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In the United States Court of Appeals  
for the Second Circuit

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JOSE PADILLA, DONNA R. NEWMAN, AS NEXT FRIEND OF JOSE PADILLA,  
*Petitioner-Appellee-Cross-Appellant,*

v.

DONALD RUMSFELD,  
*Respondent-Appellant-Cross-Appellee.*

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On Appeal from the United States District Court  
for the Southern District of New York

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER-APPELLEE-CROSS-APPELLANT JOSE PADILLA

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## TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICUS CURIAE .....	1
INTRODUCTION.....	5
ARGUMENT .....	8
Padilla Is Entitled to Meaningful Judicial Review of the Basis for His Detention, Which Necessarily Requires Access to Counsel.....	8
I.     Padilla Is Entitled to Meaningful Judicial Review, Which Requires an Adversarial Proceeding in Which He Can Contest the Basis for His Detention. ....	8
A.     Due Process Requires That Padilla Be Permitted To Challenge the Basis for His Detention. ....	8
B.     Whatever Standard of Review May Apply, It Must Adequately Test the Government's Contentions. ....	10
II.    Meaningful Judicial Review Requires Access to Counsel.....	18
A.     Padilla Cannot Effectively Challenge the Basis for His Detention Without Access to Counsel. ....	18
B.     Any Legitimate Governmental Interests Can Be Accommodated Without Depriving Padilla of Access to Counsel. ....	24
CONCLUSION .....	27
CERTIFICATE OF COMPLIANCE	
ADDENDUM: American Bar Association, <i>Revised Report 109</i> (Feb. 10, 2003)	

## TABLE OF AUTHORITIES

### CASES

<i>Addington v. Texas</i> , 441 U.S. 418 (1979) .....	13
<i>American Airways Charters, Inc. v. Regan</i> , 746 F.2d 865 (D.C. Cir. 1984).....	19
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	14
<i>Bates v. State Bar</i> , 433 U.S. 350 (1977) .....	19
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979) .....	14
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971) .....	9
<i>Bounds v. Smith</i> , 430 U.S. 817 (1977) .....	19, 21, 23
<i>Brotherhood of Railroad Trainmen v. Virginia</i> , 377 U.S. 1 (1964) .....	20
<i>Colepaugh v. Looney</i> , 235 F.2d 429 (10th Cir. 1956) .....	7
<i>Doe v. District of Columbia</i> , 697 F.2d 1115 (D.C. Cir. 1983) .....	20
<i>Doe v. Tenet</i> , 329 F.3d 1135 (9th Cir. 2003) .....	25
<i>Duncan v. Kahanamoku</i> , 327 U.S. 304 (1946) .....	13, 27
<i>Ex Parte Hull</i> , 312 U.S. 546 (1941).....	23
<i>Ex Parte Quirin</i> , 317 U.S. 1 (1942) .....	6, 17
<i>Ex Parte Merryman</i> , 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) .....	6
<i>Ex Parte Milligan</i> , 71 U.S. (4 Wall.) 114 (1866) .....	6
<i>Ex Parte Randolph</i> , 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558) .....	11
<i>Ex Parte Watkins</i> , 28 U.S. (3 Pet.) 193 (1830).....	11
<i>Felker v. Turpin</i> , 518 U.S. 651 (1996).....	11
<i>Foucha v. Louisiana</i> , 504 U.S. 71 (1992).....	9-10, 13
<i>Geders v. United States</i> , 425 U.S. 80 (1976) .....	21

<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970) .....	20
<i>In re Gault</i> , 387 U.S. 1 (1967) .....	22
<i>In re Territo</i> , 156 F.2d 142 (9th Cir. 1946) .....	17
<i>In re Yamashita</i> , 327 U.S. 1 (1946) .....	6
<i>Johnson v. Avery</i> , 393 U.S. 483 (1969) .....	21, 23
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144 (1963) .....	14
<i>Lassiter v. Department of Social Services</i> , 452 U.S. 18 (1981) .....	22
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996) .....	19, 22
<i>Martin v. Lauer</i> , 686 F.2d 24 (D.C. Cir. 1982).....	19, 20
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	9, 17
<i>Montilla v. INS</i> , 926 F.2d 162 (2d Cir. 1991) .....	23
<i>Mullane v. Central Hanover Bank &amp; Trust Co.</i> , 339 U.S. 306 (1950).....	9
<i>National Council of Resistance of Iran v. Department of State</i> , 251 F.3d 192 (D.C. Cir. 2001) .....	17
<i>Padilla v. Bush</i> , 233 F. Supp. 2d 564 (S.D.N.Y. 2002)..... <i>passim</i>	
<i>Padilla v. Rumsfeld</i> , 243 F. Supp. 2d 42 (S.D.N.Y. 2003) .....	10, 14, 16, 24
<i>Potashnick v. Port City Construction Co.</i> , 609 F.2d 1101 (5th Cir. 1980) .....	19
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932).....	18, 20
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1974) .....	21
<i>Scott v. Illinois</i> , 440 U.S. 367 (1979).....	23
<i>Superintendent v. Hill</i> , 472 U.S. 445 (1985).....	12
<i>Swain v. Pressley</i> , 430 U.S. 372 (1977).....	11
<i>Texas Catastrophe Property Insurance Ass'n v. Morales</i> , 975 F.2d 1178 (5th Cir. 1992).....	19

<i>United States v. Reid</i> , 214 F. Supp. 2d 84 (D. Mass. 2002) .....	26
<i>United States v. Robel</i> , 389 U.S. 258 (1967) .....	7
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	10, 13, 14
<i>Vitek v. Jones</i> , 445 U.S. 480 (1980).....	22
<i>Wong Wing v. United States</i> , 163 U.S. 228 (1986).....	14
<i>Youngstown Sheet &amp; Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952) .....	12, 13
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001) .....	9

## **STATUTORY PROVISIONS**

Classified Information Procedures Act, 18 U.S.C. app. §§ 1 <i>et seq.</i> .....	25
28 U.S.C. §§ 2241 <i>et seq.</i> .....	9
28 U.S.C. § 2254 .....	23
28 U.S.C. § 2255 .....	23

