AMERICAN BAR ASSOCIATION

TASK FORCE ON TREATMENT OF ENEMY COMBATANTS

PRELIMINARY REPORT*

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TASK FORCE

Neal R. Sonnett, Chair
John S. Cooke
Eugene R. Fidell
Albert J. Krieger
Stephen A. Saltzburg,
Suzanne E. Spaulding

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PRELIMINARY REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON TREATMENT OF ENEMY COMBATANTS

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I. INTRODUCTION

The September 11, 2001 attack on the United States not only shocked the nation but identified a new type of enemy: a group of individuals of varying nationalities operating with relative freedom in various countries throughout the world who are committed to murdering innocent men, women, and children found in or 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 United States reacted, as any nation would and must, with the support of the international community, to protect its people from future attack.

The unprecedented attack resulted in unprecedented responses by the government. Unable to know when and where another attack might occur, the government understandably felt the need to respond quickly and comprehensively to perceived dangers. In the process, the government confronted some United States citizens who carried arms with forces against whom the United States was engaged in battle and others who appeared to be allied with the enemy responsible for September 11th and committed to future assaults on the United States. This confrontation raised an enormously important and difficult constitutional question: what rights does a United States citizen detained by his or her government have when the citizen is alleged to be allied with an enemy group?

As a nation we have struggled for more than 200 years to establish the proper balance under our Constitution between protection of liberty and individual rights. In time of war or threat of war,

the balance may shift – appropriately – toward security, but from past experience we know that such a shift carries with it a danger of government overreaction and undue trespass on individual rights.

The recent cases of Yaser Hamdi[1] and Jose Padilla,[2] United States citizens detained as "enemy combatants," bring this potential danger into sharp relief and raise troublesome and profound issues. The government has taken the position that "with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."[3]

The implications of these detentions are much broader than these two cases. Sadly, in what promises to be a long, complex, and difficult struggle with a worldwide terrorist network, this is not likely to be the last instance in which a U.S. citizen is believed to be or accused of acting in concert with such terrorists.

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

[2] Jose Padilla, a.k.a. Abdullah al Muhajir, was arrested in Chicago on May 8, 2002 pursuant to a material witness warrant issued in the Southern District of New York. He was detained in New York City until June 9, 2002, when he was declared to be an "enemy combatant" and transferred to the control of the United States military. The United States District Judge, at the request of the Department of Justice, vacated the material witness warrant, and Padilla was transported to the Consolidated Naval Brig in Charleston, South Carolina for detention as an enemy combatant. *See* Government's Motion to Dismiss Amended Petition for Writ of Habeas Corpus in *Padilla v. Bush, et. al.*, Case No. 02-Civ-4445-MBM (S.D.N.Y.).

[3] *See Hamdi v. Rumsfeld*, _____ F.3d ____ , 2002 WL 148390802 at *5 (4th Cir. July 12, 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.

When a nation is at war, measures may seem reasonable that would never be acceptable in a time of peace. This is as true in the United States as in other countries. War, then, poses the challenge of how to protect a nation so that it may survive and prosper without damaging in the process the very liberty and freedoms for which the nation stands. As a distinguished Justice of the United States Supreme Court warned more than fifty years ago:

> ....we 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.' Ex parte Milligan, supra, 4 Wall. at pages 120, 121.

Justice Frank Murphy, concurring in *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946).

This is the challenge we faced before, it is the challenge we now face, and sadly it is a challenge unlikely to disappear in the future. How we deal with citizens suspected of terroristic activity will say much about us as a society committed to the rule of law. While we must have the means to prevent more attacks like those of September 11th, we must also insure that there are sufficient safeguards to protect the innocent and prevent possible abuses of power.

In light of the importance of these issues, the ABA Board of Governors, at the request of President Robert Hirshon, created a Task Force on Treatment of Enemy Combatants to examine these issues.

The task force is chaired by **Neal R. Sonnett**, a past chair of the ABA Criminal Justice Section, and its members are: retired Brigadier General **John S. Cooke**, chair of the ABA Standing Committee on Armed Forces Law; **Eugene R. Fidell**, president of the National Institute of Military

Justice; **Albert J. Krieger**, chair-elect of the ABA Criminal Justice Section; **Stephen A. Saltzburg**, a member of the ABA Task Force on Terrorism and the Law; and **Suzanne E. Spaulding**, chair of the ABA Standing Committee on Law & National Security.

