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Jesselyn A. Radack

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UNITED STATES CITIZENS DETAINED AS “ENEMY COMBATANTS”: THE RIGHT TO COUNSEL AS A MATTER OF ETHICS

Jesselyn A. Radack*

The Supreme Court will decide as a matter of law whether an American citizen detained as an enemy combatant has the right to counsel. The author argues that as a matter of ethics, the answer is clear — there is a right to counsel. In this Article, the author analyzes the cases regarding Jose Padilla and Yaser Esam Hamdi, discusses ABA Model Rule 4.2, and its application, and proposes an amendment to Rule 4.2's Comment.

* * *

INTRODUCTION

Sacrifices of civil rights and liberties in this country since September 11th, particularly those belonging to United States citizens detained as “enemy combatants,”¹ highlight the urgent need to speak out against government attorneys

* A.B., Brown University, 1992; J.D., Yale Law School, 1995. The Author is the Founder and Executive Director of the Coalition for Civil Rights and Democratic Liberties (<http://www.cradl.info>).

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This article is dedicated to Jane Mayer for her intellectual integrity, journalistic courage, belief in the underdog and unrelenting pursuit of truth.

¹ The controversial executive designation of “enemy combatant” is used to detain individuals whom the government suspects have intelligence about the September 11, 2001 terrorist attacks. The designation dates back to 1942, when the Supreme Court ruled that the same designation applied to Nazi saboteurs who landed by submarine on American shores to blow up industrial plants. See *Ex parte Quirin*, 317 U.S. 1 (1942). The eight men were tried before a military commission. One of them had a plausible claim of American citizenship. The Supreme Court ruled this to be irrelevant, for “citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts” qualified as “enemy belligerents.” *Id.* at 37–38.

flouting legal ethics.² The plight of American enemy combatants is a chilling reminder of the words of German anti-Nazi activist, Pastor Martin Niemöller:

First they came for the Jews
and I did not speak out — because I was not a Jew.
Then they came for the communists
and I did not speak out — because I was not a communist.
Then they came for the trade unionists
and I did not speak out — because I was not a trade unionist.
Then they came for me —
and by then there was no one left to speak out for me.³

At first blush, this may seem like hyperbole. The average American may think that “they,” meaning the government (military or civilian), cannot come for him.⁴ But the reality is that the Executive can detain an American citizen in solitary confinement without charges, indefinitely and incommunicado, on the basis of a

² This Article is not the first to suggest serious ethical lapses by the Justice Department in the name of fighting terrorism. See, e.g., D. Mark Jackson, *Has Attorney General John Ashcroft, in Alleged Terrorism Cases, Violated Government Ethics Rules Governing Prosecutors' Comments About the Accused?*, FindLaw's Legal Commentary, at http://writ.corporate.findlaw.com/commentary/20030130_jackson.html (Jan. 30, 2003) (arguing that Attorney General Ashcroft crossed ethical lines by issuing provocative and inflammatory statements, which have a substantial likelihood of prejudicing the accused, in frequent press conferences about enemy combatants); see also Elaine Cassel, *A Recent Judicial Reprimand of Attorney General Ashcroft Exposes a Pattern of Gag Order and Ethics Violations by His Office*, FindLaw's Legal Commentary, at <http://writ.corporate.findlaw.com/cassel/20030430.html> (Apr. 30, 2003) (explaining that Ashcroft was reprimanded by U.S. District Judge Gerald Rosen for speaking to the media after the judge had issued a gag order and commenting that this was not the first time Ashcroft had made inappropriate public comments).

³ See generally DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 13 (2d ed. 2002) (comparing today's response to the threat of terrorism to the anti-Communist hysteria of the 1950s); Justice William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis*, Address at the Law School of Hebrew University, Jerusalem, Israel (Dec. 22, 1987) (transcript available at www.brennancenter.org/resources/downloads/nation_security_brennan.pdf) (discussing how easily the United States forgets important historical lessons on how perceived threats to national security, in hindsight often exaggerated or unfounded, have motivated the sacrifice of civil liberties).

⁴ The male pronoun is used because all of the United States citizens designated as enemy combatants thus far are men.

unilateral determination that he is an enemy combatant.⁵ There is little chance anyone will speak out for him because the government is doing its best to deny, frustrate or compromise any meaningful access to an attorney.⁶

As circuit authority stands now, "any journalist, aid worker, or human rights investigator found in Afghanistan could be detained indefinitely as an enemy combatant."⁷ If the Executive gets its way in the Domestic Security Enhancement Act of 2003 (commonly referred to as the Patriot Act II),⁸ the new definition of "terrorism" would cover tactics used by protest groups such as People for the Ethical Treatment of Animals, Operation Rescue and demonstrators at Vieques Island, Puerto Rico.⁹ "[T]he Act's proscription on associational activity potentially encompasses every organization that has ever been involved in a civil war or a crime of violence . . . the African National Congress, the Irish Republican Army, or the Northern Alliance in Afghanistan."¹⁰ The proposed Patriot Act II's citizenship-stripping provision would extend to a citizen's support of even the legal activities of an organization that the executive branch deems to be "terrorist."¹¹

⁵ See generally *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003), *reh'g and reh'g en banc denied*, 337 F.3d 335 (4th Cir. 2003) (quoting *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002)); James X. Dempsey, *The Patriot Act and Other Assaults on Civil Liberties*, Remarks at the Meeting of the American Constitution Society (Oct. 15, 2003).

⁶ This includes, but is not limited to, refusing to tell the enemy combatant that an attorney has been retained for him, not allowing an attorney to meet with the client or receive attorney-client correspondence, and monitoring all attorney-client communications.

⁷ Joanne Mariner, *Rhetoric, Rubber-Stamping, and "Meaningful Review": The Recent Appellate Court Ruling in Hamdi v. Rumsfeld*, FindLaw's Legal Commentary, at <http://writ.news.findlaw.com/mariner/20030120.html> (Jan. 20, 2003).

⁸ Domestic Security Enhancement Act of 2003 (proposed draft dated Jan. 9, 2003) available at http://publicintegrity.org/dtaweb/downloads/story_01_020703.pdf [hereinafter Patriot Act II].

⁹ See Kevin Galvin, *Why New Law-Enforcement Powers Worry Civil Libertarians*, Common Dreams News Center, at <http://www.comondreams.org/headlines01/1206-01.htm> (Dec. 6, 2001).

¹⁰ David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 966-67 (2002).

