



## **Enemy Combatants, International Humanitarian Law, and the United States' War on Terror**

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### **Abstract**

Since the Hague Convention of 1907, International Humanitarian Law has contained detailed provisions regarding the humane treatment of prisoners of war. The Hague Convention also distinguishes between combatants, or belligerents, and civilians, using criteria which are found in the Third Geneva Convention of 1949. In this Convention, and according to subsequent commentators on International Humanitarian Law, combatants who meet certain requirements are entitled to prisoner of war status, and to the protections which the Convention extends to prisoners of war. The requirements that these fighters must fulfill in order to be considered combatants, and therefore, to be eligible for prisoner of war status include allegiance to a command belonging to a state party to the Convention, wearing a uniform, carrying arms openly, and carrying out operations in accordance with the laws and customs of war. As prisoners of war, captured combatants are immune from prosecution for such crimes as murder by the capturing power. By contrast, civilians who participate in armed hostilities while retaining civilian status are not entitled to this immunity, or to other protections that International Humanitarian Law extends to prisoners of war. The George W. Bush Administration came to categorize these civilian fighters that the U.S. had captured during its "War on Terror" in Afghanistan as "enemy combatants" who were not entitled to prisoner of war status. During the first years of the "War on Terror" (2002-2004), this designation generated extensive debate within U.S. courts regarding the concept of the "enemy combatant." Specifically, this debate focused on the status of captured Taliban and Al-Qaeda fighters, their rights as detainees under the United States Constitution and the Third Geneva Convention, the precise definition of an "enemy combatant," and the powers of the President to categorize these detainees as enemy combatants, and to confine these detainees in military facilities.

**Keywords:** International Humanitarian Law, Third Geneva Convention. Additional Protocols, combatant, prisoner of war, enemy combatant, unlawful combatant, *habeas corpus*.

### **1.0 Introduction**

International Humanitarian Law, the corpus of international law that sets global standards for the conduct of warfare, and for the safety and treatment of combatants, internees, prisoners of war, and civilians has been undergoing a development process over nearly two hundred years. Article 6 of the first Geneva Convention of 1864, one of the earliest instruments in this corpus, fit the treatment of combatants in enemy hands into the context of proper treatment of wounded and sick fighters. This Convention required parties to an international conflict who captured adversarial combatants to care for them if they were wounded or ill. Those who had recovered and were found to be unfit for further service were to be repatriated, and such repatriation was possible for other captured combatants as well, as long as they pledged not to take up arms against the state repatriating them again (Geneva Committee, 1864: Article 6).

The Hague Convention of 1907, officially known as *Law and Customs of War on Land*, contained specific stipulations regarding the treatment of prisoners of war. The Convention's requirements included humane treatment in general, and recognition of the right of prisoners of war to retain personal property, except arms, horses, and military papers. The power confining these prisoners was to be responsible for their upkeep, and was to provide them with food, lodging, and clothing of the same quality as that which national troops obtained. Prisoners of war were

also to be free to practice their respective religions. Assignment of prisoners of war to labor details could not include participation in the enemy power's war efforts, and the assigned labor could not be excessive. Prisoners of war were to be paid for their assigned labor at rate levels that soldiers in the national army obtained for like work. While prisoners of war who unsuccessfully attempted to escape captivity were subject to disciplinary measures upon recapture, successfully escaped prisoners of war who were recaptured during the course of hostilities were not to face punishment for their previous flight. Offices of inquiry were to have access to all information regarding each prisoner of war, in order to facilitate his repatriation at the close of hostilities. These offices of inquiry were also to be permitted to provide postal services for the prisoners free of postal duties, either in the country or origin or in the country of destination, and were to collect all personal property that prisoners of war lost in combat, captivity, as casualties, or as escapees, in order to forward such possessions to persons concerned. Agents of relief societies, with written permission from the military authorities confining the prisoners of war, were permitted to visit internment areas for charitable purposes upon agreeing, in writing, to abide by the military authorities' rules of order and policing. Persons following an army who were not formally part of, but who possessed certificates from, that army, were also to be treated as prisoners of war if captured by enemy forces. Such persons included reporters, correspondents and contractors. Finally, prisoners of war were to enjoy a speedy repatriation once hostilities ceased (Law and Customs of War on Land, 1907: Annex, Chapter II, Articles 4,6,7 ,8,13,14,15,16,18 & 20 ).

Since the mid-nineteenth century, International Humanitarian Law's commentators and experts have also debated the specifics of distinguishing between combatants and non-combatants in wartime situations. The 1907 Hague Convention provided criteria for the identification of combatants in Article 1 of the first Chapter of its Annex. These criteria, preserved for inclusion in the Third Geneva Convention of 1949, categorized combatants, then called belligerents, as those who 1) were commanded by a person responsible for his subordinates; 2) bore a fixed emblem of identification, recognizable at a distance; 3) carried their arms openly; and 4) conducted their operations in accordance with the laws and customs of war. The "belligerents" category also included members of militias in those parties to an international conflict where militias constituted an army. Inhabitants of a territory who, in response to an impending enemy occupation, spontaneously took up arms but did not have time to consolidate into a formal army were also to be considered belligerents (Law and Customs of War on Land, 1907: Annex, Chapter I, Articles 1-3).

The Geneva Conventions of 1864 and 1906 also designated medical personnel serving armed forces as exempt from attack. These Conventions enjoined medical personnel to wear the insignia of the red cross against a white background, and to carry that symbol as a flag. In further detail, the Second Geneva Convention defined such personnel as members of "sanitary formations" attached to military units who cared for sick and wounded combatants, or as members of evacuation convoys. These units' personnel were to be exempt from attack even if armed for self-defense, or protected by armed units <sup>1</sup>

Since the beginning of the US war in Afghanistan in 2001, and during its continuation into the present, 2021, the focus of this debate has metamorphosed into one covering combatants (fighters who have a right to direct participation in armed hostilities, or "lawful combatants), versus civilians who similarly participate, but without entitlement to do so, and therefore, without

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1 See Geneva Committee, *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field* Geneva, 22 August, 1864. International Committee of the Red Cross, "Treaties, States Parties and Commentaries." Retrieved from <https://ihl-databases.icrc.org/ihl/INTRO/120?OpenDocument>. See also Conference for the Revision of the Geneva Convention of 1864, *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, Geneva, July 6, 1906, Articles 6-13, and 17-23. International Committee of the Red cross, "Treaties, States Parties and Commentaries," Retrieved from <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E2BBC0DDDBB5E1A7C12563CD00516333>

entitlement to prisoner of war status. Since 2001, these latter fighters have come to be called “unlawful combatants.” The flashpoint of this debate has been the question of the protections and rights that “unlawful combatants” if captured or interned, can claim under the Third and Fourth Geneva Conventions of 1949, the Additional Protocols I and II of 1977 to the Third Geneva Convention, other instruments of International Humanitarian Law, provisions of the United States Constitution, the United States Code, and United States military law. This article will discuss two United States cases stemming from the Afghanistan War on Terror, *Padilla v. Rumsfeld* and *Hamdi v. Rumsfeld*, as examples which will highlight the points of law that U.S. courts and officials have been debating about the very issue of who can be defined as an “unlawful combatant,” and the legal protections that such persons are or are not permitted to claim. However, it is first necessary for us to clarify points that International Humanitarian Law has made about the definition of a combatant and a prisoner of war, and about the protections to which combatants, whether eligible to be prisoners of war or not, are entitled, in both international and non-international armed conflicts.

