

Enemy Combatant Determinations and Judicial Review

By

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*The Federalist Society
for Law and Public Policy Studies*

The Federalist Society takes no position on particular legal or public policy initiatives. All expressions of opinion are those of the author or authors. We hope this and other white papers will help foster discussion and a further exchange regarding current important issues.

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I. INTRODUCTION

Over the past several months, an increasing number of al Qaeda operatives has been captured or detained in the United States. Many of them are American citizens. The treatment of these individuals has been relatively non-controversial in cases, such as that of Zacarias Moussaoui – the “twentieth hijacker” – where the Executive Branch has determined to proceed against them through the criminal justice system. As criminal defendants before the federal courts, they receive all of the rights guaranteed to the accused under Article III of the Constitution, and the Bill of Rights, including the right to a public trial by jury and to counsel. The government has, however, chosen not to prosecute (at least for the present) some of the individuals detained because of their alleged association with al Qaeda or the Taliban. As a result, these individuals have not been given access to counsel, or the other rights appropriate to criminal defendants. They have, instead, been classified as “enemy combatants,” and held as military prisoners.

The treatment of these detained enemy combatants has led a number of advocacy groups, such as the Lawyers Committee for Human Rights, Human Rights Watch, and the American Civil Liberties Union, as well as some members of the organized bar, to claim that the Bush Administration has sacrificed constitutionally-protected civil liberties to the exigencies of the war on terror. For example, Kenneth Roth, the Executive Director of Human Rights Watch, has charged that “[t]he president is claiming unfettered power to circumvent the justice system and its safeguards of basic rights.” See Human Rights Watch News, “U.S. Circumvents Courts With Enemy Combatant Tag,” (Jun. 12, 2002). See also ACLU Press Release, “ACLU Calls Victory for Right to Counsel in Enemy Combatant Case Positive Step,” Dec. 4, 2002 (statement of Lucas Guttentag, Director, ACLU Immigrant’s Rights Project, Administration has claimed the “almost unbridled power to unilaterally detain American citizens and hold them indefinitely and incommunicado.”), <http://www.aclu.org/NationalSecurity/NationalSecurity>; Lawyers Committee for Human Rights, *A Year of Loss: Reexamining Civil Liberties Since September 11* (Sept. 5, 2002), http://www.lchr.org/us_law/loss/loss_report.pdf.

In fact, however, the Administration’s treatment of individuals associated with al Qaeda or the Taliban, who have been captured and/or detained within the United States as “enemy combatants,” including its refusal to permit these individuals to consult with counsel, is very well-grounded in established legal principles. The complaints voiced by the Government’s critics are based more on their unwillingness to accept the legal and policy consequences of the

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state of armed conflict in which the United States is now engaged, than in any excessive zeal, or an alleged latent hostility to civil rights and liberties, by the Bush Administration.

It is well-settled, in both international and U.S. domestic law, that individuals captured in war may be detained during the conflict and that they are not entitled to all of the elaborate due process rights guaranteed to criminal defendants. (These include the right to retain and consult with counsel.) The enemy combatants detained in the war against terror, like other prisoners taken in war before them, have not been subjected to a criminal justice process. Their confinement is not for purposes of punishment or deterrence. Rather, it is to ensure that they do not return to the fight against the United States. If criminal charges are actually brought against any of the detainees, they will be entitled to counsel, and all of the other process that is due, at that time.

II. The Status of “Enemy Combatant.”

A. What is an Enemy Combatant?

The status of “enemy combatant” has a long history under the laws and customs of war.¹ It generally can be defined as anyone fighting for the other side in the context of an armed conflict. Where two states are at war, this means their armed forces since, as one standard work explains: “[t]he state is represented in active war by its contending army, and the laws of war justify the killing or disabling of members of the one army by those of the other in battle or hostile operations.” William Winthrop, *Military Law and Precedents* 778 (2d ed. 1920). Traditionally, an individual is considered to become an enemy combatant at the point he becomes subject to the authority of a state’s armed force: “So soon as a man is armed by a sovereign government and takes the soldiers oath of fidelity he is a belligerent.” Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, reprinted in 7 John Moore, *A Digest of International Law* 173, H.R. Doc. No. 56-551 (1906).

At the same time, however, the category of “combatant” is broader than combat troops, or even regularly enlisted personnel. In fact, the category – which is, perhaps, better connoted by the interchangeable but less confusing term “enemy belligerent” – incorporates many individuals who have neither military training nor perform a combat role. As the Hague Convention of

¹ Claims that the Bush Administration has either invented or misapplied this term, see Certification Order and Stay at 5, *Hamdi v. Rumsfeld, et al.*, No. 2:02cv439 (E.D.Va. Aug. 21, 2002), are incorrect. As the United States Court of Appeals for the Fourth Circuit recently noted, the term enemy combatant “has been used by the Supreme Court many times.” See *Hamdi v. Rumsfeld*, 2003 U.S. App. LEXIS 198, at *15, n.3 (4th Cir. Jan. 8, 2003) (citing *Madsen v. Kinsella*, 343 U.S. 341, 355 (1952); *In re Yamashita*, 327 U.S. 1, 7 (1946); *Ex parte Quirin*, 317 U.S. 1, 31 (1942)). It also has a long pedigree in non-U.S. sources. See, e.g., British War Office, *Manual of Military Law 1929*, Amendments (No. 12), ch. XIV, section III, at 12-13 (1929) (The means of reducing an enemy's "powers of resistance are:-- Killing and disabling the *enemy combatants*; constraining them by defeat or exhaustion to surrender, that is taking them prisoners.") (emphasis added) [hereinafter *British Manual*].

1907 Respecting the Laws and Customs of War on Land, With Annex of Regulations, to which the United States is a party, makes clear, “[t]he armed forces of the belligerent parties may consist of combatants and non-combatants.” See Convention (No. IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex of Regulations, art. 3, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 (entered into force Jan. 26, 1910) (“The armed forces of the belligerent parties may consist of combatants and non-combatants.”) [hereinafter “Hague Convention” or “Hague Regulations”]; see also United States Department of the Army, *The Law of Land Warfare FM 27-10* (1956), at para. 62 (“[t]he armed forces of the belligerent parties may consist of combatants and noncombatants.”) [hereinafter “Army Field Manual”]; *British Manual*, *supra* note 1, at ¶ 21 (“[b]oth combatant and non-combatant members of the armed forces are included in the above categories [defining the armed forces of a belligerent].”). Individuals who are subject to capture and detention as enemy combatants include, for example, “civil persons engaged in military duty or in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transports and military railways.” Winthrop, *supra* at 789.

Moreover, in addition to their regular armed forces, states may employ irregular forces in warfare, or may simply find themselves facing such forces as independent antagonists. Such forces include guerillas, or other armed bands like al Qaeda, who fail to meet the four basic criteria for “lawful” combatant status. These are as follows: (1) to have a responsible command structure; (2) to wear a fixed distinctive emblem recognizable at a distance; (3) to carry arms openly; and (4) to operate in accordance with the laws and customs of war.² These criteria derived from the customary characteristics of a regular army, were first codified in the Brussels

² In addition, it should be noted, that even if al Qaeda met these requirements, its members still would not merit the status of “lawful combatants” because al Qaeda, as a group, never had the legal right to use force in the first instance. The law of armed conflict limits this right to sovereign states, and does not authorize, or immunize, violence by private individuals, whether acting alone or in association with other private individuals. See, e.g., Winthrop, *supra*, at 782 (“[i]t is the general rule that the operations of war on land can legally be carried on only through the recognized armies or soldiery of the State as duly enlisted or employed in its service.”); Emmerich de Vattel, *The Law of Nations, or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* 591, bk. 3, ch. 15 (Dublin, Luke White ed. 1792) (1758) (“The right of making war... belongs alone to the sovereign power; which not only decides whether it be proper to undertake the war, and declare it, but likewise directs all the operations. ... Therefore subjects cannot act herein of themselves, and without the sovereign's order they are not to commit any hostility.”). Although there have been efforts to erode this principle – most notably in the 1977 Protocol I Additional to the Geneva Conventions of August 12, 1949, the United States has rejected these efforts, and is not bound by them. See e.g., Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, And Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, 1977 U.S.T. LEXIS 465 (Jan. 29, 1987) (“Protocol I is fundamentally and irreconcilably flawed. . . . [it] would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war.”).

