

**TO THE HONORABLE MEMBERS OF THE  
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,  
ORGANIZATION OF AMERICAN STATES**

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**PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF**

**JOSE PADILLA**

**and**

**ESTELA LEBRON**

**BY THE  
UNITED STATES OF AMERICA**

**WITH A REQUEST FOR AN INVESTIGATION  
AND HEARING ON THE MERITS**

By the undersigned, appearing as counsel for petitioners

UNDER THE PROVISIONS OF ARTICLE 23 OF THE RULES OF PROCEDURE OF THE  
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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## INTRODUCTION

This petition is brought against the United States (U.S.) by Estela Lebron on her own behalf and on behalf of her son, Jose Padilla, for violating their rights guaranteed under the American Declaration on the Rights and Duties of Man (American Declaration).

In 2002, U.S. agents arrested Mr. Padilla in Chicago, Illinois, designated him an “enemy combatant,” and transferred him—without judicial oversight, representation by counsel, or a hearing of any kind—into the custody of the U.S. military in Charleston, South Carolina. Mr. Padilla, a Hispanic-Muslim U.S. citizen, remained in military confinement for 43 months without being charged with a crime, the first 21 months of which he was held completely incommunicado, with the exception of a single short letter to his mother letting her know that he was alive. During his detention, U.S. agents interrogated Mr. Padilla using methods that included painful stress positions, sleep deprivation, and sensory deprivation, which caused him severe physical and psychological trauma that persists to this day.

While he was detained and interrogated, the United States also refused Mr. Padilla any contact with his lawyers or family, and also interfered with his ability to practice his faith. For the entirety of his ordeal, the United States hid the truth of Mr. Padilla’s mistreatment and systematically frustrated his attempts to obtain meaningful judicial review of his detention or mistreatment by blocking communications with his attorneys.

Ms. Lebron has suffered greatly as a result of her government’s mistreatment of her son. During the first two years of Mr. Padilla’s detention, the only news about her son that the government provided Ms. Lebron was that he was in military detention. Only in 2004 did Ms. Lebron receive permission to communicate with Mr. Padilla. Between 2004 and 2006, she was permitted three short phone calls and one visit, all of which were recorded by U.S. agents. The

lack of knowledge regarding her son's condition between 2002 and 2005, and the recognition that her son had suffered serious maltreatment by the United States, caused Ms. Lebron severe mental anguish.

Ms. Lebron and her son repeatedly turned to U.S. courts to seek redress for the violations of their rights, but the courts never reached a final ruling on the legality of Mr. Padilla's detention by the military. Further, no court ever ruled upon the lawfulness of the methods of confinement and interrogation used against him. Mr. Padilla and Ms. Lebron now petition this Commission to redress human rights injuries they have suffered at the hands of the United States.

The United States' mistreatment of Mr. Padilla constitutes multiple violations of the American Declaration. First, by designating Mr. Padilla an enemy combatant and detaining him arbitrarily in military custody without charge for forty three months, the United States violated Mr. Padilla's rights under Articles I, XVIII, XXV, and XXVI. Second, the traumatic confinement conditions and interrogation techniques used against Mr. Padilla violated his rights under Articles I, XXV, and XXVI. Third, by blocking communication between Mr. Padilla and his mother and denying him the right to practice Islam, his chosen religion, the United States violated his rights to familial relations under Article VI and his right to religion under Article III. Fourth, the United States discriminated against Mr. Padilla—at least implicitly—based on his race and/or religion, and thus violated Mr. Padilla's rights to equality before the law protected under Article II. Finally, U.S. courts violated Mr. Padilla's right to a remedy for violation of these protected rights guaranteed under Article XVIII, through the refusal to consider the merits of civil suits brought by him and Ms. Lebron challenging Mr. Padilla's arbitrary detention and torture.

The United States' mistreatment of Mr. Padilla also resulted in separate violations of Ms. Lebron's rights, including her right to family life guaranteed by Article VI, her right to be free from attacks against her family's reputation under Article V, and her right to be free from cruel, inhuman and degrading treatment (CIDT) protected under Article I of the American Declaration.

Ms. Lebron, the Petitioner, respectfully requests that the Commission investigate this matter and hold a hearing on the merits.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. Petitioner Estela Lebron**

Ms. Lebron, a U.S. citizen born in Puerto Rico, is the mother of five children. After her first husband passed away, she relied heavily on Mr. Padilla, her eldest son, to help raise his four siblings as she worked full-time to make ends meet. As a result, Ms. Lebron had an especially close relationship with Mr. Padilla, despite his troubled adolescence involving several encounters with the law. Their closeness remained after Mr. Padilla chose to devote himself to Islam, rather than the Christian faith in which Ms. Lebron raised him. Ms. Lebron brings this petition on her own behalf and on behalf of her son.<sup>1</sup>

### **II. Seizure, Detention, and Interrogation of Jose Padilla**

#### **A. Initial Arrest and Detention Under the Material Witness Act**

Mr. Padilla is a U.S. citizen who lived in Egypt with his wife and two children while studying Islam and the Arabic language. After spending four years in the Middle East, he planned a trip in 2002 to visit his mother and other family members in the United States.<sup>2</sup>

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<sup>1</sup> Estela Lebron Affidavit (forthcoming).

<sup>2</sup> *Id.*; Deborah Sontag, *Terror Suspect's Path From Streets to Brig*, N.Y. TIMES, Apr. 25, 2004, <http://www.nytimes.com/2004/04/25/us/terror-suspect-s-path-from-streets-to-brig.html>.

On May 8, 2002, agents from the U.S. Federal Bureau of Investigation (FBI) arrested and detained Mr. Padilla at Chicago O'Hare International Airport as he stepped off an airplane from Switzerland.<sup>3</sup> The arrest was allegedly authorized pursuant to a material witness warrant issued under the Material Witness Statute<sup>4</sup> by the United States District Court for the Southern District of New York, in connection with an investigation into the terrorist attacks against the United States on September 11, 2001.<sup>5</sup> Following his arrest and detention in Chicago, the FBI transported Mr. Padilla to New York City where he was held at a federal detention facility.<sup>6</sup> On or about May 15, 2002, the federal district court assigned an attorney, Donna Newman, to represent Mr. Padilla.<sup>7</sup> Ms. Newman filed motions to vacate the material witness warrant and to secure Mr. Padilla's release on grounds that Mr. Padilla had not been charged with a crime and was being illegally detained.<sup>8</sup>

While Mr. Padilla was held, government officials contacted Ms. Lebron and other family members, seeking information on Mr. Padilla and, in particular, the four years that he had lived in Egypt.<sup>9</sup> The government subpoenaed Ms. Lebron to testify before a Grand Jury in New York for information about Mr. Padilla's faith and activities.<sup>10</sup> Though officials promised her that she would be able to see her son at this time, on the day of the scheduled visit, they refused her

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<sup>3</sup> *United States v. Padilla*, No. 04-60001-CR, 2007 WL 188146, at \*5 (S.D. Fla. Jan. 22, 2007).

<sup>4</sup> 18 U.S.C. §3144 (providing that "if it appears from an affidavit by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impractical to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person").

<sup>5</sup> *United States v. Padilla*, No. 04-60001-CR, at \*5.

<sup>6</sup> Third Amendment Complaint, para. 35, *Padilla v. Rumsfeld*, 764 F.Supp. 2d 787, (D.S.C. 2011) (No. 2:07-cv-00410), attached as Exhibit A [hereinafter Third Amended Complaint]; Amended Petition for Writ of Habeas Corpus para. 17, *Padilla ex rel. Newman v. Bush*, No. 2 Civ. 4445 (S.D.N.Y Jul. 19, 2002), attached as Exhibit B, [hereinafter Newman Petition].

<sup>7</sup> Newman Petition, *supra* note 6, para. 18.

<sup>8</sup> *Id.* para. 21.

<sup>9</sup> Estela Lebron Affidavit.

<sup>10</sup> *Id.*

access and informed her that she required additional permission from higher levels of the U.S. government.<sup>11</sup>

### **B. Transfer to U.S. Military Custody**

On June 9, 2002, without any warning or explanation to the federal district court or to his court-appointed counsel, U.S. government officials seized Mr. Padilla from the civilian jail where he was being held in New York and transferred him to the Naval Consolidated Brig, a military prison in Charleston, South Carolina.<sup>12</sup> The official justification for this extrajudicial seizure was an order by President George W. Bush to Defense Secretary Donald Rumsfeld to detain Mr. Padilla as an “enemy combatant.”<sup>13</sup> The order claimed that Mr. Padilla was engaged in terrorist activity in concert with Al Qaeda, that he “possesse[d] intelligence, including intelligence about personnel and activities of Al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by Al Qaeda on the United States,” and that his detention was “necessary to prevent him from aiding Al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens.”<sup>14</sup>

This unprecedented action—designating a U.S. civilian as an enemy combatant and subjecting him to indefinite military detention—was made entirely within the executive branch.<sup>15</sup> No judge reviewed the basis for the President’s order, Mr. Padilla and his counsel did not receive notice of the order, and no judicial hearing was held to authorize the action.<sup>16</sup> As a result, Mr. Padilla’s counsel had no opportunity to effectively challenge his designation as an “enemy

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<sup>11</sup> *Id.*

<sup>12</sup> Newman Petition, *supra* note 6, paras. 22-26; Declaration of Michael J. Mobbs, Special Advisor to the Under Secretary of Defense for Policy (Aug. 27, 2002), attached as Exhibit C [hereinafter Mobbs Declaration].

<sup>13</sup> Memorandum from President George W. Bush to the Secretary of Defense (June 9, 2002), attached as Exhibit D.

<sup>14</sup> *Id.*

<sup>15</sup> Third Amended Complaint, *supra* note 6, paras. 37-38.

<sup>16</sup> *Id.*



combatant” and his transfer from civilian to military custody. In particular, the government repeatedly blocked Ms. Newman’s attempts to meet with Mr. Padilla.<sup>17</sup> Though unable to communicate with him, on June 19, 2002, Ms. Newman filed a *habeas* petition with the United States District Court for the Southern District of New York on Mr. Padilla’s behalf, seeking his release from military custody.<sup>18</sup> The United States filed a sworn declaration stating that Mr. Padilla’s designation, seizure, and interrogation were justified by statements made by two unnamed suspected terrorists who had been detained and interrogated outside of the United States.<sup>19</sup> According to the government declaration, one of these confidential sources recanted information that he had initially provided, and one had been treated with drugs during his interrogation.<sup>20</sup>

### C. Detention and Interrogation in U.S. Military Custody

Mr. Padilla was held in military custody for 43 months, from June 9, 2002 to January 5, 2006.<sup>21</sup> During his detention, U.S. agents subjected Mr. Padilla to a program of unlawful

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<sup>17</sup> Newman Petition, *supra* note 6, para. 28 (“Petitioner Donna. R. Newman was informed by representatives of the Department of Defense that she could not visit or speak with José Padilla.”).

<sup>18</sup> *Id.* para. 1.

<sup>19</sup> Mobbs Declaration, *supra* note 12, at 2.

<sup>20</sup> *Id.* at 2 n1. It is unclear if the informant who recanted the information is different from the informant who was treated with drugs. One of the informants is believed to be Binyam Mohamed, a resident of the United Kingdom, who had been captured in Pakistan and unlawfully detained and interrogated there by U.S. agents before being rendered to Morocco to be tortured for information. *R (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, [2010] EWCA (Civ) 65, [60-61], [2010] 3 W.L.R. 554, available at <http://www.unhcr.org/refworld/pdfid/4ba8c30e8.pdf>. According to legal proceedings brought by Mr. Mohamed in the High Court in England, Mr. Mohamed was “intentionally subjected to continuous sleep deprivation,” *id.* [Appendix (v)], shackled during interrogations, *id.* [Appendix (vii)], and held in stress positions for days at a time, *id.* [124]. His torturers mutilated his genitals and forced him to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. *Id.* [124]. They also exposed him to “threats and inducements” that included playing on his fears of being “removed from United States custody and ‘disappearing.’” *Id.* [Appendix vi]. The Court observed that “[t]he treatment reported, if had been administered on behalf of the United Kingdom, would clearly have been in breach of the undertakings given by the United Kingdom in 1972 [in the UN Convention Against Torture].” *Id.* [Appendix x].

<sup>21</sup> Third Amended Complaint, *supra* note 6, para. 45. See generally, Motion to Dismiss for Outrageous Government Conduct, *United States v. Padilla*, No. 04-60001 (S.D. Fla. Apr. 9, 2007), attached as Exhibit E, [hereinafter Motion to Dismiss for Outrageous Government Conduct].

interrogation methods and conditions of confinement.<sup>22</sup> As part of this program, Mr. Padilla was subjected to extreme isolation, sensory deprivation, sleep deprivation, and other forms of physical and psychological torture and abuse.<sup>23</sup> Government officials threatened Mr. Padilla with torture, including threats to cut him with a knife and pour alcohol into the wounds.<sup>24</sup> His interrogators also threatened to kill him or render him to Guantánamo Bay or a foreign country, where he would be subjected to further torture and even worse treatment.<sup>25</sup> They often lied to him about where he was detained as well as their identities, making it impossible for him to believe anything that he was told.<sup>26</sup> Mr. Padilla’s hands and feet were shackled for hours at a time, and his interrogators forced him into uncomfortable and painful “stress” positions.<sup>27</sup>

Mr. Padilla’s interrogators also deprived him of sleep and subjected him to periods of “sleep adjustment.”<sup>28</sup> For much of his detention, officials denied him a mattress, pillow, sheet, or blanket, leaving him with nothing to sleep or rest on except a cold steel slab.<sup>29</sup> While confined, Mr. Padilla was subjected to extreme variations in room temperature, and noxious fumes were pumped into his cell to cause pain to his eyes and nose.<sup>30</sup> Finally, as part of the program, Mr. Padilla was subjected to loud noises at all hours of the night: his captors banged on the walls and bars of his cell and slammed the doors of nearby empty cells so as to deny him sleep or alter his sleep pattern.<sup>31</sup>

Mr. Padilla often had to endure multiple interrogations by interrogators who would scream, shake, and otherwise assault him. Government agents also gave him psychotropic drugs—

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<sup>22</sup> Third Amended Complaint, *supra* note 6, para. 81.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

believed to be some form of lysergic acid diethylamide (LSD) or phencyclidine (PCP)—against his will, to act as a sort of truth serum.<sup>32</sup>

From June 9, 2002 until March 4, 2004, Mr. Padilla was held incommunicado.<sup>33</sup> The U.S. government refused him contact with anyone outside the military prison, including his family and legal counsel.<sup>34</sup> With the exception of a single short message, informing his mother that he was alive, ten months after his initial confinement, Mr. Padilla’s only human contact during this period was with his interrogators or with guards delivering food through a slot in the door or monitoring when he used toilet facilities or showered. Even after the U.S. government permitted Mr. Padilla limited contact with his lawyers in 2004, the conditions of his confinement remained largely the same.<sup>35</sup> He was held in a unit comprising sixteen individual cells, eight on the upper level and eight on the lower level.<sup>36</sup> Mr. Padilla’s cell was located on the lower level. No other cells in the unit were occupied.<sup>37</sup> His cell was electronically monitored twenty-four hours a day, eliminating the need for a guard to patrol his unit.<sup>38</sup>

Mr. Padilla’s captors exacerbated his extreme and prolonged isolation by depriving him of all forms of sensory stimulation. They prevented him from obtaining any information from the outside world, including his access to newspapers, radio, and television.<sup>39</sup> Although initially he was provided with a copy of the Koran, even this was confiscated.<sup>40</sup> The door to his cell had a window, but a magnetic sticker covered it, depriving Mr. Padilla of a view into the hallway and

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<sup>32</sup> Motion to Dismiss for Outrageous Government Conduct, *supra* note 21, at 5.

<sup>33</sup> Third Amended Complaint, *supra* note 6, para. 82.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* paras. 90-92.

<sup>36</sup> Motion to Dismiss for Outrageous Government Conduct, *supra* note 21, at 2.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Third Amended Complaint, *supra* note 6, para. 96.

<sup>40</sup> *Id.* para. 99.

adjacent common areas of his unit.<sup>41</sup> Even when he was permitted outside for exercise, it was in a bare concrete “cage” and often at night,<sup>42</sup> so that Mr. Padilla was prevented from seeing sunlight for many months at a time.<sup>43</sup> Because he lacked a clock or a watch, and the artificial light that flooded his cell, Mr. Padilla was unable to tell what time it was for most of his captivity, and was thus unable to fulfill his religious obligation to pray five times at set hours of the day and night.<sup>44</sup> One of the few possessions Mr. Padilla had was a mirror, but that too was confiscated by his captors.<sup>45</sup> Anytime he left his cell, even to attend medical appointments, Mr. Padilla was forced to wear earphones and blackout goggles.<sup>46</sup> This complete denial of contact with the outside world and of sensory stimulation was an integral part of Mr. Padilla’s interrogation process. In a declaration from the head of the Defense Intelligence Agency, Lowell Jacoby, the United States admitted that the express purpose of isolating and denying Mr. Padilla access to counsel, courts, and family was to render him completely psychologically dependent on his interrogators in order to extract intelligence from him.<sup>47</sup>

During this time, Ms. Lebron and her family were questioned by government officials and constantly harassed by the public and by members of the media. Journalists often followed and waited outside the homes of Ms. Lebron, her elderly parents, and her children. Her grandchildren were bullied and called the “children of Bin Laden” and the “Taliban family” to the point that one grandchild’s performance in school suffered and another could not go outside without a towel covering his head. Facing considerable scrutiny and stress, Ms. Lebron suffered

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<sup>41</sup> Motion to Dismiss for Outrageous Government Conduct, *supra* note 21, at 3.

<sup>42</sup> Third Amended Complaint, *supra* note 6, para. 97.

<sup>43</sup> Motion to Dismiss for Outrageous Government Conduct, *supra* note 21, at 4.

<sup>44</sup> Third Amended Complaint, *supra* note 6, para. 98.

<sup>45</sup> Motion to Dismiss for Outrageous Government Conduct, *supra* note 21, at 4.

<sup>46</sup> Third Amended Complaint, *supra* note 6, para. 94.