## **MISCELLANEOUS**

ABA, <i>2001 Legislative and Governmental Priorities: Immigration</i> (policy adopted Feb. 2001), available at <a href="http://www.abanet.org/poladv/priorities/immigration/policies.html">http://www.abanet.org/poladv/priorities/immigration/policies.html</a> .....	2, 3
ABA, <i>American Bar Association Guidelines for Appointment and Performance of Counsel in Death Penalty Cases</i> (revised 2003), available at <a href="http://www.abanet.org/moratorium/DPGuidelines4-2003.pdf">http://www.abanet.org/moratorium/DPGuidelines4-2003.pdf</a> .....	2
ABA, <i>Association Goals</i> , available at <a href="http://www.abanet.org/about/goals.html">http://www.abanet.org/about/goals.html</a> . .....	1, 2
ABA, <i>Recommendation</i> (adopted Aug. 1988), available at <a href="http://www.abanet.org/legalservices/downloads/sclaid/10e.pdf">http://www.abanet.org/legalservices/downloads/sclaid/10e.pdf</a> .....	2
ABA, <i>Recommendation 8C</i> (adopted Feb. 2002), available at <a href="http://www.abanet.org/leadership/2002_dailyjournal.pdf">http://www.abanet.org/leadership/2002_dailyjournal.pdf</a> .....	3

ABA, <i>Revised Report 109</i> (approved Feb. 10, 2003) (attached hereto as Addendum A) .....	4, 5, 24
ABA, <i>Standards for Criminal Justice: Prosecution Function and Defense Function</i> , Standard 4-2.1 (3d ed. 1993), available at <a href="http://www.abanet.org/crimjust/standards/dfunc_toc.html">http://www.abanet.org/crimjust/standards/dfunc_toc.html</a> .....	2
ABA, <i>Standards for Criminal Justice: Prosecution Function and Defense Function</i> , Standard 4-3.1 (3d ed. 1993), available at <a href="http://www.abanet.org/crimjust/standards/dfunc_toc.html">http://www.abanet.org/crimjust/standards/dfunc_toc.html</a> .....	3
ABA, <i>Standards for Criminal Justice: Providing Defense Services</i> , Standard 5-1.1 (3d ed. 1992), available at <a href="http://www.abanet.org/crimjust/standards/defsvcs_toc.html">http://www.abanet.org/crimjust/standards/defsvcs_toc.html</a> .....	2
<i>Developments in the Law —Federal Habeas Corpus</i> , 83 Harv. L. Rev. 1038 (1970).....	11
Letter from ABA President Robert Hirshon to the Office of the General Counsel, Bureau of Prisons (Dec. 28, 2001), available at <a href="http://www.abanet.org/poladv/priorities/immigration/policies.html">http://www.abanet.org/poladv/priorities/immigration/policies.html</a> .....	3, 26
Gerald L. Neuman, <i>The Constitutional Requirement of “Some Evidence,”</i> 25 San Diego L. Rev. 631 (1988).....	12
Gerald L. Neuman, <i>Habeas Corpus, Executive Detention, and the Removal of Aliens</i> , 98 Colum. L. Rev. 961 (1998).....	11
Dan Eggen & Susan Schmidt, “ <i>Dirty Bomb</i> ” Plot Uncovered, U.S. Says: Suspected Al Qaeda Operative Held as “Enemy Combatant,” Wash. Post, June 11, 2002, at A01. ....	16
Model Rules of Professional Conduct .....	2, 25
Susan Schmidt & Kamran Khan, <i>Lawmakers Question CIA on Dirty-Bomb Suspect: Administration Officials Wonder if Ashcroft Was Unduly Alarmist in Arrest Announcement</i> , Wash. Post, June 13, 2002, at A1. ....	16

## **INTEREST OF AMICUS CURIAE<sup>1/</sup>**

The American Bar Association (“ABA”) is the leading national membership organization of the legal profession. The ABA’s membership, which comprises more than 400,000 attorneys from all 50 states, includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.<sup>2/</sup> The ABA’s mission is “to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence, and respect for the law.”<sup>3/</sup> Among the ABA’s goals is “promot[ing] meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.”<sup>4/</sup> The ABA also seeks “[t]o increase public understanding of and respect for the law, the legal

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<sup>1/</sup> This brief is filed with the consent of the parties.

<sup>2/</sup> Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

<sup>3/</sup> ABA, *Association Goals*, available at <http://www.abanet.org/about/goals.html>.

<sup>4/</sup> *Id.*

process, and the role of the legal profession” and “[t]o advance the rule of law in the world.”<sup>5/</sup>

Access to counsel and the courts has long been a core ABA concern. The ABA has adopted numerous policies that address the critical importance of access to counsel in a wide range of criminal, civil, and immigration proceedings.<sup>6/</sup> The ABA also has developed policies and standards governing professional

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<sup>5/</sup> *Id.*

<sup>6/</sup> See, e.g., ABA, *American Bar Association Guidelines for Appointment and Performance of Counsel in Death Penalty Cases* (revised 2003), available at <http://www.abanet.org/moratorium/DPGuidelines4-2003.pdf>; ABA, *Standards for Criminal Justice: Prosecution Function and Defense Function*, Standard 4-2.1 (3d ed. 1993), available at [http://www.abanet.org/crimjust/standards/dfunc\\_toc.html](http://www.abanet.org/crimjust/standards/dfunc_toc.html); ABA, *Standards for Criminal Justice: Providing Defense Services*, Standard 5-1.1 (3d ed. 1992), available at [http://www.abanet.org/crimjust/standards/defsvcs\\_toc.html](http://www.abanet.org/crimjust/standards/defsvcs_toc.html); ABA, *2001 Legislative and Governmental Priorities: Immigration* (policy adopted Feb. 2001) (Opposing the Use of Secret Evidence in Immigration Proceedings and Opposing Involuntary Transfer of Detained Immigrants and Asylum Seekers that Impede Representation), available at <http://www.abanet.org/poladv/priorities/immigration/policies.html>; ABA, *Recommendation* (adopted Aug. 1988), available at <http://www.abanet.org/legalservices/downloads/sclaid/10e.pdf> (urging that “all jurisdictions provide by statute or rule of court that attorneys appointed to represent persons who have a constitutional or statutory right to counsel receive reasonable compensation and full reimbursement for costs and expenses”).

responsibility, including those to protect the integrity of the attorney-client relationship, attorney-client privilege, and preservation of client confidences.<sup>7/</sup>

Within the ABA, the issue of access to counsel gained fresh urgency following the terrorist attacks of September 11, 2001, and the anti-terrorism initiatives that followed in their wake. The ABA has focused particularly on such matters as the due process rights of defendants tried by military commissions, including the right to counsel and the right to confront witnesses;<sup>8/</sup> the right of alien detainees to public deportation hearings with access to counsel;<sup>9/</sup> and government monitoring of attorney-client communications in terrorism cases.<sup>10/</sup>

In March 2002, the ABA created a Task Force on the Treatment of Enemy Combatants to examine the framework surrounding the detention of U.S. citizens

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<sup>7/</sup> See, e.g., Model Rules of Prof'l Conduct Rules 1.6 & 3.8; ABA, *Standards for Criminal Justice: Prosecution Function and Defense Function*, Standard 4-3.1 (3d ed. 1993), available at [http://www.abanet.org/crimjust/standards/dfunc\\_toc.html](http://www.abanet.org/crimjust/standards/dfunc_toc.html).