Declaration of 1874, and subsequently restated in both the Hague Regulations and the Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949. *See* The Brussels Declaration, Article IX, July 27, 1874, *reprinted in The Laws of Armed Conflicts* 25 (Dietrich Schindler & Jiri Toman eds., 3d. ed. 1988); Hague Regulations, *supra*, Art. 1; Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter “Geneva Convention”]. Individuals associated with a group that does not comply with these conditions are considered to be “unlawful” enemy combatants. As the Supreme Court noted in *Ex parte Quirin*, 317 U.S. 1, 31 (1942), the “Nazi Saboteur” case, like lawful combatants, unlawful combatants are “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.” As is the case with lawful enemy combatants, the category of unlawful combatant is broad enough to encompass actual combat fighters, as well as individuals who act as spies, saboteurs, or “terrorists.”³

This is true regardless of their citizenship. In *Quirin*, for example, one of the captured German agents claimed U.S. citizenship on account of his parents’ naturalization. His claim made no difference to the Court’s analysis: “Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.” 317 U.S. at 37. Similarly, in the case of *In re Territo*, 156 F.2d 142 (9th Cir. 1946), the United States Court of Appeals for the Ninth Circuit ruled that an American citizen, captured while serving in the Italian army during World War II, was not entitled to be released merely because of his citizenship, and could be detained for the duration of the war.⁴

B. The Determination of Enemy Combatant Status.

Thus, it is clearly established in American law that an individual, including a United States citizen, can properly be classified as an enemy combatant even though he is not regularly enrolled in a belligerent’s armed forces and is not an actual fighter. This, of course, suggests a very broad category indeed. However, it is not limitless. The critical characteristic suggested

³ In *Quirin*, for example, the captured German agents were not regularly enlisted in the German army, but had been recruited and trained as saboteurs. There were, nevertheless, considered enemy combatants by President Roosevelt, a designation accepted, and ultimately upheld, by a unanimous Supreme Court.

⁴ This conclusion is not affected by 18 U.S.C. § 4001(a), which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” As the Fourth Circuit recently noted on this point, “[t]here is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant he is.” *Hamdi v. Rumsfeld*, 2003 U.S. App. LEXIS 198, at *31. Moreover, even assuming that 18 U.S.C. § 4001(a) is applicable to detained enemy combatants, its conditions have been fully satisfied with respect to the war on terror. Congress has both authorized the use of force against al Qaeda and the Taliban, in Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), an “inherent” part of which is the capture and detention of enemy combatants. *See* 2003 U.S. App. LEXIS 198, at *29.

both by the laws and customs of war, and by the Supreme Court's precedent, for an "enemy combatant" is some form of formal or informal subordination to the direction of a belligerent. Thus, although the Nazi saboteurs in *Quirin* were not regularly enrolled in the German army, they were nevertheless dispatched to the United States as agents of Germany. The question in the present conflict is whether any particular individual is similarly under the direction or control of al Qaeda or the Taliban.

In the first instance, this question can be answered only by the President, or by his delegates in the Executive Branch.⁵ As the Supreme Court ruled almost a century and a half ago, it is the President, as Commander-in-chief, who must determine whether those who threaten the United States have "the character of belligerents." Once that decision is made, the courts "must be governed by the decisions and acts of the political department of Government to which this power was entrusted." See *The Amy Warwick* ("Prize Cases"), 67 U.S. (2 Black) 635, 670 (1862). This rule was emphatically reaffirmed most recently by the United States Court of Appeals for the Fourth Circuit, which noted in the Yaser Hamdi case that:

In accordance with [the]constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs. [Citations omitted.] This deference extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle. The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2. As far back as the Civil War, the Supreme Court deferred to the President's determination that those in rebellion had the status of belligerents.

Hamdi v. Rumsfeld, 296 F.3d 278, 281-82 (4th Cir. 2002). It is, in fact, undeniable that the President, or the United States military acting under his authority, has exercised this power countless times throughout the Republic's history. The Commander-in-chief's right to capture and detain enemy combatants has been accepted as a given in every conflict in which the United States has engaged since adopting the Constitution, and Washington exercised this authority as Commander-in-chief during the War for Independence. This includes the Civil War, where

⁵ Article 5 of the Geneva Convention, upon which a number of the Bush Administration's critics have relied to claim that detainees in the United States, or those held at Guantanamo Bay, Cuba, are entitled to a hearing on their status, does not alter this constitutional distribution of power. Even in instances where Article 5 actually applies, *i.e.*, where there is doubt regarding the status of an individual claiming association with the forces of a lawful belligerent, the resolution of that doubt remains within the province of the Executive Branch. The Geneva Convention itself merely requires that such doubts be resolved by a "competent tribunal." It does not purport to dictate the character of that tribunal, or whether it is judicial or executive in nature.

thousands of United States citizens, captured fighting for the Southern States, were detained in Federal prison camps.⁶

Moreover, in the current conflict, the President acts with the express authorization of Congress, and need not rely solely upon his inherent authority as Commander-in-chief. In the aftermath of the September 11, 2001 attacks, Congress enacted legislation authorizing 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.” Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). In this regard, the Fourth Circuit has explained: “capturing and detaining enemy combatants is an inherent part of warfare; the “necessary and appropriate force” referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops.” *Hamdi v. Rumsfeld*, 2003 U.S. App. LEXIS 198, at *29. The court also observed that

[f]urthermore, Congress has specifically authorized the expenditure of funds for ‘the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined. . . to be similar to prisoners of war.’ 10 U.S.C. § 956(5) (2002). It is difficult if not impossible to understand how Congress could make appropriations for the detention of persons ‘similar to prisoners of war’ without also authorizing their detention in the first instance.

Id. Whatever the extent of the President’s inherent authority to capture and detain enemy combatants as Commander-in-chief, he acts with the very fullest measure of authority when Congress has, in addition, approved his actions. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (concurrence of Justice Jackson).

Nevertheless, it was the unilateral nature of the President’s individual detainee-specific exercise of this authority that troubled both the District Court in *Hamdi v. Rumsfeld*, and the Administration’s critics who argue that there must be some judicial process accorded to individual enemy combatants. Unfortunately, by insisting that either the enemy combatant determinations be made only through some form of adjudicative process, or that detained combatants be promptly charged with specific offenses, the President’s critics have sought to transform what is inherently a unilateral process, designed for the exigencies of war and carried

⁶ In fact, during World War II, the United States detained 425,000 Axis POWs on American soil. *See* Jodi Wilgoren, “Some Captives Recall a War and Forget Hostilities,” *N.Y. Times*, Sept. 27, 2002, at A24 (“425,000 prisoners of war, mostly German, [were] held in camps in the United States”). The only reported case in which this authority was directly challenged appears to have been *In re Territo*, where the court emphatically reaffirmed the President’s authority to hold captured enemy combatants prisoner, even if they are United States citizens.

out by the Executive Branch, into a replica of the criminal justice system, or simply to have that system applied.⁷ The criminal justice model, however, is inappropriate to these circumstances.

