

**Response to the Preliminary Report of  
the ABA Task Force on Treatment of Enemy Combatants**

Last March, at the request of Robert Hirshon, then-President of the American Bar Association ("ABA"), the ABA Board of Governors established a Task Force on Treatment of Enemy Combatants ("Task Force"). On August 8, 2002, the Task Force issued a Preliminary Report, *available at* [www.abanet.org/leadership/enemy\\_combatants.pdf](http://www.abanet.org/leadership/enemy_combatants.pdf) ("Report"). The Report raises various concerns with the detention and treatment of U.S. citizens as enemy combatants.<sup>1</sup> This memorandum analyzes the various legal arguments made in that report.

As the Justice Department has repeatedly explained in numerous briefs recently filed in various federal courts, the President's legal authority to order the current detention and treatment of U.S. citizens as enemy combatants is well established. The preventative detention of enemy combatants, regardless of citizenship, by the United States in the current war against al Qaida – undertaken to gather intelligence and to stop further lethal terrorist attacks against the United States and its citizens and interests, both here and abroad – is clearly authorized under the Constitution and the laws and usages of war, unanimously recognized by the Supreme Court of the United States, and supported by a virtually unanimous vote of Congress. The law is similarly clear that, although U.S. citizens may seek judicial review of the legality of their detention as enemy combatants by filing petitions for a writ of habeas corpus, individuals held as enemy combatants have no right of access to counsel under either the Constitution or international law. The President has thus acted well within his legal authority in ordering the detention of enemy combatants to prevent further U.S. casualties in the current war against al Qaida.

In expressing its views on the detention and treatment of U.S. citizens held as enemy combatants, the Task Force does not carefully distinguish its legal arguments from its policy-based concerns. The Report states that "[h]ow we deal with citizens suspected of terroristic activity will say much about us as a society committed to the rule of law." Report at 4. As recently confirmed by the Fourth Circuit, however, *see Hamdi v. Rumsfeld*, No. 02-7338, 2003 WL 60109 (4th Cir. Jan. 8, 2003), the current detention and treatment of U.S. citizens as enemy combatants is fully authorized under and consistent with the requirements of the Constitution. Moreover, the Report itself makes numerous significant legal concessions regarding the Administration's actions. In light of those concessions, it seems clear that the Task Force's real objections to the current detention and treatment of U.S. citizens as enemy combatants are based on policy considerations, rather than questions of legality. Indeed, the Report's stated objective is "to examine the framework surrounding the detention of United States citizens declared to be 'enemy combatants'" as a matter of "policy" as well as a matter of "statutory, constitutional, and international law." Report at 5.

This legal memorandum expresses no views on the various policy considerations that might affect either the decision to detain or the manner of treatment of a U.S. citizen as an enemy combatant. For example, the Defense Department has emphasized the stealthy nature of the al Qaida organization, its deceptive communications methods, the difficulties inherent in even

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<sup>1</sup> The Report explicitly refrains from expressing any position on the detention of foreign nationals as enemy combatants, or on the detention of persons on other legal grounds. *See* Report at 5.

identifying all members and associates of al Qaida, and other considerations as constituting significant national security concerns warranting various special measures. In a letter responding to the Task Force report, William J. Haynes II, General Counsel of the Department of Defense, explained that

[a]l Qaida training manuals emphasize the "importance," when detained, of "mastering the art of hiding messages," and teach that al Qaida detainees should "[t]ake advantage of visits to communicate with brothers outside prison and exchange information that may be helpful to them in their work outside prison . . . ." See Birmingham UK Al Qaida Manual, page 16, para. 6, available at [http://www.usdoj.gov/ag/manualpart1\\_4.pdf](http://www.usdoj.gov/ag/manualpart1_4.pdf); cf. *United States v. Ahmed Abdel Sattar, et al.*, Indictment 02 Crim. 395, ¶¶ 7, 16, 30 (Grand Jury Indictment, S.D.N.Y., April 9, 2002) (attorney for member of terrorist group related to al Qaida indicted for passing messages to and from convicted terrorist Sheik Omar Abdel-Rahman).

Letter from William J. Haynes II, General Counsel, Department of Defense, to Alfred P. Carlton Jr., President, American Bar Association, Oct. 2, 2002, at 3, available at [www.defenselink.mil/news/Oct2002/b10022002\\_bt497-02.html](http://www.defenselink.mil/news/Oct2002/b10022002_bt497-02.html), and at [www.abanet.org/poladv/new/enemycombatantresponse.pdf](http://www.abanet.org/poladv/new/enemycombatantresponse.pdf). The Task Force itself recognizes that "there may be circumstances in which providing a detainee with access to counsel could be unwise, impractical, or dangerous." Report at 23. On the other hand, the Report offers, without explanation and in rather conclusory fashion, that "[g]overnment concerns that affording access to counsel may impede the collection of intelligence are not, in our view, so compelling that they justify denial of access to assistance of counsel. Nor are concerns that counsel might be used by detainees to facilitate communications with others. We have confidence that our nation's lawyers can provide effective representation without breaching security." *Id.* at 23-24. This memorandum expresses no position on either the Task Force's qualifications to weigh national security considerations or the merits of their underlying policy conclusions. It states only that the President's actions in detaining and treating U.S. citizens as enemy combatants are fully and completely lawful.

Section I of this memorandum reviews the various significant legal concessions made by the Report. Those concessions help to demonstrate that the real basis of the Task Force's concerns with current Administration practice are premised on policy, rather than legal, considerations. Section II outlines the constitutional framework that underlies the President's authority as Chief Executive and Commander in Chief to detain enemy combatants, regardless of citizenship. It concludes that that constitutional authority supports the current detention and treatment of U.S. citizens held as members of al Qaida and, thus, as enemy combatants, and explains that, in enacting 18 U.S.C. § 4001(a), Congress did not attempt to interfere with that authority. Finally, Section III shows that enemy combatants have no right of access to counsel under either the Constitution or international law.

## I.

The Report makes numerous legal concessions which recognize the legality of the current detention and treatment of U.S. citizens as enemy combatants. Because these concessions are

important to developing a proper appreciation of the Task Force's views and to demonstrating that the real nature of its objections to current practice is policy-based rather than legal, this memorandum identifies them at the outset.

First, the Report explicitly acknowledges that it is possible for a nation to be at war against a non-state organization such as al Qaeda, *see* Report at 8, that the United States is in fact currently in a state of war with al Qaeda, and that during this state of war, the President is authorized to take military actions necessary to prevent further attacks. Taking note of Congress's September 18, 2001 Joint Resolution expressly authorizing the use of military force, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("Joint Resolution")<sup>2</sup> and similar expressions of support from the United Nations Security Council and NATO, as well as ongoing U.S. combat operations in Afghanistan, the Report explains that "it may be concluded that the United States is *at war with al Qaeda*, the organization deemed responsible for the September 11 attacks." Report at 8 n.10 (emphasis added); *see also id.* at 17. The Report further points out that "[t]he openly declared goal of Al Qaeda to inflict a holy war upon the United States could not go unrecognized." *Id.* at 16. Accordingly, the Report concludes that the United States is fully authorized to take military actions to defend itself and to successfully prosecute the war against al Qaeda. *See, e.g., id.* at 2 ("The United States [has] reacted, as any nation would or must, with the support of the international community, to protect its people from future attack."); *id.* at 16-17 ("No President or Congress could ignore the threat and pretend that further attacks should not be expected."); *id.* at 24 ("The Task Force respects and supports President Bush and his administration in their efforts to root out terrorism and assure our homeland security. Of course, we should have the means to prevent more attacks like those of September 11.").

