AMERICAN BAR ASSOCIATION

TASK FORCE ON TREATMENT OF ENEMY COMBATANTS
CRIMINAL JUSTICE SECTION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

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; and

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; and

FURTHER RESOLVED, That the American Bar Association urges Congress, in coordination 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;" and

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.

REPORT

I. INTRODUCTION

The September 11, 2001, attack on the United States forced Americans to recognize new enemies of our nation. We are confronted by groups of individuals of varying nationalities, operating throughout the world, who are committed to murdering innocent men, women, and children associated with the United States; destroying both government and private property in the United States; and creating a climate of fear among Americans at home and abroad. The openly-declared goal of one of these groups, al Qaeda, to wage a holy war against this country, has forced Congress and the President to take unprecedented steps to ensure the safety of this nation and of innocents worldwide.

September 11 and other terrorist attacks, at home and abroad, raise difficult questions for our legal and political systems. For more than two hundred years, whenever this nation has been confronted by war, our government has struggled to achieve a proper balance between the protection of the people and each person's individual rights. In times of war that balance may shift appropriately toward security. Our national experience has taught, however, that we 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.

We have struggled to achieve a proper balance in the past, and we face the same struggle today. As Supreme Court Justice Murphy warned in a case arising during World War II:

> [W]e must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. There must be a careful balancing of interests. And we must ever keep in mind that "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Murphy, J., concurring) (quoting *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866)). As the Supreme Court noted in a different era, "'war power' cannot be invoked as a talismanic incantation . . . Even the war power does not remove constitutional limitations safeguarding essential liberties." *United States v. Robel*, 398 U.S. 258, 264 (1967).

The recent cases of Yaser Hamdi[1] and Jose Padilla[2] bring this potential danger into sharp relief and

[1] Yaser Hamdi was captured during the hostilities in Afghanistan, and was initially transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba in January 2002. When it was discovered that he was born in the United States and may not have renounced his citizenship, he was brought to the Naval Brig in Norfolk, Virginia, in April 2002. He has been continuously detained there as an "enemy combatant."

[2] Jose Padilla, a.k.a. Abdullah al Muhajir, was arrested in Chicago on May 8, 2002, pursuant to a material witness warrant issued in the Southern District of New York. He was detained in New York City until June 9, 2002, when he was

raise troublesome and profound issues. Both U.S. citizens, they have been designated as "enemy combatants" and detained incommunicado without access to counsel or meaningful judicial review. Indeed, as the United States Court of Appeals for the Fourth Circuit has observed, the government has taken the position 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."[3]

We recognize the government's responsibility to do everything possible to prevent another attack on our nation, but we also worry that the methods employed in the Hamdi and Padilla cases risk the use of excessive government power and threaten the checks and balances necessary in our federal system. How we deal with citizens and other persons lawfully present in the United States who are suspected of terrorist activity will say much about us as a society committed to the rule of law. While we must have the means to prevent more attacks like those of September 11th, we must also insure that there are sufficient safeguards to protect the innocent and prevent possible abuses of power.

In light of the importance of these issues, the ABA Board of Governors, at the request of then-President Robert Hirshon, created a Task Force on Treatment of Enemy Combatants in March 2002 to examine these issues.[4]

The charge of the Task Force was to examine the framework surrounding the detention of United States citizens declared to be "enemy combatants" and the challenging and complex questions of statutory, constitutional, and international law and policy raised by such detentions. The Task Force issued a Preliminary Report on August 8, 2002, which was widely circulated within the ABA, the Congress, and the Executive Branch.

Following the release of the Task Force's Preliminary Report, the ABA Criminal Justice Section and the Section of Individual Rights & Responsibilities formed their own working groups, which worked with each other and with the Task Force to further review these important issues.[5] Their invaluable input and cosponsorship has contributed substantially to this Report.

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declared to be an "enemy combatant," transferred to the control of the United States military, and transported to the Naval Consolidated Brig in Charleston, South Carolina.

[3] *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002). We note that both the Hamdi and Padilla cases are in litigation, and facts and arguments may emerge that have not been made public. It is not our purpose to address these cases specifically, but rather to discuss the implications of them and the principles we believe should be considered as our nation confronts the broader questions they raise.