This is not to deny that a unilateral Executive Branch decision to detain an individual, especially an American citizen, is a departure from the ordinary constitutionally-prescribed relationship between the government and the people. However, although the Constitution certainly applies during war, the balance between the rights of the individual and the needs of society as a whole changes – both as a legal and practical matter. As Chief Justice Rehnquist has noted, the laws are not silent in wartime, but they “speak with a somewhat different voice.”⁸ This reordering of priorities is not in derogation of liberty, but a means of defending it. In this regard, as the Fourth Circuit has observed, in explaining the imperative of judicial deference to the Executive’s decisions regarding enemy combatants that, this wartime balance also protects liberty:

The deference that flows from the explicit enumeration of powers protects liberty as much as the explicit enumeration of rights. The Supreme Court has underscored this founding principle: “The ultimate purpose of this separation of powers is to protect the liberty and security of the governed.” [Citations omitted.] Thus, the textual allocation of responsibilities and the textual enumeration of rights are not dichotomous, because the textual separation of powers promotes a more profound understanding of our rights. For the judicial branch to trespass upon the exercise of the war-making powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical. This right of the people is no less a right because it is possessed collectively.

Hamdi, 2003 U.S. App. LEXIS 198, at *23. Of course, even in wartime, the President remains subject to powerful checks and balances, both constitutional and political, exercised by Congress, the media and public opinion. Moreover, as discussed below with respect to the right of a captured enemy combatant to habeas corpus proceedings, the courts do have a role.

III. The Post-Classification Rights of a Captured Enemy Combatant.

As a general matter, once an enemy combatant has been made prisoner, his legal rights depend very much upon whether or not he qualified as a lawful combatant. Lawful combatants

⁷ To be sure, the President’s discretion could be exercised in a variety of ways, some of which may be better than others. For example, having multiple levels of review of any enemy combatant classifications by the increasingly more senior Executive Branch officials, rather than relying solely on the initial battlefield judgment of the soldiers who captured a given enemy belligerent, has much to recommend. By all accounts, this is precisely what the Administration is doing. However, this and other intra-Executive Branch review procedures stem from “good government”-related considerations and are not mandated by any constitutional imperatives.

⁸ William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* 224 (1998).

are entitled to the rights and privileges of prisoners of war (“POW”). In instances where the 1949 Geneva Conventions are applicable – as where both belligerents are either parties to the treaty, or have otherwise agreed to be bound by its provisions, those rights are very considerable. They include, among other things, the right to be detained in healthful areas, segregated according to nationality, with allowances for national habits and customs, and to have access to canteens where they may “procure foodstuffs, soap and tobacco.” See Geneva Convention, *supra*, Arts. 22, 25, 28. POWs must be permitted to wear their badges, and must be treated with due regard for their rank and age. They are even entitled to advances of pay. *Id.* at arts. 40, 44, 60. In short, it is the purpose of the Geneva Convention to ensure that POWs are, at all times, treated as honorable men of war who have had the misfortune of falling into their enemy’s hands.

Unlawful combatants, by contrast, are not entitled to the protection of the Geneva Convention, or to POW status under customary international law. They enjoy only a general entitlement to humane treatment. However, regardless of these important differences in the conditions of their detention, neither lawful nor unlawful captured enemy combatants are entitled to the due process rights guaranteed to a criminal defendant until and unless they are actually charged with a crime. This is because the capture and detention of enemy combatants is not a criminal proceeding. The purpose of their detention (including the detention of unlawful combatants) is not to punish, nor is it to otherwise stigmatize the individual. The detention of enemy combatants is solely to ensure that they do not rejoin the fight, or continue to support the opponent’s war effort. As noted by one authority: “[c]aptivity [in wartime] is neither a punishment nor an act of vengeance, but merely a temporary detention which is devoid of all penal character.” Winthrop, *supra*, at 788 (quoting British War Office, *Manual of Military Law* (1882)). Accord *British Manual*, *supra* note 1, at 248-49 (“The object of the internment [of prisoners] is solely to prevent prisoners participating further in the war.”).

Of course, if criminal charges are brought against a prisoner, then he is entitled to due process protections, the precise nature of which depends upon his status. A legal combatant, with the rights of a “POW” under the Geneva Conventions, is guaranteed a number of due process rights if the detaining power chooses to press criminal charges against him. These include the rights:

- * to be informed of the charges against him, as well as documents that would normally be communicated to an accused in the detaining power’s armed forces.
- * to have the assistance of a fellow prisoner.
- * to defense counsel of his own choice.
- * to call witnesses and to the services of an interpreter.
- * to be visited by, and have private interviews with, his counsel.

See Geneva Convention, *supra*, Arts. 84, 105.

Unlawful combatants, even though they do not enjoy the status of POWs under the Geneva Convention, also are entitled to some basic due process rights when faced with criminal prosecution. The exact extent of these rights, which are based in customary international law, is unclear. However, the practice of the war crimes trials after World War II suggest that, at a minimum, an unlawful combatant facing prosecution must be informed of the charges and have an opportunity to make a defense.⁹ Moreover, under the laws of the United States, the individual would be entitled to all of the rights guaranteed by the Constitution to criminal defendants if, like Zacarias Moussoui, he were prosecuted in the Article III courts. On the other hand, if the individual fell within the ambit of the President's Military Order of November 13, 2001 on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 *Fed. Reg.* 57,833 (2001), establishing military commissions, he would be entitled to the due process rights established in accordance with that order. These rights, fully outlined in the Department of Defense Military Commission Order No. 1 (March 21, 2002), are equivalent to those applicable in court martial proceedings under the Uniform Code of Military Justice, including the right to counsel.

However, under both international and domestic U.S. law, these due process rights attach only if and when a criminal charge is brought. An individual who is taken into custody as an enemy combatant does not have the right to contest his detention through criminal trial procedures. This is true even when a lawful combatant, entitled to POW treatment under the Geneva Convention is involved. There has, in fact, been a good deal of confusion on this point based on Article 5 of the Geneva Convention. Article 5 (which, of course, applies only in instances where the Geneva Convention is itself applicable), provides that

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Geneva Convention, *supra*, Art. 5.

The purpose of this provision, however, is not to require a judicial process through which a captive can challenge his or her status as an enemy combatant. In fact, Article 5 assumes that the individual is an enemy combatant, having "committed a belligerent act and having fallen into the hands of the enemy." Rather, it was adopted to ensure that captured enemy combatants were not summarily punished in the field (as unlawful combatants) in cases where it was not immediately obvious, based on their uniforms and identifying papers, whether they were entitled to POW treatment. As explained by the International Committee of the Red Cross in its

⁹ See generally, Lee A. Casey, David B. Rivkin, Jr., & Darin R. Bartram, *Detention and Treatment of Combatants in the War on Terrorism* 7-9 (Federalist Society 2002). The Supreme Court ruled in *Quirin* that unlawful combatants, captured in the United States, could be tried before a military commission. It did not, however, address the question of what procedural rights were required.

commentaries on the Geneva Convention, “[t]his would apply to deserters, and to persons who accompany the armed forces and have lost their identity card.” See International Committee of the Red Cross, Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention III Relative to the Treatment of Prisoners of War 77 (1960) [hereinafter ICRC Commentary]. In any case, since al Qaeda is not a party to the Geneva Convention, this provision is inapplicable to those detainees who are al Qaeda’s members.¹⁰