<sup>8/</sup> ABA *Recommendation 8C* (adopted Feb. 2002), available at [http://www.abanet.org/leadership/2002\\_dailyjournal.pdf](http://www.abanet.org/leadership/2002_dailyjournal.pdf).

<sup>9/</sup> See ABA, *2001 Legislative and Governmental Priorities: Immigration* (policy adopted Feb. 2001) (Opposing the Use of Secret Evidence in Immigration Proceedings and Opposing Involuntary Transfer of Detained Immigrants and Asylum Seekers that Impede Representation), available at <http://www.abanet.org/poladv/priorities/immigration/policies.html>.

<sup>10/</sup> Letter from ABA President Robert Hirshon to the office of the General Counsel, Bureau of Prisons (Dec. 28, 2001), available at <http://www.abanet.org/poladv/letters/exec/attorneyclient122801.html>.

declared to be enemy combatants and the challenging and complex questions of statutory, constitutional, and international law and policy raised by such detentions. On August 8, 2002, after six months of intensive research, including consultation with leading authorities, the Task Force produced a Preliminary Report that was circulated widely within the U.S. Congress and the Executive Branch.

In February 2003, the ABA House of Delegates voted by a majority of 82 percent to adopt a set of recommendations, based on the Task Force Report, addressed to the key concerns relevant to this case.<sup>11/</sup> The policy:

urges that U.S. citizens and residents 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, under a standard according such deference to the designation as the reviewing court determines to be appropriate to accommodate the needs of the detainee and the requirements of national security.<sup>12/</sup>

The policy further urges that such detainees “not be denied access to counsel in connection with the opportunity for such review, subject to appropriate conditions

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<sup>11/</sup> ABA, *Revised Report 109* (approved Feb. 10, 2003) (attached hereto as Addendum A). The House of Delegates is the ABA’s policymaking body, comprising more than 500 delegates and representing various entities within the ABA, as well as the legal profession as a whole. Reports that recommend the adoption of specific policy positions are submitted by ABA sections, committees, affiliated organizations, state and local bar associations, and individual ABA members. The full House votes on the recommendations and those that are approved become official ABA policy.

<sup>12/</sup> *Id.*

as may be set by the court to accommodate the needs of the detainee and the requirements of national security.”<sup>13/</sup>

Because the issues raised by this case go to the very core of both that policy and the ABA’s overall goals, the ABA has an exceptionally strong interest in their proper resolution to ensure the protection of liberty and equal justice under the law.

## **INTRODUCTION**

International terrorism is the very antithesis of the rule of law. Without question, effective measures are necessary to counteract this threat. At the same time, such measures must not subvert the very rule of law that they are intended to protect. That is the issue presented by this case.

The government contends that once an American citizen living within the United States has been designated by the President as an “enemy combatant,” the government may detain him without charge, without access to counsel or anyone else (apart from his interrogators), for an indefinite period of time.<sup>14/</sup> The government further argues that the courts may conduct only the most limited review of the determination — they must accept the government’s assertions at

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<sup>13/</sup> *Id.*

<sup>14/</sup> The ABA takes no position regarding the President’s authority to designate a citizen as an “enemy combatant,” but discusses only the need for a citizen so designated to be able to challenge the basis for the designation in court with the assistance of counsel.

face value and may not inquire into the sufficiency of the evidence upon which such assertions are based.

The implications of the government’s position are startling: an innocent U.S. citizen who is falsely accused could be detained indefinitely without the ability to challenge the basis for the detention in a habeas corpus proceeding or, indeed, any other proceeding. Such unfettered power to deprive a citizen of his liberty without redress is fundamentally incompatible with the constitutional guarantee of due process and the rule of law.

Since this country’s founding, some form of meaningful judicial review always has been available to test Executive detention — even for individuals captured during a declared war and designated as enemy combatants — and individuals’ access to their counsel has not been challenged. *See Ex Parte Quirin*, 317 U.S. 1, 19, 24-25 (1942) (reviewing legality of detention for trial by military commission of “enemy belligerents”); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 114, 118-19 (1866) (reviewing Executive authority to detain an individual and try him by military commission); *Ex Parte Merryman*, 17 F. Cas. 144, 150-51 (C.C.D. Md. 1861) (No. 9,487) (reviewing Executive authority to detain an individual absent suspension of the writ of habeas corpus). This history reflects the fundamental principle that due process rights cannot be nullified even in times of crisis. *See In re Yamashita*, 327 U.S. 1, 8-9 (1946) (noting that the Executive branch could not,

absent a suspension of the writ, withdraw from the courts the duty and power to inquire into the Executive Branch's claimed authority to try an enemy belligerent by military commission); *Colepaugh v. Looney*, 235 F.2d 429, 431 (10th Cir. 1956) (same). As the U.S. Supreme Court has stated, “[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.” *United States v. Robel*, 389 U.S. 258, 264 (1967).

The detainee in this case has had no previous opportunity to challenge the basis for his detention. The pending proceeding is his first and only such opportunity. For this reason, adequate procedural safeguards are especially important: Jose Padilla must have the opportunity to challenge the basis for detention; he must have access to counsel to assist him in making that challenge; and the government must substantiate the basis for its detention under a meaningful standard of review. Anything less would be inconsistent with this nation’s core principles.