[4] The Task Force is chaired by Neal R. Sonnett, and includes John S. Cooke, Eugene R. Fidell, Albert J. Krieger, Stephen A. Saltzburg, and Suzanne E. Spaulding.

[5] The Criminal Justice Section working group, appointed by Section chair Albert J. Krieger, was headed by Margaret Love and included Kenneth Bass, Frank Bowman, R.J. Cinquegrana and Marc Jones. The IRR working group, appointed by Section chair Mark Agrast, was headed by John Payton and included Michael Greenberger, John Podesta, and Jeffrey Robinson.

These Recommendations do not attempt to address the detention of foreign nationals in immigration proceedings,[6] individuals held as material witnesses,[7] or foreign nationals held as "enemy combatants" at Guantanamo Bay, Cuba, or elsewhere outside the United States.[8] Rather, they focus on the proper safeguards, which should be employed when the government designates U.S. citizens or other persons lawfully present in the United States [9] as "enemy combatants" and detains them within the United States indefinitely without meaningful judicial review and access to counsel.

II. LEGAL FRAMEWORK

A. The "Enemy Combatant" Designation

The government maintains that individuals declared to be "enemy combatants" may be detained for an indefinite period of time and have no right under the laws and customs of war or the Constitution to meet with counsel concerning their detention. The term "enemy combatant" is not a term of art which has a long established meaning. According to one commentator:

> Until now, as used by the attorney general, the term "enemy combatant" appeared nowhere in U.S. criminal law, international law or in the law of war. The term appears to have been appropriated from ex parte Quirin, the 1942 Nazi saboteurs case, in which the Supreme Court wrote that "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property [would exemplify] belligerents who are generally deemed not to be entitled to the status of prisoner of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."

Solis, "Even a 'Bad Man' Has Rights," *Washington Post*, Tuesday, June 25, 2002, Page A19.

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[6] Those concerns were addressed by the House of Delegates at the 2002 Annual Meeting when it overwhelmingly passed Report 115B, which opposed the incommunicado detention of foreign nationals in undisclosed locations by the INS and urged the adoption of due process protections in immigration proceedings.

[7] It is worth noting that, pursuant to 18 U.S.C.A. § 3006A (a)(1)(G), material witnesses have a statutory right to appointed counsel. See *In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in Western Dist. of Texas*, 612 F.Supp. 940 (W.D.Tex.1985). Indeed, Jose Padilla had counsel appointed to represent him when he was originally arrested pursuant to a material witness warrant.

[8] Two United States District Courts have recently dismissed habeas corpus claims on behalf of Guantanamo detainees on jurisdictional grounds because the detainees were not within the territorial jurisdiction of the courts. See *Coalition of Clergy v. Bush*, 189 F.Supp.2d 1036 (C.D.Cal. 2002); *Rasul v. Bush*, 2002 WL 1760825 (D.D.C. 2002).

[9] By "other persons lawfully present in the United States," we refer to permanent residents and other non-citizens lawfully in this country at the time of their designation as "enemy combatants." This would not include, for example, aliens taken into custody outside our nation's borders and then brought here for confinement, or persons who entered the United States unlawfully in the first place.

The term "enemy combatant" actually encompasses two previously-recognized classes of detainees during wartime: lawful and unlawful combatants. Each is subject to capture and detention for the duration of a conflict. "Lawful combatants," or prisoners of war, are entitled to the substantive and procedural protections set forth in the Third Geneva Convention of 1949, such as the right to the exercise of religion, the ability to correspond with persons outside detention and to keep personal effects, and the entitlement to living conditions equivalent to the soldiers of the detaining power. "Unlawful combatants" do not receive these protections, and may additionally be "subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

Article 4 of the Third Geneva Convention states that members of a military organization qualify for prisoner-of-war status if (1) they are 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 their operations in accordance with the law and customs of war. Under the law of war, then, the term "lawful combatant" typically refers to a member of a state's armed forces.[10] These individuals wear uniforms and carry distinctive identification to clearly distinguish them from civilians.

