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IS THE WAR ON TERRORISM COMPROMISING CIVIL LIBERTIES? A DISCUSSION OF *HAMDI AND PADILLA*

Like an answer, the three slogans on the white face of the Ministry of Truth came back to him:

WAR IS PEACE

FREEDOM IS SLAVERY

IGNORANCE IS STRENGTH.¹

In George Orwell's novel *1984*, the governing political party prided itself with providing continuous "peace," which it achieved through war.² "Big Brother" dictated the lives of its subjects and for all intents and purposes was the watchdog that kept this political system intact, due in large part to the systematic and intrusive intelligence surveillance system that monitored the everyday lives of civilian citizens. These citizens were made to believe that giving up their privacy and freedom was a small price to pay in exchange for guaranteed security and safety.

United States citizens now find themselves confronting a similar fate. As currently defined by the United States government, an enemy combatant is afforded none of the guarantees provided for in the Constitution. As a result, the government stipulates that an enemy combatant can 1) be indefinitely detained, 2) have no charges filed against him/her, and 3) be denied access to a lawyer. The government justifies this detention on the theory that national security might be compromised if military decision-making is second-guessed.³

This Comment will present a general overview and discussion of the legal implications involved in labeling a United States citizen an enemy combatant for the purpose of detaining that individual without judicial review for an undetermined period of time. Part I will identify and set forth the facts of the current cases that deal with the issue of post-9/11 incommunicado detention of United States citizens as enemy combatants, namely, *Padilla v. Bush*⁴

1. GEORGE ORWELL, 1984, 25-26 (Signet Classic 1992) (1949).

2. *See generally id.*

3. Respondent's Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus at 11, *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02 Civ. 4445) [hereinafter Respondent's Motion to Dismiss].

4. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

and *Hamdi v. Rumsfeld*.⁵ In addition, this section will identify cases where suspected U.S. citizen terrorists and non-U.S. citizen terrorists, have not been labeled enemy combatants, and, instead, have been charged and given access to counsel—these cases will demonstrate a stark contrast to *Hamdi* and *Padilla*'s situation. Part II will explain who is entitled to the rights enumerated in the Geneva Convention relative to the Protection of Prisoners of War (Third Geneva Convention) and the implications this has on an individual labeled an enemy combatant. Part III will discuss and distinguish *Ex Parte Quirin*,⁶ which the government heavily relies on as precedent for detaining U.S. citizens as enemy combatants without judicial review. Part IV will examine the lack of a standardized set of rules to determine who is or is not an enemy combatant and discuss how this may be in violation of the International Covenant on Civil and Political Rights (ICCPR). Part V will explain why the *Padilla* decision to allow access to counsel for the writ of habeas corpus is correct. In addition, Part V will set forth suggestions to ensure compliance with the ICCPR.

I. BACKGROUND

On September 11, 2001, terrorists executed an attack on the World Trade Center and the Pentagon. Terrorists hijacked four planes, three which reached their respective targets and one which crashed just short of its target due to the heroic efforts of its passengers.⁷ The ensuing tragic events resulted in the loss of approximately 3,000 lives.⁸ The United States government found the al-Qaeda network to be the perpetrator behind these senseless acts.⁹ In response, Congress gave President Bush its approval to use whatever force necessary to bring those responsible to justice.¹⁰ President Bush subsequently initiated military operations in Afghanistan.¹¹

5. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

6. *Ex Parte Quirin v. Cox*, 317 U.S. 1 (1942).

7. Associated Press, *Establishing Final Toll May Be Weeks Away*, S.D. UNION TRIB., Sept. 12, 2001, at A1.

8. *Hamdi v. Rumsfeld*, 296 F.3d 278, 279 (4th Cir. 2002).

9. *Id.*

10. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The exact language of the Joint Resolution states:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States.

Id.

11. *Hamdi*, 296 F.3d at 280.