Second, the Report recognizes that the United States possesses wartime authority to detain enemy combatants in order to prevent them from furthering enemy attacks on the United States in the future. The Task Force effectively concedes that the United States cannot rely exclusively on its power to enforce criminal laws, which punish individuals for committing illegal acts *in the past*, to fight wars successfully. Specifically, the Report states that the Task Force "fully recognize[s] the necessity under some circumstances to detain persons in order to prevent them from engaging in future terrorist attacks." Report at 6 n.7 (emphasis added). *See also id.* at 4 ("we must have the means to prevent more attacks like those of September 11th"); *id.* at 24 (same). Moreover, the Report acknowledges, as it must, that the President's authority to detain enemy combatants is not limited to aliens, but applies also to U.S. citizens who are enemy

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<sup>2</sup> This joint resolution, it should be noted, was not legally necessary to justify the President's use of military force, because the President already possesses such authority under the Constitution, a point that the preamble of the resolution itself notes. *See* Joint Resolution, 115 Stat. 224 ("the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States"); *Statement on Signing the Authorization for Use of Military Force*, 37 Weekly Comp. Pres. Doc. 1333, 1334 (Sep. 18, 2001), available at [www.whitehouse.gov/news/releases/2001/09/20010918-10.html](http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html) ("Senate Joint Resolution 23 recognizes the seriousness of the terrorist threat to our Nation and the authority of the President under the Constitution to take action to deter and prevent acts of terrorism against the United States. In signing this resolution, I maintain the longstanding position of the executive branch regarding the President's constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War Powers Resolution."). *See also MacLeod v. United States*, 229 U.S. 416, 426 (1913) (endorsing citation of Presidential papers as "matters of public history").

combatants, noting the Supreme Court's unanimous decision in *Ex parte Quirin*, 317 U.S. 1 (1942). See Report at 8 ("There is precedent for treating U.S. citizens as enemy combatants.") (citing *Quirin*).

Finally, the Report concludes that a state of war necessarily confers upon the United States government additional authority that it does not possess in time of peace, and that the civil liberties that protect individuals accused of a crime against actions by law enforcement officials do not necessarily extend to wartime military actions against enemy combatants. See *id.* at 2-3 ("In time of war or threat of war, the balance [between protection of liberty and individual rights] may shift – appropriately – toward security"); *id.* at 4 ("When a nation is at war, measures may seem reasonable that would never be acceptable in a time of peace"). Specifically, the Task Force finds nothing in the Constitution that expressly confers upon enemy combatants either a right against preventative detention or a right of access to counsel. The Report points out that the "[Sixth] Amendment right to counsel does not technically attach to uncharged enemy combatants," because that is a right of criminal defendants, and not of detained enemy combatants captured as the result of war. *Id.* at 23; see also *id.* at 17 ("The right to counsel . . . will attach once prosecution commences."). With respect to the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364 ("GPW"), the Report recognizes the fundamental distinction between lawful and unlawful combatants, see Report at 8-9, 13, and acknowledges that even lawful combatants have no right to counsel under GPW, see *id.* at 13. The Report even notes that, during wartime, the writ of habeas corpus may be suspended altogether, see U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."), a change in the law that the Administration has never proposed. See Report at 23. To the contrary, the Administration has regarded the filing of habeas petitions in the proper court as providing opportunities for the Administration to explain the legality of the President's actions.

In summary, the Report acknowledges that the United States is currently in a state of war, and recognizes the President's constitutional authority to detain enemy combatants, regardless of their citizenship, in time of war. The Report further concludes that enemy combatants have no right to counsel under either the Sixth Amendment or GPW. These important concessions strongly suggest that the true nature of the Task Force's concerns is based on policy considerations, and not on legal objections.

## II.

Notwithstanding the Supreme Court's unanimous decision in *Ex parte Quirin*, which recognized the President's constitutional authority to detain U.S. citizens as enemy combatants, the Task Force half-heartedly suggests that the President may need statutory authority in order to conduct such detentions. Its Report notes that "[n]either the Joint Resolution authorizing the use of force nor any laws enacted in response to the terrorist attacks have addressed the detention of United States citizens as enemy combatants." Report at 10. The President's wartime authority to direct the detention of enemy combatants arises out of the Constitution and the laws and usages of war, however, and not by act of Congress. Moreover, Congress specifically recognized that authority when it enacted its September 18, 2001 Joint Resolution, which

expressly recognizes the President's constitutional authority "to take action to deter and prevent acts of international terrorism against the United States" and specifically approves the use of "all necessary and appropriate force" against those "he determines" facilitated the attacks of September 11. Joint Resolution, 115 Stat. 224.

A.

Article II of the Constitution vests the entirety of the "executive power" of the United States government "in a President of the United States of America," and expressly provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." U.S. Const. art. II, § 1, cl. 1; *id.* § 2, cl. 1. Because both "[t]he executive power and the command of the military and naval forces is vested in the President," the Supreme Court has unanimously stated that it is "*the President alone* [] who is constitutionally invested with the *entire charge of hostile operations.*" *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (emphasis added). As Chief Executive and Commander in Chief, the President possesses the full powers necessary to prosecute successfully a military campaign. As the Supreme Court has recognized, "[t]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution." *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) (citation omitted).

One of the President's core constitutional functions as Chief Executive and Commander in Chief is that of capturing and detaining members of the enemy. It is well settled that the President may seize and detain enemy combatants at least for the duration of the conflict. Indeed, the practice of capturing and detaining enemy combatants is as old as war itself. *See, e.g., Allan Rosas, The Legal Status of Prisoners of War* 44-45 (1976). In modern conflicts, the practice of detaining enemy combatants and hostile civilians generally has been designed to balance the humanitarian purpose of sparing lives with the military necessity of defeating the enemy on the battlefield. *Id.* at 59-80. The laws of war have thus long provided for the detention of enemy combatants until "the conclusion of peace." Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 20, 36 Stat. 2277, 2301. Even GPW, which does not protect unlawful combatants such as members of al Qaida, recognizes that under the laws of war, enemy combatants may be detained at least until "the cessation of active hostilities." GPW art. 118, 6 U.S.T. 3406.<sup>3</sup> Exercising their authority under the Constitution and the laws of war, numerous Presidents have ordered the capture and detention of enemy combatants during virtually every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars, all without explicit statutory authorization to do so. Recognizing this authority, Congress has *never* attempted to restrict or interfere with the President's constitutional power on this score. It is obvious that the current President plainly has authority to detain enemy combatants in connection with the present conflict, just as he has in every previous armed conflict.

Congress recognized the President's constitutional authority in this area when it enacted the Joint Resolution of September 18, 2001. That resolution expressly recognizes that "the

<sup>3</sup> The Task Force thus mischaracterizes the Administration's legal argument as authorizing the government "to detain American citizens *indefinitely without charges.*" Report at 5 (emphasis added).