¹¹ See COLE & DEMPSEY, *supra* note 3, at 85:

The IRA had Sinn Fein, a legal arm engaged in legitimate political activity. The African National Congress engaged in both violent "terrorist" acts and nonviolent anti-apartheid activity. And according to Israeli security services, Hamas, one of the world's most notorious "terrorist groups," devotes ninety-five percent of its resources to nonviolent social services.

Id.; see also Joanne Mariner, *Patriot II's Attack on Citizenship*, FindLaw's Legal Commentary, at <http://writ.corporate.findlaw.com/mariner/20030303.html> (Mar. 3, 2003).

In other words, if you help fund an orphanage administered by one of the three Chechen separatist groups that the government has labeled as terrorist, or if you give pharmaceutical supplies to a medical outpost run by the East Turkestan Islamic Movement, or if you are on the wrong side of any of a number of other political conflicts in the world, you are vulnerable to the loss of your citizenship.

White House Counsel Alberto Gonzales stated that, "People think it is obvious that an American citizen, for example, would have a right to counsel if detained as an enemy combatant. But that's not so obvious."¹² However, Supreme Court Justice Stephen G. Breyer "urged attorneys to question government anti-terrorism practices, including the lack of access to legal counsel for some people detained for questioning."¹³ Regardless of where the Supreme Court comes down as a matter of *law* on the right to counsel for an American citizen detained as an enemy combatant — for the Supreme Court is where this question is headed¹⁴ — as a matter of *ethics*, the answer is clear: United States citizens designated as enemy combatants should be entitled to counsel.

In the case of Jose Padilla, one of two United States citizens now being held by the Defense Department as illegal enemy combatants, Michael B. Mukasey, Chief Judge of the Federal District Court of New York, ruled that the individuals Bush deems as "enemy combatants"¹⁵ have the right to a lawyer.¹⁶ He based his decision not on the Constitution, but on the habeas corpus statute.¹⁷

In the case of Yaser Esam Hamdi, the other citizen being held as an unlawful enemy combatant,¹⁸ Federal District Judge Robert G. Doumar twice ordered the

Id.

¹² Jeanne Cummings, *Gonzales Rewrites Laws of War*, WALL ST. J., Nov. 26, 2002, at A4 (quoting Mr. Gonzales).

¹³ *Breyer Says Rights Need Guarding in Terror War*, WASH. POST, Apr. 15, 2003, at A10; cf. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 218–19 (1998) ("Without question the government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war.").

¹⁴ See Editorial, *Detention Without End (Cont'd)*, WASH. POST, Mar. 28, 2003, at A22 ("[T]he government last week informed Chief Judge Michael B. Mukasey of the U.S. District Court in New York that it will appeal his ruling."); see also Editorial, *Hear From Both Sides*, WASH. POST, Jan. 10, 2003, at A20 ("The [*Hamdi*] decision demands the Supreme Court's attention. . . . The Supreme Court must now clarify that doing so [understanding the scope of any factual disputes] inescapably requires hearing from Mr. Hamdi.").

¹⁵ On April 9, 2003, Judge Mukasey ruled that the legality of President Bush's designation of Padilla as an enemy combatant may be appealed immediately to a higher court, even before the judge has ruled on the merits of a challenge to Padilla's detention. Benjamin Weiser, *New Turn in 'Dirty Bomb' Case*, N.Y. TIMES, Apr. 10, 2003, at B15.

¹⁶ *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002).

¹⁷ *Id.* at 601–02. The habeas corpus statute, 28 U.S.C. § 2241 (2000), provides, in pertinent part:

(a) Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions. . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless —

(1) He is in custody under or by color of the authority of the United States . . . ; or . . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

¹⁸ There are over 60 foreign nationals from more than 40 countries similarly detained at

military to grant Hamdi access to a federal public defender.¹⁹ However, Doumar's orders were twice stayed, and upon review, a three-judge panel of the conservative Fourth Circuit Court of Appeals²⁰ did not specifically address whether enemy combatants have a right to a lawyer.²¹ Even though the Fourth Circuit emphasized that it "earlier rejected the summary embrace of 'a sweeping proposition — namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so,'"²² the court did not reject the government's denial of Hamdi's access to counsel and declared that he was being held lawfully.²³

American Bar Association (ABA) Model Rule 4.2,²⁴ which governs communication with a person represented by counsel, demands consideration in the debate. It states, "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."²⁵ The Comment states significantly, "the Rule imposes ethical restrictions that go beyond those imposed by constitutional

the U.S. naval base in Guantánamo Bay, Cuba, but there has been far more public outcry about the detention of Padilla and Hamdi than about all the other detainees combined. On March 11, 2003, a federal appeals court ruled that the detainees have no legal rights in the United States and may not ask courts to review their detentions. *See* Neely Tucker, *Detainees Are Denied Access to U.S. Courts*, WASH. POST, Mar. 12, 2003, at A1. However, on November 10, 2003, the Supreme Court said it will review that conclusion. *See* Charles Lane, *Justices to Rule on Detainees' Rights*, WASH. POST, Nov. 11, 2003, at A1.

¹⁹ *See infra* notes 59–60 and accompanying text.

²⁰ *See* Deborah Sontag, *The Power of the Fourth: How One Appellate Court is Quietly Moving America Ever Rightward*, N.Y. TIMES, Mar. 9, 2003 (Magazine), at 38, 40 (stating that the Fourth Circuit, which includes Virginia, West Virginia, Maryland, North Carolina and South Carolina, "is considered the shrewdest, most aggressively conservative federal appeals court in the nation").

²¹ *Hamdi v. Rumsfeld*, 316 F.3d 450, 465 (4th Cir. 2003), *reh'g and reh'g en banc denied*, 337 F.3d 335 (4th Cir. 2003) ("We have no occasion, for example, to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding.").

²² *Id.* at 476 (quoting *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002)).

²³ *Id.* at 459 ("[W]e hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution.") However, the court carefully and explicitly limited its decision to the facts. *Id.* at 465.

²⁴ MODEL RULES OF PROF'L CONDUCT R. 4.2 (2001) [hereinafter MODEL RULE 4.2]. This rule is substantially identical to MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1969) except for the substitution of the term "person" for "party."

²⁵ MODEL RULE 4.2, *supra* note 24.

provisions.”²⁶ Therefore, whether or not American enemy combatants have a constitutional right to a lawyer, they have an ethical entitlement to one.

This Article submits that it is precisely *because* the government has asserted, and the judicial branch has approved, the ability to designate certain individuals as beyond the shelter of the Bill of Rights,²⁷ that the ethics rules should be given special attention.²⁸

The first section of this Article explores the history and purpose of Model Rule 4.2. Although the Sixth Amendment does not apply to enemy combatants, the next section uses it as a lens through which to examine the ethics issue. The Article goes on to argue that Model Rule 4.2 should apply to preindictment, custodial, overt contacts, especially when it comes to enemy combatants. Finally, it suggests that “intelligence gathering” should not serve as an end-run around the requirements of criminal law enforcement, and that amending the Comment to Model Rule 4.2 could prevent this.