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.

We have not attempted to address the detention of foreign nationals in immigration proceedings,[4] or individuals held as material witnesses.[5] Nor have we considered -- at least at this time -- the issue of foreign nationals held as "enemy combatants" at the United States Naval Base at Guantanamo Bay, Cuba.[6] Rather, our initial concern is whether the government can -- or should -- be able to detain American citizens indefinitely without charges and hold them incommunicado

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[4] The government recently disclosed that, since September 11th, it detained a total of 751 individuals on immigration violations, and 74 people were still being held in INS custody as of June 13, 2002. See *Center for National Security Studies, et. al. v. United States Department of Justice*, Case No. 01-2500 (Slip. Op. at p.7)

[5] Two United States District Judges in the Southern District of New York have analyzed the government's use of the material witness statute, 18 U.S.C. §3144 in post 9/11 cases and have reached very different results. Compare *United States v. Awadallah*, 202 F.Supp.2d 55 (S.D.N.Y. 2002) and *United States v. Awadallah*, 202 F.Supp.2d 82 (S.D.N.Y. 2002), both decided on April 30, 2002 with *In re The Application of the United States For a Material Witness Warrant*, ___ F.Supp.2d___, 2002 WL 1592739 (S.D.N.Y. 2002). It is worth noting, however, that material witnesses have the 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).

[6] 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).

without a hearing and without access to counsel.[7]

This Report sets forth broad principles which the Task Force believes should govern such detentions. We hope and trust that our analysis, conclusions, and principles will generate discussion and debate on an issue which affects the very fabric of our democracy.

II. BACKGROUND

In the days following the horrific and evil acts of terrorism on September 11, 2001, our nation responded swiftly, aggressively, and with widespread national and international support. Congress did not officially declare war, but it enacted a Joint Resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[8] The United Nations Security Council approved a resolution recognizing the United States' right to self-defense,[9] and NATO's North Atlantic Council stated that it regarded the attack as an action implicating Article V of the Washington Treaty that "an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against all."

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[7] As we discuss further *infra*, we fully recognize the necessity under some circumstances to detain persons in order to prevent them from engaging in future terrorist attacks. But the power to detain has obvious implications for individual rights and liberty and therefore merits serious and careful examination.

[8] Public Law 107-40, 115 Stat. 224. The Preamble to the resolution states that the acts of September 11 were attacks against the United States that "render it both necessary and appropriate that the United States exercise its rights to self-defense."

[9] See U.N.S.C.Res. 1368.

The September 11 attacks were viewed as both crimes and acts of war, and the United States has responded with both military operations and law enforcement actions. Under the circumstances, legal doctrines and principles from both domestic criminal procedure and international law, including the law of war, have been applied. Because of the unique nature of the attacks and our responses to it, it is not surprising that these doctrines and principles have been applied in new ways and have, to some extent, overlapped.

III. ANALYSIS AND LEGAL PRINCIPLES

A. Detention of "Enemy Combatants"

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:

> 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.

In the law of war, "enemy" generally describes an opposing state or quasi-state with which another state or quasi-state is at war.[10] In a war between states, the enemy consists of all the citizens

[10] "War" may exist when a state of war has been declared or when activities involving the use of force rise to such a level that a state of war exists. Absent a declaration of war, there may be some

of the other state. In wars involving non-states (typically insurgents or contestants in a civil war), who constitutes the enemy is less clear. The "enemy" as an institution or organization (e.g., an insurgent group or a band of partisans) usually does not have a legally cognizable status like a state.

Moreover, who "belongs" to this de facto organization rests not on a single, fairly objective, not easily changed factor like citizenship, but on each individual's allegiance as reflected in acts or even words. In many modern conflicts, including the present one, it is not unusual for persons to hide their allegiance to the enemy for tactical or other purposes.

