

FOIA Marker

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National Security Council - Records and Access Management

Limited Access Originals Files

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:
V	22	9	7	3	38045	1000001265

Folder Title:

0205094

Withdrawn/Redacted Material

The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	NSC Profile Sheet	NSC/ RMO Profile	1	06/14/2002	P1/b1;
003	Memorandum	Memorandum for the President - From: Alberto R. Gonzales	1	06/09/2002	P5;
004	Letter	[Letter] - To: Paul Wolfowitz - From: George J. Tenet	1	06/09/2002	P1/b1;
005	Statement	[Statement]	3	06/08/2002	P1/b1; P5;
006	Memorandum	[Memorandum] - From: Paul Wolfowitz	1	06/09/2002	P1/b1; P5;
007	Letter	[Letter] - To: John Ashcroft - From: Paul Wolfowitz	1	06/09/2002	P1/b1; P5;
008	Memorandum	[Memorandum] - From: Paul Wolfowitz	1	06/09/2002	P1/b1; P5;

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Records Not Subject to FOIA

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009	Letter	[Letter] - To: Paul Wolfowitz - From: John D. Ashcroft	2	06/09/2002	P1/b1; P5;
010	Memorandum	Memorandum - To: The Attorney General - From: Michael Chertoff	5	06/09/2002	P1/b1; P5;

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~~TOP SECRET~~
ACTION DATA SUMMARY REPORT

RECORD ID: 0205094

DOC ACTION OFFICER

CAO ASSIGNED ACTION REQUIRED

001

X 02061409 FOR RECORD PURPOSES

~~TOP SECRET~~

DECLASSIFIED
White House Guidelines
E.O. 13526, SEC 3.4(B), Sept. 11, 2006
By NH NARA, Date 10/29/2014

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Memorandum	Memorandum for the President - From: Alberto R. Gonzales	1	06/09/2002	P5;

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U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

June 8, 2002

MEMORANDUM

TO: THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: JAY S. BYBEE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

SUBJECT: DETERMINATION OF ENEMY BELLIGERENCY AND MILITARY
DETENTION

You have asked our opinion whether you should recommend to the Secretary of Defense that Jose Padilla, aka "Abdullah Al Muhair," qualifies as an enemy combatant under the laws of armed conflict, and whether he may be detained by the United States Armed Forces. Based on the facts provided to us by the Criminal Division,¹ we conclude that the military has the legal authority to detain him as a prisoner captured during an international armed conflict. Additionally, we conclude that the Posse Comitatus Act, 18 U.S.C. § 1385 (1994), poses no bar to the military's operations in detaining Padilla.

The facts provided to us show that Padilla, who is a U.S. citizen, is associated with al Qaeda, the terrorist organization that launched the attacks of September 11, 2001, and that he recently entered the United States as part of plot to commit acts of sabotage that might have resulted in massive loss of life. We conclude that Padilla is properly considered an enemy combatant and may be turned over to military authorities for detention as an unlawful enemy combatant.

I.

We note at the outset that the authority of the President as Commander in Chief to seize and detain enemy combatants in an armed conflict is settled beyond peradventure. As Chief Executive of the Nation and the "Commander in Chief of the Army and Navy of the United States," U.S. Const., Art. II, section 2, the President has full authority to direct the armed forces to seize enemy forces in an armed conflict and detain them until the end of any armed conflict.

¹ See Memorandum for Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, from: Michael Chertoff, Assistant Attorney General, Criminal Division, Re: JOSE PADILLA, aka "Abdullah Al Muhajir" (June 7, 2002).

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See generally Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations* (Mar. 13, 2002) ("OLC Transfer Memorandum"). The authority of a belligerent to seize enemy forces is long-settled under the laws and customs of war, see, e.g., L. Oppenheim, *International Law* 368-69 (H. Lauterpacht ed., 7th ed. 1952), and has been reflected in international conventions on the law of armed conflict since some of the very first codifications were produced, see, e.g. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("GPW"); Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex I arts. 4-20. As the Supreme Court explained in *Ex parte Quirin*, 317 U.S. 1, 31 (1942), "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces" and "[u]nlawful combatants are likewise subject to capture and detention."

