Inter Arma Silent Leges: An Examination of the Legal Rights of American Citizens Detained as Enemy Combatants in the War on Terror

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I. INTRODUCTION

In response to the attacks on American soil on September 11, 2001, the United States launched a “War on Terror” to rid the world of international terrorist networks who posed a threat to innocent civilians and democratic civilization. The United States is currently detaining approximately 762 individuals in connection with this war. Most of the detainees are being held in the temporary detention facility at the Naval Base in Guantanamo Bay, Cuba, although a number of others are held elsewhere in military prisons.

The detainees, having been designated “enemy combatants,” are being detained incommunicado for a seemingly indefinite period -- until either the hostilities cease or until specific charges are levied against them for their suspected war crimes. These detentions have raised profoundly difficult yet critically important issues regarding the legal rights of the detainees. As a result, the American Bar Association Board of Governors created the Task Force on Treatment of Enemy Combatants to examine the legal framework surrounding these detentions. The Task Force developed a set of recommendations that speak to the rights of United States citizens detained as enemy combatants. These recommendations have been widely distributed throughout Congress and the executive. Only two men, Yaser Hamdi and José Padilla, are currently known to fall within the scope of the recommendations. In this comment, I will discuss the circumstances surrounding the captures and detentions of Hamdi and Padilla and critique the Task Force’s recommendations in light of the ongoing War on Terror.

II. FACTUAL BACKGROUND

Tantum religio potuit suadre malorum --
So great the evils which religion could prompt.
In an act deemed an “armed attack” under international law by the North Atlantic Treaty Organization (NATO), members of the al-Qa’eda terrorist organization hijacked four American commercial airliners, crashing one into each of the World Trade Center towers in New York City and another into the Pentagon building near Washington, D.C. As it is well known, the World Trade Center towers were destroyed and the Pentagon was seriously damaged. The nation watched helplessly as the fourth airliner went unaccounted for. In a response unprecedented, the Federal Aviation Administration emptied the nation’s skies and forced some 4,500 planes to be rerouted or grounded immediately, throwing the airline industry into logistical turmoil along with the rest of the nation.\cite{5} The fourth hijacked airliner, United Airlines Flight 93, later crashed in the Pennsylvania countryside after an apparent act of heroism by the passengers\cite{6} to thwart a fourth suicide attack on a civilian target. More than 3,000 people were killed in the day’s coordinated attacks.

In the days following these atrocities, President George W. Bush exercised his authority as commander-in-chief\cite{7} under Article II, Section 3, of the Constitution and quickly launched an investigation to identify those responsible for the attacks and their state supporters. United States intelligence soon acquired a significant body of evidence indicating that Osama bin Laden’s al-Qa’eda\cite{8} terrorist organization had been responsible for the attacks and had acted with the state support of Afghanistan’s Taliban regime. On September 18, 2001 Congress issued a Joint Resolution authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks” or “harbored such organizations or persons.”\cite{9} President Bush, in a speech given to a joint session of Congress on Sept. 20, 2001, issued the Taliban regime the following ultimatum:

Deliver to the United States authorities all the leaders of al-Qa’eda who hide in your land…[c]lose immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act, and act immediately…or they will suffer [the terrorists’] fate.\cite{10}

Following the Taliban’s refusal to comply with any part of the ultimatum, the United States and its allies, in conjunction with NATO,\cite{11} exercised the lawful use of military force against the Taliban in order to accomplish the goals of the ultimatum. Just three months into the campaign, the coalition forces toppled the Taliban regime and destroyed the al-Qa’eda camps, seriously debilitating the terrorist organization’s operational abilities. During the military campaign in Afghanistan, the United States detained a number of individuals who were either captured on the battlefield or arrested by cooperating governments. Although the vast majority of the captives were processed and released in Afghanistan, more than 1,000 were turned over to American forces for
disposition. Those turned over to the American military’s custody were either suspected of war crimes or deemed too dangerous for parole. Cooperation from a number of states around the world subsequently led to other related arrests. These arrests and subsequent detentions have raised difficult issues for our legal and political systems, implicating such deeply-rooted values as the right to counsel and the right to judicial review of one’s detention.

As the government struggled to strike a balance between national security and individual rights, subsequent investigations revealed that U.S. citizens were possibly among the detainees. Yaser Hamdi and José Padilla (a.k.a. Abdullah al Muhajir) are two known examples of enemy combatants who claim American citizenship. Both are currently detained incommunicado in connection with the War on Terror. The circumstances surrounding their capture and detention are discussed in greater detail infra.

Following the discovery of American citizens among the detainees, the American Bar Association Board of Governors, at the request of then-ABA President Robert Hirshon, created a Task Force on Treatment of Enemy Combatants to examine the legal implications of the detentions. The Task Force’s recommendations, set forth in greater detail below, included demands that “U.S. Citizens and other persons lawfully present in the United States who are detained within the United states be afforded the opportunity for meaningful judicial review of their status…and not be denied access to counsel in connection with the opportunity for such review.” The recommendations express the Task Force’s concerns over the methods employed in the Hamdi and Padilla cases, and do not address the detention of foreign nationals held as “enemy combatants” at Guantanamo Bay, Cuba or elsewhere outside the United States. Below, I will weigh the merits of the Task Force’s demands against the goals of the War on Terror, and examine whether there exists any legal or policy foundation to the recommendations in light of the ongoing military campaign.

III. CRIMINAL DEFENDANTS, ENEMY COMBATANTS, OR PRISONERS OF WAR?

For the decent person, it is assumed, will attend to reason because his life aims at what is fine, while the base person, since he desires pleasure, has to receive corrective treatment by pain . . . that is why it is said that the pains imposed must be those most contrary to the pleasures he likes.

- Aristotle, Nichomachean Ethics

Although some of the detainees are suspected of having committed war crimes, none has been formally charged. Thus, they are not traditional criminal defendants, and are not entitled to the protections of the Sixth Amendment. Instead, all of the detained individuals have been declared “enemy combatants” by the President of the United States, and ordered to be detained in the custody of the Department of Defense. To
classify these individuals as enemy combatants may seem tautologous, but this classification carries profound legal implications. The government maintains that enemy combatants, unlike prisoners of war, may be detained for the duration of a conflict without access to counsel or meaningful judicial review of their detentions jus in bello. Since the legal designation of these individuals will ultimately determine the scope of their legal rights, it is critically important to properly discuss and define these terms of art.

The designation “enemy combatant” arose from American case law in 1942. In Ex Parte Quirin,20 the Supreme Court recognized the law of war’s distinction between lawful combatants -- or “prisoners of war” -- and unlawful combatants.21 The Court held that both lawful and unlawful combatants were subject to capture and detention, but unlawful combatants were “familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war.”22 This distinction is significant in that only prisoners of war are entitled to the protections set forth in the Third Geneva Convention of 1949.23 These protections include, inter alia, (1) the right to medical attention;24 (2) the right to exercise religious beliefs;25 (3) the ability to keep personal effects;26 (4) the right to send and receive correspondence, including parcels;27 and (5) the entitlement to living conditions as favorable as those of the individuals with the detaining powers.28

To qualify for prisoner of war status under the Third Geneva Convention, a member of a military organization must (1) be commanded by a person responsible for his subordinates; (2) have a fixed distinctive sign recognizable at a distance; (3) carry arms openly; and (4) conduct his operations in accordance with the laws and customs of war.29 Thus, members of a state’s regular armed forces are typically considered lawful combatants under the law of war, whereas persons who engage in belligerent acts without satisfying these criteria may be considered ineligible for prisoner of war status as unlawful combatants.