In the law of war, a "combatant" commonly refers to members of an armed force.[11] Members of a state's armed force are usually clearly distinguishable from civilians, including other government officials and employees. Members of the force normally wear uniforms and carry a distinctive identification card or document. In an organization, such as a rebel group, with an irregular armed force, the line between combatants and noncombatants is much less clear.[12]

There is precedent for treating U.S. citizens as enemy combatants. *Ex parte Quirin,* 317 U.S. 1, 63 S.Ct. 2 (1942) was a case in which German soldiers smuggled themselves into the country, hid

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uncertainty whether a state of war exists, depending on the level and nature of hostile activities. On September 18, 2001, Congress' Joint Resolution (Public Law 107-40, 115 Stat. 224) authorized the President "to use all necessary force against those nations, organizations, or persons he determines planned authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Based on this and U.S. combat operations in Afghanistan it may be concluded that the United States is at war with al Qaeda, the organization deemed responsible for the September 11 attacks.

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

[12] This is one reason for the requirements for a recognized chain of command and distinctive insignia.

their uniforms and planned sabotage here before being caught.[13] They were arrested, prosecuted for what were regarded as crimes of war, convicted, and sentenced – six to death. The Court stated:

> 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.

Id. at 317 U.S. 1, 30-31 (1942) (footnotes omitted). However, *Quirin* may not provide the clear precedential value claimed by the government; there was a formal Congressional "Declaration of War" against Germany, and all eight of the defendants were in fact uniformed members of the German military who donned civilian clothing after surreptitiously entering the United States to engage in sabotage.

Moreover, *Quirin* does not stand for the proposition that detainees may be held incommunicado and denied access to counsel, since the defendants in *Quirin* were able to seek review and they were represented by counsel. Since the Supreme Court has decided that even enemy *aliens* within the United States are entitled to review, that right could hardly be denied to United States citizens.[14]

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[13] *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

[14] "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

In *In re Territo,* 156 F.2d 142 (9th Cir. 1946), a U.S. citizen was captured in Italy while serving in the enemy Italian army and held as a POW in the United States. The court upheld the denial of his petition for writ of habeas corpus, stating, "all persons who are active in opposing an army in war may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war."

Quirin and *Territo* arose in World War II. Little question existed about who the enemy was or whether the *Quirin* defendants or Territo were members of the enemy armed forces. Thus, these decisions turned not on whether the detainees were enemy combatants, but on whether enemy combatants – even if U.S. citizens – could be detained and tried by the military. In the current situation, these lines are less clear, both in general and in application in specific cases. For this reason, the power to label a citizen an "enemy combatant" is potentially very broad.

B. Application of United States Law

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

Title 18, §4001(a) of the United States Code provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The legislative history indicates that this statute applies in the case of any detention of U.S. citizens, and is not limited to the control of civilian prisons:

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).

> The twofold purpose of the amended bill is (1) to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists and (2) to repeal the Emergency Detention Act of 1950 (Title II of the Internal Security Act of 1950) which both authorizes the establishment of detention camps and imposes certain conditions on their use.

House Report No. 92-116, p. 1435, April 6, 1971, Cong. Record Vol. 117, (1971). The House Report explained that specific repeal of the Emergency Detention Act[15] and that the "mere continued existence" of the act had "aroused much concern among American citizens, lest the Detention Act become an instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views." *Id.* at p. 1436.

The House Report also noted that the constitutional validity of the 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 other to engage in, acts of espionage or of sabotage" and permitted the government to "refuse to divulge information essential to a defense" which made the provisions .... for judicial review inadequate." *Id.*

Thus, 18 U.S.C. § 4001(a) suggests that no U.S. citizens can be detained by the federal government unless charged with violating some Act of Congress, a conclusion that finds strong support in the only case addressing that statute to ever come before the United States Supreme Court, *Howe v. Smith*.[16] In *Howe*, Chief Justice Burger, writing for the Court, declared that "the plain language of § 4001(a) proscribe[es] detention *of any kind* by the United States, absent a

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[15] 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." *Id.* at 1436.

[16] 452 U.S. 473 (1981).

congressional grant of authority to detain."[17] The *Howe* Court thus read Section 4001(a) expansively to apply to *any and all* U.S. citizens who were detained by the United States government, *under any circumstances*.

