

Policy Comment

A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen “Enemy Combatants”

In 1971, Congress repealed the Emergency Detention Act, part of the Internal Security Act of 1950,¹ by writing into 18 U.S.C. § 4001(a) the provision that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”² Enacted amid mounting public pressure during the Vietnam War, § 4001(a) sought to “restrict the . . . detention of citizens of the United States to situations in which statutory authority for their incarceration exists.”³ At the time, it represented a legislative response to the outrage over the executive internment of Japanese Americans during World War II, detentions carried out pursuant only to a presidential order.⁴ Today, § 4001(a) represents a bar to the Bush Administration’s current policy of detaining U.S. citizens as “enemy combatants,” absent congressional authorization, without charges and without access to counsel or the courts.⁵

1. Pub. L. No. 82-831, 64 Stat. 987 (1950) (codified as amended in scattered sections of 50 U.S.C.).

2. 18 U.S.C. § 4001(a) (2000); *see also* Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347 (codifying the present incarnation of § 4001(a)).

3. H.R. REP. NO. 92-116, at 1 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435.

4. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (excluding Japanese Americans from the West Coast and ordering their relocation to remote camps). Congress never explicitly authorized the internment, although it implicitly consented by criminalizing violations of the Order. *See, e.g.*, Act of Mar. 21, 1942, Pub. L. No. 77-503, ch. 191, 56 Stat. 173, *repealed by* Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, § 21, 62 Stat. 683, 868; *see also* *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding a conviction for violating the 1942 Act and finding the Act and Executive Order 9066 to be constitutional).

5. There is no formal statement of this policy in the *Federal Register* or any other official source. Perhaps the best statement comes from President Bush’s June 9, 2002, order declaring Jose Padilla, a U.S. citizen, to be an enemy combatant, an unclassified version of which is available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush60902det.pdf>.

This Comment analyzes that policy in light of the current force of § 4001(a) and *Howe v. Smith*, the 1981 Supreme Court decision that embraced an expansive reading of the antidetention statute.⁶ Since, under *Howe*, § 4001(a) applies to *all* U.S. citizens regardless of “enemy combatant” status,⁷ the only remaining issue is whether Congress authorized the detentions in question. After tracing the history of § 4001(a), this Comment evaluates, and finds inadequate, the Administration’s various justifications for the detention of U.S. citizens as “enemy combatants.” The analysis concludes that, in the absence of clear congressional authorization, the detention policy not only violates § 4001(a) but also shows complete disregard for the deeper purpose behind this provision’s enactment and the fundamental separation of powers principles manifested therein.

I

In the twenty-one years it was on the books, the Emergency Detention Act was never invoked to detain U.S. citizens without charges. Nevertheless, as the House Judiciary Committee noted, “[a]lthough no President has ever used or attempted to use these provisions, the mere continued existence of the Emergency Detention Act has aroused much concern among American citizens, lest the Detention Act become an instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views.”⁸ The legislative history demonstrates that the Committee was concerned that mere repeal of the Detention Act would send an ambiguous message about presidential power. Hence, the Report continued, “it is not enough merely to repeal the Detention Act. . . . Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority.”⁹ Thus, the 1971 Act added § 4001(a), with the clear understanding that “imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists.”¹⁰

6. 452 U.S. 473 (1981).

7. See NEAL R. SONNETT ET AL., ABA TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, PRELIMINARY REPORT 10-11 (2002), at <http://www.abanet.org/poladv/letters/exec/enemycombatantreport.pdf>.

8. H.R. REP. NO. 92-116, at 2, reprinted in 1971 U.S.C.C.A.N. at 1436. The Detention Act authorized the incarceration of citizens suspected of sabotage in connection with any “internal security emergency.” See FIONA DOHERTY ET AL., LAWYERS COMM. FOR HUMAN RIGHTS, A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11, at 35 (2002), available at http://www.lchr.org/us_law/loss/loss_report.pdf (examining the intent behind the Detention Act); see also *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1133, 1317 n.133 (1972) [hereinafter *Developments in the Law*] (same).

9. H.R. REP. NO. 92-116, at 4, reprinted in 1971 U.S.C.C.A.N. at 1438; see also *Developments in the Law*, supra note 8, at 1293 n.39 (highlighting the specific congressional intent in repealing the Detention Act).