Article 4 also provides that persons who engage in belligerent acts without meeting these criteria may be labeled "unlawful combatants." The Supreme Court has described an unlawful combatant as "[t]he spy who secretly and without uniform passes 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." *Quirin*, 317 U.S. at 31.

The government maintains that its power to designate an individual as an "enemy combatant," and to detain that person for the duration of the present conflict without bringing criminal charges, derives from the laws of war and Supreme Court precedent. It has relied on *Quirin* and other cases to support its detention of Jose Padilla and Yaser Hamdi.

The *Quirin* case, however, does not stand for the proposition that detainees may be held incommunicado and denied access to counsel; the defendants in *Quirin* were able to seek review and they were represented by counsel. In *Quirin,* "The question for decision is whether the detention of petitioners for trial by Military Commission ... is in conformity with the laws and Constitution of the United States. " *Quirin,* 317 U.S. at 18. Since the Supreme Court has decided that even enemy aliens not lawfully within the United States are entitled to review under the circumstances of Q*uirin*,[11] that

[10] See Article 4A(1), Geneva Convention Relative to the Treatment of Prisoners of War, 1949.

[11] "The contention that enemy alien belligerents have no standing whatever to contest conviction for war crimes by habeas corpus proceedings has twice been emphatically rejected by a unanimous Court. In Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3, we held that status as an enemy alien did not foreclose 'consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.' Id., 317 U.S. at 25, 63 S.Ct. at 9, 87 L.Ed. 3. This we did in the face of a presidential proclamation denying such prisoners access to our courts." *Johnson v. Eisentrager,* 339 U.S. 763, 794-95, 70 S.Ct. 936, 951-52 (1950) (Justice Black dissenting).

right could hardly be denied to U. S. citizens and other persons lawfully present in the United States, especially when held without any charges at all. *See also In re Territo*, 156 F.2d 142 (9th Cir. 1946).

B. United States Law

Neither the Joint Resolution authorizing the use of force nor any laws enacted in response to the terrorist attacks address or expressly authorize the detention of United States citizens as "enemy combatants." That is an important consideration, since existing law calls such detention into serious question.

In 1971, Congress enacted 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The House Report accompanying the legislation stated that the purpose of the bill was "to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists" and to repeal the Emergency Detention Act of 1950. *See* H.R. Rep. No. 92-116, at 1435 (1971).[12]

The Detention Act had aroused much concern as a potential instrument for apprehending and detaining citizens because they held unpopular beliefs. *See id*. at 1436. The House Report also noted that "the constitutional validity of the Detention Act was subject to grave challenge because it allowed for detention merely if there was reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." *Id*. at 1438. Further, the Report found that "the provisions of the Act for judicial review are inadequate in that they permit the government to refuse to divulge information essential to a defense." *Id*.

This statute suggests that no U.S. citizen can be detained by the federal government except pursuant to an Act of Congress. *See Howe v. Smith*, 452 U.S. 452, 479 n.3 (1981) (finding that the plain language of § 4001(a) proscribed "detention *of any kind* by the United States, absent a congressional grant of authority to detain").[13] A person detained as an "enemy combatant" should have the right to a judicial determination whether this statute pertains to his case.

The government has argued that interpreting this statute to apply to detention of persons held as enemy combatants would conflict with the President's Commander-in-Chief authority under

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[12] The Emergency Detention Act of 1950 authorized the establishment of domestic detention camps. The Act had been enacted at the beginning of the Korean War in order to allow for the apprehension and detention, during internal security emergencies, of individuals deemed likely to engage in espionage or sabotage. H.R. Rep.92-116, at 1435-36.

[13] The Administration maintains that the September 18, 2001 Joint Resolution of Congress is an "Act of Congress" that supports the detentions, *see* letter from William J. Haynes II, General Counsel of the Department of Defense, to Alfred P. Carlton, President of the ABA, at http://www.abanet.org/poladv/new/enemycombatantresponse.pdf but, as noted above, the language of the Joint Resolution contains no such express authorization. As further discussed *infra*, one Member of Congress has introduced legislation to provide authorization for detention of "enemy combatants" under stringent safeguards, including access to counsel and judicial review.

