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Katherine introduces the principles of constitutional separation of powers at play when a United States citizen is detained indefinitely in military custody by Presidential order. She then explains why she views the application of these principles as a mandate to release the citizen involved, because the constitutional separation of powers must be respected, even during times of great national crisis such as the aftermath of the September 11, 2001 attack on this country and the ensuing War on Terror.

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What Happened to Separation of Powers?

September 11, Jose Padilla, and Fundamental Change in the United States

*Katherine Santon**

INTRODUCTION

The United States of America has undergone fundamental changes since terrorists killed thousands of Americans in New York City on September 11, 2001. One change involves an increased awareness of the threat of terrorism, as terrorist attacks have continued worldwide since 2001. A second change involves more assertive protectionary measures at home and abroad, perhaps somewhat different than what the Framers of our Constitution had intended. This arguable change in the interpretation of our Constitution has sparked much debate since September 11th. Some claim that the post-9/11¹ government policy makers sought a “virtuous empire,” even if that meant “dismantle[ing] the old America” and undertaking a new interpretation of the Constitution itself.²

This article will focus on an important aspect of the potential change in United States policy toward its own citizens. After 9/11, President George W. Bush “reserved to the United States the right to strike *preemptively* against any possible threat.”³ What if a United States citizen is perceived as a “possible threat”? Is that citizen now subject to a “preemptive strike” before having the opportunity to prove his or her innocence? Does any form of due process survive under this preemptive approach?

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¹ September 11, 2001, is often referred to as “9/11” by citizens of the United States.

² Claes G. Ryn, *America the Virtuous: the Crisis of Democracy and the Quest for Empire* 8 (2003).

³ *Id.* at 7 (emphasis added).

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The Due Process Clause, found in the Fifth Amendment of the United States Constitution, provides that “no person shall ... be deprived [by the federal government] of life, liberty, or property, without due process of law...”⁴ However, the clause does not specify whether its protection should be withheld from citizens who are perceived to be a threat to their country. Imagine a United States citizen who had been captured by the United States Government and perceived as a terrorist threat; under one view, this citizen could now be held incommunicado,⁵ without any formal criminal charges, like other prisoners of war. Under another view, such detention would deprive this citizen of “life, liberty, or property, without due process of law...”⁶

Jose Padilla is just such a citizen. Padilla was arrested, declared an enemy combatant, and held incommunicado in a military brig because President Bush perceived him to be a terrorist threat.⁷ During the several years that the federal courts pondered over Padilla’s due process rights, he was never charged with an actual crime or afforded a realistic method to prove his possible innocence. This article will demonstrate that Padilla should have been immediately released from military detention or criminally charged, because neither the Constitution nor Congress gave the President authority to detain a United States citizen in such a manner.

In order to explain the due process violation, this article will present the background of Padilla’s case and the applicable legal standards. The facts of Padilla’s case and similar cases will then be analyzed under these standards, and this article will ultimately show that the President did not have the constitutional authority to detain Padilla under indefinite military custody as an enemy combatant.

⁴ U.S. CONST. amend. V.

⁵ ‘Incommunicado’ refers to a situation where one is without the means or right of communicating with others. In this case, Padilla was unable to speak with his lawyer or any other friends or family members; therefore, he was denied access to conventional forms of due process.

⁶ U.S. CONST. amend. V.

⁷ *Padilla v. Rumsfeld (Padilla I)*, 352 F.3d 695, 700 (2nd Cir. 2003), *cert. granted*, 540 U.S. 1173, *rev’d and remanded*, 159 L. Ed. 2d 513 (2004), *writ granted sub nom Padilla v. Hanft*, 2005 U.S. Dist. Lexis 2921 (D.S.C.), *rev’d*, 2005 U.S. App. Lexis 19465 (4th Cir. 2005).

FACTS OF THE CASE

Undisputed Facts

On September 11, 2001, Americans were awakened by news of a monumental terrorist attack on home soil. That morning, four planes destined for Los Angeles and San Francisco were hijacked by nineteen terrorists who are now known to have ties with al Qaeda.⁸ Two of the hijacked planes crashed into the North and South towers of the World Trade Center in New York City, another crashed into the Pentagon, and the last plane crashed in a remote area in Pennsylvania.⁹ Part of the Pentagon building caught fire, and both World Trade Center towers collapsed. The location once occupied by the World Trade Center is now a memorial where Americans come to mourn the events of that shocking day.

Approximately 3,000 people were killed in the events of 9/11.¹⁰ Later that day, President Bush addressed the nation and said, “Make no mistake, the United States will hunt down and punish those responsible for these cowardly acts.”¹¹ The 9/11 Commission, which was formed to investigate the events and persons involved with the attacks, concluded that al Qaeda was responsible.¹²

On May 8, 2002, an American citizen named Jose Padilla arrived at Chicago’s O’Hare International Airport on a flight from Pakistan. He was arrested by FBI agents, pursuant to a material witness warrant related to a grand jury investigation on the events of 9/11. Padilla had no weapons with him when he was arrested. After the arrest in Chicago he was taken to New York’s Metropolitan Correctional Center and held under maximum security. At that point, the judges of the Second Circuit Court of Appeals maintained that “any immediate threat he posed to national security had effectively been

⁸ *September 11: Chronology of Terror*, CNN, Sep. 12, 2001, <http://archives.cnn.com/2001/US/09/11/chronology.attack/>. Al Qaeda is an Islamic organization that seeks to influence nations by means of terrorism. This group was founded by Osama Bin Laden. Lawrence Wright, *The Master Plan: For the new theorists of Jihad Al Qaeda is just the Beginning*, *The New Yorker*, Sept. 11, 2006.