<sup>47</sup> Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, *Padilla ex rel. v. Bush*, No. 02 Civ 0445 (S.D.N.Y. 2002) (“Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool.”), attached as Exhibit F, [hereinafter Jacoby Declaration].

numerous health effects, both physical and psychological.<sup>48</sup> She and her son, Tomas, have suffered from depression, anxiety, nightmares, and insomnia, and both are currently seeing psychiatrists.<sup>49</sup>

In March 2004, Ms. Lebron was finally able to speak with her son, and some seven months later, in October 2004, the federal government approved a visit between them.<sup>50</sup> The visit was monitored, and their entire conversation recorded. At one point, she asked her son how the government officials were treating him, but he refused to answer. Ms. Lebron had waited for this one-hour conversation for over three years.<sup>51</sup>

#### **D. Access to Counsel**

Immediately after Mr. Padilla's extrajudicial and incommunicado detention began, his counsel filed a petition for a writ of *habeas corpus* with the United States District Court for the Southern District of New York to seek Mr. Padilla's immediate release and to compel the government to substantiate the legal basis for his detention.<sup>52</sup> For nearly two years, the government refused to provide Mr. Padilla's counsel access to him.<sup>53</sup> In January 2003—after 7 months of incommunicado detention—in the Jacoby Declaration, the U.S. stated that “it is critical to minimize external influences on the interrogation process” and that “any potential sign of counsel involvement would disrupt our ability to gather intelligence from Padilla.” In the Jacoby Declaration the United States also stated that interrogations could last months or even years, and that Mr. Padilla's complete isolation during interrogation was essential because

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<sup>48</sup> Estela Lebron Affidavit.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Newman Petition, *supra* note 6, para. 1.

<sup>53</sup> Third Amended Complaint, *supra* note 6, para. 82.

learning that a court was considering his case could give him the hope and expectation that he would one day be released, and thus undermine the process.<sup>54</sup>

On March 4, 2004, while the *habeas* petition, filed with the federal court in New York, was pending review by the U.S. Supreme Court, the government finally permitted Mr. Padilla's lawyers to meet with him.<sup>55</sup> The access afforded, however, was subject to many restrictions. The lawyers were unable to meet with their client in private. Government agents were present in every meeting and recorded conversations between Mr. Padilla and his attorney on video cameras. Government officials reviewed all legal correspondence and attorney notes and terminated any discussions between Mr. Padilla and his attorneys that they considered would convey information about internal operations of the prison or U.S. intelligence sources and methods. Perhaps most damaging to attorney-client relations (and unknown at the time to his lawyers), interrogators repeatedly told Mr. Padilla that his attorneys were government agents and untrustworthy. Interrogators also threatened Mr. Padilla "with unpleasant consequences" if he revealed to his attorneys the true conditions of his detention.<sup>56</sup>

In addition, to this direct interference with attorney-client relations, the psychological damage to Mr. Padilla from his confinement and interrogation rendered him incapable of effectively and accurately communicating to his attorneys all of the necessary information to allow them to effectively represent his interests.<sup>57</sup> The psychological damage caused to Mr.

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<sup>54</sup> Jacoby Declaration, *supra* note 47, at 8 (stating that the U.S. government found it necessary to subject Mr. Padilla to severe isolation because "(o)nly after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla.... Providing him access to counsel now... would break—probably irreparably—the sense of dependency and trust that the interrogators are attempting to create.").

<sup>55</sup> Third Amended Complaint, *supra* note 6, para. 84.

<sup>56</sup> *Id.* para. 86.

<sup>57</sup> Affidavit of Angela Hegarty, MD, para. 19, *United States v. Padilla*, No. 04-60001-CR (S.D. Fla. Jan. 22, 2007), attached as Exhibit G, [hereinafter Hegarty Affidavit].

Padilla at this time continues to this day, and he is often reluctant to see or to share information that may assist in his defense with his attorneys.<sup>58</sup>

During the nearly two years that Mr. Padilla was held incommunicado, Ms. Lebron and her family were desperately worried about him. Ms. Lebron's first contact with her son occurred ten months after his transfer to military detention, when a Pentagon official finally brought her a brief greeting card that Mr. Padilla had been allowed to write to her.<sup>59</sup> Afterwards, in the nearly two-year period between March 4, 2004, and January 5, 2006, he was allowed to receive three twenty-minute telephone calls and one visit from his mother. The United States imposed strict parameters on these conversations; for example, interrogators warned Mr. Padilla against describing his interrogations.<sup>60</sup>

Mr. Padilla's extreme isolation and mistreatment remained largely unchanged by the limited access to counsel granted by the United States in March 2004. However, toward the end of his captivity, his counsel was permitted to provide him with a copy of the Koran,<sup>61</sup> and Mr. Padilla was also permitted limited access to a radio, television, and newspapers.<sup>62</sup> However, many of the aspects of Mr. Padilla's confinement that were the most difficult for him to cope with—most notably, the extreme isolation—continued.<sup>63</sup>

#### **E. Physical and Psychological Effects of Mr. Padilla's Torture and Abuse**

Mr. Padilla has suffered—and continues to suffer from—both physical and psychological trauma as a result of his torture and cruel, inhuman, and degrading treatment. While in military custody, his mistreatment resulted in serious medical problems that were not adequately treated

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<sup>58</sup> Estela Lebron Affidavit.

<sup>59</sup> Third Amended Complaint, *supra* note 6, para. 91.

<sup>60</sup> *Id.* para. 92.

<sup>61</sup> *Id.* para. 99.

<sup>62</sup> *Id.* para. 96.

<sup>63</sup> Motion to Dismiss for Outrageous Government Conduct, *supra* note 21, paras. 6-7.

by his captors. Mr. Padilla frequently experienced cardiothoracic difficulties while sleeping or attempting to sleep, including a heavy pressure on his chest and an inability to breathe or move his body. In one incident, he felt a burning sensation in his chest. Although he requested medical attention he was denied such relief. Toward the end of his captivity, Mr. Padilla experienced swelling and pressure in his chest and arms. He was administered an electrocardiogram and given medication, but he ceased taking the medication when it caused him respiratory congestion. This was only one of the few times that he was given medication for his pain. The strain from being forced to stand in stress positions also caused Mr. Padilla great discomfort and agony. Mr. Padilla's guards repeatedly refused his requests for treatment.<sup>64</sup>

In addition to these physical effects, Mr. Padilla suffered—and continues to suffer—from psychological trauma. In February 2006, Dr. Angela Hegarty was hired by Mr. Padilla's attorneys to conduct a psychiatric evaluation of Mr. Padilla and to offer the attorneys some guidance on how to best deal with their client given his protracted period of isolation.<sup>65</sup> Dr. Hegarty met with Mr. Padilla on five consecutive days from June 26, 2006 through June 30, 2006, and again on September 11 and 12, 2006. As she later set forth in a sworn statement in subsequent criminal proceedings brought against Mr. Padilla in the United States District Court for the Southern District of Florida, she concluded to a "reasonable degree of medical certainty"<sup>66</sup> that Mr. Padilla was tortured during his detention and as a consequence suffered from post-traumatic stress disorder. Mr. Padilla also made clear to her that he had not told her everything that had been done to him and that he was unwilling to do so.<sup>67</sup>

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<sup>64</sup> Third Amended Complaint, *supra* note 6, para. 101.

<sup>65</sup> Report of Psychiatric Assessment by Dr. Angela Hegarty at 1, *United States v. Padilla*, No. 04-60001-CR (S.D. Fla. Dec. 13, 2006), attached as Exhibit H.

<sup>66</sup> Hegarty Affidavit, *supra* note 57, para. 19.

<sup>67</sup> *Id.* para. 6.



From her observations of him, Dr. Hegarty also concluded that Mr. Padilla “lack[ed] the capacity to assist in his own defense”<sup>68</sup> and had a great deal of difficulty talking about his case.<sup>69</sup> Dr. Hegarty and the attorneys repeatedly tried to explain the importance of reviewing the evidence against him, but Mr. Padilla refused to read transcripts or listen to tapes of intercepted conversations; he pled with his attorneys not to “make him” look at or listen to the material. Mr. Padilla also admitted to having had “hallucinations and strange experiences”<sup>70</sup> during his detention. He was terrified of being viewed as crazy. He even mentioned to Dr. Hegarty that one of his interrogators warned him that he would be considered insane if he told anyone “on the outside” of a particular experience in prison.<sup>71</sup> He was unable to tell Dr. Hegarty about that specific experience.<sup>72</sup> At other times, he seemed “intensely anxious and expressed fear of losing his mind on recalling his detention.”<sup>73</sup> According to Dr. Hegarty, Mr. Padilla came to believe that “no matter whether he was cooperative, or whether he pleaded with his captors, he was utterly helpless and absolutely dependent on them for everything.”<sup>74</sup>

In the five years since, Mr. Padilla’s mental state has worsened. He often refuses to meet with counsel or his mother or to respond to his family’s letters, fearful that doing so may result in his return to military custody. Ms. Lebron believes that the psychological damage to her son is irreparable, and that anyone who knows Mr. Padilla would realize that he will never be the same.<sup>75</sup>

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<sup>68</sup> *Id.* para. 19.

<sup>69</sup> *Id.* para. 13.

<sup>70</sup> *Id.* para. 9.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* para. 11.

<sup>75</sup> Estela Lebron Affidavit.

### III. Domestic Legal Proceedings

#### A. Habeas Corpus Proceedings

Following Mr. Padilla's extrajudicial seizure by military officials, his then-appointed counsel, Donna Newman, filed a *habeas* petition on his behalf with the United States District Court for the Southern District of New York, seeking his immediate release on the basis that the government lacked authority to designate and detain him as an "enemy combatant."<sup>76</sup> The federal district court upheld the legality of Mr. Padilla's detention, but the Second Circuit Court of Appeals ordered that he be granted *habeas* relief in 2003 on the ground that the 1971 Non-Detention Act (NDA) states that, "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."<sup>77</sup>

The United States petitioned the Supreme Court to review the Court of Appeals' decision, but the Supreme Court denied the petition on jurisdictional and procedural grounds, holding that the *habeas* petition (1) should have been filed in South Carolina, where Mr. Padilla was imprisoned, and not in New York, where he had been seized; and (2) named an improper respondent, because it named Defense Secretary Donald Rumsfeld, who had ordered Mr. Padilla's military seizure, rather than the warden of the military prison where he was confined.<sup>78</sup> Four dissenting Justices, however, wrote that there was ample precedent to view Mr. Padilla's case as exceptional because the government had not informed his attorneys of Mr. Padilla's whereabouts at the time of his transfer; thus, it was impossible for them to know the proper

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<sup>76</sup> Newman Petition, *supra* note 6, paras. 33-35.

<sup>77</sup> *Padilla ex rel. Newman v. Rumsfeld*, 352 F. 3d 695, 699 (2d Cir. 2003).

<sup>78</sup> *Rumsfeld v. Padilla ex rel. Newman*, 542 U.S. 426, 427 (2004).

forum or respondent.<sup>79</sup> The four dissenting Justices also agreed with the Second Circuit that the NDA prohibits Mr. Padilla's military detention.<sup>80</sup>

Days later, Mr. Padilla's attorneys filed a new *habeas* petition with the United States District Court in Charleston, South Carolina, where Mr. Padilla was being held in U.S. military custody. The U.S. government responded by alleging, for the first time, that Mr. Padilla had been in Afghanistan during a U.S. attack on the Taliban, armed with an assault weapon and fleeing.<sup>81</sup> Prior to making this allegation, the government had alleged that Mr. Padilla was part of a conspiracy to explode a "dirty bomb" in the United States, and then, a gas heat explosion conspiracy. Mr. Padilla argued that even if the government's new factual claims were true, his seizure in Chicago, Illinois, and continued detention in military custody in South Carolina were unconstitutional.<sup>82</sup> The lower court agreed, but the Fourth Circuit Court of Appeals reversed, concluding that the U.S. government could constitutionally detain Mr. Padilla on U.S. soil as an enemy combatant under the stipulation that—as the United States claimed—he had in fact carried arms for hostile forces on a foreign battlefield.<sup>83</sup> The court of appeals then remanded for a hearing on the factual basis for the government's designation of Mr. Padilla as an enemy combatant. Mr. Padilla sought review of this decision by the Supreme Court.

As that petition was pending, the United States transferred Mr. Padilla to civilian criminal custody. Consequently, on April 3, 2006, the Supreme Court denied review (*certiorari*), finding the petition for review moot because Mr. Padilla had been released from military custody and thereby had received part of the relief sought in his *habeas* petition.<sup>84</sup> As a result, the government never had to justify the legality of Mr. Padilla's detention to the Supreme Court or defend the

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<sup>79</sup> *Id.* at 427 (Stevens, J., dissenting).

<sup>80</sup> *Id.* at 664 n.8.

<sup>81</sup> Opening Brief for the Appellant, *Padilla v. Hanft*, 389 F.Supp.2d 678 (D.S.C. May 6, 2005)(No. 05-6369).

<sup>82</sup> *Padilla v. Hanft*, 389 F.Supp.2d 678, 680-81 (D.S.C. 2005).

<sup>83</sup> *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005).

<sup>84</sup> *Padilla v. Hanft*, 126 S.Ct. 1649, 1650 (2006).

factual basis for his detention before the federal court in South Carolina. Significantly, a Fourth Circuit Court of Appeal judge, who previously had affirmed the government's detention authority, wrote that Mr. Padilla's last-minute transfer had "given rise to at least an appearance that the purpose of these actions may be to avoid consideration of [the court of appeals] decision by the Supreme Court" and created an impression of wrongful detention that seriously corrodes government credibility in future cases.<sup>85</sup>

### **B. Civilian Criminal Proceedings**

On January 5, 2006, as his second *habeas* petition challenging his designation as an enemy combatant and detention in military custody was pending before the federal court in South Carolina, the government indicted Mr. Padilla in the United States civilian criminal system and transferred him to the custody of a federal jail in Miami, Florida, to await trial before the United States District Court for the Southern District of Florida.<sup>86</sup> The new criminal indictment against Mr. Padilla focused on a series of acts in which he had allegedly participated from the late 1990s, none of which included the original allegations advanced by the United States to justify Mr. Padilla's detention by the military.<sup>87</sup> Not only was there no mention of Mr. Padilla's alleged involvement in a conspiracy to detonate a "dirty bomb," there was no mention of Mr. Padilla ever having planned to stage any attack of any sort inside the United States.<sup>88</sup>

On August 16, 2007, following a trial on the charges brought against him in the indictment, Mr. Padilla was convicted of one count of conspiracy to murder, kidnap, or maim persons overseas and two counts of providing material support to Al Qaeda.<sup>89</sup> At the trial, the judge refused to admit evidence of Mr. Padilla's alleged torture by U.S. officials. However, two

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<sup>85</sup> *Padilla v. Hanft*, 432 F.3d at 585-587 (order).

<sup>86</sup> Motion to Dismiss for Outrageous Government Conduct, *supra* note 21, at 5.

<sup>87</sup> Superseding Indictment at 1-18, *United States v. Padilla*, No. 04-60001-CR (S.D. Fla. Nov. 17, 2005) [hereinafter Superseding Indictment]; *see also Padilla v. Hanft*, 432 F.3d at 584 (order).

<sup>88</sup> Superseding Indictment, *supra* note 87, paras. 1-18.

<sup>89</sup> *United States v. Padilla*, No. 04-60001-CR, 2008 WL 6124604, at 1 (S.D. Fla. Jan. 22, 2008) (Trial Order).

mental health experts, including Dr. Hegarty, testified that Mr. Padilla's treatment while in military custody had rendered him mentally unfit for trial and unable to participate fully in his own defense.<sup>90</sup> Mr. Padilla is currently serving a sentence of 17 years at the Florence ADX facility in Colorado. A resentencing hearing is scheduled to take place before the federal court in Miami, Florida on January 29, 2013.

Despite his criminal conviction, the United States has never rescinded Mr. Padilla's designation as an "enemy combatant." In November 2005, shortly after Mr. Padilla's criminal indictment was made public, Deputy Solicitor General Gregory Garre informed Mr. Padilla's *habeas* counsel, Jonathan Freiman, that it was the United States' position that the "enemy combatant" designation had not been rescinded and Mr. Padilla could be returned to military custody at any point based on it.<sup>91</sup> Throughout nearly five years of civil litigation, described below, the United States maintained that position, and, while arguing that Mr. Padilla's return to military custody was remote, never conceded that it no longer had the authority to do so.

### **C. Civil Damages Actions**

On February 9, 2007, Mr. Padilla and his mother, Estela Lebron, filed a civil suit in the United States District Court for the District of South Carolina against former Defense Secretary Rumsfeld and other high-level U.S. government officials for denial of access to counsel, denial of access to court, unconstitutional conditions of confinement, unconstitutional interrogations, denial of freedom of religion, denial of right of information, denial of right to association, unconstitutional military detention, denial of right to be free from unreasonable seizures, and denial of due process. Mr. Padilla also sought declarations that his designation and detention as an "enemy combatant" were unconstitutional and that the policies that led to his torture and

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<sup>90</sup> Hegarty Affidavit, *supra* note 57, para. 19; Forensic Evaluation Report by Dr. Patricia A. Zapf at 7, *United States v. Padilla*, No. 04-60001-CR (S.D. Fla. Dec. 13, 2006), attached as Exhibit I.

<sup>91</sup> Third Amended Complaint, *supra* note 6, para. 127.

inhumane treatment were unconstitutional. Mr. Padilla also sought an injunction against his return to military custody as an enemy combatant, and nominal monetary relief. In February 2011, the federal district court dismissed Mr. Padilla's claims on the basis that national security concerns constitute "special factors" that bar recovery, and qualified immunity protected the named defendants from civil liability.<sup>92</sup> The Fourth Circuit Court of Appeals affirmed this decision on the basis that civil damages actions challenging the designation and mistreatment of persons and groups as national security threats are not reviewable by courts.<sup>93</sup> It further held that that Mr. Padilla's claim for injunctive relief was moot due to Mr. Padilla's transfer to civilian custody.<sup>94</sup>

Meanwhile, on January 4, 2008, Mr. Padilla and his mother had filed a similar suit in the United States District Court for the Northern District of California against former Justice Department official John Yoo, who authored the legal memoranda used by the Bush administration to justify its indefinite detention and torture of terrorism suspects, including Mr. Padilla.<sup>95</sup> The trial court denied Mr. Yoo's motion to dismiss after finding that Mr. Padilla's claims, if true, amounted to violations of the U.S. constitution.<sup>96</sup> On appeal, the U.S. Court of Appeals for the Ninth Circuit dismissed the suit, ruling that qualified immunity protected Mr. Yoo because he did not reasonably understand at the time he authored the memoranda that his actions violated "clearly established law" prohibiting the torture and indefinite detention of a U.S. citizen.<sup>97</sup> Although the court observed that it was "beyond debate" that torturing a U.S.