IV. The Application of Habeas Corpus and the Right to Counsel

A. The Application of Habeas Corpus Proceedings.

The one avenue through which a captured enemy combatant, detained in the United States, may challenge his confinement is through habeas corpus proceedings.¹¹ As a general rule, federal courts can issue the writ if a prisoner “is in custody under or by the color of the authority of the United States.” 28 U.S.C. §2241(c)(1). Although the Supreme Court has never specifically addressed the issue whether captured enemy combatants, who have not also been the subject of criminal charges, can contest their detention in habeas proceedings, the lower federal courts have permitted such challenges, at least in cases involving American citizens detained in the United States.¹² Most recently, the Fourth Circuit, in dismissing Yaser Hamdi’s petition for the writ, noted that “[t]he detention of United States citizens must be subject to judicial review,” and that “[i]n war as in peace, habeas corpus provides one of the firmest bulwarks against unconstitutional detentions.” *Hamdi*, 2003 U.S. App. LEXIS 198, at *23. See also *In re Territo*, 156 F.2d 142 (9th Cir. 1946) (U.S. citizen permitted to challenge his detention as a POW during World War II.)

The appellate court in *Hamdi* went on to described the process as follows:

¹⁰ With respect to the Taliban, the United States has taken the position that they benefit from the Geneva Convention’s general requirement of humane treatment, because Afghanistan is a party. Article 5, however, also does not benefit Taliban members since the President already has determined that, as a group, the Taliban are unlawful combatants not entitled to the rights of POWs. The only “doubt” that could now arise would be whether a particular individual was actually associated with the Taliban. In the *Hamdi* case, it was conceded that the detainee was taken into custody when his Taliban unit surrendered. There was no doubt in that case.

¹¹ This assumes that the individual is held in the United States. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court ruled that several German nationals, convicted of World War II war crimes by a U.S. military commission in China, could not obtain judicial review by seeking habeas relief.

¹² In *Quirin*, of course, the petitioners were principally challenging their trial and capital convictions by military commission. The same is true of the landmark Civil War case of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), where the Court permitted a civilian U.S. citizen to challenge his capital conviction by a military tribunal through habeas. Evidently, the writ was not available at common law to challenge capture in war. See *Ex parte Quirin*, 317 U.S. 1 (1942) (summary of argument of the United States).

[g]enerally speaking, in order to fulfill our responsibilities under Article III to review a petitioner's allegation that he is being detained by American authorities in violation of the rights afforded him under the United States Constitution, we must first determine the source of the authority for the executive to detain the individual. Once the source of the authority is identified, we then look at the justification given to determine whether it constitutes a legitimate exercise of that authority.

2003 U.S. App. LEXIS 198, at *41. The source of the President's power to classify and detain an individual as an enemy combatant is, of course, his authority as Commander-in-Chief under Article II of the Constitution. *Id.* at *42 The court further concluded that the government's reasons for classifying Hamdi as an enemy combatant, set forth in the affidavit of a Defense Department official, were sufficient to justify his continued detention – and that there was no basis to permit Hamdi a further opportunity, in the form of an evidentiary hearing, to challenge those facts:

[w]here, 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 had 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 *55.

Similarly, in *Padilla v. Bush*, 2002 U.S. Dist. LEXIS 23086 (S.D.N.Y. Dec. 4, 2002), the only other case involving a habeas petition on behalf of an enemy combatant detained on American soil, the United States District Court for the Southern District of New York has also adopted a highly deferential standard of review. Jose Padilla was first detained at Chicago's O'Hare International Airport in May, 2002. He was designated as an enemy combatant based on his association with the al Qaeda network, which included trips to Saudi Arabia, Afghanistan and Pakistan to meet with al Qaeda officials. According to the United States, Padilla “acted under the direction of [Abu] Zubaydah and other senior Al Qaeda operatives, received training from Al Qaeda operatives in furtherance of terrorist activities, and was sent to the United States to conduct reconnaissance and/or conduct other attacks on their behalf.” *Id.* at *14-*15 (quoting Declaration of Michael H. Mobbs). His activities are thought to include planning for a radioactive “dirty” bomb attack in the United States. *Id.*

As will be discussed more fully below, the court determined to appoint counsel for Padilla, to assist him in “submitting facts to the court in aid of his petition,” but also made quite clear that it would review that petition under the very deferential standard applicable in the context of foreign relations and national security matters. *Id.* at *118. In particular, the court noted that it will consider the merits of Padilla's factual arguments (having already concluded that the President clearly has the legal authority to hold him if he is, indeed, an enemy

combatant, regardless of his citizenship), based on a “some evidence” test. That is, if the court finds “that there is some evidence of Padilla’s hostile status” his petition must fail. *Id.* at *125-*126.¹³

B. The Right to Counsel in Habeas Proceedings for Detained Enemy Combatants.

Although the right of an American citizen, detained in the United States as an enemy combatant, to seek habeas relief is fairly clear, the detainee’s right to retain counsel, or to have counsel appointed if an indigent, in order to pursue habeas relief, is far less certain. It has long been established that habeas proceedings are not “criminal” in nature and that, as a result, the elaborate due process rights the Constitution guarantees to criminal defendants are inapplicable, including the Sixth Amendment right to counsel. *See Texas v. Cobb*, 532 U.S. 162, 167-68 (2001) (the right to counsel does not attach until the initiation of criminal proceedings); *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Smith v. Angelone*, 111 F.3d 1126, 1130 (4th Cir. 1997) quoting *Santana v. United States*, 98 F.3d 752, 753-56 (3rd Cir. 1996) (“The “civil” label is attached to habeas proceedings in order to distinguish them from “criminal” proceedings, which are intended to punish and require various constitutional guarantees.”); *Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993); *Boudin v. Thomas*, 732 F.2d 1107, 1112 (2nd Cir. 1987). This is true even in cases involving capital convictions. *See Brown v. Vasquez*, 952 F.2d 1164, 1168 (9th Cir. 1992).¹⁴

Significantly, the District Court in *Padilla v. Bush*, the only court to address squarely the issue whether a detained enemy combatant has a right to counsel, ruled that there was no constitutional right to counsel, either under the Sixth Amendment or some more generalized “due process” requirement. *See* 2002 U.S. Dist. LEXIS 23086, at *101-*106.¹⁵ Nevertheless, the

¹³ The “some evidence” standard has most notably been applied in immigration and prison disciplinary cases. Under this standard, “it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced.” *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. at 106; *see also Tisi v. Todd*, 264 U.S. at 133. Determining that this standard has been met does not require that the entire record be examined, nor does it require that the reviewing court assess the credibility of witnesses or weigh the evidence. *See Superintendent v. Hill*, 472 U.S. 445, 455 (1985). Ironically, it is precisely because this standard does not involve the weighing of evidence proffered by both sides that the role for a lawyer in the proceedings is significantly less than it is in a case where the key to success is to put forth more credible evidence than the other side, or to refute the government’s evidence so as to create in the decisionmaker “reasonable doubt” about the defendant’s guilt.

¹⁴ An exception is the federal Anti-Drug Abuse Act, where Congress has specifically created a statutory right to counsel in habeas proceedings challenging capital convictions. *See* 21 U.S.C. § 848(q)(4)(B).