A. *United States Citizen Terrorist Suspects Who Have Been Denied Due Process*

1. *Yasser Esam Hamdi*

Yaser Esam Hamdi is a United States citizen who was captured by American and Allied Forces in Afghanistan.¹² The United States government believes he surrendered as a member of the Taliban in the Fall of 2002.¹³ Originally, the government did not know that Hamdi was a U.S. citizen.¹⁴ As a result, he was taken to Camp X-Ray in Guantanamo Bay, Cuba in January 2002.¹⁵ In April 2002, once it was discovered that Hamdi had been born in Louisiana, he was transferred to the Norfolk Naval Station Brig in Virginia.¹⁶ The U.S. government labeled Hamdi an enemy combatant, detained him indefinitely, failed to bring charges against him, and denied him access to counsel.¹⁷

Hamdi's father, Esam Fouad Hamdi, filed a petition for a writ of habeas corpus under the legal relationship of "next of friend."¹⁸ The district court held that Hamdi's father sufficiently fulfilled the next of friend criteria.¹⁹ In addition, the district court appointed Hamdi counsel and ruled that the government must allow Hamdi unmonitored meetings with his appointed counsel.²⁰

In *Hamdi v. Rumsfeld*, the court of appeals reversed the district court's decision and held that proper weight was not given to national security concerns when the court granted Hamdi access to counsel.²¹ Furthermore, the court stated "the President's wartime detention decisions are to be accorded great deference from the courts."²²

The government took an even more radical position by requesting that the court of appeals dismiss the petition for writ of habeas corpus without leave to amend because the government's judgment as to who is an enemy combatant is not subject to judicial review, since this would result in an in-

12. *Id.*

13. Warren Richey, *Terror on Trial: Citizen Detentions in the Spotlight* (Sept. 26, 2002), at <http://news.findlaw.com/csmonitor/s/20020926/26sep2002110255.html>.

14. *Hamdi*, 296 F.3d at 280.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 279. Next of friend status can be granted to an individual who is (1) acting on the behalf of a defendant who is unable to appear on his own behalf and (2) has a significant relationship with the defendant and will ensure that the defendant's best interests are upheld. *Hamdi v. Rumsfeld*, 294 F.3d 598, 603 (4th Cir. 2002).

19. *Hamdi*, 296 F.3d at 279.

20. *Id.*

21. *Id.* at 282-83.

22. *Id.* at 282 (citing *Ex Parte Quirin v. Cox*, 317 U.S. 1, 25 (1942)).

validation of executive policy.²³ The court, however, refused to summarily dismiss the petition for writ of habeas corpus because it did not want to endorse the proposition that a citizen alleged to be an enemy combatant is not entitled to “meaningful judicial review . . . on the government’s say-so.”²⁴ The court, however, held that “if Hamdi is indeed an ‘enemy combatant’ who was captured during hostilities in Afghanistan, the government’s present detention of him is a lawful one.”²⁵

Upon remand, the district court directed the government to answer Hamdi’s petition for writ of habeas corpus.²⁶ Along with its response, the government submitted an affidavit from Michael Mobbs (“Mobbs Declaration”), a special advisor to the Under Secretary of Defense for Policy.²⁷ The Mobbs Declaration contained information regarding Hamdi’s capture that allegedly confirmed and validated his detention as an enemy combatant.²⁸ In response, the district court held that the Mobbs Declaration was insufficient evidence and ordered the government to produce more evidence.²⁹ The government appealed this decision.³⁰

On January 8, 2003, the court of appeals held that the Mobbs Declaration, without more, was sufficient to justify Hamdi’s detention.³¹ The court reasoned that to hold otherwise risked creating “judicial involvement . . . into an area where the political branches have been assigned by law a pre-eminent role.”³² Specifically, the court held that the government’s right to detain Hamdi as an enemy combatant emanates from its war-making powers of Article I and II of the U.S. Constitution.³³ As a result, the court dismissed Hamdi’s petition for writ of habeas corpus because “it [was] undisputed that he was captured in an [sic] zone of active combat operations abroad,”³⁴ and the Mobbs Declaration was sufficient to “establish a legally valid basis” for his detention.³⁵ The court did, however, make the point that “[j]udicial review does not disappear during wartime, but the review of battlefield captures in overseas conflicts is a highly deferential one.”³⁶

23. *Hamdi*, 296 F.3d at 283.

24. *Id.*

25. *Id.*

26. *Hamdi v. Rumsfeld*, 316 F.3d 450, 461 (4th Cir. 2003).

27. *Id.*

28. *Id.*

29. *Id.* at 462.

30. *Id.*

31. *Id.* at 473.

32. *Id.* at 470.

33. *Id.*

34. *Id.* at 476.

35. *Id.*

36. *Id.* at 477.