I. LEGAL BACKGROUND, HISTORY AND PURPOSE OF RULE 4.2

The legal background of Model Rule 4.2 bears strongly on the right to counsel in the case of United States citizen enemy combatants. The ethical prohibition against such contacts has enjoyed a long history and broad acceptance, extending back at least to 1836 when David Hoffman first promulgated Resolution Number XLIII: “I will never enter into any conversation with my opponent’s client, relative to his claim or defence, except with the consent, *and* in the presence of his counsel.”²⁹

²⁶ MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 2 (2001); *see also* 4(B) Op. Off. Legal Counsel 576, 581 (1980) (stating that the anti-contact rule, “as generally interpreted, provides suspects and defendants with protections that the Constitution does not.”).

²⁷ *Padilla* and *Hamdi* held that President Bush has the authority to order that United States citizens be detained as enemy combatants. *Padilla*, 233 F. Supp. 2d at 606 (“The President, for the reasons set forth above, has both constitutional and statutory authority to exercise the powers of Commander in Chief, including the power to detain unlawful combatants, and it matters not that Padilla is a United States citizen captured on United States soil.”); *Hamdi*, 316 F.3d at 466 (“The designation of Hamdi as an enemy combatant thus bears the closest imaginable connection to the President’s constitutional responsibilities during the actual conduct of hostilities.”).

²⁸ This Article does not attempt to address the detention of foreign nationals in immigration proceedings, individuals held as material witnesses, or the Guantánamo Bay detainees, who, as non-United States citizens, have even fewer rights than other enemy combatants.

²⁹ 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 771 (Arno Press 1972) (2d ed. 1836), *quoted in* John Leubsdorf, *Communicating with Another Lawyer’s Client: the Lawyer’s Veto and the Client’s Interests*, 127 U. PA. L. REV. 683, 684 n.6 (1979).

The ABA initially adopted Resolution Number XLIII in 1908 in Canon 9 of the Canons of Professional Ethics: "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel."³⁰ Since that time, rules embodying this fundamental ethical precept — usually following one of the models offered by the ABA — have been adopted in every state.

In the Model Code of Professional Responsibility,³¹ which superseded the 1908 Canons and preceded the current Model Rules of Professional Conduct, the language closely resembles what is now found in Model Rule 4.2. Additionally, the Model Code set out the central proposition on which all of the anti-contact rules have rested: "The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel."³² Implementing this fundamental premise, the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, they safeguard the client-lawyer relationship from interference by adverse counsel, and they reduce the likelihood that clients will disclose privileged or other information that may harm their interests.³³

To the extent that the spirit of the rule is to serve a societal interest in not having unrepresented laypersons make decisions of legal consequence, its rationale should extend to American enemy combatants, with even more justification for its protective function in that context than in criminal cases. The Department of Justice acknowledges that the risk of damaging admissions, waiver of privileges, and misstatements "clearly applies in criminal proceedings, perhaps with more force than in the civil context."³⁴ It does not seem much of a leap to conclude that these risks apply in military detentions with even more force than in the civil or criminal context, for enemy combatants detained indefinitely and incommunicado face far more severe deprivations of liberty than persons being held for trial.

³⁰ See ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 124 (1934) ("It may be that this Canon has some relation to Hoffman's Resolutions XLIII.").

³¹ See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1983):
Communicating With One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Id.

³² *Id.* at EC 7-18 (1969).

³³ See, e.g., *United States v. Batchelor*, 484 F. Supp. 812, 813 (E.D. Pa. 1980) (holding that the interview of the defendant, without defendant's lawyer's consent, violated ethical rules).

³⁴ 4(B) Op. Off. Legal Counsel 576, 584 (1980).

II. USING THE SIXTH AMENDMENT AS A LENS

There seems to be judicial agreement that Padilla and Hamdi have no Sixth Amendment right to counsel³⁵ in their habeas corpus proceedings.³⁶ The Sixth Amendment grants that right to the “accused” in a “criminal proceeding.” Padilla and Hamdi are in the custody of the Department of Defense and there is no “criminal proceeding” in which they are detained. Because the government has not initiated adversarial judicial proceedings,³⁷ it is doubtful that the Sixth Amendment applies to their circumstances. Beyond the plain language of the Sixth Amendment, “even in the civilian community 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.”³⁸ Such “elements” are abundantly present in the Padilla and Hamdi cases.

In the case of Jose Padilla, Judge Mukasey aptly suggests that “[a]lthough . . . the right-to-counsel jurisprudence developed in cases applying the Sixth Amendment does not control this case, there would seem to be no reason why that jurisprudence cannot at least inform the exercise of discretion here.”³⁹ The Sixth Amendment can also inform the ethics analysis.

In this vein, the ABA Committee on Ethics and Professional Responsibility rejects the argument that Model Rule 4.2 either does not apply in the criminal context, or does not apply until Sixth Amendment rights attach.⁴⁰ While the “Sixth Amendments [sic] provide protections to individuals in the context of a criminal case, the Constitution establishes only the ‘minimal historic safeguards’ that defendants must receive rather than the outer limits of those they may be afforded.”⁴¹

The ABA Board of Governors, at the request of then-President Robert Hirshon, created the Task Force on Treatment of Enemy Combatants to “examine the

³⁵ The Sixth Amendment to the Constitution states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI.

³⁶ Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 600 (S.D.N.Y. 2002) (“Padilla has no Sixth Amendment right to counsel in this proceeding.”).

³⁷ See 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE: CRIMINAL PRACTICE SERIES § 11.3 (1984 & Supp. 1991).

³⁸ Middendorf v. Henry, 425 U.S. 25, 38 (1976).

³⁹ Padilla, 233 F. Supp. 2d at 603.

⁴⁰ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) at 10 [hereinafter ABA Formal Op.].

