No. 05-6396

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSE PADILLA,

Petitioner-Appellee,

v.

C.T. HANFT, U.S.N., Commander,
Consolidated Naval Brig,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF OF *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL LAW, CENTER FOR CONSTITUTIONAL RIGHTS, AND NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONER-APPELLEE

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No. 05-6396 Caption: Padilla v. Hanft

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Heidi E. Gilchrist
(signature)

June 17, 2005
(date)

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INTEREST OF *AMICI CURIAE*

Amici curiae submit this brief in support of Petitioner-Appellee Jose Padilla, with the written consent of the parties. As listed in the Appendix, *amici* include professors of constitutional law, the Center for Constitutional Rights, and the National Lawyers Guild.

SUMMARY OF ARGUMENT

The military has subjected Jose Padilla—an American citizen arrested on American soil—to prolonged and indefinite incommunicado detention as an enemy combatant, without due process of law or any of the other procedural protections that are guaranteed under the United States Constitution to civilian detainees. Its action is wholly unprecedented. Not only is there no constitutional, statutory, or common law basis for this detention, the Executive's exercise of its newly asserted powers is also proscribed by Congressional legislation that expressly bars such detention. In enacting the Non-Detention Act of 1971, 18 U.S.C. § 4001(a), Congress reaffirmed the body politic's determination never again to repeat the shame of the military internment of 110,000 individuals of Japanese ancestry—70,000 of whom were American citizens—during World War II. Neither the Authorization for Use of Military Force, Pub L. No. 107-40, 115 Stat. 224 (2001) (hereinafter "AUMF"), nor the Supreme Court's decisions in *Ex*

parte Quirin, 317 U.S. 1 (1942), and *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), can overcome Congress's clear proscription against the President's use of his Commander-in-Chief powers to detain United States citizens in the domestic arena, far from active combat. The Non-Detention Act, the Supreme Court's rulings and the separation of powers doctrine on which our democracy rests preclude the Executive's use of asserted war powers within the United States to deprive citizens of their fundamental right to personal liberty.

ARGUMENT

I. SEPARATION OF POWERS PRECLUDES THE PRESIDENT FROM USING HIS COMMANDER-IN-CHIEF POWERS TO DETAIN JOSE PADILLA AS AN ENEMY COMBATANT IN THE FACE OF CONGRESS'S EXPRESS PROHIBITION IN THE NON-DETENTION ACT, 18 U.S.C. § 4001(a)

This case is governed by the framework set forth in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). Where the President takes "measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* at 637-38 (Jackson, J., concurring). Here, the President has acted in contravention of

the Non-Detention Act, 18 U.S.C. § 4001(a), which precludes the President from using his Commander-in-Chief powers derived from a declaration of war or authorization to use military force to detain an American citizen seized in the United States absent explicit Congressional authorization. Congress clearly had the constitutional authority to enact this statute.

A. The Non-Detention Act Precludes Detention of Citizens Seized on American Soil During Wartime Without Congressional Authorization

In 1971, Congress passed the Non-Detention Act, 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." This text is unambiguous and permits no exceptions to its proscription against executive detentions that are not specifically authorized by statute. *See Desert Palace Inc. v. Costa*, 539 U.S. 90, 93-94 (2003). ("Where . . . [a] statute's words are unambiguous the judicial inquiry is complete.") In directing its prohibition to "the United States" and not any particular civil or military authority acting in its name, the text makes clear its universal application. The sweeping and universal character of this explicit prohibition is fully supported by the Act's legislative history. The legislative history of § 4001(a) reflects Congress's clear intent to deprive the

Executive of authority to detain American citizens seized on American soil without explicit statutory authorization particularly during wartime.