The Supreme Court further defined unlawful combatants as those individuals who “secretly and without uniform [pass] the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property.”30 Indeed, the Supreme Court has used the term “enemy combatant” many times in its history.31 The government has relied on this lengthy precedent to support its detentions of Yaser Hamdi and José Padilla as enemy combatants, despite their claims of American citizenship.

IV. AMERICAN CITIZENS DETAINED AS ENEMY COMBATANTS

Citizens [of the United States] who associate themselves with the military arm of the enemy government, and with its aid, guidance, and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.32
The important issues raised by the dual status of American citizen and enemy combatant are clearly illustrated in the case of Yaser Hamdi. Born in Louisiana of Saudi parents, Hamdi left for Saudi Arabia with his family at the age of three. He is believed to have traveled to Afghanistan in August 2001, where was captured during the armed hostilities after his Taliban unit surrendered to the Northern Alliance. Initially detained in Afghanistan, Hamdi was later transferred to Guantanamo Bay, Cuba, in January 2002 under suspicions that he carried important intelligence information. When it was discovered that he may not have renounced his American citizenship, he was transferred to the Norfolk Naval Station Brig in Norfolk, Virginia, where he has been detained uncharged and without access to counsel since April 2002.

On May 10, 2002, Frank Dunham, the Federal Public Defender for the Eastern District of Virginia, filed a petition for writ of habeas corpus naming as petitioners both Hamdi and himself as next friend. The petition asked, inter alia, that the district court (1) grant petitioner Frank Dunham next friend status, as next friend of Hamdi; (2) order respondents to permit counsel private and unmonitored access to meet and confer with Hamdi; (3) order respondents to cease all direct or indirect communications with Hamdi while the litigation is pending; and (4) order that petitioner Hamdi be released from unlawful custody. Subsequently, a private citizen from New Jersey, Cristian Peregrim, filed a similar habeas petition on Hamdi’s behalf, naming the United States Navy as the respondent. Both men conceded that they had no prior relationship or communication with Hamdi, although Dunham had been in contact with Hamdi’s father, who had not yet sought appointment as next friend. On May 29, after consolidating Dunham’s habeas petition with Peregrim’s, the United States District Court for the Eastern District of Virginia, Norfolk Division, concluded that only Dunham had properly filed as next friend, and ordered that Hamdi be allowed to meet with his attorney in a private, unmonitored setting. The first meeting was to take place on June 1, 2002. On May 31, however, the United States filed a motion for stay pending appeal of the district court’s unmonitored access order. The United States Court of Appeals for the Fourth Circuit granted the stay, holding that neither Dunham nor Peregrim had any significant relationship whatever with Hamdi and had therefore failed to satisfy an important prerequisite for next friend standing. In its analysis the court of appeals held that “a federal court is powerless to create its own jurisdiction.” The court reversed and remanded, instructing that the petitions be dismissed for want of subject matter jurisdiction.

While the above case was under submission, Hamdi’s father filed a separate petition for a writ of habeas corpus, naming as petitioners both Hamdi and himself as next friend. Unlike Dunham’s petition, the father’s petition did not specifically request that counsel be granted unmonitored access to Hamdi. On June 11, 2002 the district court determined that Hamdi’s father could proceed as next friend, and appointed Dunham as counsel for Hamdi based on the father’s affidavit stating that neither he nor his son...
could afford an attorney.\textsuperscript{47} Further, the district court again ordered that the public defender be granted unmonitored access to Hamdi “for the same reasons articulated in the May 29, 2002 Order.”\textsuperscript{48} The meeting was ordered to take place by June 14 -- three days before the government’s response was due.\textsuperscript{49}

The United States filed a second motion for stay pending appeal on June 13, 2002. The government urged the court of appeals not only to reverse and remand, but to dismiss Hamdi’s father’s petition in its entirety.\textsuperscript{50} Once again, the United States Court Of Appeals for the Fourth Circuit stayed the district court’s June 11 order and all proceedings before that court regarding Hamdi.\textsuperscript{51} The court of appeals agreed that Hamdi’s father was a proper next friend, but nevertheless reversed the district court’s June 11 order because “the district court 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.”\textsuperscript{52} Such implications, the court decided, included delicate national security concerns and lacked proper deference to Congress and the President to manage military affairs as provided by Articles I and II of the Constitution.\textsuperscript{53} The court, however, denied the government’s motion to dismiss, reluctant to accept the argument that courts may not review at all the government’s designation of American citizens as enemy combatants. The court reasoned that:

Any dismissal of the petition at this point would be as premature as the district court’s June 11 order. In dismissing, we ourselves would be summarily embracing a sweeping proposition -- namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so.\textsuperscript{54}

Instead, the court of appeals sanctioned a limited and deferential inquiry into Hamdi’s status. On remand, the district court held a hearing on July 18, 2002 and expressed its concern over possible violations of Hamdi’s rights as an American citizen. The district court further questioned the government’s most basic contentions regarding the War on Terror\textsuperscript{55} and ordered the government to file an answer to Hamdi’s petition by July 25.\textsuperscript{56} On July 25, the government once again filed a response and motion to dismiss the petition. In its response, the government included an affidavit from the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs. The Mobbs Declaration confirmed the circumstances surrounding Hamdi’s capture, his transfer to United States custody, his classification as an enemy combatant, and his placement in the Norfolk Naval Brig.\textsuperscript{57} The Mobbs Declaration further revealed that Hamdi was in possession of an AK-47 rifle at the time of his surrender, thereby contradicting Hamdi’s father’s contention that Hamdi was in Afghanistan as a missionary, and was an innocent bystander swept up in the conflict. According to Mobbs, subsequent interviews with Hamdi confirmed the details of his seizure and his designation as enemy combatant.\textsuperscript{58}

On August 13, 2002 the district court held a hearing to review the sufficiency of the Mobbs Declaration. Despite recognizing that the government was entitled to “considerable deference in detention decisions during hostilities,” the district court asserted that it would “challenge everything in the Mobbs Declaration.”\textsuperscript{59} Further, the
district court expressed concern that the government had withheld adverse facts, pointing to the affidavit’s lack of conclusive evidence that Hamdi had actually fired his weapon. Thus, the district court held that the Mobbs Declaration fell “far short” of supporting Hamdi’s detention. In an order dated August 16, the district court ordered the government to submit for an in camera, ex parte review: (1) copies of Hamdi’s statements and the notes taken from any interviews with him; (2) the names and addresses of all interrogators who have questioned Hamdi; (3) statements by members of the Northern Alliance regarding the circumstances of Hamdi’s surrender; and (4) a list of the date of Hamdi’s capture and all of the dates and locations of his subsequent detention. The district court did, however, allow the government to withhold “intelligence matters” from its responses, but only “insofar as those intelligence matters were outside the scope of inquiry into Hamdi’s legal status.”