## **2. The “Combatant” Classification Under International Humanitarian Law**

### **2.1 “Combatant” Classification and Prisoner of War Status in International Armed Conflicts.**

The phrases “lawful combatant” and “unlawful combatant” do not appear in either the Third Geneva Convention of 1949 or in the two Additional Protocols of 1977. (Additional Protocol I covers the protection of persons whom international armed conflicts victimize or place in jeopardy, while Additional Protocol II focuses on the protection of such persons within the context of non-international armed conflicts, i.e. civil wars). Instead of distinguishing between lawful and unlawful combatants, the Third Geneva Convention simply designates as “combatants” those fighters who are eligible for the status of prisoners of war if captured by an adversary. Prisoner of war status entitles these participants to specific protections when confined (International Committee of the Red Cross: Article 4). Additional Protocol I, for its part, defines as “combatants” those participants in armed conflicts who “...have the right to participate directly in hostilities” (International Committee of the Red Cross, 1977: Article 43 ¶ 2).

The phrase “right to participate directly in hostilities” means that combatants have the right to kill or wound enemy combatants and to destroy their military objectives (Dormann, 2003: 45).. Therefore, governments of parties to an international armed conflict may not prosecute captured, detained or interned enemy combatants for acts such as murder, assault and battery that would be crimes under their own national criminal codes in peacetime. In fact, Kjetil Larsen points out that a state’s rationale for holding an enemy combatant as a prisoner of war is not punishment at all, but, rather, the guarantee of his or her exclusion from further military operations. The only offences for which captured enemy combatants can be prosecuted and punished are serious infractions of International Humanitarian Law. such as war crimes (Larsen, 2011: 16 & 24-25).

According to Article 4 of the Third Geneva Convention, captured participants in international armed hostilities may claim prison of war if their situation conforms to any of the following criteria:

1. Such combatants may be members of the regular armed forces of a party to the conflict; members of militias and voluntary corps that are part of such armed forces; and members of regular armed forces who profess allegiance to a party to an international conflict. Such personnel retain their status as lawful combatants even if the enemy power detaining them does not recognize the government or authority to which the detainees or internees profess allegiance.
2. Prisoners of war may also be previous or current members of the armed forces of a territory that an adversary now occupies if that adversary chooses to intern them on account of their past or present military status. This category includes soldiers who have escaped previous capture, or who have decided to ignore a summons from the occupying authority, as well as those whom neutral, non-belligerent powers have received within their territories, but intern or detain under the provisions of international law.

3. Combatants eligible prisoner of war status may also be members of militias and voluntary corps within organized resistance movements which belong to a party to the conflict. This inclusion holds even though an adversary occupies the territory within which such resistance groups operate, and irrespective of whether or not such resistance groups are operating within their own territory. Such resistance groups must, however, meet the following criteria:

1. They must be commanded by leaders who are responsible for the actions of their subordinates;
2. They must have distinctive signs that render their members recognizable at a distance, such as uniforms;
3. The members of resistance groups' militias or voluntary corps must carry their arms openly; and
4. Members of these groups must conduct their operations in accordance with the laws and customs of war.

Inhabitants of a territory who take up defensive arms in the face of an invasion by an adversary, but who lack sufficient time to organize themselves into regular armed resistance units can be categorized as prisoners of war if interned, but they, too, must carry their weapons openly and adhere to the laws and customs of war when in combat (International Committee of the Red Cross, 1949: Article 4, §A. (1)-(3), & (6).; and §B, (1)-(2)).

Certain civilians accompanying the armed forces outlined above may also claim prisoner of war status if captured. These civilians include members of such auxiliary groupings as military aircraft crews, war correspondents, supply contractors, and members of labor units and providers of key services for the armed forces they accompany. Other auxiliary personnel who are eligible for the "prisoner of war" designation are masters, apprentices and pilots of the merchant marine, and the crews of the civil aircraft of the warring parties (International Committee of the Red Cross, 1949: Article 4, §B, (1)).

Article 43 of Additional Protocol I reiterates the Third Geneva Convention's provision that fighters entitled to prisoner of war status must belong to military units of a party to a conflict operating under a command that is responsible to that party, irrespective of whether or not the adversary recognizes that party as a government or authority. Members of such armed forces are to be subject to a command that requires adherence to the rules of international law governing armed conflict (International Committee of the Red Cross, 1977: Article 43, ¶¶ 1 & 2). Article 44, for its part, re-affirms the Third Geneva Convention's principle that in order to claim prisoner of war status if captured, combatants must differentiate themselves from civilians, and specifies that they must do so when engaged in an attack, or preparing to launch one. This Article acknowledges that, at times, the realities of a given conflict situation might preclude such a distinction, but still asserts that combatants eligible for the prisoner of war designation must carry their arms openly while visible to the enemy, either during an actual military operation or during preparations for one (International Committee of the Red Cross, 1977: Article 44, ¶3 (a) & (b)).

Article 75 of Additional Protocol I outlines the protections that are to be extended to anyone arrested, detained or interned in relation to an international armed conflict. These protections apply both to prisoners of war and to other internees, including those who have participated in direct armed hostilities without entitlement to do so, and to persons accused of war crimes or crimes against humanity. Such internees and detainees are to be protected from actions that threaten life, physical or mental health, such as murder, torture, corporal punishment or mutilation. Authorities responsible for captured fighters are also forbidden to inflict degrading treatment such as forced prostitution and indecent assault upon their charges. Under other provisions of Article 75, arrestees, internees, and detainees who are women are to be confined in quarters separate from those housing men, and must remain under the immediate supervision of women, unless they are being held together with their families. In addition, all confined persons must be presumed innocent until proved guilty, must be notified promptly of all charges against them, must have access to all necessary means of defense, and may only be convicted as a result of the proceedings of an impartial and regularly constituted court that adheres to

standard, judicial procedure. Such defendants are also protected from being convicted of offences that the law of the confining power did not classify as crimes at the time that the defendant committed them, and from testifying against themselves. Article 75 also grants these defendants the right to examine witnesses testifying against or for them (International Committee of the Red Cross, 1977: Article 75. ¶¶ 2 (a)&(b), 3, 4 & 5).

## 2.2 Non-International Armed Conflicts

The Third Geneva Convention and Additional Protocol II do not contain provisions defining or governing prisoner of war status in non-international armed conflicts. However, Article 3 of both the Third and Fourth Geneva Conventions of 1949, stipulates protections for non-participants in non-international armed conflicts, i.e. civil wars, which occur within the territory of one of the High Contracting Parties. The "non-participant" classification, though, may include members of armed forces who have laid down their arms, or have been rendered *hors de combat* on account of being ill, wounded, detained, or of facing any other debilitating circumstance. In all cases, parties to the conflict holding such persons are to treat them humanely, irrespective of race, color, religion, birth, sex, wealth or any other similar criteria. Parties to a non-international armed conflict are specifically forbidden to inflict upon such persons offences like murder, mutilation, torture, the taking of hostages, degrading treatment, or the passage and execution of sentences by any body other than a regularly constituted court adhering to standard and proper judicial guarantees. Article 3 also enjoins parties to the conflict to care for the wounded and sick. (International Committee of the Red Cross, 1949: Article 3, ¶¶ 1 & 2; and International Committee of the Red Cross, 1949a: Article 3 ¶¶ 1 & 2).