The Non-Detention Act was enacted specifically to ensure that the internment of Japanese-Americans following the bombing of Pearl Harbor would not be repeated. Section § 4001(a) had its origins as an amendment to H.R. 234, 92nd Cong. (1971). The purpose of that bill was, as an initial matter, "to repeal the Emergency Detention Act of 1950" (hereinafter "EDA"). H.R. Rep. No. 92-116, at 2 (1971).[1] Under the EDA, the Executive was authorized in time of war or national emergency to detain persons as "to whom there is reasonable cause to believe will engage in acts of espionage or of sabotage."[2] Internal Security Act of 1950, Pub L. No. 831, 81st Cong. 2d Sess. (Sep. 23, 1950) at § 103, reprinted in H.R. Rep. No. 92-116 at p. 9. The House Judiciary Committee recognized, however, that:

> it is not enough to merely repeal the Detention Act. . . . Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority. It has been suggested that repeal alone would leave us where we were prior to 1950. The Committee believes that imprisonment or other detention of citizens should be limited to

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[1] For example, a precursor bill that the Senate passed in 1970, S. 1872, 91st Cong. (1969), simply would have repealed the EDA. S. Rep. No. 91-632 (1969).

[2] The legislative findings preceding the Act stated that a "world Communist movement," organized on a conspiratorial basis, and with the support of the most powerful enemy nation of the United States, had sent agents to enter the United States and engage in "treachery . . . espionage, sabotage, [and] terrorism." Internal Security Act of 1950, Pub L. No. 831 (Sep. 23, 1950) at § 101(1).

> situations in which a statutory authorization, an Act of Congress, exists.

H.R. Rep. No. 92-116 at 5. Congress was concerned that the mere repeal of the EDA would result in Congressional silence on the power of the Executive to detain during wartime – and that, out of this legislative vacuum, the courts might imply executive detention powers over citizens in the next war, under the President's Commander-in-Chief powers. If such a case were to arise, a future President might assert that a wartime detention of American citizens fell into the second part in the framework articulated by Justice Jackson in the *Youngstown* case, where the distribution of power between the President and Congress is "uncertain." 343 U.S. 579, 637 (1952).

To address this concern, Congressman Railsback introduced an amendment to H.R. 234, to "do something affirmatively, other than just the repeal, to make sure that we have restricted the President's *wartime powers*." *Prohibiting Detention Camps: Hearings on H.R. 234 and Other Bills Prohibiting Detention Camps Before the House Comm. on the Judiciary*, 92nd Cong., 1st Sess. 79 (1971) (hereinafter "Hearings") (emphasis added). *See North Haven Bd. of Education v. Bell*, 456 U.S. 512, 526-27 (1982) ("remarks . . . of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction."). Both Congressman

Railsback and Congressman Ichord, the Chair of the House Internal Security Committee and the chief opponent of the Railsback Amendment—which eventually passed into law as part of the Non-Detention Act of 1971 and is codified at 18 U.S.C. § 4001(a)—agreed that under the framework established by *Youngstown*, the Railsback Amendment would operate to constrain the President's otherwise broad war powers. Congressman Railsback explained that under the Court's analysis in *Youngstown*, "even though a President might have broad war power, they can be limited by acts of Congress." Hearings at 78. Similarly, Congressman Ichord observed that *Youngstown* "teaches that where Congress has acted on a subject within its jurisdiction, sets forth its policy, and asserts its authority, the President might not thereafter act in a contrary manner." 117 Cong. Rec. 31544 (1971). For Congressman Ichord, as for Congressman Railsback, the amendment that Railsback introduced would, "under the Youngstown Steel case . . . prohibit even the picking up, at the time of a declared war, at a time of an invasion of the United States, a man whom we would have reasonable cause to believe would commit espionage or sabotage." *Id.* at 31549.

Section 4001(a) was designed to ensure that in future wars, whatever wartime power the President had to detain American citizens believed to be

spies or saboteurs would be restricted. In fact, when President Nixon signed the Non-Detention Act in 1971, he stated:

> Our democracy is built upon the constitutional guarantee that every citizen will be afforded due process of law. There is no place in American life for the kind of anxiety – however unwarranted – which the Emergency Detention Act has evidentially engendered... This strong country has no reason to fear that the normal processes of law – together with those special emergency powers which the Constitution grants to the Chief Executive – will be inadequate to deal with any situation, no matter how grave, that may arise in the future.

RICHARD NIXON, PUBLIC PAPERS OF THE PRESIDENTS 986 (1971).