¹⁵ On June 11, 2002, the Eastern District of Virginia appointed the Federal Public Defender as counsel to Yaser Hamdi, and ordered that he be given unmonitored access to the detainee. However, the court took this action *ex parte*, without even giving the United States an opportunity to respond, and the order was quickly overturned by the Fourth Circuit, noting that the court below had not “adequately consider[ed] the implications of its actions.” *Hamdi*, 296 F.3d at 279. Since that time, the Fourth Circuit has gone on to dismiss Hamdi’s habeas petition

(continue)

court continued the appointment of Padilla's counsel (appointed when he was originally arrested on a material witness warrant, before his designation as an enemy combatant), in that case, based on the Criminal Justice Act, 18 U.S.C. § 3006A ("CJA") and the All Writs Act, 28 U.S.C. § 1651(a).¹⁶ Its justification for this action is, to say the least, problematic.

The CJA was first enacted in 1964, and was designed to implement the Sixth Amendment right to counsel in criminal cases by requiring the appointment of counsel for certain persons "financially unable to obtain adequate representation." 18 U.S.C. § 3006A(a). *See* H.R. Conf. Rep. No. 88-1709, *reprinted in* 1964 U.S.C.C.A.N. 3000 (section enacted "to promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States."). In 1970, the statute was amended also to permit the appointment of counsel for indigents challenging their convictions under the federal habeas corpus statute, 28 U.S.C. §2241. Although the statutory language here is broad, permitting the appointment of counsel for "financially eligible" persons seeking habeas relief where "the court determines that the interests of justice so require," there is little doubt that Congress intended this authority to apply in criminal cases. *See* H.R. Rep. No. 91-1546, *reprinted in* 1970 U.S.C.C.A.N. 3982, 3992 ("section [3006A(a)(2)(B)] provides for compensation of counsel appointed for persons seeking collateral relief under sections 2241 Section 2241 of title 28 provides for habeas corpus for Federal prisoners convicted in Federal courts.").¹⁷ The application of this statutory appointment power in habeas proceedings brought by an enemy combatant in wartime goes far beyond Congress' purpose in enacting this section.

Even assuming *arguendo*, however, that the CJA could properly be interpreted to authorize the appointment of counsel for an indigent detained enemy combatant, it does not follow that the District Court also has the authority to order that counsel be given access to the detainee – any more than a wealthy detainee could demand that his private counsel have access. That, of course, is the key question, and it raises fundamental separation of powers issues. The authority to appoint counsel for a detainee is necessary, but not sufficient, to support an order giving counsel access to an individual detained as an enemy combatant. In the absence of a Sixth Amendment right to counsel, is difficult to discern a source of authority that would permit the court to overrule decisions, regarding the conditions of confinement for detained enemy combatants, made by the President in the exercise of his constitutional authority as Commander-in-chief – including a decision to bar detainees from outside contacts.

(continued)

on the merits, as a matter of law, without having determined whether or not he was entitled to counsel during any portion of the proceedings.

¹⁶ Padilla was originally arrested on a federal material witness warrant issued by the United States District Court for the Southern District of New York, in May, 2002. Four weeks later, he was designated an enemy combatant, based on his association with al Qaeda and his "hostile and war-like acts" against the United States. *See Padilla*, 2002 U.S. Dist. LEXIS 23086, at *13. He is believed to have entered the United States in order to construct and explode a radiological "dirty" bomb, and is now in military custody in Charleston, South Carolina.

¹⁷ As a general rule, counsel need be appointed under this statute only when an evidentiary hearing is necessary. *See Abdullah v. Norris*, 18 F.3d 571, 573 (8th Cir. 1994).

In this regard, the reliance by the *Padilla* District Court on the All Writs Act, 28 U.S.C. § 1651(a) (“AWA”) is unpersuasive. This statute permits the federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” The AWA, however, cannot serve as the substantive source of a constitutional right capable of trumping the President’s authority as Commander-in-chief. As the Supreme Court has noted, the AWA “is a residual source of authority to issue writs that are not otherwise covered by statute. . . . Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.” *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985).

The only substantive “right” the court identified in *Padilla* was that of a habeas petitioner to submit facts in support of his petition. *Id.* at *106. But, if there were a concomitant right to have counsel assist in the framing and presentation of those facts to the court, this would suggest a right to counsel in all habeas cases – since *Padilla*’s right, in this regard, is no more nor less than any other petitioner seeking the writ.¹⁸ To put it differently, the habeas petition process takes its subjects as it finds them.¹⁹

Moreover, this right to present factual material is, in fact, simply an aspect of the right of access to the courts appertaining to the right to seek habeas review in the first instance. *See Ex*

¹⁸ Moreover, to the extent that the petitioner has a right to present his factual claims to the court, Congress has established the means to this end: they are to be stated in the petitioner’s application, which must “allege the facts concerning the applicant’s commitment or detention.” 28 U.S.C. § 2241. If it does not appear “from the application that the applicant or person detained is not entitled thereto,” and if the petition and government’s return actually does present factual issues, the Court can itself conduct a hearing where the detainee “may, under oath, deny any of the facts set forth in the return or allege any other material facts.” 28 U.S.C. § 2243. Although a lawyer might well be helpful to the petitioner in this process, Congress did not create a statutory right or entitlement to counsel, and counsel is no more necessary for *Padilla* than for any other habeas petitioner.

¹⁹ In this regard, the District Court’s view -- that it is because *Padilla* has not had an opportunity to go through the normal criminal process, in which the facts bearing upon his case would have been amply developed, that an appointment of counsel to help prepare his habeas application is appropriate – is particularly difficult to justify. The reason *Padilla* has not gone through an elaborate judicial process up to now is because no criminal charges have been proffered against him. The policy rationale supporting the appointment of counsel in criminal cases, which the District Court ultimately relied upon to justify its decision to appoint counsel for *Padilla*, *see United States v. Gouveia*, 467 U.S. 180, 190 (1984) (“[t]he right to counsel exists to protect the accused during trial-type confrontations with the prosecutor”) and *Kirby v. Illinois* 406 U.S. 682, 689 (1972) (“a defendant finds himself faced with the prosecutorial forces of organized society”), does not apply in the case of an enemy combatant. *Padilla* does not face “the prosecutorial forces of organized society,” and he is not being interrogated in an effort to obtain evidence to be used in a criminal trial against him. If *Padilla* ever does face a prosecutor, and risks criminal penalties, then he will be entitled to counsel and all of the process that is due at that time.

parte Hull, 312 U.S. 546, (1941) (“the state and its officers may not abridge or impair petitioner’s right to apply to a federal court for a writ of habeas corpus.”) As part of that right, prisoners are entitled to seek the assistance of fellow inmates, and states cannot adopt rules depriving illiterate or poorly educated prisoners of this – or some equivalent – assistance. See *Johnson v. Avery*, 393 U.S. 483, 487-90 (1969).²⁰ However, this right of assistance is not the equivalent of a right to counsel.²¹ It can be vindicated by providing assistance through the government’s own personnel. Cf. *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974) (“Where an illiterate inmate is involved [in disciplinary proceedings], or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff.”). A system whereby detainees are provided with the necessary materials, and assistance (perhaps in the form of an experienced military officer) in framing a petition, including any “facts” the detainee may wish to communicate to the court, would satisfy any applicable constitutional requirement. What clearly is not required is the appointment of an advocate.

It is, of course, the advocacy aspect of a lawyer’s role that makes the appointment of counsel for enemy combatants so troubling. As Judge Henry Friendly once wrote: “Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client’s cause by an ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty.” Henry J. Friendly, “Some Kind of Hearing,” 123 *U. Pa. L. Rev.* 1267, 1288 (1975).

