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COMMENT

UNEQUAL TREATMENT OF UNITED STATES CITIZENS: ERODING THE CONSTITUTIONAL SAFEGUARDS

INTRODUCTION

On September 11, 2001, at 8:45 a.m. America witnessed a hijacked airplane flying into the North Tower of the World Trade Center in New York.¹ While the building caught on fire and cries echoed into the streets, another plane crashed into the South Tower of the World Trade Center.² Forty minutes later, a third plane crashed into the Pentagon.³ Five minutes after the South Tower collapsed, a fourth plane crashed into rural Pennsylvania.⁴ This horrific day ended the lives of thousands of people.⁵

President, George W. Bush, addressing the nation said, “terrorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America.”⁶ The President’s address referred to the democracy and freedoms Americans enjoy.⁷ Yet many Americans disagree with the President’s address. The government’s action post-September 11th may have altered the democracy and freedoms

¹ CNN.com./U.S. *Chronology of terror, available at* <http://www.cnn.com/2001/US/09/11/chronology.attack> (Sept. 12, 2002).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ White House Official Site, *Statement by the President In His Address to the Nation, available at* <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html> (Sept. 11, 2001).

⁶ *Id.*

⁷ *Id.*

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guaranteed to citizens by the United States Constitution (hereinafter, "Constitution"). The constitutional safeguards, which lay the foundation for the democracy and freedoms Americans are guaranteed,⁸ may be eroding. Subsequent actions taken by the United States government after the September 11th attacks, aimed at protecting the United States, raise constitutional issues.⁹ Citizens are detained in military custody without being charged with crimes, *incommunicado*, and without access to counsel. According to Golden Gate University School of Law's Dean Peter Keane, "the most disturbing and the most dangerous result of last year's attack is the outrageous use of those tragic deaths by our government to drastically alter our democracy and brutalize our freedoms."¹⁰

Two United States citizens Jose Padilla (aka Abdullah Al Muhajir) (hereinafter, "Padilla") and Yesser Hamdi (hereinafter, "Hamdi") were labeled enemy combatants by President Bush, for alleged acts of terrorism connected with the September 11, 2001 attacks.¹¹ The government contends Padilla is a close associate of al Qaeda and participated in the planning of future terrorist acts against the United States.¹² In

⁸ *Id.* This author is referring to the rights guaranteed to the United States Citizens under the Sixth and Fourteenth Amendment of the United States Constitution. *See id.* The Sixth Amendment provides each citizen with a right to counsel. U.S. Const. amend. VI. The Fourteenth Amendment provides no citizen shall be deprived of life, liberty, or property without due process under the law. U.S. Const. amend. XIV.

⁹ ABA Task Force on Treatment of Enemy Combatants, Preliminary Report at 2-4, available at http://www.abanet.org/leadership/enemy_combatants.pdf (Aug. 8, 2002).

¹⁰ Interview with Peter G. Keane, Dean, Golden Gate University School of Law, in San Francisco, Cal. (Sept. 9, 2002). Peter G. Keane was appointed in 1999 as Dean of Golden Gate University School of Law. His appointment follows a twenty-year career as Chief Assistant Public Defender of San Francisco. *Id.* In addition, he was in the private practice of law from 1968-1979. *Id.* Dean Keane is a former President of the Bar Association of San Francisco and a former Vice President of the State Bar of California. *Id.* He has appeared on The CBS Evening News, CNN, BBC, ABC World News, Larry King Live, Nightline, Burden of Proof, MSNBC InterNight, and other news programs throughout the world. *Id.*

¹¹ Resp't Resp. Mot. Dismiss, Am. Pet. for Writ of Habeas Corpus at 12-13, 15, *Padilla v. Bush* (Aug. 27, 2002) citing *Hamdi v. Rumsfeld*, 296 F.3d 279, 281 (2002), available <http://news.findlaw.com/hdocs/docs/terrorism/padillabush82702grsp.pdf>. According to the United States government an enemy combatant [a]rises in the context of foreign relations and national security... [related to] military-related judgments in times of active hostilities [for the] protection of Americans ... against unprovoked attack[s]. *Id.*; *See* discussion *infra* Part I.D, II.A.

¹² Resp't Resp. Mot. Dismiss, Am. Pet. for Writ of Habeas Corpus at 8, *Padilla v. Bush* (Aug. 27, 2002), available

addition, the government believes Padilla possesses information that could aid the United States in preventing future attacks.¹³ Similarly the government concluded Hamdi, based on his background and experience, has considerable knowledge of the Taliban and al Qaeda training and operations.¹⁴ The government deems this information as potentially valuable to the United States security.¹⁵

Meanwhile, another United States citizen, John Phillip Walker Lindh, (hereinafter, "Lindh") although not labeled an enemy combatant, pled guilty in a civilian courtroom to aiding the Taliban and possessing explosives in the commission of that crime.¹⁶ By not labeling Lindh an enemy combatant, he enjoyed constitutional safeguards denied to Padilla and Hamdi.¹⁷ Because Padilla and Hamdi are held as enemy combatants, they are detained indefinitely without officially being charged with a crime. Additionally, they are held *incommunicado* and without a right to counsel. Depriving citizens of liberty without due process of the law, as has been done with both Padilla and Hamdi, raises critical constitutional concerns.

The purpose of this comment is not to criticize the government's efforts in apprehending those responsible for the September 11th terrorist attacks. Rather, this comment examines the unequal treatment of United States citizens who are labeled enemy combatants by looking at the factual and procedural background of Padilla, Hamdi and Lindh. Next,

<http://news.findlaw.com/hdocs/docs/terrorism/padillabush82702grsp.pdf>; Al Qaida also spelled Al Qaeda is a terrorist group dedicated to opposing non-Islamic governments with force and violence. Indictment at 2, *United States v. Lindh* (Feb. 5, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.html>.

¹³ Resp't Resp. Mot. Dismiss Am. Pet. for Writ of Habeas Corpus at 8, *Padilla vs. Bush* (Aug. 27, 2002) citing President Bush's Order (June 9, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/padillabush82702grsp.pdf>.

¹⁴ Br. Resp't-Appellants at 9, *Hamdi v. Rumsfeld* (June 19, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums61902gbrf.pdf>. The Taliban is an extremist form of Islam, which opposes any threat to its form of religion. Indictment at 3, *United States v. Lindh* (Feb. 5, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.html>.

¹⁵ Br. Resp't-Appellants at 9, *Hamdi v. Rumsfeld* (June 19, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums61902gbrf.pdf>.

¹⁶ Bob Franken and John King, *'I plead guilty,' Taliban American says Plea bargain precludes possible life sentence* (July 2, 2002), CNN.com/ Law Center, available at <http://www.cnn.com/2002/LAW/07/15/walker.lindh.hearing/>.

¹⁷ *Id.*

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this comment examines the origins of the label enemy combatant and the constitutional safeguards afforded to criminal defendants in similar situations as Padilla, Hamdi, and Lindh. The terrorist acts Padilla, Hamdi, and Lindh are accused of involve international laws. Therefore, this comment will examine the Geneva Conventions as a means to understand humanitarian protections that may cover Padilla and Hamdi. Finally, this comment will provide recommendations for some of the issues raised.

I. BACKGROUND

A. JOSE PADILLA'S FACTUAL AND PROCEDURAL BACKGROUND

Jose Padilla is a United States citizen by birth. He was born on October 18, 1970, in Brooklyn, New York.¹⁸ Padilla allegedly traveled to Pakistan, Egypt, Saudi Arabia and Afghanistan as a close associate of the al Qaeda network.¹⁹ In 2001 and 2002, Padilla allegedly met with senior al Qaeda leaders on several occasions.²⁰ Under the direction of al Qaeda leaders, Padilla received training embodying the wiring of explosive devices.²¹ According to the United States government, the training encompassed terrorist operations targeting the United States.²² These plans subsumed a scheme to detonate explosives devices in hotel rooms and gas stations and a "radiological dispersal device" (dirty bomb) within the United States.²³ The United States government alleges Padilla, under the guidance of al Qaeda leaders, explored and advanced further terrorist attacks against the United States.²⁴ The government argued that multiple intelligence sources confirmed Padilla's involvement in planning future terrorist attacks by al Qaeda.²⁵ President Bush recounted Padilla's

¹⁸ Jonathan Weisman, Debbie Howlett and Dave Moniz, *American terror suspect is not unique*, USA TODAY (June 11, 2002), available at <http://www.usatoday.com/news/nation/2002/06/11/suspect-usat.htm>.

¹⁹ See *supra* note 11 at 7.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 7-8.

²⁴ *Id.*

²⁵ *Id.* at 8.

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involvement and ordered his detention as an enemy combatant as follows:

Padilla is closely associated with al Qaeda; that he has engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States; that he possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda; that he represents a continuing present and grave danger to the national security of the United States; and that his detention as an enemy combatant is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens.²⁶

Padilla was arrested on May 8, 2002, at O'Hare International Airport, just outside of Chicago, Illinois, pursuant to a material witness warrant related to grand jury proceedings in the Southern District of New York (hereinafter, "SDNY").²⁷ Padilla was detained at the Metropolitan Correctional Center in New York.²⁸ On May 15, 2002, the Honorable Chief Judge Michael B. Mukasey assigned him defense counsel, Donna R. Newman.²⁹ On June 9, 2002, President Bush determined Padilla was an enemy combatant and thus transferred him to the custody of the United States military.³⁰ On that same day, without informing defense counsel Newman, the Department of Justice requested that the SDNY vacate the material witness warrant.³¹ The government's request was granted.³²

²⁶ *Id.* citing President Bush's Order (June 9, 2002).

²⁷ Mot. Dismiss, Am. Pet. for Writ of Habeas Corpus at 4-5, *Padilla vs. Bush* (June 26, 2002), *available* <http://news.findlaw.com/hdocs/docs/terrorism/padillabush62602gmot.pdf>; Pet'r Reply Mot. Dismiss Pet. for Writ of Habeas Corpus at 4, *Padilla v. Bush* (July 12, 2002), *available* <http://news.findlaw.com/hdocs/docs/terrorism/padillabush71202reply.pdf>.

²⁸ Mot. Dismiss, Am. Pet. for Writ of Habeas Corpus at 5, *Padilla vs. Bush* (June 26, 2002), *available* <http://news.findlaw.com/hdocs/docs/terrorism/padillabush62602gmot.pdf>.

²⁹ Am. Pet. for Writ of Habeas Corpus at 2, *Padilla v. Bush* (June 19, 2002), *available* <http://news.findlaw.com/hdocs/docs/terrorism/padillabush61902apet.pdf>.

³⁰ *See supra* note 28.

³¹ Mot. Dismiss, Am. Pet. for Writ of Habeas Corpus at 5, *Padilla v. Bush* (June 26, 2002), *available*

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Now under the exclusive control of the United States military, Padilla was transported to the Consolidated Naval Brig in Charleston, South Carolina for detention and questioning.³³ On June 11, 2002, after the material witness warrant was vacated, Newman, as next friend of Jose Padilla, filed a petition for writ of habeas corpus.³⁴ The writ was amended on June 19, 2002.³⁵ The amended petition of habeas corpus raises the three following claims challenging Padilla's detention: Padilla's detention violates the Fourth, Fifth, and Sixth Amendments of the United States Constitution; the Presidential Order under which Padilla is detained violates Article I of the United States Constitution; Padilla's detention in military custody is unlawful because the civilian courts are open and no martial law exists.³⁶

On June 26, 2002, the government filed a motion to dismiss the amended petition of habeas corpus.³⁷ The government contends Newman lacks standing as next friend to bring the habeas corpus petition on behalf of Padilla.³⁸ Further, the government argues President Bush, Secretary Donald Rumsfeld, and Attorney General Ashcroft are improper

<http://news.findlaw.com/hdocs/docs/terrorism/padillabush62602gmot.pdf>; Pet'r Reply Mot. Dismiss Pet. for Writ of Habeas Corpus at 5, *Padilla v. Bush* (July 12, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/padillabush71202reply.pdf>.