2. Jose Padilla

Jose Padilla, also known as Abdullah al-Muhajir, is a United States citizen.³⁷ On May 8, 2002, believing him to be a member of al-Qaeda, the U.S. government arrested Padilla as he arrived in Chicago on an international flight from Pakistan.³⁸ The FBI had become interested in Padilla after interrogating a senior al-Qaeda leader who revealed that Padilla planned to return to the United States and detonate a dirty bomb.³⁹ According to the informant, Padilla met with top al-Qaeda officials and proposed constructing a hydrogen bomb.⁴⁰ Padilla gained this bomb making knowledge from internet resources which were “laughably inaccurate.”⁴¹ Al-Qaeda officials told Padilla to focus his efforts on making a dirty bomb.⁴² Padilla’s intentions were to not only detonate a dirty bomb but to target hotel rooms and gas stations with other explosive devices.⁴³

Originally, the government arrested Padilla on a material witness warrant and detained him at the Metropolitan Correctional Center in New York City.⁴⁴ After determining Padilla to be an unlawful enemy combatant, the President, acting as Commander in Chief, transferred him to a high-security Navy prison in Charleston, South Carolina.⁴⁵ Interestingly, the government failed to give Padilla’s attorney or the *Amici Curiae* copies of the military confinement orders that authorized Padilla’s detention.⁴⁶

On December 4, 2002, the district court announced its decision that the government has the authority to detain enemy combatants who are United States citizens for an indefinite period of time.⁴⁷ Specifically, the court held that:

[a]lthough unlawful combatants, unlike prisoners of war, may be tried and punished by military tribunals, there is no basis to impose a requirement that they be punished. Rather, their detention for the duration of hostilities is supportable—again, logically and legally—on the same ground that the

37. Lawyers Committee for Human Rights, *Security Detainees and the Criminal Justice System*, at http://www.lchr.org/us_law/loss/loss_ch4b.htm (last visited Nov. 8, 2002) [hereinafter LCHR].

38. *Id.*

39. *Id.* A dirty bomb is a “conventional explosive combined with radioactive material.” Associated Press, *Padilla Was Told To Lower Sights* (June 16, 2002), available at <http://www.cbsnews.com/stories/2002/06/10/attack/main511671.shtml>.

40. *Padilla Was Told To Lower Sights*, *supra* note 39.

41. *Id.*

42. *Id.*

43. Respondent’s Motion to Dismiss, *supra* note 3, at 7.

44. *Id.* at 6.

45. *Id.* at 6, 8-9.

46. Brief of *Amici Curiae* at IIIB, *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02 Civ. 4445) [hereinafter *Padilla Amici Curiae Brief*].

47. *Padilla v. Bush*, 233 F. Supp. 2d 564, 610 (S.D.N.Y. 2002).

detention of prisoners of war is supportable: to prevent them from rejoining the enemy.⁴⁸

The court held, however, that Padilla was entitled to meet with counsel regarding his petition for writ of habeas corpus.⁴⁹ The also court announced that upon "further submission from Padilla, should he choose to make one . . . the court will examine only whether there was some evidence to support the President's finding, and whether that evidence has been mooted by events subsequent to Padilla's detention."⁵⁰

B. United States Citizen Terrorist Suspect Who Has Been Given Due Process: John Walker Lindh

John Philip Walker Lindh, an American citizen, has become known as the "American Taliban."⁵¹ Northern Alliance and American forces captured Lindh in Afghanistan while he was fighting with the Taliban.⁵² Lindh originally tried to join the Taliban, but, instead, was referred to al-Qaeda because his "language skills were insufficient."⁵³ Lindh "spent seven weeks in an al Qaeda camp training in weapons, explosives and battlefield combat."⁵⁴ Osama bin Laden visited the camp several times and in fact met with Lindh and thanked him for his participation.⁵⁵ After Lindh completed his training, he fought in Afghanistan at the front lines up until his capture.⁵⁶

A federal district court in Virginia indicted Lindh on various charges, including conspiracy to murder nationals of the United States overseas.⁵⁷ In July 2002, the Government and Lindh made a plea agreement: Lindh pleaded guilty to "supplying services to the Taliban . . . and to carrying an explosive during the commission of a felony."⁵⁸ On October 4, 2002, the federal district court in Virginia sentenced him to twenty years in a federal prison.⁵⁹

48. *Id.* at 593.