## **ARGUMENT**

### **Padilla Is Entitled to Meaningful Judicial Review of the Basis for His Detention, Which Necessarily Requires Access to Counsel.**

#### **I. Padilla Is Entitled to Meaningful Judicial Review, Which Requires an Adversarial Proceeding in Which He Can Contest the Basis for His Detention.**

##### **A. Due Process Requires That Padilla Be Permitted To Challenge the Basis for His Detention.**

Although the government acknowledges that Padilla has the right to test the legality of his detention in a habeas corpus proceeding, the government in fact advocates a proceeding in which the government makes factual assertions, many under seal, that it says both the court and the detainee must take at face value. Br. of Respondent-Appellant at 44-49 (filed July 22, 2003).<sup>15/</sup> According to the government, there are no applicable standards prescribing the content of those allegations and no mechanisms by which the courts can test their reliability. *See id.* Nor, according to the government, may Padilla present his own version of the facts. *Id.* at 46-49.

Such restrictions, if accepted, would render Padilla's habeas proceeding meaningless. His right to present facts is grounded in the Constitution and

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<sup>15/</sup> See, e.g., Br. of Respondent-Appellant at 47 ("[A] factual review of the President's determination can extend no further than ensuring that it has some evidentiary support. That framework focuses exclusively on the factual support presented by the *Executive . . .*") (emphasis in original).

reflected in the procedural requirements of the habeas statutes.<sup>16/</sup> But without an adversarial judicial proceeding in which Padilla may present facts to refute the government's evidence, Padilla may never have any opportunity to present his version of events to anyone.

Even where the individual's interest is far less substantial than in this case, the constitutional minimum for procedural due process is a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”). To preserve the most fundamental liberty protected by the Due Process Clause from arbitrary deprivation, adequate protections are mandated. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that [the Due Process] Clause protects.”); *see also Foucha*

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<sup>16/</sup> See 28 U.S.C. §§ 2241 *et seq.* The statute provides that “[t]he applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.” *Padilla v. Bush*, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002) (“*Padilla I*”) (citing 28 U.S.C. § 2243 (2000)).

*v. Louisiana*, 504 U.S. 71, 80 (1992); *United States v. Salerno*, 481 U.S. 739, 750 (1987). The government's contention that Padilla must be silent, and that the asserted basis for his detention should go unchallenged, is unsupported by any case law. As the district court explained, it is not even supported under case law applying the "some evidence" standard of review. *See Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 54 (S.D.N.Y. 2003) ("*Padilla II*") (in discussing the "some evidence" standard, which the court concluded it should apply in this case, noting that "[n]o court of which I am aware has applied the 'some evidence' standard to a record that consists solely of the government's evidence, to which the government's adversary has not been permitted to respond").

Because Padilla has not had, and will not have, any other opportunity to test the government's authority to detain him, he must have the benefit of meaningful review, which in this case requires an opportunity to present facts to challenge the government's contentions.

**B. Whatever Standard of Review May Apply, It Must Adequately Test the Government's Contentions.**

That the writ of habeas corpus is available to persons who have been detained pursuant to decisions or orders of the Executive Branch is beyond question. Indeed, the scope of inquiry in habeas corpus proceedings is necessarily greater when the individual in custody invokes habeas corpus to challenge Executive detention than when a prisoner seeks to collaterally attack a federal or

state court criminal conviction. The deprivation of liberty by Executive officials is generally not accompanied by the safeguards of due process that must be present in a criminal proceeding, and so a more searching inquiry is warranted to satisfy the habeas court that the Executive detention is lawful.<sup>17/</sup> Indeed, judicial inquiry into the lawfulness of Executive detention lies at the traditional core of the writ. *See Felker v. Turpin*, 518 U.S. 651, 663-64 (1996); *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977); *id.* at 386 (Burger, C.J. concurring) (“[T]he traditional Great Writ was largely a remedy against executive detention.”).<sup>18/</sup>

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<sup>17/</sup> See Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 984 (1998); see also *Developments in the Law — Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1238-52 (1970).

<sup>18/</sup> American habeas law inherited from England a fundamental distinction between confinement by order of a court of record and confinement by order of an executive officer or “inferior” tribunal, with the requirement that judicial inquiry into the latter must be fuller in scope. *See Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 208-09 (1830); Neuman, *supra* note 17, at 982-85. Thus, historically, “[w]hile habeas review of a court judgment was limited to the issue of the sentencing court’s jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.” *Developments in the Law — Federal Habeas Corpus*, 83 Harv. L. Rev. at 1238; *see also Ex Parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (Marshall, Circuit Justice) (“[T]he authority, whether given by a legislative act, or otherwise, must be strictly pursued. Such agents cannot act on other persons, or on other subjects, than those marked out in the power, nor can they proceed in a manner different from that it prescribes.”). Although both inquiries are sometimes phrased in terms of “jurisdiction,” in the case of executive tribunals the term “jurisdiction” encompasses a broad range of legal issues determining the tribunal’s authority to order the detention of the individual. *See* Neuman, *supra* note 17, at 982-84.

The district court concluded that the “some evidence” standard should govern its review of the Executive’s decision to designate Padilla an “enemy combatant” and to detain him on that basis. Although the precise elements of this standard were not articulated by the district court,<sup>19/</sup> the court’s opinion invoked general principles of judicial deference to the President’s exercise of his authority as Commander in Chief. *Padilla I*, 233 F. Supp. 2d at 607. Whatever standard of review is employed, however, these general principles of deference in a military setting should not prevent the court from engaging in meaningful review of the government’s decision to detain Padilla. Although the utmost judicial deference to Executive decisions 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), under our constitutional structure, the courts give the Executive less deference in its exercise of authority

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<sup>19/</sup> The “some evidence” standard generally is employed in cases in which a court is reviewing a prior administrative or court decision — in which there was a hearing, an opportunity to be heard, and some official record — to ensure that the adjudication comported with procedural due process requirements. See, e.g., *Superintendent v. Hill*, 472 U.S. 445, 453-54 (1985); see generally Gerald L. Neuman, *The Constitutional Requirement of “Some Evidence,”* 25 San Diego L. Rev. 631 (1988). Here, the district court is not determining whether the Executive provided Padilla with adequate process; rather, the court is providing that process in the first instance.

over U.S. citizens who are not in the military, on the battlefield, or in the zone of military operations, *see id.*; *Duncan, v. Kahanamoku*, 327 U.S. 304, 324 (1946).

A different analysis comes into play when the case involves the evidentiary finding necessary under the Due Process Clause to deprive a citizen of liberty. Moreover, in every Supreme Court case involving a complete loss of liberty outside the criminal justice context, there was a requirement that the government, *at some point*, meet an established burden of proof.<sup>20/</sup> Accordingly, the district court must conduct a review that is meaningful, rather than one that accepts the government's assertions at face value.