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<sup>92</sup> *Lebron v. Rumsfeld*, 764 F.Supp.2d at 800-02.

<sup>93</sup> *Lebron v. Rumsfeld*, 670 F.3d 540, 556 (4th Cir. 2012).

<sup>94</sup> *Id.* at 547.

<sup>95</sup> *Padilla v. Yoo*, 633 F. Supp.2d 1005, 1015 (N.D. Cal. 2009).

<sup>96</sup> *Id.* at 1005.

<sup>97</sup> *Padilla v. Yoo*, 678 F.3d 748, 748 (9<sup>th</sup>. Cir. 2012).

citizen is unconstitutional, it found that that U.S. law between 2001 and 2003 did not clearly establish that “the treatment to which [Mr.] Padilla says he was subjected amounted to torture.”<sup>98</sup>

On April 23, 2012, Mr. Padilla sought review of the Fourth Circuit Court of Appeals decision in *Rumsfeld* by the U.S. Supreme Court. The Court, however, declined review, without comment, on June 11, 2012.<sup>99</sup>

## **CONTEXT AND PATTERNS: AUTHORIZATION FOR THE USE OF TORTURE AND ARBITRARY DETENTION IN THE “WAR ON TERROR”**

### **I. Creating a Legal Black Hole: Bush Executive Orders and the “Torture Memos”**

Mr. Padilla’s unlawful detention, torture and inhumane treatment occurred as part of a larger detention and interrogation regime instituted by the United States in response to terrorist acts of the militant Muslim fundamentalist group known as Al Qaeda. On September 11, 2001, hijackers acting on behalf of Al Qaeda crashed passenger planes into the Pentagon building in East Virginia and the two World Trade Center towers in New York City, killing thousands of civilians. Days later, the U.S. Congress passed the Authorization to Use Military Force (AUMF), authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines “planned, authorized, committed, or aided the terrorist attacks 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.”<sup>100</sup>

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<sup>98</sup> *Id.* at 763-64. Under the memo drafted by Mr. Yoo, only techniques that rises “to the level of death, organ failure, or the permanent impairment of a significant body function” would be considered torture. *Id.* at 752.

<sup>99</sup> *Lebron v. Rumsfeld*, 132 S.Ct. 2751 (2012) (*cert. denied*). In light of this denial, Mr. Padilla and Ms. Lebron decided not to seek further review of the Ninth Circuit Court of Appeal’s decision in the Yoo case.

<sup>100</sup> Authorization to Use Military Force (AUMF), Public Law 107-40, 115 Stat. 224 (2001).

Pursuant to the AUMF, the United States and other nations began a military intervention in Afghanistan in October 2001 and seized suspected members of Al Qaeda and the Taliban. In January 2002, the U.S. military opened a military prison at the Guantánamo Bay Naval Base in Cuba (“Guantánamo”) to detain and interrogate foreign nationals suspected of involvement with Al Qaeda or other militant groups. For years, the United States disputed the authority of U.S. courts to review its custody and treatment of detainees held at Guantánamo.<sup>101</sup> For a smaller set of terrorism suspects who, like Mr. Padilla, were U.S. citizens or legal residents, the United States conducted interrogations at the Naval Consolidated Brig in Charleston, South Carolina.<sup>102</sup> According to internal government emails, the Brig was subject to a “lash-up” with Guantánamo,<sup>103</sup> meaning that Mr. Padilla and others at the Brig were subject to the same operating procedures as Guantánamo and that their treatment was approved by high-level government officials.<sup>104</sup>

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<sup>101</sup> The U.S. Supreme Court ultimately found in a series of rulings: that U.S. citizens who are declared “enemy combatants” have a right to challenge that designation status and their detention based upon it in U.S. courts, *Hamdi v. Rumsfeld*, 542 U.S. 507, 508 (2004); that U.S. federal courts have jurisdiction to hear challenges brought by foreign nationals to their continued detention at Guantánamo under the habeas corpus statute, *Rasul v. Bush*, 542 U.S. 466, 466 (2004); that the statute authorizing military commissions must be read in accordance with the Geneva Conventions, *Hamdan v. Rumsfeld*, 548 U.S. 557, 558 (2006); and that non-U.S. citizens held at Guantánamo have a constitutional right to habeas corpus, *Boumediene v. Bush*, 553 U.S. 723, 724 (2008). *See generally*, JENNIFER K. ELSEA AND MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL33180, ENEMY COMBATANT DETAINEES: *HABEAS CORPUS* CHALLENGES IN FEDERAL COURT, (Feb. 3, 2010), *available at* <http://www.fas.org/sgp/crs/natsec/RL33180.pdf>.

<sup>102</sup> Guantánamo and the Brig were part of a larger network of CIA, military, and foreign-run “black sites” around the world used to interrogate suspects. This included the Abu Ghraib prison in Iraq. *See generally* U.S. SENATE COMMITTEE ON ARMED SERVICES, REPORT OF THE COMMITTEE ON ARMED SERVICES, INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (2008) [hereinafter Senate Report], *available at* [http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final\\_April%2022%202009.pdf](http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf) (referencing Mayer, Jane. *The Black Sites*, NEW YORKER, Aug. 13, 2007, *available at* [http://www.newyorker.com/reporting/2007/08/13/070813fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer)).

<sup>103</sup> Email RE:FW: EC Mail transmitted to GTMO (July 02, 2006, 1:39 PM) (“You have every right to question the ‘lash-up’ between GTMO and Charleston . . .”) (attached as Exhibit J).

<sup>104</sup> *See id.* (“Our use of GTMO on everything . . . appears to be driven by OSD [Office of Secretary of Defense] Detainee Affairs”); “Email RE: Detainee Issues, 15 April Report” (April 17, 2002, 11:02 a.m.) (referring to Brig detainee Yaser Hamdi, “DOD does not want this detainee to have any privileges that the detainees at Camp X-Ray [Guantánamo Bay] don’t have”) (attached as Exhibit K); “Email RE: Request for Guidance” (June 16, 2005, 7:59) (“[JTF-GTMO (Guantánamo Bay)] [does] not provide GCs [Geneva Conventions] to their detainees. Accordingly, neither will the NAVCONBRIG”) (attached as Exhibit L); “Email Subject: CARE OF USCIT” (April 15, 2002, 6:45 PM) (“I advised the chaplain of today’s CSPANN interview with Secretary Rumsfeld on this topic and per the



A key feature of the U.S. government's anti-terrorism strategy was to loosen or to redefine protections for terrorism suspects under domestic law and international humanitarian and human rights law. On February 7, 2002, President George W. Bush issued an Executive Order stating that those connected with Al Qaeda or the Taliban were not entitled to Geneva Convention protections due to their status as "unlawful combatants."<sup>105</sup> A string of subsequent memos authored by high-level officials at the U.S. Department of Defense and Department of Justice indicate that the U.S. government sought to eliminate long-standing legal restrictions against torture and preventive detention. One memo opined that detention conditions and interrogation techniques only rose to the level of torture, prohibited under U.S. and international law, where they caused the "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."<sup>106</sup> Other memoranda concluded that neither international law nor the Fourth,<sup>107</sup> Fifth,<sup>108</sup> or Eighth Amendments<sup>108</sup> to the U.S. Constitution or any other U.S. or international legal protections,<sup>109</sup> place limitations on the President's constitutional powers to capture, interrogate, or detain terrorism suspects either within or outside the United States.<sup>110</sup> In sum, government memoranda approved interrogation

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Secretary's remarks to reporters, the detainees legal status was still being reviewed by the legal analyst and that no decisions had been made") (attached as Exhibit K).

<sup>105</sup> Humane Treatment of Taliban and Al Qaeda Detainees, Executive Order No. 499 at 2 (Feb. 7, 2002), *available at* <http://www.aclu.org/files/projects/foiasearch/pdf/DODDIA000201.pdf>.

<sup>106</sup> Bybee, Jay, *Standards of Conduct for Interrogation Under 18 USC Secs. 2340-2340A*, Memorandum for Alberto R. Gonzales, Counsel to the President, at 1 (Aug 1, 2002) ("first Bybee memo") *available at* <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>.

<sup>107</sup> *Authority for Use of Military Force to Combat Terrorist Activities Within the United States*, Memorandum for Alberto R. Gonzales and William J. Haynes (Oct 23, 2001), at 2, 31, *available at* <http://www.justice.gov/opa/documents/memomilitaryforcecombatus10232001.pdf>.

<sup>108</sup> A 2003 memo prepared by John Yoo adopting most of the Bybee memo and concluding that neither the Fifth Amendment due process clause nor the Eighth Amendment prohibition against cruel and unusual punishment applied to the interrogation of suspected Al-Qaeda operatives. Memorandum from John Yoo to William J. Haynes II, Re: Military Interrogations of Alien Unlawful Combatants Held Outside the United States, at 1, 34-47 (March 14, 2003)[hereinafter Yoo Memo (March 14, 2003)], *available at* <https://www.fas.org/irp/agency/doj/olc-interrogation.pdf>.

<sup>109</sup> *See id.* at 81.

<sup>110</sup> The U.S. Army, along with agents of other U.S. agencies, also perpetrated torture and other abuses in U.S.-run detention facilities in Iraq. These abuses were widespread and systemic, and were authorized at the highest level of

tactics for use against suspected enemy combatants at Guantánamo that violated the Geneva Conventions and rose to the level of torture.<sup>111</sup> These tactics included stress positions, the removal of clothes, sensory deprivation, and intimidation by dogs during interrogations.<sup>112</sup> Military interrogators used many of those techniques against Mr. Padilla.<sup>113</sup>

This program of arbitrary detention and torture has been largely limited to non-white, Muslim suspects, such as Mr. Padilla. Although domestic terrorism within or against the United States is by no means exclusive to Islamic fundamentalism,<sup>114</sup> the suspects who have been beaten, tortured, subjected to “preventive detention,” and declared “enemy combatants” *have*

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the U.S. government. During interrogations, the use of military working dogs, stress positions, forced removal of clothing, sensory deprivation and manipulation, and sleep management were all common. Senate Report, *supra* note 102, at 195-215.

<sup>111</sup> Official 2002 requests from high-level officials at Guantánamo to use enhanced interrogation techniques not authorized by the Geneva Conventions. Memorandum for Chairman of the Joint Chiefs of Staff on Counter-Resistance Techniques (Oct 25, 2002), *available at* <http://www.torturingdemocracy.org/documents/20021025.pdf>. A subsequent memo recommended that Secretary of Defense Donald Rumsfeld immediately authorize these practices. Action Memo on Counter-Resistance Techniques (Nov 27, 2002), *available at* <http://www.torturingdemocracy.org/documents/20021127-1.pdf>. Secretary Rumsfeld then authorized, on December 2, 2002: yelling, deception, stress positions for up to four hours, falsified documents and reports, isolation for renewable 30 day periods, deprivation of light and auditory stimuli, hooding, 20-hour interrogations, removal of religious items, removal of clothing, dietary tampering, adjusting the temperature or smell of a room, sleep manipulation, and rough handling. *See* Senate Report, *supra* note 102, at 106. A handwritten note added by Secretary Rumsfeld himself read, “I stand for 8-10 hours a day. Why is standing limited to 4 hours?” *Id.* at *xix*. Secretary Rumsfeld reiterated this position in a subsequent order. Memorandum for the Commander, US Southern Command, Subject: Counter-Resistance Techniques in the War on Terrorism, at 1 (Apr 16, 2003), *available at*: <http://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000023.pdf>.

<sup>112</sup> Senate Report, *supra* note 102, at *xix*. A 2004 visit by the International Committee of the Red Cross (ICRC) to Guantánamo documents the widespread torture and other abuse of men held at the prison, including physical beatings, use of loud sounds to disrupt sleep patterns, prolonged solitary confinement, stress positions, and extreme temperatures during interrogation. Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, *available at*: [http://www.nytimes.com/2004/11/30/politics/30gitmo.html?\\_r=0](http://www.nytimes.com/2004/11/30/politics/30gitmo.html?_r=0). In addition, the Senate Armed Services Committee found that interrogators made death threats against detainees, used military dogs to provoke fear, insulted detainees for hours and forced them to perform humiliating acts, and routinely confiscated religious items. *See generally*, Senate Report, *supra* note 102.

<sup>113</sup> Third Amended Complaint, *supra* note 6, para. 81.

<sup>114</sup> In total, after the recent shootings at a Sikh temple in Wisconsin, deaths attributable to far-right Christian violence since 9/11 rose to 15, as compared to 17 deaths attributable to Islamic fundamentalism. Peter Bergen, *Right-Wing Extremist Terrorism As Deadly a Threat as Al-Qaeda?*, CNN, Aug. 7, 2012, *available at*: <http://www.cnn.com/2012/08/07/opinion/bergen-terrorism-wisconsin/index.html>. Other reports indicate that far-right groups have been responsible for 145 religiously motivated homicidal incidents, killing 180 people (excluding the Oklahoma City bombing), from 1990-2010. Matthew Goodwin, *Wade Michael Page and the Rise of Violent Far-Right Extremism*, GUARDIAN, Aug. 8, 2012, *available at*: <http://www.guardian.co.uk/world/2012/aug/08/wade-michael-page-violent-far-right>.

been exclusively Muslim.<sup>115</sup> Of the hundreds of people who have been detained at Guantánamo or rendered to Central Intelligence Agency (CIA) “black sites” or detention and interrogation by foreign governments around the world, almost none of them have been white and every single one has been Muslim.<sup>116</sup>

## **II. Failure to Prosecute Perpetrators and the Denial of Remedies for Torture, Inhuman Treatment, and Prolonged Arbitrary Detention in U.S. Courts**

In the years following Mr. Padilla’s initial arrest and detention, there has been a modest effort to investigate and to uncover U.S. government complicity in torture and other abuses at Guantánamo and elsewhere. In 2008 the Senate Armed Services Committee, a group within the U.S. Senate with legislative oversight over the military and the Department of Defense, conducted an official investigation into the treatment of detainees in U.S. custody. Following its review of the memoranda and other evidence of torture, the Committee concluded:

The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.<sup>117</sup>

In 2009, the Department of Justice conducted an ethics investigation into former Assistant Attorney Generals John Yoo, Jay Bybee, authors of the so-called “torture memos.”<sup>118</sup>

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<sup>115</sup> No white U.S. citizen, and no Christian U.S. citizen, has ever been subjected to the kind of torture and prolonged incommunicado detention inflicted on Mr. Padilla.

<sup>116</sup> Mr. Padilla is of Hispanic descent and is Muslim by religion. Only a handful of U.S. citizens or legal residents were ever detained and interrogated as “enemy combatants”: Yaser Hamdi, a U.S. citizen arrested in Afghanistan, Ali Saleh Kahlal al-Marri, a U.S. resident arrested on U.S. soil, and Mr. Padilla, a U.S. citizen arrested on U.S. soil. A fourth, John Walker Lindh—a white man—experienced a far shorter period of incommunicado detention and interrogation. Mr. Lindh was captured in December 2001 in Afghanistan while embedded with a Taliban fighting force. By mid-January 2002 John Ashcroft had announced Lindh would be tried in the United States, by early February he had been indicted by a civilian grand jury, and by July 2002 he had pled guilty to aiding the Taliban and to carrying an explosive during the commission of a felony. Plea Agreement para 1, *United States v. Lindh*, No. 02-37A, (E.D. Vir. 2002), available at <http://www.justice.gov/ag/pleaagreement.htm>. In contrast, Mr. Padilla was detained on U.S. soil and preventatively held for nearly four years on suspicion of a crime that was never committed.

<sup>117</sup> Senate Report, *supra* note 102, at xii.

<sup>118</sup> OFFICE OF PROFESSIONAL RESPONSIBILITY, U.S. DEPARTMENT OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATED TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 260 (2009), available at: <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

Though the initial ethics investigation concluded that Yoo and Bybee had both committed professional misconduct due to their biased legal opinions in the “torture memos,” a later 2010 memorandum from the Attorney General softened these findings to conclude that Yoo and Bybee had generated erroneous opinions, but not willfully so.<sup>119</sup> Despite this public acknowledgement of U.S. wrongdoing, however, no individual has been criminally prosecuted for the abuses committed against Mr. Padilla. Indeed, no high-level U.S. officials have been prosecuted for the prolonged arbitrary detention, torture and other abuse of the hundreds of other detainees held at Guantánamo Bay, at U.S.-run “black sites” or by foreign governments.<sup>120</sup> Despite the documentation of hundreds of cases of torture and abuse, the U.S. has only prosecuted eleven low-level soldiers for abuses at the Abu Ghraib facility in Iraq.<sup>121</sup>

Moreover, no detainee tortured and abused by U.S. officials at Guantánamo or elsewhere has obtained civil redress for their injuries or time spent in detention without charge. Although U.S. laws provide redress for torture and other human rights abuses,<sup>122</sup> in every suit brought to date, the U.S. government has successfully claimed that U.S. officials are immune from suit or

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<sup>119</sup> David Margolis, Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists, Office of the Deputy Attorney General, U.S. Department of Justice, at 67 (Jan. 5, 2010), available at <http://graphics8.nytimes.com/packages/pdf/politics/20100220JUSTICE/20100220JUSTICE-DAGMargolisMemo.pdf>.

<sup>120</sup> January 2008 the Department of Justice commissioned John Durham to investigate possible criminal violations in connection with the interrogations of specific detainees overseas. In 2011, Mr. Durham recommended opening criminal investigations into the deaths of two detainees in United States custody overseas, but the DoJ ultimately concluded in August 2012 that there was not enough admissible evidence to successfully prosecute those responsible for the deaths. Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees, Department of Justice, Office of Public Affairs (Aug 30, 2012), available at: <http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html>.