⁴¹ *Id.* at 11 (quoting United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990)).

framework surrounding the detention of United States citizens declared to be 'enemy combatants.'"⁴² Of the five recommendations the Task Force makes, the fourth — that "Citizen Detainees Should Not be Denied Access to Counsel"⁴³ — formed "the most complex issue examined by the Task Force."⁴⁴ The Task Force agrees "that the [Sixth] Amendment right to counsel does not technically attach to uncharged enemy combatants,"⁴⁵ but finds it "both paradoxical and unsatisfactory that uncharged United States citizen detainees have fewer rights and protections than those who have been charged with serious criminal offenses."⁴⁶ Indeed, foreign nationals Zacarias Moussaoui,⁴⁷ the alleged "twentieth hijacker," and Richard Reid,⁴⁸ the convicted "shoe bomber," have more rights than American citizens Padilla and Hamdi.⁴⁹

The *Padilla* and *Hamdi* decisions follow the release of the final report by the ABA's Task Force on Treatment of Enemy Combatants. Judge Mukasey and the ABA Task Force agree: an enemy combatant has a right to a lawyer.⁵⁰ At its "Midyear Meeting" in February 2003, the ABA, the largest bar association in the United States and the *de facto* ethical voice of the bar,⁵¹ overwhelmingly opposed

⁴² Preliminary Report, ABA Task Force on Treatment of Enemy Combatants (Aug. 8, 2002) at 5 [hereinafter Task Force Report]. The report was not the work of civil libertarians. The Task Force was chaired by a former assistant United States attorney and included a retired brigadier general who spent twenty-six years as an Army Judge Advocate, as well as the current president of the National Institute of Military Justice. Moreover, judges and big-business attorneys dominate the ABA itself.

⁴³ *Id.* at 23.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 18.

⁴⁷ Moussaoui is the only person charged in this country with a role in the September 11, 2001 terrorist attacks, and the government is seeking the death penalty. See Tom Jackman, *Moussaoui Asks to Call Three More al Qaeda Witnesses*, WASH. POST, Mar. 22, 2003, at A18.

⁴⁸ On January 30, 2003, Richard Reid, the British drifter and Muslim fundamentalist who attempted to detonate bombs in his shoes during a transatlantic flight, was imprisoned for life as the first admitted member of al Qaeda sentenced in the United States since the terrorist attacks on September 11, 2001. Pamela Ferdinand, *Would-Be Shoe Bomber Gets Life Term*, WASH. POST, Jan. 31, 2003, at A1.

⁴⁹ So, for that matter, does an Australian detainee at the Guantanamo Bay Prison who was given a lawyer. See John Mintz, *Guantanamo Bay Detainee is First to Be Given a Lawyer*, WASH. POST., Dec. 4, 2003, at A8. But see Susan Schmidt, *Qatari Man Designated An Enemy Combatant*, WASH. POST, June 24, 2003, at A1. Foreign national Ali S. Marri, described by federal prosecutors as an al Qaeda "sleeper operative," was designated as an enemy combatant but was not given a lawyer.

⁵⁰ See Task Force Report, *supra* note 42; *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002).

⁵¹ See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 688-91 (1989).

the Bush administration's anti-terrorism measure that bars United States citizens jailed as enemy combatants from consulting with defense lawyers: the ABA's policy-making body voted 368-76 to approve a proposal backing the right of United States citizens held as enemy combatants to have access to lawyers and judicial review of their status.⁵² It also urged Congress to establish clear standards and procedures for the designation of enemy combatants and their treatment.⁵³

Judge Mukasey and the ABA agree that the Sixth Amendment does not apply before the initiation of criminal proceedings, but they also agree that the Sixth Amendment can still enlighten other considerations.⁵⁴ The Sixth Amendment establishes the bare minimum that defendants must receive, and even the Supreme Court has recognized a Sixth Amendment right against custodial interrogation without access to counsel.⁵⁵ The Sixth Amendment is the starting point of the ethics analysis, not the end of it.⁵⁶ It would be wise to interpret the anti-contact rule in an expansive, rather than a restrictive, manner.

III. RULE 4.2 SHOULD APPLY TO PREINDICTMENT, CUSTODIAL, OVERT INTERVIEWS

The rule of professional conduct that governs contact by a lawyer with a person represented by counsel is set forth in Model Rule 4.2,⁵⁷ and the reasoning behind Model Rule 4.2 should guide the treatment of American enemy combatants.

The following discussion assumes that the American enemy combatant is represented by counsel (though given the current state of affairs, this is no small assumption). George Harris, one of "American Taliban" John Walker Lindh's principal defense attorneys, stated that he and attorney James Brosnahan were involved from December 1, 2001, but that "[f]or 55 days Lindh was essentially held incommunicado."⁵⁸ Padilla's attorney, Donna R. Newman, was appointed to

⁵² *ABA Supports Access to Counsel for Alleged Enemy Combatants*, ABA NEWS RELEASE, at <http://www.abanet.org/media/feb03/021103.html> (Feb. 11, 2003).

⁵³ See Gina Holland, *ABA Demands Rights for Enemy Combatants*, AP WIRE, Feb. 10, 2003.

⁵⁴ See Task Force Report, *supra* note 42; *Padilla*, 233 F. Supp. 2d at 600, 603.

⁵⁵ See *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964).

⁵⁶ It is interesting to note that a similar right to counsel, deriving from the Fifth Amendment privilege against compulsory self-incrimination, arises during custodial interrogation, regardless of the existence of adversarial proceedings. See U.S. CONST. amend. V; *Miranda v. Arizona*, 384 U.S. 436, 466 (1966) (holding that police must terminate interrogation of an accused in custody if the accused requests the assistance of counsel).

⁵⁷ See MODEL RULE 4.2, *supra* note 24.

⁵⁸ John Andrews, *John Walker Lindh Sentenced to 20 Years*, World Socialist Web Site, at <http://www.wsws.org/articles/2002/oct2002/lind-o07.shtml> (Oct. 7, 2002) (reporting the interview with Harris); see also *Moran v. Burbine*, 475 U.S. 412, 423-24 (1986) (holding that the failure of police to inform defendant of his attorney's efforts (the attorney was

represent him on May 15, 2002,⁵⁹ but after he was designated an enemy combatant on June 9, she was unable to meet with him despite Judge Mukasey's December order that Padilla be permitted to consult with her.⁶⁰ The government asked the court to reconsider and, in an opinion issued on March 11, 2003, Judge Mukasey reaffirmed Padilla's right to access to counsel.⁶¹ The government appealed, and a three-member appeals court panel of the Second Circuit heard arguments on November 17, 2003.⁶² It has been more than 18 months since Padilla has been allowed to meet with his attorney.⁶³ Hamdi has fared no better. On June 11, 2002, the district court appointed Federal Public Defender Frank Dunham as his counsel.⁶⁴ Judge Doumar twice ordered the Justice Department to let Hamdi meet with Dunham, only to have that order stayed both times by the appeals court.⁶⁵

Model Rule 4.2 expressly provides for *ex parte* (without the consent of the represented person's lawyer) communications that are "authorized by law."⁶⁶ The majority of circuit courts have held that preindictment, noncustodial, undercover contacts with represented persons during criminal investigations do not violate the anti-contact rule.⁶⁷

retained by defendant's sister without his knowledge) to reach him, did not deprive defendant of his right to counsel or vitiate waiver of his *Miranda* rights, but stating that "the 'deliberate or reckless' withholding of information is objectionable as a matter of ethics." (emphasis added).