In this case, the liberty interest could not be more compelling. A U.S. citizen is being detained, unable to communicate with anyone, save the government officials who are interrogating him. *See Padilla I*, 233 F. Supp. 2d at 574. He is in solitary confinement in a U.S. naval brig with no hope of imminent release. *See Amended Petition at 2-3 (JA 26)*. He can assert no rights. The government has offered him no legal protection or access to any tribunal. Indeed,

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<sup>20/</sup> See, e.g., *Foucha*, 504 U.S. at 81-82 (invalidating statute providing for civil commitment because, under the statute, a detainee was “not . . . entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community”); *Salerno*, 481 U.S. at 751 (approving process involving “clear and convincing evidence” standard for pre-trial detention based upon dangerousness); *Addington v. Texas*, 441 U.S. 418 (1979) (determining that “clear and convincing” evidence standard should be applied for civil commitment based upon dangerousness).

the deprivation of his liberty is more sweeping than would be the case if he were subject to criminal prosecution for terrorism-related offenses.<sup>21/</sup>

To support this grave deprivation of liberty, the government has offered only the Mobbs Declaration,<sup>22/</sup> which is the sole evidentiary basis (aside from the President's Order (JA 51)) proffered to Padilla to justify the detention.<sup>23/</sup> The

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<sup>21/</sup> Due process requirements are stringent and unconditional where the state seeks to detain an individual as punishment for a crime. The government may not sentence a person to imprisonment absent a finding of guilt. *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165, 167, 186 (1963); *Wong Wing v. United States*, 163 U.S. 228, 237 (1986). Indeed, between the “Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Punitive detention outside the strictures of these protections may not be imposed. See also *Salerno*, 481 U.S. at 751-52 (approving statute providing for hearing with procedural safeguards and a “clear and convincing” evidentiary standard for preventive pre-trial detention of persons charged with crimes).

<sup>22/</sup> Declaration of Michael H. Mobbs (Aug. 27, 2002) (“Mobbs Decl.”) (JA 44-49).

<sup>23/</sup> See *Padilla I*, 233 F. Supp. 2d at 572. In a motion for reconsideration, the government also proffered a declaration of Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency, supplemented by a sealed version containing additional details. *Padilla II*, 243 F. Supp. 2d at 46. This declaration’s purpose was to articulate the basis for the government’s argument that permitting Padilla to consult with counsel would interfere with the government’s interrogation techniques. *Id.* Although the sealed Jacoby Declaration apparently contains “information linking Padilla to al Qaeda,” *id.* at 49-50, Padilla has no means of challenging the Declaration’s assertions — nor has the government proffered this evidence in support of its argument that Padilla must be detained.

sufficiency of the Declaration is open to question. The declarant was not personally responsible for making the decision to detain Padilla and had no firsthand knowledge of the reasons for and circumstances surrounding the detention. *See* Mobbs Decl. ¶¶ 2-3 (JA 44-45). In the Declaration itself, Mobbs frankly admits that at least some of his sources were of dubious credibility.<sup>24/</sup> Moreover, the Declaration does not provide any details about the alleged threat posed by Padilla in conjunction with specific Al Qaeda terrorist plots. The Declaration does not assert that Padilla took any specific steps to launch an attack;

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<sup>24/</sup> In citing interviews with two individuals detained outside the United States, Mobbs stated the following:

It is believed that these confidential sources have not been completely candid about their association with Al Qaeda and their terrorist activities. Much of the information from these sources has, however, been corroborated and proven accurate and reliable. Some information provided by the sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials. One of the sources, for example, in a subsequent interview with a U.S. law enforcement official recanted some of the information that he had provided, but most of this information has been independently corroborated by other sources. In addition, at the time of being interviewed by U.S. officials, one of the sources was being treated with various types of drugs to treat medical conditions.

Mobbs Decl. ¶ 3 n.1 (JA 45).

indeed, it states that the attack “allegedly was still in the initial planning stages, and there was no specified time set for the operation to occur.”<sup>25/</sup>

The government’s asserted interest in detaining Padilla is to prevent future terrorist attacks.<sup>26/</sup> But the government’s general interest in fighting terrorism should not obscure the lack of specific evidence that the government has submitted thus far to substantiate its basis for detaining Padilla. *See Padilla II*, 243 F. Supp. 2d at 50-51. Moreover, the government’s assertions cannot be squared with the core requirement of due process, namely, that when the government deprives

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<sup>25/</sup> Mobbs Decl. ¶ 8 (JA 46). Even the Mobbs statement that the attack was “allegedly” still in the planning stages appears to have been a matter of disagreement within the Administration. The Attorney General initially indicated that Padilla’s arrest “disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive dirty bomb.” Dan Eggen & Susan Schmidt, “*Dirty Bomb*” Plot Uncovered, U.S. Says: Suspected Al Qaeda Operative Held as “Enemy Combatant,” Wash. Post, June 11, 2002, at A01. However, the Deputy Secretary of Defense seemed to contradict that statement when he stated “[t]here was not an actual plan . . . . We stopped this man in the initial planning stages,” *id.*, and that the “extent of the actual bomb plot amounted only to ‘some fairly loose talk.’” Susan Schmidt & Kamran Khan, *Lawmakers Question CIA on Dirty-Bomb Suspect; Administration Officials Wonder if Ashcroft Was Unduly Alarmist in Arrest Announcement*, Wash. Post, June 13, 2002, at A11. Given this uncertainty, the opportunity to challenge the government’s factual assertions seems all the more critical.

<sup>26/</sup> See Br. of Respondent-Appellant at 4-6.

individuals of their most fundamental liberty, they have “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”<sup>27l</sup>

The authorities relied upon by the government are not at odds with the need for meaningful review. On the contrary, even in *Ex Parte Quirin*, the defendants, all but one of whom were aliens, were represented by counsel and permitted to seek review. 317 U.S. 1, 19, 24-25 (1942); *see also In re Territo*, 156 F.2d 142 (9th Cir. 1946) (reviewing legality of detention of a an alleged prisoner of war). That right hardly should be denied to U.S. citizens, particularly in the unique and grave circumstances of this case, in which an individual is detained indefinitely. Meaningful review could not be more essential than where, as here, an individual faces a total deprivation of liberty based solely upon governmental assertions that may well be factually deficient.