<sup>121</sup> Ben Nuckols, *Military Prosecution in Abu Ghraib Scandal Ends*, Boston Globe, Jan. 11, 2008), [http://www.boston.com/news/nation/articles/2008/01/11/military\\_prosecution\\_in\\_abu\\_ghraib\\_scandal\\_ends/?camp=pm](http://www.boston.com/news/nation/articles/2008/01/11/military_prosecution_in_abu_ghraib_scandal_ends/?camp=pm).

<sup>122</sup> See Alien Tort Claims Act (ATCA), 28 U.S.C. §1350; Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, (1992); U.S. CONST. amend. V.

that the lawsuit should be dismissed at the very outset because its continuance would undermine U.S. national security interests.<sup>123</sup>

## LEGAL ARGUMENT

### I. The Commission's Interpretative Mandate

This Commission should interpret the protections afforded by the American Declaration in the light of evolving human rights laws and standards. International tribunals, including the Inter-American Court (Court) and the Inter-American Commission (Commission) have long recognized this principle. In its Advisory Opinion on South West Africa, the International Court of Justice (ICJ) noted that, “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”<sup>124</sup> The Inter-American Court has applied this same principle in relation to the proper interpretation of the American Declaration:

to determine the legal status of the American Declaration it is appropriate to look to the Inter-American System today in light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.<sup>125</sup>

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<sup>123</sup> For instance, in *Arar v. Ashcroft*, a suit challenging the unlawful rendition of a Canadian citizen from the United States to detention and torture in Syria, a U.S. court dismissed the case, concluding that foreign policy concerns and national security prevented it from hearing the case on the merits. *Arar v. Ashcroft*, 414 F.Supp.2d 250, 250 (E.D.N.Y. Feb 16, 2006), a decision upheld by the U.S. Court of Appeals for the Second Circuit. 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 3409 (2010). In *El-Masri v. United States*, a federal court refused to hear El-Masri's case on the merits because it would expose “state secrets.” El-Masri, a citizen of Germany, was allegedly unlawfully rendered from Macedonia to a U.S.-run detention facility in Afghanistan, where he was interrogated and tortured for five months before being released without charge or explanation, and then freed when the U.S. government realized he was innocent of any ties to Al-Qaeda. *El-Masri v. United States*, 479 F.3d 296 (4<sup>th</sup> Cir. 2007), *cert. denied*, 128 S.Ct. 373 (2007). And in *Mohamed v. Jeppesen Dataplan Inc.*, filed for five detainees who had been rendered and tortured in “black sites,” a federal court dismissed the complaint on similar “state secrets” grounds. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9<sup>th</sup> Cir. 2010).

<sup>124</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Reports 16, 31.

<sup>125</sup> Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, para. 37 (July 14, 1989). This interpretative framework is consistent with the general rules of treaty interpretation established by the 1969 Vienna Convention. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, paras. 114-115 (Oct. 1, 1999) (citing European Court of Human Rights decisions in *Tryer v. United Kingdom* (1978),

The Commission too has consistently adopted this principle in relation to its interpretation of the American Declaration. For example, in the *Villareal* case, the Commission noted that:

in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which the complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.<sup>126</sup>

Consistent with this approach, the Commission has looked to numerous international and regional human rights treaties and instruments as well as decisions of international courts and other bodies to interpret rights protected under the American Declaration, and should do so in relation to the provisions of the Declaration invoked by the Petitioner in this case.<sup>127</sup>

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*Marckx v. Belgium* (1979), and *Louizdou v. Turkey* (1995)). See also Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 120 (Sept. 17, 2003) (citing Advisory Opinion OC-16/99). Thus, following this reasoning, the Court found that the U.N. Convention on the Rights of the Child, having been ratified by almost all OAS members states, reflects a broad international consensus (*opinio juris*) on the principles contained therein, and thus could be used to interpret not only the American Convention but also other treaties relevant to human rights in the Americas. Juridical Status and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, paras. 29-30 (Aug. 28, 2002).

<sup>126</sup> *Ramón Martínez Villareal v. United States*, Case 11.753, Inter-Am. Comm'n H.R., Report No. 52/02, doc. 5 rev. 1 at 821, para. 60 (2002) (citing *Juan Raúl Garza v. United States*, Case 12.243, Inter-Am. Comm'n H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 1255, paras. 88-89 (2000)). See also *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, 5 rev. 1 at 727, paras. 86-88 (2004); *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, doc 5 rev. 1 at 860, paras. 96-97 (2002).

<sup>127</sup> See, e.g., Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.106, doc. 40 rev., paras. 28, 159, 165 (Feb. 28, 2000) [hereinafter Report on the Situation of Human Rights of Asylum Seekers] (referencing the U. N. Convention on the Rights of the Child to interpret Canada's responsibilities to asylum seekers under the American Declaration and the OAS Charter); *Maya Indigenous Community v. Belize*, Case 12.053, paras. 112-120, 163, 174 (referencing the American Convention, jurisprudence of the Inter-American Court, and the United Nations Convention on the Elimination of Racial Discrimination (CERD) to interpret the rights to property, equality before the law, and judicial protection for indigenous peoples contained in the American Declaration); *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 704 (2000) (referring to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) in determining Brazil's obligations under the American Declaration to effectively prosecute domestic violence-related crimes).

## **II. The United States Violated Articles I, XXV, and XXVI of the American Declaration by Arbitrarily Detaining Mr. Padilla**

The United States violated Mr. Padilla’s right to be free from arbitrary detention under the American Declaration by detaining him for almost 43 months without charge or trial while denying him effective access to legal counsel, his family, and judicial review of his detention. Moreover, because there was no legitimate basis for Mr. Padilla’s detention, it constituted punishment without trial that violated his right to be presumed innocent until proven guilty.

### **A. The American Declaration Prohibits Arbitrary Detention**

The prohibition of arbitrary detention is not explicitly set forth in the American Declaration; rather it is implicitly guaranteed by a number of separate Articles that establish fundamental rights to due process. Together these Articles protect anyone in the custody of the state from being detained arbitrarily. Articles I and XXV provide that everyone has a right to personal liberty, that “no person may be deprived of liberty except by preexisting law,” and that detainees are entitled to a “mechanism to challenge the legality of their continued detention in a court of law in a timely manner.”<sup>128</sup> Article XVIII provides that every detainee has the right to a “simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights,” and Article XXVI ensures that such hearings are impartial and that pending trial and conviction, defendants are to be presumed innocent until proven guilty.<sup>129</sup>

While some of these due process rights may be restricted under certain limited circumstances—for example, to permit a period of preventative detention—others, importantly

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<sup>128</sup> American Declaration of the Rights and Duties of Man art. I, XXV (1948) [hereinafter American Declaration]; Inter-Am. Comm’n H.R., Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., para. 120 (2002) [hereinafter Report on Terrorism and Human Rights]. The Commission considers Article XXV to be coterminous with the protections afforded by Article 7 of the American Convention. *See* Report on Terrorism and Human Rights, para. 118.

<sup>129</sup> American Declaration art. XVIII, XXVI.

the right to effective review of detention can never be restricted, even in times of armed conflict or other state of emergency.<sup>130</sup>

### *1. Arbitrary Detention Occurs When Detention Is Not Authorized by Law*

In assessing whether a period of detention is arbitrary the Commission first considers whether domestic law authorizes detention.<sup>131</sup> The Commission has found that detention that is not authorized under domestic law constitutes arbitrary detention that violates Article 7 of the American Convention.<sup>132</sup> The Commission has applied this same standard in assessing whether a period of detention violates Article XXV of the American Declaration.<sup>133</sup>

### *2. The Right to a Speedy Trial*

Article XXV of the American Declaration and Article 7(5) of the American Convention provide that detainees have the right to a speedy trial, failing which they must be released.<sup>134</sup> Only “reasonable” delays in bringing a case to trial are authorized by these provisions. In assessing reasonableness, the Commission applies a case-by-case analysis that takes into consideration the complexity of the case, the procedural filings made by the state and defendant and the conduct of judicial authorities.<sup>135</sup> In the *Desmond McKenzie Case*, the Commission found that a delay of more than two years to be *prima facie* unreasonable. Where delay is alleged

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<sup>130</sup> Habeas Corpus in Emergency Situation (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, para 44 (Jan. 30, 1987). (Interpreting Articles 27(2), 25(1) and 7(6) of the American Convention to prohibit the derogation of the right to judicial review of detention even in periods of state emergencies. Articles 25(1) and 7(6) of the American Convention provide rights analogous to Articles XVIII and XXV of the American Declaration, including the right to judicial recourse against violations of fundamental rights and the right to have a court determine, without delay, the lawfulness of arrest or detention.)

<sup>131</sup> *Jailton Neri Da Fonseca v. Brazil*, Case 11.634, Inter-Am. Comm’n H.R., Report No. 33/04, para. 54 (2004).

<sup>132</sup> See, e.g., *Maritza Urrutia v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, para. 67-70 (Nov. 27, 2003) (relying on Guatemala’s domestic law providing that no person may be deprived of personal freedom absent judicial order or being caught “flagrante delicto” to find Maritza Urrutia’s warrantless arrest while walking down the street to qualify as arbitrary and extrajudicial detention).

<sup>133</sup> *Oscar Elias Biscet et al. v. Cuba*, Case 12.476, Inter-Am. Comm’n H.R., Report No. 67/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1, para. 143 (2007) (determining that Cuba’s arrest of journalists and activists without an order from a competent judicial authority to have been arbitrary).

<sup>134</sup> American Declaration, art. XXV; American Convention, art. 7(6)

<sup>135</sup> *Desmond McKenzie et al. v. Jamaica*, Cases 12.023, 12.044, 12.107, 12.126, and 12.146, Report No. 41/00, OEA/Ser.L/V/II.106, doc. 3 rev. at 918, para. 259 (1999).



by the defendant, the burden is placed on the state to give reasons for the delay, and the state's justifications are always subject to the "closest scrutiny."<sup>136</sup>

3. *Preventative Detention is Permissible Only When Authorized by Law and Occurs for Limited Periods*

Preventative detention is authorized under the American Declaration in very limited circumstances.<sup>137</sup> Where such detention is excessively long, or has no legitimate basis, the Commission has determined that it constitutes arbitrary detention. The Commission has also determined that lengthy or unjustified periods of preventative detention amount to a criminal sentence that violates the detainee's right to be presumed innocent under Article XXVI of the American Declaration.<sup>138</sup>

Preventative detention is authorized only where there is compelling evidence of a detainee's guilt and where there is a risk of him fleeing, committing another offense, interfering with witnesses, or where such detention is required for criminal investigation purposes or to otherwise preserve public order.<sup>139</sup> Preventative detention must be of limited duration. Thus, even where there may initially be a legitimate basis for preventative detention, it will become arbitrary if the government fails to demonstrate due diligence in limiting its duration to a reasonable period.<sup>140</sup> A slow pace of investigation or procedural delays caused by an actor other

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<sup>136</sup> *McKenzie et al. v. Jamaica*, *supra* note 135, paras. 259-260.

<sup>137</sup> *Odolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha and Carlos Florentino Molero Coca v. Perú*, Case 11.182, Inter-Am. Comm'n H.R., Report No. 49/00, OEA/Ser.L/V/II.106, doc. 3 rev. at 1126, para. 85-86 (1999) (permitting preventative detention in certain cases); *Jorge Luis Bronstein et al. v. Argentina*, Cases 11.205, 11.236, 11.238, 11.239, 11.242, 11.243, 11.244, 11.247, 11.248, 11.249, 11.251, 11.254, 11.255, 11.257, 11.258, 11.261, 11.263, 11.305, 11.320, 11.326, 11.330, 11.499 and 11.504, Report No. 2/97, Inter-Am. Comm'n H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 25.

<sup>138</sup> *Id.* See also *Suárez-Rosero v. Ecuador*, Merit, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 35, para. 77 (Nov. 12, 1997).

<sup>139</sup> *Bronstein v. Argentina*, *supra* note 137, paras. 26-37.

<sup>140</sup> *Id.* para. 38.

than the person in custody indicates insufficient diligence, and any detention that results as a consequence will be deemed arbitrary.<sup>141</sup>

#### 4. *Effective Judicial Review of Detention is a Non-Derogable Right*

No one can be deprived of their liberty without due process of law, and once detained everyone, regardless of their status, has a right to judicial review of that detention.<sup>142</sup> Thus, periods of incommunicado detention are never permissible.<sup>143</sup> One mechanism for such review is the writ of *habeas corpus* which the Commission has long recognized as an essential guarantor of the right to be free from arbitrary detention; a procedure that “performs a vital role in ensuring that a person’s life and physical integrity are respected.”<sup>144</sup> *Habeas* review must be meaningful and effective, which requires a timely review process, and an impartial hearing.<sup>145</sup> Recognizing that access to legal counsel and the necessary time and means to prepare a defense is a prerequisite of impartial hearings, the Commission also requires that detainees be given prompt access to an attorney and adequate opportunities, time, and facilities to meet and communicate freely and confidentially with them.<sup>146</sup> The right to effective review of detention is so important to the guarantee of non-arbitrary detention that it is non-derogable. Thus even during an armed conflict situation or other state of and emergency, there must be some effective procedure to

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<sup>141</sup> *Wemhoff v. Federal Republic of Germany*, Judgment of June 27, 1968, Eur. Ct. H.R., Series A, No. 7, para. 77 (1968); *Toth v. Austria*, Judgment of Dec. 12, 1991, Eur. Ct. H.R., Vol. 224, para. 77 (1991) (determining that the rules of procedure of the Austrian courts caused unreasonable delay by suspending investigation).

<sup>142</sup> *Jailton Neri Da Fonseca v. Brazil*, Case 11.634, Inter-Am. Comm’n H.R., Report No. 33/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 845, para. (2004).

<sup>143</sup> *Asencios Lindo et al.*, *supra* note 137, para. 97 (determining that that a law permitting 15 days of incommunicado detention “constitutes a violation per se of Article 7 and 8 of the American Convention.” The Commission considers 15 days of incommunicado detention to “clearly contravene” the right of a detainee to be brought promptly before a judge and the right to communicate freely and privately with his counsel).

<sup>144</sup> Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, para. 31 (Oct. 6, 1987).

<sup>145</sup> *Biscet v. Cuba*, *supra* note 133, para. 144 (finding detention to have been arbitrary due to a lack of impartial court hearings).

<sup>146</sup> *Castillo Petruzzi et al. v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, para. 139 (May 30, 1999) (citing UN Basic Principles on the Role of Lawyers, Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Aug. 27 to Sept. 7 1990)).

allow a detainee to challenge the basis of their detention. A failure to afford such meaningful review renders the detention arbitrary in violation of the American Declaration.<sup>147</sup>

## **B. The United States Arbitrarily Detained Mr. Padilla**

The United States' detention of Mr. Padilla fails to meet the American Declaration's requirements for lawful, non-arbitrary detention. Because Mr. Padilla's detention was not authorized by pre-existing law, lacked requisite procedural protections, had no legitimate basis, and was for an unreasonably long period, it constituted arbitrary detention and violated Articles I, XVIII, XXV, and XXVI of the American Declaration.

### *1. No Domestic Law Authorized Mr. Padilla's Arrest and Detention*

Domestic law authorized neither Mr. Padilla's initial arrest in Chicago nor his later detention as an "enemy combatant." Mr. Padilla's initial arrest relied upon the pretextual and illegitimate use of a material witness warrant, while his designation and detention as an enemy combatant violated the Non-Detention Act of 1971. Moreover, his military detention was for the purpose of interrogation and intelligence gathering, which are not recognized legitimate bases for detention under U.S. law.<sup>148</sup>

On May 8, 2002, federal agents arrested Mr. Padilla at Chicago O'Hare International Airport under a material witness warrant, which authorizes arrest for the *sole* purpose of securing testimony in a criminal proceeding.<sup>149</sup> As later became apparent, the United States arrested Mr.

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<sup>147</sup> *Judicial Guarantees in States of Emergency*, *supra* note 144; Report on Terrorism and Human Rights, *supra* note 127, para. 220; *Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba)*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.117, doc. 5 rev. 1 (2002) (citing that both international humanitarian law and human rights law protect detainees during armed conflicts); *Coard et al. v. United States*, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99 (1999) (holding that under no circumstances can a person under the authority and control of a state be deprived of fundamental human rights, including the right to be free from arbitrary detention and to judicial review of detention).

<sup>148</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (O'Connor, J., plurality opinion) ("[W]e agree that indefinite detention for the purpose of interrogation is not authorized.")

<sup>149</sup> Material Witness Statute, 18 U.S.C. §3144 (requiring government official to file an affidavit alleging that the arrested individual has material information pertaining to a criminal proceeding and that it would be impractical to secure testimony by subpoena). The U.S. Supreme Court held that a man, claiming he had been unlawfully held

Padilla for the purpose of interrogation and intelligence-gathering. As Secretary of Defense Donald Rumsfeld told the public: “[O]ur interest really in his case is not law enforcement, it is not punishment because he was a terrorist or working with the terrorists. Our interest at the moment is to try and find out everything he knows so that hopefully we can stop other terrorist acts.”<sup>150</sup> Because interrogation falls outside of the scope of permissible purpose under the authorizing statute,<sup>151</sup> Mr. Padilla’s arrest was extrajudicial and therefore arbitrary.

Though Mr. Padilla sought to challenge his detention as a material witness, he was not afforded the opportunity to do so. Two days before a federal court was scheduled to consider a motion for his release, President Bush designated him an “enemy combatant” and placed him under military detention, where he remained for the next 43 months.<sup>152</sup> This detention violated the Non-Detention Act of 1971, which explicitly prohibits the U.S. government from detaining U.S. citizens without explicit Congressional authorization.<sup>153</sup> The Second Circuit and four Supreme Court Justices agreed with this conclusion when considering a *habeas* petition filed on Mr. Padilla’s behalf.<sup>154</sup> The majority in Mr. Padilla’s *habeas* petition declined to rule on the

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under the material witness warrant, could not sue the Attorney General for promulgating a policy that permitted pretextual use of the statute. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2077 (2011). This holding limits the ability of detainees to receive damages for wrongful detentions, but it does not establish the lawfulness of arrests under material witness warrants for purposes other than securing testimony. *Id.* at 2085 (Kennedy, J., concurring) (noting that “[t]he Court’s holding...leaves unresolved whether the Government’s use of the Material Witness Statute in this case was lawful,” and affirming that that material witness warrants requires “a showing by affidavit that ‘the testimony of a person is material in a criminal proceeding’ and ‘that it may become impractical to secure the presence of the person by subpoena.’”).