This authority to seize enemy combatants has been exercised in conflicts throughout the history of the Nation, from the time of the Founding to the present. See generally Lt. Col. George G. Lewis & Capt. John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, Dep't of the Army Pamphlet No. 20-213 (1955); see also *Case of Jefferson Davis*, 11 U.S. Op. Att'y Gen. 411, 411 (1866) (stating that Jefferson Davis and others "have been heretofore and are yet held as prisoners of war" and that "[u]ntil peace shall come in fact and in law, they can rightfully be held as prisoners of war").¹ Indeed, early in the Nation's history it was determined that the President could direct the capture of those in the service of an enemy whenever the United States was engaged in hostilities – even without a declaration of war, see 1 Op. Att'y Gen. 84, 85 (1798) (explaining that a person acting with a commission from France during the Quasi-War should be "confined as a prisoner of war"), and that authority has been routinely exercised ever since, most recently in conflicts such as Korea, Vietnam, and the Gulf War. See generally OLC Transfer Memorandum.

In addition, we note that it is well established that the United States is currently in a state of armed conflict to which the laws of armed conflict apply. In response to the attacks of September 11, Congress passed S.J. Res. 23, which authorizes the President to use military force against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or [that] harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The President, acting under his authority as Commander in Chief, and with congressional support, dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported and protected it, and

¹ In fact, even when the United States is not itself involved in an armed conflict, in order to preserve the United States' position as a neutral power with respect to an armed conflict being waged between other belligerents, the President may direct the armed forces to capture and detain combatants from another nation who seek refuge in U.S. territory. See, e.g., *Ex parte Toscano*, 208 F. 938, 940 (S.D. Cal. 1913) (rejecting petition for habeas corpus filed by Mexican soldiers so captured and interned during civil war in Mexico). Such combatants may be seized and, without being charged with any violation of law, interned for the duration of the conflict. See *id.*

our armed forces are still engaged in hostilities in Afghanistan. Moreover, in issuing the Military Order of November 13, 2001 that provides for the creation of military commissions, the President expressly concluded that "[i]nternational terrorists, including members of al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces." Military Order, The Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001). This Office has also previously concluded that the United States is in a state of armed conflict with the al Qaeda terrorist network and with the Taliban. See, e.g., Memorandum from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Legality of the Use of Military Commissions To Try Terrorists*, Nov. 6, 2001, at 22-33 ("Military Commission Memorandum"); Memorandum to Alberto Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 22, 2002).

The facts provided to us establish that Padilla is properly considered an enemy combatant. The facts show that he recently entered the United States as part of a plan to conduct acts of sabotage that could result in a massive loss of life. Specifically, Padilla was traveling to the United States from Pakistan, and while abroad he had meetings with a senior al Qaeda operative with whom he discussed a plan to detonate a radiological explosive device in the United States. Padilla apparently has already conducted research into the construction of such a weapon and had considered ways with which to obtain the necessary nuclear material. He had received training, at the direction of a senior al Qaeda official, in the use of explosives. It is well settled under the laws of war that such saboteurs are combatants who may be seized and detained; indeed, they are unlawful enemy combatants. See, e.g., *Ex parte Quirin*, 317 U.S. at 35-37 ("[T]hose who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants . . .").

Padilla entered the country without any weapons or materials for the planned bomb, because it appears that he was engaged in preliminary reconnaissance at the direction of al Qaeda officials. That is irrelevant, however, to the determination of his status as an enemy combatant. He entered the United States in furtherance of the plan to later deploy a radiological explosive. Even if Padilla's immediate purpose upon this visit was only reconnaissance or gathering information, he still qualifies as an enemy combatant subject to seizure and detention. Under the laws of war, it is well settled that scouts or other members of enemy forces whose only purpose is gathering information may be seized and detained. Moreover, as the Supreme Court explained in *Quirin*, persons are "not any the less belligerents if . . . they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." 317 U.S. at 38. Because Padilla entered the United States in furtherance of a plan to commit sabotage, the mere fact that he did not succeed (or was not so close to consummating the plan that he would have weapons material with him) does not alter his status as a combatant subject to seizure.

II.

The only difficulty presented by this case arises from the fact that Padilla is a U.S. citizen who was seized in the United States. He was detained upon his entry into the United States at Chicago's O'Hare International Airport. This fact scenario thus implicates the limitations on applying the laws of war to U.S. citizens that the Supreme Court set out in *Ex parte Milligan*, 71 U.S. 2 (1866), and *Ex parte Quirin*, 317 U.S. 1 (1942).

In *Ex Parte Milligan*, Union forces in the state of Indiana had seized a civilian named Milligan and tried him by military commission on various charges including giving aid and comfort to the enemy conspiring to seize weapons in federal arsenals, and planning to liberate Confederate prisoners of war. Milligan was a U.S. citizen and resident of Indiana. He had not, however, ever been a resident of one of the Confederate states, nor had he crossed into enemy territory, nor been a member of the military of the United States nor, it appears, of the Confederacy. It is unclear from the case whether Milligan actually ever communicated with members of the Confederate government or armed forces.

