Undermining the Bill of Rights:
The Bush Administration Detention Policy

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I. Introduction

The U.S. Supreme Court is poised to hear two major challenges to the Bush Administration's detention policy in the war on terror and its designation and handling of "enemy combatants." This policy violates fundamental principles enshrined in our Constitution - such as the separation of powers and due process of law – and actually threatens progress in the war on terror and America's campaign for greater freedom and democracy around the world. These cases will define the scope of presidential powers and the Bill of Rights for years to come.

At its broadest formulation, the Administration's anti-terror policy confers on the executive branch unparalleled powers that may not be reviewed, questioned, or checked by Congress or the courts. In effect, the President and the Department of Defense claim to be the sole arbiters of due process of law for anyone they detain, including American citizens, both in the United States and around the world in the war on terrorism.

Specifically, the detention policy allows the President to designate anyone, even an American citizen arrested on American soil, as an "enemy combatant" and shields that decision and the reasons behind it from meaningful review. It presupposes that the government can deny even a U.S. citizen constitutional rights such as access to counsel and due process of law, and may detain him indefinitely in violation of U.S. law. The policy includes procedural rules for military "trials" of suspected terrorists that even U.S. military lawyers call unjust, and which would allow the government to continue to detain those found innocent. Finally, the policy – as it applies to foreign nationals being held at Guantanamo Bay, Cuba - undermines the Geneva Convention, a historic accord championed by the United States after World War II, thus rolling back decades of progress in the international law of war to the detriment of U.S. soldiers fighting abroad.

Several critical cases testing the government's use of these new powers are now being heard in the courts, including the upcoming Supreme Court hearings on challenges to the government's detention policy as to the American citizens detained as "enemy combatants" and aspects of the Guantanamo detention policy. Moreover, even while the courts have increasingly challenged the Administration's disregard of basic rights, the President has nominated the General Counsel of the Department of Defense, William Haynes, the very author of the unconstitutional policies, to one of the most influential federal appellate courts in the country. Republican Senators have voted to send the nomination to the Senate floor. The future of the separation of powers and the Bill of Rights in America are currently very much at stake.

II. Inconsistent Implementation of the Detention Policy Raises Troubling Questions

A review of the Administration's treatment of so-called "enemy combatants" reveals that even on its own terms, the Administration's conduct is inconsistent and erratic.

For example, one American "enemy combatant" named Yaser Esam Hamdi was captured by pro-U.S. Northern Alliance forces on the field of battle during the U.S. invasion of Afghanistan. Hamdi was named an "enemy combatant" by the Administration in April 2002 and has been held by the military without charge or trial ever since. John Walker Lindh, another American who

similarly was captured by pro-U.S. Northern Alliance forces with a group of Taliban soldiers in Afghanistan, has been treated much differently. Within seven months, Lindh was prosecuted through the civilian court system and allowed to plead guilty to federal criminal charges pursuant to a plea bargain. Even though Lindh admitted to training in an al Qaeda camp and meeting with Osama bin Laden, he has been serving a jail sentence in a federal prison since July 2002, while Hamdi has been held virtually incommunicado as an "enemy combatant" in a military brig for the last two years.[1]

Two other men — one a U.S. citizen named Jose Padilla and another here on a valid student visa named Ali Saleh Kahlah al-Marri[2] — were taken into custody in the United States and were designated as "enemy combatants" only after spending weeks and months inside the civilian legal system as material witnesses or suspects in criminal investigations. During that time, both men met with civilian public defenders or private attorneys with no apparent ill effect on national security or U.S. terrorism investigations.[3] However, once the men were transferred to military custody, the potential for such an impact on terrorism investigations was cited as the primary reason to bar the men from meeting with their lawyers to challenge the legality of their detentions, despite the Administration's failure to point to any real evidence to support such a claim.[4]

Further, the lone evidence cited in the detention of the two American "enemy combatants" – Hamdi and Padilla - is a pair of documents known as "Mobbs Declarations."[5] Each one consists of a statement of information from a special advisor to the Under Secretary of Defense for Policy named Michael Mobbs. In each, Mr. Mobbs states that the government has sufficient reason to believe that these U.S. citizens have committed certain undisclosed acts justifying their designations as "enemy combatants," but he fails to provide any explanation as to the substance or source of that information. In a criminal court, Mobbs' unsubstantiated statements would be excludable for their lack of evidentiary value, but they have nonetheless been offered by the government in order to justify the indefinite detention of two American citizens. There are few precedents in American history for the complete suspension of constitutional rights by the highest office of government, and none have relied on similarly unsupportable statements by a government official who lacks personal knowledge.