10. H.R. REP. NO. 92-116, at 2, reprinted in 1971 U.S.C.C.A.N. at 1436.

The Supreme Court affirmed such a broad reading in the only case it has considered involving a § 4001(a) claim, upholding, in *Howe v. Smith*, a transfer of state prisoners to federal custody.¹¹ At issue was whether the transfer under 18 U.S.C. § 5003(a)—which authorizes the Attorney General to contract with states for the detention of state inmates in federal prisons—was authorized in circumstances other than those where there was a need for specialized treatment available only in the federal system.¹² Howe argued that, as a state prisoner, his detention was not authorized by Congress, and § 4001(a) thus precluded his transfer. The Court disagreed. Relying on the legislative history of § 5003(a), along with the construction adopted by the Bureau of Prisons, the Court affirmed the legality of the practice, finding that § 5003(a) was sufficiently explicit congressional authorization for Howe's transfer to satisfy the demands of § 4001(a).¹³

The most important pronouncement in *Howe*, however, came as dicta in a footnote. The government had initially claimed that Howe, as a state prisoner, lacked standing because he was not a federal prisoner; he was merely serving his sentence in a federal prison. Chief Justice Burger, writing for the Court, disagreed:

This argument . . . fails to give adequate weight to the plain language of § 4001(a) proscribing detention *of any kind* by the United States, absent a congressional grant of authority to detain. If the petitioner is correct that neither § 5003 nor any other Act of Congress authorizes his detention by federal authorities, his detention would be illegal.¹⁴

Thus, the Court set an unequivocal standard for § 4001(a): It applies to *any* federal detention of a U.S. citizen, and such detentions are manifestly illegal if not legislatively authorized.

II

In the aftermath of the terrorist attacks of September 11, 2001, the policy of detaining U.S. citizens without access to counsel or the courts as

11. 452 U.S. 473.

12. See 18 U.S.C. § 5003(a) (1974). The Seventh Circuit, in *Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978), had already read § 5003(a) to allow transfers only where a need for specialized treatment uniquely available in the federal prisons could be demonstrated. Howe was transferred to federal custody because Vermont's Department of Corrections had determined that he should serve his life sentence in a maximum security facility, and, at the time, the state did not have any such facility suitable for long-term incarceration. See *Howe*, 452 U.S. at 476-79 (discussing the factual background); see also *Howe v. Civiletti*, 625 F.2d 454, 455-56 (2d Cir. 1980) (same).

13. *Howe*, 452 U.S. at 483-86. The only dissent came from Justice Stewart, who believed that there was no independent cause of action and that Howe should instead have filed a habeas petition based on § 4001(a). *Id.* at 487.

14. *Id.* at 479 n.3.

“enemy combatants” has brought a renewed focus on § 4001(a),¹⁵ along with arguments from the government for why it does not apply, or, if it does, why *Howe*’s requirements are fulfilled.

In particular, as of this writing, the Administration has pursued that policy with regard to two U.S. citizens: Yasser Esam Hamdi, who was transferred to U.S. custody from the Northern Alliance in Afghanistan in the fall of 2001,¹⁶ and Jose Padilla, the so-called “dirty bomber,” who was arrested on a material witness warrant outside Chicago’s O’Hare International Airport on May 8, 2002.¹⁷ Hamdi was subsequently transferred to Camp X-Ray—the temporary detention facility for noncitizens at Guantanamo Bay, Cuba—in January 2002, before it was determined that he was an American citizen. After that discovery, in April 2002, he was transferred to the Naval Brig in Norfolk, Virginia, where he has since been held without charges.¹⁸ Padilla was in civilian custody for just over one month before he was determined to be an “enemy combatant” and transferred to military detention.¹⁹ Since then he has been held without charges at the Consolidated Naval Brig in Charleston, South Carolina.²⁰

In the absence of an official statement of the policy, the government’s justifications for Hamdi’s and Padilla’s detentions are best culled from three different sources: Attorney General John Ashcroft’s answers to questions from Senator Russell Feingold during a July 25, 2002, hearing before the Senate Judiciary Committee;²¹ the government’s July 24, 2002, reply brief to Hamdi’s habeas petition;²² and the government’s October 11,

15. See, e.g., DOHERTY ET AL., *supra* note 8, at 56-59; SONNETT ET AL., *supra* note 7; Beverley Lumpkin, *Detention Law: “Enemy Combatants” and 18 U.S.C. § 4001(a)*, ABCNEWS.COM, July 20, 2002, at <http://more.abcnews.go.com/sections/us/hallsofjustice/hallsofjustice131.html>.

16. See Petition for Writ of Habeas Corpus at 3, *Hamdi v. Rumsfeld* (E.D. Va. June 11, 2002) (No. 02-439) [hereinafter *Hamdi* Habeas Petition], available at <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums61102pet.pdf>.