⁹ *September 11: Chronology of Terror*, *supra*.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

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neutralized.” Donna R. Newman was appointed as Padilla’s attorney and saw him sporadically over a period of weeks.¹³

Padilla’s relocation to New York was the first event in a series that led to his current detention in a naval brig in South Carolina. Shortly after Padilla’s transfer to New York, President Bush issued his “June 9th Order,”¹⁴ labeling Padilla an ‘enemy combatant.’ This terminology is used for a person viewed as a threat to national security. President Bush directed the Secretary of Defense, Donald Rumsfeld, to take Padilla into custody, and Padilla was immediately transported to a naval brig in South Carolina without Ms. Newman’s knowledge.¹⁵ Ms. Newman sought a writ of habeas corpus demanding his release. She filed her motion for the writ in New York, just after attending a status conference there and learning about the events that had transpired.¹⁶ Padilla had no contact with his family, or his attorney, once he had been placed in the South Carolina military brig.¹⁷ During his detention, Padilla was constantly interrogated regarding al Qaeda.¹⁸

The issue discussed in this article is whether President Bush’s military detention of Padilla is constitutional. A long stream of litigation between Padilla and the federal government has ensued. Padilla’s original motion for habeas corpus had been filed on his behalf in the United States District Court for the Southern District of New York. The presiding district court judge ruled

¹³ *Padilla I*, 352 F.3d at 700.

¹⁴ See “June 9th Order” in Appendix.

¹⁵ *Padilla I*, 352 F.3d at 700.

¹⁶ *Id.* at 700. A writ of habeas corpus is “an extraordinary writ issued upon a petition challenging the lawfulness of restraining a person who is imprisoned or otherwise in another’s custody.” It is “a writ issued from a superior court to an inferior court requiring that a defendant be produced along with the cause for which the defendant has been taken and held.” *Habeas Corpus*, FindLaw, (1996), <http://dictionary.lp.findlaw.com/> (Search the Legal Dictionary for “Habeas Corpus”).

¹⁷ *Padilla I*, 352 F.3d at 700; Since February of 2004, the military has allowed Padilla access to counsel “subject to appropriate security restrictions.” The Department of Defense emphasizes that this access to counsel is an exception, and is not required under international law or under laws of war, and as such, should not be considered precedent. *Padilla Allowed Access to Lawyer*, United States Department of Defense News Release, Feb. 11, 2004, <http://www.defenselink.mil/releases/2004/nr20040211-0341.html>.

¹⁸ *Padilla I*, 352 F.3d at 700.

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that his military detention was constitutional.¹⁹ Padilla then appealed that decision to the Second Circuit Court of Appeals, which held that he must be criminally charged or released.²⁰ Donald Rumsfeld, U.S. Secretary of Defense and named respondent to the case, then appealed to the United States Supreme Court. The Supreme Court dismissed the case on the grounds that the motion for a writ of habeas corpus had been filed in the wrong jurisdiction. Since Padilla had been moved to South Carolina, the Court ruled the original motion should have been filed there (instead of New York).²¹ The Court also held that Hanft, the Commander of the Consolidated Naval Brig in South Carolina, was the proper respondent to the motion for a writ of habeas corpus, rather than Rumsfeld.²²

Padilla's legal team re-filed the motion for a writ of habeas corpus in South Carolina, and the district court there held that he must be criminally charged or his detention would be unconstitutional.²³ Commander Hanft then appealed to the Fourth Circuit Court of Appeals, which reversed the lower court's ruling and approved Padilla's detention.²⁴ This entire process took almost four years. Padilla's attorney, Ms. Newman, stated at the time that she expected the case would once again be appealed to the Supreme Court.²⁵

Essential to the Fourth Circuit's ruling was the allegation that Padilla was associated with Al Qaeda, an Islamic Fundamentalist organization originating during the Soviet War in Afghanistan in 1988.²⁶ Founded by Osama Bin Laden, al Qaeda's goals are believed to include restoration of the

¹⁹ *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

²⁰ *Padilla I*, at 695.

²¹ *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004).

²² *Id.* at 436-37. The Supreme Court actually held that Commander Marr was the proper respondent; however, Commander Marr had recently been succeeded by Commander Hanft. *Padilla v. Hanft*, 2005 U.S. App. Lexis 19465 (4th Cir. 2005).

²³ *Padilla v. Hanft*, 2005 U.S. Dist. Lexis 2921 (D.S.C. 2005).

²⁴ *Padilla v. Hanft (Padilla II)*, 2005 U.S. App. Lexis 19465 (4th Cir. 2005).

²⁵ Email from Leah Tudan, UC Irvine, regarding an interview with Donna Newman who said she was "still petitioning to be heard by the Supreme Court" at that time (Oct. 23, 2005, 05:50 pm PST) (on file with author).

²⁶ Wright, *supra*.

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Caliphate²⁷ and work with other Islamic extremist groups to combat Western influence.²⁸ On February 23, 1998, Osama Bin Laden issued a directive under the organization's name that pronounced, "to kill Americans and their allies, civilians, and military is an individual duty of every Muslim who is able." Al Qaeda has since been linked to a number of terrorist attacks, including the 9/11 attacks in New York and Washington, the 1998 embassy bombings in Kenya and Tanzania, the attack on the U.S.S. Cole, and the July 7, 2005 London bombings.²⁹

Alleged Facts

Many of the governmental actions and court rulings in the Padilla case are also based upon alleged facts that Padilla might still dispute if given the chance. The June 9th Order issued by President Bush directed Secretary of Defense Rumsfeld to detain Padilla as an enemy combatant. The Order describes Padilla as "closely associated with al Qaeda," one who "engaged in conduct that constituted hostile and war-like acts," one who "possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States," and one who "represents a continuing, present and grave danger to the national security of the United States [such] that detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States."³⁰

²⁷ The word 'Caliph' is used to describe the leader of the Muslim community. The first few caliphs that succeeded Mohammad were killed by Muslim followers who had divided into two sects. These sects, the Sunni and Shiites disagreed about who the next leader, or caliph should be. This disagreement still is a tenet of these sects today and has resulted in war. Review of *Heirs of Muhammad; Islam's First Century and the Origins of the Sunni-Shia Split*, Kirkus Reviews (Nov.15, 2006) <http://web.lexis-nexis.com/universe/document> (last visited December 18, 2006).