President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” Joint Resolution, 115 Stat. 224. The resolution additionally authorizes “the President . . . to use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks 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.” *Id.* § 2(a) (emphasis added). Congress has thus endorsed the use not only of deadly force, but also of the lesser use of force necessary to capture and detain enemy combatants to prevent them from furthering hostilities against the United States.<sup>4</sup>

Likewise, the Supreme Court has long affirmed the President’s constitutional authority as Chief Executive and Commander in Chief to order the capture and detention of enemy belligerents. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court unanimously stated:

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

*Id.* at 30-31 (emphasis added and footnotes omitted). See also *id.* at 31 n.8 (citing authorities); *Duncan v. Kahanamoku*, 327 U.S. 304, 313-14 (1946); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946); *Ex parte Toscano*, 208 F. 938, 940 (S.D. Cal. 1913); L. Oppenheim, *International Law* 368-69 (H. Lauterpacht ed., 7th ed. 1952).

The President’s authority to detain an enemy combatant is not restricted to aliens, but applies equally to U.S. citizens, as the Task Force itself concedes and as numerous federal courts, including a unanimous Supreme Court, have affirmed. See Report at 8; see also *Quirin*, 317 U.S. at 37 (“Citizenship in the United States of an enemy belligerent does not relieve him from the consequence of a belligerency which is unlawful.”); *In re Territo*, 156 F.2d 142, 144 (9th Cir. 1946) (“[I]t is immaterial to the legality of petitioner’s detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America.”); *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (“[T]he petitioner’s citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war.”). The fact that a detainee is an American citizen does not affect the President’s constitutional authority as Chief Executive and Commander in Chief to detain him, once it has been determined that he is an enemy combatant.

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<sup>4</sup> As the Supreme Court has noted, “[w]hen the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action ‘would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.’” *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

As the Supreme Court has unanimously held, all individuals who “associate” themselves with the “military arm of the enemy” and “with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war,” regardless of their citizenship. *Quirin*, 317 U.S. at 37-38. Nothing further need be demonstrated to justify their detention as enemy combatants. Indeed, the U.S. Court of Appeals for the Fourth Circuit recently applied this long established line of authority to the present conflict, finding it “long been established” that the government may lawfully detain “an ‘enemy combatant’ who was captured during [the recent] hostilities in Afghanistan.” *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002). Finding *Quirin* directly applicable to the current conflict, the court concluded that “both lawful and unlawful combatants, regardless of citizenship, ‘are subject to capture and detention as prisoners of war by opposing military forces.’” *Id.* (quoting *Quirin*, 317 U.S. at 31, 37).

## B.

The President’s legal authority to direct the detention of enemy combatants during wartime thus arises out of the Constitution and the laws and usages of war, and not by act of Congress. The Report does not directly challenge this proposition. Quite the contrary, the Report expressly acknowledges that the United States has the legal authority to “treat[] U.S. citizens as enemy combatants” no less than aliens, *see* Report at 8, citing *Quirin*.<sup>5</sup> The Report makes a series of rather half-hearted attempts, however, to distinguish *Quirin*’s recognition of Presidential power to order the detention of enemy combatants. Careful review of the Report’s assertions makes clear that there is nothing to those proposed difficulties.

First, the Report construes *Quirin* narrowly to provide that the power to detain enemy combatants is limited to only those wars which have been declared by Congress, and to only “uniformed members” of an enemy armed force. *See* Report at 9. Neither proposition withstands scrutiny.

Congress has declared war only five times in the history of the United States, during the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II.<sup>6</sup> Presidents have used military force, however, including that use of force necessary to detain enemy combatants, in hundreds of conflicts in the absence of a formal declaration of war,

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<sup>5</sup> The Task Force’s assertion that “[t]he term ‘enemy combatant’ is not a term of art which has a long established meaning,” *see* Report at 7 – supported only by a citation of an op-ed published in the *Washington Post* – is thus difficult to comprehend or reconcile with the Report’s subsequent citation of the Supreme Court’s unanimous, sixty-year old decision in *Quirin*, which expressly addresses the detention of enemy combatants. *See also Hamdi*, 2003 WL 60109, at \*19 n.3 (“Persons captured during wartime are often referred to as ‘enemy combatants.’ While the designation of Hamdi as an ‘enemy combatant’ has aroused controversy, the term is one that has been used by the Supreme Court many times.”) (collecting cases).

<sup>6</sup> *See* Act of June 18, 1812, 2 Stat. 755 (1812) (War of 1812); Act of May 13, 1846, 9 Stat. 9 (Mexican-American War); Act of Apr. 25, 1898, 30 Stat. 364 (Spanish-American War); Joint Resolution of Apr. 6, 1917, 40 Stat. 1 (World War I: Germany); Joint Resolution of Dec. 7, 1917, 40 Stat. 429 (World War I: Austria-Hungary); Joint Resolution of Dec. 8, 1941, 55 Stat. 795 (World War II: Japan); Joint Resolution of Dec. 11, 1941, 55 Stat. 796 (World War II: Germany); Joint Resolution of Dec. 11, 1941, 55 Stat. 797 (World War II: Italy); Joint Resolution of June 5, 1942, 56 Stat. 307 (World War II: Bulgaria); Joint Resolution of June 5, 1942, 56 Stat. 307 (World War II: Hungary); Joint Resolution of June 5, 1942, 56 Stat. 307 (World War II: Rumania).

and often in the absence of statutory authorization.<sup>7</sup> In any event, Congress expressly authorized the current conflict when it enacted the Joint Resolution of September 18, 2001, and the Supreme Court has repeatedly held that Congressional approval of Presidential uses of the military need not take the form of a declaration. See, e.g., *Bas v. Tingy*, 4 U.S. 37 (1800); *Talbot v. Seeman*, 5 U.S. 1 (1801); *The Prize Cases*, 67 U.S. 635, 668 (1862); *Montoya v. United States*, 180 U.S. 261, 267 (1901).

There is similarly no basis for limiting the President's power to detain enemy combatants to only those combatants who wear uniforms. Indeed, as a unanimous Supreme Court indicated in *Quirin* itself, enemy combatants who do not wear uniforms do not meet the four traditional conditions of lawful combat under the laws of war and are therefore unlawful combatants, unprotected by even the limited set of rights enjoyed by lawful enemy combatants,<sup>8</sup> and of course, unlawful combatants are subject to military detention no less than lawful combatants. See *Quirin*, 317 U.S. at 30-31. Under the Task Force's formulation, however, enemy combatants could unilaterally prevent their detention simply by refusing ever to wear a uniform, notwithstanding the fact that the laws of war have long *required* combatants to wear uniforms or some other form of distinctive insignia. Neither the Constitution nor the laws of war support such an absurd proposition.

Second, the Report attempts to apply a 1971 provision of Title 18 of the United States Code, which governs the administration of *federal criminal law*, to the wartime effort of the United States to detain enemy combatants to prevent future attacks. The section of the federal criminal code cited by the Task Force states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," and thus provides that the United States ordinarily may not detain U.S. citizens absent statutory authority to do so. 18 U.S.C. § 4001(a) (2000). Section 4001(a) cannot be read, however, to interfere with the President's *constitutional* authority as Chief Executive and Commander in Chief to detain enemy combatants.