³² See *supra* note 28.

³³ *Id.*

³⁴ Pet'r Reply Mot. Dismiss Pet. for Writ of Habeas Corpus at 5, *Padilla v. Bush* (July 12, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/padillabush71202reply.pdf>. A writ of habeas corpus is available to every person who claims to be unlawfully imprisoned or restrained. *United States v. Commanding Officer, Armed Forces*, 403 F.2d 371 (1968). 28 U.S.C. § 2242 (2002) requires a writ of habeas corpus to be in writing, signed, and verified by the person whose relief is sought or by someone acting in his behalf. *Id.* Since Padilla is held *incommunicado* and without access to counsel, Donna Newman filed the writ of habeas corpus as next friend of Padilla. See *supra* note 29. The two requirements for a petition as next friend are set out in *Whitmore v. Arkansas*, 495 U.S. 149, 163-164 (1990). First, there must be an explanation outlining why the party for whom the relief is sought cannot sign and verify the writ. *Id.* Second, the next friend must be truly dedicated to the best interest of the person for whom relief is sought and a significant relationship between the real party in interest must exist. *Id.*

³⁵ See *supra* note 29 at 10.

³⁶ See *supra* note 11 at 9-10. Martial law is the will of the commanding officer. *Ex Parte Milligan*, 71 U.S. 2, 35 (1866). The notion that in certain cases a proclamation by a commanding officer supplants civil law is erroneous. *Id.*

³⁷ Mot. Dismiss, Am. Pet. for Writ of Habeas Corpus, *Padilla vs. Bush* (June 26, 2002), available

<http://news.findlaw.com/hdocs/docs/terrorism/padillabush62602gmot.pdf>.

³⁸ *Id.* at 6-10.

respondents for the habeas corpus.³⁹ Rather, Padilla's proper custodian is Commander M.A. Mar, the officer in charge of the brig where he is detained.⁴⁰ The government further suggests the SDNY lacks territorial jurisdiction over the brig where Padilla is detained.⁴¹ On July 12, 2002, Newman filed a reply to the government's motion to dismiss arguing she possesses the proper standing as next friend to bring the habeas petition on Padilla's behalf.⁴² Newman maintains the SDNY has jurisdiction over the petition because the proper custodian is not the jailer.⁴³ The reply states that Commander Marr is not authorized to deliver Padilla's body.⁴⁴ Therefore, the proper respondents are President Bush and Secretary Rumsfeld.⁴⁵

In addition to Padilla's reply to the government's motion to dismiss, the New York State Association of Criminal Defense Lawyers (hereinafter, "NYSACDL") and the National Association of Criminal Defense Lawyers (hereinafter, "NACDL") filed an *amici curiae* brief in the SDNY to inform the court of those issues NYSACDL and NACDL identified as critical to Padilla's case.⁴⁶ These issues include: the court's subject matter and *in personam* jurisdiction over Padilla's case; Ms. Newman's proper status as "next friend"; President Bush and Secretary Rumsfeld status as proper respondents; Commander Marr's lack of authority as proper respondent; Padilla's illegal detention arising out of the denial of his Constitutional right to legal counsel and to communicate freely with an attorney; the court's ability to review Padilla's cases; Padilla's entitlement to "prisoner of war" status or in the alternative, a hearing as prescribed by the Geneva Conventions if viewed as an enemy combatant.⁴⁷ On September 27, 2002, amici submitted a supplemental brief seeking to clarify its

³⁹ *Id.* at 10-16.

⁴⁰ *Id.* at 16-20.

⁴¹ *Id.*

⁴² Pet'r Reply Mot. Dismiss Pet. for Writ of Habeas Corpus at 6-11, *Padilla v. Bush* (July 12, 2002), available

<http://news.findlaw.com/hdocs/docs/terrorism/padillabush71202reply.pdf>.

⁴³ *Id.* at 11-15.

⁴⁴ *Id.* at 21-24.

⁴⁵ *Id.* at 15-21.

⁴⁶ Br. Amici Curiae, *Padilla v. Bush* (July 2002), available

<http://news.findlaw.com/hdocs/docs/terrorism/padillabush702ambrf.pdf>.

⁴⁷ *Id.*

position in its initial brief.⁴⁸ The sole issue amici identified in Padilla's case is his continued unlawful *incommunicado* detention in military custody as a civilian.⁴⁹

On August 27, 2002, the government submitted a response and a motion to dismiss the amended petition for writ of habeas corpus asserting the lawfulness of Padilla's detention.⁵⁰ The government maintains that the President's June 9, 2002, order and the sworn declaration from Michael Mobbs, Special Advisor to the Under Secretary of Defense For Policy, satisfy the judicial review for determining the lawfulness of Padilla's detention.⁵¹ In Mobbs' unclassified declaration, he claims involvement with matters relating to the detention of enemy combatants.⁵² In addition, Mobbs declaration states he examined governmental records and reports relevant to Padilla's case and the President's June 9, 2002 order that was based on multiple intelligence sources.⁵³ However, the records, reports and the intelligence sources used for Mobbs' declaration are not cited.⁵⁴

The government submitted a reply in support of its motion to dismiss the amended petition for a writ of habeas corpus on October 11, 2002.⁵⁵ The government maintains that American jurisprudence allows the military to detain enemy combatants in absence of an official declaration of war.⁵⁶ In addition, the government argues that Congress supported the President's

⁴⁸ Supplemental Br. Amici Curiae at 1, *Padilla v. Bush* (Sept. 27, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/padillabush92702ambrf.pdf>.

⁴⁹ *Id.* Amici contends that the government's arguments failed in the following four ways: an extra-constitutional status is imposed on a citizen with the label enemy combatant; the United States is legally at war; even in the absence of martial law the American history supports the detention of citizens in military custody; the Commander in Chief warrants complete judicial deference. *Id.* at Part IV.

⁵⁰ Resp't Resp. Mot. Dismiss Am. Pet. for Writ of Habeas Corpus at 10-20, *Padilla vs. Bush* (Aug. 27, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/padillabush92702ambrf.pdf>.

⁵¹ See *supra* note 11 at 15.

⁵² Unclassified Decl. Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy at 1, *Padilla v. Bush* (Aug. 27, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/padillabush82702mobbs.pdf>.

⁵³ *Id.*

⁵⁴ *Id.* at 1-6.

⁵⁵ Resp't Reply In Supp. Mot. Dismiss Am. Pet. for Writ of Habeas Corpus, *Padilla v. Bush* (Oct. 11, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/padillabush101102grply.pdf>.

⁵⁶ *Id.* at Part I, Subpart A.

action.⁵⁷ The government further argues the President's determination that Padilla is an enemy combatant is entitled to deferential treatment by the courts.⁵⁸

The SDNY ordered the petitioner and respondents to submit additional briefing addressing Padilla's right to counsel and the propriety of Mobbs' declaration *in camera* and *ex parte* on October 21, 2002.⁵⁹ Seven days after the order, the government submitted its response arguing that Padilla has no right to counsel because he is an enemy combatant.⁶⁰ The government asserts the purpose of Padilla's detention is twofold.⁶¹ First, his detention prevents him from aiding the enemy in executing attacks against the United States.⁶² Second, his detention assists the United States military in gathering information necessary to carry out the war.⁶³ The government contends the Sixth Amendment right to counsel is not triggered until the criminal prosecution against Padilla is initiated.⁶⁴

Further, the government contends that although the unclassified version of Mobbs' declaration alone establishes the proper determination of Padilla's status as an enemy combatant, the SDNY may consider Mobbs' classified declaration *in camera* and *ex parte*.⁶⁵ The government maintains the classified version of Mobbs' declaration contains confidential intelligence materials.⁶⁶ Moreover, the government argues that due to the ongoing armed conflict, the intelligence materials contained in the declaration are compelling reasons to keep Mobbs' classified declaration *in camera* and *ex parte*.⁶⁷

⁵⁷ *Id.* at Part I, Subpart B.

⁵⁸ *Id.* at Part II.

⁵⁹ Resp't Response This Ct.'s October 21, 2002 Order at 1, *Padilla v. Bush* (Oct. 28, 2002), *available* <http://news.findlaw.com/hdocs/docs/terrorism/padillabush102802grsp.pdf>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1-2.

⁶³ *Id.*

⁶⁴ *Id.* at 3.

⁶⁵ *Id.* at 15.

⁶⁶ *Id.* at 15-21.

⁶⁷ *Id.* at 19.

On December 4, 2002, the SDNY delivered an opinion and order.⁶⁸ The SDNY denied the government's motion to dismiss the amended petition for a writ of habeas corpus for Newman's lack of standing as next friend of Padilla.⁶⁹ The court held the proper respondent in Padilla's case is Secretary Rumsfeld.⁷⁰ The court further disclosed that it possesses the proper jurisdiction over the case and Secretary Rumsfeld.⁷¹ The SDNY, however, found the President has the constitutional

⁶⁸ Op. Order, *Padilla v. Bush* (Dec. 4, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/padillabush120402opn.pdf>.

⁶⁹ *Id.* at 24. The government contends Newman lacks the significant relationship required by next friend and cites Hamdi as authority. *Id.* at 18. The SDNY found that Newman was not an intruder or uninvited meddler posing as next of friend. *Id.* at 20. In fact, Newman consulted with Padilla as his defense counsel during the material witness proceedings. *Id.* at 19-20. In addition, Newman consulted with Padilla's family in her role as attorney. *Id.* at 20. Therefore, the SDNY found that Newman was the one person aware of Padilla's wishes and the person best equipped to achieve them. *Id.* The SDNY noted the legal issues between the material witness and habeas corpus proceedings are different. *Id.* The relationship, however, between Newman and Padilla has not changed. *Id.* Therefore, the SDNY held that Newman has standing to pursue Padilla's petition as next friend. *Id.* at 24.

⁷⁰ See *supra* note 68 at 24. The SDNY found the proper respondent for the writ of habeas corpus was Secretary Rumsfeld because of his personal involvement in Padilla's case. *Id.* at 32. The President's June 9, 2002 order, charged Secretary Rumsfeld with Padilla's detention. *Id.* He sent the Department of Defense personnel to take custody of Padilla. *Id.* Secretary Rumsfeld or his designee determined and sent Padilla to the brig in South Carolina. *Id.* Finally, Secretary Rumsfeld decides what information is releasable or filtered from Padilla and determines when the danger Padilla poses has passed. *Id.* Since Secretary Rumsfeld was the proper respondent, the SDNY found it unnecessary to reach a decision determining whether President Bush was the proper respondent in Padilla's case. *Id.* at 33. A second reason the court dismissed the President as a respondent is based on the relief Padilla seeks. *Id.* Padilla is not directly seeking relief from the President. *Id.* Based on the two above-mentioned reasons, President Bush was dismissed as a party to the case. *Id.* at 34. Similarly, Commander Mar was also dismissed because Secretary Rumsfeld, as proper respondent, could order him to comply with an order. *Id.* at 35-36. Thus, the court denied the government's motion to dismiss for lack of jurisdiction or in the alternative transfer of Padilla's case to South Carolina. *Id.* at 3.