Article II, section 2, clause 1 of the Constitution, and that the principle of constitutional avoidance requires that the statute be read as not covering enemy combatants so as to avoid this constitutional conflict. The court in *Padilla*, however, rejected this argument as having no applicability when a statute is unambiguous, as is 18 U.S.C. §4001.[14] Instead, that court found that the Congress' September 18, 2001, authorization to use military force is an Act of Congress which, if it authorizes Padilla's detention, meets the requirements of §4001.[15]

Even if the Military Force Authorization is interpreted as authorizing detentions of enemy combatants including U.S. citizens and others lawfully present in the United States, judicial review should remain available to determine – based on a standard according appropriate deference to the President's determination – whether detention of a particular U.S. citizen or person lawfully present in the United States meets that standard.

C. International Human Rights Laws and Treaties

International agreements and principles recognized by the United States also support the fundamental importance of recognizing a detainee's right to judicial review and access to counsel. They include Articles 8 and 9 of the Universal Declaration of Human Rights[16] and the International Covenant on Civil and Political Rights (ICCPR), [17] which attempt to protect individuals from arbitrary detention, and guarantee a meaningful review of a detainee's status.

Moreover, Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the United Nations General Assembly in 1988, requires that "[a] detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it." Principle 18 entitles such a detainee to "communicate and consult with his legal counsel," with "adequate time and facilities for consultation," including visits by counsel "without delay or censorship and in full confidentiality." According to Principle 18, these rights may be limited only 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."

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[14] *Padilla v. Bush,* ___ F.Supp. ___ , Case No. 02 Civ. 4445 (MBM) (SDNY, Dec. 4, 2002).

[15] *Id.* at 72-74.

[16] Article 8 declares that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9 provides that no one shall be subjected to arbitrary arrest, detention or exile.

[17] Article 14 of the ICCPR, which describes certain standards and procedures that should be used in all courts and tribunals, was also referenced in a Report and Recommendation adopted by the House of Delegates at the February 2002 Midyear meeting relating to the President's November 13, 2001, Military Order regarding use of Military Commissions. *See* Revised Report 8C, available at: http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf.

While we do not urge, as does Principle 17(2), that detainees should have a *right* to have assigned or appointed legal counsel provided to them by a judicial or other authority, we do strongly maintain that *access* to retained or volunteer counsel should not be denied to detainees.

III. DETAINEES SHOULD BE AFFORDED MEANINGFUL JUDICIAL REVIEW OF THEIR STATUS.

The government's power to detain persons who are not charged with criminal offenses is not absolute. United States citizens and persons lawfully within the United States have the Constitutional right to seek review of their detention status through a petition for writ of habeas corpus. The right of habeas corpus is fundamental and has not been suspended by Congress. Therefore, detainees who have not been charged with a crime or a violation of the law of war should be afforded a prompt opportunity for meaningful judicial review of the basis for their detention as "enemy combatants."

A. Detainees Have a Right to Judicial Review to Determine Whether There is a Factual and Legal Basis for Their Detention

By direct constitutional command, the writ of habeas corpus provides access to the federal courts to challenge detentions of persons by the Executive.[18] The Constitution provides that "the privilege of the Writ of Habeas Corpus shall not be suspended" except by Congress,[19] and then only "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, Sec. 9, cl. 2. As difficult and testing as the current struggle against terrorism surely is, it is neither a rebellion nor an invasion. Moreover, Congress has not acted to suspend the writ of habeas corpus.

The Supreme Court has recognized the right of a detainee in the United States in wartime to challenge his detention through the habeas corpus procedure. *See, e.g., Quirin*, 317 U.S. at 24; *Milligan*, 71 U.S. at 122. In *Quirin*, German saboteurs during World War II landed in New York and Florida, buried their uniforms upon landing, and proceeded inland in civilian dress.[20] Before they were able to carry out their plans, they were arrested, prosecuted and convicted by military tribunals for war crimes, and six of them were sentenced to death. The Supreme Court upheld their designation as unlawful combatants, and their detention for trial by military commissions authorized by the Constitution and the Articles of War enacted by Congress. *Id*. at 47. Nevertheless, the Court affirmed their right to review of their detention, stating:

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[18] "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 121 S.Ct. 2271, 2280 (2001).