Under United States law, the validity of the detention of citizen detainees may be challenged by filing a writ of habeas corpus, which Blackstone aptly called "the great and efficacious writ, in all manner of illegal confinement."[18] As the United States Supreme Court explained in *Harris v. Nelson*, 394 U.S. 286, 291, 89 S.Ct. 1082, 1086 (1969):

> The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended * * *.' U.S.Const., Art. I, s 9, cl. 2. The scope and flexibility of the writ--its capacity to reach all manner of illegal detention--its ability to cut through barriers of form and procedural mazes--have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

The Court further commented:

> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.

Id., 394 U.S. at 292, 89 S.Ct. at 1087.

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[17] *Howe*, 452 U.S. at 479 n.3.

[18] 3 W. Blackstone, Commentaries *131 (Lewis ed. 1902). See generally *Fay v. Noia,* 372 U.S. 391, 399--415, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

C. The Geneva Conventions

The four Geneva Conventions of 1949, to which the United States is a party, provide the general framework for analysis of the grounds and procedures for detention and treatment of enemy combatants. The treatment of captured combatants during an armed conflict is covered by the Third Geneva Convention Relative To The Treatment of Prisoners of War, which defines prisoners of war (POWs) and sets forth the framework for their protection. Persons not entitled to POW status, including so-called "unlawful combatants," are nevertheless entitled to protections provided by the Fourth Geneva Convention Relative To The Protection of Civilian Persons in Time of War. However, in cases in which a civilian has engaged in "acts hostile to the security of the State, such individual shall not be entitled to claim such rights and privileges ... as would ... be prejudicial to the security of such State."

Thus, certain lines of demarcation have been drawn that distinguish what is expected of government in various circumstances. It is relatively clear that when we are at war fighting against a declared enemy, as in World War II for example, enemy prisoners who are captured on the battlefield or in the combat arena are declared Prisoners of War and entitled to protection as such. Those prisoners must be treated in accordance with the Convention and have rights under the Convention. They are not criminal defendants; they have no right to counsel; they may be questioned but need not provide any information other than name, rank serial number and date of birth. Prisoners of war do have the right, subject to censorship for security purposes, to correspond with others outside the prison.

Some individuals are captured during war on the battlefield or in the combat arena but do not qualify as prisoners of war. Such persons are those who have committed a belligerent act and have

been captured, but are not part of an organization that qualifies its members as Prisoners of War. Under some circumstances the Fourth Geneva Convention permits detention of civilians in a war zone.

Since it is not always clear whether an individual captured during a war qualifies as a Prisoner of War, Article 5 of the Geneva POW Convention[19] provides that when there is doubt about the status of a captured individual, he or she will be treated the same as a Prisoner of War until such time as his or her status has been determined by a competent tribunal.[20] The Article 5 process, however, is not directly relevant to our examination of the treatment of U.S. citizens who are detained in this country.

D. International Human Rights Laws and Treaties

Any analysis of the treatment of enemy combatants must also consider a variety of other recognized international agreements which are relevant to our analysis, particularly to the issue of access to counsel. They include:

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[19] Article 5 states:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

[20] The United States has substantial experience with Article 5 of the Convention; for example, it established Article 5 tribunals for thousands of individuals during the Gulf War. See *Operational Law Handbook*, JA 422 (Charlottesville 1977) at 18-8.

1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights, adopted in 1948, has been strongly supported by the United States. Indeed, President Bush proclaimed December 9, 2001 as "Human Rights Day & Bill of Rights Week"[21]

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" and Article 9 provides that no one "shall be subjected to arbitrary arrest, detention or exile."

2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

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." More important, Principle 18 provides:

> 1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
>
> 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
>
> 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or

[21] The Proclamation, issued for the Declaration's 53rd anniversary, stated: "The terrible tragedies of September 11 served as a grievous reminder that the enemies of freedom do not respect or value individual human rights. Their brutal attacks were an attack on these very rights." President Bush called on "the people of the United States to honour the legacy of human rights passed down to us from previous generations and to resolve that such liberties will prevail in our nation and throughout the world as we move into the 21st century."

> restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

3. International Covenant on Civil and Political Rights (ICCPR)

The International Convention on Civil and Political Rights was adopted and opened for signature, ratification and accession by U.N. General Assembly resolution 2200A (XXI) on December 16, 1966, and became effective in 1976, following ratification by the necessary number of states.[22] Article 14 of the ICCPR describes certain standards and procedures that should be used in all courts and tribunals.[23]

IV. DISCUSSION

The attack on the United States on September 11, 2001 – as well as other attacks on United States embassies, personnel, and property abroad – raise new and difficult questions for our legal and political systems. Once it began, the hijacking of planes and wanton and willful taking of lives could not go unanswered. The openly declared goal of Al Qaeda to inflict a holy war upon the United States could not go unrecognized. No President or Congress could ignore the threat and pretend that

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[22] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

[23] At the American Bar Association Midyear meeting in February 2002, the House of Delegates considered and adopted a Report and Recommendation relating to the November 13, 2001, Military Order Regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." Recommendation 6 urged the President and Congress to assure that the law and regulations governing any tribunal would "[r]equire compliance with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights, including but not limited to, provisions regarding prompt notice of charges, representation by counsel of choice, adequate time and facilities to prepare the defense, confrontation and examination of witnesses, assistance of an interpreter, the privilege against self-incrimination, the prohibition of *ex post facto* application of law, and an independent and impartial tribunal, with the proceedings open to the public and press or, when proceedings may be validly closed to the public and press, trial observers, if available, who have appropriate security clearances."

further attacks should not be expected.

The need for action was undeniable. Congress authorized the President to respond. The United Nations recognized the need for the United States to act in self-defense. Accordingly, the President committed American armed forces to do battle with the Taliban and Al Qaeda in Afghanistan. Whether this was a declared war or not, it was approximately as clear who the enemy was in Afghanistan as in previous conflicts: namely, the enemy were the Taliban fighters who repressed the people of that country and the Al Qaeda forces who benefitted from Taliban protection while providing substantial resources to support the Taliban forces.

Many suspected Taliban and Al Qaeda forces or supporters who were captured in battle have been detained, and questions about those detainees abound. Most knowledgeable people recognize that they are difficult questions to answer and involve the law of war, international law, and treaty obligations. Even so, there is concern among many Americans about the prudence, if not the legality, of prolonged incommunicado detention of a large group of people far removed from the battle in which they were captured.

As a society, we know that America is a land in which dissent is a fundamental right, but we take pains to assure that dissent is not confused with treasonous acts. We do not lightly presume that Americans, even those who protest and complain about their country's policies, are "enemies."

If an American citizen who is detained as a Prisoner of War or as an illegal combatant is subsequently prosecuted for treason or for another crime against the United States, that citizen will have the benefit of the constitutional protections afforded all defendants in American criminal prosecutions. The right to counsel, the privilege against self-incrimination, the right to jury trial and other familiar rights will attach once prosecution commences.

There is reason for confidence, therefore, that an American who is charged with a crime against the United States, even one involving the taking up arms against the United States, will receive the full panoply of rights traditionally afforded criminal defendants. Neither the Executive nor the Congress has sought to interfere with the exercise of these rights, and there is no indication that Due Process will be denied those charged with federal crimes.

But, there is genuine reason for concern about a President's – or anyone's – power to unilaterally declare that an American citizen who is arrested in the United States or elsewhere far from any battlefield or combat arena is part of the enemy and thus may be treated in the same way as enemy seized in battle. Indeed, 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, like John Walker Lindh, a U.S. citizen, or foreign nationals like Zacarias Moussaoui, the alleged "20th hijacker" and Richard Reid, the alleged "shoe bomber."

The war on terrorism requires that new questions be asked. With whom are we at war? Who defines the enemy? How does one conduct war against individuals or groups of individuals who swear no allegiance to any nation and whose affiliations to each other are not always clear? What qualifies an individual as a combatant? Who has the right to negotiate to end the war? Who defines how long the war will last? Where is the war actually being fought?