⁷¹ See *supra* note 68 at 3. The court citing Title 18 of the United States Code Section 2241(a) held there was jurisdiction over Padilla's habeas corpus petition if it was authorized under New York's long arm statute. *Id.* at 44. New York's long arm statute permits a court to exercise personal jurisdiction over cases for non-resident that transact business in person or through an agent within the state. *Id.* at 45. The statute defines a business broadly and does not limit commercial transactions. *Id.* at 45. Under New York's long arm statute, the SDNY found personal jurisdiction over Secretary Rumsfeld. *Id.* The court further denied the government's motion to transfer Padilla's case to South Carolina because the issues pertaining to the proper respondent and jurisdiction favored keeping the case in the SDNY. *Id.* at 46-47. The court also cited case law that suggested taking into consideration the convenience and practicality of the parties. *Id.* Therefore, the court found that those considerations supported keeping the case in the SDNY. *Id.*

authority to detain Padilla.⁷² Therefore, Padilla's detention is not *per se* unlawful.⁷³ The court further held that Padilla may consult with counsel in matters aiding the habeas corpus petition.⁷⁴ The SDNY determined Padilla's status as an enemy combatant, is subject to the judicial review standard of some evidence.⁷⁵ In addition, the SDNY will not use Mobbs' sealed declaration to determine whether the government has met the standard of some evidence.⁷⁶ The SDNY ordered both parties

⁷² See *supra* note 68 at 46-52. The SDNY held that it was unnecessary for a congressional declaration of war to occur in order for the President to exercise his power in an armed conflict. *Id.* at 50. The SDNY citing the *Prize cases*, 67 U.S. (2 Black) 635 (1862), found that the United States Supreme Court recognized a war without a declaration of war. *Id.* The court further reasoned that even if Congressional authorization were necessary, the joint resolution passed on September 14, 2001, fulfilled that requirement. *Id.* at 53. The court rationalized that the President's June 9, 2002, order simply labeled Padilla an enemy combatant. *Id.* at 60-61. An enemy combatant is analogous to an unlawful combatant who is not subject to the protections of the Geneva Conventions. *Id.* The SDNY citing *United States v. Lindh* found the Taliban militia unqualified for lawful combatant status. *Id.* at 60. Therefore the SDNY held that the President's authority to order the detention of unlawful enemy combatants arises under the joint resolution and from his status as Commander-in-Chief. *Id.* at 66.

⁷³ See *supra* note 68 at 3. In concluding Padilla's detention is not *per se* unlawful, the SDNY reasoned that the case falls within the exception of Title 18 of the United States Code Section 4001. *Id.* at 68-69. The court found that Padilla is in fact detained pursuant to an "Act of Congress," the joint resolution. *Id.* The SDNY further noted the joint resolution qualified as an act of Congress. *Id.* at 72. The court held that Title 18 of the United States Code Section 4001(a) does not bar Padilla's detention. *Id.* at 74. Furthermore, the court held that Padilla detention is not barred as a matter of law. *Id.*

⁷⁴ See *supra* note 68 at 75. The SDNY held that Padilla has a right to present facts. *Id.* at 75-76. This right is firmly rooted in the following statutes: Title 28 of the United States Code Section 2241; Title 28 of the United States Code Section 2243; Title 28 of the United States Code Section 2246, the Federal Rules of Civil Procedures; Rules Governing Section 2254; Title 18 of the United States Code Section 3006(a)(2)(B). *Id.* at 75-77. The court determined that the most convenient and useful vehicle for Padilla to present facts is through counsel. *Id.* at 75. The court, however, noted that Padilla has no right to counsel under the Sixth Amendment of the United States Constitution absent criminal proceeding. *Id.* at 77-78.

⁷⁵ See *supra* note 68 at 96-97. The SDNY will examine evidence supporting the President's June 9, 2002, order determining Padilla an enemy combatant by the standard of "some evidence." *Id.* The court cited the deference treatment the Supreme Court and the Fourth Circuit Court of Appeals in *United States v. Hamdi* grant to the President's constitutional authority. *Id.* at 93-96. In addition, the court will examine whether that evidence is mooted by subsequent actions or events to Padilla's detention. *Id.* at 96. Specifically, the SDNY will look for "some evidence" suggesting that the government's papers support Padilla's hostile status. *Id.* at 97.

⁷⁶ See *supra* note 68 at 90. The SDNY found the sealed Mobbs' declaration did not broaden the nature of the accusations against Padilla compared to the unsealed Mobbs declaration. *Id.* at 100. The sealed Mobbs declaration sets forth objective circumstantial evidence corroborating factual allegations set out in the sealed Mobbs declaration. *Id.* After Padilla has the opportunity to contest the unsealed Mobbs declaration and if the SDNY finds the government failed to meet the "some evidence"

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to discuss and arrange conditions for Newman's consultation with Padilla.⁷⁷ The SDNY further scheduled the parties for a conference on December 30, 2002, to report the results of those discussions and arrangements and to schedule further proceedings.⁷⁸

B. YESSER HAMDI'S FACTUAL AND PROCEDURAL BACKGROUND

Yesser Hamdi is a United States citizen by birth.⁷⁹ He was born on September 26, 1980, in Baton Rouge, Louisiana.⁸⁰ In response to the al Qaeda terrorist network attack on the United States on September 11, 2001, the President ordered the United States armed forces to apprehend al Qaeda and Taliban members.⁸¹ During this ongoing military operation, the United States Armed Forces captured Hamdi.⁸² He was initially detained at Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba.⁸³ When it came to light that he was born in Louisiana, and may be an American citizen, Hamdi was transported to the Norfolk Naval Station Brig.⁸⁴ Allegedly, Hamdi possesses considerable knowledge about the Taliban and the al Qaeda network.⁸⁵ Particularly his knowledge pertaining to their training and operations is potentially valuable information to the United States.⁸⁶ Therefore, the United States determined Hamdi's continued detention as an enemy combatant comports with the laws and customs of war.⁸⁷

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham filed a writ of habeas corpus as next friend of Hamdi.⁸⁸ On May 29, 2002, the district court granted the writ of habeas corpus and allowed

test, the admission of the sealed Mobbs declaration will be reevaluated. *Id.* at 101.

⁷⁷ See *supra* note 68 at 102.

⁷⁸ *Id.*

⁷⁹ Yesser Hamdi, Birth Certificate, *available*

<http://news.findlaw.com/hdocs/docs/terrorism/hamdi92680birthc.pdf>. (last visited Feb. 25, 2003).

⁸⁰ *Id.*

⁸¹ *Hamdi v. Rumsfeld*, 294 F.3d 598, 601 (2002).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See *supra* note 15 at 9.

⁸⁶ *Id.*

⁸⁷ *Hamdi v. Rumsfeld*, 294 F.3d at 601.

⁸⁸ *Id.* at 600-601.

Hamdi unmonitored access to the public defender.⁸⁹ The government filed a motion for stay in the court of appeals.⁹⁰ While these proceedings were pending, Esam Fouad Hamdi, Hamdi's father, filed a petition for writ of habeas corpus as next friend.⁹¹ On June 11, 2002, the district court concluded that Hamdi's father properly filed his case as next friend.⁹² The Federal Public Defender for the Eastern District of Virginia was appointed as counsel for the petitioners, and the court ordered the government to allow the public defender unmonitored access to Hamdi.⁹³ On July 12, 2002, the Fourth Circuit Court of Appeals reversed the District Court's June 11th order mandating access to counsel and remanded the case for further proceedings because it appointed counsel and ordered access to the detainee without adequately considering the implications of its actions and before allowing the United States even to respond.⁹⁴ On June 14, 2002, the government's motion to stay the proceedings connected with Hamdi was granted by the Fourth District Court of Appeals.⁹⁵

On July 31, 2002, the district court for the Eastern District of Virginia ordered the government to produce numerous materials that were redacted to protect intelligence information for *in camera* review.⁹⁶ The court's production order requested *sua sponte* copies of all statements made by enemy combatants, notes taken from any interviews with enemy combatants, contact information on anyone who interrogated enemy combatants, copies of all statements made by the Northern Alliance concerning enemy combatants, and chronology of the detention of the enemy combatants while in military control.⁹⁷ The district court further ordered the

⁸⁹ *Id.* at 601-602.

⁹⁰ *Hamdi v. Rumsfeld*, 296 F.3d 278, 280 (2002).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 284.

⁹⁵ Order at 1-2, *Hamdi v. Rumsfeld* (Aug. 7, 2002), available

<http://news.findlaw.com/hdocs/docs/terrorism/hamdirums080702ord.pdf>.

⁹⁶ Resp't Mot. Relief From This Ct.'s Prod. Order of July 31, 2002 at 1, *Hamdi v. Rumsfeld* (Aug. 5, 2002), available

<http://news.findlaw.com/hdocs/docs/terrorism/hamdirums080502gmot.pdf>; Resp't Mem. In Supp. Mot. Relief from This Ct.'s Prod. Order of July 31, 2002 at 1-3, *Hamdi v. Rumsfeld* (Aug. 5, 2002), available

<http://news.findlaw.com/hdocs/docs/terrorism/hamdirums080502gmot.pdf>.

⁹⁷ Resp't Mem. In Supp. Mot. Relief from This Ct.'s Prod. Order of July 31, 2002 at

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government to appear for arguments on August 8, 2002, pertaining to the information submitted in accordance with its July 31st production order.⁹⁸

On August 5, 2002, the government filed a motion for relief from the district court's July 31st production order, on the grounds the order produced an insidious burden on the government.⁹⁹ Further, the government contends the information is not necessary for the resolution of the habeas corpus petition or respondent's motion to dismiss.¹⁰⁰ On August 7, 2002, the district court's order issued an order canceling the hearing scheduled for August 8, 2002, pending Hamdi's motion to dissolve the stay with the court of appeals.¹⁰¹

On August 8, 2002, the Fourth District Court of Appeals dissolved its June 14, 2002, stay order.¹⁰² The court of appeals furthered directed the district court to resolve the issue of whether Mobbs' declaration was sufficient, on its own, to detain Hamdi without being charged, without right to counsel, and *incommunicado*.¹⁰³ On August 16, 2002, pursuant to the directions provided by the court of appeals, the district court examined Mobbs' declaration, read briefs submitted by both parties, and heard oral arguments on the matter.¹⁰⁴ The district court held Mobbs' declaration was insufficient to detain

1-3, *Hamdi v. Rumsfeld* (Aug. 5, 2002), available

<http://news.findlaw.com/hdocs/docs/terrorism/hamdirums080502gmot.pdf>.

⁹⁸ *Id.* at 1.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 6.

¹⁰¹ *See supra* note 95.

¹⁰² Order at 4-5, *Hamdi v. Rumsfeld* (Aug. 16, 2002), available

<http://news.findlaw.com/hdocs/docs/terrorism/hamdirums81602ord.pdf>.

¹⁰³ *Id.* at 1-2. Michael H. Mobbs declaration was attached to the Respondent's brief submitted on July 25, 2002. *Id.* at 9. Mobbs' Declaration was a two page long document, which failed to address critical issues to Hamdi's case. *Id.* The district court found the declaration lacked the following: the nature and authority Mobbs possesses to review and make declarations on behalf of the Executive Branch determining Hamdi's status; the authority a Special Advisor of Defense for Policy has for labeling citizens enemy combatants; intelligence information or the gathering of intelligence information pertaining to Hamdi; information explaining why Hamdi is treated differently than all other captured Taliban; the authority and the procedures used to conclude Hamdi's capture was lawful; the authority and the procedures authorizing Mobbs to supervise the classification of enemy combatants; details surrounding Hamdi's detention and transfer to military custody. *Id.* at 9-11. These questions were further asked during oral arguments and Respondents' counsel was unable to answer. *Id.* at 13.