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<sup>27l</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545 (1965)). With an interest at stake that was much less substantial, the D.C. Circuit found a violation of the due process rights of two Iranian organizations, which the Secretary of State had designated as a “foreign terrorist organization,” without providing them with an opportunity to be heard. *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 195-96 (D.C. Cir. 2001). The court noted that the administrative process was “truncated” and that “[a]t no point in the proceedings establishing the [government’s] administrative record is the alleged terrorist organization afforded notice of the materials used against it, or a right to comment on such materials or the developing administrative record.” *Id.* at 196.

## **II. Meaningful Judicial Review Requires Access to Counsel.**

### **A. Padilla Cannot Effectively Challenge the Basis for His Detention Without Access to Counsel.**

The right to present facts — and to obtain meaningful review of the government’s “enemy combatant” designation — would be hollow without its necessary corollary: access to legal representation. This corollary is particularly critical where, as here, denial of access to counsel effectively means the denial of all rights.

Even in noncriminal cases in which the Sixth Amendment right to appointed counsel does not attach, the Fifth Amendment right to obtain meaningful access to the courts protects a citizen’s right to consult with a retained lawyer. The government’s effort to cut off all consultation between Padilla and his counsel seeks to deprive Padilla — and, by extension, any other U.S. citizen designated and detained as an enemy combatant — of the rights guaranteed under the Constitution. Furthermore, as the district court found, Padilla’s statutory right to present facts to the court in connection with this petition “will be destroyed utterly if he is not allowed to consult with counsel.” *Padilla I*, 233 F. Supp. 2d at 604. Such a result must be rejected as incompatible with the rule of law.

It is firmly established in our law that citizens have a right to consult with a lawyer in connection with asserting their legal rights. *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (“If, in any case, *civil [or] criminal*, a state or federal court were

arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.”) (emphasis in original).<sup>28/</sup> The right to consult with paid or *pro bono* counsel is integral to the “fundamental constitutional right of access to the courts” inherent in the Due Process Clause, *Bounds v. Smith*, 430 U.S. 817, 828 (1977), and thus is entirely distinct from the Sixth Amendment right to appointed counsel in criminal cases. See *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) (“[W]hile private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights.”). Indeed, until recently, the notion that a litigant must be permitted to consult with an attorney scarcely seemed controversial. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 374 n.4 (1996) (Thomas, J., concurring) (“Like anyone else seeking to bring suit without the assistance of the State, prisoners can seek the advice of an attorney, whether *pro bono* or paid.”); *Bates v. State Bar*, 433 U.S. 350, 376 n.32 (1977) (“[T]he Court’s concern that the

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<sup>28/</sup> See also *Texas Catastrophe Prop. Ins. Ass’n v. Morales*, 975 F.2d 1178, 1180 (5th Cir. 1992) (finding a “constitutionally guaranteed right to retain hired counsel in civil matters” that is “grounded in the Fourteenth Amendment due process clause”); *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 (D.C. Cir. 1984) (acknowledging “invalidity of a governmental attempt to deny counsel to a civil litigant”); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980) (“[r]ecognizing that a civil litigant has a constitutional right to retain hired counsel” in striking down a district court rule prohibiting a litigant from consulting with his lawyer during breaks in the litigant’s testimony).

aggrieved receive information regarding their legal rights and the means of effectuating them . . . applies with at least as much force to aggrieved individuals as it does to groups.”); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964) (“A State could not . . . infringe in any way the right of individuals and the public to be fairly represented in lawsuits.”).

Virtually any litigant — civil or criminal — needs the assistance of a lawyer to present the best case on the facts and the law. “Even the intelligent and educated layman . . . requires the guiding hand of counsel *at every step in the proceedings against him.*” *Powell*, 287 U.S. at 68-69 (emphasis added). Lawyers provide an indispensable role in helping the litigant “determin[e] the nature of claims against him, the opposing arguments available to him, and the manner in which his case would be most effectively presented.” *Doe v. District of Columbia*, 697 F.2d 1115, 1119 (D.C. Cir. 1983); *see also Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (determining that welfare recipient “must be allowed to retain an attorney if he so desires” at a pre-termination hearing because of counsel’s pivotal role in “delineat[ing] the issues, present[ing] the factual contentions in an orderly manner, conduct[ing] cross-examination, and generally safeguard[ing] the interests of the recipient”).

Without the ability to consult with a lawyer, a citizen often will be unable to assert his or her rights effectively. *See Martin*, 686 F.2d at 32 (noting that “all

other legal rights would be illusory” without meaningful access to the courts and, by extension, the ability to consult with counsel) (internal citations and quotation marks omitted); *see also Geders v. United States*, 425 U.S. 80, 88 (1976) (“Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer’s guidance.”). Thus, “Padilla’s need to consult with a lawyer to help him do what the [habeas] statute permits him to do is obvious.” *Padilla I*, 233 F. Supp. 2d at 602.

Consistent with its findings about the importance of legal representation, the Supreme Court has held that “[r]egulations and practices that unjustifiably obstruct the availability of professional representation . . . are invalid.” *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (citing *Ex Parte Hull*, 312 U.S. 546, 549 (1941)). Such invalid “[r]egulations and practices” include failure to provide prisoners with adequate law libraries or adequate assistance from persons trained in the law to draft habeas petitions or civil rights actions, *see Bounds*, 430 U.S. at 828; prohibitions against the use of paralegals and law students to conduct attorney-client interviews with inmates, *see Procunier*, 416 U.S. at 421; and total restrictions on inmates seeking assistance from other inmates in preparing legal documents, *see Johnson v. Avery*, 393 U.S. 483, 490 (1969). Even as the Court has declined to find “an abstract, freestanding right to a law library or legal assistance,”

it has reaffirmed that prisoners must be granted access to those resources as a “means for ensuring a reasonably ‘adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.’” *Lewis*, 518 U.S. at 351 (quoting *Bounds*, 430 U.S. at 825).