Additional Protocol II to the Third Geneva Convention provides further detail on the conduct of warfare in non-international conflicts. As mentioned above, this Additional Protocol contrasts with Additional Protocol I, in that it does not outline criteria under which direct participants in armed hostilities may obtain prisoner of war status. This Protocol does, however go into detail about the rights that adversarial armed forces must confer upon all persons at large who have not participated in hostilities, or who have ceased to do so by virtue of having been captured, detained or interned. First, powers confining such persons are forbidden to inflict the following violations upon them:

1. Violence that threatens their life, health, physical or mental well-being, including murder, torture and corporal punishment;
2. Collective punishment;
3. The taking of hostages;
4. Acts of terrorism
5. Degrading treatment such as rape, enforced prostitution, and any form of indecent assault;
6. All forms of slavery and slave trade;
7. Pillage; and
8. Threats to commit any of the above-mentioned acts (International Committee of the Red Cross, 1977a: Article 4, ¶2),

Children caught in situations of non-international armed conflict are to be cared for and educated, morally and spiritually as well as academically, according to the wishes of their parents or guardians. Nor are children younger than fifteen years of age to be recruited into any armed forces, or allowed to participate in hostilities. Children under the age of fifteen years who have been recruited into armed forces are to be cared for and educated if captured. Forces which gain control of portions of lands where civil war has been taking place are to exert all efforts to reunite families. With the consent of their parents, children are to be removed from combat zones in countries facing civil war, and taken to safer areas, accompanied by persons responsible for their safety. (International Committee of the Red Cross, 1977a: Article 4 ¶ 3).

Specifically in regard to persons who are deprived of their liberty on account of a non-international armed conflict, whether internees or detainees, Additional Protocol II provides that such persons are to be treated in accordance with their medical needs if sick, wounded or shipwrecked, without any distinction other than the priorities of medical necessity (International Committee of the Red Cross, 1977a: Article 5 ¶ 1(a) & Article 7 ¶ 2). Captured persons are also

to have the same access to food, drinking water, safeguards pertaining to health and hygiene, and protection against climate-related rigors available to the local civilian population. Detainees and internees are also to be allowed to practice their religion, and to receive spiritual support from chaplains if such support is requested and appropriate. If compelled to work, internees and detainees are to do so under the same safeguards and working conditions accorded to the local civilian population (International Committee of the Red Cross, 1977a: Article 5 ¶ 1(b), (d) & (e)).

Article 5 of Additional Protocol II further enjoins those who are supervising persons captured in connection with a non-international armed conflict to ensure that interned or detained women are held in separate quarters from men, except in cases where families as units are confined. Women who are not confined with their families are to be detained or interned under the immediate supervision of other women, and all confined persons are to be allowed to send and receive letters and cards, the number per time period of which a competent authority may limit if necessary. Authorities supervising internees and detainees are not to hold them at locations near combat zones, and are, if able to do so under conditions of safety, to evacuate detainees and internees from areas that become combat zones. This Article also directs those responsible for internees and detainees to avail them of medical examinations, but forbids such authorities to allow their charges to be subject to medical procedures that medical needs do not indicate, and that do not conform to standard, lawful medical practice (International Committee of the Red Cross, 1977a: Article 5 ¶ 2).

Article 6 of this Additional Protocol covers the prosecution and punishment of persons charged with, and found guilty of, criminal offenses within the context of non-international armed conflicts. This Article stipulates that no sentence can be passed, and no penalty can be inflicted, upon a defendant unless pronounced by a court that operates under the principles of judicial impartiality and independence. Persons charged with criminal offenses are promptly to be informed of the particulars of the offence of which they are accused; are to be granted all necessary means of defense throughout the proceedings; and are not to be found guilty of an act that the law of the jurisdiction trying them did not classify as a criminal offence at the time that the defendant committed it. Article 6 further provides that defendants are to be presumed innocent until proved guilty; forbids authorities to compel defendants to testify against themselves; and prohibits the imposition of the death penalty on persons who were under eighteen years of age at the time of the offence, on pregnant women, or on the mothers of young children. In addition, this Article directs authorities in power to exert efforts towards extending the broadest amnesty to adversarial participants in a civil war, and to persons being held as internees or detainees at the cessation of hostilities (International Committee of the Red Cross, 1977a: Article 6).

### **2.3 The Concept of the Unlawful Combatant**

As mentioned above, both Knut Dormann and Kjetil Larsen stated that there were fighters who had the right to participate in international armed conflicts, and those who did not. Fighters within the latter category could not claim prisoner of war status. Larsen calls members of this latter group “unlawful combatants. The debate over the legal status of “unlawful enemy combatants,” and specifically over the protections they can claim once captured has intensified against a background of increased civilian participation in warfare, especially in light of the fact that much recent warfare has occurred within states, rather than between them. In the U.S.’s continuous “War on Terror” in Afghanistan, the George W. Bush Administration adopted a policy of ambiguity in categorizing Taliban, but not Al-Qaeda, fighters as eligible for the protections of the Third Geneva Convention, while considering fighters from neither group eligible for prisoner of war status (see below).

In cases of wars between states, battles have taken place between armies readily distinguishable both from each other and from civilians, because of their uniforms (Larsen, 2011: 7). In traditional, interstate warfare, especially prior to the end of the Cold War, civilians had played relatively peripheral roles in armed conflicts. However, towards the end of the twentieth century and into the first two decades of the twenty-first, direct civilian participation in armed hostilities

has increased. One indication of this trend has been the growing extent to which states' armed forces have outsourced military work to private contractors. (Larsen, 2011: 7)

Another factor in this trend has been greater urbanization of modern combat. Instead of being carried out on distinct battlefields, warfare has increasingly occurred in cities and towns since the final Cold War years. In addition, in a growing number of situations, civilian operators of advanced contemporary military technology have been able to engage in combat from a distance. Generally, the fact that an increasing number of civilians has actively participated in armed hostilities wearing civilian attire has made it more difficult for regular military forces to distinguish between combatants and civilians, and thereby to protect both themselves and civilians (Larsen, 2011: 7-8).

The central premise of the "unlawful combatants" concept is that civilians, unlike combatants, do not have the right to participate directly in armed hostilities, except in cases of *levee en masse*, defined as a massive popular uprising against an invader. Since civilians in all other instances are non-combatants, belligerents may not target or attack them. If, however, civilians do participate directly in armed hostilities, they lose their protection from attack, and, in contrast to combatants, face ambiguous status at best if captured, as they may not be assured of attaining the protection that prisoner of war status grants (Dormann, 2003: 46).

An unlawful combatant is, in essence, a civilian who participates directly in armed combat without being entitled to do so under International Humanitarian Law. Nonetheless, if the status of a captured person who has committed a belligerent act against a party to an international armed conflict is uncertain, Article 5 of the Third Geneva Convention provides that it is up to a competent tribunal to determine that person's status. Meanwhile, he or she has the right to the protection of the Convention (International Committee of the Red Cross, 1949: Article 5).