Upon the government’s motion, the court of appeals granted interlocutory review of the August 16 production order to consider the question certified by the district court: “Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Hamdi’s classification as an enemy combatant.” In so doing, the court noted that it “may address any issue fairly included within the certified order because it is the order that is appealable, and not the controlling question identified by the district court.” Three sub-issues included (1) whether Hamdi’s detention was authorized by Congress; (2) whether Hamdi had a right under the Geneva Convention to a formal hearing to determine his status as enemy combatant; and (3) whether the district court’s order conflicted with constitutional war-making powers of the President and Congress.

Hamdi contended that his detention violated 18 U.S.C. § 4001 and was therefore illegal. In addressing whether Congress had authorized Hamdi’s detention, the court held that Congress had, in its Joint Resolution of September 18, “authorized the President to use all necessary and appropriate force” and that the necessary and appropriate force referred to “necessarily includes the capture and detention of any and all hostile forces arrayed against our troops.” The court further reasoned that Congress had made monetary appropriations for the detention of prisoners of war and persons “similar to prisoners of war” and that it would not have done so without also authorizing their detentions in the first place. The court cited Quirin in reminding that “citizenship in the United States of an enemy belligerent does not relieve him from the consequences of his belligerency.” Thus, the court reasoned that had Congress intended to provide American belligerents some immunity from capture and detention, it would have made such intentions explicit. Since the court found no evidence to suggest as much, Hamdi’s contention that § 4001(a) barred his detention was dismissed.

Hamdi’s second legal ground for relief, that Article 5 of the Third Geneva Convention barred his continued detention, was also dismissed by the court. The court reasoned that the language in the Geneva Convention was not “self-executing” and did not “create private rights of action in the domestic courts of the signatory countries.” Even if Article 5 were self-executing, the court held, it was not clear that the “competent tribunal” to determine Hamdi’s status would be an Article III court. The court concluded
that Article 5 enforcement is achieved through diplomatic means and reciprocity, not necessarily by American civil courts.  

Thus, the court held that Hamdi had no right under the Third Geneva Convention to a formal hearing to determine his status as enemy combatant. Finding no purely legal barrier to Hamdi’s detention, the court turned to the question of whether further factual exploration would bring an Article III court into conflict with the war-making powers of Article I and II. To this end, the court determined that the nature of the statements that the district court ordered to produce “may contain the most sensitive and valuable information for our forces in the field.” The court found this level of judicial involvement in matters of combat to be an intrusion into an area where Congress and the President had been constitutionally granted the preeminent role. Thus, “[a]sking the executive to provide more detailed factual assertions would be to wade further into the conduct of war than we consider appropriate and is unnecessary to a meaningful judicial review of this question.” The court held that the district court’s order conflicted with the constitutional war-making powers of the President and Congress.

In conclusion, the court decided that “the factual averments in the Mobbs Declaration, if accurate, [were] sufficient to confirm that Hamdi’s detention conform[ed] with a legitimate exercise of the war powers given to the executive by Article II, Section 2 of the Constitution and...[was] consistent with the Constitution and laws of Congress.” While recognizing that “the detention of United States citizens must be subject to judicial review,” the court was cognizant of the gravity of its holding and was careful to limit its decision to Hamdi’s specific context. The court of appeals ultimately reversed the district court’s production order and ordered Hamdi’s petition dismissed.

While the Mobbs Declaration was being fervently debated in the Hamdi case, the United States District Court for the Southern District of New York was considering a second Mobbs Declaration in connection with the capture and detention of José Padilla, the only other known enemy combatant who claimed American citizenship.

B. José Padilla

As in Hamdi, the Mobbs Declaration in Padilla (the “Second Mobbs Declaration”) sought to substantiate the President’s June 9, 2002 detention order classifying Padilla as an enemy combatant. The second Mobbs Declaration revealed that Padilla was born in New York and was convicted of murder in Chicago in his youth. After his release from prison at age eighteen, Padilla was convicted in Florida of a handgun charge in 1991 and was again incarcerated. Released in 1998, Padilla moved to Egypt and took the alias Abdullah Al Muhajir. He traveled throughout Saudi Arabia and Afghanistan, where he met with senior al-Qa’eda leaders, including senior Osama bin Laden lieutenant Abu Zubaydah. Proposing to conduct terrorist operations within the United States, Padilla was directed by Zubaydah to travel to Pakistan for training from al-Qa’eda operatives in wiring explosives and in the construction of a “uranium-enhanced explosive device.” Padilla’s discussions with Zubaydah included plans to build and detonate a “radiological dispersal device,” also known as a “dirty bomb.” American intelligence suggested that al-Qa’eda members may have directed Padilla to return to
the United States to conduct reconnaissance, or perhaps other attacks on al-Qa’eda’s behalf. Padilla was apprehended by federal officials on May 8, 2002, upon his arrival in Chicago from Pakistan, pursuant to a material witness warrant issued by the United States District Court for the Southern District of New York.

After his capture, Padilla was removed from Chicago to New York’s Metropolitan Correctional Center, where he was held by the Department of Justice. On May 15, 2002, Padilla appeared before the district court and Donna R. Newman was appointed as his counsel. Newman conferred with Padilla and members of his family before submitting to the district court a motion to vacate the warrant on June 7, 2002.

Just two days later, on June 9, the government notified the district court ex parte that it was withdrawing the subpoena, and the district court signed an order vacating the warrant. At that time, the government informed the court that the President had designated Padilla an enemy combatant on the grounds contained in the second Mobbs Declaration. As a consequence of Padilla’s new status, he was taken into the custody of the Department of Defense and transferred to the Naval Consolidated Brig in Charleston, South Carolina, where he currently remains.

Newman filed a habeas corpus petition as next friend of Padilla despite being notified by the government that she would not be permitted to speak to, or meet with, Padilla. She was further told that, although she could write to Padilla, he might not receive the correspondence. The government moved to dismiss the habeas petition, attacking Newman’s standing as next friend and arguing that Padilla’s detention was lawful jus in bello.

The district court distinguished Hamdi from the present case, holding that Newman had a significant preexisting relationship with Padilla and thus had proper standing as next friend under the Whitmore standard. The court further held that, unlike the detainee’s father in Hamdi, there was no indication that any other member of Padilla’s family sought to assume that role in Newman’s stead.

The district court next turned to the question of the lawfulness of Padilla’s detention. Newman did not deny the President’s authority to order the seizure and detention of enemy combatants in a time of war, but argued that such an order was not appropriate in the instant case because Congress had not declared war. The district court rejected this argument, holding that “[A] formal declaration of war is not necessary in order for the executive to exercise its constitutional authority to prosecute and armed conflict -- particularly when, as on September 11, the United States is attacked.” The district court agreed with the Supreme Court, which had previously held that “war may exist without a declaration on either side,” and that when the aggressive acts of other countries impose a war on the United States, the President “does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.” The district court further reasoned that, even if Congressional authorization were deemed necessary, the Joint Resolution of Congress had provided the President with such authorization.
Like the *Hamdi* court, the *Padilla* court held that 18 U.S.C. § 4001(a) did not prohibit Padilla’s detention, finding that the Joint Resolution of Congress was sufficient to satisfy the requirements § 4001(a). The district court further held that Padilla’s detention was not barred by the Third Geneva Convention, nor was it otherwise barred as a matter of law.