It is difficult to imagine a case in which a party’s interest in access to his lawyer is weightier than it is in this one. Padilla faces potentially unlimited incarceration as an enemy combatant despite never having been convicted of any crime in connection with the alleged events that prompted the government’s designation. Only through access to counsel will Padilla have any reasonable chance to assert, in a meaningful way, his most basic constitutional right — to be free from an arbitrary and total deprivation of liberty. Moreover, denying Padilla the opportunity to consult with a lawyer would eviscerate his ability to present facts effectively in support of his habeas petition and therefore would significantly enhance the risk that Padilla would be erroneously deprived of liberty. Just as it is true that “as a litigant’s interest in personal liberty diminishes, so does his right to appointed counsel,” *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26 (1981),<sup>29/</sup> so

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<sup>29/</sup> The Supreme Court repeatedly has held that where litigants face significant deprivation of liberty interests in noncriminal settings, they must be provided with appointed counsel. See *Vitek v. Jones*, 445 U.S. 480, 497 (1980) (plurality) (holding indigent prisoner entitled to appointed counsel to contest involuntary transfer to a state mental hospital); *In re Gault*, 387 U.S. 1, 41 (1967) (finding that “the Due Process Clause . . . requires that in respect of proceedings to determine

too is it the case that the litigant’s need for access to his retained counsel is at its apex where the deprivation of liberty is complete and indefinite.

The Supreme Court has “consistently emphasized” that habeas corpus actions “are of fundamental importance in our constitutional scheme because they directly protect our most valued rights,” *see Bounds*, 430 U.S. at 827 (internal quotation and citations omitted), and that therefore “access . . . to the courts for the purpose of presenting [a writ of habeas corpus] may not be denied or obstructed.” *Johnson*, 393 U.S. at 485; *see also Ex Parte Hull*, 312 U.S. at 549 (“[T]he state and its officers may not abridge or impair petitioner’s right to apply to a federal court for a writ of habeas corpus.”).<sup>30/</sup> And as this Court has recognized, even aliens have a due process right to retained counsel in deportation proceedings. *Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991). Given the indefinite deprivation of

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delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed,” the juvenile must be provided with appointed counsel even though the case is technically “civil”); *cf. Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (holding that Sixth Amendment only requires appointment of counsel in criminal cases where defendant is incarcerated on the theory that “actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment”).

<sup>30/</sup> Indeed, as the district court noted, Padilla’s interest in securing legal representation is greater than that of the typical prisoner seeking post-conviction relief in a petition under 28 U.S.C. §§ 2254 or 2255, since, unlike the post-conviction habeas petitioner, a detainee like Padilla has not had the benefit of completed criminal proceedings in which there had been representation by counsel. *Padilla I*, 233 F. Supp. 2d at 602.

liberty that Padilla faces, his interest in having the right to consult with retained counsel in connection with his habeas petition is no less momentous.

**B. Any Legitimate Governmental Interests Can Be Accommodated Without Depriving Padilla of Access to Counsel.**

The government has legitimate interests in protecting classified information from disclosure and preventing detainees from communicating with terrorists with whom they allegedly are associated. The ABA policy on the treatment of enemy combatants acknowledges that such concerns may justify the imposition of “appropriate conditions as may be set by the court to accommodate the needs of the detainee and the requirements of national security.”<sup>31/</sup> What such concerns cannot justify is the total denial of access to counsel. In the present case, as the district court recognized, the government and Padilla’s lawyers can agree upon conditions limiting Padilla’s interaction with counsel that are both constitutional and effective in minimizing the risk that Padilla might use his lawyers to transmit information to terrorist operatives. Should the parties fail to agree, the court can craft appropriate conditions. *See Padilla II*, 243 F. Supp. 2d at 57 (ordering that “counsel will consult in an effort to agree on the conditions under which Padilla will consult with counsel and, if he chooses, submit facts in response to the Mobbs Declaration” and that, “[a]bsent agreement, the court will impose [such]

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<sup>31/</sup> ABA, *Revised Report 109*, *supra* note 11.

conditions”). The district court has many options available to it, including those provided under the Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1 *et seq.* (“CIPA”), which sets forth a variety of security measures to protect classified information while ensuring a defendant’s right to an effective defense.<sup>32/</sup>

Moreover, the government’s argument that Padilla must be deprived of access to counsel out of concern that his lawyers may pass information to others undermines a presumption that is central to the American justice system: lawyers are officers of the court who are sworn to uphold the law, including any restrictions placed upon their interaction with their clients.<sup>33/</sup> As one court recently observed in rejecting overly restrictive conditions of interaction between a group of lawyers and their client, an alleged member of al Qaeda, the lawyers:

are zealously to defend [their client] to the best of their professional skill without the necessity of affirming their bona fides to the government. As trusted officers of th[e] Court, in their representation of [their client] they are subordinate to the existing laws, rules of court, ethical requirements, and case-specific orders of th[e] Court — and to nothing and no one else.

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<sup>32/</sup> See, e.g., *Doe v. Tenet*, 329 F.3d 1135, 1148 (9th Cir. 2003) (noting that under CIPA, possible measures include using *in camera* proceedings, sealing records, and requiring security clearances for court personnel and attorneys with access to the court records).

<sup>33/</sup> See Model Rules of Prof’l Conduct pmlb. (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”).

*United States v. Reid*, 214 F. Supp. 2d 84, 94 (D. Mass. 2002). The same presumption must apply to Padilla's lawyers, especially given the district court's finding that "nothing in their past conduct . . . suggest[s] that they would be inclined to act as conduits for their client, even if he wanted them to do so." *Padilla I*, 233 F. Supp. 2d at 604. Nor is the government without a remedy when there are sufficient grounds to believe that a detainee will attempt to communicate with terrorist organizations by passing messages through an attorney or the attorney's legal staff.<sup>34/</sup>

The logical consequences of the power claimed by the government are breathtaking: any U.S. citizen in the United States may be detained forever on the basis of untested allegations that he has no opportunity to rebut. Such a result

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<sup>34/</sup> The ABA President has previously indicated:

[T]he Department of Justice has a number of existing mechanisms through which it can seek disclosure of these communications with court approval. It can seek authorization for a conventional wiretap under Title III. It can request an order under the Foreign Intelligence Surveillance Act (FISA). Or it can move to compel counsel to disclose the communications by issuing a grand jury subpoena and then litigating the applicability of the crime-fraud exception before a federal district court judge. The Department has advanced no reason why these established measures are not sufficient.

Letter from ABA President Robert Hirshon to the Office of the General Counsel, *supra* note 10.

cannot be supported in a society of laws. As Justice Jackson said during a period of national danger no less grave than the present one:

[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)).

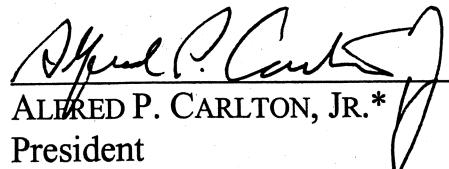
## **CONCLUSION**

Padilla is a U.S. citizen. He was captured in the United States. He is being detained incommunicado on the basis of a declaration by one mid-level official. He never has had a hearing at which he might challenge the basis for his confinement.

