# Chapter 15 - Military Detention before 9/11

## Review Alien Enemy Act – page 425

## Korematsu v. United States, 323 U.S. 214 (1944)

### Who was detained?

### Where were they detained?

### What if they were on the East Coast?

### What was the rationale for why they posed a danger to the US?

### Did subsequently declassified data support this claim?

### Can you think of other reasons the detention was important?

### What happened to the detainee's property?

### Did the United States Supreme Court say the detention was unconstitutional?

### Was it a unanimous opinion?

### Why did Justice Jackson say he was more worried about the opinion upholding the order than the order itself?

### Has it subsequently been overruled by the United States Supreme Court?

### Do you think it could happen again?

### What does the Enemy Alien Act say?

### Why do you think Roosevelt did not use?

### How about Bush post 9/11?

## Ex parte Mitsuye Endo, 323 U.S. 283 (1944)

### Endo is a fascinating case that explains the basis for the use of internment camps and the system for granting leave to detained persons:

#### "When compulsory evacuation from the West Coast was decided upon, plans for taking care of the evacuees after their detention in the Assembly Centers, to which they were initially removed, remained to be determined. On April 7, 1942, the Director of the Authority held a conference in Salt Lake City with various state and federal officials including the Governors of the inter-mountain states. 'Strong opposition was expressed to any type of unsupervised relocation and some of the Governors refused to be responsible for maintenance of law and order unless evacuees brought into their States were kept under constant military surveillance.' As stated by General De Witt in his report to the Chief of Staff:

#### 'Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger of action in concert during any attempted enemy raids along the coast, or in advance thereof as preparation for a full scale attack, would be eliminated. That the evacuation program necessarily and ultimately developed into one of complete Federal supervision, was due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration.'"

### The court found in Endo that once the government had decided that a detained individual was a loyal citizen and eligible for release, their statutory authority to detain was ended and the person must be released.

### Was Korematsu really a failure of the hearing process problem?

## Ex parte Quirin, 317 U.S. 1 (1942)

### Who are lawful combatants?

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### What is the classic example of an unlawful combatant?

### How does the legal treatment differ for lawful and unlawful combatants?

### Where did the court find the legal authority for the military tribunals?

### What courts are used for offenses by military personnel?

### What if the unlawful combatant is a US citizen?

### How did the court distinguish ex parte Milligan?

## Think about our discussions about the problems of deciding when an imperfect war ends and who is a combatant. What problems does this pose in figuring out what Quirin means in the war on terror?

## What did Congress add to the traditional law allowing trials by military tribunals in the wake of Hamdan?

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

### What is the narrow issue before the court?

### Does the court find that Congress has in fact authorized Hamdi’s detention?

### What question does this save the court from having to answer?

### Did the Court find that citizens could be held as foreign combatant?

### Did the court approve indefinite detention?

### What did the court set as an indicator of when the right to detain might end in this case?

### The government says it caught Hamdi in Afghanistan, that alone is proof he is an enemy combatant. Did the court agree?

### What standard did the government urge the court to use to review the factual basis of Hamdi's detention?

### What test did the court use?

### How does that work?

### What is Hamdi’s ‘‘private interest"?

### What does the court assume about the legality of detention as a basis for its analysis?

### Why?

### What danger is the government worried about when it detains Hamdi?

### What is the administrative cost argument?

### What balance does the Court find?

### Does this mean right when the person is detained?

### What sort of evidence might have to be admitted?

### Is this unusual in an administrative hearing?

### Could the statute create a presumption in favor of the government's evidence?

### What does this parallel in administrative law?

### When does the court say that the some evidence standard is appropriate?

### Is this predicate present in Hamdi?

### Does the court rule out using a military tribunal as the independent reviewer for a habeas corpus proceeding?

### What Act did the dissent find undermined the right to hold Hamdi?

### What is the text of the Act?

### How did the president layout the process for the Korematu detentions?

### What does the dissent say about why whether these are allowed?

### What does this dissent say about the power given the president by the Force Resolution authorizing the war on terror?