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<sup>7</sup> Congress has expressed its support for the general use of military force on a number of occasions throughout U.S. history. See, e.g., Act of May 28, 1798, 1 Stat. 561 (Quasi War with France); Act of Feb. 6, 1802, 2 Stat. 129 (First Barbary War); Act of Jan. 15, 1811, 3 Stat. 471 (East Florida); Act of Feb. 12, 1813, 3 Stat. 472 (West Florida); Act of Mar. 3, 1815, 3 Stat. 230 (Second Barbary War); Act of Mar. 3, 1819, 3 Stat. 510 (African Slave Trade); Joint Resolution of June 2, 1858, 11 Stat. 370 (Paraguay); Joint Resolution of Apr. 20, 1898, 30 Stat. 738 (Spanish-American War); Joint Resolution of Apr. 22, 1914, 38 Stat. 770 (Mexico); Joint Resolution of Jan. 29, 1955, 69 Stat. 7 (Formosa); Joint Resolution of Mar. 9, 1957, 71 Stat. 5 (codified at 22 U.S.C. § 1962) (Middle East); Joint Resolution of Aug. 10, 1964, 78 Stat. 384 (Gulf of Tonkin); Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).

<sup>8</sup> See *Quirin*, 317 U.S. at 31 ("The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."); *id.* at 34-35 ("The definition of lawful belligerents . . . is that adopted by Article 1, Annex to Hague Convention No. IV of October 18, 1907, to which the United States was a signatory and which was ratified by the Senate in 1909. . . . Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear 'fixed and distinctive emblems'"); *id.* at 36 n.12 (noting "acts which, when committed within enemy lines by persons in civilian dress associated with or acting under the direction of enemy armed forces, are 'war crimes'").



Nothing in section 4001 indicates that its provisions were meant to reach the President's constitutional authority as Chief Executive and Commander in Chief to detain enemy combatants. To the contrary, section 4001 addresses the Attorney General's authority with respect to the federal civilian prison system, rather than the President's constitutional power as Chief Executive and Commander in Chief to detain enemy combatants. Congress specifically enacted the language contained in subsection (a) into section 4001 of Title 18 in 1971. Act of Sep. 25, 1971, Pub. L. No. 92-128, § 1, 85 Stat. 347. Prior to 1971, section 4001 simply gave the Attorney General the power to "control and manage[]" the federal civilian prison system. Act of June 25, 1948, ch. 645, § 4001, 62 Stat 683, 847. Moreover, section 4001 specifically carved out "military or naval institutions" from its coverage of "Federal penal and correctional institutions." In 1971, this provision was moved into subsection (b) but was otherwise left untouched. Construing the scope of the new language in subsection (a) broadly to cover all types of detention, beyond that of the federal civilian prison system, is difficult to reconcile with its coupling with the old language now contained in subsection (b). The correct reading is that subsections (a) and (b) have the same scope; both apply exclusively to the federal civilian prison system.

The particular placement of section 4001(a) in Title 18, within the larger context of the United States Code, further demonstrates that it does not govern the detention of enemy combatants by the U.S. Armed Forces. Title 18 covers "Crime and Criminal Procedure." Statutes concerning the powers of the military and issues of national security, by contrast, are generally found in Title 10 ("Armed Forces") and in Title 50 ("War and National Defense"). Moreover, the particular part of Title 18 in which section 4001 is located contains chapters governing exclusively federal criminal confinement. Part III of Title 18, which contains section 4001, is entitled "Prisons and Prisoners" and contains chapters relating to the Bureau of Prisons, good time allowances, parole, and institutions for women, among other topics. Nothing in those provisions can plausibly be construed to apply to the detention of enemy combatants. Congress's decision to place section 4001(a) in this particular provision of the U.S. Code thus provides further support for the conclusion that subsection (a) does not apply to the President's constitutional power to detain enemy combatants.

Unsurprisingly, then, the Report does not rely on either the text or the structure of section 4001(a) to support its suggestion that the language may apply outside of the control of civilian prisons. The Report instead turns immediately to legislative history. *See* Report at 10-11. A review of the legislative history of 18 U.S.C. § 4001(a) only reinforces the conclusion, however, that Congress never intended subsection (a) to restrict the President's constitutional powers as Chief Executive and Commander in Chief. As the Task Force Report notes, *see* Report at 11, the 1971 addition of section 4001(a) was accompanied by, and closely identified with, the repeal of the Emergency Detention Act of 1950, ch. 1024, 64 Stat. 1019, 1019-31 (1950) (codified at 50 U.S.C. §§ 811-826, *repealed by* Pub. L. No. 92-128, 85 Stat. 347, 348). That Act authorized the federal government to detain individuals suspected of violating certain criminal statutes. Specifically, it empowered the Attorney General to "to apprehend and by order detain . . . each person as to whom there is [a] reasonable ground to believe that such person . . . will engage in, or probably will conspire with others to engage in, acts of espionage or . . . sabotage." 64 Stat. 1021. The Act expressly defined espionage and sabotage in relation to particular sections of

Title 18 of the United States Code. *Id.* at 1030. In other words, the Act addressed the detention of civilian individuals based on suspected criminal conduct, and not the wartime detention of enemy combatants in order to prevent future attacks. Accordingly, both the repeal of the 1950 Act and the accompanying codification of section 4001(a) address civilian detention, and not the detention of enemy combatants.

Moreover, when some members of Congress questioned the scope of proposed section 4001(a) on the ground that it potentially infringed upon the President's war powers, in violation of the Constitution,<sup>9</sup> others assured members that the statute would not extend so far. Then-Congressman Abner Mikva explained that Congress lacked the authority to interfere with the President's constitutional powers as Chief Executive and Commander in Chief, and that the legislation could not be interpreted to do so. He argued that the legislation did not interfere with "any inherent power of the President of the United States, either as the Chief Executive or Commander in Chief, under the Constitution of the United States, to authorize the detention of any citizen of the United States," because "obviously no act of Congress can derogate the constitutional power of a President." 117 Cong. Rec. 31,555 (1971).

Congress's understanding of the effect of section 4001(a) has remained constant to this day. In 1984, thirteen years after the enactment of section 4001(a), Congress added section 956 to Title 10 of the United States Code, the title which specifically governs the U.S. Armed Forces. Section 956 explicitly authorizes the U.S. Armed Forces to use any funds appropriated to the Department of Defense to pay for the detention of prisoners of war and other enemy combatants. 10 U.S.C. § 956 (2000). This provision plainly contemplates that the President has the power to detain prisoners of war and other enemy combatants, notwithstanding the prior enactment of section 4001(a). As explained earlier, that authority is based on the President's constitutional power as Chief Executive and Commander in Chief, and applies to U.S. citizens and non-citizens alike, as unanimously held by the Supreme Court in *Quirin*. Nothing in 10 U.S.C. § 956 distinguishes between citizens and non-citizens or otherwise indicates that the President's power is in any way diminished today. Similarly, in 1994, Congress amended 18 U.S.C. § 757, a provision of the federal criminal code prohibiting anyone from facilitating the escape of an enemy combatant detained by the United States. Like 10 U.S.C. § 956, 18 U.S.C. § 757 presumes that the President has the authority to direct the detention of enemy combatants, and does not contemplate any distinction on the basis of citizenship.<sup>10</sup>

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<sup>9</sup> See, e.g., 117 Cong. Rec. 31,542 (1971) (statement of Rep. Ichord) ("[The amendment] would . . . deprive the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises. Hence the amendment also has the consequence of doing patent violence to the constitutional principle of separation of powers. . . . Although many Members of this House are committed to the repeal of the Emergency Detention Act of 1950, they have no purpose, I am sure, to confound the President in the exercise of his constitutional duties to defend this Nation, nor would they wish to render this country helpless in the face of its enemies.").