²⁸ Wright, *supra*. Al Qaeda, which means "the base," is only a name used in popular culture to refer to the organization, while the official name for Bin Laden's organization is the International Front for Jihad against the Jews and Crusaders. The term 'Jihad' has two definitions, it can be used to describe a Muslim holy war or a crusade or struggle. It is derived from the word *jahada* meaning "to strive." American Heritage Dictionary (4th Edition 2000).

²⁹ Wright, *supra*.

³⁰ George W. Bush, *June 9th Order* (June 9, 2002), reprinted in Appendix.

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Many of the President's allegations were based on a document referred to as the "Mobbs Declaration," drafted by Michael H. Mobbs, a special advisor to the Under Secretary of Defense for Policy. Mobbs did not claim firsthand knowledge to everything asserted within his declaration; some of the information was gathered from others in the course of his official duties.³¹ Mobbs had headed the Detainee Policy Group since February of 2002, and had been "substantially involved with matters related to the detention of enemy combatants in the current war against the Al Qaeda terrorists...."³²

According to the Mobbs Declaration, Padilla was born in New York, involved in gang activity, and served time in his youth for murder and handgun possession. He later moved to Egypt, and traveled to Pakistan, Saudi Arabia, and Afghanistan. At that time, Mobbs declared that Padilla was "closely associated with known members and leaders of the Al Qaeda terrorist network."³³ Furthermore, the declaration stated that:

Padilla met with senior Usama Bin Laden lieutenant Abu Zubaydah. Padilla and an associate approached Zubaydah with their proposal to conduct terrorist operations within the United States. Zubaydah directed Padilla and his associate to travel to Pakistan for training from Al Qaeda operatives in wiring explosives.³⁴

The declaration alleged that Padilla planned to "build and detonate a 'dirty bomb'" within the United States.³⁵ This information contributed to the President's belief that Padilla qualified as an enemy combatant (i.e., a threat to national security) when he returned to the United States.

³¹ Mobbs "claim[ed] no direct knowledge of Padilla's actions or of the interrogations that produced the information discussed in his declaration." *Padilla I*, 352 F.3d at 700.

³² Defense Department, Mobbs Decl. (Aug. 27, 2002).

³³ *Id.*

³⁴ *Id.* Though 'Osama' is generally spelled with an 'O,' it also sometimes begins with a 'U.' Since Middle Eastern alphabets are not Roman, the decision over which vowel to use in the English translation has not been agreed upon.

³⁵ *Id.* The principle type of dirty bomb combines a conventional explosive, such as dynamite, with radioactive material. In most instances, the conventional explosive itself would have more immediate lethality than the radioactive material. If this material dispersed in the air, several city blocks could become contaminated. *Fact Sheet on Dirty Bombs*, U.S. Nuclear Regulatory Commission, 06/12/2006, <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/dirty-bombs.html>.

LEGAL STANDARD

General Legal Standards

Very few legal precedents are directly controlling in Padilla's case. The following legal standards all have some potential significance when it comes to determining his constitutional rights.

United States Constitution

The United States Constitution could be a very important source that authorizes President Bush's detention of Padilla, for if the Constitution specifically approves the President's action, that power is generally undisputed.

Article II, Section 2 of the United States Constitution states that "the President shall be Commander in Chief of the Army and Navy of the United States." That section continues: "he shall have Power, by and with the Advice and Consent of the Senate, to make Treaties [and] appoint Ambassadors."³⁶ From this, it is generally agreed that the Framers meant for the President to have command over the armies, and perhaps even broad power over foreign relations.³⁷

The major question regarding the President's authority stemming from the United States Constitution is whether any such foreign relations power includes the power to declare a United States citizen an enemy combatant, and then detain that citizen in a military brig.

Youngstown Sheet & Tube Company v. Sawyer

The *Youngstown Steel* case revolved around collective bargaining between steel manufacturers and their employees during the Korean War. American steelworkers and their employers reached a deadlock and no

³⁶ U.S. CONST. art. II, § 2.

³⁷ In *Curtiss-Wright*, for instance, the Court determined that the President did not need to rely on a Congressional act to control the sale of weapons to a foreign nation because the President possessed the power to regulate the sale of arms under "broad foreign relations power" that emanates from the other powers (such as "commander in chief" and "treaty making") expressly granted to the President in Article II of the Constitution. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).

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intervening measures could rectify the situation. The employees' representative gave notice of an impending strike. President Truman then ordered the Secretary of Commerce to take possession of the steel mills and keep them running, by whatever means necessary, to ensure continued production of steel for weapons and other war materials.³⁸ Because the United States was involved in the Korean conflict without a formal declaration of war, the Article II Commander-In-Chief power was not sufficient to justify the President's action on its own.

Youngstown Steel raised the issue of whether President Truman acted within his constitutional authority when he seized *domestic* steel mills to keep them operating. The Court reasoned that if Truman's order was constitutional, the authority must have come from either the Constitution or Congress. Congress had previously considered adding private property seizure to the labor laws as an Executive tool, but that mechanism never gained enough support and the proposal was dropped. Thus, the right of the Executive to seize private property to settle a domestic labor dispute did not come from Congress. The Court also found that there was no language in the Constitution giving the President this authority over domestic seizure, so his seizure order was found unconstitutional.³⁹ The concept that the President's power must come from either the Constitution or Congress is a crucial precedent set in this case.