### Is the president complying with this limit?

### What is evidence of this?

### What is the US Patriot Act an acronym for?

### What does Justice Scalia say the court's should require?

### What question does this lead Scalia to ask?

### How was United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002) disposed of?

### What is the Suspension Clause and when does it apply?

### What does Scalia think of the claims by the President that he has the authority to try citizens held on US soil, with a military tribunal?

### Given this, why was Scalia so skeptical about Rasul?

### How did Scalia distinguish Quirin?

### How is Hamdi different?

### What is only basis for denying habeas corpus to a citizen on US soil that Scalia would accept?

### Who is covered by Scalia's argument that the only constitutional remedy is criminal prosecution?

### How can the government evade this?

### How did Thomas's dissent different from Scalia?

### What finally happened to Hamdi?

### What justification did the Court give for the government's continued right to hold Padilla, once the case had been heard in the correct district court?

### What purpose did this court say is not served by criminal prosecution rather than detention?

# Chapter 16 - Military Detention After 9/11

## This is where we sort out authority for detention, now that we have worked out who gets habeas corpus.

### Does it matter if there is authority if you do not get habeas and the Alien Tort Claims act is dead?

## Remember Quirin – what did it tell us about who could be detained and under what authority?

## Does Quirin tell us anything about indefinite detention?

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

### What is Hamdi’s claim to citizenship?

### Where was he captured?

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### What question does this save the court from having to answer?

### Did the Court find that citizens could be held as foreign combatant?

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### What standard did the government urge the court to use to review the factual basis of Hamdi's detention?

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### What is the text of the Act?

### How did the president lay out the process for the Korematu detentions?

### What does the dissent say about whether these are allowed?

### What does this dissent say about the power given the president by the AMUF authorizing the war on terror?

### Is the president complying with this limit?

### What is evidence of this?

### What is the US Patriot Act an acronym for?

### What does Justice Scalia say the court should require?

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### How was United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002) disposed of?

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## Notes and Questions

### 1 The AMUF

#### How would the “Affirmation of Armed Conflict with Al-Qaeda, the Taliban, and Associated Forces” (p 465) affect the detention analysis in Hamdi?

#### Does it terminate when we leave Afghanistan and Iraq?

### 2 - 4. The Greater Includes the Lesser?

#### A lower court in a separate detention case understood this to reflect the Supreme Court’s belief that ‘‘detention alone . . . [is] certainly the lesser of the consequences an unlawful combatant could face.’’ Is this really true?

## Jose´ Padilla

### Review chart on 470

### How did the 4th Cir finally resolve the case?

## Ali Saleh Kahlah al-Marri

### How did al-Marri end up in detention?

### What did the “Rapp Declaration’’ assert?

### What were the two parts of the spit opinion in the en banc appeal of his habeas corpus petition?

### Al-Marri v. Pucciarelli, 534 F. 3d 213 (DCC 2008

#### Motz – arguments against the AUMF as authority for the detention.

##### What does the Rapp Declaration not assert?

##### How broadly does she say the government is reading the AUMF?

##### What is her charity example?

##### How does she read Hamdi and Padilla?

##### The other detentions were ‘‘classic wartime detention’’ (Hamdi) or the ‘‘classic battlefield’’ detention (Padilla) How was this detention decision made?

##### In international law terms, what is the classification for the conflict in Afghanistan?

##### What does this pose a problem with enemy combatants?

##### Where does the Common article three look for the law of detention in nonintenational conflicts?

##### What is that law in the US?

##### Can enemy combatants be tried for crimes?

##### Even if Congress could grant the power of detention in this circumstance, does the AUMF do it?

##### What does the Patriot Act allow?

##### How is this short term detention limited?

#### The due process problem

##### What process was he denied?

#### What happened on remand?