The government argues that the placement of § 4001(a) in the federal code overrides the plain meaning of the statute's text. Brief for the Respondent-Appellant at 59 (hereinafter "Gov't Br."). This argument is similarly unavailing. Section 4001(b) was drafted decades earlier, in a different era, for different reasons. Whatever may have led Congress to associate §4001(a) with §4001(b) does not bear on the meaning of § 4001(a).[3] As the District Court correctly held in responding to this

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[3] Section § 4001(b) of Title 18 was passed in 1891, a full 80 years before 1971, when § 4001(a) was passed. *See* Act of Mar. 3, 1891, § 4, 26 Stat. 839, 839, as amended by Act of May 14, 1930, § 2, 46 Stat. 325, 325 and Act of June 25, 1948, § 1. The current section heading was amended in 1971 to denote the division between § 4001's subsections as follows: "1971. Act September 25, 1971, substituted the [current] section heading [('Limitation on detention; control of prisons')] for one which read 'Control by Attorney General'; designated existing provisions as subsec. (b); and inserted subsec. (a)." *See* 18 U.S.C.S. § 4001 (2002), History; Ancillary Laws and Directives, Amendments. Section 4001(b) was left unchanged. *See* H.R. Rep. No. 92-116 at 6. Therefore the language of neighboring provisions is entirely irrelevant to the interpretation of § 4001(a).

argument, "Simply stated, the statute is clear, simple, direct, and [un]ambiguous.[4] It forbids *any* kind of detention of an United States citizen, except that it be specifically allowed by Congress." *Padilla v. Hanft*, 2005 U.S. Dist. LEXIS 2921 (D.S.C. 2005) at *32.

Finally, the Government's effort to draw a distinction between civilian and military detention under § 4001(a), *see* Gov't Br. at 60, must fail because the categories of persons Congress sought to protect under the Non-Detention Act included persons asserted by the President to be wartime saboteurs and spies. This is the very category of persons that the President now claims to have the power to detain militarily as unlawful enemy combatants. But Congress could not have intended to restrict the President's wartime authority to detain American citizens believed to be saboteurs and spies and at the same time permitted him to retain such authority by merely labeling the alleged saboteur or spy as an enemy combatant and detaining them in a military facility rather than a civilian one. In fact, Congressman Kastenmeier, who managed the bill, noted the testimony of a Justice Department official who indicated that it would be a mistake to assume:

> that all provisions for the detention of convicted persons are contained in title 18. He pointed to a number of criminal provisions that appear in other titles; for example, titles 21 —

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[4] Clearly the District Court intended to use the word "unambiguous" here and the use of "ambiguous" in the text is a typographical error.

> narcotics; 50 — selective service; 26 — internal revenue; and 49 — airplane hijacking... To alleviate these problems... [t]he amendment provides that no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress. In this way, the legislation also avoids the pitfalls that might be created by repealing the Detention Act by leaving open the possibility that people might nevertheless be detained without the benefit of due process, merely by executive fiat.

117 Cong. Rec. 31540-41.

B. Congress Has Not Authorized Padilla's Detention

As the government concedes, no statute explicitly authorizes the detention of American citizens as enemy combatants. The government contends, however, that the AUMF, permitting the use of force to respond to the attacks of September 11, 2001, Pub L. No. 107-40, 115 Stat. 224, implicitly vest the President with the extraordinary executive detention powers being asserted over Padilla.

The government's argument cannot be reconciled with due process principles. In a similar context, the Supreme Court has explained that the draconian power to deprive citizens of the fundamental right to liberty must be spelled out in clearest of terms:

> We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time

> measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

Ex Parte Endo, 323 U.S. 283, 300 (1944). As the District Court held, the AUMF does not contain the clear and unmistakable language authorizing detention that § 4001(a) demands. Moreover, the government's interpretation of this resolution would contravene the central purpose of § 4001(a).