[19] *Id*. at 2281 n. 24 (endorsing the view that the Suspension Clause "was intended to preclude any possibility that 'the privilege itself would be lost' by either the inaction or the action of Congress." *Quoting Ex parte Bollman,* 4 Cranch 75, 95, 2 L.Ed. 554 (1807)).

[20] *Quirin,* of course, arose during a declared war against nations who were identified enemies. Although two of the detainees claimed to have American citizenship, that claim was not central to the case, and the Supreme Court had little difficulty in finding that Americans who donned foreign uniforms and swore allegiance to a country at war with the United States could lawfully be treated like other members of the armed forces of the enemy country.

> [T]here is certainly nothing in the Proclamation [regarding military tribunals] to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.

Id. at 25.

The 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. *See In re Yamashita*, 327 U.S. 1, 8 (1946); *Quirin*, 317 U.S. at 39; *Colepaugh v. Looney*, 235 F.2d 429, 432-33 (1956) (discussing factual contentions that "involves [] matter[s] of fact directly bearing on [detainee's] guilt or innocence" and holding such matters "not within the scope of this inquiry").

This right to challenge the legal basis for the domestic detention of an "enemy combatant" cannot be removed from federal judicial review. As stated by the Tenth Circuit in *Colepaugh*, the Executive Branch:

> ...could not foreclose judicial consideration of the cause of restraint, for to do so would deny the supremacy of the Constitution and the rule of law under it as construed and expounded in the duly constituted courts of the land. In sum, it would subvert the rule of law to the rule of man.

235 F.2d at 431; *see also In re Yamashita*, 327 U.S. at 8 ("The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner."). And, while it is beyond the scope of this Report, there is also support for the proposition that the government may not avoid such review by removing the detainee from the United States.[21]

In the current conflict, the government has asserted conflicting views on the power of the courts to review the factual basis for its designation of "enemy combatants." In *Hamdi v. Rumsfeld*, the government argued that the court "may not review at all its designation of an American citizen as an enemy combatant" because "[the government's] determinations on this score are the first and final word." *See* 296 F.3d 278, 283 (4th Cir. 2002). The Fourth Circuit refused to dismiss Hamdi's habeas petition on this ground and remanded the case to the district court, because "[i]n dismissing, we ourselves would be embracing a sweeping proposition – namely that, with no judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without

[21] *See Ex parte Endo*, 323 U.S. 283, 304-306 (1944) (Douglas, J.) (holding that where petitioner had been removed from the district in which the petition was filed, district court could act on habeas petition if there was a respondent within the jurisdictional reach of the court); *Hirota v. MacArthur*, 338 U.S. 197, 202 (1948) (Douglas, J., concurring) (construing *Endo*).

charges or counsel on the government's say-so." *Id*.

More recently, the government softened its position on judicial review. The court in *Padilla* stated that "[t]he government has not disputed Padilla's right to challenge his detention by means of a habeas corpus petition."[22]

In addition, the General Counsel of the Department of Defense, in a letter to this Association, has stated that "the government welcomes meaningful judicial review of its detention in the United States of 'enemy combatants.'"[23]

B. Substantial, But Not Absolute Deference Should Be Given to Executive Designations of "Enemy Combatants"

U.S. courts have generally deferred to military judgments concerning POW status and related questions. See *Johnson*, 339 U.S. at 763; *Hamdi*, 296 F.3d at 281-82.[24] This deference flows from the President's primary responsibility for foreign affairs and the prosecution of war, and from a recognition of the potential damage judicial interference may cause in military operations. Judicial deference to a President's decision is warranted with respect to the conduct of "military commanders engaged in day-to-day fighting in a theater of war." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *see also Endo*, 323 U.S. at 302; *Hamdi*, 296 F.3d at 278. However, the courts may give the Executive less deference in circumstances involving U.S. citizens not on the battlefield or in the zone of military operations. *See Youngstown*, 343 U.S. at 587; *Duncan*, 327 U.S. at 304.