Captured enemy combatants are lawfully subject to interrogation, in an effort to obtain information to be used in fighting the war. Permitting access to counsel, who may provide expertise but must, as an ethical matter, also assume the role of advocate, interposing him or herself between the government and the detainee, undermines the interrogation process – a carefully structured process that, ultimately, is dependent upon psychological pressure since torture is forbidden. As explained by the United States in a recent submission to the District Court in Padilla’s case:

The military’s efforts to obtain intelligence information through interrogation rely in large part on developing and maintaining an atmosphere of trust and dependency. [Citation omitted.] The objective is to produce a relationship in which the subject perceives that he is reliant on his interrogators for his basic needs and desires. Achieving that objective can take a significant amount of time. . . .

²⁰ These cases, of course, were decided in a criminal context, involving state prison rules rather than the President’s right to detain enemy combatants in time of war, and they might well ultimately be distinguished on those grounds.

²¹ Significantly, most habeas petitions are prosecuted *pro se*. As one standard work notes: “prisoners thrive on it as a form of occupational therapy.” Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4261 (1988).

Because of the delicate nature of the relationship between the subject and his interrogators and the significant time frequently required to achieve the necessary dependence and trust, interposing counsel into the relationship – even if only for a limited duration or for a specific purpose – can irreparably damage efforts to obtain vital intelligence through interrogation. [Citation omitted.] Any manner of external influence can compromise the ability to conduct effective interrogations.

Padilla v. Rumsfeld, No. 4445, Respondents’ Motion for Reconsideration in Part.

In its earlier decision, the District Court sought to address the government’s legitimate concern that the appointment of counsel for enemy combatants in general, and Jose Padilla in particular, might interfere with his interrogation, by noting that it had not suggested a “general right to counsel in connection with questioning,” but only for the purpose of “presenting facts to the court in connection with this petition.” 2002 U.S. Dist. LEXIS 23086, at *112. The fundamental difficulty with this approach is that it suggests that counsel, whose ethical obligation to any client is to be a zealous advocate, should not advocate on Padilla’s behalf, but act only as scrivener. In addition, it assumes that Padilla or a similarly situated detained enemy combatant will understand counsel’s limited role, and will not himself act as if he now has an advocate vis-à-vis his captors. This is a highly implausible assumption. Indeed, commenting specifically on the Padilla case, Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency, observed in a January 9, 2003, declaration (submitted as a part of the government’s Motion for Reconsideration In Part addressed to the District Court):

Permitting Padilla any access to counsel may substantially harm our national security interests. As with most detainees, Padilla is unlikely to cooperate if he believes that an attorney will intercede in his detention. DIA’s assessment is that Padilla is even more inclined to resist interrogation than most detainees. DIA is aware that Padilla has had extensive experience in the United States criminal justice system and had access to counsel when he was being held as a material witness. These experiences have likely heightened his expectations that counsel will assist him in the interrogation process. Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla.

Because Padilla is likely more attuned to the possibility of counsel intervention than most detainees, I believe that any potential sign of counsel involvement would disrupt our ability to gather intelligence from Padilla. Padilla has been detained without access to counsel for seven months – since the DoD took control of him on 9 June 2002. Providing him access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This

would break – probably irreparably – the sense of dependency and trust that the interrogators are attempting to create.

At a minimum, Padilla might delay providing information until he believes that his judicial avenues of relief have been exhausted. Given the nature of his case, his prior experience in the criminal justice system, and the length of time that has already elapsed since his detention, Padilla might reasonably expect that his judicial avenues of relief may not be exhausted for many months or years.

Moreover, Padilla might harbor the belief that his counsel would be available to assist him at any point and that seven months is not an unprecedented time for him to be without access to counsel.

Any such delay in Padilla’s case risks that plans for future attacks will go undetected during that period, and that whatever information Padilla may eventually provide will be outdated and more difficult to corroborate.

Declaration of Vice Admiral Lowell Jacoby (USN) Director of the Defense Intelligence Agency, January 9, 2003, at 8, 9

In any case, it is the very fact of counsel’s access to the detainee, for whatever purpose, that “can irreparably damage” efforts to obtain intelligence information.

Moreover, in the current conflict, there is a very real risk that counsel will be used – wittingly or unwittingly – by captured al Qaeda operatives to transmit information back to the group.²² There is little doubt that the District Court dismissed the Government’s second concern, that counsel may be used to communicate with other al Qaeda agents, far too quickly. Here, the court suggested that Padilla’s conversation with counsel could be monitored, and that there was nothing in his lawyers’ past “to suggest that they would be inclined to act as conduits.” 2002 U.S. Dist. LEXIS 23086, at *113. Yet, the ability to monitor his contacts with counsel would, perhaps, complicate the transmission of messages, but does not render it impossible. Moreover, it is hardly likely, as the court itself stated, that Padilla’s counsel would willingly cooperate in such activities. The danger is, rather, that Padilla (or other enemy combatants in the future) may

²² In this regard, the government has opposed granting access to counsel to detained enemy combatants because it “would jeopardize the two core purposes of detaining enemy combatants – gathering intelligence about the enemy, and preventing the detainee from aiding in any further attacks against America.” *Padilla v. Bush, et al.*, Respondents’ Response to This Court’s October 21, 2002 Order (Oct. 28, 2002), available at <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html>.

use appointed counsel as unwitting conduits, fully understanding that he is being carefully monitored.²³

V. Conclusion

Under both the international law and the U.S. Constitution, during the times of armed conflict, the President can classify individuals, captured in this conflict, as enemy combatants and detain them for the conflict's entire duration. This is the case with both lawful and unlawful combatants. The citizenship of these individuals is of no consequence. While specific charges for the violations of laws of war can be brought against lawful combatants, and unlawful belligerents can be tried and punished merely for their unlawful involvement in combat, the Executive Branch has no obligation to bring such charges. So long as criminal charges are not brought, detained enemy combatants have no constitutional right to counsel.

Although enemy combatants held in the United States may be entitled to challenge their detention by seeking a writ of habeas corpus, this right does not imply, or support, a right to counsel. Of all the issues surrounding the treatment of enemy combatants in the war on terror, the question of whether detainees are entitled to a lawyer is, perhaps, the most difficult – at least for lawyers and courts. For members of the bar it is hard to conceive of a situation where lawyers could not, at the least, be helpful, and where the right to counsel should not be guaranteed for an individual facing perhaps years in custody. Lawyers, however, are not always the answer.²⁴

The capture and detention of enemy combatants in time of war is one circumstance where the right to counsel is not guaranteed. It is not a criminal process, and the full extent of the government's obligation is not to interfere with a prisoner's preparation and filing of a petition

²³ It must also be noted, however, that one member of the bar has been criminally charged based on her alleged passing of messages for Sheik Omar Abdel-Rahman. *See* Mark Hamblett, "NY Lawyer Indicted for Aiding Terrorists Attacks Constitutionality of Charges," *New York Lawyer* (Jan. 13, 2003), <http://www.nylawyer.com/news/03/01/011303a.html>

²⁴ It is also worth noting that, an assumption, which underpins much of the criticism directed at the Bush Administration – that anything short of providing detained enemy combatants with full-fledged and robust, lawyer-assisted opportunity to challenge their status – would impair civil liberties, and invite government misconduct, is unwarranted. To begin with, there is no evidence that the government has acted improperly in either the Hamdi or Padilla cases. Second, given the fact that the relevant government declarations are filed under oath, there is every reason to expect that they will be accurate and as detailed as is necessary to support the original classification decision. Third, it is precisely because the habeas review system, as described by the Fourth Circuit in the Hamdi case, and the Southern District of New York in Padilla's case, is appropriately deferential to the government's legitimate national security interests, that there are no incentives for the Executive Branch to cut corners. Last, but not least, there are a number of political checks and balances that impact the overall government strategy for dealing with enemy combatants, including public opinion, media, and Congress. These checks and balances provide ample insurance that the Executive Branch continues properly to balance the imperatives of individual liberty and national defense.

seeking a writ of habeas corpus – and to provide a basic level of assistance if the individual himself is incapable of this task. The government need not provide, nor is a detained enemy combatant entitled to, the services of an advocate. In this respect, a system whereby detainees are furnished with only the necessary materials, and minimal assistance, in writing a petition setting forth any “facts” the detainee may wish to communicate to the court, would satisfy any applicable constitutional requirement, and would avoid the dangers inherent in permitting access to counsel.