1. The AUMF Does Not Constitute the Explicit Congressional Authorization to Detain American Citizens Required by the Non-Detention Act

Whether or not, in the absence of § 4001(a), the Joint Resolution could support the government's assertion of power to detain Padilla,[5] the

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[5] Both the timing of the passage of the AUMF—which came just seven days after the attacks—and the AUMF's plain language attest to the fact that Congress intended to restrict its application to those organizations and individuals who participated in the September 11 attacks. The limited discussion surrounding the adoption of the AUMF shows that Congress attempted to limit the use of force it was authorizing in a manner that would preclude its application against Padilla. The text of the resolution authorizes the use of force against only "those nations, organizations or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF. Further, the Congressional Record makes clear that "[t]hose persons, organizations or nations that were not involved in the September 11 attacks are, by definition, outside the scope of this authorization." 147 Cong. Rec. S9949 (daily ed. Oct. 1, 2001) (statement of Sen. Byrd). There was no discussion in Congress of extending the President's power to seize and detain without charge or trial American citizens on American soil. In fact, the Senate

language and history of § 4001(a) unequivocally precludes such a result. The central purpose of § 4001(a) was to ensure that a declaration of war—or a simple authorization of the use of military force—would not be deemed to provide the President with the authority to detain American citizens picked up on American soil without charge or trial, as many tens of thousands of Japanese-American citizens had been detained under President Roosevelt's 1942 Executive Order. Congressman Railsback, who introduced the provision now codified at 18 U.S.C. § 4001(a), explained that the express purpose of the provision was "to try to do something about what occurred in 1942 through President Roosevelt's Executive Order." 117 Cong. Rec. 31550 (1971). Similarly, Congressman Matsunaga, the chief sponsor of H.R. 234, stated that the purpose of § 4001(a) was "to add protective language to existing law in order to prevent a repetition of the type of interference with individual liberty which resulted in the incarceration in American concentration camps during World War II of some 110,000 persons of Japanese ancestry." Hearings at 48. As the Second Circuit majority observed, which neither the dissent nor the government contested, "almost every representative who spoke in favor of repeal of the Emergency

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deleted a proviso proposed by the White House that would have given the President the authority "to deter and pre-empt any future acts of terrorism or aggression against the United States," demonstrating unequivocally that "[i]t was not the intent of Congress to give the President unbridled authority . . . to wage war against terrorism writ large." *Id.*

Detention Act or adoption of the Railsback Amendment or in opposition to other amendments, described the detention of Japanese-American citizens during World War II as the primary motivation for their positions." *Padilla v. Rumsfeld*, 352 F.3d 695, 720 (2d. Cir. 2003), *overruled on other grounds by Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

If accepted, the Government's argument would lead to the nonsensical conclusion that Congress, in enacting § 4001(a), did not believe that the statute would have precluded the Japanese-American detentions—because the 1941 Declaration of War had provided the requisite Congressional authorization for these detentions. Yet Congress was clear that the enactment of § 4001(a) was intended to prevent the President from arguing that a Declaration of War gave him the authority to detain American citizens. Certainly, if a declaration of war would not give a future President the authority to repeat President Roosevelt's detention of Japanese-American citizens during World War II, then the much more limited AUMF permitting President Bush to use force cannot be read to authorize such detentions.

Moreover, the legislative history of § 4001(a) establishes that Congress's purpose in requiring statutory authorization for the detention of citizens was to ensure that citizens would not be domestically picked up and

detained during wartime without due process and the other procedural protections that are guaranteed under the Constitution to civilian detainees. For Congressman Railsback, H.R. 234 reflected "the intention of the sponsors that we must make clear that the only way a citizen may be detained is in the traditional common law manner—upon probable cause that the detainee has committed a crime against the government." Hearings at 41. Similarly, subcommittee member Congressman Biester supported H.R. 234 because it provided "that no executive authority of this country at any time has the power to detain any person who is a citizen of the United States without the safeguards of the criminal law." *Id.* at 60. Congressman Kastenmeier, the Chairman of the Subcommittee of the Judiciary Committee that drafted the H.R. 234 reported that H.R. 234 would ensure that citizens not "be detained without the benefit of due process, merely by executive fiat." 117 Cong. Rec. 31541 (1971). To Judiciary Committee Chairman Congressman Celler, H.R. 234 "would forbid the imprisonment or detention of citizens by the U.S., except pursuant to legislative authority and due process." *Id.* at 31553. In light of the 1971 Congress's determination to end the practice of domestic wartime detentions lacking in due process, § 4001(a) must be read as demanding some explicit Congressional determination to override a citizen's due process rights before such rights

can be negated. An authorization to use force that does not discuss detention, much less the detention of American citizens on American soil, will not suffice.