Courts have preserved their role in reviewing Executive detention even in times of war. *See, e.g., United States v. Robel*, 407 U.S. 297, 318-19 (1972) ("The standard of judicial inquiry must also recognize that the 'concept' of 'national defense' cannot be deemed an end in itself, justifying an exercise of [executive] power designed to promote such a goal."); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (holding meaningful review of enemy combatant status is required), *on remand*, E.D. Va., 2:02-439, Order, 8/16/02, at 2 ("While it is clear that the executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of these designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens."); *United States v. Lindh*, 2002 U.S. Dist. LEXIS 12683 (deference does not mean "conclusive deference" or "judicial abstention").

IV. DETAINEES SHOULD NOT BE DENIED ACCESS TO COUNSEL

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[22] *Padilla v. Bush, supra,* slip opinion at 75.

[23] *See* letter dated September 23, 2002 from William J. Haynes II, General Counsel of the Department of Defense, to Alfred P. Carlton, President of the ABA, available at: http://www.abanet.org/poladv/new/enemycombatantresponse.pdf.

[24] *See also Ex parte Quirin*, 317 U.S. 1 (1942); *In re Territo*, 156 F.2d 142 (9th Cir. 1946).

A citizen or other person lawfully within the United States who is detained within the United States should not be denied access to the courts for the purpose of seeking habeas corpus relief. Toward that end, he should, at the very least, have the right to contact and communicate with an attorney in order to facilitate a request for relief.

While there may be circumstances in which providing a detainee with access to counsel would be unwise, due to the geographical location and the state of hostilities,[25] citizens and other persons lawfully present in the United States detained within the United States, far from the battlefield, should not fall within that category. Indeed, the right to prompt judicial review may well be hollow unless citizen detainees are afforded meaningful access to counsel and to the effective assistance of counsel in order to appropriately challenge their detention.

The government's concerns that access to counsel may impede the collection of intelligence, or that counsel might facilitate communications with others, do not justify denial of access to counsel. As the court noted in *Padilla*, since access to counsel is for purposes of challenging the basis of detention and not in connection to the intelligence interrogation, "the interference with interrogation would be minimal or non-existent."[26] Moreover, the court found that the concern that counsel might facilitate communication with others was without factual basis ("gossamer speculation" in the court's words) and could be extended to cover any indicted member of al Qaeda facing trial in an Article III court – "a result barred by the Sixth Amendment."[27] In fact, these concerns are frequently overcome in sensitive criminal prosecutions, as in the case of the 1993 World Trade Center bombers[28] and the current Moussaoui prosecution,[29] where defense attorneys (or standby attorneys) were required to submit to security clearance background checks and the courts have not hesitated to place sensitive pleadings and documents under seal.[30] Lawyers can provide effective representation – and have, in numerous cases – without threatening the nation's security.

The Sixth Amendment right to counsel is limited to traditional criminal prosecutions. *See, e.g., Middendorf v. Henry*, 425 U.S. 25, 36-42 (1976) (holding no Sixth Amendment right to counsel in summary court-martial proceedings); *Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973) (holding

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[25] For example, no reasonable person would suggest that the battle should pause while a combatant captured and detained on the battlefield is granted a visit from his or her lawyer.

[26] *Padilla v. Bush, supra*, slip opinion at 85.

[27] *Id.* at 86.

[28] *See* Phil Hirschkorn, "Security clearances required for defense attorneys in embassy bombings case," January. 26, 2001, available at :
http://www.cnn.com/LAW/trials.and.cases/case.files/0012/embassy.bombing/trial.report/trial.report.1.26.

[29] *See* "Origination of Special Administrative Measures Pursuant to 28 C.F.R. § 501.3 for Federal Pre-Trial Detainee Zacarias Moussaoui," available at: http://news.findlaw.com/cnn/docs/terrorism/usmouss41702gsam.pdf.

[30] Indeed, broad and substantial protection of classified information has long been afforded in federal criminal cases by the Classified Information Procedures Act of 1980 (CIPA). *See* Title 18, U.S.C. App III.

no Sixth Amendment right to counsel in probation or parole revocation hearings).