¹⁰⁴ *Id.*

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Hamdi.¹⁰⁵ The government's motion for relief from the district court's production order on July 31st filed on August 5, 2002, was denied.¹⁰⁶ The court ordered the government to comply with its July 31st production order by August 21, 2002.¹⁰⁷

On August 19, 2002, the government filed a motion for certification of interlocutory appeal and stay claiming the district court's August 16, 2002, holding implicates an important question of deferential treatment owed to military decisions and requires sensitive national security information.¹⁰⁸ The government contends the August 16, 2002, order involves a controlling issue of law, which will determine the outcome of the case.¹⁰⁹ In addition, the government requests a stay of Hamdi's proceeding while the issue is resolved.¹¹⁰

C. JOHN PHILLIP WALKER LINDH'S FACTUAL AND PROCEDURAL BACKGROUND

John Phillip Walker Lindh is a United States citizen by birth.¹¹¹ He was born in February 1981, in Washington, D.C.¹¹² Lindh's indictment alleged the following counts:

[C]onspiracy to murder United States Nationals including civilians and military personnel by committing murder; conspiracy to provide materials support and resources to Harakat ul-Mujahideen (HUM) and providing material support and resources to the HUM; conspiracy to provide material support and resources to al Qaeda and providing material support and resources to al Qaeda; conspiracy to contribute services to al Qaeda and contributing services to al

¹⁰⁵ *Id.* at 2, 14.

¹⁰⁶ *Id.* at 2.

¹⁰⁷ *Id.*

¹⁰⁸ Resp't Mot. Certification Interlocutory Appeal and Stay at 1, *Hamdi v. Rumsfeld* (Aug. 19, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums81902gmot.pdf>. A court may certify an interlocutory order under 28 U.S.C. § 1292(b) if the following criteria is met: an order involves a controlling question of law; substantial grounds for a difference of opinion regarding the question of law; an immediate appeal from the order may determine the outcome of the litigation. *Id.* at 2.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 7-8.

¹¹¹ *Profile: John Walker Lindh*, (Thursday, Jan. 24, 2002), available at <http://news.bbc.co.uk/1/hi/world/americas/1779455.stm>

¹¹² *Id.*

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Qaeda; conspiracy to supply services to the Taliban and supplying services to the Taliban; using, carrying, and possessing firearms and destructive devices during violent crimes.¹¹³

On or about November 25, 2001, Lindh surrendered to the Northern Alliance during an ongoing civil war against the Taliban.¹¹⁴ Johnny Spann, a Central Intelligence Agency employee was conducting interviews of captured Taliban personnel at the Aala-iJanghi (QIJ) compound near Afghanistan.¹¹⁵ Among the individuals interviewed was Lindh.¹¹⁶ Shortly after Spann interviewed Lindh, prisoners staged an uprising, which ultimately ended Spann's life.¹¹⁷ The situation was controlled after several days.¹¹⁸ Lindh was shot in the leg as he attempted to escape.¹¹⁹ On December 1, 2001, the Northern Alliance soldiers detained Lindh with the assistance of United States military personnel.¹²⁰ After Lindh was identified as a United States national, he was given medical assistance and interrogated.¹²¹

¹¹³ Indictment at 6-14, *United States v. Lindh* (Feb. 5, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.html>. Harakat ul-Mujahideen (HUM) is a terrorist group dedicated to Islam's extremist views. *Id.* at 3.

¹¹⁴ Criminal Compl. at 2, *United States v. Lindh* (Jan. 15, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uswlindh11502cmp.html>. The Northern Alliance, which fought to overthrow the Taliban's militia control of Afghanistan, was a coalition of non-Pashtun groups who opposed the Taliban., Indictment at 3, *United States v. Lindh* (Feb. 5, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.html>. According to CNN, the United States exchanged and gave information to the Northern Alliance. *Northern Alliance: U.S. strikes accurate*, CNN Report available at <http://www.cnn.com/2001/WORLD/asiapcf/central/10/07/ret.abdullah.attacks.cnn/> (Oct. 7, 2001).

¹¹⁵ Criminal Compl. at 2, *United States v. Lindh* (Jan. 15, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uswlindh11502cmp.html>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 10. Pashtun is the ethnic majority in Afghanistan. Indictment at 3, *United States v. Lindh* (Feb. 5, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.html>.

¹²⁰ Br. Amici Curiae Int'l Human Rights Org. In Supp. of Def. Mot. Suppress Involuntary Statements and Evidence at 3, *United States v. Lindh* (June 18, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uslindh71002ammot.pdf>.

¹²¹ Criminal Compl. at 2-3, *United States v. Lindh* (Jan. 15, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uswlindh11502cmp.html>.

On March 15, 2002, the defense filed a motion to compel production of discovery with the Eastern District of Virginia.¹²² The motion moved the court for an order compelling the government to comply with the Federal Rules of Criminal Procedure 16(a).¹²³ Lindh sought identifying information for the following individuals the government claimed as confidential sources: individuals who participated in his interrogations; individuals the government redacted from reports; individuals who wrote documents pertaining to statements allegedly made by Lindh; individuals who guarded and maintained contact with Lindh; and all other information referencing Lindh.¹²⁴

On June 17, 2002, Lindh filed a motion to suppress involuntary statements and evidence.¹²⁵ In support of Lindh's motion, the International Human Rights Organization filed a amici curiae brief on July 10, 2002.¹²⁶ This amici consists of several human rights organizations dedicated to the consistent application of international laws.¹²⁷ Amici identified two issues critical to Lindh's case.¹²⁸ First, they allege the tortures, cruel, inhuman and degrading treatment endured by Lindh while in the custody of the United States, are prohibited by international laws.¹²⁹ Second, they allege statements given by Lindh, obtained through torture and coercion, are forbidden by

¹²² Notice Mot. and Mot. Compel Prod. Disc., *United States v. Lindh* (March 15, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uslindh31502discmot.pdf>.

¹²³ *Id.* at 1. The Federal Rules of Criminal Procedure 16(a) permits the defendant to obtain relevant written or recorded statements made before or after his or her arrest, if used at trial. Fed. R. Crim. P. 16(a).

¹²⁴ Notice Mot. and Mot. Compel Prod. Disc. at 2-9, *United States v. Lindh* (March 15, 2001), available <http://news.findlaw.com/hdocs/docs/lindh/uslindh31502discmot.pdf>.

¹²⁵ Def. Notice and Mot. Suppress Statements on Dec. 1, 2001, U.S. Special Forces and Robert Felton, *United States v. Lindh* (June 17, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uslindh61702sfsupmot.pdf>.

¹²⁶ Mot. Leave To File Br. of Amici Curiae and Br. of Amici Curiae Int'l Human Rights Org. In Supp. Def. Mot. Suppress Involuntary Statements and Evidence, *United States v. Lindh* (June 18, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uslindh71002ammot.pdf>.

¹²⁷ *Id.* at 1. The following organizations support Amici: the Center for Constitutional Rights, the Center for Justice & Accountability, the Extradition and Human Rights Committee of the American Branch of the International Law Association, Human Rights Advocates, and World Organization Against Torture USA. *Id.* at 1-4.

¹²⁸ Br. Amici Curiae Int'l Human Rights Org. In Supp. of Def. Mot. Suppress Involuntary Statements and Evidence at 5, *United States v. Lindh* (June 18, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uslindh71002ammot.pdf>.

¹²⁹ *Id.*

international laws.¹³⁰ Amici sought to exclude evidence and statements obtained through coercion and torture.¹³¹

On July 15, 2002, Lindh and his team of lawyers entered into a plea agreement with United States Attorneys for the Eastern District of Virginia by pleading guilty to two crimes.¹³² The first crime consisted of supplying services to the Taliban.¹³³ The second crime consisted of carrying explosives in the course of supplying services to the Taliban.¹³⁴

In conjunction with the plea agreement, both parties stipulated and agreed to the following facts. On June 30, 2000, President William J. Clinton declared the nation in state of emergency because of threats posed by al Qaeda and the Taliban.¹³⁵ The nation's state of emergency continued with President's Bush declaration that the Taliban continued to use Afghanistan as a safe heaven for the operations of Usama bin Laden and the al Qaeda network.¹³⁶ In May or June of 2001, Lindh traveled to Afghanistan with the purpose of assisting the Taliban in its fight against the Northern Alliance.¹³⁷ During the same time, Lindh revealed to the Taliban recruiting personnel that he was an American citizen and wanted to fight in the front lines.¹³⁸ Additionally, Lindh disclosed his desire to undergo military preparation at a training camp.¹³⁹ Lindh participated fully in the training activities.¹⁴⁰ His training included "weapons, orienteering, navigation, explosives and battlefield combat."¹⁴¹ After completing his training and

¹³⁰ *Id.*

¹³¹ *Id.* at 28-29. Some of the examples of torture and coercion Lindh endured are highlighted in Amici's brief. *Id.* at 3-5. Some of the examples are: Lindh bound, blindfolded, and handcuffed while in custody; derogatory and threatening statements including death threats; plastic straps used to bind Lindh's hands which cut into his skin and cut off his circulation; Lindh was stripped naked and bound to a stretcher; Lindh was placed in a metal storage container with no windows, and no heat source; Lindh was provided with minimal food and medical attention. *Id.*

¹³² Def. Sentencing Mem. at 3,11, *United States v. Lindh* (Sept. 26, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uslindh92602dsenmem.pdf>.

¹³³ *Id.* at 11.

¹³⁴ *Id.*

¹³⁵ Statement of Facts, *United States v. Lindh* (July 15, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uslindh71502sof.pdf>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

pledging allegiance to jihad, Lindh traveled to the front line in Takhar, Afghanistan bearing an AKM rifle.¹⁴² Between September and November of 2001, Lindh and his fighting group rotated shifts fighting against the Northern Alliance.¹⁴³ Lindh, knowingly engaging in a commission of a felony, carried a rifle and grenades.¹⁴⁴

As part of the plea agreement, both parties concurred that Lindh's sentence would be twenty years in prison.¹⁴⁵ Defense counsel, however, requested from the court that Lindh gain access to a facility with educational opportunities at the university level as well as one close to his family's residence in California.¹⁴⁶ Such a request was based on the notion that Lindh possessed knowledge and intelligence that could assist the United States in countering future terrorist threats.¹⁴⁷ Therefore, providing Lindh access to higher education can only further the United States efforts in countering future terrorist threats.¹⁴⁸

D. ENEMY COMBATANT

Labeling individuals as enemy combatants originated during World War II.¹⁴⁹ On July 2, 1942, President Franklin D. Roosevelt issued Proclamation No. 2561 (hereinafter, "Proclamation") demanding that enemies entering the United States committing sabotage, espionage, or warlike acts be tried within the laws of war.¹⁵⁰ The proclamation asserted that any person charged with attempting to commit or committing sabotage, espionage, or warlike acts, is subject to a military tribunal and prohibited from seeking remedies from civilian United States Courts.¹⁵¹ The Proclamation cites the

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Plea Agreement, *United States v. Lindh* (July 15, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf>.

¹⁴⁶ Def. Sentencing Mem. at 1, *United States v. Lindh* (Sept. 26, 2002), available <http://news.findlaw.com/hdocs/docs/lindh/uslindh92602dsenmem.pdf>.

¹⁴⁷ *Id.* at 7-8.

¹⁴⁸ *Id.*

¹⁴⁹ See *supra* note 9 citing *Ex parte Quirin v. United States*, 317 U.S. 1 (1942).

¹⁵⁰ Proclamation No. 2561, 7 Fed. Reg. 5101, and in 56 Stat. 1964 (July 2, 1942).