An examination of the text of § 4001(a) as it was originally proposed also makes clear that Congress intended that this provision require the adoption of a statute explicitly authorizing the detentions of citizens before the Executive could employ this power. H.R. Rep. No. 92-116 at 1. The original proposal provided that "no person shall be committed to imprisonment or otherwise detained except in conformity with the provisions of Title 18." *Id.* The Justice Department objected to the proposed language because it failed to recognize that there was explicit statutory authority for executive detention and incarceration of citizens contained in other titles of the U.S. Code besides Title 18. *Id.* at 4. Rather than attempt to delineate every section of the U.S. Code authorizing executive detention, the Judiciary Committee rewrote the text into its current form, permitting detentions pursuant to an act of Congress, wherever codified. The new language was not designed to change the purpose of the bill, which was to ensure that a citizen not be detained except in accordance with a specific provision of the U.S. Code authorizing such detention. It was simply

intended to address the Justice Department's legitimate objection that other provisions of the code besides Title 18 specifically authorized detentions.

Congress's clear purpose in enacting § 4001(a) was to remove whatever wartime authority a President may have to detain citizens whom he believes to be enemy belligerents in order to prevent a repetition of what happened in 1942. If a declaration of war or a lesser statutory authorization to use force were to be deemed an act of Congress sufficient to meet the statute's requirement for creating authority to detain, the statute's central purpose would be negated. Congress then would have *prohibited* the detention of citizens during times of warfare unless authorized by statute, and concomitantly *permitted* such detentions whenever it authorized warfare. Such an interpretation of § 4001(a) would be contrary to the statute's central purpose and cannot be endorsed. *See, e.g., Kosak v. United States*, 465 U.S. 848, 854 n.9 (1984) (rejecting "unduly generous interpretations... [that] run the risk of defeating the central purpose" of a statute).

In short, by enacting § 4001(a), Congress expressed a clear public policy against the Executive's detention of citizens, in wartime or in time of peace, even in the case of citizens "likely to engage in espionage or sabotage." H.R. Rep. No. 92-116 at 2. Congress did so at the time of the

Vietnam War, when widespread domestic dissent was focused on that war, in the wake of the political assassinations of major political figures, and in the face of domestic terrorism. The Supreme Court, in addressing the statute's application, has declared that "the plain language of § 4001(a) prescribes detention *of any kind* by the United States, absent a Congressional grant of authority to detain." *Howe v. United States*, 452 U.S. 473, 480 n.3 (1981) (emphasis in original). Nothing in the legislative history § 4001(a), its text, or its subsequent construction by the courts indicates that its clear proscription can be ignored here.

2. The Narrow Ruling in *Hamdi* Does Not Control This Case

The weight of the Government's argument relies on the narrow ruling in *Hamdi* that the AUMF permitted the detention of an American citizen seized while "carrying a weapon against American troops on a foreign battlefield." 124 S. Ct. at 2642 n.1. As the District Court held, the factual distinctions between Hamdi's capture and Padilla's arrest and detention render *Hamdi* inapplicable to this case. *Padilla*, 2005 U.S. Dist. LEXIS at *20.

This case raises very different and far graver concerns than did *Hamdi*. In *Hamdi*, the petitioner, an American citizen, was captured on a battlefield in Afghanistan fighting with a Taliban unit and wielding a

Kalashnikov assault rifle. 124 S. Ct. at 2637. Noting that the Taliban "are individuals Congress sought to target in passing the AUMF," *Id.* at 2640, and that "[t]he AUMF authorizes the President to use 'all necessary and appropriate force,'" *Id.*, the Court ruled that Hamdi's detention was "so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.* Therefore the AUMF acted as the specific legislation §4001(a) required for the President to detain Hamdi. However, as the District Court noted, "[j]ust because something is sometimes true... does not mean that it is always true." *Padilla*, 2005 U.S. Dist. LEXIS at *19. In fact, the Court repeatedly restricted their ruling to facts of Hamdi's capture and detention. *Hamdi,* 124 S. Ct. at 2635.[6]