The concurring opinion by Justice Jackson in *Youngstown Steel* is also of interest, for it lays out a useful categorical approach to assessing potential sources for Presidential authority. The categories are as follows: (1) the President may act pursuant to an authorization of Congress, in which his powers are maximal to the extent allowed to the federal government; (2) the President may act under some circumstances (not specified in Justice Jackson's concurrence) when it is unclear whether Congress agrees; and (3) if the President takes action against the will of Congress, he must rely on his own Constitutional power, less any Congressional authority regarding the matter.⁴⁰ Thus, in *Youngstown Steel*, the President's seizure fell into the third category, because Congress had declined to empower the Executive with domestic seizure authority to resolve labor disputes, and therefore he lacked the authority to regulate the domestic activities of the steel mills.

³⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-83 (1952).

³⁹ *Id.* at 582-87.

⁴⁰ *Id.* at 636-37 (Jackson, J., concurring).

Because Justice Jackson’s framework will also be necessary to understand the relationship between Congress and the President in the Padilla case, the following chart is provided as a visual representation of this framework:

CATEGORY ONE <i>Congress expressly supports the President</i>	CATEGORY TWO <i>Congress remains silent on the issue</i>	CATEGORY THREE <i>Congress expressly disagrees</i>
President acts pursuant to a Congressional grant of authority	Congress is silent on the issue	President acts against the express will of Congress
↓	↓	↓
President can rely on own constitutional authority as well as any Congressional authority properly delegated by Congress ⁴¹	Creates a “zone of twilight” that will require further analysis	President must rely on own constitutional authority derived from Article II of the Constitution ⁴²

⁴¹ The requirement of “properly delegated” authority from Congress to the President was highlighted in the case of *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In this case, Congress had issued the National Industrial Recovery Act [NIRA], which in turn delegated to the President Roosevelt the authority to create “codes of fair competition” for various domestic industries. Because the NIRA did not provide “clear standards” for creation of these codes, the Supreme Court ruled that the power delegated by Congress was too broad to be sustained under the American constitutional system. At the federal level, Article I of the Constitution specifies that Congress (rather than the President) shall “make laws.” The *Schechter* case stands for the proposition that Congress cannot give the President “unfettered discretion” when attempting to delegate domestic regulatory authority. The case further stands for the proposition that if Congress has no “federal” authority to regulate at all (as was the case in *Schechter* due to an insufficient link to interstate commerce), then Congress cannot authorize the President to do so either. *Schechter Poultry*, 295 U.S. 495-542.

⁴² *United States v. Curtiss-Wright Exp.* is an example of a “Category Three” case because the Court found that the President had his own power to ban arms sales to Bolivia as part of the “broad foreign relations power” emanating from Article II of the Constitution. Thus, the President could have acted even without the support of Congress. *Curtiss-Wright*, 299 U.S. 304.

The Non-Detention Act

Legislated in 1971, the federal Non-Detention Act states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”⁴³ The Non-Detention Act was created to void the pre-existing Emergency Detention Act of 1950.⁴⁴ The Emergency Detention Act, which allowed for Executive detention in times of national crisis, had fallen out of favor due to its association with the internment of Japanese-Americans during World War II.⁴⁵ Because Padilla is a United States citizen, the Non-Detention Act would prohibit his detention in military custody. However, a specific “Act of Congress” could intervene and allow his detention. The Joint Resolution for Authorization of Use of Military Force could be that very “Act of Congress.”

The Joint Resolution for Authorization for Use of Military Force

The Joint Resolution for Authorization for Use of Military Force (AUMF) was created just after the 9/11 attacks on the United States, giving the Executive extra power in light of the national security situation.⁴⁶ The AUMF states:

The 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, 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.⁴⁷

President Bush relied on the AUMF as authorization for his military detention of Padilla and used this act of Congress to classify Padilla as an enemy combatant.

⁴³ 18 U.S.C. § 4001(a) (2000).

⁴⁴ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004).

⁴⁵ *Id.*

⁴⁶ *Padilla*, 389 F. Supp. 2d at 682.

⁴⁷ Joint Resolution for Authorization for Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224 (Sept. 18, 2001).

The debate here is whether the AUMF does indeed authorize detention of United States citizens as enemy combatants, and whether Padilla fits into this description. Notably, the AUMF itself provides only general answers in this regard, leaving much open to judicial (and arguably Executive) interpretation.

Application of Legal Standards in Other Cases

Hamdi v. Rumsfeld

The *Hamdi* case involved a United States citizen, Yaser Hamdi, who was detained as an enemy combatant shortly before Padilla. Hamdi was a United States citizen living in Afghanistan. He traveled to Afghanistan in July or August of 2001. The government alleged that Hamdi was affiliated with the Taliban during the War in Afghanistan. He remained with his Taliban Unit following 9/11, and was captured in Afghanistan by United States allies. The government contended that he was an enemy combatant because he was “‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and ‘engaged in armed conflict against the United States.’”⁴⁸ Hamdi’s father sought a motion for a writ of habeas corpus and claimed that Hamdi had merely been trapped in Afghanistan while doing “‘relief work.’”⁴⁹

Hamdi was detained, incommunicado, in a military brig and was unable to speak with family, friends, or legal counsel. He was detained indefinitely without due process, though the Supreme Court majority ultimately held that he had the right to counsel and to contest the factual allegations against him before a neutral party.

The Court used the Non-Detention Act as the applicable legal standard, which states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”⁵⁰ The United States Government relied upon the AUMF as an arguable congressional exception to the Non-Detention Act, thereby providing authority to detain Hamdi. The Supreme Court majority agreed that a citizen taking up arms against U.S. allies abroad could be deemed an enemy combatant under the scope of the AUMF.⁵¹

⁴⁸ *Hamdi*, 124 S.Ct. at 2639.