⁵⁹ Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002).

⁶⁰ *Id.* at 572 ("Newman has averred that she was told she would not be permitted to visit Padilla at the South Carolina facility, or to speak with him; she was told she could write to Padilla, but that he might not receive the correspondence.").

⁶¹ See Padilla v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003); see also Judge Says Padilla May See Lawyers, WASH. POST, Mar. 12, 2003, at A8.

⁶² Michelle Garcia, *Appeals Court Weighs Case of Enemy Combatant*, WASH. POST, Nov. 18, 2003, at A3.

⁶³ *Id.*

⁶⁴ Hamdi v. Rumsfeld, 316 F.3d 450, 460 (4th Cir. 2003).

⁶⁵ See, e.g., Hamdi v. Rumsfeld, 296 F.3d 278, 279–80 (4th Cir. 2002). As this Article was about to go to press, the Bush Administration reversed its policy, saying that Hamdi would be allowed access to a lawyer. However, the government emphasized that the decision should not be treated as precedent. The change in policy came on the eve of a government filing due at the Supreme Court on December 3, 2003, before the Court reviewed Hamdi's detention. See Jerry Markon & Dan Eggen, *U.S. Allows Lawyer for Citizen Held as 'Enemy Combatant'*, WASH. POST, Dec. 3, 2003, at A1.

⁶⁶ See MODEL RULE 4.2, *supra* note 24.

⁶⁷ See United States v. Balter, 91 F.3d 427, 435–36 (3d Cir. 1996), *cert. denied*, 519 U.S. 1011 (1996); United States v. Johnson, 68 F.3d 899, 902 (5th Cir. 1995); United States v. Powe, 9 F.3d 68, 69 (9th Cir. 1993); United States v. Ryans, 903 F.2d 731, 739–40 (10th Cir. 1990), *cert. denied*, 498 U.S. 855 (1990); United States v. Sutton, 801 F.2d 1346, 1366 (D.C. Cir. 1986); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir. 1983), *cert. denied*, 464 U.S. 852 (1983).

But in the case of the United States citizens detained as enemy combatants, the contacts with them involve preindictment, *custodial, overt* contacts with represented persons for "intelligence gathering" and possible criminal prosecution at a later date. As a matter of ethics, these contacts are not "authorized by law" within the meaning of Model Rule 4.2.⁶⁸ Congress' September 2001 joint resolution authorizing the use of military force,⁶⁹ the Patriot Act,⁷⁰ the United Nations Security Council's resolution recognizing our country's right to self-defense,⁷¹ and NATO's Article V of the Washington Treaty construing "an . . . attack against one" as "an attack against . . . all,"⁷² do not address the detention of United States citizens as enemy combatants.

Moreover, the Administration has not sought a legislative structure setting forth the grounds for detention, the maximum periods of detention, forms of administrative or judicial review, or any of the other conditions that would help legalize the process.⁷³ On February 7, 2003, a preliminary draft of a bill titled the Domestic Security Enhancement Act of 2003,⁷⁴ which would be a potential successor to the Patriot Act, was leaked to the Center for Public Integrity and posted on the Internet. However, the draft bill, popularly referred to as the Patriot Act II, does not answer these questions.⁷⁵

⁶⁸ MODEL RULE 4.2, *supra* note 24.

⁶⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The preamble to the resolution states that the acts of September 11, 2001 were attacks against the United States that "render it both necessary and appropriate that the United States exercise its rights to self-defense." *Id.*

⁷⁰ See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)*, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter *Patriot Act*].

⁷¹ S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).

⁷² North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.

⁷³ See Editorial, *Detaining Americans*, WASH. POST, June 11, 2002, at A24 (asserting that Congress' role is to help find a thoughtful balance between security interests and individual rights). See generally Philip Heymann, *The Power to Imprison*, WASH. POST, July 7, 2002, at B7 (stating that the President's claim to power for detaining citizens as combatants is not bolstered by congressional support).

⁷⁴ Patriot Act II, *supra* note 8.

⁷⁵ Charles Lane, *U.S. May Seek Wider Anti-Terror Powers*, WASH. POST, Feb. 8, 2003, at A1, A13. As of at least January 2003, the Department of Justice has been drafting new anti-terrorism legislation. The draft legislation grants sweeping powers to the government, eliminating or weakening many of the checks and balances that remained on government surveillance, wiretapping, detention and criminal prosecution even after passage of the Patriot Act. See *id.* On September 10, 2003, President Bush officially announced and endorsed, in the form of a three-point plan, the so-called "Patriot Act II." See Eric Lichtblau, *Bush Seeks to Expand Access to Private Data*, N.Y. TIMES, Sept. 14, 2003, at <http://www.nytimes.com/2003/09/14/national/14PATR.html>.

Instead, the draft bill expands the Bush Administration's "enemy combatant" definition to all American citizens who "may" have violated any provision of Section 802 of the first Patriot Act.⁷⁶ In an execution of legislative gymnastics of Olympic proportions, Section 501 of the draft bill, deceptively titled "Expatriation of Terrorists,"⁷⁷ strips even native-born Americans of all the rights of United States citizenship if they provide support to a "terrorist organization,"⁷⁸ allowing them to be imprisoned indefinitely in their own country as undocumented aliens. This presumptive denationalization of American citizens who support the activities of any organization that the executive branch deems "terrorist" is a throwback to the McCarthy Era⁷⁹ and is contrary to citizenship as a "constitutional birthright."⁸⁰

If anything, denying American enemy combatants access to counsel is *contrary* to existing law.⁸¹ The *Hamdi* case did not specifically reach the issue. The *Padilla* case is the only decisional authority directly on point, and it grants access to counsel, at a minimum, for the purpose of presenting facts to the court in connection with a habeas corpus petition.⁸²

Moreover, the U.S. Code, in a broad and categorical provision that repealed the Emergency Detention Act,⁸³ provides that "[n]o citizen shall be imprisoned or

⁷⁶ Patriot Act, *supra* note 70, at § 802. Section 802 contains the new definition of domestic terrorism, which includes activities that "involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State," when they appear to be intended to coerce civilians or government policy or conduct. *Id.*

⁷⁷ Patriot Act II, *supra* note 8, at § 501.