By not allowing Padilla to contest the government’s claims in an independent judicial proceeding, the government has denied him access to the primary means by which the Constitution provides for correction of wrongful deprivations of liberty. The opportunity for meaningful review, aided by counsel, is the constitutional minimum. If we permit anything less, we risk irrevocable damage to the rule of law.

Dated: July 29, 2003

Respectfully submitted,



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Date: July 29, 2003

*Revised Report 109*  
*Approved by the ABA*  
*House of Delegates*  
*February 10, 2003*

AMERICAN BAR ASSOCIATION

TASK FORCE ON TREATMENT OF ENEMY COMBATANTS  
CRIMINAL JUSTICE SECTION  
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES  
SENIOR LAWYERS DIVISION  
GENERAL PRACTICE, SOLO AND SMALL FIRM SECTION  
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1       RESOLVED, That the American Bar Association urges that U.S. citizens and residents who  
2       are detained within the United States based on their designation as "enemy combatants" be afforded  
3       the opportunity for meaningful judicial review of their status, under a standard according such  
4       deference to the designation as the reviewing court determines to be appropriate to accommodate the  
5       needs of the detainee and the requirements of national security; and

6       FURTHER RESOLVED, That the American Bar Association urges that U.S. citizens and  
7       residents who are detained within the United States based on their designation as "enemy  
8       combatants" not be denied access to counsel in connection with the opportunity for such review,  
9       subject to appropriate conditions as may be set by the court to accommodate the needs of the  
10      detainee and the requirements of national security; and

11      FURTHER RESOLVED, That the American Bar Association urges Congress, in  
12      coordination with the Executive Branch, to establish clear standards and procedures governing the  
13      designation and treatment of U.S. citizens, residents, or others who are detained within the United  
14      States as "enemy combatants;" and

15      FURTHER RESOLVED, That the American Bar Association urges that, in setting and  
16      executing national policy regarding detention of "enemy combatants," Congress and the Executive  
17      Branch should consider how the policy adopted by the United States may affect the response of other  
18      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<sup>1</sup> and Jose Padilla,<sup>2</sup> bring this potential danger into sharp relief and 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."<sup>3</sup>

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 11<sup>th</sup>, 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.<sup>4</sup>

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.

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<sup>1</sup> 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."

<sup>2</sup> 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 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.

<sup>3</sup> *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4<sup>th</sup> 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.

<sup>4</sup> 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.

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.<sup>5</sup> Their invaluable input and cosponsorship has contributed substantially to this Report.

These Recommendations do not attempt to address the detention of foreign nationals in immigration proceedings,<sup>6</sup> individuals held as material witnesses,<sup>7</sup> or foreign nationals held as "enemy combatants" at Guantanamo Bay, Cuba, or elsewhere outside the United States.<sup>8</sup> 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<sup>9</sup> 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 indefinitely 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:

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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).

<sup>9</sup> 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.

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.

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.<sup>10</sup> 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.

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<sup>10</sup> See Article 4A(1), Geneva Convention Relative to the Treatment of Prisoners of War, 1949.

These same authorities, however, support a right to judicial review of such status. The *Quirin* case, for example, 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. *See also In re Territo*, 156 F.2d 142 (9th Cir. 1946). Since the Supreme Court has decided that even enemy aliens not lawfully within the United States are entitled to review, that right could hardly be denied to U. S. citizens and other persons lawfully present in the United States.<sup>11</sup>

## 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).<sup>12</sup>

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.*

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<sup>11</sup> “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).

<sup>12</sup> 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.

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”).<sup>13</sup> A person detained as an “enemy combatant” should have the right to a judicial determination whether this statute pertains to his case.

### C. International Human Rights Laws and Treaties

International agreements recognized by the United States also suggest a detainee’s right to judicial review and access to counsel. They include Articles 8 and 9 of the Universal Declaration of Human Rights<sup>14</sup> and the International Covenant on Civil and Political Rights (ICCPR),<sup>15</sup> 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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<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> 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.<sup>16</sup> The Constitution provides that "the privilege of the Writ of Habeas Corpus shall not be suspended" except by Congress,<sup>17</sup> 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 wartime to challenge the factual basis for 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.<sup>18</sup> 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

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<sup>16</sup> "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).

<sup>17</sup> *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)).

<sup>18</sup> *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.

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:

[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.<sup>19</sup>

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

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<sup>19</sup> *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*).

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 charges or counsel on the government’s say-so.” *Id.*

More recently, the government softened its position on judicial review. In its response to Jose Padilla’s Petition for a Writ of Habeas Corpus, the government suggested that an individual would have the right to challenge the factual basis for the “enemy combatant” designation:

To the extent that the courts conclude that judicial review may be had of an executive determination during a war that an individual is an enemy combatant, such review is limited to confirming based on some evidence the existence of a factual basis supporting the determination.

See Respondents’ Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, *Padilla v. Bush*, No. 02 Civ. 4445 (S.D.N.Y. 2002), at 15 (citing *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998)).<sup>20</sup>

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.’”<sup>21</sup>

#### **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.<sup>22</sup> 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*

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<sup>20</sup> The Government also argues, however, that this inquiry should be limited to confirming that the government has “some evidence” supporting its designation. *See id.* at 18-19.

<sup>21</sup> *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>.

<sup>22</sup> *See also Ex parte Quirin*, 317 U.S. 1 (1942); *In re Territo*, 156 F.2d 142 (9th Cir. 1946).

*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**

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,<sup>23</sup> 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. These concerns are frequently overcome in sensitive criminal prosecutions, as in the case of the 1993 World Trade Center bombers<sup>24</sup> and the current Moussaoui prosecution,<sup>25</sup> 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

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<sup>23</sup> 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.

<sup>24</sup> See Phil Hirschhorn, “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>.

<sup>25</sup> 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>.

under seal.<sup>26</sup> 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 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).

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<sup>26</sup> 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.

## **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 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.<sup>27</sup> 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.**"<sup>28</sup>

## **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.

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<sup>27</sup> 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.

<sup>28</sup> See H.R. 5684, <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:h.r.05684>:(emphasis added).

## 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 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.<sup>29</sup>

The proposed Recommendations should be adopted by the ABA House of Delegates 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

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<sup>29</sup> 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).