⁴⁹ *Id.*

⁵⁰ 18 U.S.C. § 4001(a) (2000).

⁵¹ *Hamdi*, 124 S.Ct. at 2639-40.

The Court then considered whether, in these “narrow circumstances,” President Bush had authority to detain Hamdi. Because the fighting in Afghanistan was ideologically connected to the War on Terror, the Court found that the AUMF applied. Since the act of detaining an individual is done to prevent that individual from returning to battle, the Court concluded that Hamdi’s detention was necessary to prevent Hamdi from again taking up arms against allies of the United States.

Even though his detention was considered an indefinite detention, the Court determined that Hamdi would need to be released as soon as hostilities ended, because the fighting in Afghanistan was not open-ended like the War on Terror. Also, even though the AUMF does not authorize indefinite detention, detaining individuals taking up arms against the United States is “necessary and appropriate force” and authorized by the AUMF. In reviewing these considerations, the Court held that Hamdi’s detention was constitutional; however, the Court also held that he should be given the chance to meet with counsel and rebut the government’s statement of facts before a neutral party.⁵²

Application of Legal Standards in Padilla’s Case

Padilla v. Rumsfeld (Padilla I)

Padilla I was argued before the Second Circuit Court of Appeals. In this opinion, the Court began with a discussion of the precedent set in *Youngstown Steel*. The Court found that the President’s authority to detain a United States citizen in the domestic setting must come from either the Constitution or Congress. Article II of the United States Constitution provides the President with the authority as Commander-in-Chief; however, the Court reasoned that this power does not give the President authority to detain a citizen militarily. Even “times of grave national security threats or war” do not justify the President assuming that authority outside the military sphere. Therefore, the Second Circuit held that Article II of Constitution cannot be used, alone, as a source of authority for Padilla’s detention.

⁵² *Id.* at 2635-60. Since *Hamdi v. Rumsfeld* was heard by the Supreme Court, the government has made a deal with Hamdi. Hamdi was released from custody in exchange for renouncing his U.S. citizenship and promising not to take up arms against the U.S. or return to the United States for at least ten years. Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. Nat’l Security L. & Pol’y 73 (2005).

The Court then described the *Youngstown Steel* concurrence and discussed Justice Jackson's three categories of Presidential authority. The Court placed President Bush's actions in Category Three, in which the President acts incompatibly with Congress. The Non-Detention Act denies authority to the President to detain any United States citizen, and the Court concluded that the AUMF does not allow President Bush that authority because it contains no language authorizing detention.⁵³ The Court held that President Bush's detention of Padilla is unconstitutional and unlawful, and that Padilla must be released from military detention or criminally charged.⁵⁴

Donald Rumsfeld appealed to the Supreme Court, which dismissed the entire case on the grounds that the motion for a writ of habeas corpus was filed in the wrong jurisdiction, and should be re-filed in South Carolina.⁵⁵ The Court also held that Hanft, the Commander of the Consolidated Naval Brig in South Carolina, was the proper respondent to the writ of habeas corpus, and not Rumsfeld.⁵⁶ Padilla re-filed the motion for a writ of habeas corpus in South Carolina, and the district court there held that Padilla must be criminally charged, or his detention is unconstitutional.⁵⁷ Commander Hanft then appealed to the Fourth Circuit Court of Appeals.⁵⁸

Padilla v. Hanft (Padilla II)

Padilla II is Padilla's most recent case (as of this writing) and was argued before the Fourth Circuit Court of Appeals. Based on the *Hamdi* ruling, the Fourth Circuit Court held that an enemy combatant is any individual who is "part of, or supporting forces, hostile to the United States [who] engaged in an armed conflict against the United States" and the capture and detention of which is necessary to prevent the combatant from returning to the battlefield. The Court held that Padilla unquestionably qualifies as an enemy combatant

⁵³ *Padilla I*, 352 F.3d at 711-12.

⁵⁴ *Id.* at 724.

⁵⁵ *Rumsfeld v. Padilla*, 542 U.S. 426, 442.

⁵⁶ *Id.* at 436-37. The Supreme Court actually held that Commander Marr was the proper respondent, however Commander Marr had recently been succeeded by Commander Hanft. *Padilla v. Hanft*, 2005 U.S. App. Lexis at 19465 (4th Cir. 2005).-

⁵⁷ *Padilla v. Hanft*, 2005 U.S. Dist. Lexis 2921 (D.S.C., 2005).-

⁵⁸ *Padilla v. Hanft (Padilla II)*, 423 F.3d 386 (4th Cir. 2005).

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because Padilla was allegedly engaged in supporting forces hostile to the United States, and because the President determined that detaining him was necessary to prevent him from continuing to do so.⁵⁹—

After the Fourth Circuit determined that Padilla qualified as an enemy combatant, the Court addressed whether the Executive has the authority to *detain* a United States citizen who qualifies as an enemy combatant. The Government contended that the President is both constitutionally and statutorily authorized to detain citizens as enemy combatants. The Government utilized the President’s authority as Commander-in-Chief as grounds for this assertion, stating that the President is responsible for preventing international acts of terrorism.⁶⁰ Furthermore, the Government argued that the AUMF explicitly authorizes Executive detention in this manner because it states that the President is authorized to use “all necessary and appropriate force.”⁶¹ The Government argued that since the President is acting within the express will of Congress, the President’s authority is maximal.⁶² The Fourth Circuit agreed with the Government regarding the President’s authority from the AUMF, but did not discuss the authority of the President as Commander-in-Chief as a separate source of detention power.