49. *Id.* at 599.

50. *Id.* at 588.

51. LCHR, *supra* note 37.

52. *United States v. Lindh*, 227 F. Supp. 2d 565, 569 (E.D. Va. 2002).

53. Attorney General Transcript, John Walker Lindh Press Conference (Jan. 15, 2002), available at <http://www.usdoj.gov/ag/speeches/2002/011502walkertranscript.htm>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Lindh*, 227 F. Supp. 2d at 566 n.2. The court in *Lindh* held that the Taliban did not meet the four criteria required to be recognized as a prisoner of war. *United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002).

58. *Lindh*, 227 F. Supp. 2d at 566.

59. *Id.* at 572.

C. Non-Citizen Terrorist Suspects Who Have Been Given Due Process

1. Richard Reid

Richard Reid, a convert to Islam, is a British citizen who was arrested on December 22, 2001 after attempting to ignite explosives hidden in his shoe during an international flight from Paris to Miami.⁶⁰ Passengers and flight attendants on board the flight restrained Reid⁶¹ and upon arrival he was arrested and later charged with numerous counts, including attempted murder and homicide.⁶² In his indictment, the government contended that Reid received training from al-Qaeda in Afghanistan.⁶³ On October 4, 2002, Reid plead guilty to all the charges against him.⁶⁴

2. Zacarias Moussaoui

Zacarias Moussaoui is a French national who has become widely known as the “twentieth hijacker.”⁶⁵ The government believes that in 1998 Moussaoui attended an al-Qaeda training camp located in Afghanistan.⁶⁶ He entered the United States with a visa on February 23, 2001, with the apparent purpose of attending flight school.⁶⁷ Moussaoui, however, was arrested on August 16, 2001 and held on immigration charges when flight instructors at his school became suspicious because he paid in cash for his tuition, “expressed an ‘unusual interest’ in the fact that a plane’s doors could not be opened during flight, and insisted on learning to fly . . . despite . . . minimal aptitude for flying.”⁶⁸ A later inspection of Moussaoui’s home revealed evidence which linked him to the September 11th attacks, and included knives, Boeing 747 flight manuals and a flight simulator computer program.⁶⁹ The government has thus far charged Moussaoui with conspiracy to commit acts of terrorism transcending national boundaries, though more charges are likely.⁷⁰

60. *Richard Reid Pleads Guilty* (Oct. 5, 2002), available at <http://www.cnn.com/2002/LAW/10/04/reid.guilty.plea/> (last visited Nov. 8, 2002).

61. *Id.*

62. Indictment, *United States v. Reid*, No. 02-10013 (D. Mass. Jan. 16, 2002), available at <http://news.findlaw.com/hdocs/docs/reid/usreid011602ind.pdf> (last visited Mar. 17, 2003).

63. *Id.*

64. *Richard Reid Pleads Guilty*, *supra* note 60.

65. LCHR, *supra* note 37.

66. Superseding Indictment at 10, *United States v. Moussaoui*, No. 01-455 (E.D. Va. July 16, 2002), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss71602spind.pdf> (last visited Mar. 17, 2003) [hereinafter *Moussaoui Indictment*].

67. *Id.* at 14.

68. LCHR, *supra* note 37.

69. *Moussaoui Indictment*, *supra* note 66, at 18.

70. *Id.* at 2.

The government is currently appealing several issues, one of which is “whether Moussaoui . . . should have the right to question . . . an al Qaeda operative [who was] in contact with Moussaoui.”⁷¹ The government is concerned that if Moussaoui is given the right to contact those with sensitive information, the case against him may be compromised.⁷² As a result, the district court has postponed the trial pending the resolution of the government’s appeal.⁷³

II. PRISONERS OF WAR V. UNLAWFUL ENEMY COMBATANT STATUS

The 1949 Third Geneva Convention enumerates protections afforded to prisoners of war.⁷⁴ It defines prisoners of war as members of an armed force “who have fallen into the power of the enemy.”⁷⁵ Specifically, it divides prisoners of war into categories, the most relevant here being:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war.⁷⁶

The main justification for detaining prisoners of war under the Third Geneva Convention is “to prevent them from rejoining the enemy.”⁷⁷ Arguably the policy here is to ensure the fair treatment and captivity of lawful combatants by setting universal standards. Per the Third Geneva Convention, lawful combatants cannot be subject to prosecution for actions that would not be deemed unlawful if committed by the captor’s soldiers.⁷⁸ In other words, the fact that a combatant is taking up arms against an enemy power is not grounds for prosecution. As a result, prisoners of war may be detained, without charges or trial, until they are released and repatriated at the end of the conflict.⁷⁹

71. Associated Press, *Moussaoui Trial Suspended* (Feb. 12, 2003), available at <http://www.cbsnews.com/stories/2002/07/22/attack/main515896.shtml> (last visited Mar. 17, 2003).