<sup>10</sup> In addition, last October the Congressional Research Service issued a report analyzing the power of the Executive Branch to detain individuals during the current conflict in the interest of national security. See Jennifer Elsea, Congressional Research Service, *Race-based Civil Detention for Security Purposes*, Order Code RS21039 (2001). That report specifically discusses 18 U.S.C. § 4001(a) and concludes only that section 4001(a) was "intended to prevent the President from authorizing *civil* detention of citizens without an act of Congress." *Id.* at 3 (emphasis added). Notably, the report makes no mention of military detention of U.S. citizens who are enemy combatants, and does not even hint at the possibility that section 4001(a) has any application outside of ordinary civilian detention.

Finally, the conclusion that section 4001(a) does not interfere with the President's constitutional authority as Chief Executive and Commander in Chief is compelled by the well-established canon of statutory construction that statutes are not to be construed in a manner that presents constitutional difficulties so long as a reasonable alternative construction is available. This canon of construction specifically applies where an act of Congress could be read to encroach upon powers constitutionally committed to a coordinate branch of government,<sup>11</sup> and has special force in the area of foreign affairs and war powers in particular.<sup>12</sup> Congress may no more regulate the President's authority, as Commander in Chief, to detain enemy combatants, regardless of their citizenship, than it may regulate his ability to direct troop movements on the battlefield. Section 4001(a) can be reasonably construed to avoid this constitutional difficulty and not to apply to the President's detention of enemy combatants pursuant to his Chief Executive and Commander in Chief authority, and under the canon of avoidance, section 4001(a) must be so construed.

In light of the text, structure, and legislative history of section 4001(a), combined with the traditional avoidance canon, it is unsurprising that federal courts have generally applied section 4001(a) only within the context of the federal civilian penitentiary system.<sup>13</sup> Moreover, the Fourth Circuit recently construed section 4001(a) specifically not to apply to U.S. citizens held as enemy combatants, stating that "[t]here is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is." *Hamdi*, 2003 WL 60109, at \*10. *See also id.* at \*9 ("Any alternative construction . . . would be fraught with difficulty. . . . If Congress had intended to override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit.").<sup>14</sup>

<sup>11</sup> *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 800-1 (1992) (citation omitted) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the [Administrative Procedure Act]. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.").

<sup>12</sup> *See Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 183 (1996) (Congress may not by legislation "constrain[] the President's exercise of his constitutional authority as Commander-in-Chief"); *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 232-33 (1986) (construing federal statutes to avoid curtailment of traditional presidential prerogatives in foreign affairs).

<sup>13</sup> *See, e.g., Howe v. Smith*, 452 U.S. 473, 479 (1981) (noting "the authority of the Federal Government, in the official person of the Attorney General, to receive and to hold [state convicts subsequently transferred to] a federal penitentiary," citing 18 U.S.C. §§ 4001(a) & 5003); *Lono v. Fenton*, 581 F.2d 645, 648 (7th Cir. 1978) (section 4001(a) "forbid[s] non-statutory confinement in federal prisons"); *Sellers v. Ciccone*, 530 F.2d 199, 201 (8th Cir. 1976) (section 4001(b) vests Attorney General with "[t]he administration of the rehabilitative programs for federal prisoners").

<sup>14</sup> In *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), the district court construed section 4001(a) more broadly, but nevertheless upheld the detention of a U.S. citizen as an enemy combatant as authorized by an act of Congress – specifically, the Joint Resolution of September 18, 2001. *See id.* at 596-99. Thus, no court has ever construed section 4001(a) to deny the President the ability to detain U.S. citizens as enemy combatants.

In the end, the Report only “suggests” that section 4001 might restrict the President’s wartime authority to detain enemy combatants who are U.S. citizens. *See* Report at 11. It does not address, however, either the statutory or historical context of the provision, nor does it explain whether or not its interpretation would render section 4001 unconstitutional. The Report does quote, out of context, a footnote in *Howe v. Smith*, 452 U.S. 473 (1981). *See* Report at 11-12. That case involved a challenge under section 4001(a) by individuals convicted of civilian criminal charges in state court and subsequently held in custody in federal civilian prison. Federal law explicitly permits such detention. Under 18 U.S.C. § 5003(a) (2000), “[t]he Attorney General . . . is . . . authorized to contract with the proper officials of a State or Territory for the custody . . . of persons convicted of criminal offenses in the courts of such State or Territory: *Provided*, That any such contract shall provide for reimbursing the United States.” *Howe*, 452 U.S. at 475 n.1. In *Howe*, the Supreme Court held that section 5003(a) constituted sufficient statutory authority to authorize federal detention of state prisoners under section 4001(a). There is loose language in *Howe* that the Task Force mistakenly reads to apply section 4001(a) to the President’s constitutional authority to detain enemy combatants. Specifically, the Court noted that “the plain language of § 4001(a) proscrib[es] detention of *any kind* by the United States, absent a congressional grant of authority to detain. If the petitioner is correct that neither § 5003 nor any other Act of Congress authorizes his detention by federal authorities, his detention would be illegal even though that detention is on behalf, and at the pleasure, of the State of Vermont.” *Howe*, 452 U.S. at 479 n.3. But the *Howe* decision only stands for the proposition that section 4001(a) applies to the entirety of the federal civilian criminal prison system, regardless of how each prisoner was originally taken into custody. It does not address any other form of detention by the United States, and certainly in no way contemplates the detention of enemy combatants pursuant to the President’s authority as Commander in Chief.

In any event, the Administration’s current detention program must be lawful notwithstanding 18 U.S.C. § 4001(a) because such detention has indeed been authorized by “an Act of Congress,” as two federal courts have recently held. *See Hamdi*, 2003 WL 60109, at \*9; *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 598-99 (S.D.N.Y. 2002). The Joint Resolution of September 18, 2001 not only explicitly recognizes that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States,” but also specifically authorizes “the President . . . to use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks 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.” Joint Resolution, 115 Stat. 224 (emphasis added). Nothing in this resolution limits the President’s authority to use force only against non-U.S. citizens, nor does the resolution distinguish between the use of lethal force and the use of lesser degrees of force necessary to capture and detain enemy combatants. The Joint Resolution thus constitutes “an Act of Congress” authorizing the detention of U.S. citizens under 18 U.S.C. § 4001(a).

### III.

The Task Force also argues that U.S. citizens detained as enemy combatants are entitled to judicial review and access to counsel. The Administration has never denied any U.S. citizen detained as an enemy combatant access to the courts to ensure the legality of the detention. Although the Report suggests that the Administration constitutionally could have sought to effectuate a suspension of the writ of habeas corpus altogether, *see* Report at 23, the United States has not done so. Quite the contrary, the Administration has availed itself of the opportunity to explain its legal authority to detain enemy combatants before the proper U.S. court capable of exercising jurisdiction over the habeas petition.

