

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

|                                 |   |                    |
|---------------------------------|---|--------------------|
| JOSE PADILLA,                   | : |                    |
| DONNA R. NEWMAN,                | : |                    |
| as Next Friend of Jose Padilla, | : |                    |
|                                 | : |                    |
| Petitioners,                    | : |                    |
|                                 | : |                    |
| v.                              | : | 02 Civ. 4445 (MBM) |
|                                 | : |                    |
| GEORGE W. BUSH,                 | : |                    |
| DONALD RUMSFELD,                | : |                    |
| JOHN ASHCROFT,                  | : |                    |
| COMMANDER M.A. MARR,            | : |                    |
|                                 | : |                    |
| Respondents.                    | : |                    |

RESPONDENTS' RESPONSE TO THIS COURT'S OCTOBER 21, 2002 ORDER

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**RESPONDENTS' RESPONSE TO THIS COURT'S OCTOBER 21, 2002 ORDER**

Respondents hereby submit their response to this Court's October 21, 2002 Order directing the parties to submit additional briefing "on the issues of petitioner's right to counsel and the propriety of the government's sealed affidavit."

**A. Padilla Has No Right To Counsel**

1. Padilla has no right to counsel because he is being detained solely as an enemy combatant during wartime, not for any criminal or other punitive purposes. His detention, like the detention of all enemy combatants in wartime, serves two critical purposes related to the conduct of the war: It prevents him from continuing to aid the enemy in executing

attacks against the United States, and it assists the military in gathering the intelligence necessary to effectively execute the war. Accordingly, his detention as an enemy combatant is in no sense "criminal," and it has no penal consequences whatsoever. W. Winthrop, Military Law and Precedents 788 (2d ed. 1920) ("'Captivity [in wartime] is neither a punishment nor an act of vengeance,' but merely a temporary detention which is devoid of all penal character.'") (quoting British War Office, Manual of Military Law (1882)); see also In re Territo, 156 F.2d 142, 145 (9th Cir. 1946) ("The object of capture is to prevent the captured individual from serving the enemy.").

There is no general right under the laws and customs of war for those detained as enemy combatants to have counsel to challenge the legality of their detention. Indeed, even under the Third Geneva Convention -- which the President determined does not apply to individuals, such as Padilla, affiliated with al Qaida, see White House Fact Sheet, Status of Detainees at Guantanamo, Office of the Press Secretary, Feb. 7, 2002 ([www.whitehouse.gov/news/releases/2002/02/20020207-13.html](http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html)) -- prisoners of war have no right to counsel to challenge their detention. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75

U.N.T.S. 135 (GPW), Article 105.<sup>1</sup>

Nor does the Constitution confer Padilla a right to counsel. The Sixth Amendment right to counsel applies by its terms only in the case of "criminal prosecutions," U.S. Const. amend. VI, and it therefore is not triggered unless and until the government has commenced a criminal prosecution against the defendant. See Texas v. Cobb, 532 U.S. 162, 167-168 (2001) (The Sixth Amendment right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.") (quoting McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)) (citations and internal quotation marks omitted). Indeed, the Supreme Court reaffirmed earlier this year that the Sixth Amendment is part of the Constitution's "basic 'fair trial' guarantee." United States v. Ruiz, 122 S. Ct. 2450, 2455 (2002). Accordingly, the Sixth Amendment does not apply to the detention of an enemy combatant who -- like the vast majority of such combatants throughout our Nation's history -- has not been

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<sup>1</sup> Article 105 of the GPW provides that a prisoner of war should be afforded counsel to defend against charges brought against him in a trial proceeding at least two weeks before the opening of such trial. But the availability of that right to counsel for trial only underscores that prisoners of war who do not face such charges are not entitled to counsel to challenge their

charged with any crime. Cf. Middendorf v. Henry, 425 U.S. 25, 38 (1976) (“[A] proceeding which may result in deprivation of liberty is nonetheless not a ‘criminal proceeding’ within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial.”).<sup>2</sup>

There also is no right to counsel for enemy combatants, such as Padilla, under the Fifth Amendment’s Due Process Clause. Finding a generalized due process right to counsel in these circumstances could not be squared with settled historical practice, under which no such right has been recognized pursuant to domestic or even international law. For that reason alone, this Court should not create such a right. See Herrera v. Collins, 506 U.S. 390, 407-408 (1993) (looking to “[h]istorical practice” in evaluating scope of “Fourteenth Amendment’s guarantee of due process” in criminal procedure context); Medina v. California, 505 U.S. 437, 445-446 (1992).

Moreover, core separation-of-powers principles mandate, at a minimum, that courts employ a highly deferential standard of

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wartime detention.