¹⁵¹ *Id.*

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Constitution and United States Statues as authority for prosecuting individuals before military tribunals.¹⁵²

The United States government contends that citizens are detainable indefinitely upon its “say-so.”¹⁵³ The government asserts the authority to label citizens as enemy combatants and cites *Ex Parte Quirin* for support.¹⁵⁴ In *Ex Parte Quirin*, the President Franklin D. Roosevelt acting within his power as Commander in Chief appointed a military commission to try the petitioners for “offensives against the law of war and the Articles of War...”¹⁵⁵ At the time, the United States declared war against the German Reich.¹⁵⁶ One of the accused claimed United States citizenship.¹⁵⁷ All of the accused, wearing German infantry uniforms, emerged from submarines and entered the United States carrying explosives, flammable articles and timing devices.¹⁵⁸ Upon coming ashore in the United States, they discarded their uniforms and embarked on the execution of their sabotage plans.¹⁵⁹ They were apprehended before the execution of these plans.¹⁶⁰

The United States Supreme Court considered whether the President acted within his power when he authorized trials by military commissions.¹⁶¹ The President, as Commander in Chief, appointed a Military Commission to try offenses against the laws of war.¹⁶² As Commander in Chief, the President must carry into effect all laws passed by Congress for the conduct of war.¹⁶³ The Court explicitly stated that citizenship was not an issue in the case because the crime violated the laws of war.¹⁶⁴ The Court held that the President’s July 2, 1942, Proclamation Order was authorized by the

¹⁵² *Id.*

¹⁵³ See *supra* note 9 at 3; *Hamdi*, 296 F.3d at 283. The government contends that American citizens “alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so.” *Id.*

¹⁵⁴ *Hamdi*, 296 F.3d at 283.

¹⁵⁵ *Ex parte Quirin*, 317 U.S. at 22.

¹⁵⁶ *Id.* at 21.

¹⁵⁷ *Id.* at 20.

¹⁵⁸ *Id.* at 21.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 21.

¹⁶¹ *Id.* at 29.

¹⁶² *Id.* The President’s power as Commander in Chief is derived from the Constitution. *Id.* at 25.

¹⁶³ *Id.* at 26.

¹⁶⁴ *Id.* at 37.

Constitution.¹⁶⁵ Thus, the President's measures ordering the accused to be tried before a military tribunal was lawful.¹⁶⁶

In contrast to the facts in *Ex Parte Quirin*, Congress did not declared war at the time of Padilla, Hamdi, and Lindh's detention. On September 18, 2001, Congress passed a Joint Resolution but did not authorize an official declaration of war.¹⁶⁷ The Joint Resolution authorized President Bush to:

[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹⁶⁸

In addition to *Ex parte Quirin*, the government relied on *In re Territo* for its authority to detain enemy combatants irrespective of their United States citizenship.¹⁶⁹ In *Territo*, an American citizen was captured in the battlefield and legally held as a prisoner of war during World War II.¹⁷⁰ The Ninth Circuit acknowledged that the accused was a United States citizen, but deemed that citizenship did not shield the prisoner from the governing laws during a time of war.¹⁷¹ Thus, *Territo* provides authority for the government to detain a United States citizen as a prisoner of war.¹⁷²

In contrast to the cases the government cites as authority to detain enemy combatants irrespective of their citizenship,

¹⁶⁵ *Id.* at 48.

¹⁶⁶ *Id.*

¹⁶⁷ S.J. Res. 23, 107th Cong. (2001) (enacted). In contrast to a joint resolution, the Senate and the House of Representatives expressly authorized an official congressional declaration of war in a statute. S.J. Res. 119, 77th Cong., 55 Stat. 796 (1941). The last congressional declaration of war occurred on December 11, 1941. *Id.* Congress declared war between the Government of Germany and the United States. *Id.* In addition, on the same day, Congress declared war between the Government of Italy and the United States. S.J.Res. 120, 77th Cong., 55 Stat 796, 797. In both statutes Congress formally declared war and authorized the President to employ the entire naval and military forces to engage in war against the respective governments and to bring the conflict to a successful termination. *Id.*

¹⁶⁸ S.J. Res. 23, 107th Cong. (2001) (enacted).

¹⁶⁹ *Hamdi*, 296 F.3d at 283 citing *In re Territo*, 156 F.2d 142 (9th Cir. 1946).

¹⁷⁰ *In re Territo*, 156 F.2d at 145-146.

¹⁷¹ *Id.* at 144-145.

¹⁷² *Id.* at 148.

the American Bar Association Task Force on Treatment of Enemy Combatants, Newman, NYSACDL, and NACDL argue that the United States Supreme Court case *Ex Parte Milligan* is in fact, the controlling precedent for Padilla and Hamdi's case.¹⁷³ In *Ex Parte Milligan* a military commander arrested a United States citizen in his Indiana residence.¹⁷⁴ Upon trial before a military commission, Milligan was charged with conspiring against the United States, aiding rebels against the United States, inciting a rebellion, disloyal practices, and violating the laws of war.¹⁷⁵ Milligan challenged the commission's authority to prosecute him, however, the objection was overruled.¹⁷⁶ The military commission found Milligan guilty on all the charges and sentenced him to death.¹⁷⁷ Milligan filed his petition for writ of habeas corpus with the District Court of Indiana.¹⁷⁸ The Supreme Court granted certiorari.¹⁷⁹

The Court concluded that if President Andrew Johnson's Order detained a citizen, except as a prisoner of war, the Court could examine the lawfulness of the government's imprisonment.¹⁸⁰ The Court found that Milligan was imprisoned solely under the authority of the President.¹⁸¹ The Court understood the Constitution to apply equally to all citizens in times of peace and war.¹⁸² The Court held that the military commission did not have jurisdiction to prosecute Milligan.¹⁸³

¹⁷³ See *supra* note 9 at 19, 25; Am. Pet. for Writ of Habeas Corpus at 7, *Padilla v. Bush* (June 19, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/padillabush61902apet.pdf>; Supplemental Br. Amici Curiae at Part I, Subpart A, B, *Padilla v. Bush* (Sept. 27, 2002), available <http://news.findlaw.com/hdocs/docs/terrorism/padillabush92702ambrf.pdf>.

¹⁷⁴ *Ex Parte Milligan*, 71 U.S. 2, 6 (1866).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 7.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 8-9.

¹⁸⁰ *Id.* at 116.

¹⁸¹ *Id.* at 134.

¹⁸² *Id.* at 120.

¹⁸³ *Id.* at 136.

E. THE MILITARY ORDER

President Bush issued a Military Order on November 13, 2001, entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”¹⁸⁴ The President issued the military order in response to Congress’ authorization to use all necessary force against those responsible for the September 11, 2001, attacks.¹⁸⁵ Although Congress did not officially declare war, Hamdi and Padilla remain detained pursuant to Congress’ Joint Resolution.¹⁸⁶ The President’s Military Order authorized perpetrators acting alone or in concert, intending to engage or engaging in terrorist acts against the United States to be tried by a military commission.¹⁸⁷

The Military Order identifies the United States in a state of “national security,” and provides data on international terrorists, naming members of al Qaeda as responsible for carrying out the September 11, 2001, terrorist attacks.¹⁸⁸ The findings proclaim the attacks created a state of armed conflict, justifying the use of Armed Forces.¹⁸⁹ In addition, the Military Order confers exclusive jurisdiction over non-citizens.¹⁹⁰ The President, however, may determine from “time to time” who the exclusive jurisdiction may cover.¹⁹¹

As authority for executing the Military Order, President Bush cites Senate Joint Resolution 23 “Authorization for Use of Military Force” and Section 836 of Title 10 of the United States Code.¹⁹² Joint Resolution 23 permits the President to use all necessary and appropriate force.¹⁹³ While Section 836 of Title

¹⁸⁴ Mil. Order, 66 Fed. Reg. 57833 (Nov. 13, 2001).

¹⁸⁵ *Id.*

¹⁸⁶ *See supra* note 11 at 11.

¹⁸⁷ Resp’t Mot. Stay Mag. J. May 20, 2002 Order Regarding Access Mem. Supp. at 3-4, *Hamdi v. Rumsfeld* (May 23, 2002), *available* <http://news.findlaw.com/hdocs/docs/terrorism/hadmirum52302gmot.pdf>; Resp’t Resp. Mot. Dismiss, Am. Pet. For Writ of Habeas Corpus at 4-6, *Padilla v. Bush* (Aug. 27, 2002), *available* <http://news.findlaw.com/hdocs/docs/terrorism/padillabush82702grsp.pdf>; Mil. Order, 66 Fed. Reg. 57833 (Nov. 13, 2001).

¹⁸⁸ Mil. Order, 66 Fed. Reg. 57833 at Section 1 (Nov. 13, 2001).

¹⁸⁹ *Id.* at Section 1(a).

¹⁹⁰ *Id.* at Section 7(b)(1).

¹⁹¹ *Id.* at Section 2(a), Section 7(b).

¹⁹² *See supra* note 184.

¹⁹³ S.J. Res. 23, 107th Cong. (2001) (enacted); *See supra* note 9 at 6.

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10 of the United States Code specifically states that the President may prescribe rules governing military tribunals and these rules are proper if they do not violate the Constitution.¹⁹⁴

The Department of Defense was authorized to develop the policies and procedures for the military tribunals in accordance with the November 13, 2001 Military Order by President Bush.¹⁹⁵ On March 21, 2002, the Department of Defense issued Military Commission Order No. 1 (hereinafter, "Order") with the purpose of ensuring that individuals subject to the military tribunals receive a full and fair trial.¹⁹⁶ The accused may select a "detailed defense counsel," which is a military officer or a civilian attorney.¹⁹⁷ The guidelines, however, are unlike the procedural rules that govern civilian courts. According to the Order, limited disclosure of protected information from documents is allowed in the proceedings.¹⁹⁸ Evidence is admissible if it has reasonable probative value.¹⁹⁹ The commission may, on its own initiative, summon and hear witnesses via telephone, audiovisual or any other means it deems appropriate.²⁰⁰

Post-trial procedures consist of an administrative review.²⁰¹ After the administrative review, a review panel examines the trial record.²⁰² The review panel, in its discretion, may forward the record of trial to the Secretary of Defense or return the case to the "Appointed Authority" for further proceedings only if a "material error of law occurred."²⁰³ The commission's charges and sentences including, death or life in prison, are binding when the President or the Secretary of Defense make the final decision.²⁰⁴

¹⁹⁴ 10 USCA § 836 (West 2002).

¹⁹⁵ Dept. of Def, Mil. Comm'n Order No.1 (March 21, 2002), *available* http://www.defenselink.mil/news/Mar2002/n03212002_200203213.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at Section 4 (C)(2)(a)(b).

¹⁹⁸ *Id.* at Section 6(D)(5)(b).

¹⁹⁹ *Id.* at Section 6(D)(1).

²⁰⁰ *Id.* at Section 6(D)(2)(a).

²⁰¹ *Id.* at Section 6(H)(3).

²⁰² *Id.* at Section 6(H)(4).

²⁰³ *Id.*

²⁰⁴ *Id.* at Section 6 (H)(2)(6).

F. TITLE 18 OF THE UNITED STATES CODE SECTION 4001(A)

Congress, through Title 18 of the United States Code Section 4001(a), prohibited the detention of citizens who are not officially charged with a crime.²⁰⁵ However, President Bush's authority for detaining Padilla and Hamdi comes under the guise of Congress' Joint Resolution 23 and the President's Military Order.²⁰⁶ This authority arguably allows the government to detain citizens indefinitely, without right to counsel, and *incommunicado*.²⁰⁷

The language of the Title 18 Section 4001(a) establishes limitations on the control and detention of citizens.²⁰⁸ The statute reads: "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."²⁰⁹ In *Howe v. Smith*, a prisoner held in Vermont, who was transferred to federal prison, challenged the Attorney General and the Federal Government's authority to receive and hold him in a federal penitentiary.²¹⁰ The Court acknowledged in a footnote that the language of Section 4001(a) prohibited detention of "any kind" without congressional authorization.²¹¹ The Court interpreted Section 4001(a) to mean that persons protected by the Constitution shall not be detained indefinitely without congressional authority.