17. See Amended Petition for Writ of Habeas Corpus at 4-5, *Padilla ex rel. Newman v. Bush* (S.D.N.Y. June 19, 2002) (No. 02-4445) [hereinafter *Padilla* Habeas Petition], available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush61902apet.pdf>.

18. *Hamdi* Habeas Petition, *supra* note 16, at 4.

19. The so-called “Mobbs Declaration,” and not President Bush’s June 9th order, serves as the government’s determination of Padilla’s status. An unclassified version of the Declaration is available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush82702mobbs.pdf>. For Hamdi, a similar declaration, also by Michael H. Mobbs, Special Advisor to the Undersecretary of Defense for Policy, serves as the legal determination. See Declaration of Michael H. Mobbs, Exhibit 1 Attached to Respondents’ Response to, and Motion To Dismiss, the Petition for a Writ of Habeas Corpus, *Hamdi v. Rumsfeld* (E.D. Va. July 24, 2002) (No. 02-439) (on file with author) [hereinafter *Hamdi* Reply Brief]. In both cases, the government is arguing that Mobbs’s determination is not subject to judicial review.

20. *Padilla* Habeas Petition, *supra* note 17, at 6.

21. *Oversight of the Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong., 2002 WL 1722725 (2002) [hereinafter *Oversight Hearing*].

22. *Hamdi* Reply Brief, *supra* note 19, at 11-13.

2002, reply brief to Padilla's amended habeas petition.²³ Taken together, the sources suggest three different challenges to the application of § 4001(a).

The first argument, as Ashcroft summarized in response to questioning from Senator Feingold, asserts that “[t]he president’s authority to detain enemy combatants, including U.S. citizens, is based on his commander-in-chief responsibilities under the Constitution, not provisions of the criminal code. . . . Section 4001(a) does not . . . interfere with the president’s constitutional power as commander-in-chief.”²⁴ Second, as the government argues in Hamdi’s case, “even if Section 4001 were susceptible to a different interpretation, [a] Court’s duty would be to adopt the facially reasonable—if not textually compelled—interpretation that Section 4001 is addressed to civilian, rather than military detentions.”²⁵

Finally, the government suggests that, even if § 4001(a) *does* apply, there is explicit congressional authorization, both via the Use of Force Authorization passed in response to the September 11th attacks²⁶ and through 10 U.S.C. § 956, the general authorization measure for all military detentions.²⁷

23. Respondents’ Reply in Support of Motion To Dismiss the Amended Petition for a Writ of Habeas Corpus at 16-19, Padilla *ex rel.* Newman v. Bush (S.D.N.Y. Oct. 11, 2002) (No. 02-4445) [hereinafter *Padilla* Reply Brief], available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush101102grply.pdf>.

24. *Oversight Hearing*, *supra* note 21 (statement of Attorney Gen. John Ashcroft); see also *Hamdi* Reply Brief, *supra* note 19, at 11 (“[N]othing in Section 4001 suggests that Congress sought to intrude upon the ‘long . . . established’ authority of the Executive to capture and detain enemy combatants in war time.”). For this point, the government relies on a statement from then-Congressman Abner Mikva, during the debate over the 1971 Act, that “nothing in the House bill . . . interferes with [the Commander-in-Chief] power, because obviously no act of Congress can derogate the constitutional power of a President.” See *Padilla* Reply Brief, *supra* note 23, at 18 n.4 (quoting 117 CONG. REC. 31,555 (1971)); *Oversight Hearing*, *supra* note 21 (statement of Attorney Gen. John Ashcroft). Both citations take Mikva’s words out of context, however, since Mikva qualified his statement with the caveat that it was only true “[i]f there is any inherent [constitutional] power of the President . . . to authorize the detention of any citizen of the United States.” 117 CONG. REC. 31,555 (1971) (statement of Rep. Abner Mikva) (emphasis added). Much of Mikva’s statement suggests he was skeptical that such power existed. See *id.* at 31,556.

Even taken out of context, there are two serious problems with the argument derived from Mikva. First, the President’s authority during “war time” is irrelevant to the present policy, since neither Hamdi nor Padilla was detained during a period of congressionally declared war. Second, even if there were a state of declared war, the argument that the President derives detention power directly from the Commander-in-Chief Clause, U.S. CONST. art. II, § 2, cl. 1, directly conflicts with *Ex parte Quirin*, 317 U.S. 1, 27 (1942), which clearly located the President’s power to detain and try unlawful combatants during wartime in Congress’s Articles of War and *not* in the Constitution. Under *Quirin*, then, a President’s detention power derives from the Constitution only to the extent that it is delegated by Congress.