Viewed in the aggregate, it is apparent that the Administration's treatment of enemy combatants has been unpredictable and inconsistent, symptomatic of a policy that is not only badly flawed

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[1] Henry Schuster, "Walker Lindh: Al Qaeda spoke of more attacks," CNN.com, http://www.cnn.com/2002/LAW/10/03/walker.lindh.documents/, 10/04/02.

[2] Al-Marri is currently challenging his detention through the federal court system. He sought permission to have his case heard in Illinois, where he attended college, but on March 8, 2004, the 7th Circuit Court of Appeals denied that request, ruling that al-Marri's case must be pursued in South Carolina where he is being held incommunicado in a Navy brig. *See Al-Marri v. Rumsfeld,* 360 F.3d 707 (7th Cir. 2004).

[3] Paula Span, "Civil Liberties Aside in 'Dirty Bomb' Case," *The Washington Post*, 8/3/03.

[4] Once their cases were under consideration by the Supreme Court, the government decided to grant Padilla and Hamdi restricted access to their lawyers, though it continues to insist that the detainees have no legal right to counsel. Still, Padilla's attorney called the government's offer "far from magnanimous," commenting that the circumscribed visits she will be having with Padilla are much less than the traditional level access afforded attorneys. The government insisted that its sudden conversion — after it received several rebukes from lower court judges — was not a precedent. *See* Jerry Markon, "Terror Suspect, Attorney Meet for the First Time," *The Washington Post,* 2/04/04; Thomas E. Ricks and Michael Powell, "2nd Suspect Can See Lawyer," *The Washington Post,* 2/12/04.

[5] *See generally Padilla v. Rumsfeld,* 352 F.3d 695 (2nd Cir. 2003); *Hamdi v. Rumsfeld,* 316 F.3d 450 (4th Cir. 2003).

but also constitutionally infirm. Indeed, a recent *Newsweek* article quotes Administration lawyers as admitting that "[t]here is a sense in which we were making this up as we went along. . ." and that Administration officials considered naming more Americans as enemy combatants, including a truck driver from Ohio and a group of men from Portland, Oregon.[6]

III. Anti-Terror Detentions Rest on a Flawed Legal Foundation

The Bush Administration has attempted to justify the detentions of "enemy combatants" here and foreign nationals in Guantanamo Bay with a grab-bag of court precedents and theories. The central tenet of the policy is simple but badly flawed: During wartime, the executive branch can detain whoever it wants – even American citizens – and can deny them the right to meaningfully challenge that detention indefinitely.

However, the Administration's policy withers under closer scrutiny. In fact, the constitutional limits on the executive branch, the laws and treaties of the United States, and the principles of fundamental fairness dictate that there is no legal basis for the indefinite detention of citizens or non-citizens without charge or trial.

a. The Unlawful Detention of U.S. Citizens Contravenes Federal Law and the Constitution

Contrary to the Administration's assertion, under the current laws of this country, there is no authority of the executive branch to detain U.S. citizens on U.S. soil as "enemy combatants." Even during times of war, as the Supreme Court has repeatedly noted, the executive branch, like Congress and the courts, "possess no power not derived from the Constitution."[7] While the Constitution gives the president authority to wage war as Commander-in-Chief, the executive branch's powers are limited and balanced by authority allocated to Congress.

This careful balance is intended to protect against abuses of power and when the executive acts in direct conflict to the express or implied will of Congress, his inherent powers are diminished. This is even more true when the executive acts domestically since, as the Supreme Court wrote in *Youngstown Sheet & Tube Co. v. Sawyer*, "Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy."[8] Clearly then, the will and intent of Congress should be critical in the conduct of the war on terrorism within the borders of the United States. This exact situation is presented by the Administration's detention of U.S. citizens like Jose Padilla and Yaser Esam Hamdi on U.S. soil as "enemy combatants," an issue on which Congress has long made its will known.

In 1971, Congress passed legislation which requires specific congressional authorization for the detention of U.S. citizens. Codified in 18 U.S.C. § 4001(a), the Non-Detention Act expressly states: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

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[6] Michael Isikoff and Daniel Klaidman, "The Road to the Brig," *Newsweek*, 4/26/04.
[7] *Ex Parte Quirin,* 317 U.S. 1, 25 (1942).
[8] 343 U.S. 579, 644 (1952).