The Supreme Court held that Milligan could not be constitutionally subjected to trial by military commission. It found that the military could not apply the laws of war to citizens in states in which no direct military threat exists and the courts are open. It is worth quoting the relevant passage:

[the laws of war] can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service.

71 U.S. at 121-22. Thus, the Court made clear that the military could not extend its authority to try violators of the laws of war to citizens well behind the lines who are not participating in the military service.

Milligan left open, however, whether the laws of war could apply to a person who was more directly associated with the forces of the enemy, and hence could be detained as a prisoner captured during war.² The government argued that Milligan was such a prisoner of war. The Court, however, rejected that claim because Milligan had not committed any "legal acts of hostilities against the government," but instead had "conspired with bad men to assist the enemy." As the Court explained:

But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute [of habeas corpus]. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles [i.e., the Civil War], a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is

² We are using prisoner of war here not in the Geneva Convention sense, but only as it refers to individuals who can be legitimately detained under the customary laws of war.

punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

Id. at 131.³ Thus, the Supreme Court concluded that Milligan could not be held as a prisoner of war because his actions were not sufficient "acts of hostility" to place him within the category of enemy belligerents.

In *Ex parte Quirin*, the Court clarified and restricted the scope of its holding in *Milligan*. In *Quirin*, several members of the German armed forces who had covertly entered the United States with the objective of committing acts of sabotage were seized and ultimately tried by military commission. The FBI captured the saboteurs within the United States after they had hidden their uniforms and infiltrated into New York and Chicago. The Supreme Court concluded that they were properly held by the military and tried by military commission even though one of the defendants (Haupt) was allegedly a citizen, their plans occurred behind the front lines within states unthreatened by war, and the courts within the United States were operating openly.

The Court found that *Milligan* does not apply to enemy belligerents captured within the United States. See Military Commissions Memorandum at 14-16. The status of the saboteurs in *Quirin* as enemy belligerents, rather than non-belligerent civilians, was easily determined due to their training in the German Reich, their membership in its Marine Infantry, their transportation by German submarine, and their initial dress in German uniforms. The Court expressly distinguished *Milligan* on the basis that Milligan had been a civilian, and not an enemy belligerent. From the facts of *Milligan*, "the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, *was a non-belligerent*, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established." 317 U.S. at 45 (emphasis added). Because the Nazi saboteurs were belligerents, the *Quirin* Court found that *Milligan* did not apply.

Indeed, the Court made clear that status as a citizen would not allow one who had the status of a belligerent to escape military jurisdiction, even if he were captured within the United States. As the Court declared, "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." *Id.* at 37. The Court continued: "[c]itizens 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 are enemy belligerents within the meaning of the Hague Convention and the law of war." *Id.* at 37-38.

³ The end of this passage might be read to suggest that the government may apply the laws of war only to lawful combatants. That is plainly incorrect, as the Supreme Court itself explained in *Ex Parte Quirin*: "Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 31.

In discussing the fact that the German saboteurs also fell into the category of unlawful combatants, the Court explained why a mission of sabotage within the United States qualified as acts of belligerency. According to the Court:

[E]ntry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and war-like act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. [The rules of land warfare] plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States.

317 U.S. at 36-37. Thus, the Court found that capture of the defendants away from the front did not alter the status of the German saboteurs as enemy belligerents. Instead, the Court found that enemy belligerents who sought to commit sabotage remained subject to military jurisdiction, even if captured in areas of the United States free from threat of direct enemy attack.

Moreover, the Court explained that the fact that the German saboteurs had only entered the country and had not yet implemented their destructive plans did not alter their status as belligerents. As the Court observed, "[n]or are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." *Id.* at 38. Indeed, an opposite result would be absurd. It would allow the government to apply the laws of war to those captured outside the United States, while requiring the government to provide enemies who attack the nation directly with the higher standards of treatment required for those accused under the federal criminal laws.

Thus, *Quirin* made clear the limitations on *Milligan*. *Milligan* found that non-belligerent civilians behind the lines, where martial law is not declared and the courts are open, could not be subject to treatment as combatants subject to seizure by the military under the laws of war. *Quirin* makes clear that *Milligan* does not apply to enemy belligerents, even if those belligerents are citizens and are captured within the United States outside any theatre of active operations.