While the Sixth Amendment does not technically attach to uncharged "enemy combatants," there is no dispute that individuals who have been criminally charged do have a Sixth Amendment **right** to counsel, and 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 Sixth Amendment does not guarantee a detainee's right to the assistance of counsel in the preparation and presentation of a habeas petition, but a right of access to counsel in habeas proceedings is implicit in the Fifth Amendment's Due Process Clause. *See Middendorf*, 425 U.S. at 34 ("This conclusion [that the Sixth Amendment did not apply], of course, does not answer the ultimate question of whether the plaintiffs are entitled to counsel . . . but it does shift the frame of reference from the Sixth Amendment[] . . . to the Fifth Amendment's prohibition against the deprivation of 'life, liberty, or property, without due process of law.'"). A noncriminal proceeding which may result in confinement may require affording the right to counsel. *See In re Gault*, 387 U.S. 1, 30 (1967) (grounding right to counsel to juveniles facing confinement in the "essentials of due process and fair treatment"); *see also Middendorf*, 425 U.S. at 47 (holding due process did not mandate assistance of counsel because defendant could simply opt out of summary court-martial procedure to receive the right to counsel).

In *Ex parte Hull*, the Supreme Court held that the "state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U.S. 546, 549 (1941) (striking down a regulation that prohibited state prisoners from filing petitions for habeas corpus unless they were determined to be "properly drawn" by the parole board's legal investigator).

In a habeas proceeding brought by an "enemy combatant" detainee, the assistance of counsel is necessary to a meaningful opportunity to be heard. *See Parratt v. Taylor*, 451 U.S. 527, 540 (1981); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman . . . requires the guiding hand of counsel *at every step in the proceedings against him*." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (emphasis added).

In the recent *Padilla v. Bush* decision, the court found that "Congress intended habeas corpus petitioners to have an opportunity to present and contest facts, and courts to have the flexibility to permit them to do so under proper safeguards. Padilla's need to consult with a lawyer to help him do what the statute permits him to do is obvious."[31]

V. CONGRESS, IN COORDINATION WITH THE EXECUTIVE, SHOULD ESTABLISH CLEAR STANDARDS AND PROCEDURES

Congress, in coordination with the Executive Branch, should examine the issue of detaining

[31] *Padilla v. Bush, supra,* slip opinion at 81.

U.S. citizens and other persons lawfully present in the United States as "enemy combatants," and should enact legislation establishing clear standards and procedures governing such detention. This is particularly necessary in light of the discussion of 18 U.S.C. §4001(a), *supra*.

Congress should monitor the Executive's detention practices in order to assure that they are consistent with Due Process, American tradition, and international law.[32] The Task Force acknowledges the need to give proper deference to the Executive Branch in times of crisis, but neither the Congress nor the Courts should hesitate to question actions which may impact upon or violate long cherished constitutional principles.

There has already been congressional response to the Preliminary Report of the Task Force. On October 16, 2002, Rep. Adam Schiff (D-CA) introduced H.R. 5684, "The Detention of Enemy Combatants Act." Section 4 of the bill, entitled "Procedural Requirements" provides for the promulgation of rules with "clear standards and procedures governing detention of a United States person or resident" and provides that such rules shall **"**guarantee timely access to judicial review to challenge the basis for a detention, and permit the detainee access to counsel.**"**[33]

VI. CONSIDERATION OF HOW U.S. POLICY MAY AFFECT THE RESPONSE OF OTHER NATIONS TO FUTURE ACTS OF TERRORISM.

Finally, our Recommendation 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," the Executive and Legislative Branches should consider how the policy adopted by the United States may affect the response of other nations to future acts of terrorism.

VII. CONCLUSION

In 1866, Justice Davis, writing for the Court in *Ex parte Milligan*, stated that, "No graver question was ever considered by this court, nor none which more nearly concerns the rights of the whole people . . . By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people." 71 U.S. 2, 119 (1866). In July 1942, the Justices of the Supreme Court convened a Special Term of the Court to hear arguments in the *Quirin* case. Today, the questions raised by detention of "enemy combatants" are no less grave.