<sup>2</sup> Similarly, although there is a limited entitlement to counsel associated with the Self-Incrimination Clause of the Fifth Amendment, see Miranda v. Arizona, 384 U.S. 436 (1966), that right is a “trial right of criminal defendants” and therefore does not extend to this situation.

review to the military's wartime determination that an individual is an enemy combatant. See Hamdi v. Rumsfeld, 296 F.3d 278, 282-283 (4th Cir. 2002). Any appropriate role for the courts in this sensitive military context is limited to reviewing legal challenges to the detention and, at most, to confirming there is some basis in fact for the determination that an individual is an enemy combatant. The President's June 9 determination and the Mobbs Declaration more than satisfy that standard in this case. See Resp. Op. Br. 12-17; Resp. Reply Br. 6-7. Because the appropriate inquiry turns on the military's basis for its determination that an individual is an enemy combatant, there is no warrant for creating a right to access counsel that lacks any basis in historical practice, tradition, or legal precedent.

That is particularly the case because recognizing a right to counsel and affording access to counsel would jeopardize the two core purposes of detaining enemy combatants -- gathering intelligence about the enemy, and preventing the detainee from aiding in any further attacks against America. In deciding to detain Padilla as an enemy combatant, the President specifically determined that he "possesses intelligence, including

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United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (emphases added).

intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other government personnel, or citizens." Presidential Order (June 9, 2002). Compelled access to counsel would directly interfere with -- and likely thwart -- the military's efforts to gather such vital intelligence from detained combatants.

It also would pose the risk that Padilla will continue to assist the enemy. The President determined that Padilla "represents a continuing, present, and grave danger to the national security of the United States" and that his detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." Ibid. It is a matter of public record that an al Qaeda training manual provides instructions for passing information to fellow terrorists through the use of intermediaries. The intermediaries may be unaware that they are being so used. See Al Qaeda Training Manual, available at [www.usdoj.gov:80/ag/trainingmanual.htm](http://www.usdoj.gov:80/ag/trainingmanual.htm). There is legitimate cause for concern that an enemy combatant such as Padilla, who spent a substantial amount of time in Afghanistan and Pakistan with senior members of al Qaeda, may have received such training. Thus, counsel might become the unwitting conduit for

the transmission of information damaging to national security, even in the good-faith belief that he or she was acting in the zealous pursuit of the client's interests. Accordingly, this Court should adhere to historical practice and settled law and reject petitioners request "to permit counsel to meet and confer with Jose Padilla." Amend. Pet. 9 (Prayer for Relief ¶ 2).<sup>3</sup>

2. Petitioners do not appear to press the contention that Padilla is entitled to counsel even if he has properly been determined to be an enemy combatant. Instead, they principally argue that Padilla is entitled to the same protections accorded detainees in the criminal justice system because he cannot properly be considered an enemy combatant. That is incorrect.

As explained, under any constitutionally appropriate standard of review, the Mobbs Declaration and the President's order of June 9, 2002, amply support the President's determination that Padilla is an enemy combatant subject to detention during wartime. Petitioners emphasize that Padilla

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<sup>3</sup> The fact that Padilla himself has no right to counsel does not necessarily mean that counsel could not be appointed for a proper next friend. In a next-friend habeas action, counsel directly represents the next friend, not the detainee on whose behalf the petition is filed. See In re Heidnik, 112 F.3d 105, 112 (3d Cir. 1997); cf. Hamdi v. Rumsfeld, 294 F.3d 598, 603 (4th Cir. 2002). In this case, that produces the anomaly that Ms. Newman could be appointed to represent herself, an anomaly that underscores that Ms. Newman lacks next-friend standing. See Resp. Juris. Br. at 6-10; Resp. Juris. Reply 2-8. Nonetheless, it remains possible that a court could appoint counsel for a proper next friend, such as Padilla's mother.

"was not captured by the military" on the "battlefield." Sur-reply 2. But those facts do not preclude Padilla's detention as an enemy combatant, and petitioners' understanding of that term is inconsistent with settled law. Although the defendants in Ex parte Quirin, 317 U.S. 1 (1942), were "taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation," id. at 21, that did not prevent the Court from ratifying their treatment as "enemy belligerents," id. at 38, nor did it foreclose their transfer to military custody or their prosecution by the military for violating the laws of war, id. at 37-38. Indeed, the Quirin Court cited the defendants' attempt to pass themselves off as civilians in order to conduct attacks in the United States as a reason to accord them "the status of unlawful combatants." Id. at 35.<sup>4</sup>

The fact that Padilla's activities on behalf of al Qaida might also form the basis for criminal charges against him does not compel the President or his subordinate officers to place

