years later in *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955). See also Note, *Executive Agreement Cannot Withdraw Consent to Be Sued; Just Compensation Clause Given Extraterritorial Operation*, 55 COLUM. L. REV. 926 (1955).

<sup>133</sup> See *S. Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (en banc) (“We hold that the holdings of our predecessor courts, the United States Court of Claims and the United States Court of Customs and Patent Appeals, announced by those courts before the close of business September 30, 1982, shall be binding as precedent in this court.”).

<sup>134</sup> *But see* *Atamirzayeva v. United States*, 77 Fed. Cl. 378 (2007) (holding that non-citizens must nevertheless have a substantial connection to the United States in order to have *standing* to pursue extraterritorial takings claims); LaFata, *supra* note 13 (arguing that *Turney* should be overruled).

<sup>135</sup> Except where otherwise noted, the following summary is taken from the Court of Claims' discussion in *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751 (2003), *aff'd*, 378 F.3d 1346 (Fed. Cir. 2004).

<sup>136</sup> After the Supreme Court denied certiorari to review the Federal Circuit's decision, the D.C. District Court dismissed El-Shifa's FTCA claim, concluding that the decision to destroy the plant fell within the discretionary function exception to the FTCA. See *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267 (D.D.C.

government moved to dismiss, arguing initially that (1) the Reciprocity Act<sup>137</sup> barred prosecution of El-Shifa's claims; (2) the claim was a maritime tort, falling within the exclusive admiralty jurisdiction of the district courts<sup>138</sup>; and (3) the Takings Clause did not apply to non-citizens overseas. At the court's invitation, the government subsequently added, as a fourth ground for dismissal: the military necessity doctrine.

Although the Court of Federal Claims rejected the first three grounds,<sup>139</sup> it relied upon the fourth. After exhaustively recounting the background and history of the military necessity doctrine,<sup>140</sup> the court found that it was not in a position to second-guess the President's determination that the pharmaceutical plant posed an "imminent threat to our national security."<sup>141</sup> As Judge Baskir wrote,

With their citation of what they describe as instances of official back-pedaling, Plaintiffs have gone a long way in demonstrating that the designation of El-Shifa as a chemical weapons plant associated with terrorism may have been tragically inaccurate. But notwithstanding the aftermath of the President's decision, for purposes of this lawsuit, we must defer to the President's designation.<sup>142</sup>

On appeal, the Federal Circuit affirmed Judge Baskir's opinion in its entirety, notwithstanding the Supreme Court's intervening decision in *Hamdi*.<sup>143</sup> In addition, whereas Judge Baskir had amorphously suggested that the President's designation was unreviewable, the Federal Circuit cast the issue more formally in terms of the political question doctrine, holding that the President's identification of the plant as "enemy property" presented a nonjusticiable political question, along the lines enunciated in *Baker v. Carr*.<sup>144</sup> Thus:

We are of the opinion that the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered

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2005); *see also* *El-Shifa Pharm. Indus. Co. v. United States*, Civ. No. 01-731 (RWR), 2007 WL 950082 (D.D.C. Mar. 28, 2007) (denying El-Shifa's Rule 59(e) motion to alter the judgment).

<sup>137</sup> *See* 28 U.S.C. § 2502(a) (2000) ("Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise within such court's jurisdiction.").

<sup>138</sup> 46 U.S.C. app. § 740 (2000), *repealed by* Pub. L. No. 109-304, 120 Stat. 1485 (2006).

<sup>139</sup> *El-Shifa*, 55 Fed. Cl. at 756-64.

<sup>140</sup> *See id.* at 764-72.

<sup>141</sup> *Id.* at 771.

<sup>142</sup> *Id.*

<sup>143</sup> *See* *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005).

<sup>144</sup> 369 U.S. 186 (1962) (setting forth a six-factor test for determining when lawsuits raise nonjusticiable political questions).

with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation's friends and which belong to its enemies. In our view, the Constitution envisions that the political branches, directly accountable to the People, will adopt and promulgate measures designed to ensure that the President makes the right decision when, pursuant to his role as Commander-in-Chief, he orders the military to destroy private property in the course of exercising his power to wage war. . . .