Newman further argued that the nature of the conflict with al-Qa’eda was such that there could be no clear end, thus making Padilla’s detention as enemy combatant potentially indefinite and therefore unconstitutional. Reminding that federal courts are only permitted to hear actual “cases” and “controversies,” the court rejected this argument as well. The court held that the issue would be addressed only if and when Padilla could credibly claim that he had been detained too long “whether due to the sheer duration of his confinement or the diminution or outright cessation of hostilities.”

The court did, however, find that Padilla had the right to present facts under 28 U.S.C. § 2243. The court determined that “the most convenient way for him to go about that, and the way most useful to the court, is to present them through counsel.” Finding the government’s arguments insufficient to warrant denying Padilla access to counsel, the district court ordered that Padilla be permitted to consult with counsel. The opinion gave the parties until December 30, 2002, to work out by agreement the conditions for compliance with that holding. The court further stated that it would impose the conditions itself if the parties could not agree.

In fact, the parties could not reach agreement on the conditions for compliance with the district court’s holding. On March 11, 2003, the district court granted the government’s motion to reconsider. Appended to the government memorandum in support of the motion was a declaration by Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency. The Jacoby Declaration maintained that “permitting Padilla to consult with counsel could set back by months the government’s efforts to bring psychological pressure to bear upon Padilla in an effort to interrogate him,” thereby compromising the government’s interrogation techniques. The Jacoby Declaration further concluded that Padilla “could potentially provide information” on numerous subjects, including not only his plot to detonate a “dirty bomb,” but also more general subjects such as al-Qa’eda training, planning, recruitment, and other operations throughout the world, including in the United States. Admiral Jacoby stressed that this kind of information is both time-sensitive and perishable.

Notwithstanding Admiral Jacoby’s caution that permitting Padilla access to counsel might substantially harm national security interests, the district court criticized Jacoby's failure to mention (1) “the particulars of Padilla’s actual interrogation thus far, and what they suggest about the prospect of obtaining additional information” from Padilla; and (2) “when, if at all, intelligence personnel have ever experienced effects of an interruption in interrogation like the effects predicted in the Jacoby Declaration.”
The district court ultimately adhered to its prior decision and once again ordered that Padilla be permitted to consult with counsel. The government has appealed the ruling to the United States Court of Appeals for the Second Circuit.

As mentioned above, Hamdi and Padilla are just two among 650 detainees currently held as enemy combatants. Their claims of American citizenship raise unique legal issues, discussed more fully below. Before examining these issues and the subsequent Task Force recommendations, I will briefly discuss the status of the foreign-national enemy combatants.

C. FOREIGN DETAINEES
The families of sixteen detainees from Australia, Britain, and Kuwait have brought similar actions contesting the legality and conditions of their confinement. On March 11, 2003, the United States Court of Appeals for the District of Columbia Circuit upheld a district court decision dismissing the actions for want of jurisdiction. The text of the United States’ lease with Cuba, the court determined, shows that Cuba -- not the United States -- has sovereignty over Guantanamo Bay. The court thus concluded that the detainees were aliens held outside U.S. territory and were therefore not entitled to the rights enumerated in the Constitution, such as the right to counsel and judicial review. The ABA Task Force’s recommendations do not attempt to address the detentions of foreign nationals held as enemy combatants at Guantanamo Bay, Cuba. Rather, they focus on the detentions of “American citizens or other persons lawfully present in the United States” as enemy combatants without meaningful judicial review and access to counsel. Only Hamdi and Padilla are currently known to fall within the scope of the recommendations. Having examined the circumstances surrounding the Hamdi and Padilla detentions, I will now turn to an analysis of the ABA Task Force’s Recommendations.

V. ABA TASK FORCE RECOMMENDATIONS

[W]e must always guard against the dangers of overreaction and undue trespass on individual rights, lest we lose the freedoms which are the greatness of America.

- ABA Task Force on Treatment of Enemy Combatants

The American Bar Association’s Task Force on Treatment of Enemy Combatants urges, inter alia, that U.S. Citizens and other persons lawfully present in the United States who are detained within the United States based on their designation as “enemy combatants” (1) be afforded the opportunity for meaningful judicial review of their status; and (2) not be denied access to counsel in connection with the opportunity for such review. The American Bar Association further urges Congress, in coordination with the executive, to establish clear standards and procedures governing the designation and treatment of U.S. Citizens and other persons lawfully present in the United States who are detained within the United States as “enemy combatants.” Lastly, the Task Force
urges that Congress and the President, in setting and executing national policy regarding U.S. Citizens and other persons lawfully present in the United States who are detained within the United States based on their designation as enemy combatants, “should consider how the policy adopted by the United States may affect the response of other nations to future acts of terrorism.”

For the reasons set forth below, I believe that the ABA Task Force’s recommendations are neither supported by international or domestic legal precedent, nor by historical practice. If adopted, the recommendations would seriously undermine legitimate national security objectives and frustrate military efforts to successfully prosecute the War on Terror against an unconventional and savage enemy.

A. JUDICIAL REVIEW

RESOLVED, That the American Bar Association urges that U.S. citizens and other persons lawfully present in the United States who are detained within the United States based on their designation as “enemy combatants” be afforded the opportunity for meaningful judicial review of their status.

- ABA Task Force on Treatment of Enemy Combatants
  First Recommendation

The Task Force questions the President’s authority to detain Hamdi and Padilla as enemy combatants without meaningful judicial review of their status or access to counsel. Warring states, however, have the inherent legal right to detain enemy combatants in order to prevent them from rejoining the enemy. Additionally, detaining enemy combatants is necessary to conduct interrogations, which is a crucial intelligence-gathering technique in times of war, and especially in the War on Terror. Indeed, enemy combatants have been detained in every major conflict in American history, including conflicts as recent as Vietnam, the Korean War, and the Gulf War. The purpose of these detentions is not punitive, but to protect the nation against further attacks. Thus, the fact that Hamdi and Padilla have been declared enemy combatants does not necessarily mean that the executive is required to inflict every consequence of that status on them, including charging them with a crime and prosecuting them before a military tribunal or other judicial authority. Instead, the President may declare an individual an enemy combatant, regardless of his citizenship, and order him detained for the duration of the conflict.

The President’s authority to detain enemy combatants is clearly articulated in Article II of the Constitution. The provisions of Article II provide that the President “shall be Commander in Chief of the Army and Navy of the United States.” Thus, one of the President’s most important responsibilities is the execution of military campaigns, including the detention of enemy combatants during wartime. The proposition that the President may detain enemy combatants for the duration of a war is deeply rooted in
American legal history. This authority to detain an enemy combatant is not diminished by a claim, or even a showing, of American citizenship. Despite the fact that a detainee’s claim of American citizenship may afford him the legal right to challenge his detention via a habeas corpus petition, it has no effect on the President’s authority to detain him once declared an enemy combatant.