It is not only individuals, though, who can be categorized as unlawful combatants. Groupings that fit into this category include militias and other organized armed resistance groups that do not belong to a party to an international conflict, or profess allegiance to it; groups which are not under the command of a person who is responsible for the actions of his or her subordinates; units which do not carry their arms openly; units which do not possess a fixed, distinctive sign recognizable at a distance, (i.e. do not wear uniforms); and groups which do not conduct their operations in accordance to International Humanitarian Law (Dormann, 2003: 47 and International Committee of the Red Cross, 1949: Article 4, ¶ A(2)). It is against the criteria discussed in previous sections for defining combatant and prisoner of war status, clarifying the legal protections that participants in armed conflicts may claim, and identifying who may be deemed an unlawful combatant that we now examine the two United States cases, *Padilla v. Rumsfeld* and *Hamdi v. Rumsfeld*, and the debates on points of United States Law and International Humanitarian Law that these cases have engendered.

### **3.0 The U.S.'s War on Terror Since 2001 and Unlawful Combatant Cases**

On September 18, 2001, one week after the September 11, 2001 attacks in New York City and Washington, DC, the U.S. Senate and House of Representatives passed a joint resolution, Public Law 107-40, which authorized the use of the United States Armed Forces against those responsible for the attacks. Public Law 107-40 (115 Stat. 224) specifically provided that

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 (Public Law 107-40; §2 (a)),

During its war in Afghanistan against the Taliban and Al-Qaeda forces over the following three years, the U.S. captured a number of prisoners whom it classified as enemy combatants. The U.S. government's cases against these prisoners highlighted basic differences between the George W. Bush Administration's interpretations of Constitutional provisions, U.S. statutes and International Humanitarian Law on the one hand, and the interpretations of other U.S. officials

and legal authorities on the other. Prior to the Afghanistan war, anyone whom the U.S. government incarcerated could generally assume entitlement to due process, disclosure of evidence, access to counsel, family visitation, and judicial review. However, in handling the cases of "unlawful combatants," the George W. Bush Administration's officials frequently dismissed as inappropriate traditional interpretations of provisions of the United States Constitution and Code, the Third Geneva Conventions, and its Additional Protocols regarding the legal protections to which prisoners of war and other wartime detainees and internees are entitled. The Bush Administration's fundamental rationale for this approach was that these unlawful combatants were too dangerous to be accorded customary rights and protections under law.

### 3.1 Padilla v. Rumsfeld

In the *Padilla v. Rumsfeld* case, initially decided on April 12 of 2002 in the District Court for the Southern District of New York, plaintiff José Padilla, a U.S. citizen, was detained at O'Hare International Airport in Chicago upon arriving there from Pakistan during that year. He was first detained under a material witness warrant that the Southern District Court of New York had issued in connection with a grand jury investigation of the attacks of September 11, 2001. President George W. Bush then designated Padilla as an unlawful enemy combatant, and directed the Department of Defense to receive him from the Department of Justice. The Justice Department then requested the District Court to vacate the material witness warrant, and after it did so, the military gained custody of Padilla and transported him to the Naval Consolidated Brig in Charleston, South Carolina (United States Department of Justice, 2003: ¶ 2), where he was to be detained indefinitely and without charges, on grounds of his alleged connections with Al-Qaeda and the danger to U.S. national security that he consequently posed.

In his *habeas corpus* plea, Padilla had argued before the District Court that President Bush had unlawfully ordered him detained. Padilla had contended that since he was a U.S. citizen, he was protected from such detention under Title 18, U.S.C. § 4001(a), a section of the "Crime and Criminal Procedure" Title of the United States Code. Subsection (a), a statute enacted in 1971, states that "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress" (Title 18, U.S.C. § 4001(a)). On December 4, 2002, however, the District Court held that the President, as Commander in Chief of the United States Armed Forces, was constitutionally empowered to detain José Padilla as an unlawful enemy combatant despite the absence of a formal, Congressional declaration of war, and despite Padilla's U.S. citizenship (International Committee of the Red Cross, 2002). Attached to that decision, though, was the provision that the President would have to produce some evidence which would substantiate the claim that José Padilla was, in fact, an enemy combatant (American Civil Liberties Union of New York: 2021).

The Southern District Court of New York further held that that Padilla had, in fact, been detained pursuant to an Act of Congress, namely, under Public Law 107-40, the Joint Resolution for the Authorization of the Use of Military Force. (United States Department of Justice, 2003 ¶3b). In addition, the District Court held that designating Padilla as an unlawful enemy combatant was correct since he did not meet the criteria necessary for categorization as a lawful combatant under the Third Geneva Convention. Nor did the Third Geneva Convention abridge President Bush's right to classify Padilla as an unlawful enemy combatant, and to order him detained without trial for the duration of hostilities (International Committee of the Red Cross, 2002).

The District Court did allow Padilla to seek factual justification, with the assistance of counsel, for his being classified as an unlawful combatant. However, the Bush Administration countered on January 9, 2003, by submitting a sworn declaration by Vice-Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency, stating that granting Padilla access to counsel would compromise the military's attempts to gain intelligence from him, thereby raising national security concerns. The District Court, though, did not change its deposition (United States Department of Justice, 2003: ¶ 3 (b) & (c)).

On December 18, 2003, in response to the Government's appeal of the District Court's decision, the Second Circuit Court of Appeals panel struck down the District Court's ruling affirming the President's power unilaterally to order the detention of José Padilla, stating that the President



lacked inherent, Constitutional powers to detain U.S. citizens on U.S. soil absent Congressional authorization. This ruling specifically negated the District Court's finding that Public Law 107-40 constituted such Congressional authorization for Padilla's detention. Instead, the Court of Appeals panel concluded that 18 U.S.C. § 4001 (a) did, indeed bar all detentions of U.S. citizens, including the wartime detention of enemy combatants, short of specific, statutory authorization. The findings of the Court of Appeals panel also covered the interpretation of 10 U.S.C §956 (5). Section 956 of Title 10 (Armed Forces) states that

,,,funds appropriated to the Department of Defense may be used for . . . expenses incident to the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of the Army, Navy, or Air Force pursuant to Presidential proclamation.

The Court of Appeals did not hold that this subsection of 10 U.S.C §956 affirmed the Federal government's authority to seize U.S. citizens, even those suspected of being unlawful combatants, at locations that were outside of combat zones. On all of these grounds, the Court of Appeals remanded the case to the Southern District Court of New York, instructing that court to issue a writ of *habeas corpus* on behalf of Padilla (United States Department of Justice, 2003: ¶4 (b)). This instruction released José Padilla from military custody, but allowed the government to transfer him to the custody of civilian authorities, either for criminal prosecution or for testimony as a material witness (American Civil Liberties Union of New York, 2021).