In 1971, Section 4001(a) was amended to prohibit the detention and control of United States citizens where statutory basis for incarceration exist.²¹² Moreover, the amended statute repealed the Emergency Detention Act of 1950 (Title II of the Internal Security Act of 1950), which authorized the establishment of detention camps and imposed conditions for their use.²¹³ The Emergency Detention Act of 1950 was

²⁰⁵ 18 USCA § 4001(a) (West 2002); See also Stephen I. Vladeck, *A Small Problem of Precedent: 18 U.S.C. §4001(a) and the Detention of U.S. Citizen "Enemy Combatants,"* 112 YALE L.J. 961 (2003) (discussing 18 U.S.C. § 4001(a) in light of the detention of United States citizens as enemy combatants).

²⁰⁶ See *supra* note 28 at 3-4; *Hamdi*, 294 F.3d at 601.

²⁰⁷ Pet'r Reply *supra* note 42 at 5; *Hamdi*, 294 F.3d at 601.

²⁰⁸ 18 USCA § 4001(a) (West 2002); See *supra* note 9 at 11.

²⁰⁹ 18 USCA § 4001(a) (West 2002); See *supra* note 9 at 11.

²¹⁰ *Howe v. Smith*, 452 U.S. 473, 479 (1981); See *supra* note 9 at 11. Only one Supreme Court case has made mention of Section 4001(a). *Id.*

²¹¹ *Howe v. Smith*, 452 U.S. at 479.

²¹² Pub. L. No. 92-128; See *supra* note 9 at 11.

²¹³ Pub. L. No. 92-128; See *supra* note 9 at 11.

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enacted at the onset of the Korean War.²¹⁴ The Act established procedures for dealing with individuals who intended to commit, or committed acts of sabotage or espionage.²¹⁵ The House Report acknowledged that the statute was subject to grave challenge, as it required only the intent to commit, or a reasonable belief that an individual would commit, sabotage or espionage.²¹⁶

G. INTERNATIONAL LAWS AND TREATY CONSIDERATIONS

In 1945, the United Nations created the United Nations Charter.²¹⁷ The Charter was established to address threats to international peace. Particularly, the Charter identified basic humanitarian standards to be followed by all United Nations members at times of peace and war.²¹⁸ On December 10, 1948, the United States signed the United Nations' Universal Declaration of Human Rights (hereinafter, "Declaration").²¹⁹ The Declaration is a pledge to promote fundamental human rights and dignity and to maintain friendly relationships between nations.²²⁰ As a member of the Charter and as a signatory of the Declaration, the United States pledged to respect human dignity and rights and to recognize fundamental freedoms.²²¹ Specifically, the Declaration declares

²¹⁴ Pub. L. No. 92-128; *See supra* note 9 at 11, fn 15.

²¹⁵ *Id.*

²¹⁶ Pub. L. No. 92-128.

²¹⁷ Inter-Allied Declaration, June 12, 1941, *available* <http://www.un.org/aboutun/milestones.htm>. The Inter-Allied Declaration signed on June 12, 1941, "was the first step towards the establishment of the United Nations." *Id.* This Declaration was an agreement "to work together, with other free peoples, both in war and in peace." *Id.* On August 14, 1941 the President of the United States, Franklin Delano Roosevelt, and Prime Minister Winston Churchill of the United Kingdom proposed a set of principles intended to maintain international peace and security. *Id.* During World War II, President Franklin D. Roosevelt, along with the heads of twenty-six other nations pledged their governments to continue to fight against Germany, Italy, Japan and associated countries while recognizing basic humanitarian rights. *Id.* The Charter was created in 1945 at a United Nations conference in San Francisco with representatives of 50 countries. *Id.*

²¹⁸ *Id.*

²¹⁹ Universal Declaration of Human Rights, Office of the U.N. High Commissioner for Human Rights Geneva, Switzerland, Press Kit (Dec. 10, 1948), *available* <http://www3.itu.int/udhr/miscinfo/carta.htm>.

²²⁰ Universal Declaration of Human Rights, Dec. 10, 1948, *available* <http://www.un.org/rights/50/decla.htm>.

²²¹ *Id.*

that the preservation of human rights is essential.²²² Article 3 of the Declaration preserves individual's rights to life, liberty and security.²²³

The day after the September 11th attacks, the United Nations Security Council enacted Resolution 1368.²²⁴ The Resolution sought to reaffirm the purpose under which the Charter was created and to address threats to international peace.²²⁵ The Resolution called upon its Member States to cooperate with one another to bring to justice those responsible for the September 11th attacks.²²⁶

H. GENEVA CONVENTIONS

The term enemy combatant, which Padilla and Hamdi are designated, is raised in the Third and Fourth Geneva Conventions.²²⁷ The Conventions govern the treatment of lawful and unlawful enemy combatants.²²⁸ Further, the Conventions established the foundation for contemporary humanitarian law.²²⁹

²²² *Id.*

²²³ *Id.* at art. 3. Article 3 of the Declaration preserves individual's rights to life, liberty and security. *Id.* Article 8 of the Declaration authorizes an effective remedy by competent national tribunals when fundamental rights by the constitution or laws are violated. *Id.* at art. 8. Article 9 of the Declaration prohibits its members from subjecting individuals to arbitrary arrests, detentions or exiles. *Id.* at art. 9. In addition, Article 28 entitles everyone to a social and international order where the rights and freedoms set forth in this Declaration are recognized. *Id.* at 28.

²²⁴ U.N. Security Council Resolution 1368, Sept. 12, 2001, *available* <http://www.state.gov/p/io/rls/othr/2001/4899.htm>.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949-Feb. 12, 1950, 6 U.S.T. 3316 (date of entry into force with respect to the United States of America: Feb. 2, 1956) [hereinafter Geneva III], *available*

<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68?OpenDocument>; Geneva Convention Relative to the Protections of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949-Feb. 12, 1950, 6 U.S.T. 3516 (date of entry into force with respect to the United States of America: Feb. 2, 1956) [hereinafter Geneva IV], *available* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5?OpenDocument>; *See also supra* note 9 at 13.

²²⁸ HR 5071, 107th Cong., 148 CONG. REC. 4402 (2002); *See generally* The History of Humanitarian Law, *available* <http://www.redcross.lv/en/conventions.htm#geneva> (last visited Feb. 18, 2003).

²²⁹ *See generally* The History of Humanitarian Law, *available* <http://www.redcross.lv/en/conventions.htm#Geneva> (last visited Feb. 18, 2003). The Geneva Conventions were written rules to protect the victims of conflicts; open to all

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On August 12, 1949, sixty-one Nations, including the United States, signed the Geneva Conventions.²³⁰ The Conventions established regulations for persons during an official declaration of war or armed conflict.²³¹ The First and Second Geneva Conventions set out standards for the wounded and the sick of the armed forces in the field and at sea.²³² Each Convention is premised on the notion that each individual who finds themselves under the authority of an adverse party is entitled to respect for his or her life, dignity, personal rights, and political and religious convictions.²³³ Each individual is protected against acts of violence or reprisal and each is also entitled to communicate with his or her families and receive aid.²³⁴

The Third and Fourth Geneva Conventions specifically address prisoners of war and lawful enemy combatants.²³⁵ The Third Geneva Convention governs the treatment of prisoners of war.²³⁶ Prisoners of war fall into six specific categories.²³⁷ These categories include: members of the Armed Forces of either side of the conflict; members that are commanded by a party of the armed conflict or contain fixed distinctive insignia or carry arms openly or operations comport with the laws of war; members who proclaim allegiance to armed forces not recognized by the detaining power; people who accompany the

states and the obligation extends without discrimination to the wounded and sick; and respect for medical personnel transporting equipment. *Id.*

²³⁰ Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949-Feb. 12, 1950, 6 U.S.T. 3217 (date of entry into force with respect to the United States of America: Feb. 2, 1956) [hereinafter Geneva II], available <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/44072487ec4c2131c125641e004a9977?OpenDocument>.

²³¹ *Id.*; ABA Task Force on Treatment of Enemy Combatants, Preliminary Report at 13 (Aug. 8, 2002) available at http://www.abanet.org/leadership/enemy_combatants.pdf; *See generally supra* note 228.

²³² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949-Feb. 12, 1950, 6 U.S.T. 3114 (date of entry into force with respect to the United States of America: Feb. 2, 1956) [hereinafter Geneva I], available <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3?OpenDocument>; *See supra* note 230.

²³³ *See supra* note 229 and accompanying text.

²³⁴ *See supra* note 229 and accompanying text.

²³⁵ Geneva III and IV, *supra* note 227.

²³⁶ Geneva III, *supra* note 227, art. 4, 6 U.S.T. at 3320, 3322.

²³⁷ *Id.*

armed forces but are not members; crew members; inhabitants of non-occupied territory are lawful enemy combatants.²³⁸

The Geneva Conventions provide a minimum standard for the humane treatment of prisoners of war.²³⁹ Distinctions based on race, religion, sex, wealth or other similar criteria are prohibited.²⁴⁰ Further, violence, torture, humiliation, degrading treatment, sentencing and execution are barred, absent the safeguards afforded to civilians.²⁴¹ Additionally, treatment for the sick and wounded is required.²⁴²

Even those not considered prisoners of war, within the language of the Third Geneva Convention, are still afforded protection under the Fourth Geneva Convention. The Fourth Geneva Convention governs the treatment of civilian persons in time of war.²⁴³ Article 4 of the Fourth Geneva Convention provides protections to people who are not nationals of the detaining power or adverse power and find themselves in the conflict.²⁴⁴ A person who is a threat to security is not protected under the Geneva Conventions.²⁴⁵ Article 5 of the Fourth Geneva Convention specifically excludes individuals who are suspected of, or engage in, hostile activities that affect the state security from protections prescribed under the Geneva Conventions.²⁴⁶ The Fourth Convention, however, clearly states that no one who is protected should be deprived of the type of fair trial prescribed by the Geneva Convention.²⁴⁷

I. MILITARY TRIBUNALS ACT 2002 AND THE SEPARATION OF POWERS

While in military custody, Padilla and Hamdi may be subject to the laws governing military tribunals. Congress, however, did not authorized the use of military tribunals.²⁴⁸ On July 9, 2002, California Congressmen, Adam Schiff,

²³⁸ *Id.*

²³⁹ *Id.* at art. 3, 6 U.S.T. at 3318, 3320.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Geneva IV, *supra* note 227.

²⁴⁴ Geneva IV, *supra* note 227, art. 4, 6 U.S.T. at 3520.

²⁴⁵ Geneva IV, *supra* note 227, art. 5, 6 U.S.T. at 3520, 3522.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ HR 5071, 107th Cong., 148 CONG. REC. 4402 (2002).

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introduced a bill seeking congressional authorization for tribunals to prosecute unlawful combatants in the war on terrorism.²⁴⁹ Article I, Section 8 of the Constitution gives Congress the power to create tribunals inferior to the Supreme Court, which includes the power to authorize military tribunals.²⁵⁰ These powers not only permit Congress to authorize military tribunals, but also permit the creation of rules governing captures and the rules that define and punish offenses.²⁵¹

Schiff's bill, the Military Tribunals Act of 2002, seeks jurisdiction over non-citizens, non-United States residents, "unlawful combatants, al-Qaeda members, and those working in concert with them to attack the United States."²⁵² Under the bill, the right to due process and humane treatment and the right to petition for writ of habeas corpus in the military tribunals are preserved.²⁵³ The bill requires the President to report to Congress information on the detainees, the basis for their detention, and a timetable for their detention.²⁵⁴ The trial proceedings are open to the public.²⁵⁵ Evidence, however, from the Federal Government may be concealed if the evidence hinders the prosecution, military, or intelligence.²⁵⁶

II. DISCUSSION

The events occurring on September 11, 2001, were tragic. Thousands of innocent lives were lost as the result of terrorist attacks. Those responsible for the attacks should be punished. A potential hazard in seeking justice for our nation is the loss of constitutional safeguards afforded to citizens of the United States. The cornerstone upon which America was built, the United States Constitution, must not be jeopardized. America is premised on the concept of equal protection under the Constitution. Under the Constitution, United States citizens are guaranteed a right to due process. Fundamental due

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

process includes the right to counsel, the right to confront and cross-examine one's accusers, the right to a jury trial and the right to appeal.