To show that the AUMF authorizes Executive detention, the Fourth Circuit likened Padilla to Hamdi, in that both are United States citizens, both were detained as enemy combatants pursuant to the AUMF, and both had alleged affiliation with forces hostile to the United States. Because the Supreme Court majority had held that Hamdi’s detention was constitutional, the Fourth Circuit reasoned that Padilla’s detention is therefore authorized by the AUMF as well.⁶³

Padilla argued that his case is not analogous to *Hamdi* because the location of capture of each differs since Hamdi was captured in Afghanistan while in possession of a weapon and Padilla was taken into custody in Chicago with no weapon. The Fourth Circuit did not agree that this is a significant difference. Instead, the court held that the narrow questions addressed in *Hamdi*

⁵⁹ *Padilla II*, 423 F.3d at 391.

⁶⁰ Petr.’s Br. 27, March, 2004

⁶¹ *Id.*; 18 U.S.C. § 4001(a) (2000).

⁶² Petr.’s Br. 38, March, 2004., citing *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

⁶³ *Padilla II*, 423 F.3d at 390-91.

did not concern locus of capture.⁶⁴

The Fourth Circuit's opinion was fairly short and did not delve into the previously mentioned cases as the prior Second Circuit Court opinion had done. Furthermore, the Fourth Circuit seems to have misinterpreted or misunderstood the Joint Appendix of Stipulated Facts. The Joint Appendix of Stipulated Facts can be found in the Memorandum Opinion and Order from the Fourth Circuit, and merely retells the events of the day of Padilla's arrest. The Fourth Circuit seemed to interpret the Stipulated Facts as an admission by Padilla that he is involved with al Qaeda,⁶⁵ but such an admission is not included there.

ANALYSIS

Neither Congress nor the United States Constitution authorized President Bush to militarily detain United States citizens. This analysis will address: (i) the legislative history of the Non-Detention Act, (ii) the unacceptability of the AUMF as an exemption to the Non-Detention Act, and (iii) the Supreme Court's misapplication of the AUMF to the Non-Detention Act. Secondly, it will be shown that the Constitution and the Framers' Intent was not to give this detention power to the President. As the argument progresses, the Fourth Circuit's opinion and express analogy between *Hamdi* and *Padilla* will be proved invalid.

Neither Congress nor the United States Constitution provided the President with the authority to detain Padilla. According to *Youngstown Steel*, the President must get his power from either the United States Constitution or Congress.⁶⁶ Using Justice Jackson's concurring opinion as a model, it will be argued that *Padilla* must be placed under Category Three, where the President takes "measures incompatible with the express or implied will of Congress,"⁶⁷ because he acted in contravention to the Non-Detention Act. As such, "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."⁶⁸

⁶⁴ *Id.* at 393-94.

⁶⁵ *Id.* at 390.

⁶⁶ *Youngstown*, 343 U.S. at 585.

⁶⁷ *Id.* at 637 (Jackson, J., concurring).

⁶⁸ *Id.*

*Congress does not support the President's Detention of Jose Padilla
in light of the Non-Detention Act*

The clause in the Non-Detention Act providing that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress” is explicit and unambiguous in its meaning. The legislative history behind this act exhibits the clear intention of Congress to prevent the President from detaining United States citizens during war-time. The AUMF does not constitute the necessary exemption to the Non-Detention Act.

To use Justice Jackson’s concurrence in *Youngstown Steel* as a framework, Congress did not want remain silent on the issue of citizen detention, so this case cannot fall within Category Two,⁶⁹ referred to by Justice Jackson as the “zone of twilight” where it is difficult to measure the extent of presidential authority. Instead, the case belongs in Category Three, where the President’s power is at its “lowest ebb,” because the President is acting against the express will of Congress if he detains a citizen in military custody. The legislative history of the Non-Detention Act, which was meant to remove any detention authority that existed under its predecessor, the Emergency Detention Act, clarifies that Padilla’s detention is an act against the express will of Congress. Unless and until Congress directs otherwise, United States citizens are not to be detained, indefinitely and incommunicado, in military custody.

Furthermore, the AUMF does not constitute the necessary exemption to the Non-Detention Act. Although the AUMF represents the will of Congress, it does not fit as the necessary Congressional exception to the Non-Detention Act. The AUMF does not authorize Executive detention of United States citizens, it does not apply to Padilla in any way, and it does not include clear and distinct provisions for authorizing Executive action of this sort.

According to the precedent set in *A.L.A. Schechter Poultry Corporation v. United States*,⁷⁰ any Act passed by Congress giving the President regulatory

⁶⁹ See the visual representation of Justice Jackson’s categorical framework in the preceding discussion of the *Youngstown Steel* case.

⁷⁰ The National Industrial Recovery Act [NIRA] was held to be an unconstitutional attempt at delegation of regulatory authority from Congress to the President in the *Schechter Poultry* case. According to the Supreme Court, Congress could not give President Roosevelt wide discretion to create “codes of fair competition” for trades and industries, because the NIRA set “no intelligible policies to govern the President, no standards to guide and restrict his action, and no procedure for making determinations

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authority must be accompanied by clear and distinct standards for the President's actions.⁷¹ The AUMF contains no mention of the President's authority to detain United States citizens. Because this standard does not exist within the AUMF, it cannot be said to authorize any detention of United States citizens. The Constitution explicitly provides Congress with all legislative authority. To transfer this authority to the President, without regard to the precedent set in *Schechter Poultry*, is unconstitutional. If Congress had indeed intended to give this authority to the President, then Congress must heed *Schechter Poultry*, and provide specific language that authorizes Executive detention, rather than just military 'force.' Under the current circumstances, military 'force' does not encompass Executive detention of United States citizens, and since the AUMF contains no mention of 'detention,' it cannot authorize Padilla's captivity.