The American Civil Liberties Union of New York filed two *amicus* briefs regarding the Padilla case. In the first, submitted before the District Court, Southern District of New York, the Civil Liberties Union maintained that detaining José Padilla was unconstitutional, because the detention had taken place without the filing of any charges against him. In addition, this argument stressed that the government could not impose any sanctions upon a detainee without proving its case, and that such sanctions could be those that the legislature prescribed only. In the second brief, filed on April 12, 2004, the Civil Liberties Union affirmed the Second Circuit Court of Appeals decision ordering Padilla's transfer from military to civilian custody, since he had been detained outside of a combat zone. The Civil Liberties union argued that this specific reality dictated the primacy of civilian authorities over military ones (American Civil Liberties Union of New York, 2021) .

John C. Yoo, then Deputy Assistant Attorney General, expressed opinions contrasting sharply with those of the Civil Liberties Union regarding the Padilla case. In a memorandum of 2002 to Daniel J. Bryant, Assistant Attorney General for the Office of Legislative Affairs, Yoo affirmed that Article II of the U.S. Constitution declared the President to be Commander in Chief of the U.S. Army and Navy, and that in this capacity, he possessed complete and unilateral power to prosecute military campaigns. Yoo further emphasized that one of the functions of this overall Presidential power was that of seizing and detaining members of enemy forces, and that Public Law 107-40 gave the President additional authority to use military force to protect the U.S. from further terrorist acts. Yoo also cited affirmation of the President's authority to detain prisoners of war and other enemy combatants by citing 10 U.S.C. §956 (5), quoted above (Yoo, 2002: 1-2, 6 & 8),

Nor, according to Yoo, did enemy combatants' claims to, or demonstrations of, U.S. citizenship immunize them from detention. One of Yoo's citations for this point was *Ex parte Quirin*, 317 U.S. 1 (1942). In this case, a group of members of the German armed forces, one of whom was a U.S. citizen, entered the U.S. during World War II with the intention of committing acts of sabotage. Regarding *Quirin*, the U.S. government had shown that the captured saboteurs had undergone training in Germany, were members of the German Marine Infantry, had hidden their German Marine Infantry uniforms, and had entered the U.S. in civilian attire. These actions made them unlawful enemy belligerents, and that classification applied to the infiltrator among them who was a U.S. citizen as well (Yoo, 2002: 4 & 6).

Focusing specifically on 18 U.S.C. § 4001 (a) and (b), Yoo maintained that section 4001 of Title 18 of the U.S. Code did not, in any way, address the issue of confinement of unlawful combatants and prisoners of war, or presidential powers to do so. Rather, section 4001, whose (b) subsection is quoted below, merely covered the U.S. Attorney General's authority over U.S. Federal prisons and over inmates thereof. Yoo argued that in fact, subsection (b) of section 4001 explicitly excluded military and naval institutions from the Attorney General's jurisdiction:

The control and management of Federal penal and correctional institutions, except military and naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil service laws, the Classification Act, as amended and the applicable regulations.

(2) The Attorney General may establish and conduct industries, farms, and other activities, and classify the inmates, and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation (18 U.S.C. § 4001 (b) (2)).<sup>2</sup>

Yoo emphasized that Title 18 in its entirety contained statutes addressing "Crime and Criminal Procedure," while statutes covering the military were generally found in Title 10, governing "Armed Forces," and in Title 50, covering "War and National Defense." Yoo's final point about § 4001 (a) of Title 18 was that it had been adopted in order to repeal the Emergency Detention Act of 1950, 50 U.S.C §§ 811-826, under which the U.S. Attorney General had been empowered to apprehend and order the detention of persons who could reasonably be suspected of engaging in, or conspiring with others to engage in, acts of sabotage or espionage. Since the repeal of the Emergency Detention Act of 1950 was meant to protect U.S. citizens from emergency detention on mere suspicion of criminal intent, Yoo argued that 18 U.S.C. § 4001 (a) was meant to re-affirm that the Federal government was permitted to imprison or detain a U.S. citizen on the basis of actual breakage of Federal law only. The legislative intent underlying the adoption of 18 U.S.C. § 4001 (a). therefore, had nothing to do with abridging the President's authority to confine prisoners of war and unlawful combatants. (Yoo, 2002: 7 & 1)

### 3.2 Hamdi v. Rumsfeld

Yaser Hamdi, also a U.S. citizen, was arrested in Afghanistan in 2001, and was classified as an enemy combatant for taking up arms with the Taliban forces against U.S. allies there. Hamdi's father submitted a *habeas corpus* petition stipulating that his son had gone into Afghanistan to do relief work; had arrived there merely two months before the attacks of September 11, 2001; and, therefore could not have received military training (Supreme Court of the United States, June 28, 2004: Syllabus, 1). In response to the habeas petition, the government presented a declaration by a Defense Department official, Michael Mobbs, who asserted that upon arriving in Afghanistan in July or August of 2001, Hamdi had joined a Taliban unit and remained with it through the onset of U.S. military operations against Al-Qaeda and Taliban forces on October 7, 2001. According to Mobbs, late in 2001, Hamdi was captured by the Northern Alliance during a battle between the Alliance and the Taliban. Mobbs stated that, during his capture, Hamdi had surrendered his Kalashnikov rifle to the Alliance. After an uprising at the Mazar-e-Sharif prison to which the Northern Alliance forces had first transported him, Hamdi's captors moved him again, this time to a prison at Sherghan, Afghanistan, where a U.S. interrogation team interviewed him. Mobbs related that Hamdi told his interrogators that he was a U.S.-born Saudi citizen<sup>3</sup> who had entered Afghanistan during the previous summer for the purpose of training with the Taliban and joining its forces. A U.S. military screening team then determined that

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2 18 U.S.C. § 4001 (a) and (b), quoted in John C. Yoo, *Memorandum for Daniel J. Bryant, assistant attorney General, Office of Legislative Affairs*, U.S. Department of Justice, Office of Legal Counsel, June 27, 2002, p. 1.

3 Justice O'Connor's presentation of her opinion, with which Justices Kennedy, Breyer, and Chief Justice Rehnquist concurred, stated that the U. S. authorities learned that Hamdi was a natural-born U.S. citizen prior to incarcerating him in the Naval Brig in Norfolk Virginia, and subsequently, in a brig in Charleston, South Carolina. Supreme Court of the United States, *Yaser Esam Hamdi and Esam Fouad Hamdi, as Next Friend of Yaser Fouad Hamdi, Petitioners v. Donald H. Rumsfeld, Secretary of Defense, et. al.* No. 03-6696, June 28, 2004.

Hamdi was an enemy combatant. Under an order from the U.S. Land Forces commander, U.S. forces took custody of Hamdi and some of his fellow detainees, and transported them to the U.S.-controlled short-term detention facility at Kandahar. Mobbs relates that in January, 2002, a Detainee Review and Screening Team that the Commander of the U.S. Central Command had established reviewed Yaser Hamdi's record and determined that he met the Secretary of Defense's criteria for transfer to Guantanamo Bay as an enemy combatant.<sup>4</sup> Mobbs also states that a subsequent interview with Hamdi confirmed that he had surrendered his weapon to the Northern Alliance, and that this act re-affirmed the accuracy of deeming him an enemy combatant (Mobbs, 2002).