<sup>150</sup> News Briefing with Defense Secretary Donald Rumsfeld, U.S. Department of Defense (June 12, 2002), 2002 WL 22026773 [hereinafter DoD News Briefing]. There have been numerous reports of abuse of the material witness warrant statute in the wake of September 11. *See generally*, Human Rights Watch, *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11*, June 2005 Vol. 17, no. 2 (G).

<sup>151</sup> Material Witness Statute, *supra* note 149.

<sup>152</sup> *Padilla ex rel. Newman v. Rumsfeld*, 352 F.3d at 700.

<sup>153</sup> *Id.* at 699; *Rumsfeld v. Padilla ex rel. Newman*, 542 U.S. at 464 n.8 (Stevens J, dissenting).

<sup>154</sup> *Padilla ex rel. Newman v. Rumsfeld*, 352 F.3d at 699; *Rumsfeld v. Padilla ex rel. Newman*, 542 U.S. at 464 n.8 (Stevens J, dissenting).

merits, and instead found that the petition had been wrongly filed in New York, when it should have been filed in South Carolina where Mr. Padilla was then held.<sup>155</sup>

The federal district court judge in South Carolina who reviewed Mr. Padilla's second *habeas* petition agreed with the Second Circuit and the four Justices that there was no lawful basis for Mr. Padilla's detention.<sup>156</sup> The Fourth Circuit Court of Appeals, however, reversed, holding that the 2001 AUMF authorized military detention of U.S. citizens who had carried arms on a foreign battlefield, and remanded to the lower court to find whether, in fact, Mr. Padilla had carried arms.<sup>157</sup> Before the U.S. government could be compelled to produce evidence supporting its allegation, it transferred him to the criminal justice system. This maneuver also prevented Supreme Court review, which likely would have compelled the government to release Mr. Padilla regardless of factual findings because the executive had exceeded its authority by exerting military authority over a U.S. citizen on U.S. soil.<sup>158</sup>

In all events, military detention for the purpose of interrogation is unlawful under the U.S. Constitution, as the Supreme Court has recognized.<sup>159</sup> The United States government seized and held Mr. Padilla for 43 months, 21 of which were incommunicado, for the purpose, in its own words, of "intelligence-gathering."<sup>160</sup> Thus, by seizing Mr. Padilla under a pretextual basis and holding him incommunicado in military detention for the purpose of extracting intelligence

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<sup>155</sup> *Rumsfeld v. Padilla ex rel. Newman*, 542 U.S. at 427.

<sup>156</sup> *Padilla v. Hanft*, 389 F.Supp.2d at 678-79.

<sup>157</sup> *Padilla v. Hanft*, 423 F.3d at 389-90 n1.

<sup>158</sup> Of the nine justices who would have ruled on the legality of Mr. Padilla's detention, four had already voiced the view that such detention was unlawful. *Rumsfeld v. Padilla ex rel. Newman*, 542 U.S. at 464 n.8 (Stevens J, dissenting). A fifth, Justice Scalia, had dissented from *Hamdi v. Rumsfeld*, another case involving a U.S. citizen held as an enemy combatant, on the grounds that military detention of a citizen was unlawful, absent suspension of habeas corpus by Congress. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004)(Scalia, J., dissenting).

<sup>159</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (O'Connor, J., plurality opinion) ("we agree that indefinite detention for the purpose of interrogation is not authorized.").

<sup>160</sup> Jacoby Declaration, *supra* note 47, at 5-7.

from him, the United States subjected Mr. Padilla to arbitrary detention and violated Article XXV of the American Declaration.

2. *The United States Denied Mr. Padilla Timely and Impartial Judicial Review of His Detention*

The United States failed to provide Mr. Padilla with adequate judicial review of his detention. Mr. Padilla had to litigate the basis of his detention by the U.S. military for 43 months; 21 of those were also without access to counsel.<sup>161</sup> Even after attorneys gained access to Mr. Padilla, the government continued to intercept and censor communications between them, and acted to undermine trust between Mr. Padilla and his attorneys.<sup>162</sup> Such practices erode the impartiality of all judicial hearings reviewing the legality of Mr. Padilla's detention, and violate Articles XXV and XXVI of the American Declaration.

When Mr. Padilla's first *habeas* petition finally reached the Supreme Court in 2004, the Court declined to consider the petition on the merits and instead found that Mr. Padilla's lawyers had improperly filed the petition.<sup>163</sup> In a forceful dissent joined by three other Justices, Justice Stevens wrote that New York was the proper forum for *habeas* review, especially in light of fact that the government secretly transferred Mr. Padilla to South Carolina without giving his attorney notice.<sup>164</sup> By negating two-years of litigation and forcing a refiling in South Carolina, the United States violated Mr. Padilla's right to have the legality of his detention ascertained *without delay* by a court under Article XXV.

Mr. Padilla's lawyers filed a second petition for *habeas* relief in the United States federal court in South Carolina in 2004. On appeal, the court of appeals held that the government was

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<sup>161</sup> Third Amended Complaint, *supra* note 6, para. 82.

<sup>162</sup> *Id.* paras. 84-88 (citing the Jacoby Declaration, *supra* note 47, at 8-9).

<sup>163</sup> *Rumsfeld v. Padilla ex rel. Newman*, 542 U.S. at 427.

<sup>164</sup> *Padilla v. Rumsfeld*, 542 U.S. at 458 (Stevens, J., dissenting) (adding that indefinite incommunicado detentions for interrogation purposes are unlawful "tools of tyrants," at 465.).

authorized to hold Mr. Padilla under a set of stipulated facts in which Mr. Padilla hypothetically carried arms against the United States on a foreign battlefield, and remanded to the lower court to determine whether such facts were true.<sup>165</sup> At the same time, the Supreme Court agreed to review the appellate court's decision to determine whether the government had sufficient authority to detain Mr. Padilla even under the stipulated facts.<sup>166</sup>

Before the trial court could determine the truthfulness of these stipulated facts and two days before the Supreme Court was to decide on the merits of Mr. Padilla's *habeas* challenge, the government filed criminal charges and transferred Mr. Padilla into civilian custody to avoid further judicial review.<sup>167</sup> The Supreme Court decided that, because civilian charges had been filed, it need not consider the merits of Mr. Padilla's petition,<sup>168</sup> even though, as one Supreme Court Justice noted, nothing prevents the military from re-detaining Mr. Padilla as an enemy combatant at the conclusion of his criminal trial or after serving his sentence.<sup>169</sup> The United States thereby denied Mr. Padilla the opportunity to receive a final judicial holding on either the factual or legal validity of his military detention, thereby denying him meaningful and effective judicial review of the legality of his detention as required by Article XXV.

### 3. *The United State Subjected Mr. Padilla to an Unreasonable Period of Pre-Trial Delay*

More than four years passed between Mr. Padilla's initial arrest and his eventual criminal trial. The Commission has found similarly extended periods of time constitute a *prima facie* violation of the right of detainees to a trial without undue delay.<sup>170</sup> Where there is such a delay, the government has the burden of overcoming the closest scrutiny in justifying it.<sup>171</sup> While the

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<sup>165</sup> *Padilla v. Hanft*, 423 F.3d at 389-90.

<sup>166</sup> *Padilla v. Hanft*, 126 S.Ct. 1649, 1651 (2006) (Ginsburg J., dissenting).

<sup>167</sup> *Padilla v. Hanft*, 432 F.3d at 584 (order).

<sup>168</sup> *Padilla v. Hanft*, 126 S. Ct. at 1649.

<sup>169</sup> *Padilla v. Hanft*, 126 S.Ct. at 1651 (Ginsburg J., dissenting).

<sup>170</sup> *McKenzie et al. v. Jamaica*, *supra* note 134, paras. 258-59.

<sup>171</sup> *Id.*

United States argued in federal court that vital national security reasons justified holding Mr. Padilla indefinitely in military custody, rather than in the criminal justice system, it nonetheless transferred him into civilian custody without explaining why those national security reasons no longer applied.<sup>172</sup> In light of the fact that none of the purported justifications for holding Mr. Padilla without trial were cited in his criminal indictment,<sup>173</sup> the United States is unlikely to produce sufficient reason to meet its burden.

4. *Mr. Padilla's Period of Preventative Detention lacked Adequate Justification and Was Unreasonably Lengthy*

The United States characterized Mr. Padilla's detention as preventative, but never provided the necessary justification, and diligence in limiting its duration, that the American Declaration requires of non-arbitrary preventive detention.<sup>174</sup> While the United States suspected that Mr. Padilla was an Al Qaeda operative who planned to detonate a "dirty bomb,"<sup>175</sup> it did not provide the evidence of criminal guilt that is essential to justify a period of preventative detention.<sup>176</sup> The evidence that "justified" Mr. Padilla's detention came from the interrogations (likely by torture) of two terrorist suspects overseas.<sup>177</sup> However, according to the United States' own statement, one of these suspects disavowed the relevant information and one of them was under the influence of drugs at the time of his interrogation.<sup>178</sup> The paucity of evidence of Mr. Padilla's guilt is borne out by the fact that he was never charged with a criminal conspiracy to

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<sup>172</sup> *Padilla v. Hanft*, 432 F.3d at 582 (order).

<sup>173</sup> *Id.* at 584; Superseding Indictment, *supra* note 87, at 1-18.

<sup>174</sup> *Bronstein v. Argentina*, *supra* note 137, paras. 26-37

<sup>175</sup> Mobbs Declaration, *supra* note 12, at 2.

<sup>176</sup> *Bronstein v. Argentina*, *supra* note 137, para. 26.

<sup>177</sup> Mobbs Declaration, *supra* note 12, at 2 n.1; *R (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, *supra* note 20, at 60-61.

<sup>178</sup> Mobbs Declaration, *supra* note 12, at 2 n.1 (it remains unclear whether the person who disavowed and the person who was under the influence of drugs under his interrogation was the person).



detonate a “dirty bomb” in the United States or any other criminal activity.<sup>179</sup> Rather, the government defended Mr. Padilla’s preventive detention on the basis of its perceived need to interrogate him for intelligence.<sup>180</sup> Intelligence gathering, however, falls outside the scope of permissible reasons, recognized by the Commission, that authorize preventive detention.<sup>181</sup> As there was no lawful or other reasonable basis for Mr. Padilla’s preventative detention, it constitutes arbitrary detention that violates the American Declaration.

Even if the United States had provided adequate justification for Mr. Padilla’s preventative detention, it would nonetheless have been arbitrary. The Commission has found that preventive detention is only authorized if it is of a reasonable duration.<sup>182</sup> Although the Commission has not stipulated what constitutes a reasonable period but has adopted a case-by-case approach to assess whether the state has acted diligently in attempting to limit the duration of preventative detention.<sup>183</sup>

Here, the United States failed to show the required diligence. While Mr. Padilla was in preventative detention, the United States stated that it had no intention of charging Mr. Padilla with a crime,<sup>184</sup> and that it was holding him for as long as necessary to obtain valuable intelligence.<sup>185</sup>

Mr. Padilla’s preventive detention ended only when the Supreme Court decided to review his initial *habeas* petition. Had the Supreme Court not intervened, it is likely that the United

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<sup>179</sup> DoD News Briefing, *supra* note 150 (quoting government officials remarking candidly that “[O]ur interest in [Mr. Padilla’s] case is not law enforcement, it is not punishment because he was a terrorist or working with the terrorists. Our interest at the moment is to try to find out everything he knows so that we can hopefully stop other terrorist acts.”); *see also Judge Agrees Padilla Terror Case ‘Light on Facts’*, ASSOCIATED PRESS, June 21, 2006 (noting that the “indictment does not mention the ‘dirty bomb’ allegations.”), available at: [http://www.msnbc.msn.com/id/13462968/ns/us\\_news-security/t/judge-agrees-padilla-terror-case-light-facts/](http://www.msnbc.msn.com/id/13462968/ns/us_news-security/t/judge-agrees-padilla-terror-case-light-facts/).

<sup>180</sup> Jacoby Declaration, *supra* note 47, at 4.

<sup>181</sup> *Bronstein v. Argentina*, *supra* note 137, paras. 26-37.

<sup>182</sup> *Bronstein v. Argentina*, *supra* note 137, para. 19; *Suárez-Rosero v. Ecuador*, *supra* note 136, para. 77.

<sup>183</sup> *Id.* para. 38.

<sup>184</sup> DoD News Briefing, *supra* note 150.

<sup>185</sup> Jacoby Declaration, *supra* note 47, at 4.

States would have held Mr. Padilla in military custody for even longer. Indeed, even following Mr. Padilla's transfer to civilian custody—and to this day—the United States has refused to rescind Mr. Padilla's designation as an enemy combatant and to disavow the authority to return him to military custody. Accordingly, Mr. Padilla's preventative detention was unreasonably long and thus unauthorized and arbitrary in violation of Article XXV. In addition because his detention lacked any legitimate basis, it was the equivalent to criminal punishment without trial and violated Mr. Padilla's right to be presumed innocent under Article XXVI of the American Declaration.<sup>186</sup>

### **III. The United States Violated Articles I, XXV, and XXVI of the American Declaration by Torturing Mr. Padilla and Subjecting Him to Cruel, Inhuman or Degrading Treatment**

Mr. Padilla was subjected to various unlawful interrogation methods and conditions of confinement including, but not limited to: death threats and threats of torture and cruel, inhuman, and degrading treatment (CIDT); sleep deprivation; stress positions; and sensory deprivation. The Inter-American system and other international bodies have found that these types of methods and conditions constitute torture and CIDT as prohibited by Articles I, XXV, and XXVI of the American Declaration.

#### **A. The American Declaration Prohibits Torture and CIDT**

Articles I, XXV and XXVI of the American Declaration prohibit torture and other CIDT. Article I protects personal security, Article XXV grants the right to “humane treatment” to individuals in custody, and Article XXVI prohibits “cruel, infamous or unusual punishment.”<sup>187</sup> Although the American Declaration does not contain an explicit definition on the right to humane treatment, the Commission has interpreted Article I of the Declaration to include

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<sup>186</sup> Report on Terrorism and Human Rights, *supra* note 128, para. 223. *See also* Suárez-Rosero v. Ecuador, *supra* note 138, para. 77.

<sup>187</sup> American Declaration art. I, XXV, XXVI.

equivalent protections in Article 5 of the Convention,<sup>188</sup> which guarantees the right of everyone to respect for their “physical, mental, and moral integrity,” and to be free from “torture or to cruel, inhuman, or degrading punishment or treatment.”<sup>189</sup>

Reading Articles I, XXV, and XXVI together, the Commission has stated that the Declaration’s right to humane treatment encompasses three broad categories of prohibited treatment: “(1) torture; (2) other cruel, inhumane, or degrading treatment or punishment; (3) other prerequisites for respect for physical, mental and moral integrity, including certain regulations governing the means and objectives of detention or punishment.”<sup>190</sup> As the Commission has also noted, the Inter-American Court has held that “every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to...humane treatment.”<sup>191</sup>

The Commission has specified that “[a]n essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations *erga omnes*.”<sup>192</sup> As evidenced by their incorporation in universal and regional human rights treaties as well as the Geneva Conventions, the prohibitions against torture and CIDT form part of customary international law.<sup>193</sup> Indeed, these two prohibitions are so universally recognized

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<sup>188</sup> Report on Terrorism and Human Rights, *supra* note 128, para. 155.

<sup>189</sup> American Convention art. 5.

<sup>190</sup> Report on Terrorism and Human Rights, *supra* note 128, para. 150.

<sup>191</sup> *Neira-Alegria et al. v. Peru*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 21, para. 60 (Jan. 19, 1995). *See also* *Hernández Lima v. Guatemala*, Case 11.297, Inter-Am. Comm’n H.R., Report No. 28/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 406, para. 58 (1997).

<sup>192</sup> Report on the Situation of Human Rights of Asylum Seekers, *supra* note 127, para. 118.

<sup>193</sup> *See, e.g.*, Universal Declaration of Human Rights, G.A. res. 217A (III), art. 5, U.N. Doc A/810 at 71 (1948); International Covenant on Civil and Political Rights, art. 7, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (ICCPR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987; Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 32, 75 U.N.T.S. 287, entered into force Oct. 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, art. 17, 75 U.N.T.S. 135, entered into force Oct. 21, 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of

that the Commission has identified the prohibition of torture as a *jus cogens* norm,<sup>194</sup> and has emphasized that the right to humane treatment is a non-derogable right that applies equally in time of peace or armed conflict.<sup>195</sup> As such, the American Declaration strictly prohibits detention and interrogation methods that amount to torture or CIDT.

Neither the American Declaration nor the American Convention expressly defines “torture.” However, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the United States has ratified, defines torture for the purposes of that treaty as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions....

Article 2 of the Inter-American Convention to Prevent and Punish Torture defines torture similarly as:

any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this Article.<sup>196</sup>

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Victims of International Armed Conflicts (Protocol I), art. 75, 8 June 1977; Common Article 3, Geneva Conventions.

<sup>194</sup> Report on Terrorism and Human Rights, *supra* note 128, para. 155.

<sup>195</sup> *Id.* para. 180.

<sup>196</sup> Organization of American States, Inter-American Convention to Prevent and Punish Torture, art. 2, Dec. 9, 1985, O.A.S.T.S. No. 67.

Under the Inter-American Torture Convention, torture refers to acts committed by state agents or individuals acting under the orders of instigation of state agents.<sup>197</sup> In addition, the Commission has considered that for treatment to rise to the level of torture, it must (1) produce physical and mental pain and suffering, (2) be inflicted intentionally, and (3) be committed by either a public official or by a private person acting at the instigation of the former.<sup>198</sup> In sum, the Commission considers both intensity and purpose in evaluating whether specific conduct or treatment amounts to torture.