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<sup>4</sup> Petitioners' suggestion that Padilla was not "willing to die for [al Qaida's] cause," Sur-reply 2, if accepted as a basis for precluding an enemy combatant designation, would mean that the United States would not have the authority to detain anyone fighting for al Qaida or any other enemy who chose to surrender rather than fight to the death. Here, as the President specifically determined and as the Mobbs Declaration elaborates, Padilla is "closely associated with al Qaeda" and has "engaged in conduct that constituted hostile and war-like acts \* \* \* that had the aim to cause injury to or adverse affects on the United States." Presidential Order (June 9, 2002). That is a more than sufficient basis to detain him as an enemy combatant under the laws

Padilla in the criminal justice system and provide him with the associated procedural protections, including a right to counsel. Nor does it somehow transform his present detention as an enemy combatant during wartime into something resembling a criminal detention or punishment. As the Supreme Court explained in Quirin, the "universal agreement and practice" among nations is that unlawful enemy combatants such as Padilla and the petitioners in Quirin "are \* \* \* subject to capture and detention [during wartime], but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 30-31 (emphasis added). Indeed, throughout our Nation's history, the vast majority of individuals seized in war as enemy combatants -- many of whom were, or claimed to be, United States citizens -- were never charged with any offense but instead were simply detained during the conflict. None of those enemy combatants was entitled to counsel for the purpose of challenging his detention in United States courts.

Accordingly, whether Padilla at some future time may be charged with violating domestic criminal law (or the laws of war) has no bearing on whether he is presently an enemy

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of war. See Quirin, 317 U.S. at 37-38.

combatant subject to detention during wartime. And there is no obligation under the laws and customs of war for a nation to charge enemy combatants with an offense rather than merely to detain them during the course of the armed conflict. Cf. In re Yamashita, 327 U.S. 1 (1946) (upholding authority to convene military commission after the cessation of hostilities to try belligerents for violating the law of war during the conflict). The President's determination to detain Padilla as an enemy combatant in a time of war -- rather than to place him in the criminal justice system and charge him with a violation of domestic criminal law -- is a military and political judgment not subject to reassessment by the courts.

**B. The Court May Consider The Classified Mobbs Declaration In Camera And Ex Parte**

This Court has authority to consider the classified Mobbs Declaration in camera and on an ex parte basis. The Government strongly emphasizes, as an initial matter, that the unclassified Mobbs Declaration by itself more than satisfies any appropriate standard of judicial review of the President's determination that Padilla is an enemy combatant. That declaration describes Padilla's multiple contacts with senior al Qaida officials while in Pakistan and Afghanistan, his discussions with them of plans to detonate a dirty bomb or other explosive device within the United States, his training from al Qaida operatives, including on the wiring of explosive devices, and his return to the United States to advance the conduct of further terrorist attacks on al Qaida's behalf.

Although the unclassified version of the Mobbs Declaration fully suffices to establish that Padilla was properly determined to be an enemy combatant, the government provided the classified version of the declaration to the Court to apprise the Court of certain classified intelligence information concerning Padilla and the determination that he is an enemy combatant. This Court's review of the classified declaration without its

disclosure to petitioners is proper and is fully consistent with legal precedent.

As the Commander in Chief of the armed forces, the President has the "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy" to have access to such information. Department of the Navy v. Egan, 484 U.S. 518, 527 (1988). That authority "exists quite apart from any explicit congressional grant," and serves "the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." Ibid.; see National Council of Resistance of Iran v. Department of State, 251 F.3d 192, 208 (D.C. Cir. 2001) ("[I]tems of classified information which do not appear dangerous or perhaps even important to judges might make all too much sense to a foreign counterintelligence specialist who could learn much about this nation's intelligence gathering capabilities from what these documents revealed about sources and methods.") (internal quotation marks omitted).

In several contexts, courts have upheld the government's submission of classified information in camera without disclosure to the opposing party. This Court, for instance, has conducted an in camera and ex parte review of "sensitive

material" submitted by the government in connection with a criminal defendant's motion to suppress evidence obtained through a warrantless physical search and electronic surveillance. United States v. Bin Laden, 126 F. Supp. 2d 264, 287 (S.D.N.Y. 2000).<sup>5</sup> The Court was persuaded by the government's "arguments about [the] ongoing threat posed by al Qaeda and the potentially damaging impact of disclosure on existing foreign intelligence operations," and it therefore rejected the defendant's request for disclosure of classified search and surveillance materials. Ibid. (internal quotation marks omitted).