The facts in this case are not squarely on all fours with either *Milligan* or *Quirin*. Unlike the circumstances of *Quirin*, the nation's current enemy is not a traditional nation-state with a uniformed, regular armed force. Instead, the nation is at war with an international terrorist organization, whose members have entered the nation covertly and have infiltrated our society in sleeper cells. As demonstrated by the attacks on September 11, al Qaeda members seek to attack American civilian targets without any military value, rather than conduct conventional military campaigns. We conclude, however, that the instant case is far closer to the scenario presented in *Quirin* than *Milligan*. Under the reasoning in *Quirin*, Padilla properly qualifies as a belligerent (or combatant) who may be seized by the military and held at least until the end of the conflict. The nature of Padilla's plan in itself qualifies him as a belligerent. The detonation of a

radiological bomb could result in massive loss of life. Moreover, the mere fact that Padilla is still apparently in the planning stages for this act and may only have entered the United States now for reconnaissance purposes in no way takes him out of the category of a combatant.

Finally, in *Milligan*, the Court emphasized that Milligan had always been a resident of Indiana and it appeared that he had never been within Confederate territory, nor was it clearly alleged that he had ever actually communicated with the enemy. In some ways, therefore, he appeared to be an enemy *sympathizer*, but could not really be said to be part of the enemy forces. Here, in contrast, Padilla has recently been in Pakistan and has been in direct communication with a top al Qaeda leader concerning his plan to detonate a radiological bomb and other missions. That clear evidence shows that Padilla entered the United States as part of a plan of destruction sponsored and supported by enemy forces further confirms his status as an enemy combatant.

III.

As we have previously advised elsewhere, the Posse Comitatus Act (PCA) does not limit the President's authority to deploy the military against international terrorists operating within the United States. See generally Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States* at 2-3 (Oct. 23, 2001). For the reasons explained there, and summarized here, we similarly conclude that the PCA does not impose a statutory prohibition on the use of the military to detain an international terrorist captured within the United States.

The PCA states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385.⁴ There are several reasons why the detention of Padilla by the military would not violate the PCA.

First, both the express language of the PCA and its history show clearly that it was intended to prevent the use of the military for domestic *law enforcement* purposes. It does not address the deployment of troops for domestic *military* operations against potential attacks on the United States. Both the Justice Department and the Defense Department have accordingly interpreted the PCA *not* to bar military deployments that pursue a military or foreign policy function. In *Application of the Posse Comitatus Act to Assistance to the United States National*

⁴ The PCA originated as the Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145, 152. It was amended in 1956 to cover the Air Force. Act of Aug. 10, 1956, § 18(a), 70A Stat. 626; see *United States v. Walden*, 490 F.2d 372, 375 n.5 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974). The contemporary version of the PCA differs only slightly from the original.

Central Bureau, 13 Op. O.L.C. 195 (1989), our Office cited and agreed with a Department of Defense regulation that interpreted the PCA not to bar military actions undertaken primarily for a military purpose. We said (*id.* at 197):

[T]he regulations provide that actions taken for the primary purpose of furthering a military or foreign affairs function of the United States are permitted. 32 C.F.R. § 213.10(a)(2)(i). We agree that the Posse Comitatus Act does not prohibit military involvement in actions that are primarily military or foreign affairs related, even if they have an incidental effect on law enforcement, provided that such actions are not undertaken for the purpose of executing the laws.⁵

Because using military force to combat terrorist attacks would be for the purpose of protecting the nation's security, rather than executing the laws, domestic deployment in the current situation would not violate the PCA.

Central to this conclusion is the nature of the current conflict and the facts of this specific case. As we have advised elsewhere, the September 11, 2001 attacks on the World Trade Center and the Pentagon began an international armed conflict between the United States and the al Qaeda terrorist organization. See generally Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001); Military Commissions Memorandum. As a consequence of those operations, the armed forces have captured al Qaeda members as enemy combatants. As we have discussed above, capture and detention of enemy combatants is a critical part of international armed conflict, as demonstrated by the fact that the laws of armed conflict have long regulated the treatment of prisoners of war.

Here, the detention of Padilla by the military is part of that international armed conflict. The President has ample authority as Commander-in-Chief and Chief Executive to employ the military to protect the nation from further attack and to conduct operations against al Qaeda both at home and abroad. Detaining al Qaeda operatives who attempt to enter the United States to attack military or civilian targets is part of our ongoing military operations in this international

⁵ *Accord United States v. Thompson*, 30 M.J. 570, 573 (A.F.C.M.R.) (“[T]he prohibitions contained in the Posse Comitatus Act . . . do not now, nor were they ever intended to, limit military activities whose *primary purpose* is the furtherance of a military (or foreign affairs) function, regardless of benefits which may incidentally accrue to civilian law enforcement), *aff'd*, 32 M.J. 5 (C.M.A. 1990), *cert. denied*, 502 U.S. 1074 (1992).