The Report mistakenly conflates the right to habeas review, however, with the right of access to counsel, *see* Report at 9 – an error that is especially difficult to comprehend when the Task Force has specifically recognized that the Sixth Amendment right to counsel does not apply to individuals held as enemy combatants. As demonstrated below, enemy combatants have no right of access to counsel under either the Constitution or international law. Although the Task Force urges that enemy combatants be given access to counsel, it fails to cite any source of law establishing that enemy combatants are legally entitled to such access. The Task Force's suggestion with respect to counsel should therefore be taken as a policy proposal, rather than as legal argument.

#### A.

The Constitution does not confer any right of access to counsel upon enemy combatants held by the U.S. Armed Forces, regardless of their citizenship. As previously noted, the Report correctly states that the "Sixth Amendment right to counsel does not technically attach to uncharged enemy combatants." Report at 23. The Sixth Amendment applies only to "criminal prosecutions." U.S. Const. amend. VI. The right to counsel expressly guaranteed under the Sixth Amendment is thus a right only of criminal defendants facing criminal prosecution in a civilian court of law, and not of detained enemy combatants captured as the result of war. The purpose of detaining enemy combatants, after all, is not to punish, but to disable the combatant, to prevent his return to the battlefield, and to deprive the enemy of his assistance until peace is restored. *See, e.g., Territo*, 156 F.2d at 145 ("The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front."); *Ex parte Toscano*, 208 F. 938, 941 (S.D. Cal. 1913) ("Internment is not a punishment for crime. . . . [B]elligerent troops are disarmed as soon as they cross the neutral frontier, and detained in honorable confinement until the end of the war.") (quotations omitted); *Hamdi*, 2003 WL 60109, at \*7 ("detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies . . . [and] in lieu of prosecution may relieve the burden on military commanders of litigating the circumstances of a capture halfway around the globe"). As Chief Executive and Commander in Chief, the President may order the detention of enemy combatants in order to prevent the individual from engaging in further hostilities against the United States, to deprive the enemy of that individual's service, and to collect information helpful to the United States' efforts to prosecute the armed conflict successfully. *See, e.g., Quirin*, 317 U.S. at 28 ("An important incident to the conduct of war is the adoption of measures by the military command . . . to seize . . . those enemies who . . .

attempt to thwart or impede our military effort”). While enemy combatants may also be subject to criminal prosecution under United States or international law, *see, e.g., id.* at 28-29 (President’s war power to detain enemy combatants includes power to “subject to disciplinary measures those enemies who . . . have violated the law of war”), no evidence of criminal liability is necessary for the U.S. Armed Forces to detain an enemy combatant. The Report therefore correctly concludes that the Sixth Amendment right to counsel, which is expressly limited to “criminal proceeding[s],” has no bearing on the preventative detention of enemy combatants. U.S. Const. amend. VI. *See also Middendorf v. Henry*, 425 U.S. 25, 38 (1976) (“[A] proceeding which may result in deprivation of liberty is nonetheless not a ‘criminal proceeding’ within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial.”). Similarly, the Self Incrimination Clause of the Fifth Amendment is a “trial right of criminal defendants” and therefore also does not confer any right to counsel upon enemy combatants. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

The Task Force does not claim any right of access to counsel for enemy combatants under either the Sixth Amendment or the Self Incrimination Clause of the Fifth Amendment. But the Task Force does claim that enemy combatants enjoy “full Due Process rights,” including access to counsel. Report at 24. The Report offers no explanation, however, as to how the Due Process Clause of the Fifth Amendment confers upon enemy combatants a right of access to counsel. In our view, any suggestion of a generalized due process right to counsel under the Fifth Amendment could not be squared with, *inter alia*, the historical *unavailability* of any right to prompt charges or counsel for those held as enemy combatants. *Cf. Herrera v. Collins*, 506 U.S. 390, 407-8 (1993) (looking to “[h]istorical practice” in evaluating scope of “Fourteenth Amendment’s guarantee of due process” in criminal procedure context); *see also Medina v. California*, 505 U.S. 437, 445-46 (1992); *Moyer v. Peabody*, 212 U.S. 78, 84 (1909). As the Supreme Court stated in *Quirin*, “[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.” 317 U.S. at 27-28. Under the laws of war, the military’s detention of captured enemy combatants without counsel or charges is lawful for at least the duration of the underlying conflict.

Accordingly, enemy combatants held during the current conflict have no constitutional right of access to counsel, regardless of their citizenship. As the Fourth Circuit recently stated, “[a]s an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime. But . . . Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to the well-established laws and customs of war.” *Hamdi*, 2003 WL 60109, at \*17. *See also id.* at \*15 (“To be sure, a capable attorney could challenge the hearsay nature of the Mobbs declaration and probe each and every paragraph for incompleteness or inconsistency, as the district court attempted to do. The court’s approach, however, had a signal flaw. We are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive’s law enforcement powers. We are dealing with the executive’s assertion of its power to detain under the war powers of Article II.”); *id.* at \*17 (noting that,

under *Quirin*, “the due process guarantees of the Fifth and Sixth Amendments were inapplicable”).<sup>15</sup>

B.

Finding no express provision of the Constitution that entitles enemy combatants to access to counsel, the Task Force turns to international law. It is important to recognize at the outset, however, that none of the international legal claims made in the Report would be enforceable in any U.S. court even were they meritorious. *See, e.g., Hamdi*, 2003 WL 60109, at \*10 (“the Geneva Convention is not self-executing”). In any event, the Task Force’s international legal arguments are unpersuasive, because nothing about the current detention and treatment of U.S. citizens as enemy combatants violates international law. The Report first suggests that there may be something in the four Geneva Conventions of 1949 that might somehow protect U.S. citizens detained by the United States as enemy combatants. It provides no analysis, however, and identifies no provisions which confer upon enemy combatants a right of access to counsel to challenge their detention.

The Report first states that “[t]he treatment of captured combatants during an armed conflict is covered by [GPW], which defines prisoners of war (POWs) and sets forth the framework for their protection.” Report at 13. The Task Force then specifically acknowledges that not all combatants are lawful combatants entitled to the protections of GPW. *See id.* at 13-14 (“Some individuals are captured during war on the battlefield or in the combat arena but do not qualify as prisoners of war. Such persons are those who have committed a belligerent act and have been captured, but are not part of an organization that qualifies its members as Prisoners of War.”). Finally, the Report concludes correctly that GPW does not provide even lawful combatants with a right to counsel. *See id.* at 13 (prisoners protected by GPW “have no right to counsel”).

The Task Force thus expresses no doubt about the correctness of the President’s February 2002 determination<sup>16</sup> that GPW does not apply to the United States conflict with al Qaida

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<sup>15</sup> The Fourth Circuit, to be sure, was careful to limit its ruling to the particular factual circumstances presented in that case – namely, a U.S. citizen first captured as an enemy combatant “in a[] zone of active combat operations abroad,” *id.* at \*18 – expressly refraining from commenting one way or the other on any cases presenting different facts. *See, e.g., id.* at \*7 (“We have no occasion . . . to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding.”). That said, there is nothing in the Fourth Circuit’s opinion that would prevent that court from applying precisely the same well-established legal principles to U.S. citizens designated and held as enemy combatants under other circumstances.