The legislative history of the Non-Detention Act suggests that Congress clearly saw it as a statutory check on the detention of U.S. citizens, even during times of military conflict. The Non-Detention Act was enacted as part of larger legislation that repealed the Emergency Detention Act of 1950 — a blanket authorization for the attorney general to detain suspected enemy agents, including Americans, during times of war. During the waning years of the Vietnam War, Congress acted to replace this open-ended authority with a limitation of executive power to protect Americans from unilateral action by the executive branch. Under the law, the president may only hold U.S. citizens if an act of Congress specifically authorizes the detentions. Many members of Congress in speaking in support of the Non-Detention Act were mindful of the nation's still-fresh detention of Japanese Americans during World War II. Congress viewed rolling back that precedent as an opportunity to chart a new course.[9]

The plain language of the Non-Detention Act has led some to point to the recent Senate Joint Resolution 23, known as the Authorization of the Use of Military Force ("AUMF").[10] For example, in *Hamdi v. Rumsfeld,* the Fourth Circuit upheld the Administration's claim that even if the Non-Detention Act precluded the executive detention of U.S. citizens without congressional authorization, the AUMF provided that authorization.[11] However, given the legislative history of the AUMF and its lack of explicit language to that effect, this holding is extremely questionable.

The AUMF was passed in the weeks after September 11, 2001 to give the president authority to use military force specifically against those who planned, committed, or aided the terrorist attacks on the World Trade Center and the Pentagon. Nowhere in its language does the AUMF authorize indefinite detentions of U.S. citizens, as required by the Non-Detention Act. No member argued that this resolution was an authorization of the president to use the military to imprison U.S. citizens within the territory of the United States for the duration of the potentially endless war on terrorism or that the AUMF met the requirement of the Non-Detention Act. There was no mention of Sec. 4001(a) at all during the debates, nor is there any mention of it in the resolution itself. In fact, there is nothing in the record at all suggesting that it was Congress' intent that the AUMF would be sufficient to meet the requirements of the Non-Detention Act. Conversely, explicit reference in the AUMF *is* made to other federal statutes, making it clear that when Congress intends for its actions to meet certain legislative requirements, it understands how to do so.

Indeed, the Second Circuit in *Padilla v. Rumsfeld* agreed and 11 months after the Fourth Circuit's decision, the *Padilla* court rejected the Administration's argument that the authorization requirement of the Non-Detention Act was met by the AUMF.[12] Thus, lacking explicit congressional approval, the court held that the executive has no authority to detain U.S. citizens arrested on U.S. soil as "enemy combatants" and ordered that Padilla be released within 30 days to allow the government to prosecute him through the criminal justice system where he would be

[9] *See Padilla v. Rumsfeld,* 352 F.3d 695 at 718-721 (discussing 117 Cong. Rec. H31542 (daily ed. Sept. 13, 1971)). Significantly, the legislation's sponsor, Congressman Thomas Railsback (R-IL), argued that where there was no specific congressional authorization of detention, the executive branch should be limited to using traditional law enforcement tools to investigate and prevent harm from potential enemy agents. The Non-Detention Act was intended to provide that check. As one member, Congressman Robert Eckhardt (D-TX), put it during the floor debate: "You have got to have an act of Congress to detain, and the act of Congress must authorize detentions."

[10] Authorization for Use of Military Force Joint Resolution, Pub.L. No. 107-40, 115 Stat. 224 (2001).

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

[12] *Padilla, supra.*

guaranteed due process of the law. The government appealed to the Supreme Court, which will hear argument in both the *Padilla* and *Hamdi* cases on April 28, 2004.

Perhaps the most troubling aspect of the Bush Administration's defense of its detention policy is its claim that its activities in this area are not even subject to review by the judiciary. This argument is completely inconsistent with the Constitution's framework of separation of powers which exists specifically to ensure that no action by any one branch of government occurs in a vacuum. As the Supreme Court stated in *Powell v. Alabama,* the courts must defend the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[13] This is no less true during wartime.