⁷⁸ *Id.*

⁷⁹ See generally COLE & DEMPSEY, *supra* note 3 (comparing the terrorist threat response to the anti-communist response in the 1950s).

⁸⁰ See *Afroyim v. Rusk*, 387 U.S. 253 (1967). The Supreme Court's current jurisprudence gives Americans vigorous protections against involuntary loss of citizenship. The current rule — that citizenship can only be relinquished voluntarily — was established in this landmark case. The Supreme Court affirmed that the Fourteenth Amendment established "a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit." *Id.* at 262.

⁸¹ See generally Task Force Report, *supra* note 42 (discussing the history of the treatment of enemy combatants through precedent and statutes).

⁸² *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 603 (S.D.N.Y. 2002).

⁸³ Emergency Detention Act of 1950, tit. 2, §§ 100–16, 64 Stat. 1019 (1950) (repealed 1971).

otherwise detained by the United States except pursuant to an Act of Congress.”⁸⁴ The Supreme Court read this provision expansively to apply to *any and all* United States citizens detained by the government *under any circumstances*.⁸⁵

Finally, a variety of other recognized international agreements condemn denying access to counsel.⁸⁶ The Universal Declaration of Human Rights states that everyone “has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”⁸⁷ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, a General Assembly Resolution, requires that “[a] detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.”⁸⁸ The International Covenant on Civil and Political Rights prescribes certain standards and procedures that should be followed in all courts and tribunals.⁸⁹

There is an avalanche of authority that the government is *not* authorized by law to communicate with represented American enemy combatants.⁹⁰ If prosecuted, Padilla and Hamdi will have the benefit of the constitutional protections afforded all defendants in American criminal prosecutions — such as the right to counsel, the privilege against self-incrimination, and the right to a jury trial. But the due process protections normally found in the criminal justice system are the minimum. It stands to reason, therefore, that there should be just as much, if not more,

⁸⁴ 18 U.S.C. § 4001(a) (2002). See *Howe v. Smith*, 452 U.S. 473, 479–80 n.3 (1981) (finding that “the plain language of § 4001(a) proscrib[es] detention of *any kind* by the United States, absent a congressional grant of authority to detain”). But see *Hamdi v. Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003) (holding that Congress’ joint resolution authorizing the use of military force provided congressional authorization for Hamdi’s detention); *Padilla*, 233 F. Supp. 2d at 598 (holding that the Act applies and its terms have been complied with by Congress’ joint resolution).

⁸⁵ *Howe*, 452 U.S. at 479 n.3 (emphasis added).

⁸⁶ Article 5 of what is sometimes referred to as the Third Geneva Convention is not directly relevant to the treatment of United States citizens who are detained in this country. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 5–6 U.S.T. 3316, 3322–3324, 75 U.N.T.S. 135; see also *Hamdi*, 316 F.3d at 468 (holding that the language in the Geneva Convention is not self-executing and does not create private rights of action in the domestic courts of the signatory countries); cf. *Padilla*, 233 F. Supp. 2d at 590, 592–93 (stating *inter alia* that the Geneva Convention applies whether or not a war has been declared).

⁸⁷ *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d sess., pt. 1, at 73, art. 8 (1948).

⁸⁸ G.A. Res. 173, U.N. GAOR, 43d Sess., Supp. No. 49, at 297, 299 (1988) (Principle 17(1)). Most of the thirty-nine principles listed in this document have been violated.

⁸⁹ See International Covenant on Civil and Political Rights, Mar. 23, 1976, arts. 14–15, 999 U.N.T.S. 172, 176–77.

⁹⁰ See *supra* text accompanying notes 81–89.

protection for enemy combatants. As the *Padilla* court noted, "this is not the usual case."⁹¹

American enemy combatants are more vulnerable than the average criminal defendant because they are detained in solitary confinement indefinitely, incommunicado, and without charges; they can be interrogated more aggressively; and they are clearly among the most despised people in this country.⁹² Moreover, the "level of personal involvement by a Cabinet-level officer in the matter . . . is . . . unprecedented. . . . [W]hen viewed in comparison to past cases, the circumstances present here seem at least 'very special.'"⁹³ The *Padilla* court noted that "it would be a mistake to create the impression that there is a lush and vibrant jurisprudence governing these matters. There isn't."⁹⁴ Even as the Supreme Court placed limits on the government's authority to detain immigrants awaiting deportation, in an eerie foreshadowing of the September 11th attacks, the Court was careful to point out that the case before it did *not* involve "terrorism or other special circumstances where special arguments might be made for forms of preventive detention."⁹⁵ If the intent of Model Rule 4.2 is to be honored, enemy combatants must be allowed counsel, for it is "[difficult to] think of a more definite description of the type of situation where it would be a good thing to have a lawyer."⁹⁶

In its seminal opinion on Model Rule 4.2, the ABA Committee on Ethics and Professional Responsibility noted that because "prosecutors have substantial control over the timing of an indictment, limiting the Rule to post-indictment communications could allow the government to 'manipulate grand jury proceedings

⁹¹ *Padilla*, 233 F. Supp. 2d at 579 (discussing court's jurisdiction).

⁹² See *Bridges v. Wixon*, 326 U.S. 135, 166 (1945) (Murphy, J., concurring) ("Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land."); see also *Cole*, *supra* note 10, at 959 ("In the end, the true test of justice in a democratic society is not how it treats those with a political voice, but how it treats those who have no voice in the democratic process.").

⁹³ *Padilla*, 233 F. Supp. 2d at 581–82 (discussing the court's jurisdiction).

⁹⁴ *Id.* at 607.

⁹⁵ *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001).

⁹⁶ *Talk of the Nation: Enemy Combatants* (NPR radio broadcast, Feb. 11, 2003) (quoting A.P. Carleton Jr., President of the ABA); see also Anthony Lewis, *The Silencing of Gideon's Trumpet*, N.Y. TIMES, Apr. 20, 2003 (Magazine), at 50, 77:

[Enemy combatants] are not in precisely Gideon's position. They are not being prosecuted; they are being held indefinitely, without charges, in solitary confinement. They are not looking for counsel; they both already have lawyers, highly competent ones appointed by federal judges. But they are not allowed to talk to them. Those differences from Gideon's situation seem to make their need to consult the lawyers they have, if anything, more compelling.

to avoid its encumbrances.”⁹⁷ The same argument can be made with respect to the government having absolute control over the timing of a “law enforcement” proceeding as opposed to the seemingly more innocuous and less adversarial “intelligence gathering” process.⁹⁸ Limiting the Model Rule to civil and criminal proceedings could allow the government (the military and the prosecutors) to manipulate the timing and characterization of “intelligence gathering” to avoid the dictates of the Model Rule.⁹⁹ In the *Lindh* case, the government utterly blurred the two.¹⁰⁰

As reflected in the public record, before the Lindh interrogation, the Department of Justice’s internal ethics unit advised, “[W]e don’t think you can have the FBI agent question [him]. It would be a pre-indictment, custodial overt interview, which is not authorized by law.”¹⁰¹ When the FBI interviewed Lindh despite this recommendation, the ethics unit then advised that “Lindh’s confession might ‘have to be sealed’ and ‘only used for national security purposes,’ not in a criminal case against him,”¹⁰² which is exactly how the government tried to use it.