Even though Article II suffices to establish the President’s authority to detain enemy combatants, that authority is further supported in the current conflict by the September 18, 2001 Joint Resolution of Congress. The Task Force argues that “neither the Joint Resolution nor any laws enacted in response to the terrorist attacks address or expressly authorize the detention of United States citizens as enemy combatants.” However, the authorization to “use all necessary and appropriate force” necessarily includes the authority to detain individuals against whom the war is being fought, as well as the authority to designate them as enemy combatants, in order to prevent them from engaging in further hostilities against the United States. The Joint Resolution further serves the purpose of satisfying the requirements of 18 U.S.C. §4001(a), in the event that the statute is interpreted to apply to enemy combatants, even though it does not.

There being no barrier under domestic law to detain these men, the Task Force looks to international law for support. Since the Third Geneva Conventions do not apply to enemy combatants, discussed supra, the Task Force looks to Articles 8 and 9 of the Universal Declaration of Human Rights (the “UDHR”), and the International Covenant on Civil and Political Rights (the “ICCPR”). The Task Force notes that both treaties “attempt to protect individuals from arbitrary detention and guarantee a meaningful review of a detainee’s status.” However, although the UDHR has gained considerable authority as a legal guide to all member states, it is not as yet regarded as legally binding among the nations of the world. Even if the United States were strictly bound by the UDHR, Article 8 allows for “an effective remedy by the competent national tribunals” only for “acts violating the fundamental rights granted…by the constitution and by law.” [emphasis added]. Since the detention of enemy combatants during wartime is unambiguously permitted under the Third Geneva Convention and domestic law, and since enemy combatants are not entitled to the protections of the Constitution, no fundamental rights have been violated. Consequently, the UDHR does not necessarily entitle enemy combatants to judicial review.

Article 9 of the UDHR provides that “[n]o one shall be subjected to arbitrary arrest, detention, or exile.” None of the enemy combatants, however, are detained arbitrarily. Any suggestion to the contrary is misleading -- the implication being that the enemy combatants are detained lawlessly. Rather, each of the individuals, including Hamdi and Padilla, are being held in connection with their affiliations with a ruthless terrorist organization that is responsible for the deaths of innocent civilians worldwide. As mentioned above, the legal authority to detain enemy combatants until the cessation of hostilities is well-settled.

Further, the lack of a foreseeable end to the War on Terror does not necessarily mean that the detentions are arbitrary or indefinite. In previous wars, enemy combatants have
been legally detained for many years. Since we have not yet approached that point in
the present conflict -- Hamdi and Padilla have been detained for approximately 17
months -- concerns of indefinite detention are premature.

Likewise, the ICCPR does not create a right to judicial review for enemy combatants.
Article 9 of the ICCPR reads:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take
proceedings before a court, in order that that court may decide without delay on the
lawfulness of his detention and order his release if the detention is not lawful.\(^\text{145}\)

Article 4 of the ICCPR, however, provides that:

In time of public emergency which threatens the life of the nation and the existence of
which is officially proclaimed, the States Parties to the present Covenant may take
measures derogating from their obligations under the present covenant to the extent
strictly required by the exigencies of the situation, provided that such measures are not
inconsistent with their other obligations under international law…\(^\text{146}\)

Undeniably, the War on Terror is a conflict of sufficient gravity to invoke Article 4 of the
ICCPR and temporarily limit American obligations therein. Taking such measures are
not inconsistent with our obligations under international law, since no international treaty
guarantees limitless access to counsel and judicial review for enemy combatants.

While the government’s power to detain persons who are not charged with criminal
offenses is well-settled, the Task Force argues that this power is not absolute.\(^\text{147}\)
Nevertheless, courts have historically given substantial deference to the executive in
times of war, and should continue to do so. The origin of the requirement of judicial
deerence to the executive in times of war is found in the Constitution itself. While Article
II vests “commander-in-chief” powers in the President, Article I grants Congress the
power to “provide for the common Defence and general Welfare of the United
States…To declare War…and make Rules concerning Captures on Land and
Water…”\(^\text{148}\) Article III, by which courts are governed, contains nothing analogous to the
specific war powers enumerated in Articles I and II. Thus, the executive and legislative
branches are best organized to conduct war efforts in a manner that the judiciary simply
is not.\(^\text{149}\)

Despite the need for judicial deference in times of war, courts have generally held that
judicial deference does not equate to judicial abstention.\(^\text{150}\) Thus, as the Task Force
argues, deference to executive designations of enemy combatants should not be
without limit.\(^\text{151}\) The government, too, has recognized that judicial deference is not
unlimited, and has welcomed meaningful judicial review of its detentions of enemy
combatants in the United States.\(^\text{152}\) In fact, in an act unprecedented in this nation’s long
history of wartime detentions of enemy combatants, the Executive Branch submitted to
the courts in *Hamdi* and *Padilla* factual evidence supporting the detentions of those men
as enemy combatants (i.e., the Mobbs and Jacoby Declarations). Thus, the government
has remained cognizant of the limits on its authority to detain enemy combatants without first providing a foundation for the detentions.

However, neither should the level of judicial review of the detentions of enemy combatants be without limitation. Judicial review should be limited in the interest of national security, and in accordance with the separation of powers doctrine of the Constitution. The habeas statute itself recognizes that a habeas petition may raise “only issues of law.” Thus, courts have had, and should continue to have, an extremely narrow role in factually reviewing the adequacy of the government’s detention of an individual as enemy combatant. Factual inquiry into the detention of enemy combatants should only require some evidence supporting the government’s designation of detainees as enemy combatants. The Task Force has conceded that “[j]udicial review is not intended to determine the detainee’s guilt or innocence, but is limited to an inquiry of whether the Executive Branch, given substantial deference, has a factual basis for the detention.” Further factual investigation would bring an Article III court into conflict with the war-making powers of Article I and II, and would compel the military to reveal highly sensitive information crucial to its successful prosecution of the war. Any impediment that the military faces in its prosecution of the war only has the effect of lengthening the duration of the conflict, thus prolonging the detentions of the enemy combatants -- to the chagrin of the Task Force.

The Task Force maintains that “the writ of habeas corpus provides access to the federal courts to challenge detentions of persons by the executive,” and that “the Constitution provides that ‘the privilege of the Writ of Habeas Corpus shall not be suspended’ except by Congress, and then only ‘when in Cases of Rebellion or Invasion the public safety may require it.’” The Task Force expresses with confidence that the ongoing War on Terror “is neither a rebellion nor an invasion.” I believe that we should be cautious to accept the Task Force’s categorical conclusion at face value. The al-Qa’eda terrorist network, to which Hamdi and Padilla have pledged their allegiance, and with whom America is currently engaged in the War on Terror, is supported and led by Osama bin Laden -- an individual who has expressed as among his primary motivations the United States’ support of Israel in Israel’s ongoing conflicts with Palestine. The mission statement of the al-Qa’eda terrorist organization is thus to rebel against America, its support of Israel, and Western values in general -- a mission statement adopted by both Hamdi and Padilla in their voluntary affiliations with the terrorists. Under this analysis, alliance with al-Qa’eda and conducting attacks at the behest of its leaders indeed resembles a violent rebellion.