. . . .

Under these conditions, where the President's own assessment of the offensive posture of the Nation's enemies overseas leads him to conclude that the Nation is at risk of imminent attack, we cannot find in the Constitution any support for judicial supervision over the process by which the President assures himself that he has in fact targeted that part of the enemy's wealth of property that he thinks, if it were destroyed, would most effectively neutralize the possibility of attack. . . .<sup>145</sup>

As for *Hamdi* and the Supreme Court's apparent suggestion that courts *should* take more of an active role in the determination of "enemy" status during wartime, the Federal Circuit concluded its opinion by dismissing the significance of the Supreme Court's June 2004 decisions:

Unlike the enemy combatant designations at issue in *Hamdi* and *Rasul*, whose purpose was to invoke the President's power to detain indefinitely captured enemy combatants, the enemy property designation here was made in view of the President's "go/no go" decision regarding the use of force in what is deemed to be a foreign theater of war and in the face of what he perceived to be an imminent terrorist attack on the United States.<sup>146</sup>

Thus, *El-Shifa* suggests that the President's determination that foreign property is "enemy" property raises a nonjusticiable political question, no matter how much that determination is subsequently called into question.

### C. *El-Shifa's Shortcomings*

At the outset, the Federal Circuit's decision seems puzzling on several levels. First, the case law did not resolve whether a takings claim could lie for *mistaken* resort to military necessity. Thus, even if *El-Shifa's* allegations were ultimately proven correct, it is not clear why the military necessity doctrine would not still preclude recovery, unless the government acted in bad faith. (And if the government *did* act in bad faith, it is not clear why recovery should not lie.) That is to say, what is perhaps most remarkable about *El-Shifa* is the extent to which it is

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<sup>145</sup> See *El-Shifa*, 378 F.3d at 1365–66.

<sup>146</sup> *Id.* at 1369.

unclear whether the pharmaceutical plant's status as "enemy property" was even dispositive.

Second, especially so soon on the heels of *Hamdi*, the Federal Circuit's open-ended deference to the Executive Branch is difficult to fathom. In the Federal Circuit's view, the Executive Branch is free to designate *any* foreign property as "enemy" property, and then be absolved of any liability for the destruction thereof. The Federal Circuit's response was that the political process could be trusted to protect against abuses, but the very same logic was emphatically rejected in *Hamdi*, which arguably presented an even stronger case for such deference.<sup>147</sup> After all, as compared to U.S. citizens such as Hamdi, foreigners residing overseas are hardly in a position to exercise influence over the political process.<sup>148</sup>

Third, at least prior to *El-Shifa*, the military necessity doctrine had never distinguished between enemy property and friendly property; the only issue was the necessity of the taking. Indeed, whereas the Federal Circuit distinguished *Hamdi* and *Rasul* by noting that those cases raised the specter of ongoing detention away from the battlefield, the distinction works just as well in reverse: *El-Shifa* sought judicial recourse only *after the fact*, and therefore did not implicate the President's ongoing tactical battlefield authority.<sup>149</sup>

Fourth, there was a fairly substantial question as to whether property in a country with which the United States was *not* at war could be "enemy" property. In marked contrast to the decisions under the Alien Enemy Act and the Trading with the Enemy Act, which relied upon a declaration of war, the destruction of the Sudanese pharmaceutical plant was undertaken without any congressional authorization. In that context, one would have expected *more* searching judicial review into the determination by the Executive Branch, rather than less.

Finally, although the review ultimately proved illusory, the last point to make about *El-Shifa* is the thoroughness—if not the convincingness—of the courts' consideration of the relevant contentions. If there were *any* argument that individuals identified by the Executive Branch as enemies are generally barred from pressing their claims in federal court, one would have expected to see such an argument in *El-Shifa*. But both the Court of Federal Claims and the Federal Circuit implicitly sustained *El-Shifa's* ability to get into court even in the course of rejecting its claims. The flaw in the opinions was in the nature of the review—deferential to a fault.