Without knowing the full and complete answers to these broad questions, it is not clear how to answer the narrower questions: May the Executive detain an American citizen or any other person lawfully in the United States as an "enemy", a "combatant", or an "enemy combatant" on the basis of a unilateral determination that the individual is "connected to", a "supporter of"; a "member of"; or an "aider, abettor or coconspirator of" an individual or group that has participated in an attack on

the United States or expressed support for such an attack?

What standard – reasonable suspicion, probable cause, etc. – applies to such detention? What time limit, if any, applies to such detention? Is there any judicial review available to a detainee? If a decision is made to detain, must that decision be periodically reviewed? Does a detainee have a right to consult with counsel with respect to detention? While being detained?

U.S. courts have generally deferred to military judgment concerning POW status and related questions. See *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Hamdi v. Rumsfeld*, ___ F.3d ___ (July 12, 2002).[24] This deference flows from the President's and Congress' primary responsibility for foreign affairs and the prosecution of war, and from the potential damage of judicial interference in military operations. However, the same is not true in circumstances involving U.S. citizens not on the battlefield or in the zone of military operations. See *Ex parte Milligan,* 71 U.S. 2 (1866); *Duncan v. Kahanamoku,* 327 U.S. 304 (1946).[25]

Moreover, the federal judiciary has little experience with detention of Americans as enemy combatants outside a declared war, with nations as enemies, and with captured soldiers. *Ex parte Milligan* and *Ex parte Quirin* can be cited for and against judicial involvement in Executive determinations as to combatants, but the reality is that neither decision addresses whether there can

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

[25] It should be noted that POWs are entitled to and generally can communicate with outsiders. Through such communications they can gain the services of an attorney who can seek relief in an appropriate court. POWs may also communicate, through their chain of command, with representatives from neutral states and international organizations, and in this way raise issues concerning their detention.

be detentions of Americans or lawful residents without some form of judicial review.[26]

V. RECOMMENDATIONS

We fully recognize that these are very difficult and complex issues. The stark reality is that there is no universal consensus as to the right answers to either the broad or the narrow questions now facing our nation. With the disquieting recognition that the battles of the future could focus on individuals and groups spread among as well as on nations themselves, we nonetheless believe that there are certain principles that should and could receive support from those who appreciate the need to assure that we do not lose our sacred liberties and freedoms while we fight to save them.

The Task Force therefore recommends that the following principles be followed with respect to the treatment of U.S. citizens declared to be enemy combatants:

1. The Administration Should Explain the Basis and Scope of Its Authority to Detain U.S. Citizens as Enemy Combatants

The administration should explain, more fully and formally than it has, the basis for detaining someone as an enemy combatant, especially Americans seized far from any recognized battlefield or combat zone.

This is important as a matter of domestic and international law and public support. Actions taken today will serve as precedents forever. Regardless of the wisdom and good faith with which actions are taken, detention without process in a few cases may be used as justification by others for

[26] History has not been kind to the Japanese internment cases, which upheld detention of American citizens and lawful residents. Judicial review was ultimately provided, internment was sustained, and the decisions have been questioned as much as any in American law. Indeed, Congress passed the Civil Liberties Act of 1988 "to provide a Presidential apology and symbolic payment of $20,000.00 to the internees, evacuees, and persons of Japanese ancestry who lost liberty or property because of discriminatory action by the Federal government during World War II." See http://www.usdoj.gov/kidspage/crt/redress.htm.

much broader use of such detention.

By better explaining the rationale for such detention (even recognizing that security concerns may limit what can be made public), the government can win support – assuming its reasoning is sound – and can cabin the authority should others try to extend it inappropriately. There may be substantial reasons for such detentions that would be consistent with domestic and international law, but it is also possible that the case for detention is problematic and might create a dangerous precedent.

The Administration has not yet attempted to explain what procedures it believes should be required to assure that detentions are consistent with Due Process, American tradition, and international law. It cannot be sufficient for a President to claim that the Executive can detain whomever it wants, whenever it wants, for as long as it wants as long as the detention bears some relationship to a terrorist act once committed by somebody against the United States. Short of such a claim, what are the limits?