What is more, whereas Hamdi was captured on the battlefield, Padilla was arrested on American soil while on a reconnaissance mission, as American intelligence suggests, in furtherance of his and al-Qa’eda’s desire to launch further attacks. While it may be a considerable stretch to categorize this single infiltration as an “invasion,” it is nevertheless possible, if not plausible, that Padilla may have been instructed to reunite with other al-Qa’eda operatives already in the United States in order to complete his mission or launch additional attacks. Even if such infiltrations are not considered “invasions” in the Constitutional sense, they are indicative of a new era of warfare
against an unconventional enemy that the framers could not have envisioned, and they are sufficiently analogous to underscore the concerns expressed in the Constitution for the public safety during an invasion. The gravity of al-Qa'eda’s infiltrations is not diminished by the mere fact that the terrorist network does not resemble a conventional invading army. Therefore, however unlikely it may be that Congress should consider these terrorist acts “rebellions” or “invasions” and thus suspend the writ of habeas corpus, the Task Force’s military assessment of the War on Terror should be viewed with great scrutiny given the historically unique nature of the conflict.

Even if the current struggle against terrorism does not constitute an invasion or rebellion, courts should act with the aforementioned level of deference in their inquiries, adopting the “some evidence” standard for reviewing the government’s designation of enemy combatants.

**B. RIGHT TO COUNSEL**

*FURTHER RESOLVED, That the American Bar Association urges that U.S. citizens and other persons lawfully present in the United States who are detained within the United States based on their designation as “enemy combatants” not be denied access to counsel in connection with the opportunity for such review.*

- ABA Task Force on Treatment of Enemy Combatants
Second Recommendation

The Task Force argues that, without meaningful access to counsel, the right to judicial review would be hollow. Yet there is no support for an enemy combatant’s right to counsel anywhere in domestic or international law, military custom, or historical practice. For example, the right to counsel is not included among the many carefully enumerated rights of lawful combatants in the Third Geneva Convention, much less is it afforded unlawful combatants who have no rights under the Convention at all. The detainees in the current conflict have not, after all, been accorded prisoner of war status -- an issue that the Task Force does not address in its recommendations. Nor do Hamdi’s and Padilla’s claims of American citizenship affect their status as enemy combatants.

The Task Force looks to other sources of international law to support its position. It emphasizes that Principle 18 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* provides that “a detained or imprisoned person shall be allowed to communicate and consult with his counsel. However, Principle 18 further provides that:

The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted.*save in exceptional circumstances, to be
specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order. [Emphasis added].

Surely, if ever this nation has seen an exceptional circumstance, the War on Terror against renegade terrorist networks and their rogue state supporters certainly qualifies as such. The President is a proper authority, under Principle 18, to enact lawful regulations classifying certain individuals as enemy combatants, thus eliminating their purported right to counsel. Further, the government has consistently asserted its compelling national security interests as its primary motivation for detaining enemy combatants uncharged and without access to counsel. For example, permitting the enemy combatants to meet with counsel would undermine the authority of the interrogators and thereby disturb the necessary psychological leverage that is critical to conduct meaningful interrogations. Thus, the Task Force’s reliance on Principle 18 is misplaced.

Nor is there any support in United States law for the Task Force’s position. The Task Force is correct in acknowledging that “the Sixth Amendment right to counsel is limited to traditional criminal prosecutions,” and is thus inapplicable to uncharged enemy combatants. However, the Task Force opines that “it is both paradoxical and unsatisfactory that uncharged U.S. citizen detainees have fewer rights and protections than those who have been charged with serious criminal offenses.” The Task Force’s illogical statement, reductio ad absurdum, suggests that enemy combatants should be afforded more Constitutional protections than criminals for the mere reason that no charges have been brought against them. But the mere fact that an enemy combatant remains uncharged by no means renders him any more benign, as the Task Force suggests, than a charged criminal -- nor does it make him any more deserving of Sixth Amendment protection. Indeed, many of the terrorist detainees, including Padilla and Hamdi, have been designated enemy combatants under compelling suspicions that they are the most dangerous kinds of criminals -- war criminals. The Task Force appears to imply that criminal charges should be brought against the enemy combatants, but this would contradict the very utility of the detentions -- to gather intelligence, not to punish. Despite the lack of relief for enemy combatants in the Sixth Amendment, the Task Force argues that a right of access to counsel is implicit in the Fifth Amendment’s Due Process Clause -- an argument that it inexplicably omitted from its October 17, 2002 response to the Department of Defense. As the government noted, “there is no due process or other legal basis, under either domestic or international law, that entitles enemy combatants to legal counsel.” Even the most general due process analysis reveals that there is no tradition or practice of creating a free-floating right of access to counsel for an enemy combatant. Even assuming, arguendo, that the Fifth Amendment did grant upon enemy combatants some right to counsel in order to challenge their detention, creating such a right at this time would unnecessarily jeopardize compelling national security interests and possibly harm the military’s intelligence-gathering efforts that may help prevent future attacks.

The Task Force has in fact recognized that “there may be circumstances in which providing a detainee with access to counsel could be unwise, impractical, or
dangerous.” To be sure, al-Qa’eda training manuals provide instructions for al-Qa’eda detainees to “[t]ake advantage of visits to communicate with brothers outside prison and exchange information that may be helpful to them in their work outside prison.” Thus, counsel appointed to represent enemy combatants may, without their knowledge, be used as intermediaries to transmit messages in furtherance of the terrorist network’s plans. In addressing these concerns, the Task Force acknowledged that “[a]ccess to counsel could interfere with “ongoing efforts to gather and evaluate intelligence” and might enable detainees to “pass concealed messages to the enemy” but found [that these arguments] were not “so compelling that they justify denial of access to assistance of counsel” and that “our nation’s lawyers can provide effective representation without breaching security.”

As a matter of fact, at least one attorney for a member of a terrorist network related to al-Qa’eda has been indicted for passing messages to and from a convicted terrorist, Sheikh Omar Abdel-Rahman. This is not to say, a fortiori, that because at least one case exists more will necessarily follow. However, the existence of such a case is a compelling illustration of just one of the perils in creating a nonexistent right for enemy combatants to meet with counsel. I do not believe that we should reward the enemy combatants with the freedoms that they are trained to use against us, nor should we grant them access to the courts simply because they happened to be captured closer to their target, as was Padilla. There being no support for the right to counsel of enemy combatants under international or domestic law, and considering the harmful effect on national security and military efforts in the War on Terror, the Task Force’s recommendation that enemy combatants should not be denied access to counsel is without foundation.