72. *Id.*

73. *Id.*

74. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention No. III].

75. *Id.* art. 4(A).

76. *Id.* art. 4(A)(2)(a)-(d).

77. *Padilla v. Bush*, 233 F. Supp. 2d 564, 610 (S.D.N.Y. 2002).

78. Geneva Convention No. III, *supra* note 74, art. 82.

79. *Id.* art. 118.

Individuals who do not qualify as prisoners of war are subject to the guarantees enumerated in the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).⁸⁰ Consequently, individuals, such as those described earlier in this paper who are termed unlawful enemy combatants fall within the protections of the Fourth Geneva Convention.⁸¹ The main distinction between these two categories is that unlawful enemy combatants may be prosecuted for taking up arms against an enemy power.

Interestingly, the term unlawful enemy combatant is not found anywhere in the Geneva Conventions.⁸² The U.S. government, however, justifies its detainment of Hamdi and Padilla by citing several cases which use the term unlawful enemy combatant as it relates to United States citizens. One of these cases, *Ex Parte Quirin*, is discussed in more detail below.

III. DISCUSSION OF *EX PARTE QUIRIN*

A. *Facts of the Case*

The government relies on *Ex Parte Quirin*, a case that dealt with Nazi saboteurs who came to the United States as spies,⁸³ as authority for detaining United States Citizens as enemy combatants. The eight petitioners in *Ex Parte Quirin* received training at a sabotage school in Germany and later arrived off the coast of New York in June 1942 aboard a submarine.⁸⁴ After the petitioner's arrest, the President established a Military Commission on July 2, 1942, to prosecute the petitioners.⁸⁵ The President also declared that enemies of the United States charged with "sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to . . . the jurisdiction of military tribunals."⁸⁶ On July 3, 1942, the government charged petitioners with violating the laws of war, aiding the enemy, spying, and conspiracy to commit the charged offenses.⁸⁷

The trial before the military tribunal was in progress when the petitioners filed a writ of habeas corpus in federal district court.⁸⁸ The district court denied the petition for writ of habeas corpus and the Supreme Court granted

80. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention No. IV]; Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces* (Jan. 29, 2002), at <http://www.hrw.org/backgrounder/usa/pow-bck.htm> [hereinafter HRW].

81. HRW, *supra* note 80.

82. *Id.*

83. *Ex Parte Quirin v. Cox*, 317 U.S. 1, 21 (1942).

84. *Id.*

85. *Id.* at 22.

86. *Id.* at 22-23.

87. *Id.* at 23.

88. *Id.*

certiorari.⁸⁹ The issue before the Court was “whether the detention of petitioners by [the government] for trial by Military Commission” was constitutional.⁹⁰

The Court in *Ex Parte Quirin* made a distinction between lawful enemy combatants and unlawful enemy combatants.⁹¹ The Court held that:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.⁹²

Furthermore, the Court stated that “an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property” is not afforded the status of prisoner of war.⁹³

Although one of the eight petitioners was an American citizen,⁹⁴ the Court, nonetheless, held that unlawful enemy combatants, regardless of citizenship, could be tried in military tribunals.⁹⁵ Specifically, the court stated that “[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”⁹⁶

B. Ex Parte Quirin is Distinguishable from the Present Situation

The government’s reliance on *Ex Parte Quirin* is misplaced for several reasons. First, in *Ex Parte Quirin*, the petitioners were charged with offenses within a month of their capture.⁹⁷ Here, Padilla and Hamdi have not been charged with any offenses since their capture. Second, a military tribunal tried the petitioners in *Ex Parte Quirin* soon after they were charged.⁹⁸ Here, the government has expressed no intention to try either Padilla or Hamdi in a military tribunal in the near future. Third, the petitioners had access to counsel during the military tribunal and the petition for writ of habeas corpus. Here, neither Hamdi nor Padilla has had access to counsel.⁹⁹ Finally and

89. *Id.* at 19-20.