APPENDIX

**Declaration of Vice Admiral Lowell E. Jacoby (USN)
Director of the Defense Intelligence Agency**

Pursuant to 28 U.S.C. § 1746, I, Vice Admiral Lowell E. Jacoby, hereby declare that, to the best of my knowledge, information, and belief, and under penalty of perjury, the following is true and correct:

Summary

I submit this Declaration for the Court's consideration in the matter of Jose Padilla v. George W. Bush et al., Case No. 02 Civ. 4445, pending in the United States District Court for the Southern District of New York. This Declaration addresses the following topics:

- my qualifications as an intelligence officer and Director of the Defense Intelligence Agency;
- the roles and mission of the Defense Intelligence Agency;
- the intelligence process;
- interrogations as an intelligence tool;
- interrogation techniques;
- use of interrogations in the War on Terrorism;
- intelligence value of Jose Padilla; and
- potential impact of granting Padilla access to counsel.

Based upon information provided to me in the course of my official duties, I am familiar with each of the topics addressed in this Declaration. I am also familiar with the interrogations of Jose Padilla ("Padilla") conducted by agents of the Federal Bureau of Investigation ("FBI") after his detention in Chicago on 8 May 2002 and by agents of the Department of Defense ("DoD") after DoD took control of Padilla on 9 June 2002. I have not included information obtained from any interrogations in this Declaration, however.

I assess Padilla's potential intelligence value as very high. I also firmly believe that providing Padilla access to counsel risks loss of a critical intelligence resource, resulting in a grave and direct threat to national security.

Experience

I am a Vice Admiral in the United States Navy, with more than 30 years of active federal commissioned service. I currently am the Director of the Defense Intelligence Agency. I report to the Secretary of Defense. In addition to other assignments, I have previously served as the Director of Intelligence (J2) for the Chairman of the Joint Chiefs of Staff; the Director of Intelligence for the Commander of the U.S. Pacific Command; the Commander of the Joint Intelligence Center Pacific; and the Commander of the Office of Naval Intelligence.

I have received the National Intelligence Medal of Achievement from the Director of Central Intelligence. My military decorations include two Defense Distinguished Service Medals, the Navy Distinguished Service Medal, the Defense Superior Service Medal, and two Legions of Merit. I hold a Masters degree in National Security Affairs from the Naval Postgraduate School.

The Defense Intelligence Agency

The Defense Intelligence Agency ("DIA") is a DoD combat support agency with over 7,000 military and civilian employees worldwide. DIA is a component of DoD and an important member of the United States Intelligence Community—a federation of 14 executive branch agencies and organizations that work separately and cooperatively to conduct intelligence activities necessary to protect the national security of the United States.

DIA activities include collection of information needed by the President and Vice President, the National Security Council, the Secretaries of State and Defense, and other Executive Branch officials for the performance of their duties and responsibilities. One of DIA's highest priorities is to collect intelligence on terrorists, including al Qaida members, by interrogation and other means.

The Defense HUMINT Service ("DHS"), under DIA's Directorate for Operations, handles all human-source intelligence collection within DoD.

The Intelligence Process

The security of this Nation and its citizens is dependent upon the United States Government's ability to gather, analyze, and disseminate timely and effective intelligence. DIA has expended considerable efforts to develop effective intelligence techniques.

Generally speaking, the intelligence cycle can be broken down into five basic steps:

1. **Planning and direction.** Senior United States policy makers establish the intelligence requirements for DIA. DIA formulates more specific plans and directions to meet those requirements. Finished intelligence products also generate new requirements.
2. **Collection.** Raw intelligence data can be gathered by various means. Human-Source Intelligence ("HUMINT") is the oldest and historically the primary method of collecting intelligence. HUMINT includes clandestine acquisition of materials as well as overt collection of information through methods such as interrogation.
3. **Processing and exploitation.** Intelligence data, including human-source reports, must be converted to a form and context to make them more comprehensible to the intelligence analysts and other users.
4. **Analysis and production.** Intelligence analysts absorb the incoming information, evaluate it, and prepare a variety of intelligence products.
5. **Dissemination.** After reviewing intelligence information and correlating it with other information available, analysts typically disseminate finished intelligence to various users.

One critical feature of the intelligence process is that it must be continuous. Any interruption to the intelligence gathering process, especially from an external source, risks mission failure. The timely, effective use of intelligence provides this Nation with the best chance of achieving success in combating terrorism at home and abroad, thus helping to prevent future catastrophic terrorist attacks.

Protecting the specific sources and methods used during the intelligence process is of paramount importance to the integrity of the process. DIA employs all available safeguards to ensure that its sources and methods are not intentionally or inadvertently made public or disclosed outside the Intelligence Community, because of the resulting damage to intelligence collection efforts.

Interrogation as an Intelligence Tool

Interrogation is a fundamental tool used in the gathering of intelligence. Interrogation is the art of questioning and examining a source to obtain the maximum amount of usable, reliable information in the least amount of time to meet intelligence requirements. Sources may include insurgents, enemy combatants, defectors, refugees, displaced persons, agents, suspected agents, or others.

Interrogations are vital in all combat operations, regardless of the intensity of conflict. Interrogation permits the collection of information from sources with direct knowledge of, among other things, plans, locations, and persons seeking to do harm to the United States and its citizens. When done effectively, interrogation provides information that likely could not be gained from any other source. Interrogations can provide information on almost any topic of intelligence interest.

The Department of the Army's Field Manual governing Intelligence Interrogation, FM 34-52, dated 28 September 1992, provides several examples of the importance of interrogations in gathering intelligence. The Manual cites, for example, the United States General Board on Intelligence survey of nearly 80 intelligence units after World War II. Based upon those surveys, the Board estimated that 43 percent of all intelligence produced in the European theater of operations was from HUMINT, and 84 percent of the HUMINT was from interrogation. The majority of those surveyed agreed that interrogation was the most valuable of all collection operations.

The Army Field Manual also notes that during OPERATION DESERT STORM, DoD interrogators collected information that, among other things, helped to:

- develop a plan to breach Iraqi defensive belts;
- confirm Iraqi supply-line interdiction by coalition air strikes;
- identify diminishing Iraqi troop morale; and
- identify a United States Prisoner of War captured during the battle of Kaffi.

Interrogation Techniques

DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or even years, after the interrogation process began.

Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process. Therefore, it is critical to minimize external influences on the interrogation process. Indeed, foreign governments have used these techniques against captured DoD personnel.

Even the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949—which the President has determined does not apply to enemy combatants such as Padilla—recognizes that a detainee's ability to communicate with members of his or her family or government may be suspended when such a person is suspected of engaging in activities hostile to the security of the detaining State.

Use of Interrogations in the War on Terrorism

Terrorism poses an asymmetric threat to the United States. "Asymmetric warfare" generally consists of unanticipated or non-traditional approaches to circumvent or undermine an adversary's strengths while exploiting its vulnerabilities through unexpected technologies or innovative means. "Asymmetric warfare" may also consist of leveraging inferior tactical or operational strength against American vulnerabilities to achieve disproportionate effect with the aim of undermining American will in order to achieve the asymmetric actor's strategic objectives.