2. Congress Should Establish Clear Standards and Procedures Governing Detention of United States Citizens

Congress, in coordination with the Executive branch, should examine the issue of detaining U.S. citizens as enemy combatants, and should enact legislation establishing clear standards and procedures governing the detention and treatment of U.S. citizens detained as enemy combatants. This is particularly necessary in light of our discussion of 18 U.S.C. §4001(a), *supra*.

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. As the Washington Post recently

observed in an editorial:

> . . . the government's actions in this latest case cut against basic elements of life under the rule of law. If its positions are correct, nothing would prevent the president -- even in the absence of a formal declaration of war -- from designating any American as an enemy combatant. Without proving the correctness of the charge before a court, the military could then detain that person forever. And having done so, it could prevent that detainee from hiring a lawyer to argue that the government, in fact, has it all wrong. If that's the case, nobody's constitutional rights are safe. The administration owes the country a more thoughtful balance; Congress's role -- the patriotic thing to do -- is to help find it.

Editorial, "Detaining Americans" Washington Post, Tuesday, June 11, 2002, Page A24.

Congress should also maintain continuing oversight of detention of U.S. citizens to assure that such detentions are consistent with Due Process, American tradition, and international law.[27] As Sen. Russell Feingold (D-WI) observed during a United States Senate Judiciary Committee hearing:[28]

> ...I do think we need to learn a lesson from this history to question our government when it appears to be overreaching. Such questions are not unpatriotic and should not be viewed as an inconvenience by the Executive Branch. They are a crucial tool for Congress to play its constitutional role in protecting the great heritage of this country and the rule of law.

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[27] 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.

[28] Senate Committee on the Judiciary, December 4, 2001, http://judiciary.senate.gov/member_statement.cfm?id=128&wit_id=85

3. Citizen Detainees Should Have Access to Judicial Review to Challenge Their Detention

As set forth above, United States citizens who are detained by the Government have a right under the Constitution to seek release from their detention through a petition for writ of habeas corpus, a fundamental right which Congress has not suspended. Citizen detainees who have not been charged with violations of United States criminal laws or the law of war should therefore be afforded a prompt opportunity for judicial review of the basis for their continued confinement.

4. Citizen Detainees Should Not be Denied Access to Counsel

The most complex issue examined by the Task Force is that of access to counsel. We agree that a United States citizen detainee should not be denied access to the courts and he or she should, at the very least, have the right to contact an attorney in order to seek habeas corpus relief.

We also agree, however, that the 6th Amendment right to counsel does not technically attach to uncharged enemy combatants, and we recognize that, depending on the geographical location and the state of hostilities, there may be circumstances in which providing a detainee with access to counsel could be unwise, impractical, or dangerous.[29]

While we are mindful of such concerns, we do not believe that citizens detained within the United States, far from the battlefield, 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.

Government concerns that affording access to counsel may impede the collection of intelligence are not, in our view, so compelling that they justify denial of access to assistance of

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[29] 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.

counsel. Nor are concerns that counsel might be used by detainees to facilitate communications with others. We have confidence that our nation's lawyers can provide effective representation without breaching security. When government practices result in indefinite incommunicado detention, they must be weighed against the requirements of the rule of law and the sacred tradition of providing our nation's citizens with full Due Process rights.

5. <u>Consideration Should be Given to the International Impact of Our Treatment of Enemy Combatants</u>

Finally, we urge the Executive and Legislative branches, in establishing and implementing procedures to govern the detention of U.S. citizens held as enemy combatants, to give full consideration to the impact of its policies as precedents in the use of international legal norms in shaping other nations' responses to future acts of terrorism.

VI. CONCLUSION

The Task Force respects and supports President Bush and his administration in their efforts to root out terrorism and assure our homeland security. Of course, we should have the means to prevent more attacks like those of September 11. At the same time, there must be safeguards to protect the innocent and prevent possible abuses of power.

Since our Nation's founding, it has been a bedrock principle of our Democracy that is it the duty of the courts to protect the constitutional rights of citizens from overreaching government authority—even when that authority is well-intentioned, and regardless of how unpopular or hated those citizens might be. "Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land."[30]

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[30] *Bridges v. Wixon*, 326 U.S. 135, 166 (1945) (Justice Murphy, concurring.)