25. *Hamdi* Reply Brief, *supra* note 19, at 12. The interpretation would be “reasonable” because § 4001(b) deals explicitly with the Attorney General’s control over civilian prisons. *Id.*; see also *Oversight Hearing*, *supra* note 21 (statement of Attorney Gen. John Ashcroft) (“No court has ever construed 4001(a) to apply outside the context of civilian detention . . .”).

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

27. *Oversight Hearing*, *supra* note 21 (statement of Attorney Gen. John Ashcroft); see also *Padilla* Reply Brief, *supra* note 23, at 16-17 (arguing that § 956(5) authorizes the detention). Textually, § 956(5) allows the use of funds appropriated to the Defense Department for “expenses

III

Each of the government's arguments fails for the same reasons. None takes notice of the Supreme Court's decision in *Howe*, nor of most of the arguments given here suggesting that § 4001(a) was explicitly meant as a limitation on the President's power to detain U.S. citizens. Furthermore, the assertion that a court's duty is "to adopt the facially reasonable—if not textually compelled—interpretation that Section 4001 is addressed to civilian, rather than military detentions" is completely incorrect under the most basic rules of statutory interpretation. The Supreme Court, in *Howe*, adopted a definitive interpretation of § 4001(a), under which the provision applies to *all* federal detentions.³⁰ Arguing that U.S. citizen enemy combatants are not subject to § 4001(a) thus runs contrary to the law's legislative history, the only case where it was interpreted by the Supreme Court, and even, to some extent, *Ex parte Quirin*,³¹ the case that created the "enemy combatant" distinction in the first place.³²

Indeed, *Quirin* is a double-edged precedent for the government. There, the Supreme Court, in upholding the constitutionality of military tribunals for eight suspected Nazi saboteurs, simultaneously held that one of the suspects, although a U.S. citizen, could be brought before such a court, but that the government could not preclude the privilege of the writ of habeas corpus.³³ Suffice it to say that it is not at all obvious that *Quirin* can be read to authorize detentions of U.S. citizens absent authorization from Congress, especially since, in *Quirin*, there *was* legislative approval.³⁴ It certainly cannot be read to justify the preclusion of habeas review, since the Court ruled explicitly to the contrary.

What remains, therefore, is the argument that the detentions *are* legislatively authorized, which, in the government's *Hamdi* brief, relies on the facts that Hamdi was detained in Afghanistan during the course of

incident to the maintenance, pay, and allowances of . . . persons detained in the custody of the Army, Navy, or Air Force pursuant to Presidential proclamation." 10 U.S.C. § 956 (2001). It does not authorize the detentions themselves.

30. As the Supreme Court established in *Flood v. Kuhn*, 407 U.S. 258 (1972), statutory precedents are evaluated with a significant presumption of stare decisis. See generally William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) ("Statutory precedents . . . often enjoy a super-strong presumption of correctness.").

31. 317 U.S. 1.

32. See generally Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1280-83 (2002) (describing *Quirin*'s shortcomings).

33. *Quirin*, 317 U.S. at 24-25, 36-38.

34. Indeed, the Court specifically noted the existence of such authorization. *Id.* at 26-27; see also SONNETT ET AL., *supra* note 7, at 8-9 (highlighting other problems with *Quirin* as a precedent for detaining "enemy combatants").

military action and that the President's war powers give him widespread authority over the military theater.³⁵ Such an argument, in turn, relies on the Ninth Circuit's 1946 decision in *In re Territo*,³⁶ in which the appellate court held that a U.S. citizen fighting for an enemy army could constitutionally be detained as a prisoner of war. However, *Territo*, which based its holding on *Quirin*'s blurring of the distinction between combatants who were U.S. citizens and those who were not, still does not provide a means around § 4001(a), since World War II prisoners of war were detained pursuant to the Articles of War, a clear congressional authorization.

Hence, in World War II, U.S. citizens at arms against the United States were either detained legally as POWs (according to *Territo*) or tried legally before military tribunals as "unlawful combatants" (according to *Quirin*).³⁷ There was *no* middle ground for "enemy combatants" to be held indefinitely without a judicial remedy.³⁸ Thus, Hamdi's classification conflates the two legal categories recognized by the courts during World War II so as to deny him both POW rights and access to the courts, and is therefore a measure unsupported by any judicial or legislative precedents.