Department of Defense (“DoD”) regulations promulgated pursuant to a congressional directive in 10 U.S.C. § 375 also recognize that the PCA does not apply to or restrict “[a]ctions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities.” DoD Directive 5525.5, Enclosure 4, E4.1.2.1 (Jan. 15, 1986) (as amended Dec. 20, 1989). See generally *United States v. Hitchcock*, No. 00-10251 (D. Haw. 2001) at *4-*5 (reviewing and applying DoD Directive 5525.5). Several courts (including the court of appeals in *Hitchcock*) have accepted and applied the DoD Directive in a variety of circumstances to find that the use of the military was *not* in violation of the PCA or 10 U.S.C. § 375. See, e.g., *United States v. Chon*, 210 F.3d 990, 993 (9th Cir.) (activities of Navy Criminal Investigative Service “were permissible because there was an independent military purpose for their investigation – the protection of military equipment”), *cert. denied*, 531 U.S. 910 (2000); *Applewhite v. United States Air Force*, 995 F.2d 997, 1001 (10th Cir. 1993) (military may investigate illegal drug transactions by active duty military personnel), *cert. denied*, 510 U.S. 1190 (1994).

armed conflict. As a result, detention of Padilla is not law enforcement, but instead constitutes military operations to protect the national security exempted from the PCA.

Second, the PCA includes both a constitutional and a statutory exception. It excludes military actions taken "in cases and under circumstances expressly authorized by the Constitution or Act of Congress." Both of these exceptions apply to the use of the Armed Forces to detain al Qaeda operatives in response to the September 11 attacks. By its own terms, the PCA excludes from its coverage any use of the military for constitutional purposes. As Attorney General Brownell noted in reviewing the PCA's legislative history, "[t]here are in any event grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate." *President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders - Little Rock, Arkansas*, 41 Op. Att'y Gen. 313, 331 (1957). Thus, the dispositive question is whether the President is deploying troops pursuant to a plenary constitutional authority. Here, that is clearly the case. The President is deploying the military pursuant to his powers as Chief Executive and Commander in Chief in response to a direct attack on the United States. Detention of al Qaeda operatives within the United States is undertaken pursuant to this constitutional authority. Thus, the PCA by its own terms does not apply to the domestic use of the military as contemplated in this case.

Even if the PCA's constitutional exception were not triggered, Pub. L. No. 107-40 would allow the President to avoid application of the PCA in this case. Pub. L. No. 107-40 authorizes "the use of United States Armed Forces against those responsible for the recent attacks launched against the United States." This authorization does not distinguish between deployment of the military either at home or abroad, nor does it make any distinction between use of the Armed Force for law enforcement or for military purposes. Rather, it simply authorizes the use of force against terrorists linked to the September 11 attacks. It is clear that the al Qaeda terrorist organization is one of the groups responsible for the September 11 attacks on the United States. Detention of al Qaeda operatives within the United States is part of the military use of force against those linked to the September 11 attacks. Thus, Pub. L. No. 107-40 provides the statutory authorization envisioned by the PCA's drafters to allow the use of the military domestically, whether for law enforcement purposes or not.

Conclusion

We believe that you have ample grounds to recommend to the Secretary of Defense that Jose Padilla qualifies as an enemy combatant under the laws of armed conflict, and that he may be detained as a prisoner by the U.S. Armed Forces. The Posse Comitatus Act presents no statutory bar to the transfer of Padilla to the Department of Defense.

Please do not hesitate to contact us if we can provide any further assistance.

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THE WHITE HOUSE
WASHINGTON
FOR OFFICIAL USE ONLY

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources, including the memorandum from the Director of Central Intelligence to the Acting Secretary of Defense, the letter from the Acting Secretary to the Attorney General, and the memorandum and legal opinion from the Attorney General to the Acting Secretary, all dated June 9, 2002;

Consistent with my memorandum on "Humane Treatment of al Qaeda and Taliban Detainees" of February 7, 2002;

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

- (1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;
- (2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;
- (3) Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;
- (4) Mr. Padilla possesses 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 or its armed forces, other governmental personnel, or citizens;
- (5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is 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;
- (6) it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and
- (7) it is, as the Attorney General has advised, consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.

DATE: June 9, 2002