Even the *Hamdi* court - which ultimately deferred to the Administration's unsupported assertion that the indefinite detention of U.S. citizens as "enemy combatants" was necessary to national security – recognized the fundamental role of the courts during wartime. Specifically, the court said, "[o]ur forbears recognized that the power to detain could easily become destructive 'if exerted without check or control' by an unrestrained executive free to 'imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure.' . . .The duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict. . . While that recognition does not dispose of this case, it does indicate one thing: The detention of United States citizens must be subject to judicial review. . ."[14]

While the Fourth Circuit rejected Hamdi's *habeas* claim out of deference to the president's wartime powers,[15] the Second Circuit in *Padilla v. Rumsfeld* held that such deference did not preclude meaningful judicial review of the president's activities in that case, especially when the executive acts in disregard of another branch of government. The *Padilla* court said, "[t]he deference due to the Executive in its exercise of its war powers therefore only starts the inquiry; it does not end it. Where the exercise of Commander-in-Chief powers, no matter how well intentioned, is challenged on the ground that it collides with the powers assigned by the Constitution to Congress, a <u>fundamental</u> role exists for the courts."[16] Thus, not only is the Administration's detention policy subject to review by the courts, it is the proper constitutional function of the courts to do so.[17]

b. The Guantanamo Bay Detentions Violate U.S. and International Law

The Bush Administration has also argued that, in the matter of the detention of foreign nationals at Camp X-ray in Guantanamo, the courts have absolutely no jurisdiction to review its actions because the individuals are being held in an area outside of U.S. territory. Again, the assertion is

[13] 287 U.S. 45, 67 (1932) (internal quotation marks omitted).
[14] *Hamdi,* 316 F.3d at 464 (4th Cir. 2003) (citations omitted).
[15] *Id.* at 476 (suggesting that judicial inquiry stops after it is shown that capture was made in a "zone of active combat" and the government has some factual basis for the designation).
[16] *Padilla,* 352 F.3d at 713 (2nd Cir. 2003) (emphasis added).
[17] Even the dissenting judge in *Padilla* agreed that the Administration's actions with respect to Padilla were unlawful, explaining that although he believed that the Administration could detain Padilla, it must provide him with meaningful access to an attorney and an opportunity to challenge his detention. *See Padilla,* 352 F.3d at 732-733 (Wesley, J., dissenting, stating that despite government's valid concerns as to national security, Padilla has the right to be "assisted by counsel" in contesting "whether he is actually an enemy combatant thereby falling within the President's constitutional and statutory authority.").

incorrect. Simply stated, the government cannot have its cake and eat it too. The U.S. government's freedom to house troops, detainees and whatever else it wishes in Guantanamo clearly indicates that the U.S. has dominion and control over the territory.

In *Odah v. United States,* the first detainee case to reach the appellate courts, the D.C. Circuit sided with the Bush Administration and held that U.S. courts lacked jurisdiction to grant relief to Guantanamo Bay detainees.[18] Because the *Odah* court used a purely mechanical analysis which led it to conclude that "Cuba – not the United States – has sovereignty over Guantanamo Bay," it ruled that foreign nationals held there are not entitled to basic constitutional protections and cannot obtain *habeas* relief from our courts.[19]

However, nine months later, the Ninth Circuit in *Gherebi v. Bush* rejected that finding and the government's insistence that U.S. courts lack jurisdiction over Guantanamo Bay detainees.[20] The *Gherebi* court disagreed that the Supreme Court case upon which the *Odah* court relied required a finding of "sovereignty," and concluded that the U.S. had both sovereignty and territorial jurisdiction over Guantanamo Bay, either of which can serve as the basis for U.S. jurisdiction under Supreme Court precedent.

This conclusion comports with common sense. The base at Guantanamo Bay is leased from Cuba under an agreement signed in 1903. As the *Gherebi* court stated:

> The United States has exercised 'complete jurisdiction and control' over the Base for more than one century now, 'with the right to acquire ... any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.' We have also treated Guantanamo as if it were subject to American sovereignty: we have acted as if we intend to retain the Base permanently, and have exercised the exclusive, unlimited right to use it as we wish, regardless of any restrictions contained in the Lease or continuing Treaty.[21]

Moreover, under the terms of the Treaty's Supplemental Agreement of 1934, the United States exercises the exclusive right to prosecute all persons – citizens and aliens alike – who commit criminal offenses there. Given these factors, as the *Gherebi* court discusssed, the U.S. exercises exclusive territorial jurisdiction over Guantanamo Bay and "by virtue of its exercise of such jurisdiction, *habeas* rights exist for persons located at the Base."[22] The Supreme Court heard argument in the case on April 20, 2004, and a decision on these important issues is expected by this summer.