The government has contended that appointment of counsel for enemy combatants in the absence of charges would interfere with intelligence gathering by establishing an adversarial relationship with the captor from the outset.¹⁰³ But using information from intelligence gathering for criminal prosecution subverts the rule. The purpose of the rule is to protect from government overreaching.

⁹⁷ ABA Formal Op., *supra* note 40, at 31 (citing *United States v. Hammad*, 858 F.2d 834, 839 (1988)).

⁹⁸ Cf. Michael Powell, *No Choice but Guilty*, WASH. POST, July 29, 2003, at A10 (explaining how the “enemy combatant” label is being used to coerce the criminal process).

⁹⁹ See *Hamdi v. Rumsfeld*, 316 F.3d 450, 465 (4th Cir. 2003) (discussing “detention rather than the initiation of criminal charges”); *Padilla*, 233 F. Supp. 2d at 604 (discussing the government’s assertion that Padilla might communicate intelligence via his counsel if allowed to confer with them).

¹⁰⁰ See Jane Mayer, *Lost in the Jihad*, THE NEW YORKER, Mar. 10, 2003, at 50; see also Andrew Cohen, *Feds Counterattack in Lindh Case*, COURT WATCH, July 1, 2002, at <http://www.cbsnews.com/stories/2002/07/01/news/opinion/courtwatch/main513967.shtml> (three different interrogation periods were at issue: 1) the initial period when Lindh talked to U.S. Special Forces troops, 2) a subsequent five-day period when Lindh was being interrogated by other military officials, and 3) a two-day period, from December 9–10, when Lindh was questioned by the FBI. “The government’s case essentially stands or falls on Lindh’s statements to his captors and then to FBI agents who questioned him.”).

¹⁰¹ Mayer, *supra* note 100, at 58; see also Michael Isikoff, *The Lindh Case E-Mails*, NEWSWEEK, June 24, 2002, at 8.

¹⁰² Mayer, *supra* note 100, at 58 (quoting Isikoff, *supra* note 101).

¹⁰³ *Hamdi v. Rumsfeld*, 296 F.3d 278, 282 (4th Cir. 2002) (expressing concern that the June 11 order of the district court “does not consider what effect petitioner’s unmonitored access to counsel might have upon the government’s ongoing gathering of intelligence”). That issue, however, was not presented in the appeal that led to the Fourth Circuit’s most recent decision. See *Hamdi v. Rumsfeld*, 316 F.3d 450, 466 n.4 (4th Cir. 2003).

IV. PROPOSAL

This Article proposes amending the Comment to Model Rule 4.2 to add the following language:

This Rule applies to communications with a United States citizen detained as an illegal or unlawful "enemy combatant," prior to the initiation of law enforcement proceedings, who is represented by counsel concerning the matter to which the communication relates. If the communication relates only to intelligence gathering, then this Rule would not be triggered.

Such a change would be ethically sound and consonant with the Model Rules of Professional Conduct, while at the same time showing proper deference to the government's legitimate security and intelligence interests.

After all, in the *Padilla* case, "[t]he government has argued that 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.'"¹⁰⁴ The *Hamdi* decision similarly outlines three vital military "detention interests," directly derived from the war powers of Articles I and II of the Constitution,¹⁰⁵ for holding enemy combatants: incapacitation, relieving the burden on military commanders of conforming their conduct with the encumbrances of civilian litigation, and intelligence gathering.¹⁰⁶

In point of fact, the *Hamdi* decision reiterates that these interests are accomplished through "detention rather than the initiation of criminal charges"¹⁰⁷ and "detention in lieu of prosecution."¹⁰⁸ Secretary of Defense Donald Rumsfeld articulated the same objective with respect to the *Padilla* case:

Here is an individual who has intelligence information . . . [O]ur interest really in his case is not law enforcement, it is not punishment because he

¹⁰⁴ *Padilla*, 233 F. Supp. 2d at 603 (quoting the government's response to the court's October 21, 2002 order).

¹⁰⁵ U.S. CONST. art. I, § 8; U.S. CONST. art. II, § 2, cl. 1.

¹⁰⁶ See *Hamdi*, 316 F.3d at 465–66. The third detention interest, that of intelligence gathering, was not an issue on appeal. *Id.* at 466 n.4; see also *Padilla*, 233 F. Supp. 2d at 600 ("Padilla's detention 'does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence.'") (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997)).

¹⁰⁷ *Hamdi*, 316 F.3d at 465.

¹⁰⁸ *Id.*

was a terrorist or working with the terrorists . . . [W]e are not interested in trying him at the moment; we are not interested in punishing him at the moment. We are interested in finding out what he knows.¹⁰⁹

Accordingly, if the detention interest is strictly developing needed intelligence, and not eventual criminal prosecution, the anti-contact rule should pose no impediment. As the *Hamdi* court emphasized: "We are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers."¹¹⁰

Part of the problem facing enemy combatants emerges from a solution to a different and laudable goal: increasing coordination between law enforcement agencies (such as the FBI) and intelligence agencies (such as the CIA) in terrorism investigations. The attacks of September 11th highlighted a breakdown in the collection and sharing of information by the two communities.¹¹¹ While this criticism is valid, the solutions go beyond dismantling institutional barriers, and end up short-circuiting procedures designed to protect the innocent. Ethics concerns develop when criminal prosecutions are bootstrapped onto military investigations.¹¹²

By way of analogy, in the context of the Fourth Amendment, the Supreme Court acknowledged that lesser standards relating to search and seizure might be appropriate for cases relating to national security.¹¹³ But it also made clear that lower standards are permissible only with respect to the "collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions."¹¹⁴

The Supreme Court did not suggest that the foreign intelligence gathering rules could be employed if the primary purpose was to prosecute criminal conduct; in

¹⁰⁹ *Padilla*, 233 F. Supp. 2d at 573–74 (quoting News Briefing at the Department of Defense (June 12, 2002), available at 2002 WL 22026773).