The *habeas corpus* petition which Yaser Hamdi's father submitted on behalf of his son stated that Yasar Hamdi's indefinite confinement was unconstitutional, under the Fifth and Fourteenth Amendments. The Fifth Amendment provides that no person may be deprived of life, liberty, or property without due process of law. The Fourteenth Amendment stipulates that all persons born or naturalized in the United States are citizens of both the country and their states of residence, and prohibits any state's adoption of laws which abridge the privileges and immunities of U.S. citizens. Specifically, this Amendment forbids states to deprive persons of life, liberty, or property without due process of law; and forbids states to deny persons within their jurisdictions equal protection under law (United States Constitution, Fifth Amendment and Fourteenth Amendment: § 1). The habeas petition requested that the District Court for the Eastern District of Virginia honor due process by appointing counsel for Yaser Hamdi, and the District Court did so (Supreme Court of the United States, June 28, 2004: Opinion of Justice O'Connor. 3).

In opposition to that petition, the U.S. Government argued that since it had deemed Yasar Hamdi an enemy combatant, the Bush Administration was authorized, under Public Law 107-40, (115 Stat. 224) to hold Hamdi indefinitely. Consequently, the Administration enjoyed, at its unilateral discretion, the option, and not the obligation, to grant Hamdi access to counsel and to further process (Supreme Court of the United States, June 28, 2004: Opinion of Justice O'Connor, 3). The District Court for the Eastern District of Virginia, however, held that the Mobbs Declaration, by itself, did not justify Hamdi's detention, on account the hearsay nature of the Mobbs affidavit, and instructed the Bush Administration to provide additional material for an *in camera* review (Supreme Court of the United States, June 28, 2004: Syllabus 1). The requested material included copies of all of Yaser Hamdi's statements about his activities in Afghanistan, and notes taken on the subject during interviews with him as well. The District Court also requested a list of the names and addresses of all of Hamdi's interrogators; statements by members of the Northern Alliance regarding Hamdi's surrender and capture; a list of dates and locations of his subsequent detentions; and the names and titles of U.S. officials who determined that Yaser Hamdi was an enemy combatant and that he was to be detained in a naval brig (Supreme Court of the United States, June 28, 2004: Opinion of Justice O'Connor, 5-6).

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4 In the three years following the attacks of September 11, 2001 the U.S. government had not formulated a clear-cut definition of an enemy combatant. Hence, in his Memorandum of March 13, 2002 to William J. Haynes II, General Counsel for the Department of Defense, Assistant Attorney General Jay S. Bybee stated that President Bush had declared that as neither Al-Qaeda nor Taliban fighters under U.S. detention were entitled to Prisoner of War status under the Third Geneva Convention, they could be considered enemy combatants. Al-Qaeda fighters were excluded from prisoner of war status because they were members of an armed force that did not belong to a High Contracting Party to the Convention. President Bush had decided that Taliban detainees were to be excluded, despite the fact that both the United States and Afghanistan were High Contracting Parties to the Convention. President Bush had made this decision under his contention that Taliban units did not adhere to the requirements of the Convention's Article 4, i.e., Taliban fighters did not wear uniforms, carry their arms openly, or conduct their operations in accordance with the laws of warfare. Bybee, Jay S., *Memorandum for William J. Haynes II, General Counsel, Department of Defense: Re: The President's power as Commander in Chief to transfer captured terrorists to control and custody of foreign nations*, March 13, 2002, U.S. Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General.

The Court of Appeals for the Fourth Circuit, though, maintained that because Yaser Hamdi had been captured in an active combat zone, it was unrequired and even improper for any court to hold a factual inquiry or an evidentiary hearing in which Hamdi would be heard. At most, Hamdi was entitled to a limited judicial inquiry into the legality of his detention, rather than to a deep probe into the facts of his capture (Supreme Court of the United States, June 28, 2004 : Syllabus, 1-2). In addition, referring to *Ex parte Quirin*, 317 U.S. 1 (1942), the Court of Appeals concluded that since Yaser Hamdi had taken up arms against the United States, it was appropriate to designate him an enemy combatant irrespective of his U.S. citizenship. As an enemy combatant, he was entitled to a limited inquiry as to the legality of his detention only (The Supreme Court of the United States, June 28, 2004: Opinion of Justice O'Connor, 8).

The Fourth Circuit Court of Appeals also held that the constitutional principle of separation of powers among the three branches of the U.S. government precluded any such investigation of the circumstances of Yaser Hamdi's capture and ongoing detention. Specifically, this Court argued that while the United States Constitution had vested extensive, specific, and clearly demarcated war powers between the Executive and Legislative branches, it had vested no such powers in the Judicial branch. Therefore, the Virginia District Court lacked the power to initiate an extensive *in camera* investigation regarding the Hamdi case (The Supreme Court of the United States, June 28, 2004: Opinion of Justice O'Connor, 7).

In addition, the Court of Appeals concluded that the assertions of the Mobbs Declaration, if accurate, would be sufficient to justify Yaser Hamdi's detention, and that Public Law 107-40, (115 Stat. 224), authorizing the President to use military force in response to the September 11, 2001 attacks, provided the Congressional authorization that 18 U.S.C. § 4001(a) required for the detention of suspected U.S. citizens (Supreme Court of the United States, June 28, 2004 : Syllabus, 2). The capturing and detaining of enemy combatants after all, was an integral part of warfare. As in the Padilla case, the government argued that the legislative intent underlying the adoption of 18 U.S.C § 4001 (a) had been to repeal the Emergency Detention Act of 1950, formerly 50 U.S.C § 811, as a safeguard against a repeat of the establishment of the internment camps that had held ethnic Japanese U.S. civilian citizens during World War II. Therefore, 18 U.S.C. § 4001 (a) did not apply to military detentions. Finally, the Court of Appeals dismissed Hamdi's contention that he was entitled to the protections extended to prisoners of war under Article 5 of the Third Geneva Convention of 1949, maintaining that the Convention was not self-executing, and that in any event, it did not bar the President from ordering Hamdi detained until the cessation of hostilities (The Supreme Court of the United States, June 28, 2004: Opinion of Justice O'Connor, 7- 9). On all of these grounds, the Fourth Circuit Court of Appeals rejected Hamdi's habeas petition.

The U.S. Supreme Court reviewed the Fourth Circuit Court's ruling in 2004 after granting a *certiorari* petition that Hamdi had submitted. Justice O'Connor, Justice Kennedy, Justice Breyer, and Chief Justice Rehnquist all concluded that while Public Law 107-40 (115 Stat. 224) allowed the detention of combatants under the circumstances of this case, this fact did not negate a citizen's right, under the principle of due process, to a hearing under which he or she could contest the factual basis for that detention (Supreme Court of the United States, June 28, 2004: Syllabus 2). Yaser Hamdi's request for a timely and meaningful hearing on his detention, including on its indefinite duration, was part of his *habeas corpus* petition. The Supreme Court's conclusion was that Hamdi was, in fact, entitled to such a hearing, since, absent suspension in an emergency situation, the submission of the *habeas corpus* petition was the right of every individual detained within the United States under Article I, § 9 of the U.S. Constitution. Furthermore, 28 U.S.C. § 2241, governing the submission of *habeas corpus* petitions, upheld the right of habeas petitioners both to present facts of their own and rebut those that the government presented. Nor could the government contend that the facts surrounding Hamdi's detention were undisputed, since Yaser Hamdi had not been permitted to speak for himself; had not conceded that he had been supporting forces hostile to the United States or its coalition partners; and had not conceded that he had even taken up arms against the United States at all. (The Supreme Court of the United States, June 28, 2004: Opinion of Justice O'Connor, 17-20).