90. *Id.* at 18-19.

91. *Id.* at 30-31.

92. *Id.*

93. *Id.*

94. *Id.* at 20.

95. *Id.* at 45.

96. *Id.* at 37.

97. *Id.* at 23.

98. *Id.*

99. Although the district court has granted Padilla supervised access to counsel with re-

most importantly, the Court in *Ex Parte Quirin* reviewed the petition for writ of habeas corpus.¹⁰⁰ Here, the government asserts that the President's determination of an individual as an enemy combatant is enough to satisfy the "appropriate standard of judicial review,"¹⁰¹ and thus should not be second-guessed. In other words, the government believes that its wartime decision making powers are above judicial review.

The Court's actions in *Ex Parte Quirin* clearly illustrate the principle that even during wartime the government is still subject to judicial review. The fact that the Court may be deferential to the government's determination of who is an enemy combatant does not translate into the absence of judicial review entirely. Thus, because *Ex Parte Quirin* is distinguishable from the present situation, it does not provide a valid authority for the government to detain a United States citizen without access to counsel, without being charged, without a trial, and without judicial review.

IV. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. ICCPR Generally

On June 8, 1992, the United States ratified the ICCPR,¹⁰² which sets forth certain inalienable rights that are due to all persons.¹⁰³ The United States, however, ratified the ICCPR with the specific declaration that the treaty was not self-executing.¹⁰⁴ As a result, the treaty does not become the supreme law of the land until an act of Congress makes it such. Nonetheless, it is possible to use the ICCPR as persuasive authority to aid in the interpretation of domestic law through indirect incorporation.¹⁰⁵

Article 9 of the ICCPR deals with an individual's right to liberty and security.¹⁰⁶ The General Comment to Article 9 states that if preventive deten-

gard to his petition for writ of habeas corpus, it remains to be determined whether the government will honor this ruling.

100. *Quirin*, 317 U.S. at 48. Ultimately, the Court denied the petition for habeas corpus because it concluded that "the petitioners were held in lawful custody and did not show cause for their discharge." *Id.*

101. Respondent's Motion to Dismiss, *supra* note 3, at 15.

102. Status of Ratifications of the Principal International Human Rights Treaties, available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Jan. 15, 2003).

103. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

104. United Nations, Declarations and Reservations (Feb. 5, 2002), available at http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm.

105. Mark A. Sherman, *Representing Defendants in International Criminal Cases: Asserting Human Rights and Other Defenses: Indirect Incorporation of Human Rights Treaty Provisions in Criminal Cases in United States Courts*, 3 ILSA J. INT'L & COMP. L. 719, 749 (1997). Specifically, the idea here is that for indirect incorporation to occur, international treaties, like the ICCPR, "must be invoked as persuasive authority, bolstering constitutional and statutory defenses or claims, and must be connected to customary international law." *Id.* at 724.

106. ICCPR, *supra* note 103, art. 9.

tion is used to ensure public security, the detention must meet the provisions set forth by the ICCPR.¹⁰⁷ Specifically, the detention “must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available. . . .”¹⁰⁸ In addition, the General Comment states that Article 9 applies to all individuals who are arrested or detained, not just criminal defendants.¹⁰⁹

There are certain circumstances, however, during which certain rights may be derogated under Article 4. In order to derogate, a State must meet two conditions: 1) “the situation must amount to a public emergency which threatens the life of the nation, and 2) the State party must have officially proclaimed a state of emergency.”¹¹⁰ Additionally, “such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.”¹¹¹ Furthermore, the derogation cannot be inconsistent with other obligations under international law.¹¹²

If a member state chooses to derogate from certain provisions, formal requirements must be performed. Specifically, the derogating state party must immediately inform the other State Parties.¹¹³ This is accomplished by notifying the Secretary-General of the United Nations as to which article(s) it intends to derogate from as well as the reasons for the derogation.¹¹⁴

107. *Id.* ICCPR General Comment 8, (4), *Right to Liberty and Security of Persons* (Art. 9) (June 30, 1982) [hereinafter Art. 9 General Comment].