Further, by its very terms, the AUMF does not apply to Padilla's case. The AUMF applies *only* to those who were directly involved in the 9/11 attacks. The AUMF specifically states that the President is authorized to use force "against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."⁷² This explicitly provides that the AUMF applies to only those involved with those attacks. The timing of the AUMF fully reflects Congress' resolution that the AUMF applies to those involved with 9/11 because the AUMF was passed days after the 9/11 attacks.

The AUMF cannot apply to Padilla because his case does not allege that he was involved with 9/11, and his case must be considered only on the facts of his specific situation. The government neither alleges nor contends that Padilla "planned, authorized, committed, or aided [the 9/11] terrorist attacks."⁷³

in conformity with due process of law." The Court maintained that Congress is not permitted to transfer this legislative responsibility without very clear standards. Further, the Court reasoned that even extraordinary conditions do not create or enlarge constitutional power. *Schechter Poultry*, 295 U.S. 495-542. From this, we can see that even if Congress *did* attempt to delegate the authority to detain citizens to the President, that delegation of authority (through the AUMF) would *not* be constitutional unless in included very clear standards rather than "unfettered Executive discretion."

⁷¹ *Id.* at 541.

⁷² Joint Resolution for Authorization for Use of Military Force, Pub. L. No. 107-41, §2(a), 115 Stat. 224 (Sept. 18, 2001).

⁷³ See *id.* for the source of the quoted language.

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There are no references to Padilla's involvement with 9/11 in either the President's June 9th Order or the Mobbs Declaration.⁷⁴ If the government does not allege that Padilla had any specific involvement with the actual events of 9/11, then the terms of the AUMF cannot be used to justify his detention.

Lastly, since the AUMF does not provide clear standards for the President's actions, it should not be used to justify detention of *any* American citizen, including one in Hamdi's situation (captured abroad), until it has been revised under the guidelines set in *Schechter Poultry*. In *Schechter*, the Supreme Court held that the NIRA contained "no intelligible policies to govern the President, no standards to guide and restrict his action, and no procedure for making determinations in conformity with due process of law."⁷⁵ The AUMF should be treated similarly because it sets no standards for the kind of military force authorized by the President.

The NIRA authorized President Roosevelt to create "codes of fair competition" for trades and industries.⁷⁶ Doing this essentially gave a 'blank check' to the President to create whatever standards he desired. In the same vein, the AUMF would give a 'blank check' to the President to utilize military force without any restraints as to the type of force used, or to what degree. Because the AUMF so closely resembles the standardless NIRA, which was deemed unconstitutional by the Supreme Court, the AUMF is unconstitutional as it stands today. To validate the AUMF, Congress must revise it to provide distinct standards for the President's action.

The Supreme Court misinterpreted the AUMF in its opinion in *Hamdi v. Rumsfeld*. The Court described the AUMF as "[authorizing] the President to use 'all necessary and appropriate force' against 'nations, organizations, or persons' associated with the September 11, 2001, terrorist attacks."⁷⁷ The difficulty in this description is the word "associated." It is this inappropriate use of this word "associated" that has caused the Supreme Court to inappropriately conclude that the AUMF is an acceptable exemption to the Non-Detention Act.

⁷⁴ Editors' Note: There are also no charges against Padilla for being involved in 9/11 in the eventual criminal indictment that was filed against him on November 17, 2005. In the indictment, Padilla was charged with conspiring to murder, kidnap, and maim persons. See <http://news.findlaw.com/nytimes/docs/padilla/uspadi11705ind.pdf>.

⁷⁵ *Schechter Poultry*, 295 U.S. at 495.

⁷⁶ *Id.* at 521.

⁷⁷ *Hamdi*, 124 S. Ct. at 2640 (emphasis added).

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The Court then held that “there can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.”⁷⁸ In this excerpt, the Court is reasoning that since Congress sought to target those responsible for the 9/11 attacks in passing the AUMF, then naturally Congress sought to target Al Qaeda associates, because the 9/11 Commission has found Al Qaeda responsible for the attacks. The Court then reasons that because Padilla is *associated* with Al Qaeda, it can be concluded that Padilla is *associated* with the 9/11 attacks.

The AUMF has been shown to explicitly limit its application to those who “[the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001....” The AUMF does *not* explicitly mention those *associated* with 9/11.

Because the Supreme Court has misinterpreted the AUMF to apply to those *associated* with the 9/11 attacks, it becomes clear why several of the Justices would have also concluded that the AUMF must apply to Padilla. Indeed, if Congress worded the AUMF to target those “*associated* with the September 11, 2001, terrorist attacks,” then such logic might be justified. However, because “associated” is not the wording used in the AUMF, this reasoning is inappropriate.

*The President’s authority as Commander in Chief does not apply to
Domestic Affairs, even during Wartime*

The President has authority over foreign affairs according to the structure of Article II of the Constitution as well as the precedent set in *Curtiss-Wright Corporation v. United States*.⁷⁹ Article II states that “the President shall

⁷⁸ *Id.*

⁷⁹ In *Curtiss-Wright*, Congress passed a Joint Resolution allowing the President to determine whether weapons could be sold to parties within nations involved in violent conflict. If the President decided that not selling weapons would promote peace then he could ban their sale. Because the Court found that the President already had a “broad foreign relations power” emanating from Article II of the Constitution, it was unnecessary for Congress to delegate the authority to do so, and yet, the President’s action was deemed constitutional. *See, e.g., Curtiss-Wright*, 299 U.S. 304.

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be Commander in Chief of the Army and Navy of the United States.”⁸⁰ That section continues: “he shall have Power, by and with the Advice and Consent of the Senate, to make Treaties [and] appoint Ambassadors.”⁸¹ Moreover, the Supreme Court in *Curtiss-Wright* reasoned that the President holds the Nation’s broad authority over the conduct of foreign affairs.