The Supreme Court additionally held that the government could not contend that a thorough hearing determining the validity of Yaser Hamdi's enemy combatant status would compromise the U.S.'s prosecution of the War on Terror, either through its revelations, or through the burdens caused by long-distance litigation. Such a hearing, after all, would solely focus on Hamdi's specific activities in Afghanistan. While cases involving enemy combatants might feature presumption in favor of the government's stipulations, that did not negate an accused enemy combatant's right to challenge the government's accusations before an impartial authority. Thus, the Supreme Court held that the war powers that the Constitution vested in the President did not circumscribe the powers of the courts to grant a citizen a writ of *habeas corpus* if he or she contended unjust detention. Only under a Congressional suspension of the writ, in the face of an insurrection, could citizens be deprived of that right. The Supreme Court also acknowledged that, as it had ordered, Yaser Hamdi had been granted the right to unmonitored consultation with counsel (The Supreme Court of the United States, June 28, 2004: Opinion of Justice O'Connor: 29-30).

Nonetheless, the Supreme Court also acknowledged that, despite the fact that Article 118 of the Third Geneva Convention of 1949 stipulates that the detention of prisoners of war must cease at the end of hostilities, the continuous nature of the War on Terror in Afghanistan might well make Hamdi's detention indefinite of necessity (The Supreme Court of the United States, June 28, 2004: Opinion of Justice O'Connor, 12-14 ).

Justices Souter and Ginsburg agreed with the Court's decision about Hamdi's right to a timely and meaningful hearing, and his right to counsel, but held that Yaser Hamdi's detention, itself, was unauthorized (Supreme Court of the United States, June 28, 2004: Syllabus, 2). They held that 18 U.S.C § 4001(a) had not been intended solely to limit non-military detention, but had been intended as a far-reaching check on the Executive branch's unilateral right to order the detentions of U.S. citizens on the grounds of national security. Specifically, Congress had adopted this statute as a means for repealing the Emergency Detention Act of 1950. Instead of simply repealing the act, though, Congress had, in addition, inserted into U.S.C. 18 § 4001 the explicit language in subsection (a) stipulating that the United States was permitted to imprison or detain U.S. citizens pursuant to an act of Congress only. Congress's purpose, in adopting this statute, was not only the prevention future massive and arbitrary detentions of citizens, as had occurred in the case of the Japanese Americans during World War II, but also to prevent the President from unilaterally ordering such detentions. The World War II detention order affecting the Japanese Americans had, after all, been a Presidential one (The Supreme Court of the United States. June 28, 2004: Opinion of Justice Souter, 4-6).

The deeper rationale underlying Justice Souter's argument that the United States government's detention of its own citizens required explicit Congressional legislation prescribing such detention was the Constitutional principle of separation of powers, and the impact of that principle on the tension between national security needs and the requirements for safeguarding individual liberty. Accordingly, Souter held that as the Executive branch of the government primarily served as the guarantor of national security, the role of the Legislative branch must be that of setting parameters regarding the powers of the Executive branch in order ensure a balance between national security and liberty for citizens (The Supreme Court of the United States. June 28, 2004: Opinion of Justice Souter, 6-7). In relation to the interpretation of U.S.C. § 4001 (a) as connected to *Hamdi v. Rumsfeld*, the Souter opinion presented three arguments.

The first of these dismissed Secretary Rumsfeld's contention that the enactment of 18 U.S.C. § 4001 (a) within Title 18 (Crimes and Criminal Procedure) of the United States Code, rather than within Title 10 (Armed Forces) or Title 50 (War and National Defense) meant that 18 U.S.C. § 4001 (a) did not apply to military detention. Instead, Justice Souter pointed out that, to the contrary, that statute's own language contained no exclusion of military detentions. He further emphasized that debate on the statute when it was under consideration in the House of Representatives showed that 18 U.S.C. § 4001 (a) was intended to prevent arbitrary Executive actions regarding the detention of citizens, in peacetime and wartime alike. In his second argument, Justice Souter dismissed the government's contention that the Authorization of the Use of Military Force (AUMF) Resolution, Public Law 107-40 (115 Stat. 224) constituted the Act

of Congress that 18 U.S.C. § 4001 (a) required for Federal imprisonment or detention of U.S. citizens in wartime situations. Affirming that the A.U.M.F. Resolution authorized the President to use military force against armies and individuals responsible for the September 11 attacks, and against those who aided and abetted those forces, Souter nonetheless maintained that the A.U.M.F. Resolution's specific language made no references to the detention of dangerous U.S. citizens. Indeed, Public Law 107-40 (115 Stat. 224) did not need to do so, given the abundance of statutes covering offences that domestic terrorists and their supporters might commit (The Supreme Court of the United States, June 28, 2004: Opinion of Justice Souter, 7-10).

The Souter/Ginsburg opinion also addressed the Hamdi case in connection with the White House's ambiguous position on the legal status of Taliban detainees from the war in Afghanistan who were confined at Guantanamo Bay. This ambiguity arose from the Administration's statement in its Fact Sheet of February 7, 2002 that the Third Geneva Convention applied to the Taliban detainees, but that the Convention's applicability to them did not grant them prisoner of war status. According to this Fact Sheet, the George W. Bush Administration was excluding these detainees from this status because Washington had never recognized the Taliban as the Afghan government, even though Afghanistan, itself, was a state party to the Convention. At the same time, the Administration's Fact Sheet stated that, as a matter of policy, the Taliban detainees would be provided with many of the privileges to which prisoners were entitled (The White House, 2002: 1).

In contrast to the White House position, Justice Souter argued that the Administration's very statement that the Third Geneva Convention applied to the Taliban detainees actually meant that they were entitled to prisoner of war status (The Supreme Court of the United State, June 28, 2004: Opinion of Justice Souter, 11). Indeed, Article 4 §A ¶3 of the Convention includes among those eligible for such status "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" (International Committee of the Red Cross, August 12, 1949: Article 4 §A ¶3). The Souter/Ginsburg opinion further held that even in cases where a detainee's eligibility for prisoner of war status was unclear, Article 5 of the Convention mandated that such detainees were to "...enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal" (The Supreme Court of the United States, June 28, 2004: Opinion of Justice Souter, 12; & International Committee of the Red Cross, August 12, 1949: Article 5).