The Administration also argued in *Odah v. United States* that Guantanamo detainees have neither the rights of prisoners of war under the Geneva Convention nor the rights of individuals arrested under U.S. law.[23] In fact, it claims that the Due Process Clause of the Fifth Amendment does not

[18] 321 F.3d 1134 (D.C. Cir. 2003).
[19] *Id.* at 1143.
[20] *Gherebi v. Bush,* 352 F.3d 1278 (9th Cir. 2003).
[21] *Id.* at 1287.
[22] *Id.* at 1289.
[23] *Odah, supra.*

apply at all to individuals held in Guantanamo Bay. However, the Supreme Court in *Mathews v. Eldridge* called due process "flexible" and explained that the clause "calls for such procedural protections as the particular situation demands."[24]

In practice, U.S. courts have found in a variety of contexts that even foreign entities with no property or presence in this country are entitled to *some* due process rights before a deprivation of life, liberty or property can lawfully occur. Thus, if the Due Process Clause can protect an alien corporation with no presence in this country from having to defend itself in a U.S. court, then the clause should also be available to protect an alien individual from being detained indefinitely without any court review whatsoever.

If the interpretation of the Due Process Clause argued by the U.S. was applied to our government's actions in Guantanamo Bay, then presumably any action — even the summary execution or torture of prisoners detained there — would be permitted. Astonishingly, the government made that very claim before the Ninth Circuit.[25] The very idea that the Constitution would have nothing to say about such matters is unthinkable, as is the notion that foreign nationals imprisoned at Guantanamo Bay are not entitled to process of any kind. As the *Gherebi* court said, "[h]ere, we simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement."[26]

Further, the Administration's detention policy is contrary to the policies of the human rights community and our closest democratic allies around the world. For example, Judge Steyn, one of Britain's most senior judges, denounced the Guantanamo policy as a "monstrous failure of justice," emphasizing that "[t]he purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of the courts, and at the mercy of the victors." That same month, Spanish Foreign Minister Ana Palacio called the indefinite detentions at Guantanamo a "major error" and urged this Court to "open a path" to end the "legal limbo." And although several Pakistanis were among those released in November 2003, the second secretary of the Pakistan Embassy responded by saying, "[t]he government is happy, but this is too damn late. Their lives have been destroyed. Their families have gone through psychological trauma, since they were not terrorists; they were just low-level Taliban fighters."

International law – particularly universal norms of human rights and the laws of war embodied in the Geneva Convention – is vitally important to the safety and well being of American men and women deployed abroad in the U.S. Armed Forces. The Administration's willingness to disregard such important principles threatens American soldiers who may be captured abroad in future conflicts. Furthermore, it undermines the United States' global campaign to expand freedom, democracy, and human rights throughout the world, and damages our standing with our

[24] 424 U.S. 319, 321 (1976).
[25] *Gherebi,* 352 F.3d at 1299-1300 (9th Cir. 2003) ("[A]t oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantanamo, the U.S. government has never before asserted such a grave and startling proposition.").
[26] *Id.* at 1283.

allies – all of which are essential to our long term success in the war on terror. Although the Supreme Court's decision in the Guantanamo detainee cases is expected to focus on the jurisdictional question, justices may also consider the legality of the Administration's asserted power.

IV. Conclusion

The Administration's detention policy runs contrary not only to the Constitution, but also to the legal and legislative actions of our government and our society as a whole. This country has historically embraced the principles of fairness and equal treatment for all and in concert with the civil rights and international communities, we have found that an impartial review of the legality of executive detention is a fundamental part of the administration of justice. In contrast, under the Bush Administration, justice can be selectively delayed or deprived, the question of guilt or innocence can be ignored, and the fundamental principle that, in bad times as in good, review is necessary to ensure that the deprivation of liberty is lawful can be disregarded.

In the coming months, the Supreme Court will issue rulings that could decide whether these actions by the executive branch are permissible or whether they violate our constitutional system of checks and balances and the principles of fairness upon which this country was founded. It is particularly ironic that even as the Supreme Court is considering the legality of the Administration's policies, the nomination of the policy's author to an influential Court of Appeals is pending in the Senate. Should Department of Defense General Counsel William Haynes' nomination to a lifetime position as a judge on the Fourth Circuit Court of Appeals be confirmed, he would play a pivotal role in implementing these decisions. Given Mr. Haynes' record, his appointment to the federal bench could have a devastating effect on our civil liberties.