Under FISA, similarly, courts consistently resolve legal challenges to surveillance and searches by considering the government's FISA application and supporting materials in camera and ex parte when the Attorney General certifies that disclosure would harm the national security. For example, in United States v. Squillacote, 221 F.3d 542 (4th Cir. 2000), cert. denied, 532 U.S. 971 (2001), the Fourth Circuit, after conducting an in camera review of FISA materials provided by the government, rejected the defendants' claim that there was no probable cause to believe they were agents of a foreign power. The court

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<sup>5</sup> The defendant, El-Hage, was an American citizen. 126 F. Supp. 2d at 270.

refused to "elaborate further" on the basis for its decision, "[g]iven the sensitive nature of the information upon which" it relied. Id. at 554. The court denied the defendants' request for disclosure of the FISA materials, holding that the materials submitted by the government sufficed "to determine the legality of the surveillance." Ibid. See also Global Relief Foundation, Inc. v. O'Neill, 207 F. Supp. 2d 779, 790 (N.D. Ill. 2002) ("[D]isclosure of the [FISA] information we have reviewed [regarding the Global Relief Foundation and its executive director] could substantially undermine ongoing investigations required to apprehend the conspirators behind the September 11 murders and undermine the ability of law enforcement agencies to reduce the possibility of terrorist crimes in the future.").

In pre-FISA cases, moreover, courts frequently ruled that it was appropriate to consider sensitive information pertaining to foreign intelligence on an in camera and ex parte basis when determining the constitutionality of intelligence surveillance. See United States v. Ajlouny, 629 F.2d 830, 838-839 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981). Those decisions rested on the recognition that, in "'a field as delicate and sensitive as foreign intelligence gathering,' as opposed to domestic, criminal surveillance, 'there is every reason why the court should proceed in camera and without disclosure' to

determine the legality of a surveillance." United States v. Belfield, 692 F.2d 141, 148-149 (D.C. Cir. 1982) (quoting United States v. Lemonakis, 485 F.2d 941, 963 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974)); see ibid. ("In this circuit and in others, it has constantly been held that the legality of electronic, foreign intelligence surveillance may, even should, be determined on an in camera, ex parte basis.").

The same conclusion should obtain here. That is especially so in view of the nature of the Court's inquiry in this case. The balance of considerations tips strongly in favor of in camera and ex parte review of the classified Mobbs Declaration in the circumstances of this case.

The need to maintain confidentiality here is most compelling, because the intelligence information at issue arises in the midst of an ongoing armed conflict against an enemy with whom the President has determined Padilla was "closely associated," and on whose behalf Padilla already has engaged in "hostile and war-like acts" against the United States. Presidential Order (June 9, 2002). Disclosure of the classified intelligence information could compromise intelligence gathering crucial to the ongoing war effort by revealing sources and by divulging methods of collecting intelligence. Such intelligence functions are especially vital in the current conflict in view

of the enemy's commitment to launching surprise attacks by combatants masked as civilians to inflict maximum damage on the civilian population. See Bin Laden, 126 F. Supp. 2d at 287 (declining disclosure and adversary hearing based on, inter alia, "Government's assertion that disclosure of the ex parte materials would jeopardize the ongoing investigation of al Qaeda").

Moreover, the room for a factual review of the President's enemy combatant determination is extraordinarily limited given the sensitive nature of the judgment and the fact that it implicates core executive powers involving the military and national security. See id. at 287 (observing that "the issues raised by El-Hage's motion were predominantly legal questions and the fact-based inquiry was limited, so the benefit of holding an adversary hearing was substantially lessened"); ibid. (emphasizing "limited factual inquiry that was necessary to resolve the issues presented"); see also Ajlouny, 629 F.2d at 839 ("We are also convinced that accurate resolution of the factual issues would not have been materially advanced by either disclosure of information to the defendant or an adversary hearing."). Because any factual inquiry in this matter is highly restricted, because petitioners have the unclassified declaration containing all material facts concerning Padilla's

detention relevant to resolution of their legal claims, and because of the "ongoing threat posed by al Qaeda," Bin Laden, 126 F. Supp. 2d at 287, consideration of the classified declaration in camera and ex parte is permissible and appropriate.<sup>6</sup>

Insofar as the Court might nonetheless conclude that it cannot consider the classified declaration in the absence of its disclosure to Padilla's counsel, respondents would withdraw that declaration and reiterate that the unclassified Mobbs Declaration provides an ample factual basis for the President's determination that Padilla is an enemy combatant.

#### **CONCLUSION**

For the foregoing reasons, as well as the reasons explained in our opening and reply briefs, the amended petition for a writ of habeas corpus should be dismissed.

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<sup>6</sup> That conclusion is unaffected by whether Padilla's counsel possess the requisite security clearances. As this Court has explained, "security clearances enable \* \* \* attorneys to review classified documents, 'but they do not entitle them to see all documents with that classification.'" Bin Laden, 126 F. Supp. 2d at 287 n.27; see also United States v. Ott, 827 F.2d 473, 477 (9th Cir. 1987) ("Congress has a legitimate interest in authorizing the Attorney General to invoke procedures designed to ensure that sensitive security information is not unnecessarily disseminated to anyone not involved in the surveillance operation in question, whether or not she happens for unrelated reasons to enjoy security clearance.").

Respectfully submitted,

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