<sup>16</sup> On February 7, the White House released a fact sheet which explained, first, that as a matter of policy, “[t]he United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949.” White House, Office of the Press Secretary, *Fact Sheet: Status of Detainees at Guantanamo* (Feb. 7, 2002), available at [www.whitehouse.gov/news/releases/2002/02/20020207-13.html](http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html). The fact sheet went on state, however, that as a *legal* matter,

The President has determined that the Geneva Convention applies to the Taliban detainees, but not to the al-Qaida detainees.

because al Qaida is not, and cannot be, a signatory to GPW. See GPW art. 2, 6 U.S.T. 3318 (GPW “shall apply to all cases of declared war or of any other armed conflict which may arise *between two or more of the High Contracting Parties*”) (emphasis added). Nor does the Report raise any questions about the President’s determination (upheld by a federal court last year, see *United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002); see also *Padilla*, 233 F. Supp. 2d at 592) that Taliban fighters are unlawful combatants not entitled to the protections of GPW, pursuant to article 4 of the Convention, GPW art. 4, 6 U.S.T. 3320. The Task Force’s apparent reluctance to challenge the Administration’s determination that GPW protects neither al Qaida nor Taliban fighters is unsurprising, given that both al Qaida and the Taliban militia fail at least three of the four traditional conditions of lawful combat: (1) “[t]o be commanded by a person responsible for his subordinates”; (2) “[t]o have a fixed distinctive emblem recognizable at a distance”; (3) “[t]o carry arms openly”; and (4) “[t]o conduct their operations in accordance with the laws and customs of war.” Annex to the Hague Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 1, 32 Stat. 1803, 1811. Both al Qaida and the Taliban lack a military command structure, under which subordinates are disciplined for disobeying superiors or violating the laws of war. Al Qaida and Taliban fighters do not distinguish themselves from the civilian population, making it difficult for U.S. soldiers to avoid harming innocent noncombatants. And both al Qaida and the Taliban militia have a notorious history of brutalizing civilians in plain violation of the laws of war. See generally *Lindh*, 212 F. Supp. 2d at 558 & n.38. The Report does not even mention, let alone analyze, article 4 of GPW. The Report notes only that article 5 requires that determinations of eligibility for GPW protections must be made by a “competent tribunal” in cases of “doubt.” GPW art. 5, 6 U.S.T. 3324. The Task Force concludes, however, that the “Article 5 process . . . is not directly relevant” to the present circumstance. Report at 14. This conclusion is consistent with the

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Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.

Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs.

Therefore, neither the Taliban nor al-Qaida detainees are entitled to POW status.

*Id.* That same day, White House Press Secretary Ari Fleischer informed reporters that

the national security team, as you know, has always said that these detainees should not be treated as prisoners of war, because they don’t conform to the requirements of Article 4 of the Geneva Convention, which detailed what type of treatment would be given to people in accordance with POW standards. That’s a very easily understood legal doctrine of Article 4. For example, the detainees in Guantanamo did not wear uniforms. They’re not visibly identifiable. They don’t belong to a military hierarchy. All of those are prerequisites under Article 4 of the Geneva Convention, which will be required in order to determine somebody is a POW.

White House, Office of the Press Secretary, *Press Briefing by Ari Fleischer* (Feb. 7, 2002), available at [www.whitehouse.gov/news/releases/2002/02/20020207-6.html](http://www.whitehouse.gov/news/releases/2002/02/20020207-6.html). See also *id.* (“the determination has already been made that neither the Taliban nor the al Qaeda are prisoners of war”). These statements echoed earlier statements by the President that the detainees held at Guantanamo Bay “will not be treated as prisoners of war; they’re illegal combatants.” *Remarks prior to discussions with Chairman Hamid Karzai of the Afghan Interim Authority and an exchange with reporters*, 38 Weekly Comp. Pres. Doc. 127, 128 (Feb. 4, 2002), available at 2002 WL 14546971.



Administration's view of article 5, for there is no "doubt" that the captured detainees are not members of a group protected by GPW, because they are al Qaida and Taliban fighters.

Rather than focus on the provisions of GPW, which by the Task Force's own admission establishes the governing "framework for [the] protection" and "treatment of captured combatants," Report at 13, the Report instead suggests that relief might be found in the provisions of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365 ("GC"). The Report does not identify any particular provision of GC, however, that confers a right of access to counsel upon persons protected by that Convention. Moreover, the Task Force's apparent theory that GC, which expressly provides for the "Protection of *Civilian* Persons in Time of War," Report at 13 (emphasis added), applies to enemy *combatants* is even more far-fetched. A bedrock principle of the laws of war rests on a sharp distinction between combatants and civilians. Combatants are strictly forbidden from targeting civilians for military hostilities. *See, e.g., Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons In Time of War* 3 (Jean S. Pictet, ed. 1958) ("GC Commentary") (noting the "cardinal principle of the law of war that military operations must be confined to the armed forces and that the civilian population must enjoy complete immunity"). Yet the Task Force would ignore this foundational distinction between civilians and combatants, despite the fact that the title of GC expressly codifies the distinction by providing protections exclusively to "*Civilian* Persons." 6 U.S.T. 3516 (emphasis added). *See also* GC Commentary at 45 ("The very title of the Convention shows in a general way whom it is meant to cover.").

Not only does the Report ignore the title of GC, under the Task Force's theory, all unlawful combatants would enjoy protection under the Geneva Conventions. Yet there is nothing in the Geneva Conventions which suggests that the drafters intended to undermine the four traditional requirements of lawful combat. Moreover, by extending the civilian protections of GC to unlawful combatants, the Task Force effectively concludes that the Armed Forces of the United States may not target al Qaida and Taliban fighters for military hostilities. *See, e.g.,* GC art. 27, 6 U.S.T. 3536 ("Protected persons . . . shall be protected especially against all acts of violence or threats thereof"). This approach to the 1949 Geneva Conventions, which perversely privileges unlawful combatants over lawful combatants, cannot be correct. As the Task Force itself acknowledges, article 4 of GPW expressly upholds the age-old distinction between lawful and unlawful combatants. As a direct consequence of their illegal belligerency, unlawful combatants simply do not receive international legal protections under the Geneva Conventions.<sup>17</sup>

Finally, GC by its own terms does not apply to U.S. citizens held by the United States. Article 4 of GC, which sets out the eligibility requirements for protection under that Convention, clearly states that its protections have no application to civilians who are held by countries of

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<sup>17</sup> *See, e.g.,* Ingrid Detter, *The Law of War* at 148 (2d ed. 2000) ("The main effect of being a lawful combatant is entitlement to prisoner of war status. Unlawful combatants, on the other hand, though they are a legitimate target for any belligerent action, are not, if captured, entitled to any prisoner of war status. They are also personally responsible for any action they have taken and may thus be prosecuted and convicted for murder if they have killed an enemy soldier. They are often summarily tried and *enjoy no protection under international law.*") (emphasis added).

which they are a citizen. See GC art. 4, 6 U.S.T. 3520 (“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”) (emphasis added). The Task Force does not even mention, let alone articulate a theory of, article 4.

### C.

The Report also mentions three “other recognized international agreements” as potential legal sources for the right to counsel. Report at 14. Specifically, the Task Force cites (1) the Universal Declaration of Human Rights, U.N. G.A. Res. 217 (III 1948) (“Declaration”), (2) the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. G.A. Res. 43/173 (1988) (“Body of Principles”), and (3) the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (“ICCPR”). See Report at 14-15. None of these texts, however, prohibit the detention of enemy combatants or confer upon such individuals a right of access to counsel. Indeed, neither the Declaration nor the Body of Principles even constitute binding international law.