108. Art. 9 General Comment, *supra* note 107. Article 9 states:

(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. . . . (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Id. art. 9(1)-(4).

109. Art. 9 General Comment, *supra* note 107, (1).

110. ICCPR, *supra* note 103, General Comment on Article 4, (2) (adopted July 24, 2001).

111. *Id.*

112. *Id.*

113. *Id.* art 4 (3).

114. *Id.*

B. ICCPR as Applied to the Current Situation

Here, arguably, the government's determination of enemy combatants may be deemed to be arbitrary. For example, the government's determination that Hamdi is an enemy combatant is contradictory to its determination that Lindh is not an enemy combatant, because both Hamdi and Lindh were captured in Afghanistan during combat against U.S. forces.

The fact that the government's subtle distinctions between these two cases are not readily apparent is evidence of the need for clear and concise guidelines in defining who is considered an enemy combatant. As it stands now, the *Padilla* court has defined an enemy combatant as an "unlawful combatant, acting as an associate of a terrorist organization whose operations do not meet the four criteria necessary to confer lawful combatant status on its members and adherents."¹¹⁵ In other words, the *Padilla* court has reduced the term enemy combatant to simply mean someone who does not qualify as a prisoner of war. This broad definition, however, does not explain the discrepant treatment among those individuals who do not qualify as prisoners of war. The government's failure to account for these discrepancies is in violation of the ICCPR's requirement that "preventive detentions must be based on grounds and procedures established by law."¹¹⁶

The ICCPR may be of much assistance in interpreting U.S. domestic law. In deciding whether to grant the petition of a writ of habeas corpus, the court should approach the issue in such a manner as to preserve compliance with international law, namely Article 9 of the ICCPR which states that anyone who is detained "shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."¹¹⁷ Therefore, if the United States required judicial review of these detentions, then it would also ensure compliance with Article 9 of the ICCPR.

V. PADILLA IS CORRECT IN PERMITTING JUDICIAL REVIEW TO DETERMINE THE LAWFULNESS OF AN ENEMY COMBATANT'S DETENTION

A. Generally

The structure of the United States government was based in part on the desire to avoid absolute power being vested in just one branch of government. The Federalist Papers, No. 51, states clearly the intention of the drafters to have a system of checks and balances:

To What expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as

115. *Padilla v. Bush*, 233 F. Supp. 2d at 593.

116. Art. 9 General Comment, *supra* note 107, (4).

117. ICCPR, *supra* note 103, art. 9 (4).

laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.¹¹⁸

A writ of habeas corpus (writ) permits a court to examine the lawfulness of executive detention.¹¹⁹ The Constitution, however, does allow for certain situations where the writ may be derogated. Specifically, the Constitution provides that: “[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety require it.”¹²⁰ Currently, Congress has taken no action to suspend the writ; in fact, the government concedes that there has been no suspension.¹²¹ Therefore, without a suspension of the writ, the government’s assertion that its classification of enemy combatants is not subject to judicial review fails.

B. The Padilla Rationale

In *Padilla*, the court held that Padilla was not only entitled to judicial review of his detention by the government, but access to counsel.¹²² Because the government did not dispute Padilla’s right to petition for writ of habeas, the court focused only on whether Padilla was entitled to counsel.¹²³ Therefore, the court based its ruling on the presumption that individuals who are designated enemy combatants are entitled to judicial review of the legality of their detention.

The court correctly noted that because Padilla has the right to make “fact-based arguments” in challenging the government’s detention of him, the “most convenient . . . and . . . most useful” way to do this is to grant him access to counsel.¹²⁴ Otherwise, the court reasoned, congressional intent in creating the rules that govern habeas corpus would be frustrated.¹²⁵

According to *Padilla*, although the Sixth Amendment is not applicable in this case because this is not a criminal proceeding, the Sixth Amendment

118. Padilla Amici Curiae Brief, *supra* note 46, at IV(B) (quoting Federalist No. 51 (James Madison)).

119. Michael C. Dorf, *Who Decides Whether Yaser Hamdi, or Any Other Citizen, is an Enemy Combatant?* (Aug. 21, 2002), at <http://writ.corporate.findlaw.com/dorf/20020821.html>.