C. STANDARDS AND PROCEDURES

FURTHER RESOLVED, That the American Bar Association urges Congress, in connection with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of U.S. citizens and other persons lawfully present in the United States who are detained within the United States as “enemy combatants”

- ABA Task Force on Treatment of Enemy Combatants
Third Recommendation

The Task Force urges that "Congress should monitor the executive’s detention practices in order to assure that they are consistent with Due Process, American tradition, and international law.” Indeed, Congress has responded to the issues raised by the Task Force with the "Detention of Enemy Combatants Act." Introduced on February 27, 2003 by Rep. Adam Schiff (D-CA), the bill has been referred to the Committee on the Judiciary as well as the Committee on Armed Services. Section 4 of the bill, entitled “Procedural Requirements,” reads:
The rules prescribed for the detention of enemy combatants shall establish clear standards and procedures governing detention of a United States person or resident that preserve the government's ability to detain those who may threaten the United States, assist in the gathering of vital intelligence, and protect the confidentiality of that information or any other information which, if released, could impede the government's investigation of terrorism. Such rules shall also guarantee timely access to judicial review to challenge the basis for a detention, and permit the detainee access to counsel.\textsuperscript{173}

Since the detention of enemy combatants is authorized by the Constitution and by Congress, it certainly is proper for Congress, in conjunction with the executive, to establish clear procedures regarding the detention of American Citizens as enemy combatants. The Task Force's recommendations, however, should not guide our wartime lawmakers in this respect. For the reasons mentioned above, Congress and the President should seek guidance from existing domestic law, current international law, longstanding historical practice, the rules and customs of war, and the current state of world security -- all of which support the detention of enemy combatants without access to counsel and minimal judicial review.

D. POLICY

\textit{FURTHER RESOLVED, That the American Bar Association urges that, in setting and executing national policy regarding U.S. citizens and other persons lawfully present in the United States who are detained within the United States based on their designation as “enemy combatants,” Congress and the Executive Branch should consider how the policy adopted by the United States may affect the response of other nations to future acts of terrorism.}

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- ABA Task Force on Treatment of Enemy Combatants

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Fourth Recommendation\textsuperscript{174}

There should be no doubt that the disposition of these weighty issues requires sensitivity to public and world policy. Nor should there be any doubt that the government has struggled to achieve a balance between pressing national security concerns and world opinion. The government's careful attention to the legal basis of its actions, as explained above, demonstrates its desire to promote justice and uphold the rule of law even amid the daunting task of protecting innocent civilians from the reach of ruthless terrorists. In this respect, the Task Force's fallacious suggestion that Hamdi's and Padilla's detentions violate the rule of law is both premature and imprudent, and the Task force should reconsider its analysis and conclusions.

V. CONCLUSION
For the foregoing reasons, judicial review of the status of enemy combatants should be very limited in the interest of national security. Since the military’s authority to classify individuals as enemy combatants and detain them for the duration of the conflict is well-established under the law, Article III courts should not second-guess the military’s designation of enemy combatants if the government can produce some evidence supporting its designation. Courts should therefore adopt the “some evidence” standard, as the Fourth Circuit did in *Hamdi*, in limiting judicial factual inquiries pursuant to the Separation of Powers Doctrine, and in accordance with the requisite level of deference in this time of war.

Enemy combatants are not entitled access to legal counsel under any theory of domestic or international law, and no such right should now be created. Furthermore, an enemy combatant’s access to counsel unnecessarily jeopardizes compelling national security interests in at least two respects. First, creating a right for an enemy combatant’s access to counsel would likely interfere, and irreparably harm, the military’s ongoing efforts to gather intelligence by diminishing the relationship of dependency that is necessary for fruitful interrogation. Second, al-Qa’eda has trained its members to pass concealed messages through unsuspecting intermediaries if they are taken into custody. Once an individual has been declared an enemy combatant, and the government has brought forth evidence establishing his alliance with the enemy, he should not be rewarded with the very freedoms he is trained to use against this nation to hurt innocent lives. I do not believe we should, as the Task Force suggests, rewrite American law to sympathize with unlawful combatants who claim American citizenship. Nor should we thrust our legal system into the same turmoil that the American public faced on September 11, 2001, to the delight of the now enemy combatant detainees.

While Congress and the President should certainly establish clear procedures regarding the detention of enemy combatants, they should not be persuaded by the Task Force’s recommendations. The recommendations are not supported by international or domestic law, nor by the laws and customs of war. The Task Force should further rethink its analysis and conclusions, which are imprudent in the War on Terror.

Although it is true that a state of war necessarily invests in the government additional authority that it does not possess in times of peace, the people of this nation must be safeguarded against potential abuses of that authority. Contrary to the Task Force’s suggestions, however, the government has evinced no such abuse at this time, and arguments to the contrary are premature. The detainees have been, and should continue to be, treated humanely. They should be released or charged as soon as the conflict ends, but not so long as American troops remain on the ground in Afghanistan rooting out al-Qa’eda remnants. Until such time, if ever, that the government has clearly abused its wartime authority, we should defer to our government in its pursuit of peace and justice pursuant to the rule of law. I believe that to do otherwise, the average
American citizen stands to lose the very freedoms that the Task Force is advocating for enemy combatants.

Chief Justice William H. Rehnquist, in a speech to lawyers in 2000, commented that:

The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over. [While that may seem] a thoroughly undesirable state of affairs [to lawyers and judges], in the greater scheme of things it may be best for all concerned. While we would not want to subscribe to the full sweep of the Latin *maxim inter arma silent leges* -- in time of war the law is silent -- perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.  

Chief Justice Rehnquist’s words underscore the gravity of the legal issues raised when detaining enemy combatants who claim American citizenship. The Task Force recommendations, however, do not resolve these issues but appear to only complicate them at the expense of national security. Despite the disagreement, both sides of the debate seek common solutions: national security and legal justice. These are, after all, the very *raisons d'être* of the War on Terror.

The laws are certainly not silent in the War on Terror, nor do they speak with a muted voice. Rather, the laws in the War on Terror speak with a different voice altogether -- a thunderous voice that calls for the protection of innocent lives from the reaches of savage terrorist organizations and their remorseless members, even those who claim citizenship in this country, take up arms against it, and now seek to enjoy its protections.