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[6] As the District Court made clear, the plurality opinion in *Hamdi* limited their ruling to the facts of that case at least *ten* times. *Padilla* at *18 n.8 and accompanying text. ("'Justice Scalia largely ignores the context of [*Hamdi*]: a United States citizen captured in a *foreign* combat zone.' *Hamdi*, 124 S. Ct. at 2643 (emphasis in original)... In fact, in the plurality opinion, Justice O'Connor noted at least nine additional times that the Court's holding that Mr. Hamdi's detention as an enemy combatant was constitutionally permissible was limited to the facts of that case. *Id.* at 2635 ('Congress authorized the detention of combatants in the *narrow circumstances* alleged here.') (emphasis added); *Id.* at 2639 ('We therefore answer only the *narrow question* before us.') (emphasis added); *Id.* at 2639-40 ('We conclude that the AUMF is explicit congressional authorization for the detention of individuals in the *narrow category* we describe.') (emphasis added); *Id.* at 2640 ('We conclude that the detention of individuals falling within the *limited category* we are considering ... is an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.') (emphasis added); *Id.* at 2641 ('Congress has clearly and unmistakably authorized detention in the *narrow circumstances* considered here.') (emphasis added); *Id.* at 2642 ('Ex parte Milligan ... does not undermine our holding about the Government's authority to seize enemy combatants, *as we define that term today.*') (emphasis added); *Id.* at 2642 n.1 ('Here the

Under no circumstances could the AUMF be interpreted as Congressional authorization for a domestic arrest and detention of an American citizen such as Padilla, who was taken into custody unarmed, in the United States, on suspicion of a crime he is alleged to have planned to execute in the United States. First, the intent of § 4001(a) was to protect citizens domestically from precisely this type of Executive detention. Congress's clear purpose in enacting § 4001(a) was to remove whatever wartime authority a President may have had to domestically arrest and detain citizens whom he believes to be enemy agents in order to prevent a repetition of what happened in 1942. Second, to find otherwise would result in the ambiguous wording of the AUMF eviscerating all force of §4001(a). While it is logical that the AUMF authorized capture of armed combatants on a foreign battlefield, to further read the AUMF to permit domestic arrest and detention of citizens without charge is an impermissible expansion of Executive power. Section 4001(a) clearly requires something more explicit. Otherwise, if a declaration of war or other statutory authorization to use force were to be deemed an Act of Congress sufficient to meet § 4001(a)'s

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basis asserted for detention by the military is that Hamdi was *carrying a weapon against American troops on a foreign battlefield*; that is, that he was an enemy combatant.') (emphasis added); *Id.* at 2643 (noting with disapproval that 'Justice Scalia finds the *fact of battlefield capture* irrelevant....') (emphasis added); *Id.* ('Justine Scalia can point to no case or other authority for the proposition that those *captured on a foreign battlefield* ... cannot be detained outside the criminal process.') (emphasis added).")

requirement for creating authority to detain, § 4001(a) would be rendered meaningless. Such an interpretation would require finding that the AUMF repealed § 4001(a) by implication. Further, in passing § 4001(a), Congress would have prohibited the detention of citizens during times of warfare unless authorized by statute, and paradoxically permitted such detentions whenever it has authorized warfare. Such an interpretation of the statute – which renders it meaningless – cannot be countenanced.

Simply put, the President has sought to avoid the requirements of process, Constitutional protections, and Congressional limits on Executive detention by asserting that Padilla's detention is a military matter that civilian courts have no role in. While this is not a novel concept in American history, attested to by the disgrace of Japanese-American internment, Congress recognized the fallacy of such reasoning in a democratic society when it passed §4001(a),[7] requiring Congressional authorization for future Executive detention. Congress has not passed any legislation authorizing Padilla's detention. His detention is therefore in violation of §4001(a).

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[7] *See also Civil Liberties Act of 1988, 50 U.S.C. § 1989 et. seq.* (providing a governmental apology and $1.65 billion in reparations for internees).

II. THE NON-DETENTION ACT'S PRECLUSION OF THE PRESIDENT'S AUTHORITY TO DETAIN PADILLA IS CLEARLY WITHIN THE CONSTITUTIONAL AUTHORITY OF CONGRESS

The Government argues that an interpretation of 18 U.S.C. § 4001(a) that prohibits Padilla's detention here would raise serious questions as to whether Congress can constrain the "inherent authority as Commander in Chief during wartimes to order the military detention of combatants." Gov't Br. at 57. The Supreme Court's rulings, and the Constitution's text, have long removed any doubt as to Congress's power to regulate the detention of an American citizen who is seized within the United States, outside of an active theatre of military operations.