In its analysis of the contours of the protections afforded by Article 5 of the American Convention, the Commission has considered decisions of the European Commission on Human Rights (European Commission). According to this body, “the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable.”<sup>199</sup> According to the European Court of Human Rights (European Court), “[t]he assessment of this minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects.”<sup>200</sup> A key indicator of torture or CIDT is that such acts impose more than “that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.”<sup>201</sup>

The Commission has adopted the European Court’s view that torture is an aggravated form of inhuman treatment perpetrated with a purpose. The European Court has held that if

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<sup>197</sup> Inter-American Convention to Prevent and Punish Torture art. 3 (“The following shall be held guilty of the crime of torture: a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so. b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto”).

<sup>198</sup> Report on Terrorism and Human Rights, *supra* note 128, para. 154. See also *Raquel Marti de Mejía v. Perú*, Case 10.970, Inter-am. Comm’n H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7 at 157, para. 185 (1996).

<sup>199</sup> *The Greek Case*, 1969 Y.B. Eur. Con. on H.R.186 (Eur. Comm’n of H.R.).

<sup>200</sup> *Case of Çiçek v. Turkey*, Judgment of 27 February 2001, Eur. Ct. H.R., para. 172 (2001).

<sup>201</sup> *Case of Valasinas v. Lithuania*, Judgment of 24 October 2001, Eur. Ct. H.R., para. 102 (2001).

certain acts are deliberately inflicted, carefully thought-through before being administered, and carried out with the express purpose of obtaining admissions or information from the victim, it will constitute torture.<sup>202</sup> The Commission has accepted this analysis.<sup>203</sup>

In examining whether a particular detainee has been subjected to torture or CIDT, it is appropriate to consider the totality of the circumstances; acts that might not individually constitute torture or CIDT may rise to this level when performed in combination. For example, in *Selmouni*, the European Court found that “the physical and mental violence, *considered as a whole*, committed against the applicant's person caused ‘severe’ pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture....”<sup>204</sup>

The Commission has found that both the American Convention and the Inter-American Convention to Prevent and Punish Torture permit flexibility in assessing whether, in view of its severity, an act or practice constitutes torture or inhuman treatment. Regarding the conceptual difference between “torture” and “inhuman treatment,” the Commission has shared the view of the European Commission on Human Rights that “inhuman treatment” includes “degrading treatment” and that “torture” is “an aggravated form of inhuman treatment perpetrated with a purpose, namely to obtain information or confessions or to inflict punishment.”<sup>205</sup> According to the Commission, such classification should be done on a case-by-case basis, taking into account factors such as “the duration of the suffering, the physical and mental effects on each specific victim, and the personal circumstances of the victim.”<sup>206</sup>

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<sup>202</sup> *Aksoy v. Turkey*, App. No. 100/1995/606/694, Judgment, Report of Judgments and Decisions, para. 64 (1996).

<sup>203</sup> *Victor Rosario Congo v. Ecuador*, Case 11.427, Inter-Am. Comm’n H.R., Report No. 63/99, OEA/Ser.L/V/II.95, doc. 7 rev. at 475 paras. 58, 59, 62 (1998).

<sup>204</sup> *Selmouni v. France*, App. 25803/94, 29 Eur. H.R. Rep. 403, para. 105 (1999) (emphasis added). *See also Aydin v. Turkey*, (1998) 25 Eur. H.R.Rep. 251, para. 84 (holding that “the accumulation of acts of physical and mental violence inflicted on the applicant” amounted to torture).

<sup>205</sup> Report on Terrorism and Human Rights, *supra* note 128, para. 158 (citing *Luis Lizardo Cabrera v. Dominican Republic*, *supra* note 199, para. 79).

<sup>206</sup> *Luis Lizardo Cabrera v. Dominican Republic*, *supra* note 199, paras. 82-83.

Consistent with its interpretative mandate, the Commission has relied on human rights and humanitarian law treaties and other international instruments, customary international law, and decisions of U.N. and regional human rights bodies to define the content and scope of the protections afforded by the prohibitions of torture and CIDT guaranteed under the American Declaration.

### **B. Mr. Padilla Was Tortured and Subjected to CIDT.**

The Inter-American system and other international bodies have consistently found that the interrogation methods and detention conditions to which Mr. Padilla was subjected fall squarely within the definition of the prohibitions against torture and CIDT guaranteed by the American Declaration.<sup>207</sup> Each of these individual acts constitutes torture, and at a minimum, CIDT. Moreover, the many abusive actions to which Mr. Padilla was subjected *together* amount to torture, per the Commission's consideration of the totality of the circumstances. Given the duration, severity, and calculated nature of the United States' abuse of Mr. Padilla, there is no question that he was tortured.

#### *1. Death Threats and Threats of Torture and CIDT*

On orders from senior government officials, interrogators threatened Mr. Padilla with torture and death. They also threatened to unlawfully render Mr. Padilla from the United States to another location or foreign country, including Guantánamo Bay, where he would be subjected to even worse torture. Interrogators also threatened Mr. Padilla with imminent execution and with being cut with a knife and having alcohol poured on the open wounds.

The Inter-American system has found that such threats of death, torture, or CIDT themselves constitute torture or CIDT when they cause severe suffering, either alone or when

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<sup>207</sup> The U.S. government claimed in domestic civil proceedings that U.S. law between 2001 and 2003 did not clearly establish that the abuses committed against Mr. Padilla amounted to torture. That distinction is not of concern to the Inter-American system since it has considered these abuses as torture even before 2001.

combined with physical abuse. Relevant factors include the duration of the mental abuse and the credibility of the threats. For example, in *Maritza Urrutia v. Guatemala*, the Commission observed that intimidation can produce “severe mental or moral suffering in the victim” so as to constitute torture.<sup>208</sup> In “*Street Children*” v. *Guatemala*, the Commission also found that “creating a threatening situation or threatening an individual with torture may, at least in some circumstances, constitute inhuman treatment.”<sup>209</sup> Finally, in *Loayza-Tamayo vs. Peru*, the Commission determined that “intimidation with threats of further violence” in conjunction with other abuses constitutes CIDT.<sup>210</sup>

## 2. *Deprivation of Sleep*

The United States purposefully deprived Mr. Padilla of sleep during his detention. For a substantial period of his captivity, he was denied a mattress, blanket, sheet, and pillow and was left with only a cold, steel slab, making sleep impossible. In addition, Mr. Padilla’s captors employed a number of tactics to keep him from getting necessary sleep and rest, including intentionally making loud noises at all hours of the night. They electronically opened and shut adjacent cell doors so as to make a loud clanking sound, and banged on walls and cell bars to create startling noises. These disruptions would occur throughout the night and cease only in the morning, when interrogations would begin. Other times, his captors would disrupt him with constant artificial light and noxious fumes that made his eyes and nose run.

Acknowledging that sleep is an essential human need, the Inter-American system recognizes that when the deprivation of sleep is not a reasonable incident to interrogation, and causes severe suffering, either alone or in combination with other conduct, then such deprivation

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<sup>208</sup> *Urrutia v. Guatemala*, *supra* note 132, para. 91.

<sup>209</sup> “*Street Children*” (*Villagram-Morales et al.*) v. *Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, para. 165 (Nov. 19, 1999).

<sup>210</sup> *Loayza-Tamayo v. Peru*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 33, para. 123 (Sept. 17, 1997).



constitutes torture or CIDT. The Commission has noted that torture or CIDT “could include more subtle treatments that have nevertheless been considered sufficiently cruel, such as . . . prolonged denial of rest or sleep.”<sup>211</sup> In *Urrutia v. Guatemala*, the Court determined that when sleep deprivation is used “to obliterate the victim’s personality and demoralize her” it constitutes torture.<sup>212</sup>

Other international bodies have noted that sleep deprivation is used primarily to break down the will of the detainee and is prohibited under international anti-torture law when it is not merely a side effect of a lengthy interrogation. The UN Committee Against Torture, for example, has noted that “sleep deprivation for prolonged periods” constitutes torture.<sup>213</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has found that sleep deprivation is “clearly designed to break a detained person’s will and [has] no place in the interrogation process.”<sup>214</sup> Likewise, the UN Special Rapporteur on Torture has found that the “jurisprudence of both international and regional human rights mechanisms is unanimous in stating that [the use of sleep deprivation] violate[s] the prohibition of torture and ill-treatment.”<sup>215</sup> Finally, the ECHR has found that depriving detainees of sleep pending their

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<sup>211</sup> Report on Terrorism and Human Rights, *supra* note 128, para. 212 (citing Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, Feb. 19, 1986, [hereinafter U.N. Special Rapporteur Report on Torture] para. 119; *Muteba v. Zaire*, (124/1982) Report of the Human Rights Committee, U.N. Official Records of the General Assembly, 22nd Session, Supplement No. 40, (1984), Communication No. 124/1982, Democratic Republic of the Congo, 24/07/84. CCPR/C/22/D/124/1982, para. 10.2; *Setelich v. Uruguay*, (63/1979) Report of Human Rights Committee, U.N. Official Records of the General Assembly, 14th Session, Communication No. 63/1979 : Uruguay. 28/10/81 CCPR/C/14/D/63/1979, para. 16.2; *Weinberger v. Uruguay*, (28/1978) Report of Human Rights Committee, UN Official Records of the General Assembly, 31st Session, Communication No. 28/1978, U.N. Doc. CCPR/C/11/D/28/1978, para. 4.).

<sup>212</sup> *Urrutia v. Guatemala*, *supra* note 132, para. 94.

<sup>213</sup> U.N. Comm. against Torture, Concluding Observations of the Committee against Torture: Israel, para. 257, U.N. Doc. A/52/44, (Sep. 5, 1997), *available at* <http://www.unhcr.ch/tbs/doc.nsf/0/69b6685c93d9f25180256498005063da?Opendocument>.

<sup>214</sup> Council of Europe, Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 15 September 2003, para. 11 (2004), *available at* <http://www.cpt.coe.int/documents/tur/2004-16-inf-eng.htm>.

<sup>215</sup> Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note by the Secretary-General, Human Rights Questions: Implementation of Human Rights Instruments, U.N. GAOR, 59th Sess., Agenda

interrogation constitutes inhuman and degrading treatment when used in combination with other techniques.<sup>216</sup>

### 3. *Stress positions*

Government officials often placed Mr. Padilla in stress positions for hours at a time. They forced him to stand or to be shackled with a belly chain, a practice that results in severe pain.

International human rights bodies have long recognized that similar stress positions to those used on Mr. Padilla, including forced standing and forced sitting in uncomfortable positions in order to cause severe pain, constitute torture or CIDT, when used either alone or in combination with other abuses. The European Court has also held that certain stress positions on their own can constitute torture or CIDT.<sup>217</sup> The U.N. Special Rapporteur on Torture found that the combined interrogation techniques of forcing prisoners to sit in a very low chair or stand against a wall, tightly manacled hands or legs, subjecting prisoners to loud noise, sleep deprivation, hooding, keeping prisoners in cold air, and violent shaking violated the international prohibition against torture: “Each of these measures on its own may not provoke severe pain or suffering. Together—and they are frequently used in combination—they may be expected to induce precisely such pain or suffering, especially if applied on a protracted basis of, say, several hours.”<sup>218</sup>

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Item 107(a), para. 17, U.N. Doc. A/59/324 (Sept. 1, 2004), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/498/52/PDF/N0449852.pdf?OpenElement>.

<sup>216</sup> *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. (ser. A) 25 (1978), para. 168. (look at BB 194).

<sup>217</sup> *Aksoy v. Turkey*, App. No. 21987/93, 23 Eur. H.R. Rep., para. 64 (1996).

<sup>218</sup> Report of the Special Rapporteur on Torture to the UN Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 121, U.N. Doc E/CN.4/1997/7 (Jan 10. 1997), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G97/101/13/PDF/G9710113.pdf?OpenElement>.

#### 4. *Sensory deprivation*

Under strict orders from the highest levels of government, Mr. Padilla’s captors kept him in almost complete isolation for nearly two years. Beyond denying him human contact, they also denied Mr. Padilla all types of sensory stimuli, including natural sunlight, the time, and even a mirror.

Regional courts and international human rights bodies have found that when sensory deprivation causes severe suffering, either alone or in combination with other treatments, it constitutes torture or CIDT. Such sensory deprivation, including certain forms of solitary confinement and restrictions on sight, can cause severe psychological harm and long-term mental damage. For example, in *Velásquez Rodríguez*, the Inter-American Court held that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being,” constituting a violation of Article 5 of the American Convention’s prohibition against torture and inhuman and degrading treatment.<sup>219</sup> The Court has highlighted the suffering that prolonged isolation causes: “Solitary confinement produces moral and psychological suffering in the detainee, placing him in a particularly vulnerable position.”<sup>220</sup>

Similarly, the Commission has found that “isolation can in itself constitute inhumane treatment.”<sup>221</sup> In *Victor Rosario Congo v. Ecuador*, for example, it held that solitary confinement, during which the complainant was held in isolation and was “unable to satisfy his

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<sup>219</sup> *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, paras. 156, 187 (July 29, 1988).

<sup>220</sup> *Urrutia v. Guatemala*, *supra* note 132, para. 87.

<sup>221</sup> *Victor Rosario Congo v. Ecuador*, *supra* note 203, paras. 58-59.

basic needs,” constituted inhuman and degrading treatment.<sup>222</sup> Whereas the petitioner in that case was held in solitary confinement for approximately 40 days, Mr. Padilla was held in almost complete isolation for nearly two years.

The suffering caused by solitary confinement can also be exacerbated by restrictions on the ability to move and by concealment of the detention facility’s location. In the *Loayza-Tamayo Case*, the Court held that solitary confinement in a tiny cell with no light constitutes CIDT.<sup>223</sup> Likewise, in *El Megreisi v. Libya*, the U.N. Human Rights Committee (HRC) found that “prolonged incommunicado detention in an unknown location” constitutes “torture and cruel, inhuman treatment in violation of Articles 7 and 10(1)” or the ICCPR.<sup>224</sup> In that case, the individual had been detained, apparently by Libyan security police, for three years in undisclosed detention until his wife was allowed to visit him, after which he continued to be held in an unknown location. Like the captors in the above case, Mr. Padilla’s captors kept the location of the detention facility from him, and in doing so exacerbated the intensity of the effect of sensory deprivation.

In sum, when the United States subjected Mr. Padilla to sensory and sleep deprivation, interrogated him for long periods in painful stress positions and under threat of death and physical abuse, denied him all contact with the outside world—all for the purpose of “engag[ing] in a robust program of interrogating individuals who have been identified as enemy combatants”<sup>225</sup>—it engaged in torture, and at the very least cruel, inhuman or degrading treatment, all in violation of Articles I, XXV and XXVI of the American Declaration.

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<sup>222</sup> *Id.*

<sup>223</sup> *Loayza-Tamayo vs. Peru*, *supra* note 210, para. 58.

<sup>224</sup> *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990, para. 5.4 (1994).

<sup>225</sup> Jacoby Declaration *supra* note 47, at 6.

#### **IV. The United States Violated Ms. Lebron’s Right to Humane Treatment under Article I of the American Declaration**

The United States’ arbitrary detention, torture and inhumane treatment of her son also violated Ms. Lebron’s right to humane treatment, protected under Article I of the Declaration. As noted, Article I, encompasses broadly similar protections as those provided under Article 5 of the American Convention.<sup>226</sup>

Significantly, Article 5—and hence those guaranteed by Article I—are much broader in scope than mere protection from physical mistreatment; rather they extend to any act that is “clearly contrary to respect for the inherent dignity of the human person” and specifically include acts that cause psychological and emotional damage.<sup>227</sup>

##### **A. Article I of the American Declaration Recognizes the Right to be Free from Psychological and Emotional Damage**

Both the Commission and the Court have found that proscribed conduct need not necessarily be physical in nature but rather may include conduct that causes psychological and moral suffering.<sup>228</sup> Accordingly, the Commission and the Court have found that acts resulting in “emotional trauma,”<sup>229</sup> “trauma and anxiety,”<sup>230</sup> and “intimidation” or “panic”<sup>231</sup> violate Article 5. The Commission has also found that acts affecting an individual’s “personal self-esteem . . . translate[] into important damage to moral integrity.” Further, any act that “affects the normal

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<sup>226</sup> Report on Terrorism and Human Rights, *supra* note 128, para. 155 (noting that while the American Declaration lacks a general provision on the right to humane treatment, the Commission has interpreted Article I as containing a prohibition similar to that of Article 5 of the American Convention) (citing *Juan Antonio Aguirre Ballesteros v. Chile*, Case 9437, Inter-Am. Comm’n H.R., Report No. 5/85 (1985), OEA/Ser. L/V/II.66, doc. 10 rev. 1 (1985)).

<sup>227</sup> *Castillo-Páez v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 35, paras. 63, 66 (Nov. 3, 1997).

<sup>228</sup> *The Greek Case*, *supra* note 199, para. 186; *Loayza-Tamayo vs. Peru*, *supra*, note 210, para. 57.

<sup>229</sup> , Case 11.436, Inter-Am. Comm’n H.R., Report No. 47/96, OEA/Ser.L/V/II.95, doc. 7 rev., paras. 106, 132 (1996) (finding Cuba responsible for violating the personal integrity of 31 survivors of a refugee boat fleeing to U.S. as a consequence of the emotional trauma resulting from the shipwreck caused by Cuba).

<sup>230</sup> See *Maria Mejía v. Guatemala*, Case 10.553, Inter-Am. Comm’n H.R., Report No. 32/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 370, para. 60 (1996) (Guatemalan military officials found liable for causing “trauma and anxiety to the victims [constraining] their ability to lead their lives as they desire”).

<sup>231</sup> See *id.* para. 61 (finding Guatemalan military responsible for actions designed for “intimidating” and to cause “panic” among community members).

development of daily life and causes great tumult and perturbation to him and his family,” “seriously damages his mental and moral integrity” in violation of Article 5(1).<sup>232</sup>

### **B. The United States Violated Ms. Lebron’s Right to be Free from CIDT by Causing Her Psychological and Emotional Damage**

On numerous occasions, the Inter-American Court has determined that family members of victims and survivors of torture, CIDT, and/or arbitrary detention can suffer violations of their right to human treatment due to injury to their “mental and moral integrity.”<sup>233</sup> The HRC and the European Court have also found that close relatives of human rights victims, including mothers, could themselves be victims of human rights violations by virtue of the mental suffering they experience. In *Quinteros v. Uruguay*,<sup>234</sup> for example, the HRC found that:

it underst[ood] the deep sadness and anxiety that the author of the communication suffer[ed] owing to the disappearance of her daughter and the continuing uncertainty about her fate and her whereabouts. The mother had the right to know what had happened to her daughter. In this respect, she is also a victim of the violations of the [International] Covenant [on Civil and Political Rights], in particular of Article 7 [cf. Article 5 of the American Convention], suffered by her daughter.<sup>235</sup>

Here, Ms. Lebron experienced severe mental anguish when the United States failed to notify her of the detention of her son and the conditions under which he was being held in military custody. Her mental anguish was exacerbated when the United States refused her access or even communication with her son for a 21-month period and when she eventually learned of

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<sup>232</sup> See also U.N. Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 151, para. 2 (2003) (noting that the purpose of the ICCPR’s prohibition of torture and other cruel, inhuman or degrading treatment is to protect both the dignity and the physical and mental integrity of the individual).