Unlike any previous conflict, we face a foe that knows no borders and perceives all Americans, wherever they may be, as targets of opportunity. Our terrorist enemies have also clearly demonstrated their willingness—and in fact have expressed their intent—to use any type of potential weapon, including weapons of mass destruction.

This asymmetric threat creates difficult and unique challenges for DIA because of the many variables in identifying and addressing the threat. The complexities of the problem—and the dire consequences at stake—require innovative and aggressive solutions.

As explained above, the intelligence cycle is continuous. This dynamic is especially important in the War on Terrorism. There is a constant need to ask detainees new lines of questions as additional detainees are taken into custody and new information is obtained from them and from other intelligence-gathering

methods. Thus, it is vitally important to maintain an ongoing intelligence process, including interrogations.

The United States is now engaged in a robust program of interrogating individuals who have been identified as enemy combatants in the War on Terrorism. These enemy combatants hold critical information about our enemy and its planned attacks against the United States that is vital to our national security.

These interrogations have been conducted at many locations worldwide by personnel from DIA and other organizations in the Intelligence Community. The results of these interrogations have provided vital information to the President, military commanders, and others involved in the War on Terrorism. It is estimated that more than 100 additional attacks on the United States and its interests have been thwarted since 11 September 2001 by the effective intelligence gathering efforts of the Intelligence Community and others.

In fact, Padilla's capture and detention were the direct result of such effective intelligence gathering efforts. The information leading to Padilla's capture came from a variety of sources over time, including the interrogation of other detainees. Knowledge of and disruption of al Qaida's plot to detonate a "dirty bomb" or arrange for other attacks within the United States may not have occurred absent the interrogation techniques described above.

Interrogating members of al Qaida, or those individuals trained by al Qaida, poses additional challenges and risks. Al Qaida is a highly dangerous and sophisticated terrorist organization that has studied and learned many counterintelligence techniques. An al Qaida training manual, "Military Studies in the Jihad Against the Tyrants," provides instructions regarding, among other things: the collection of intelligence; counter-interrogation techniques; and means of covert communication during periods of capture. As detainees collectively increase their knowledge about United States detention facilities and methods of interrogation, the potential risk to national security increases should those methods be released. Moreover, counsel or others given access to detainees could unwittingly provide information to the detainee, or be used by the detainee as a communication tool.

In summary, the War on Terrorism cannot be won without timely, reliable, and abundant intelligence. That intelligence cannot be obtained without robust interrogation efforts. Impairment of the interrogation tool—especially with respect to enemy combatants associated with al Qaida—would undermine our Nation's intelligence gathering efforts, thus jeopardizing the national security of the United States.

methods. Thus, it is vitally important to maintain an ongoing intelligence process, including interrogations.

The United States is now engaged in a robust program of interrogating individuals who have been identified as enemy combatants in the War on Terrorism. These enemy combatants hold critical information about our enemy and its planned attacks against the United States that is vital to our national security.

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Intelligence Value of Jose Padilla

Padilla is currently being detained in the Naval Consolidated Brig, Charleston at Naval Weapons Station, Charleston, South Carolina. The President has determined that Padilla is closely associated with al Qaida, an international terrorist organization with which the United States is at war. The President has further determined that Padilla possesses intelligence, including intelligence about personnel and activities of al Qaida, that, if communicated to the United States, would aid our efforts to prevent further attacks by al Qaida on the United States, its armed forces, other government personnel, or its citizens.

Padilla has been implicated in several plots to carry out attacks against the United States, including the possible use of a "dirty" radiological bomb in Washington DC or elsewhere, and the possible detonation of explosives in hotel rooms, gas stations, and train stations.

As noted in the unclassified Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, dated 27 August 2002, Padilla has, among other things:

- met with senior Usama Bin Laden lieutenant Abu Zabaydah in Afghanistan about conducting terrorist operations in the United States;
- conducted research in the construction of a "uranium-enhanced" explosive device at an al Qaida safehouse in Pakistan;
- discussed plans to build and detonate a "radiological dispersal device" (also known as a "dirty bomb") within the United States;
- received training from al Qaida operatives in furtherance of terrorist activities;
- met with other senior al Qaida operatives to discuss Padilla's involvement and participation in terrorist activities targeting the United States; and
- spent time in Afghanistan, Pakistan, Saudi Arabia, Egypt, and Southwest Asia.

Thus, Padilla could potentially provide information about, among other things:

- details on any potential plot to attack the United States in which he has been implicated, including the identities and whereabouts of al Qaida members possibly still at large in the United States and elsewhere;
- additional al Qaida plans to attack the United States, its property, or its citizens;
- al Qaida recruitment;
- al Qaida training;
- al Qaida planning;

- al Qaida operations;
- al Qaida methods;
- al Qaida infrastructure;
- al Qaida capabilities, including potential nuclear capabilities;
- other al Qaida members and sympathizers; and
- al Qaida activities in Afghanistan, Pakistan, Saudi Arabia, Egypt, Southwest Asia, the United States, or elsewhere.

The information that Padilla may be able to provide is time-sensitive and perishable. As noted above, any information obtained from Padilla must be assessed in connection with other intelligence sources; similarly, Padilla is a potential source to help assess information obtained from other sources. Any delay in obtaining information from Padilla could have the severest consequences for national security and public safety.

Potential Impact of Granting Padilla Access to Counsel

Permitting Padilla any access to counsel may substantially harm our national security interests. As with most detainees, Padilla is unlikely to cooperate if he believes that an attorney will intercede in his detention. DIA's assessment is that Padilla is even more inclined to resist interrogation than most detainees. DIA is aware that Padilla has had extensive experience in the United States criminal justice system and had access to counsel when he was being held as a material witness. These experiences have likely heightened his expectations that counsel will assist him in the interrogation process. Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla.

Because Padilla is likely more attuned to the possibility of counsel intervention than most detainees, I believe that any potential sign of counsel involvement would disrupt our ability to gather intelligence from Padilla. Padilla has been detained without access to counsel for seven months—since the DoD took control of him on 9 June 2002. Providing him access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break—probably irreparably—the sense of dependency and trust that the interrogators are attempting to create.


At a minimum, Padilla might delay providing information until he believes that his judicial avenues of relief have been exhausted. Given the nature of his case, his prior experience in the criminal justice system, and the length of time that has already elapsed since his detention, Padilla might reasonably expect that his judicial avenues of relief may not be exhausted for many months or years.

Moreover, Padilla might harbor the belief that his counsel would be available to assist him at any point and that seven months is not an unprecedented time for him to be without access to counsel.

Any such delay in Padilla's case risks that plans for future attacks will go undetected during that period, and that whatever information Padilla may eventually provide will be outdated and more difficult to corroborate.

Additionally, permitting Padilla's counsel to learn what information Padilla may have provided to interrogators, and what information the interrogators may have provided Padilla, unnecessarily risks disclosure of the intelligence sources and methods being employed in the War on Terrorism.

In summary, the United States has an urgent and critical national security need to determine what Padilla knows. Padilla may hold extremely valuable information for the short-term and long-term security of the United States. Providing Padilla access to counsel risks the loss of a critical intelligence resource, and could affect our ability to detain other high value terrorist targets and to disrupt and prevent additional terrorist attacks.


LOWELL E. JACOBY, VADM, USN
Director of the Defense Intelligence Agency

Executed on 9 January 2003