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2 The temporary detention facility is also known by the designation “Camp X-Ray.”
3 The 45-square-mile base, situated on land seized by the United States in the Spanish-American War, has been leased by the United States from Cuba for over a century.
7 “The President shall be Commander in Chief of the Army and Navy of the United States and the Militia of the Several States…” U.S. CONST. art. II, § 2, cl. 1.
8 The al-Qa’eda terrorist network has been linked to other violent attacks against the United States, including the Aug. 1998 bombing of U.S. embassies in Nairobi, Kenya and Dar-Es-Salaam, Tanzania, as well as the 1993 attack on U.S. military personnel in
9 Although Congress did not issue a formal Declaration of War under Article I, Section 8 of the Constitution, it did issue a joint resolution authorizing the President to use military force if necessary to respond to the attacks. Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224 [hereinafter Joint Resolution].
13 Yaser Hamdi was captured during the military campaign in Afghanistan, and was among the individuals transferred to Camp X-Ray. In April 2002, he was brought to the Naval Brig in Norfolk, Virginia, when it was discovered that he was born in the United States and may not have renounced his citizenship.
14 Padilla is currently detained at the Naval Consolidated Brig in Charleston, South Carolina.
16 Id.
18 ARISTOTLE, SELECTIONS 1179b (Terence Irwin & Gail Fine trans., Hackett Publishing 1995).
19 “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…” U.S. CONST. amend. VI. (emphasis added).
20 Ex Parte Quirin, 317 U.S. 1 (1942) [hereinafter Quirin].
21 Id. at 31.
22 Id.
24 Id. at art. 29.
25 Id. at art. 34.
26 Id. at art. 18.
27 Id. at art. 72.
28 Id. at art. 25.
29 Id. at art. 4(A)
30 Quirin, 317 U.S. at 31.
31 See, e.g., Madsen v. Kinsella, 343 U.S. 341, 355 (1952); In re Yamashita, 327 U.S. 1, 7 (1946).
32 Quirin, 317 U.S. at 37-38.
33 Hamdi v. Rumsfeld, 316 F.3d 450, 461 (4th Cir. 2003) [hereinafter Hamdi III].
34 The Northern Alliance, a loosely-knit coalition of military groups opposed to the Taliban government, allied itself with, and fought alongside, coalition troops during the
military campaign in Afghanistan.
36 Hamdi v. Rumsfeld, 294 F.3d 598, 601 (4th Cir. 2002) [hereinafter Hamdi I].
37 Next Friend is defined as “A person who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian.” BLACK’S LAW DICTIONARY 1065 (7th ed. 1999).
38 294 F.3d at 601.
39 Id.
40 See note 101 infra.
41 294 F.3d at 601.
42 Id. at 607.
43 Id., (quoting Whitmore v. Arkansas, 495 U.S. 149 (1990)).
44 Id.
45 Hamdi v. Rumsfeld, 296 F.3d. 278 (4th Cir. 2002) [hereinafter Hamdi II].
46 Id. at 280.
47 Id. at 280-81.
48 Id. at 281.
49 Id.
50 Id. at 282.
51 Id. at 281.
52 Id. at 284.
53 Id. at 281.
54 Id. at 283.
55 For example, the court asked, “With whom is the war I should suggest we’re fighting?” and, “will the war never be over as long as there is any...person who might feel that they want to attack the United States of America or the citizens of the United States of America?” Hamdi III, supra note 33, at 461.
56 Id.
57 Id.
58 Id.
59 The court further stated that it was prepared to “pick [the Mobbs Declaration] apart piece by piece,” and even questioned whether Mobbs was indeed a government employee. Id. at 462.
60 Id. at 472.
61 Id. at 462.
62 Id. at 470.
63 Id.
64 Id. at 462.
65 Id., (quoting Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 205 (1996)).
66 Id. at 450.
67 "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress.” 18 U.S.C. § 4001(a).
68 See Joint Resolution, supra note 9.
69 Id. at 466.
70 Id. at 467.
72 Hamdi III, supra note 33, at 468.
73 Id.

74 Article 5 of the Third Geneva Convention requires an initial formal determination of an enemy belligerent’s status by “a competent tribunal.” See Third Geneva Convention, supra note 23, at art. 5.

75 Hamdi III, supra note 33, at 463. (quoting Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (1972)).
76 Id.
77 Id. at 469.
78 Id. at 450.

79 The court postulated that the value of an enemy combatant’s detention lied in his disarmament and removal from the front, as well as in that “detention, in lieu of prosecution, relieved the burden on military commanders of litigating the circumstances of a capture halfway around the globe.” A third interest, that of gathering intelligence, was not presented in this appeal. Hamdi III, 316 F.3d at 465.
80 Id. at 470.
81 Id. at 473.
82 Id. at 450.
83 Id. at 473.
84 Id. at 464.
85 Id.

88 Second Mobbs Declaration, supra note 86, ¶ 4.
89 Id.
90 Id.
91 Id. at ¶ 6.
92 Id. at ¶ 7.
93 Id. at ¶ 8.
94 Id. at ¶ 10.

96 Id.
97 Id.
98 Id.
99 Id.
100 Id.

101 Whitmore v. Arkansas, supra note 41, at 163. The Whitmore court emphasized the strict limitations for achieving “next friend” status: First, a next friend must “provide an
adequate explanation -- such as inaccessibility, mental incompetence, or other disability -- why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the next friend must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has further been suggested that a next friend must have some significant relationship with the real party in interest. "It was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends." 102 Padilla I, 233 F. Supp. 2d at 577.
103 Id. at 588.
104 Id.
105 The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862).
106 Padilla I, 233 F. Supp. 2d at 590.
107 Joint Resolution, supra note 9.
109 U.S. CONST. art. III, § 2
110 Padilla I, 233 F. Supp. 2d at 591.
111 "The Applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts." 28 U.S.C. § 2243 (2001).
112 Padilla I, 233 F. Supp 2d at 599.
113 Id. at 610.
114 Id.
116 Id.
117 Id. at *6.
118 Id.
119 Id. at *7.
120 Id. at *12.
123 Padilla II, supra note 115 at *22.
124 Nor do the recommendations attempt to address the detentions of foreign nationals in immigrations proceedings or individuals held as material witnesses. Task Force Report, supra note 15, at 3.
125 Id.
126 Id. at 1.
127 Id. at ¶ 1.
128 See Quirin, 317 U.S. at 27-28; see also United States v. Salerno, 481. U.S. 739, 748 (1987) ("[I]n times of war or insurrection, when society's interest is at its peak, the government may detain individuals whom the government believes to be dangerous.").
129 Secretary Rumsfeld stated in a news briefing that the government’s interest in detaining Padilla “is not law enforcement, it is not punishment because he was a terrorist or working with the terrorists. Our interest in the moment is to try and find out everything he knows so that hopefully we can stop other terrorist attacks.” See News
Briefing, Department of Defense (June 12, 2002), 2002 WL 22026773 [hereinafter DoD News Briefing].
130 Hamdi III, 316 F.3d. 450, 469 (4th Cir. 2003).
131 Quirin, 317 U.S. at 37.
132 U.S. CONST. art. II, § 1.
133 See, e.g. Quirin, 317 U.S. 1 (1942); Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956); In re Territo, 156 F.2d 142, 145 (9th Cir. 1946).
134 Quirin 317 U.S. at 31.
135 Id. at 37-38.
136 See Joint Resolution, supra note 9.
138 Section 4001(a) requires that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress.” Thus, the statute should not be interpreted to restrict the President’s constitutional authority as Commander in Chief to detain enemy combatants.
141 Id.
142 An additional defect of the UDHR is that it possesses no enforcement mechanism for any of the human rights that it lists. See Addicott, supra note 12, at 153.
143 UDHR, supra note 139, at art. 8.
144 Id. at art. 9.
146 Id. at art. 4.
149 Hamdi III, 316 F.3d. at 463.
155 Id. at 7.
156 Id., see also U.S. CONST., Art. I, § 9, cl. 2.
157 Congress has not made such a finding, nor has it suspended an American citizen’s
Constitutional right to seek review of his detention status through a petition for writ of habeas corpus.


159 Id. at 10.

160 Quirin, 317 U.S. at 37-38.


162 Donald Rumsfeld has stated, “Our interest at the moment is to try and find out everything [Padilla] knows so that hopefully we can stop other attacks.” See DoD News Briefing, supra note 128.


164 Id. at 11.

165 Sonnett Response, supra note 161, at p. 4.

166 Haynes Letter, supra note 152, at p. 3.

167 Sonnett Response, supra note 161, at p. 4.


169 Sonnett Response, supra note 161, at p. 4.

170 United States v. Ahmed Abdel Sattar, et al., Indictment 02 Crim. 395, 7, 16, 30 (Grand Jury Indictment, S.D.N.Y., April 9, 2002).


173 Id. at § 4.