The Souter/Ginsburg opinion also cited U.S. Army Regulation 190 – 8, of 1997, which re-affirms the provisions of the Third Geneva Convention regarding the protections that the U.S. Armed Forces must extend to detainees. Paragraph 2 of Section 1 -5 of this Regulation's first chapter, for instance, stipulates that "All persons taken into custody by U.S. forces will be provided with the protections of the GPW [Geneva Convention Related to the Treatment of Prisoners of War] until some other legal status is determined by competent authority." Section 1 – 6(a) of this Regulation states that persons whom the U.S. Armed Forces retain in custody for having committed belligerent acts, and whose prisoner of war status, as provided in Article 4 of the Third Geneva Convention, is in question, are entitled to the protections of the Third Geneva Convention pending a competent tribunal's determination of such status. Section 1 – 6 (b). on its part, requires the utilization of such a tribunal to determine the status of any enemy belligerent in the custody of the U.S. Armed Forces claiming the right to prison of war status. Consequently, the Souter/Ginsburg opinion maintained that in holding Yaser Hamdi incommunicado, the U.S. government was not treating him as a prisoner of war. (Departments of the Army, the Navy, the Air Force, and the Marine Corps, 1997: Chapter 1, §1 – 5 (2); and The Supreme Court of the United States, June 28, 2004: Opinion of Justice Souter, 11-12).

Justice Souter also emphasized that Army Regulation 190-8 required any hearing determining the status of wartime detainees to guarantee such detainees the following rights: 1) a written record of all proceedings; 2) a guarantee that the proceedings would be open except at the deliberation stage and where national security issues were at stake; 3) the detainee's entitlement to be advised of his or her rights at the beginning of the hearing; and 4) the detainee's right to be present at all stages of it. The detainee was also to retain the right to summon his or her own witnesses if they were reasonably available, to question the witnesses

that the Tribunal summoned, to testify at the Tribunal, or to refrain from doing so. The Tribunal was to determine the detainee's status on the basis of preponderance of evidence, and a detainee whom the Tribunal had denied prisoner of war status was not to be executed, imprisoned, or otherwise penalized short of further proceedings for the determination of guilt or innocence of alleged offences, and for appropriate penalties following the establishment of guilt (Departments of the Army, the Navy, the Air Force, and the Marine Corps, Chapter 1, §1 – 6 (2)-(9), & (10)(g); and The Supreme Court of the United States, June 28, 2004: Opinion of Justice Souter, 12-13).

#### 4.0 Conclusion

The two cases discussed above illustrate an extensive debate that has taken place within the United States legal system over the status and legal entitlements of enemy combatants. The issue underlying this debate has been the tension between preserving civil liberties on the one hand, and guaranteeing national security on the other. These two cases, though, have shown how this central issue has manifested itself in a variety of sub-issues. The participants in this debate were almost as varied as the issues covered, ranging from the father of one of the plaintiffs, to the New York Civil Liberties Union, to all levels of the United States court system.

One point of debate was connected to the George W. Bush Administration's detention of each plaintiff as an enemy combatant, i.e., a detainee who was not entitled to prisoner of war status, and to the legal protections that such status grants detainees. The Administration maintained that designation as an enemy combatant barred the two plaintiffs from invoking the guarantees of the Third Geneva Convention, on account of their alleged affiliations with Al-Qaeda or the Taliban. Justice Souter's opinion regarding the Hamdi case, however, was that the Convention enjoined detaining powers to treat detainees as prisoners of war, pending a competent tribunal's evaluation of their status. Furthermore, this opinion held that when President Bush stated in his Fact Sheet that the Third Geneva Convention applied to Taliban detainees, he was, in fact, designating those detainees as prisoners of war.

Both plaintiffs were United States citizens, and this fact generated additional debate about their detention particulars. José Padilla had argued that 18 U.S.C. § 4001 (a) protected U.S. citizens like him from Federal detention short of an Act of Congress describing a specific violation, but Deputy Assistant Attorney General Yoo countered that Padilla's argument was irrelevant, as the statute governed civilian detentions only, and not military ones, and that in any event, Padilla's U.S. citizenship did not immunize him from detention as an enemy combatant. At another angle, the American Civil Liberties Union argued that it was unlawful for Padilla to be held in military custody, since he had been arrested outside of a combat zone. Regarding the Hamdi case, the Souter/Ginsburg opinion held that part of the rationale for the enactment of 18 U.S.C § 4001 (a) had been the general protection of U.S. citizens from the wholesale, arbitrary Federal detention that United States citizens of Japanese origin had suffered during World War II.

Concerning a related issue, Deputy Assistant Attorney General Yoo maintained that Public Law 107-40 the Authorization of the Use of Military Force (A.U.M.F.) Act of 2001 furnished the Bush Administration with the Act of Congress that 18 U.S.C. § 4001(a) required for Federal detention of U.S. citizens. Yoo's position was that since Article II of the United States Constitution granted the President of the United States plenary powers as Commander in Chief of the United States Armed Forces, and since the detaining of enemy fighters was an integral part of warfare, the A.U.M.F. Act merely fortified his right to designate citizens like José Padilla enemy combatants and detain them. However, regarding the Hamdi case, the Souter/Ginsburg opinion was that the A.U.M.F. Act did not fit the United States Code statute's Act of Congress requirement for such detention, because the A.U. M. F. Act did not contain explicit provisions prescribing such detention.

There was also the issue of separation of powers. The Fourth Circuit Court of Appeals maintained that Yaser Hamdi could not claim entitlement to an evidentiary hearing on the grounds that he had taken up arms against the United States, and had been captured in a combat zone. In so doing, this court also held that Hamdi's capture and confinement were clearly within the President's power as military Commander in Chief. This court held that the Constitution had not empowered the Judicial branch of the United States Government to oversee or circumscribe the

President's plenary war powers. The Souter/Ginsburg opinion countered this argument under the general principle that each of the three branches of the United States government served the function of overseeing and circumscribing the actions of the other two. Accordingly, this opinion specifically referred to 18 U.S.C § 4001(a) in arguing that the purpose of the adoption of this statute had been to enable the Legislative branch to temper the Executive branch's powers under the A.U.M.F. Act. Under the separation of powers principle, the balance between national security and civil liberties required the Legislative branch's modification of the Executive branch's ambit.

Finally, there arose the issue of a plaintiff's right to submit a *habeas corpus* petition. In answer to Yaser Hamdi's habeas petition stating that his detention had been unconstitutional under the Fifth and Fourteenth amendments, and to the District Court for the Eastern District of Virginia's ruling that Hamdi was entitled to a detailed, *in camera* hearing concerning the circumstances and duration of his detention, the Fourth Circuit Court of Appeals had ruled that such a hearing would be improper, given the plaintiff's enemy combatant status. While a plurality of the Supreme Court's justices, in contrast to Justices Souter and Ginsburg, held that the A.U.M.F. Act did constitute Congressional authorization as U.S.C. 18 § 4001 (a) required for the Federal detention of United States citizens, such authorization did not, short of a national emergency suspension of *habeas corpus*, negate any detained citizen's right to challenge that detention via a *habeas corpus* petition.

Robust debate such as that which has ensued in connection with *Padilla v. Rumsfeld* and *Hamdi v. Rumsfeld* is an indication of health in any legal system. At the same time, though, the debate over these two cases has raised some matters of concern. The aftermath of the September 11, 2001 attacks engendered some arguments suggesting fewer checks on Presidential war powers, for instance. Other arguments suggested a loose interpretation of the language of the A.U.M.F. Act, implying that there might be circumstances justifying a relaxation of the circumstances prohibiting the Federal detention of United States Citizens short of Congressional, statutory authorization. Still other arguments suggested that, at times, certain detainees were not entitled to *habeas corpus* hearings. All of these compromises are potentially serious regarding the preservation of civil liberties.

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