We would do well to heed the admonition of Justice Murphy in *Duncan v. Kahanamoku*, 327 U.S. 304, 335:

> Moreover, we 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.' Ex parte Milligan, supra, 4 Wall. at pages 120, 121.

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.

The ABA Task Force on Treatment of Enemy Combatants will continue to review and analyze these issues, and the American Bar Association stands ready to be of assistance in any way to help establish standards and procedures to ensure that we do not erode our cherished Constitutional safeguards and that we strengthen the rule of law.[31]

We must get this right. The people of this great country deserve no less.

[31] 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).

AMERICAN BAR ASSOCIATION
TASK FORCE ON TREATMENT OF ENEMY COMBATANTS

SUMMARY OF RECOMMENDATIONS

1. **The Administration Should Explain the Basis and Scope of Its Authority to Detain U.S. Citizens as Enemy Combatants**

2. **Congress Should Establish Clear Standards and Procedures Governing Detention of United States Citizens**

3. **Citizen Detainees Should Have Access to Judicial Review to Challenge Their Detention**

4. **Citizen Detainees Should Not be Denied Access to Counsel**

5. **Consideration Should be Given to the International Impact of Our Treatment of Enemy Combatants**

ABA Task Force on Treatment of Enemy Combatants

Chair

NEAL R. SONNETT is a past chair of the ABA Criminal Justice Section, which he now represents in the ABA House of Delegates, and is a member of the ABA Task Force on Gatekeeper Regulation and the Profession. He is vice-president of the American Judicature Society and past president of the National Association of Criminal Defense Lawyers. The *National Law Journal* profiled him as one of the "Nation's Top White Collar Criminal Defense Lawyers" and selected him three times as one of the "100 Most Influential Lawyers In America." He is a former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida.

Members

JOHN S. COOKE retired from the United States Army in 1998 as a Brigadier General after twenty-six years of service in the Judge Advocate General's Corps. He served as Chief Judge, U.S. Army Court of Criminal Appeals, Commander, U.S. Army Legal Services Agency, Judge Advocate (senior legal advisor) for U.S. Army forces in Europe, and Deputy Commandant, The Judge Advocate General's School. He is outgoing chair of the ABA Standing Committee on Armed Forces Law and served on the ABA Task Force on Terrorism and the Law.

EUGENE R. FIDELL is president of the National Institute of Military Justice and a partner in the Washington, D.C. firm of Feldesman, Tucker, Leifer, Fidell & Bank LLP. He served on the Code Committee on Military Justice and the Advisory Board on the Investigative Capability of the Department of Defense, and has taught Military Justice at Yale Law School. He is coeditor (with Dwight H. Sullivan) of Evolving Military Justice (Naval Institute Press 2002) and edited NIMJ's forthcoming Annotated Guide to the Procedures for Trials by Military Commissions (LEXIS/NEXIS Matthew Bender 2002).

ALBERT J. KRIEGER is a nationally renowned criminal defense trial attorney now in his 54th year of practice. He is the incoming chair of the ABA Criminal Justice Section and a past president of the National Association of Criminal Defense Lawyers, which he represents in the ABA House of Delegates. He served two terms on the ABA Criminal Justice Standards Committee, and he has been honored by local, state, and national bar associations throughout the nation for his lifetime of contributions to the adversary system of criminal justice.

STEPHEN A. SALTZBURG is Howrey Professor of Trial Advocacy, Litigation and Professional Responsibility at the George Washington University Law School. He served as Associate Independent Counsel in the Iran-Contra investigation, and is a former Deputy Assistant Attorney General in the Criminal Division. He serves in the ABA House of Delegates from the Criminal Justice Section and is on the Council of the Litigation Section. He served on the ABA Task Force on Terrorism and the Law, and is a member of the ABA Task Force on Gatekeeper Regulation and the Profession.

SUZANNE SPAULDING currently serves as chair of the ABA Standing Committee on Law and National Security. She has served as Executive Director of the National Commission on Terrorism (the "Bremer Commission") and Executive Director of the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction. She is a former Deputy Staff Director and General Counsel for the Senate Select Committee on Intelligence; and a former Assistant General Counsel for the Central Intelligence Agency.