Padilla and Hamdi are citizens detained indefinitely without being charged with a crime, without right to counsel, and *incommunicado*. Allegedly, Padilla and Hamdi possess information of al Qaeda that could aid the United States in preventing terrorist attacks. Allegedly, they conspired with al Qaeda in planning and carrying out acts of terrorism. In contrast, another citizen, Lindh, was permitted to exercise his rights as guaranteed by the Constitution. In Lindh's sentencing memorandum, he admits to possessing knowledge and intelligence that could assist the United States in countering future terrorists acts, the same reasons the government cites as the basis of Padilla and Hamdi's detention.²⁵⁷ Lindh, however, was officially charged with crimes and afforded access to counsel. In a civilian courtroom, Lindh pled guilty to aiding the Taliban and carrying arms in the commission of that crime.

The Association of Business Trial Lawyers (hereinafter, "ABTL") coordinated a panel on December 10, 2002, addressing the civil liberties and security issues the Padilla, Hamdi, and Lindh cases presented.²⁵⁸ Frank Dunham, the Federal Public Defender representing Hamdi, initially believed his client's case was analogous to the John Walker Lindh case.²⁵⁹ In fact, Dunham planned to borrow the briefs submitted by Lindh's attorney to the Eastern District of Virginia.²⁶⁰ Daniel Collins, Associate Deputy Attorney General for the United States Department of Justice, representing the government at the

²⁵⁷ See *supra* note 146.

²⁵⁸ Association of Business Trial Lawyers, *Can Civil Liberties Be Preserved During the War on Terrorism?* December 10, 2002, in San Francisco, California. The focus of this panel was to discuss the hundreds of people who have been incarcerated for an indefinite period of time, without counsel, or judicial review. Specifically, the debate addressed the balance of civil liberties and security in light of the apparent presence of sleeper cells in the United States. The moderator of the panel was James J. Brosnahan, Partner, Morrison & Foerster LLP. The speakers included: The Honorable Michael Daly Hawkins, United States Circuit Judge, 9th Circuit; Steven R. Shapiro, National Legal Director, ACLU; Daniel Collins, Associate Deputy Attorney General, United States Department of Justice; Frank Dunham, The Federal Public Defender, Eastern District of Virginia, representing Yasser Hamdi; Robert Rubin, Legal Director, Lawyers' Committee for Civil Rights, representing Hady Omar.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

ABTL, refused to comment on Padilla or Hamdi's case.²⁶¹ According to Dean Keane, however, Hamdi and Lindh's case are factually similar, as they are both United States citizens detained in Afghanistan.²⁶² Thus, Padilla's case should present a stronger argument for allowing him constitutional protections guaranteed under the Constitution to all citizens.

A. ENEMY COMBATANTS

The government incorrectly relies on *Ex Parte Quirin* for its authority to label citizens as enemy combatants.²⁶³ *Ex Parte Quirin* arose during World War II, at a time when Congress authorized the use of military tribunals for the prosecution of those accused of violating the laws of war. In contrast to the facts in *Ex Parte Quirin*, the Joint Resolution Congress passed on September 14, 2001, did not amount to an official congressional declaration of war. Congress authorized President Bush to use military force only in response to the September 11th attacks and in preventing future terrorist acts. Moreover, the Joint Resolution did not address the labeling of citizens as enemy combatants as was the case in *Ex Parte Quirin*. In fact, nowhere in the Joint Resolution was the term enemy combatant used.²⁶⁴

In the present situation, the SDNY rendered its decision on the Padilla case on December 4, 2002. The SDNY noted that an official declaration of war was not necessary. In reaching this conclusion, the SDNY cited the *Prize cases* as authority and highlighted the history of armed conflicts in which Congress did not declare war.²⁶⁵ In fact, the SDNY

²⁶¹ *Id.*

²⁶² *See supra* note 10.

²⁶³ *See* discussion *supra* Part I. D.

²⁶⁴ S.J. Res. 23, 107th Cong. (2001) (enacted).

²⁶⁵ Op. and Order at 50, *Padilla v. Bush* (Dec. 4, 2002) citing *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), *available*

<http://news.findlaw.com/hdocs/docs/terrorism/padillabush120402opn.pdf>. In the *Prize cases*, the Supreme Court recognized that the President has the power to initiate or declare war. *Id.* In addition, "war may exist without a declaration on either side." *Id.* The SDNY cites the history of armed conflicts that were not officially declared by Congress but nonetheless amount to a war. *Id.* at 52. The naval war against France in the 1970's was not declared but authorized by Congress. *Id.* The SDNY also lists the Korean War, the Vietnam War, the Persian Gulf War, and the Kosovo bombing campaign. *Id.*

reasoned that an official congressional declaration of war seems to be the exception rather than the rule.

However, Steven Shapiro, ACLU panel speaker at the ABTL and Brosnahan, distinguishes the war on terrorism from the armed conflicts cited by the SDNY on two grounds.²⁶⁶ First, the war on terrorism deals with various geographical locations.²⁶⁷ The location of the battlefield is constantly changing. Second, the war on terrorism is not with a nation state.²⁶⁸ Thus, there is no foreseeable conclusion like a truce, treaty, or cease-fire ending this war.²⁶⁹ As such, the current situation is distinguishable from any prior armed conflict or official war.²⁷⁰

Arguably, even if the Joint Resolution is similar to a declaration of war, *Ex Parte Quirin* is still inapplicable. The accused in *Ex Parte Quirin* did not challenge their status as enemy combatants. Rather, the accused challenged the President's authority to prosecute prisoners of war in military tribunals. Finally, the accused in *Ex Parte Quirin* were not held indefinitely without charge, nor were they held *incommunicado* without right to counsel. Nor did, Daniel Collins at the ABTL panel, dispute Frank Dunham's assertion that the accused in *Ex Parte Quirin* were not detained indefinitely, without charge, *incommunicado* and without right to counsel.²⁷¹ *Ex Parte Quirin* fails to support the government's current practice of holding citizens indefinitely without charge. Therefore, *Ex Parte Quirin* is inapplicable.

In addition, the government's reliance on *Territo* as authority to label Padilla an enemy combatant is misplaced. In *Territo*, the detainee was captured abroad and labeled a prisoner of war.²⁷² In contrast, Padilla was captured in the United States and not labeled a prisoner of war.²⁷³ Although Hamdi and Lindh were captured abroad they were not labeled prisoners of war. Therefore, *Territo* is inapplicable.

²⁶⁶ See *supra* note 258.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *In re Territo*, 156 F.2d at 146.

²⁷³ See *supra* note 42 at 6.

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Furthermore, the court in *Territo* failed to address the legality of labeling citizens as enemy combatants. Rather, *Territo* addressed the government's ability to detain United States citizens in military custody as prisoners of war during an official declaration of war. It is indisputable that during an official declaration of war those captured in the battlefield may be labeled prisoners of war. Neither Padilla nor Hamdi are viewed as prisoners of war, but enemy combatants. Lindh, on the other hand, was viewed as a citizen with Constitutional protections. Further, at the time Padilla, Hamdi, and Lindh were detained, Congress did not declare war. Therefore, *Territo* did not support the government's stance of appointing citizens enemy combatants, stripped of their constitutional rights, merely on the government's "say-so."²⁷⁴

Interestingly, Daniel Collins, representing the United States Department of Justice at the ABTL panel, was unable to provide a definition or specific criteria used in appointing enemy combatants.²⁷⁵ Rather, Collins cited the opinion in *Ex Parte Quirin* and the Constitution as conferring the President with the authority to label individuals enemy combatants.²⁷⁶ Danger exists without clearer guidelines for classifying citizens enemy combatants. Shapiro argues the ability to categorize citizens enemy combatants must not lie solely on the executive branch.²⁷⁷ Shapiro stresses the necessity in preserving the United States' system of checks and balances in the designation of enemy combatants.²⁷⁸

B. THE MILITARY ORDER

While the Military Order proclaims that the United States is in a state of "national security," arguably justifying the use of the Armed Forces, the Military Order is inapplicable. The Military Order fails to support the detention of Padilla and Hamdi because the Military Order does not extend to American citizens. The Military Order specifically states that individuals covered by this Order are non-United States citizens. Thus,

²⁷⁴ See *supra* note 153 and accompanying text.

²⁷⁵ See *supra* note 258.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

citizens like Padilla, Hamdi, and Lindh are excluded from this order.

Although Section 2 of the Military Order gives the President discretion from “time to time” to authorize perpetrators connected with international terrorism to be tried before a military commission, the Military Order provides no guidelines or criteria for determining who may be detained from “time to time” by the President.²⁷⁹ The Military Order fails to define what from “time to time” means. Since Padilla and Hamdi are in military custody pursuant to the Military Order, Section 2 of the order is the only clause that may cover United States citizens. The vagueness in this clause demonstrates the need for clearer guidelines to determine who, in fact, is an enemy combatant.

While President Bush cites the Senate Joint Resolution 23 as authority for implementing the military tribunals, his reliance is misplaced. The Senate Joint Resolution simply authorizes the use of military force, not military tribunals. The use of military force allows the President to use the armed forces in capturing those who are responsible for the September 11th attacks and those connected with international terrorism. In contrast to using military force, the military order permits individuals to be tried and punished in military tribunals.

The Military Order also cites Section 836 of Title 10 of the United States Code as authority for implementing the Military Tribunals. Section 836 authorizes the President to prescribe rules governing military tribunals that does not violate the Constitution.²⁸⁰ The President does not have the power to authorize the use of military tribunals. Rather, only Congress holds this power as derived from the Constitution. A distinction must be drawn between implementing military tribunals and prescribing rules governing military tribunals.

Even though Section 836 prohibits the President from making rules governing military tribunals in violation of the Constitution, the President did just that. The President authorized the Military Commission Order, an order prescribing the policies and procedures for the military

²⁷⁹ See *supra* note 191.

²⁸⁰ 10 USCA § 836 (West 2002).

tribunals that violate the Constitution.²⁸¹ The Order outlines the procedures for trials by military tribunals against non-United States Citizens.²⁸² The Order implements policy and procedures for the military commission trials in accordance with the President's November 13, 2001 Military Order.²⁸³ The Order allows the accused to chose between a "detailed defense counsel" and a civilian attorney.²⁸⁴

In addition to denying Padilla and Hamdi access to counsel as authorized under the Order, the Order's guidelines do not comport with the general principles of evidence and procedures that govern civilian courts. First, the guidelines permit only limited disclosure of "protected information" from documents.²⁸⁵ Exactly what information is protected is left up to the discretion of the Presiding Officer.²⁸⁶ In addition, the Presiding Officer or the Appointed Authority may close the proceedings because of protected information.²⁸⁷ They may even exclude the accused and his or her counsel from the proceedings.²⁸⁸

Second, under the Order any evidence is admissible that has probative value to a reasonable person.²⁸⁹ This standard supplants the Federal Rules of Evidence, which govern civilian courts, and allow only relevant evidence.²⁹⁰ In civilian courts, the judge is permitted to exclude relevant evidence, if the danger outweighs the probative value.²⁹¹ Essentially, the Order may allow every piece of evidence against the accused to be considered, while in a civilian courtroom the same evidence may be excluded. Arguably, without the limitations of the Federal Rules of Evidence, irrelevant facts and proof may be considered.

Third, the Order allows the Commission, on its own initiative, to summon and hear witnesses via telephone,

²⁸¹ *Id.*; Mil. Order 66 Fed. Reg. 57833 (Nov. 13, 2001).