<sup>233</sup> *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No 160, para. 335 (Nov. 25, 2006); *Goiburú et al. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No 153, para. 96 (Sept. 22, 2006); *Vargas-Areco v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 155, para. 96 (Sept. 26, 2006); *Servellón-García et al. v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 152, para. 128 (Sept. 21, 2006).

<sup>234</sup> Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990).

<sup>235</sup> *Id.* para. 14.

his conditions of confinement and the techniques employed on him during his interrogation.<sup>236</sup> Inter-American jurisprudence recognizes that both unjustified prevention of familial interaction, and knowledge of mistreatment of loved ones can injure the “psychic integrity” of family members of human rights abuse victims, and constituted breach of the right to humane treatment.<sup>237</sup> In this case, Ms. Lebron suffered psychological pain as a result of the government’s refusal to provide information about her son’s whereabouts and condition, and as a result of learning about the United States’ mistreatment of her son.<sup>238</sup> As the Inter-American Court has found similar suffering to constitute a violation of Article 5 of the American Convention’s guarantee of humane treatment,<sup>239</sup> Ms. Lebron’s suffered a violation of her right to humane treatment under Article I of the American Declaration.

#### **V. The United States Violated Ms. Lebron’s and Mr. Padilla’s Right to Family Life Under Articles V and VI**

By preventing Ms. Lebron from visiting her son, Mr. Padilla, while he was arbitrarily detained, the United States violated their rights to family life protected by Article VI of the American Declaration.<sup>240</sup> Further, by branding Mr. Padilla publicly as a terrorist while holding him for a lengthy period without trial, the United States violated Ms. Lebron’s right under Article V of the Declaration to be free from attacks against her family’s reputation.<sup>241</sup> Articles V and VI encompass broadly similar rights to those guaranteed by Article 11(2) of the American Convention, which the Commission may reference to give content to the more general but analogous rights under the Declaration. Article 11(2) provides that “[n]o one may be the object

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<sup>236</sup> Estela Lebron Affidavit.

<sup>237</sup> *Miguel Castro-Castro Prison v. Peru*, *supra* note 233, paras. 339-340.

<sup>238</sup> Estela Lebron Affidavit

<sup>239</sup> *See Miguel Castro-Castro Prison v. Peru*, *supra* note 233, paras. 338-42.

<sup>240</sup> American Declaration, art. VI.

<sup>241</sup> American Declaration, art. V.

of arbitrary or abusive interference with ... his family... or of unlawful on his honor or reputation.”<sup>242</sup>

Incommunicado detention to which Mr. Padilla was subjected can violate the right of family relations. In the *Castro Castro massacre case*, the Court recognized that prolonged incommunicado detention can violate the rights of the prisoners themselves, as well as the rights of their relatives to be free from inhumane treatment under Article 5 of the Convention.<sup>243</sup> In reaching this conclusion, the Court recognized that the right to family relations, in particular the right of visitation between a mother and child, is encompassed by the right to humane life.<sup>244</sup>

Here, the United States failed to fulfill its obligation to provide adequate visitation opportunities between Mr. Padilla and his mother, Ms. Lebron. Though Mr. Padilla was initially detained in May 2002, despite many attempts, his mother was not permitted to speak to him until March 2004, and was not permitted to visit him until later that year.<sup>245</sup> She was not even notified as to his status and location until 10 months after his detention in a military brig.<sup>246</sup> The rationale given by the United States government for isolating Mr. Padilla from his family was to break his will for interrogation purposes.<sup>247</sup> As the right of family visitation applies to both mother and child, in addition to arbitrarily and abusively interfering with Ms. Lebron’s right to family relations, the United States also violated Mr. Padilla’s rights when it violated Ms. Lebron’s.

Inter-American jurisprudence also recognizes that publicly branding someone as a terrorist can violate the right of that person’s family to be free from reputational attacks. In the *Gomez Paquiyauri Brother Case*, the Court held that where the state treats a person a “terrorists”

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<sup>242</sup> American Convention, art. 11(2).

<sup>243</sup> *Miguel Castro-Castro Prison v. Peru*, *supra* note 233, paras. 340-42, 434 (finding that Peru violated the rights of inmates’ next of kin through incommunicado confinement, and ordering compensation to adult and children next of kin).

<sup>244</sup> *Id.* para. 330.

<sup>245</sup> Estela Lebron Affidavit.

<sup>246</sup> *Id.*

<sup>247</sup> Jacoby Declaration, *supra* note 47, at 7-9.



and subjects his or her family “to hatred, public contempt, persecution, and discrimination... there has been a violation of Article 11 of the American Convention.”<sup>248</sup> The United States subjected Mr. Padilla’s family “to hatred, public contempt, persecution, and discrimination” when it held him for forty three months under highly publicized—and shifting—accusations of domestic terrorism, accusations for which he was never charged, let alone convicted.<sup>249</sup> Ms. Lebron and her children and grandchildren suddenly found themselves branded as the family members of an “enemy combatant,” and, as a result, they faced public persecution and discrimination.<sup>250</sup>

## **VI. The United States Violated Mr. Padilla’s Right to Religion under Article III of the American Declaration**

The United States violated Mr. Padilla’s right to religion when it removed religious items from Mr. Padilla during his incommunicado detention and forbade him from practicing his religion. The Inter-American Court has indicated the right to religion is a foundation of democracy and “constitutes a far-reaching element in the protection of the convictions of those who profess a religion and in their way of life.”<sup>251</sup> Interference with the practice of religion can constitute a violation of Article 12 of the Convention.<sup>252</sup> The right to religion is so fundamental

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<sup>248</sup> *Gómez Paquiyauri Brothers v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, para. 182 (July 8, 2004) (the victims in this case were extrajudicially killed by government forces and labeled terrorists).

<sup>249</sup> Mr. Padilla was ultimately charged and convicted of charges dating from pre-2001 and relating to actions overseas. Superseding Indictment, *supra* note 87, at 1-18.

<sup>250</sup> Estela Lebron Affidavit.

<sup>251</sup> “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) v. *Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, para. 79 (Feb. 5, 2001).

<sup>252</sup> Article 12 reads, “(1) Everyone has the right to freedom of conscience and religion. This right includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or in private, 2) No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs, 3) Freedom to manifest one’s religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others, 4) Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions. *See also Plan de Sánchez Massacre v. Guatemala*, Reparations, Merits, Inter-Am. Ct. H.R. (ser. C) No. 105, paras. 42(7), 42(30), 47 (Apr. 29, 2004) (holding that massacres and “scorched-earth” policies against indigenous groups destroyed their religious values, and that the right to religion was violated when family members could not exercise

that it is listed among the non-derogable rights in the Convention, and it can only be circumvented if “necessary” for public safety or the freedoms of others.<sup>253</sup> The Inter-American system also recognizes that the right to religion is connected to the right to be free from discrimination.<sup>254</sup>

While he was detained without charge, Mr. Padilla’s religious items were taken from him, and he was periodically forbidden from practicing his religion, Islam.<sup>255</sup> This directly implicated his freedom to practice his religion in violation of Article III of the American Declaration.

## **VII. The United States Violated Mr. Padilla’s Rights to Equality Before the Law Under Article II**

The United States violated the American Declaration by discriminating against Mr. Padilla because its mistreatment of him was based, at least implicitly, on his race and/or religion. If Mr. Padilla were white and/or non-Muslim, he would neither have been detained without charge for almost four years nor subjected to detention and interrogation methods that constitute torture and CIDT.

### **A. The American Declaration Provides for Equality Before the Law.**

Article II of the American Declaration provides that, “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”<sup>256</sup> Consistent with the Commission’s interpretative

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their religious beliefs in burying their loved ones); *Jehovah’s Witnesses v. Argentina*, Case 2137, Inter-Am. Comm’n H.R. Report No. 45-78, OEA/Ser.L/V/II.47, doc. 13 rev. 1, “Resolves” para. 1 (1979) (holding that an official decree signed by the President of Argentina limiting the ability of Jehovah’s Witnesses to exercise their religion was a violation of their right to religion).

<sup>253</sup> Report on Terrorism and Human Rights, *supra* note 128, at para. 361.

<sup>254</sup> American Declaration art. II; American Convention art. 1(1), 24, 27(1).

<sup>255</sup> Third Amended Complaint, *supra* note 6, para. 81.

<sup>256</sup> American Declaration art. II. *See also* Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4 para. 55 (Jan. 19, 1984) (holding that

mandate, Article II of the Declaration should be read in light of the analogous provisions of Articles 1<sup>257</sup> and 24<sup>258</sup> of the American Convention.<sup>259</sup> Though neither the Declaration nor the Convention defines discrimination, in *Atala Riffo and Daughters v. Chile* the Inter-American Court applied the definition established by the HRC:

...any distinction, exclusion, restriction, or preference based on certain motives, such as race, color, gender, language, religion, a political or any other opinion, the national or social origin, property, birth or any other social condition, that seeks to annul or diminish the acknowledgment, enjoyment, or exercise, in conditions of equality, of the human rights and fundamental freedoms to which every person is entitled.<sup>260</sup>

Article II protects against intentionally discriminatory laws, policies, and practices as well as those that while facially neutral have a discriminatory effect.<sup>261</sup> Under this standard, differential treatment is discriminatory if it does not rest on “objective and reasonable” grounds;<sup>262</sup> that is, when it does not pursue a legitimate objective or use means proportionate to

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under the Declaration, it is “impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.”)

<sup>257</sup> Article I (1) reads: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

<sup>258</sup> Article 24 reads, “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

<sup>259</sup> See *Undocumented Migrants*, *supra* note 125, paras. 58-60.

<sup>260</sup> United Nations, Human Rights Committee, General Comment No. 18, Non-Discrimination, November 10, 1989, CCPR/C/37, para. 6; *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, para. 81 (Feb. 24, 2012).

<sup>261</sup> *Mossville Environmental Action Now v. United States*, Petition 242-05, Inter-Am. Comm’n H.R., Report No. 43/10, para. 42 (2010); *Andrews v. United States*, Case 11.139, Inter-Am. Comm’n H.R., Report No. 57/96, OEA/Ser.L/V/II.95, doc. 7 rev., para. 173 (1997). See also Comm. on the Elimination of Racial Discrimination, General Recommendation XIV: Definition of Discrimination (art. 1, par.1), U.N. Doc. A/48/18, para. 2 (Mar. 22, 1993).

<sup>262</sup> Thus, the Court has held that a proposed amendment to Costa Rica’s Constitution that would have provided different avenues of naturalization for husbands and wives would violate the nondiscrimination clause of the Convention because it did not rest on objective and reasonable grounds. *Provisions of the Constitution of Costa Rica*, *supra* note 253, para. 57, “Conclusion.” In the *Morales* case, the Commission found that Guatemalan law outlining the differentiated marital roles of husbands and wives to have constituted gender discrimination because it reinforced “systemic disadvantages”—not objective and reasonable grounds. *Maria Eugenia Morales De Sierra v. Guatemala*, Case 11.625, Inter-Am. Comm’n H.R., Report No. 4/00, OEA/Ser.L/V/II.111, doc. 20 rev. at 929, para. 39 (2000). Likewise, in *Atala v. Chile*, the Court declared that Chile had discriminated against the petitioner on the basis of her sexual orientation when it took away her children because living with a lesbian was not in their “best interest.” *Atala v. Chile*, *supra* note 260, “Conclusion.” Such behavior was not objective or reasonable. *Id.* paras. 100-04.

the ends sought.<sup>263</sup> Because the non-discrimination provision of Article II protects against the application of laws in unequal ways, “any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is per se incompatible with that instrument.”<sup>264</sup> Significantly, for this petition, the Commission has noted its special concern regarding the potential for discrimination on the basis of race and/or religion in the application of counter-terrorism laws.<sup>265</sup>

Thus, for a finding of discriminatory conduct, a petitioner need prove only that she was a member in a protected group and that her membership was an implicit factor in the challenged state action.<sup>266</sup> In European case law, often referenced by the Commission in discrimination cases,<sup>267</sup> a nexus is required between unfavorable treatment and the protected ground to prove this implicit factor.<sup>268</sup> The Council of Europe’s handbook on non-discrimination suggests asking the question, “Would the person have been treated less favorably had he/she been part of a protected group?”<sup>269</sup> If so, there exists sufficient nexus for a colorable discrimination claim.

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<sup>263</sup> *Undocumented Migrants*, *supra* note 125, para. 91 (Sept. 17, 2003); *Morales De Sierra v. Guatemala*, *supra* note 262, para. 31 (citing U.N.H.R. Committee, *Broeks v. The Netherlands*, Comm. No. 172/1984, para. 13; *Zwaan de Vries v. The Netherlands*, Comm. No. 182/1984, para. 13; Eur. Ct. H.R., *Belgian Linguistics Case*, Ser. A No. 6, p. 34, para. 10).

<sup>264</sup> *Provisions of the Constitution of Costa Rica*, *supra* note 256, para. 53; *Atala v. Chile*, *supra* note 260, para. 78.

<sup>265</sup> Report on Terrorism and Human Rights, *supra* note 128, para. 351. Importantly, “In circumstances where states detain individuals for reasons relating to a terrorist threat, whether for administrative or preventative reasons, the laws authorizing the detention cannot be applied so as to target individuals based upon a prohibited ground of discrimination.” Any measures that do take membership in a protected group into account must be “based upon objective and reasonable justification,” and are subject to enhanced scrutiny. *Id.* paras. 353-55.

<sup>266</sup> *See Atala v. Chile*, *supra* note 260, para. 94 (citing Case 43546/02, *E.B. v. France*, 2008 E.C.H.R., paras. 88 and 89) (holding that sex orientation was at least an implicit factor in rejecting a child adoption application).

<sup>267</sup> *See, e.g., Atala v. Chile*, *supra* note 260, para. 94; *Morales De Sierra v. Guatemala*, *supra* note 262, para. 31 (citing *Broeks v. The Netherlands*, Comm. No. 172/1984, U.N.H.R. Committee, para. 13; *Zwaan de Vries v. The Netherlands*, Comm. No. 182/1984, para. 13; Eur. Ct. H.R., *Belgian Linguistics Case*, Ser. A No. 6, p. 34, para. 10).

<sup>268</sup> Council of Europe European Union Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law*, at 25, 27 (2010) [hereinafter *European Discrimination*].

<sup>269</sup> *See id.*, at 26.

**B. The United States Discriminated Against Mr. Padilla at Least Implicitly Based on his Race and/or Religion.**

Mr. Padilla is of Hispanic descent and is Muslim by religion, and thus falls into a category of “non-white Muslim” men. As discussed above, of the hundreds of people who have been detained at Guantánamo Bay, Abu Ghraib, or unlawfully rendered to CIA “black sites” or foreign governments around the world by the United States, almost none of them have been white and every single one has been Muslim.

Only a handful of U.S. citizens or legal residents have ever been detained and interrogated as “enemy combatants”: Yaser Hamdi, a U.S. citizen arrested in Afghanistan, Ali Saleh Kahlah al-Marri, a U.S. resident arrested on U.S. soil, and Mr. Padilla, a U.S. citizen arrested on U.S. soil. A fourth, John Walker Lindh—a white man—experienced a far shorter period of incommunicado detention and interrogation. Mr. Lindh was captured in December 2001 in Afghanistan while embedded with a Taliban fighting force. By early February 2002 he had been indicted by a civilian grand jury, and by July 2002 he had pled guilty to aiding the Taliban and to carrying an explosive during the commission of a felony.<sup>270</sup>

In contrast, Mr. Padilla was detained on U.S. soil and held for 43 months on suspicion of a crime that was never committed. The government only transferred him to the civilian system as a way of avoiding Supreme Court review of his *habeas* claim. And Mr. Padilla was then tried and convicted for a vague conspiracy predating and unrelated to the original justifications for his military detention and torture. Race is the only significant difference between Mr. Lindh and Mr. Padilla.

Mr. Padilla’s mistreatment is put in even starker relief when compared to the treatment of white, Christian suspected terrorists. Terrorism within the U.S. is by no means limited to Islamic

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<sup>270</sup> Plea Agreement, *United States v. Lindh*, No. 02-37A, (E.D. Vir. 2002), para. 1, available at <http://www.justice.gov/ag/pleaagreement.htm>.

fundamentalism; 15 terrorism-related deaths are attributable to far-right Christian violence since 9/11, as compared to 17 deaths attributable to Islamic fundamentalism.<sup>271</sup> Other reports indicate that far-right groups have been responsible for 145 religiously motivated homicidal incidents, killing 180 people (excluding the Oklahoma City bombing), from 1990-2010.<sup>272</sup> The most deadly act of terrorism to occur on U.S. soil before 9/11 was the Oklahoma City bombing, which killed 168 people and was planned by a white Christian.<sup>273</sup> In 2009, a Department of Homeland Security (DHS) Report warned of an increasing threat in far-right terrorism due to the economic downturn, the election of a black president, a tide of illegal immigration, and a perceived threat to U.S. sovereignty.<sup>274</sup> The study found that the majority of 86 major foiled and executed plots from 1999-2009 were *unrelated* to Al Qaeda or other Islamist movements.<sup>275</sup>

But no white U.S. citizen, and no Christian U.S. citizen, has ever been subjected to the kind of torture and prolonged incommunicado detention inflicted on Mr. Padilla, even when arrested for acquiring materials for chemical, biological, radiological or nuclear (CBRN) weapons, or dirty bomb material.<sup>276</sup>—the same accusation used to excuse the U.S. government’s treatment of Mr. Padilla. Moreover, following conservative political backlash from its 2009 report, DHS “eviscerated” its department on domestic terrorism related to non-Islamic threats and publicly repudiated the author of the report.<sup>277</sup>

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<sup>271</sup> Peter Bergen, *Right-Wing Extremist Terrorism As Deadly a Threat as Al-Qaeda?*, CNN, Aug. 7, 2012, available at <http://www.cnn.com/2012/08/07/opinion/bergen-terrorism-wisconsin/index.html>.