¹¹⁰ *Hamdi*, 316 F.3d at 473; cf. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 287 (S.D.N.Y. 2000) (resolving a motion to suppress electronic surveillance and noting that the most significant question was whether the searches in question were conducted for "foreign intelligence purposes or law enforcement purposes").

¹¹¹ See generally Matthew Purdy & Lowell Bergman, *Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, at A1 (explaining how an arsenal of new antiterrorism tools was applied to the case, including a free flow of information between criminal investigators and intelligence officers, after September 11th).

¹¹² There is just as much of an ethics problem when military investigations — threatening to designate defendants as "enemy combatants" — are used to coerce the criminal process. However, that is beyond the scope of this Article.

¹¹³ See *United States v. United States District Court*, 407 U.S. 297 (1972). The Foreign Intelligence Surveillance Act (FISA) Court of Review recently issued an opinion — the first in its history — that relied, in part, on this case. See *In re Sealed Case* Nos. 02-001, 02-002, 310 F.3d 717, 737–38 (Foreign Int.Surv.Ct.Rev. 2002).

¹¹⁴ *United States District Court*, 407 U.S. at 318–19.

fact, it suggested quite the opposite. Ironically, the Fourth Circuit similarly held that national security and criminal prosecution are very different things.¹¹⁵ National security concerns recede, and individual privacy interests come to the fore, when "the government is primarily attempting to form the basis for a criminal prosecution,"¹¹⁶ not to gather intelligence.

It is sometimes difficult to draw the line where intelligence gathering ends and criminal prosecution begins, but when in doubt, the government should err in favor of protecting individual rights. Otherwise, under the guise of intelligence gathering and national security, prosecutors can circumvent otherwise applicable legal and ethical requirements.

How can the legitimacy of the criminal justice system be safeguarded if the government decides that it wants to prosecute after gathering intelligence? This can be accomplished by sealing off contacts made for national security and intelligence-gathering purposes (interrogations, interviews, statements, etc.) from those used for criminal prosecution, and not using the former for the latter. Although the Model Rules of Professional Conduct do not recognize, formally, the use of screening procedures, screening has nonetheless been accepted in many jurisdictions as an effective strategy.¹¹⁷

An effective screen would include the following factors: (1) the disqualified military and/or civilian agents, officers and lawyers do not participate in the criminal prosecution, (2) the disqualified military and/or civilian agents, officers and lawyers do not discuss the matter with the prosecution team, (3) the disqualified military and/or civilian agents, officers and lawyers represent through sworn testimony that they have not imparted any tainted information to the prosecution team, and (4) the disqualified military and/or civilian agents, officers and lawyers do not have access to any files or documents relating to the prosecution and vice-versa.

For example, the *Padilla* court suggested "there is no reason that military personnel cannot monitor Padilla's contacts with counsel, so long as those who participate in the monitoring are *insulated* from any activity in connection with . . . a future criminal prosecution of Padilla."¹¹⁸ Such screening measures were not

¹¹⁵ See *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

¹¹⁶ *Id.* at 915.

¹¹⁷ See, e.g., *Ford v. United States*, 756 F.2d 249, 254 (2d Cir. 1985) (holding that the government promise to create a "Chinese Wall" so as not to use the testimony of the witness-spouse against the non-witness spouse was sufficient to meet the claim of privilege by the testifying spouse); *United States v. Seregos*, 655 F.2d 33, 37 (2d Cir. 1981) (finding that when the prosecutor and agent insulated themselves from the proceedings in which immunized testimony was given, the evidence against the defendant was not tainted by such testimony).

¹¹⁸ *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 604 (S.D.N.Y. 2002) (emphasis

taken in the case of John Walker Lindh and “[i]t is no coincidence that the Lindh [surprise plea bargain] deal came about on the eve of a scheduled week-long [suppression] hearing that was going to bring into the open the specifics of how Lindh was treated and by whom.”¹¹⁹

The *Padilla* court, upon reconsideration at the government’s behest of the access to counsel issue, amplified and elaborated its suggestion regarding screening:

The government does not explain the need for that separation [between military interrogation and criminal law enforcement], and so I am left to guess what it might be. One possible explanation might be a desire to avoid polluting any future prosecution of Padilla with information obtained as the result of his interrogation without counsel, although there are ways to do that without separating the interrogation entirely from this litigation. In fact, it is not unheard of for information that might potentially invalidate a prosecution to be walled off within a single prosecutor’s office, and for the prosecution to proceed without incident.¹²⁰

Future prosecutions of American enemy combatants would be well-advised to follow this guidance.

V. CONCLUSION

Indefinite detention, detention without charge, secret deportation proceedings, ethnic profiling, surreptitious searches and wiretaps, military tribunals,¹²¹ and citizens denied counsel and judicial review — these things sound a lot like the hallmarks of the rogue nations and repressive regimes we are trying to defeat. Whether the architect of such policies is Attorney General John Ashcroft or White House Counsel Alberto Gonzales, many of these counterterrorism measures are — if not unconstitutional — unnecessary, unwise and unethical.

Ethics rules “seek to regulate the conduct of lawyers according to the standards of the profession quite apart from other laws or rules that may also govern a

added).

¹¹⁹ Andrew Cohen, *Lindh Layers Are Peeling Away*, COURT WATCH, Mar. 11, 2003 at <http://www.cbsnews.com/stories/2003/03/11/news/opinion/courtwatch/main543497.shtml>; see also Larry Margasak, *Lindh Pleads Guilty in Surprise Deal*, AP WIRES, July 15, 2002.

¹²⁰ *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 51 (S.D.N.Y. 2003).

¹²¹ See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57, 833 (Nov. 16, 2001). In such tribunals, the military would be the prosecutor, judge, jury and executioner, the trials could be held in secret, classified evidence could be used against the defendant without affording him an opportunity to confront it, and there would be no judicial review. See *id.*

lawyer's actions."¹²² Accordingly, by defining a lawyer's duties to maintain standards of ethical conduct, ethics rules like Model Rule 4.2 may offer protections beyond those provided by the Constitution, statute or case law. It defies logic to think that attorneys on the side of law enforcement are not intimately involved in the treatment of American enemy combatants.

The debate is framed repeatedly as one of civil liberties versus national security, when in fact, the two concepts should not be seen in opposition. Without preserving civil liberties, we will never have real security. Our greatest protection from terrorism is preserving the constitutional freedoms that differentiate us from the terrorists. If American citizens can be locked away without any sort of counsel or meaningful review for as long as the United States remains at war with al Qaeda, the liberty of all Americans effectively becomes the hostage of presidential whim. An unbridled power of military detention will not forever be deployed only against would-be terrorists.

¹²² ABA Formal Op., *supra* note 40, at 31.