We are a great nation not just because we are the most powerful, but because we are the most democratic. But indefinite detention, denial of counsel, and overly secret proceedings could tear at

[32] As part of its oversight authority, Congress should consider requiring periodic reports from the Executive, and should include a provision in the proposed Homeland Security Department providing the Inspector General with specific authority to investigate allegations regarding denial of access to counsel or violations of constitutional rights arising from continued detentions.

[33] *See* H.R. 5684, http://thomas.loc.gov/cgi-bin/bdquery/z?d107:h.r.05684:(emphasis added).

the Bill of Rights, the very fabric of our great democracy. We must ensure that we do not erode our cherished Constitutional safeguards and that we strengthen the rule of law.[34]

The ABA House of Delegates should adopt the proposed Recommendations in order to strike a proper balance between individual liberty and Executive power. We must get this right. The people of this great country deserve no less.

Respectfully submitted,

NEAL R. SONNETT,
Chair
Task Force on Treatment of Enemy Combatants

February 2003

[34] As Justice Brandeis warned: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

GENERAL INFORMATION FORM

Submitting Entity: Task Force on Treatment of Enemy Combatants

Submitted By: Neal R. Sonnett, Chair

1. Summary of Recommendation(s).

   Through these Recommendations, 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, that they not be denied access to counsel in connection with the opportunity for such review, that Congress, in coordination with the Executive Branch, establish clear standards and procedures governing their designation and treatment, and that, in setting and executing national policy regarding U.S. citizens and other persons lawfully present in the United States detained within the United States 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.

2. Approval by Submitting Entity.

   The ABA Task Force on Treatment of Enemy Combatants, approved this Recommendation and Report by email vote on November 20, 2002. The Criminal Justice Section approved it at its November 16, 2002 Council meeting. The Section of Individual Rights and Responsibilities approved it at its Council meeting on October 18, 2002.

3. Has this or a similar recommendation been submitted to the House or Board previously?
   No similar Recommendations are known to have been previously submitted.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

   The ABA has a long history of protecting due process and the right to counsel. This Recommendation would complement and extend those existing policies to insure that U.S. citizens and other persons lawfully in the United States who are designated as "enemy combatants" be afforded the opportunity for meaningful judicial review of their status and not be denied access to counsel.

5. What urgency exists which requires action at this meeting of the House?

   Two United States citizens are currently being detained as “enemy combatants” without access to counsel or the opportunity for meaningful judicial review. These circumstances present an important challenge to the rule of law on which the American Bar Association

should speak out. The Task Force on Enemy Combatants was created by the ABA Board of Governors precisely because of the importance of the issue, and the Task Force recommendations should be adopted by the House of Delegates so that the ABA can speak out on these issues. The need for prompt House action is critical to our system of justice.

6. Status of Legislation.
On October 16, 2002, Rep. Adam Schiff (D-CA) introduced H.R. 5684, "The Detention of Enemy Combatants Act." The bill has been referred to the Committee on the Judiciary and the Committee on Armed Services. As of this date, no action has been taken on the proposed legislation, but it is based upon many of the principles enunciated in these Recommendations and adoption by the House would lend support to this legislative effort.

7 Cost to the Association.
The adoption of the Recommendation would not result in any direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the Recommendation adopted and implemented. Such costs should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

8. Disclosure of Interest. (If applicable)
No known conflict of interest exists.

9. Referrals.
Concurrently with submission of this report to the ABA Policy Administration Office, it is being circulated to the following:

Standing Committees/Task Forces:
- Law and National Security
- Legal Aid and Indigent Defendants
- Military Law
- Task Force on Terrorism and the Law

Sections, Divisions and Forums:
- Administrative Law
- Government and Public Sector Lawyers
- International Law and Practice
- Judicial Division
- National Conference of Federal Trial Judges

Law Student Division
Litigation
Senior Lawyers Division
State and Local Government Law
Young Lawyers Division

Affiliated Organizations:

The Federal Bar Association
National Association of Attorneys General
National Association of Criminal Defense Lawyers
National District Attorneys Association
National Legal Aid and Defenders Association

10. Contact Person. (Prior to the meeting)

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11. Contact Person. (Who will present the report to the House)

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