<sup>272</sup> Matthew Goodwin, *Wade Michael Page and the Rise of Violent Far-Right Extremism*, GUARDIAN, Aug. 8, 2012, available at: <http://www.guardian.co.uk/world/2012/aug/08/wade-michael-page-violent-far-right>.

<sup>273</sup> Gore Vidal, *The Meaning of Timothy McVeigh*, VANITY FAIR, Sep. 2001, available at: <http://www.vanityfair.com/politics/features/2001/09/mcveigh200109>.

<sup>274</sup> See generally U.S. DEPARTMENT OF HOMELAND SECURITY, *RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT 2-3* (2009), available as <http://www.fas.org/irp/eprint/rightwing.pdf>.

<sup>275</sup> R. Jeffrey Smith, *Homeland Security Department Curtails Home-Grown Terror Analysis*, WASHINGTON POST, June 7, 2011, available as [http://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH\\_story.html](http://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH_story.html).

<sup>276</sup> See *Right-Wing Extremist Terrorism As Deadly a Threat as Al-Qaeda?*, *supra* note 114.

<sup>277</sup> *Homeland Security Department Curtails Home-Grown Terror Analysis*, *supra* note 275.

Thus Mr. Padilla's right to equality before the law has been violated, as the United States has only arbitrarily detained and tortured people who are non-white and/or Muslim. The United States does not have to be explicit about its discriminatory actions or motivated exclusively by discriminatory intent; disparate impact is enough. Implicit in the decision to incarcerate Mr. Padilla without charge and subject him to torture was his identity as a non-white Muslim man. Moreover, Mr. Padilla's treatment cannot be justified by any "objective and reasonable" ground, nor did his treatment serve any legitimate purpose or comply with the Declaration's proportionality requirements. Asking the counterfactual suggested by the Council of Europe handbook is telling: "Would people like Lindh, the Oklahoma City bomber, and far-right Christian militants—people in "materially similar" circumstances, but of different races and/or religions—have been worse off if they were non-white and/or Muslim?" The answer is an instinctive "yes." Accordingly, because Mr. Padilla's mistreatment by the United States was on account of his race and/or his religion it constitutes discriminatory treatment in violation of Article II of the American Declaration.

#### **VIII. The Failure of U.S. Courts to Consider the Merits of Mr. Padilla's and Ms. Lebron's Claims Violated Their Rights to a Remedy Guaranteed under Article XVIII of the American Declaration**

The United States has systematically barred Mr. Padilla and Ms. Lebron from obtaining a remedy for the torture and other abuses perpetrated against them through interference with Mr. Padilla's access to counsel, avoidance of review on the merits, and the unwarranted dismissals of their civil claims. Under Article XVIII of the American Declaration, every person has a right to turn to the courts to remedy abuses perpetrated against them, and States have an obligation to provide remedies for those abuses. The Commission has interpreted Article XVIII of the American Declaration in the light of the more specific protections of Articles 8 and 25 of the

American Convention.<sup>278</sup> Article 8 provides for “the right to a hearing with due guarantees . . . for the determination of . . . rights . . .” and Article 25 provides for the “protection against acts that violate . . . fundamental rights recognized by the constitution or laws of the state or by the Convention.”<sup>279</sup>

The Commission has also determined that together with Articles 1(1) and 2 of the Convention, Article 25<sup>280</sup> comprises three elements: first, “the right of every individual to go to a tribunal when any of his rights have been violated”; second, the right “to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not the violation has taken place”; and third, the right to have remedies enforced when granted.<sup>281</sup>

The legal and practical ability to turn to a court, satisfying the first element of Article 25, is not enough. To satisfy the second element, courts must actually decide on the merits of a case. For instance, when an Argentine court refused to adjudicate a lower court judge’s claim of wrongful termination because it deemed the claims “non-justiciable” and a “political question,” the Commission held that refusing to hear the case on the merits violated the Articles 8 and 25 of the Convention because “the logic of

every judicial remedy indicates that the deciding body must specifically establish the truth or error of the claimant’s allegation.”<sup>282</sup>

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<sup>278</sup> *Maria da Penha v. Brazil*, *supra* note 127, para. 37.

<sup>279</sup> American Convention, art. 25.

<sup>280</sup> Article 1(1) of the American Convention requires States to “to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.” Article 2 requires States to “adopt . . . such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

<sup>281</sup> *Raquel Martí de Mejía v. Perú*, *supra* note 198.

<sup>282</sup> *Gustavo Carranza v. Argentina*, Case 10.087, Inter-Am. Comm’n H.R., Report No. 30/97, OEA/Ser.L/V/II.9, doc. 7 rev., para. 73, 83 (1997).



Finally, to satisfy element three, both the Commission and the Court have found that the tribunal must be able to grant a remedy that adequately addresses the violation.<sup>283</sup> The Court held in the *Five Pensioners* that:

The inexistence of an effective recourse against the violation . . . constitutes a transgression of the Convention . . . . [F]or such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it. Those recourses that are illusory, owing to the general conditions in the country or to the particular circumstances of a specific case, shall not be considered effective.<sup>284</sup>

Mr. Padilla and Ms. Lebron attempted to turn to U.S. courts multiple times. During Mr. Padilla's ongoing detention from 2002-2005, his lawyers filed two *habeas* petitions challenging his designation as an "enemy combatant," his denial of due process and his continued detention. Two days before the Supreme Court was to decide on his second *habeas* challenge, the government filed charges in the civilian system, thereby avoiding Supreme Court review. In the subsequent criminal case against Mr. Padilla, the presiding judge ruled that any mention of his treatment in detention be excluded from his trial, since the civilian charges filed were unrelated to the legal basis for his detention.

Because no criminal investigation was conducted into Mr. Padilla's years of incommunicado detention and torture and abuse in military custody, Mr. Padilla and Ms. Lebron sought relief in the U.S. civil system in two separate federal legal proceedings, naming a number of U.S. officials as defendants. Both lawsuits were dismissed without consideration on the merits. The Fourth Circuit Court of Appeals dismissed the first suit, filed in February 2007,

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<sup>283</sup> See *Velásquez-Rodríguez v. Honduras*, *supra* note 219, para. 64. See also Report on Terrorism and Human Rights, *supra* note 128, para. 334.

<sup>284</sup> "*Five Pensioners*" v. *Perú*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 98, para. 136 (Feb. 28, 2003). See also *Durand and Ugarte v. Perú*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 68, para. 62 (Aug. 16, 2000); *Cantoral-Benavides v. Perú*, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 88, para. 164 (Dec. 3, 2001).

because it found national security concerns are “special factors” that preclude claims like Mr. Padilla’s.<sup>285</sup> The Ninth Circuit Court of Appeals dismissed the second suit, filed in January 2008, finding that Mr. Yoo “is entitled to qualified immunity...because it was not clearly established that in 2001-2003 that the treatment to which Padilla says he was subjected amounted to torture.”<sup>286</sup>

In sum, no U.S. court has ever heard the merits of Mr. Padilla’s claims that he was tortured. A court has never determined the “truth or error” of his allegations, much less provided him with a remedy. All three of the elements required by the Commission to satisfy an Article XVIII right to a remedy have been denied to Mr. Padilla: 1) he was denied access to a court or tribunal for years, 2) no court or tribunal has heard his case on the merits, and 3) no adequate remedy has been given.<sup>287</sup> In sum, though Mr. Padilla had the right to file a civil suit in the United States, his right to a remedy proved to be “illusory” because, like other claimants before him, his cases were erroneously dismissed on national security grounds.

## **ADMISSIBILITY**

### **I. This Petition is Admissible under the Rules of Procedure of the Inter-American Commission on Human Rights**

#### **A. The Commission Has the Jurisdiction and Competence to Consider this Case**

As a member of the Organization of American States (OAS), the United States is bound by the American Declaration and is subject to the jurisdiction of the Commission.<sup>288</sup> The OAS General Assembly and the Commission considers that the American Declaration encompasses human rights referenced in the Charter of the OAS. The Inter-American Commission has

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<sup>285</sup> *Lebron v. Rumsfeld*, 764 F.Supp.2d at 800.

<sup>286</sup> *Padilla v. Yoo*, 678 F.3d at 764.

<sup>287</sup> See *Raquel Martí de Mejía v. Perú*, *supra* note 198.

<sup>288</sup> Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 48, entered into force Dec. 13, 1951. See also *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Inter-Am. Comm’n H. R., Report No. 147, OEA/Ser.L/V/II.71, doc. 9, para. 46 (1987).

repeatedly asserted its competence to receive petitions alleging violation of rights under the American Declaration by OAS member states, including the United States.<sup>289</sup>

Further, Article 20 of the Commission's Statute expressly empowers the Commission to consider allegations of human rights violations by non-parties to the American Convention and to make recommendations to bring about more effective human rights observance.<sup>290</sup> Article 23 of the Rules of Procedure for the Inter-American Commission on Human Rights (Rules of Procedure) permits persons or groups from OAS states to submit petitions to this Commission alleging violations of human rights enshrined in the American Declaration.<sup>291</sup> Therefore, the Commission possesses competence *ratione personae* to receive this petition by virtue of the United States' membership in OAS.

The Commission also has competence *ratione loci* and *ratione temporis* to consider this petition. This petition alleges that violations of human rights occurred within the territory of the United States and the alleged violations occurred between 2002 and 2006 – well after the United States' ratification of the OAS Charter in 1951. Finally, the Commission has competence *ratione materiae* since the petition alleged violations of human rights that are protected by the American Declaration.

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<sup>289</sup> See, e.g., *Virgilio Maldonado Rodriguez v. United States*, Petition 1762-11, Inter-Am. Comm'n H.R., Report No. 63/12, para. 45 (2012); *Djamel Americana v. United States*, Petition P-900-08, Inter-Am. Comm'n H.R., Report No. 17/12, para. 27 (2012); *Coard et al. v. United States*, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, para. 7 (1999); *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Inter-Am. Comm'n H. R., Report No. 147, OEA/Ser.L/V/II.71, doc. 9, para. 29 (1987).

<sup>290</sup> Statute of the Inter-American Commission on Human Rights art. 20 (providing that, in respect to those OAS members states that are not parties to the American Convention on Human Rights, the Commission may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent, and to make recommendations to such states in order to bring about more effective observances of fundamental human rights). See also Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, para. 34-45 (July 14, 1989).

<sup>291</sup> Inter-American Commission on Human Rights, Rules of Procedure, approved by the Commission at the 137th session held from Oct. 28 to Nov. 13, 2009, and amended on September 2nd, 2011, art. 23.

## **B. Petitioner Has Exhausted All Available, Appropriate, and Effective Domestic Remedies**

Article 31(a) of the Rules of Procedure provides that petitions are admissible only if the petitioner has first pursued and exhausted remedies available for the alleged violations of their rights at the domestic level.<sup>292</sup> Article 31(b), however, provides an explicit exception to this exhaustion requirement where domestic law lacks due process, petitioner's access to remedies has been denied, or unwarranted delays prevent the timely provision of remedies.<sup>293</sup> The Commission has long recognized that to satisfy these requirements a petitioner need not pursue every theoretical possibility for relief at the domestic level but only those "that are available, appropriate and effective for solving the presumed violations of [their] rights."<sup>294</sup> Thus domestic remedies that do not have a reasonable prospect of success or are incapable of providing redress for the violations alleged need not be exhausted for claims to be admissible.<sup>295</sup> In particular, "extraordinary remedies" such as a writ of certiorari before the U.S. Supreme Court, need not be pursued to satisfy the exhaustion rule.<sup>296</sup> In short, the rationale of the exhaustion rule is to give the state adequate notice of the violations and an opportunity to provide redress to the victims and survivors in appropriate cases. Thus, "if the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the

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<sup>292</sup> Inter-American Commission on Human Rights, Rules of Procedure, art. 31(1).

<sup>293</sup> *Id.* art. 31(b).

<sup>294</sup> *Elias Gattass Sahih v. Ecuador*, Case No. 1/03, Inter-Am. Comm'n H.R., Report No. 9/05, OEA/Ser.L/V/II.124, doc. 5, para. 30 (2005). *See also Cayara v. Perú*, Preliminary Objections, Judgment, Inter-Am. Ct.H.R. (ser. C) No.14, para. 42 (Feb. 3, 1993) (insisting that "[i]t is generally accepted that the procedural system is a means of attaining justice and that the latter cannot be sacrificed for the sake of mere formalities"); *Fairén Garbí and Solís-Corrales v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 6, para. 93 (Mar. 15, 1989).

<sup>295</sup> *Arley José Escher et al. v. Brazil*, Case 12.353, Inter-Am. Comm'n H.R., Report No. 18/06, OEA/Ser.L/V/II.124, doc. 5, para. 28 (2006), (citing *Valdés Díaz v. Chile*, Case 12.337, Inter-Am. Comm'n H.R., Report No. 57/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2, para. 40 (2003); *Naranjo et al. v. Venezuela*, Case 667/01, Inter-Am. Comm'n H.R., Report No. 70/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 569, para. 52 (2004).

<sup>296</sup> *Christian Domenichetti v. Argentina*, Case 11.819, Inter-Am. Comm'n H.R., Report No. 51/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 at 117, para. 45 (2003) ("[A]s a general rule the only remedies that need be exhausted are those whose function within the domestic legal system is appropriate for providing protection to remedy an infringement of a given legal right. In principle, these are ordinary rather than extraordinary remedies.").

State had an opportunity to remedy the issue within its jurisdiction, the purpose of the [exhaustion of domestic remedies rule] is fulfilled.”<sup>297</sup>

All claims advanced in this petition meet these requirements. Mr. Padilla and Ms. Lebron provided the United States with a reasonable opportunity to provide redress for the injuries resulting from Mr. Padilla’s unlawful detention and torture by filing two lawsuits in U.S. federal courts, the first against Defense Secretary Donald Rumsfeld and other Defense Department officials and the second against Mr. John Yoo,<sup>298</sup> alleging violations of their constitutional rights, including denial of access to counsel, denial of access to courts, unconstitutional conditions of confinement, unconstitutional interrogation, denial of freedom of religion, denial of the right to information, unconstitutional military detention, denial of the right to be free from unreasonable seizures, and denial of due process.<sup>299</sup> Ms. Lebron also brought a claim for denial of her right to association with her son.

These suits were dismissed, respectively, by the Fourth and Ninth Circuit Courts of Appeals on the basis of qualified immunity and national security.<sup>300</sup> On June 11, 2012, the Supreme Court, without comment, declined to review the Fourth Circuit Court of Appeals decision.<sup>301</sup> The Ninth Circuit Court of Appeals issued its decision following the Supreme Court’s denial of certiorari of the Fourth Circuit’s decision. Mr. Padilla and Ms. Lebron elected not to seek Supreme Court review of that decision. However, as noted, pursuit and exhaustion of such “extraordinary remedies” are not required to meet the exhaustion rule. Accordingly, all available, appropriate and effective remedies have been pursued and exhausted by Petitioner.

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<sup>297</sup> *Naranjo v. Venezuela*, *supra* note 295, para. 52.

<sup>298</sup> *See Lebron v. Rumsfeld*, 764 F. Supp.2d 787; *Padilla v. Yoo*, 633 F. Supp 2d 1005.

<sup>299</sup> Third Amended Complaint, *supra* note 6, para. 137.

<sup>300</sup> *See Lebron v. Rumsfeld*, 670 F. 3d 540; *Padilla v. Yoo*, 678 F. 3d 748.

<sup>301</sup> *Lebron v. Rumsfeld*, 132 S. Ct. 2751 (2012) (*cert. denied*).

**C. This Petition is Submitted within Six Months from the Exhaustion of Available and Effective Domestic Remedies**

The U.S. Supreme Court declined to review the Fourth Circuit Court of Appeals decision, which affirmed the dismissal of Mr. Padilla's suit by the United States District Court of South Carolina on June 11, 2012. This petition was filed on December 11, 2012, which is within the six-month time limit required by the Commission's rules.<sup>302</sup>

**D. No Duplicate Proceedings Are Pending in Other International Tribunals**

The Petitioner confirms that the subject matter of this petition is not pending before another international tribunal, nor has it been previously examined and settled by the Commission or any other tribunal.

**CONCLUSION AND PETITION**

The facts stated herein establish that the United States of America violated Mr. Padilla's rights under Articles I, II, III, V, VI, XVIII, XXV, and XXVI under the American Declaration. Thus, Petitioner Estella Lebron respectfully requests that the Inter-American Commission on Human Rights:

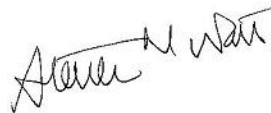
1. Declare this Petition admissible;
2. Investigate, with hearings and witnesses as necessary, the facts alleged in this Petition;
3. Declare that the United States of America is responsible for violating Mr. Padilla rights under the American Declaration of the Rights and Duties of Man, including, *inter alia*, his rights to be free from torture and inhumane treatment under Articles I, XXV, and XXVI, to be free from prolonged and arbitrary detention under Articles I, XXV, and XXVI, to merit-based judicial review of his detention under Articles XVIII, to familial relations under

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<sup>302</sup> Inter-American Commission on Human Rights, Rules of Procedure art. 32(1).

- Articles V and VI, to equality under the law under Article II, to freedom of religion under Articles III, and to judicial remedy of injuries to fundamental rights under Article XVIII;
4. Declare that the United States of America is responsible for violating Ms. Lebron's rights under the American Declaration of the Rights and Duties of Man, including, *inter alia*, her rights to be free from inhumane treatment under Articles I, and to family relations under Articles V and VI;
  5. Request that the United States annul Mr. Padilla's status as an "enemy combatant" who can be subject to indefinite military detention at the discretion of the United States; and
  6. Such other remedies as this Commission considers adequate and effective to redress the violations alleged in this Petition.

Dated: December 11, 2012  
Respectfully Submitted,



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