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<sup>147</sup> See *supra* note 103 and accompanying text.

<sup>148</sup> Cf. *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938) (suggesting that judicial review is particularly important in cases involving "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989).

<sup>149</sup> We can analogize this distinction to the distinction between post-detention damages suits and habeas petitions. It is not difficult to conclude that the former raises far less of a threat to the President's authority than the latter.



## IV. CONCLUSION: ENEMIES AFTER SEPTEMBER 11

I do not mean by the above analysis to suggest that enemies, citizens or non-, foreign or domestic, have a constitutional right of access to the courts, either in detention cases or more generally. At least in the former context, I personally believe that they do,<sup>150</sup> but I also recognize, as I must, that my viewpoint is neither universally shared nor currently reflected in the case law.

Starting from the assumption, then, that no such constitutional right exists, one might well wonder what—if any—importance we can ascribe to the conclusion that American courts have a rich and long tradition of entertaining claims brought by enemies during wartime. A few observations come to mind:

*First*, statutory definitions are helpful. When Congress sees fit to define the class of individuals against whom particular powers may be invoked, the courts have a far easier job—and do far less violence to the separation of powers—by merely policing the limits of the statute. As the recent military commission decisions in the *Khadr* and *Hamdan* cases demonstrate,<sup>151</sup> even non-Article III jurists can meaningfully assess whether individuals are “unlawful enemy combatants” within the relevant statutory definition.

*Second*, for the reasons identified by Justice O’Connor in *Hamdi*, preclusion of review in cases such as *El-Shifa* in the name of deference to the executive during wartime “cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government.” Thus, there is at least some support for the proposition that preclusion of review may offend the separation of powers even in those cases where the individuals have few, if any, constitutional rights.

*Third*, as much as the tradition is in favor of judicial review of claims by enemies, the courts also have had a long experience with questions as to the scope of review, questions that are currently at the forefront of the Guantánamo cases.<sup>152</sup> Although the current cases raise the question of

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<sup>150</sup> See, e.g., Vladeck, *supra* note 4.

<sup>151</sup> See William Glaberson, *Military Judges Dismiss Charges for 2 Detainees*, N.Y. TIMES, June 5, 2007, at A1 (noting military commission decisions holding that the trial courts lacked the authority to decide whether defendants are “alien unlawful enemy combatants” under the Military Commissions Act, and are therefore subject to the jurisdiction of the military commissions). On appeal, the Court of Military Commission Review (CMCR) reversed. See *United States v. Khadr*, No. 07-001 (Ct. Mil. Comm’n Rev. Sept. 24, 2007), available at <http://www.scotusblog.com/movabletype/archives/CMCR%20ruling%209-24-07.pdf>. The CMCR’s decision is presently on appeal to the D.C. Circuit.

<sup>152</sup> See, e.g., *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) (establishing the scope of the D.C. Circuit’s review of Combatant Status Review Tribunal decisions under the Detainee Treatment Act of 2005), *as amended on denial of reh’g*, 503 F.3d 137 (D.C. Cir. 2007).

what is constitutionally required, there is still much to learn from the decisions from the First and Second World Wars with respect to burdens of proof, types of admissible evidence, and other relevant considerations. These cases, in point of fact, are not as unprecedented as we are often led to believe.

*Fourth*, and perhaps most importantly, there simply is no traditional bar on access to the courts for enemies during wartime, *particularly* where the principal issue is whether the individual at issue is, in fact, an “enemy.” Whether Congress can preclude such access goes to the question of whether the individual at issue has constitutional rights that might be infringed by such preclusion. But absent such affirmative action by Congress, the default is that American courts have always been open to status challenges by enemies, and have even entertained certain procedural claims where enemy status was *not* at issue. It may be a tradition that some find disturbing, but it is a tradition the existence of which is, once we properly consider the relevant history, beyond dispute.