Neither the Declaration nor the Body of Principles are formal agreements between nations; they are instead resolutions approved by the General Assembly of the United Nations. While such resolutions may serve as some evidence of international consensus, see, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 882-84 (2nd Cir. 1980), they are not binding international law. The Charter of the United Nations, 59 Stat. 1031 (1945) (“U.N. Charter”), makes clear that the General Assembly has no power to create international law. The sole function of the General Assembly with respect to international law is merely to “encourag[e] the progressive development of international law and its codification.” U.N. Charter art. 13(1)(a) (emphasis added). Other provisions of the U.N. Charter confer upon the General Assembly merely advisory functions as well. For example, the General Assembly may “discuss . . . any matters within the scope of the present Charter,” “make recommendations . . . on any such questions,” and “make recommendations with regard to [general principles of co-operation in the maintenance of international peace and security] to the Members or to the Security Council.” U.N. Charter arts. 10-11. General Assembly resolutions are thus, at most, mere aspirations and goals for the future development of international law, and not themselves statements of international law. Therefore, because both the Declaration and the Body of Principles are U.N. General Assembly resolutions, their provisions are not binding international law. To our knowledge, no federal court has ever addressed the legal effect of the Body of Principles,<sup>18</sup> and nearly every federal court that has addressed the issue has concluded that the Declaration does not constitute binding international law.<sup>19</sup>

<sup>18</sup> See Lynne Miriam Baum, *Pursuing Justice In A Climate Of Moral Outrage: An Evaluation Of The Rights Of The Accused In The Rome Statute Of The International Criminal Court*, 19 Wis. Int'l L.J. 197, 213 (2001) (describing Body of Principles as “non-binding”).

<sup>19</sup> See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719-20 (9th Cir. 1992); *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 816 n.17 (D.C. Cir. 1987) (“the Universal Declaration of Human Rights . . . is merely a nonbinding resolution, not a treaty, adopted by the United Nations General Assembly in 1948”); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 818 (D.C. Cir. 1984) (Bork, J. concurring) (Declaration is “meant to be [a] statement[] of ideals and aspirations only” and is, “in short, merely precatory”) (citations omitted); *Kyler v. Montezuma County*, No. 99-1052, 2000 WL 93996, at \*1 (10th Cir. Jan. 28, 2000) (Declaration “[does] not,

In any event, the detention of enemy combatants without access to counsel violates neither the Declaration nor the Body of Principles. Article 9 of the Declaration states that “[n]o one shall be subjected to arbitrary arrest, detention or exile,” and article 8 provides that individuals have a right to an “effective remedy by the competent national tribunals for acts violating . . . fundamental rights.” Nothing in the Declaration, however, either interferes with the well-established principle under the laws of war that enemy combatants may be detained at least until the end of hostilities, or attempts to characterize such detentions as “arbitrary.” Principles 17 and 18 of the Body of Principles establish a general right to counsel for “detained person[s].” Principle 18(3), however, specifically states that the right to counsel may be “suspended or restricted . . . in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.” Once again, the detention of enemy combatants has long been authorized under the laws of war, and the purpose of such detentions is quite plainly to maintain security and good order and to protect the population against enemy attack.

Finally, although the ICCPR is a legally binding agreement under international law, it is a non-self-executing agreement under the express conditions of the Senate and thus has no legal effect in U.S. courts.<sup>20</sup> Moreover, the ICCPR does not apply to the treatment of enemy combatants, because the rights of enemy combatants are governed by a separate body of international law applicable during armed conflicts, namely, the laws of war. It is a well-established canon of construction that a specific law will control a general law – that is, where a distinct body of law governs a specific category of circumstances, a more general instrument will be construed not to govern those circumstances.<sup>21</sup> This canon applies specifically to treaties as well as to domestic statutes. Human rights laws such as the ICCPR thus do not apply in cases of armed conflict; indeed, at least one federal court has already held that the ICCPR has no application in times of war. *See M.A. A26851062 v. INS*, 858 F.2d 210, 219 n.7 (4th Cir. 1988) (“Documents detailing minimum standards of human rights *other than in times of war* include . . . the International Covenant on Civil and Political Rights”).<sup>22</sup>

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by [its] terms, confer rights upon individual citizens”); *Sanchez v. Dankert*, No. 00Civ.1143 (GBD) (FM), 2002 WL 529503, at \*11 (S.D.N.Y. Feb. 22, 2002) (“While the Universal Declaration may provide insight into the law of nations, it is a nonbinding resolution, not a treaty.”) (internal quotation marks and citation omitted); *United States v. Schiffer*, 836 F. Supp. 1164, 1171 (E.D. Pa. 1993) (“Unless or until ratified as a treaty, the U.N. Declaration on Human Rights at best serves as evidence of ‘international common law,’ or customary international law”), *aff’d*, 31 F.3d 1175 (3rd Cir. 1994); *but see Beharry v. Reno*, 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002) (“While the [Universal Declaration of Human Rights] is not a treaty, it has an effect similar to a treaty.”).

<sup>20</sup> *See* 138 Cong. Rec. 8,071 (1992); *see also Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights*, S. Exec. Docs. Nos. 95-C, D, E & F, at VI (1978); *Beazley v. Johnson*, 242 F.3d 248, 267 (5th Cir. 2001); *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n. 1 (1st Cir. 1994) (“Articles 1 through 27 of the Covenant were not self-executing”); *Ralk v. Lincoln County*, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000) (neither legislative nor executive branch intended ICCPR to be self-executing); *Jama v. INS*, 22 F. Supp. 2d 353, 365 (D.N.J.1998) (ICCPR not self-executing); *White v. Paulsen*, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998) (same).

<sup>21</sup> *See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (“[W]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”) (internal quotation marks and citations omitted); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general.”).

<sup>22</sup> *See also Jean Pictet, Humanitarian Law and the Protection of War Victims* 15 (1975) (“[H]umanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime . . . . Moreover,

Moreover, many of the provisions of the ICCPR cited by the Task Force expressly do not apply to enemy combatants. For example, article 14 of the ICCPR expressly applies only to criminal proceedings. Article 14(3), which sets forth fair trial protections, applies only to those subject to trial on a "criminal charge." The right to appellate review in article 14(5) similarly shields only those convicted of a "crime." The terms "crime" and "criminal charge" are most naturally understood – giving the words of the treaty their ordinary meaning – to refer to charges of violations of a nation's penal law. *See, e.g., Black's Law Dictionary* 370 (6th ed. 1990) ("crime" defined as "[a] positive or negative act in violation of penal law; an offense against the State or United States."). Article 15 likewise applies only to criminal proceedings; it provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

In sum, there is plainly nothing in either U.S. or international law which legally entitles enemy combatants to access to counsel to challenge their preventative detention. The Task Force's recommendation that counsel be afforded to enemy combatants is thus best construed as a policy recommendation, and not as legal argument.

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human rights govern relations between the State and its own nationals, the law of war those between the State and enemy nationals. . . . Thus, the two systems are complementary, and indeed they complement one another admirably, but they must remain distinct . . ."); G.I.A.D. Draper, *Humanitarian Law and Human Rights*, 1979 *Acta Juridica* 193, 205 ("The two regimes are not only distinct but diametrically opposed . . . . At the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things, be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states or other organized groups, and internal rebellions.").