Even so, the Court did *not* state that this Executive authority over foreign affairs should be allowed to bleed into control of domestic affairs. The Supreme Court has long recognized the necessity of separation of powers, even during periods of national emergency.⁸² In *Youngstown Steel*, Justice Jackson declared that “no doctrine that the court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed force to some foreign venture.”⁸³ In *Curtiss-Wright*, the Court held that the President’s action was *only* acceptable because it was *entirely* within the category of foreign affairs.

Padilla’s case cannot be considered within the category of foreign affairs. Using the literal translation of Article II of the Constitution, if a treaty is present in Padilla’s case, or if the President is acting as Commander-in-Chief, then Padilla’s case is within the authority of the President. No treaty is involved in this case and the President could not have been acting as Commander-in-Chief, even if the ‘War on Terror’ is taken as a literal war, because Padilla was not on a battlefield when he was detained. Moreover, since Padilla’s arrest was pursuant to a material witness warrant related to domestic legal proceedings, it must be considered a domestic affair. Since this was a domestic issue, the President did not have the authority to order the material witness warrant vacated, Padilla declared an enemy combatant, transfer of custody over Padilla to the Secretary of Defense, or final custody over Padilla by the commander of a military brig. Hence, Article II of the Constitution does not create the authority to support Padilla’s detention. Although President Roosevelt was found to have his own Article II authority to prevent weapon sales in *Curtiss-Wright*, the same logic cannot justify Padilla’s detention.

⁸⁰ U.S. CONST. art. 2, § 2.

⁸¹ U.S. CONST. art. 2, § 2.

⁸² *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring).

⁸³ *Id.* at 646.

Hamdi v. Rumsfeld is not analogous to Padilla's case

Padilla cannot qualify as an enemy combatant, even if Hamdi did, because *Hamdi* is not analogous to *Padilla*, as the Fourth Circuit argues. The Supreme Court delivered its decision regarding Hamdi based on the “narrow circumstances” of that case.⁸⁴ There are too many distinctions between the facts of *Hamdi* and *Padilla* to argue that *Padilla* is analogous in the same “narrow circumstances” that *Hamdi* embodies. The first distinction is that Hamdi was captured in Afghanistan, while allegedly armed and fighting against United States armed forces or their allies. Padilla was arrested in Chicago, was not armed, and had never (not even alleged in the Mobbs Declaration or the June 9th Order) engaged in armed combat with United States forces or allies.⁸⁵

Second, Hamdi was engaged in the geographically-defined War in Afghanistan, while Padilla is alleged to be involved in the ideologically-defined ‘War on Terror.’ The War on Terror is open-ended, unlike the War in Afghanistan. Application of the Geneva Convention is controversial with regard to the War on Terror. However, if applied, even the Geneva Convention requires that an enemy combatant be released as soon as peace follows.⁸⁶ That would have been feasible for Hamdi, but not for Padilla. In essence, Padilla could be detained throughout his lifetime, because the War on Terror could easily last that long. These distinctions make it inappropriate to view the *Hamdi* case as precedent in Padilla’s situation.

CONCLUSION

After looking at the background facts of the *Padilla* case, the June 9th Order, and the Mobbs Declaration, various legal standards were explained including the Non-Detention Act [NDA], the Joint Resolution for Authorization for Use of Military Force [AUMF], and the United States Constitution. Relevant case precedents were also examined, such as *Youngstown Steel*, *Curtiss-Wright*, *Schechter Poultry*, and *Hamdi*. Moreover, the application of the various legal standards in two opinions regarding Padilla were described.

⁸⁴ *Hamdi*, 124 S. Ct. at 2635.

⁸⁵ George W. Bush, *June 9th Order* (June 9, 2002) (reprinted in appendix to this article). See also Mobbs Decl. (Aug. 27, 2002).

⁸⁶ *Hamdi*, 124 S. Ct. at 2641.

This analysis has shown that neither the Constitution nor Congress authorized Executive detention of United States citizens, even in times of national crises. *Hamdi* is not a relevant legal standard to the Padilla case and the Supreme Court in *Hamdi* was short-sighted when it determined the AUMF to be a valid and constitutional exception to the Non-Detention Act. Looking beyond Padilla's case, the *Hamdi* opinion sets a dangerous precedent for the future. With regard to Padilla's actual case, the clear factual distinctions should be used to ensure that the *Hamdi* precedent is not applied.

It is strange that a nation so amenable to life, liberty, and freedom is completely willing to withhold these fundamental rights from a United States citizen. This oddity brings us back to the discussion of the change that the United States has gone through in the recent years. During times of national crisis, the President could have an understandable desire to reach for more power than the Constitution affords that branch of government. The Framers foresaw actions such as these, and placed the concept of separation of powers into the United States Constitution. The Framers counted on the legislative and judicial branches of our government to keep the executive branch in check. Jose Padilla's case demonstrates the danger when this careful balance is neglected. It is the responsibility of Congress, the courts, and United States citizens to guard the fundamental notions of separation of powers and due process of law that are so integral to the American way of life. Not even the understandable tension during an open-ended 'War on Terror' can justify neglect of this duty.

APPENDIX

The "June 9th Order" of 2002 was based on information regarding Padilla's background and activities while abroad, as found in a declaration by Michael H. Mobbs, the Special Advisor to the Under Secretary of Defense for Policy. The actual text of the President's order reads as follows:

THE WHITE HOUSE: WASHINGTON: FOR OFFICIAL USE ONLY
TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources,

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REDACTED

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;

(2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;

(3) Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;

(4) Mr. Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) It is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and

(7) It is REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.

DATE: June 9, 2002

Signature

/President George W. Bush