²⁸² Mil. Order 66 Fed. Reg. 57833 at Section 1 (Nov. 13, 2001).

²⁸³ *Id.*

²⁸⁴ *See supra* note 195 at Section 4(C).

²⁸⁵ *Id.* at Section 6(D)(5).

²⁸⁶ *Id.* at Section 6(D)(1).

²⁸⁷ *Id.* at Sections 6(D)(5)(c) and 6(B)(3).

²⁸⁸ *Id.* at Section 6(B)(3).

²⁸⁹ *Id.* at Section 6(D)(1).

²⁹⁰ FED. R. EVID. 401.

²⁹¹ FED. R. EVID. 403.

audiovisual or any other means.²⁹² In civilian courts, judges are allowed to call witnesses.²⁹³ A witness's testimony via telephone, audiovisual or other means, however, must be deemed unavailable by the court as a requisite to admissibility.²⁹⁴

Lastly, the Order does not permit an independent judicial review.²⁹⁵ The review process consists only of an administrative review conducted by an "Appointed Authority."²⁹⁶ The "Appointed Authority" may be the Secretary of Defense or a designee.²⁹⁷ The Order does not explain who the "Appointed Authority" or designee might be. After the administrative evaluation, panels consisting of three Military Officers review the record of the trial.²⁹⁸ The review panel may either forward the record of trial to the Secretary of Defense or return the case to the "Appointed Authority" for further proceedings but only if a "material error of law occurred."²⁹⁹ The final decision-maker, however, is the President or the Secretary of State.³⁰⁰ Under this scheme, the President acts both as prosecutor and judge. He designates citizens as enemy combatants and makes the final decision on appeal. Therefore, there is no guarantee of fundamental fairness. The purpose behind the implementation of the Military Commission Order is to ensure a full and fair trial before a military commission. The procedures, however, prescribed in the Order conflict with the purpose behind its implementation. The Order's

²⁹² See *supra* note 195 at Section 6(A)(5).

²⁹³ FED. R. EVID. 614.

²⁹⁴ See generally FED. R. EVID. 801, 802, 803. In *Brumley v. Wingard*, 269 F.3d 629 (2001), the petitioner was convicted in state court for "complicity to commit aggravated murder with two death penalty specifications and kidnapping." *Id.* at 633. The petitioner argued the state court erroneously allowed a videotape of an incarcerated witness without first finding the individual unavailable. *Id.* at 637. The court reasoned in some cases the state's compelling interest such as, protecting child abuse survivors, outweighs the defendant's right to confrontation. *Id.* at 644. Generally the court, however, must find the witness unavailable. *Id.* Nonetheless, the court held the admission of the videotape was not harmless error and affirmed the lower court's decision. *Id.* at 644-645, 647. See also Edward K. Esping, Stephanie A. Giggetts, Christine M. Gimeno, Rachel M. Kane, & Susan L. Thomas, Testimony by Closed-Circuit Television or Videotape, 25 Ohio Jur. 3d Crim Law § 468 (Nov. 2002).

²⁹⁵ See *supra* note 195 at Section 6(H).

²⁹⁶ *Id.* at Section 6(H)(3).

²⁹⁷ *Id.*

²⁹⁸ *Id.* at Section 6(H)(4).

²⁹⁹ *Id.*

³⁰⁰ *Id.* at Section 6(H)(6).

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procedures conflict with a full and fair trial under the Constitution.

C. TITLE 18 OF THE UNITED STATES CODE SECTION 4001(A)

That the laws of civilian courts are inapplicable to military court may, in some respects, explain the conflict between congressional legislature and the government's action.³⁰¹ Whatever the explanation may be, it is essential that Padilla and Hamdi, as United States citizens, be given the same constitutional safeguards, as Lindh.³⁰²

The SDNY did not explicitly rule that Section 4001(a) was inapplicable to Padilla's case.³⁰³ Section 4001(a) prohibits the detention of any person protected by the Constitution without congressional authority. Padilla and Hamdi are not been officially charged with crimes, nor has Congress authorized their detention. The executive branch has unilaterally designated Padilla and Hamdi enemy combatants without congressional authority. Thus, the detention of Padilla and Hamdi violates Section 4001(a).³⁰⁴

Additionally, when Title 18 of the United States Code Section 4001(a) was amended in 1971, the House Report noted that the statute was subject to severe challenge because it only required reasonable grounds for believing someone intended to engage, or engaged in, espionage or sabotage.³⁰⁵ The belief that a person in the future could engage in espionage or sabotage allowed the government to preserve information essential to the defense of an accused.³⁰⁶ Similarly, President Bush's November 13, 2001 Military Order raises similar concerns. The Military Order allows an individual who intends to undertake future terrorist attacks against the United States to be tried before military commissions. Similar to the 1971 amendment to Title 18 Section 4001, the Military Order only requires the intent of an individual to engage in future

³⁰¹ *Ex Parte Milligan*, 71 U.S. at 137.

³⁰² *See supra* note 146 at 11; *Ex Parte Milligan*, 71 U.S. at 120.

³⁰³ *See supra* note 68 at 67-74.

³⁰⁴ *See supra* note 205, 208.

³⁰⁵ Pub.L. No. 92-128; *See supra* note 9 at 11, fn 15.

³⁰⁶ *Id.*

terrorist attacks. Therefore, history dictates that this Military Order should be subject to “grave challenge.”³⁰⁷

D. INTERNATIONAL LAWS AND TREATY CONSIDERATIONS

The United Nations Charter was created to fight all threats to international peace. Combating all threats to international peace is important for the United States as well as other signatory nations. Clearly, those responsible for the September 11, 2001, terrorist attacks should be punished. Punishing individuals, however, who threaten international peace should not permit the government to label certain citizens enemy combatants and strip them of their constitutional rights for an indefinite period of time. Punishing individuals who threaten international peace should not mean international laws, which the United States has pledged to abide by, can be ignored. As a member of the Charter, international laws and treaties bind the United States.

Under the Declaration, every individual is protected against arbitrary arrests and detentions. Arguably, the government’s designation of United States citizens Padilla, Hamdi, and Lindh as enemy combatants seems inconsistent and arbitrary. Since the United States government’s actions may conflict with the Declaration, an international treaty, a close look at all applicable laws is essential.

In addition, the Declaration preserves an individual’s right to life and liberty. The label enemy combatant allows the government to detain citizens *incommunicado* and without a right to counsel. Padilla and Hamdi are not allowed to communicate with family or friends. Further, they are detained without right to counsel. Such circumstances may violate the United Nations treaty. As United States citizens, Padilla and Hamdi are guaranteed rights under international United Nations agreements.

³⁰⁷ *Id.*

E. GENEVA CONVENTIONS

Protections prescribed by the Geneva Conventions to protect victims of conflicts should extend to include Padilla and Hamdi.³⁰⁸ The Conventions provide a minimum standard for humane treatment, entitling every person to dignity and respect for one's life. Moreover, the Conventions make a clear distinction between the protections afforded to lawful enemy combatants, protected prisoners of war, and unlawful enemy combatants, unprotected prisoners of war. An unlawful enemy combatant is one who is suspected of engaging, or has engaged, in hostile activities that threaten the security of the state. Padilla and Hamdi could conceivably fit under the following categories, as defined in the Third Geneva Convention, guaranteeing them certain protections: members of the Armed Forces of either side of the armed conflict, members that are commanded by a party to the conflict or operations comport with the laws of war, loyal members of the armed forces but who are not recognized by the detaining power, and crew members.³⁰⁹

Under the Fourth Geneva Convention, Hamdi could be categorized as a lawful combatant since he was captured in Afghanistan. Although Padilla was captured in the United States the Fourth Geneva Convention makes clear that every person is entitled to humane treatment.³¹⁰ Therefore, Padilla and Hamdi should be given a hearing prescribed by the Conventions to determine whether they are entitled to the status of prisoner of war.³¹¹

F. MILITARY TRIBUNALS ACT 2002 AND THE SEPARATION OF POWERS

As of the date of this writing, no action has been taken by Congress to implement the Military Tribunals Act. The Act seeks to establish the jurisdiction of military tribunals "over non-U.S. residents, unlawful combatants, al-Qaeda members and those working in concert with them to attack the United

³⁰⁸ See *supra* note 227 and accompanying text.

³⁰⁹ See *supra* note 227 and accompanying text.

³¹⁰ Geneva IV *supra* note 227.

³¹¹ See *supra* note 9 at 24.

States.”³¹² The military tribunal decisions are subject to challenge because Congress did not specifically authorized the use of military tribunals.

Even if this Act is passed, it is inapplicable to United States citizens like Padilla, Hamdi or Lindh. The Act is specifically geared towards non-citizens, such as those detained at Guantanamo base. Our government should impose a set standard of guidelines for labeling citizens enemy combatants.

III. RECOMMENDATIONS

To address the concern that the government is inconsistently labeling citizens enemy combatants, while others in similar situations are afforded the rights guaranteed to criminal defendants in a civilian courtroom, specific recommendations are offered. In civilian courts, criminal defendants are subject to a preliminary proceeding to determine if probable cause exists for the criminal charges. Similarly, citizens identified as enemy combatant should be subject to a preliminary proceeding. The preliminary proceeding should be used to determine if the status is lawful, since enemy combatants, per the government, may be detained indefinitely for the duration of the conflict. Conceivably, the duration of the conflict against international terrorism may never end.

Evidence that the individual is an enemy combatant connected to international terrorism should be submitted to the United States District Court for review. The government’s burden should be analogous to criminal proceedings. The District Court should review the status of an enemy combatant *in camera*. Allowing the court to review the necessary information *in camera* will protect information from leaking out to the public and possible accomplices of the perpetrator. This process will preserve the confidentiality of the government’s sources of information. Additionally, the District Court should examine whether the designation of enemy combatant violates treaties of international law.

The alleged enemy combatant should be given access to counsel in order to ensure procedural and substantive

³¹² HR 5071, 107th Cong., 148 CONG. REC. 4402 (2002).

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constitutional safeguards guaranteed to all citizens in civilian courts. Each enemy combatant should have the choice between a court appointed defense counsel or privately retained counsel. Each enemy combatant should also be permitted to communicate freely with his or her counsel while in custody.

Additionally, the enemy combatant should be allowed to communicate with his family and friends. Limitations should be effected to ensure information aiding or leading to international terrorism is prevented. In addition, each conversation and visit should be monitored and supervised except with his or her counsel. If conversations in a language other than English occur, at the expense of the accused, a translator certified by the court should translate the conversation into English for the government. In the event that the accused cannot afford a translator, one should be provided.

Even after a review by the district court deeming the individual an enemy combatant, a hearing prescribed by the Geneva Conventions should be allowed. The hearing will determine if the status of a prisoner of war is appropriate. Implementing procedures similar to those in criminal proceedings will ensure that the government's standards for labeling citizens enemy combatant is not arbitrarily imposed.

IV. CONCLUSION

Requiring a basic level of due process for United States citizens counterbalances any impediment resulting from the implementation of procedures to non-selectively designated enemy combatant. While the government's job may become more difficult by requiring concrete evidence of enemy combatant status, this is not a permissible reason to erode constitutional safeguards. Despite the challenges presented by preserving the Constitution, its historical significance and benefits are indispensable and deserving of preservation.

To fully comply with the Constitution, criminal defendants must have access to counsel. Policies that obstruct a citizen's right to counsel, especially when the death penalty and life sentences are implicated, threaten the fundamental principles

on which this country is based. Enemy combatants should be treated similarly to criminal defendants because the punishment is equally grave. Further, United States citizens under the law should be treated equally in crimes and punishment. The government's standards of labeling selected citizens as enemy combatants should be revised to adequately reflect the central importance of preserving constitutional protections.

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