120. U.S. CONST. art. I, § 9, cl. 2.

121. Respondent’s Motion to Dismiss, *supra* note 3, at 32.

122. *Padilla v. Bush*, 233 F. Supp. 2d at 610. Although the government did not dispute an enemy combatant’s right to habeas corpus, it did heavily stress that the court should not second-guess their war time decision-making powers. Respondent’s Motion to Dismiss, *supra* note 3, at 11. In addition, the government attempted to claim other procedural barriers, such as the court’s lack of jurisdiction, to prevent the court from granting the writ of habeas corpus. *Id.* at 1-2.

123. *Padilla*, 233 F. Supp. 2d at 599.

124. *Id.*

125. *Id.* at 600.

may be used to “inform the exercise of discretion here.”¹²⁶ As a result, the court held that discretion sided with allowing Padilla to have access to counsel, but not without restrictions.¹²⁷

The court explained that this access would not have adverse effects on the government’s efforts to extract information from Padilla because the right to counsel is “not in connection with questioning.”¹²⁸ Furthermore, the court imposed additional security measures on Padilla’s right to counsel, such as the ability for independent military personnel who are “insulated” from Padilla’s case to monitor counsel’s consultations with Padilla.¹²⁹

C. Looking Forward

If, in fact, the detention of an enemy combatant who is a United States citizen is lawful, then certain procedural safeguards must be delineated. Namely, the right to judicial review and access to counsel should be granted to all individuals the government labels enemy combatants.

Additionally, in order to ensure not only the security of the United States, but of citizens’ individual rights, it is of utmost importance for the government to define exactly what is meant by an enemy combatant. Furthermore, the government should codify what types of circumstances will give rise to a determination of being labeled an enemy combatant as opposed to a defendant in a criminal proceeding. These measures will serve several purposes. First, it will give the public a better understanding of what standards the government is using in detaining United States citizens. Second, it will foster a sense of trust and confidence in the general public that the military and the government are acting in accord with standardized protocols. Finally, it will ensure that the United States is in compliance with international law, namely the ICCPR.

Transparency of government, within reasonable limits given the classified nature of national security, is key to achieving these goals. A transparent government, however, can only exist if the rule of law is followed. Thus, it is imperative to create objective standards for the determination of who is an enemy combatant and to ensure the right to judicial review for those individuals labeled as such.

126. *Id.* at 603. Article 14 of the ICCPR also provides that criminal defendants are entitled to counsel. ICCPR, *supra* note 103, art. 14 (3)(d). Thus, it is also possible to use the ICCPR to bolster the court’s proposition that enemy combatants are entitled to counsel when having a court review the lawfulness of their detention.

127. *Padilla*, 233 F. Supp. 2d at 605.

128. *Id.* at 603.

129. *Id.* at 604.

CONCLUSION

The freedoms we have now should not be compromised by our nation's war on terrorism. To do so would entail the gradual evisceration of the principles upon which our nation was founded. The United States government would like to have its citizens believe that it is only temporarily infringing upon citizens' rights in the name of peace, however, once a single concession is made, it becomes easier and easier to continue down the same path strengthened with precedents that are based on flawed foundations.

As George Orwell wrote in his novel *1984*, "[w]hen war is continuous there is no such thing as military necessity. Technical progress can cease and the most palpable facts can be denied or disregarded. . . . A peace that was truly permanent would be the same as a permanent war."¹³⁰ The concentration of power in one body of government at the expense of individual freedoms was a threat that the drafters of the Constitution feared. As a result, our Constitution provides for a system of checks and balances to ensure that no one government branch will have unlimited and unfettered discretion to do as it sees fit.

The ideals and visions that the drafters had in mind certainly did not entail the slippery slope that is facing us in the cases of Padilla and Hamdi. The *Padilla* court's decision that Padilla is entitled to have access to counsel with respect to his petition for writ of habeas corpus correctly reinforces the principle that the government is subject to judicial review for its actions, even during the war against terrorism.

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130. ORWELL, *supra* note 1, at 163-64.

* J.D. Candidate, April 2004, California Western School of Law; B.A., Psychology/Business Administration, University of San Diego, 1998. I dedicate this article to my parents, Carmen and Jesús; my sister, Gabriela; and my Abuelita Josefina for giving me the strength to succeed. I would like to give a special thank you to Jason Crum for his support and encouragement. I would also like to thank all those individuals who made this article possible and especially Robert Robinson for his thoughtful comments.