Yet if the government's justification for the continuing detention of Hamdi is problematic, it is all the more so for Padilla because he was not a battlefield detainee. Indeed, it would clearly violate the spirit of § 4001(a), if not its plain language, to read the Use of Force Authorization (which approved the military action in *Afghanistan* but said nothing about domestic activity) as signaling acquiescence in Padilla's detention.⁴⁰

35. See *Hamdi* Reply Brief, *supra* note 19, at 6-9, 19 n.9.

36. 156 F.2d 142 (9th Cir. 1946).

37. The only other World War II era case that upheld a military tribunal conviction of a U.S. citizen for spying is *Colepaugh v. Looney*. 235 F.2d 429 (10th Cir. 1956).

38. *Quirin*, 317 U.S. at 31 ("Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.").

40. As this Comment went to press, Chief Judge Michael B. Mukasey of the Southern District of New York handed down the bulk of his decision on Padilla's habeas petition, including his determination that § 4001(a) applies to the detentions of U.S. citizens as enemy combatants and that, in Padilla's case, it is satisfied by the Use of Force Authorization. See *Padilla ex rel. Newman v. Bush*, No. 02-4445, 2002 WL 31718308, at *27-30 (S.D.N.Y. Dec. 4, 2002).

Judge Mukasey interpreted the Use of Force Authorization to "authorize[] action against not only those connected to the subject organizations who are directly responsible for the September 11 attacks, but also against those who would engage in 'future acts of international terrorism' as part of 'such . . . organizations.'" *Id.* at *30 (quoting Authorization for Use of Military Force § 2(a)). Yet Mukasey's interpretation is hardly dispositive, since the language of the Authorization suggests that it applies to future acts only to the extent that the capture of those responsible for the September 11th attacks would prevent future attacks by those persons. Authorization for Use of Military Force § 2(a) ("[T]he President is authorized to use all necessary and appropriate force against those . . . he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism.").

Regardless of Mukasey's interpretation, however, there is a separate—and far more important—conclusion implicit within his decision that closely tracks the argument here: The

IV

In his 1998 book on wartime civil liberties, Chief Justice Rehnquist made the rather banal observation that “[t]he government’s authority to engage in conduct that infringes civil liberty is greatest in time of declared war.”⁴¹ Whereas forests have already been felled on the question of whether the ongoing “war against terror” constitutes a “declared” war for purposes of constitutional law,⁴² the Chief Justice used that statement partly to justify the omission of the Vietnam War from his 254-page study. Yet it was in the midst of the undeclared war in Vietnam that Congress precluded the possibility of a future chief executive repeating one of the darker moments in the history of the U.S. government’s treatment of its own citizens—the internment of over 100,000 Japanese Americans in detention camps⁴³—by enacting § 4001(a). The point is not that Congress meant to preclude the detention of U.S. citizens as “enemy combatants” *per se*; the point is that such detentions cannot be based on a unilateral decision by the executive branch. In that regard, § 4001(a) is a manifestation of the most foundational—and most fundamental—separation of powers principles.

On October 16, 2002, California Congressman Adam Schiff introduced⁴⁴ the Detention of Enemy Combatants Act,⁴⁵ which explicitly authorizes the detention of U.S. citizens as enemy combatants so long as they are members of al Qaeda or have willingly cooperated with a terrorist network in the planning of an attack against the United States. Such an act would exemplify the authorization sought by § 4001(a)⁴⁶ and embody the separation of powers principles highlighted herein.⁴⁷ Its passage is unlikely, yet its mere existence is a statement in and of itself—Congress knows how to authorize the detention of U.S. citizen enemy combatants, if it so desires.

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legality of the detention of U.S. citizen enemy combatants such as Padilla rests *entirely* on whether or not it is authorized by Congress. It is troubling—and worth revisiting on appeal—to read the Authorization as the type of clear congressional acquiescence sought by § 4001(a), but it is highly significant that Mukasey looked to Congress *at all*.

41. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 218 (1998).

42. *See, e.g.*, Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 346-50 (2002).

43. *See generally* Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649 (1997) (outlining the background of *Korematsu* and its progeny).

44. *See* THOMAS, Bill Summary & Status for the 107th Congress, H.R. 5684, at <http://thomas.loc.gov> (last visited Nov. 22, 2002).

45. H.R. 5684, 107th Cong. (2002).

46. Indeed, the bill explicitly makes reference both to § 4001(a) and to *Howe*. *Id.* § 2(11).

47. *Id.* § 2(14) (“Nothing in this Act permits the Government, even in wartime, to detain American citizens . . . as enemy combatants indefinitely without charges and hold them incommunicado without a hearing and without access to counsel . . .”). The bill assures that detainees have access to counsel and are eligible to petition for habeas relief. *Id.* § 2(15).