A. The Broad Discretion Accorded to the President's Conduct of Military Operations Abroad is Not Accorded to His Actions Addressing Domestic Affairs, Even During Wartime

The Supreme Court has long recognized that the distinction between internal and external governmental affairs is a critical factor in determining the scope of the President's constitutional war powers. *Youngstown*, 343 U.S. at 645-46 (Jackson, J., concurring). While great deference is given to the President's authority as Commander-in-Chief to act in external affairs, the Court has never accepted the proposition that the President's Commander-in-Chief authority, standing alone, may be turned inward to

intrude upon domestic affairs, even in times of national security threats or undeclared wars. *See Youngstown*, 343 U.S. at 642 (Jackson, J., concurring); *see also id.* at 632 (Douglas, J., concurring) ("[O]ur history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs."); *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring) (reasoning that "[i]n *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact," and that in *Curtis-Wright*, the effect of the President's action was "entirely external to the United States and [falls] within the category of foreign affairs.").

The President's military powers were never intended "to supercede representative government of internal affairs," a proposition that Justice Jackson found "obvious from the Constitution and from elementary American history." *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). The Government seeks to avoid the ruling in *Youngstown* by casting the seizure of the steel mills as merely a "domestic economic initiative" aimed at "prevent[ing] a work stoppage," while characterizing Padilla's detention as "a core exercise of the President's Commander-in-Chief power." Gov't Br. at 58. In fact, the seizure of the steel mills at issue in *Youngstown* was

not a purely domestic economic matter, but, because steel production was considered integral to the operation of the War in Korea, it was justified by President Truman as an exercise of his Commander-in-Chief power. *Youngstown*, 343 U.S. at 583.[8] In this regard, Justice Jackson declared in *Youngstown* that "no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed force to some foreign venture." *Youngstown*, 343 U.S. at 642. *See also id.* at 644. As the District Court noted in addressing the government's argument below, "[s]imply stated, this is a law enforcement matter, not a military matter." *Padilla*, 2005 U.S. Dist. LEXIS at *36.[9]

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[8] *See also Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814) (holding that the President could not seize, as enemy property, material found on U.S. land at the commencement of hostilities in 1812 without Congressional authority); *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850) (finding that the President, as Commander-in-Chief, could not annex territory to the United States by virtue of a military conquest unless he received authority from Congress); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866) (military commissions cannot be justified "on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is no unwritten criminal code to which resort can be had as a source of jurisdiction").

[9] It is beyond question that Congress has the constitutional power to regulate the detention of American citizens who are captured within the United States during time of war or military conflict. The Constitution does not limit Congress's war powers to the authorization or declaration of war; rather, it explicitly provides Congress with a panoply of war powers including: (i) the power to "make Rules concerning Captures on Land and

B. The Plain Meaning of the Non-Detention Act is Consistent With the Limits the Court Has Placed on the Commander-in-Chief's Power to Detain American Citizens

The plain meaning of § 4001(a) is that Congress sought to exercise the full extent of its Constitutional power to preclude the executive detentions of American citizens during war or other national emergencies without statutory authorization. Congress explicitly recognized the Constitutional framework provided by *Youngstown*, and intended to occupy the field by precluding executive detentions. "Even though a President might have broad war powers, they can be limited by acts of Congress." Hearings at 78 (statement of Rep. Railsback); *see also* 117 Cong. Rec. 31551 (1971) (statement of Rep. Railsback). Congress also recognized that the President had exercised a common-law power to detain prisoners during the conduct of war—a power which they understood to be limited to "the theater of

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Water," U.S. Const. Art. I, § 8, cl. 11; (ii) the sole authority to authorize the seizure of citizens' homes for military purposes during times of war, U.S. Const. Amend. III; and (iii) the exclusive power to authorize the seizure of enemy property within the United States during wartime. *Brown*, 12 U.S. at 115-16. Indeed, the Supreme Court, early in its history, affirmed a Congressional statute which limited the President's power during wartime to seize ships on the high seas that were thought to be aiding the enemy. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (finding that Presidential Order did not make seizures legal). If Congress has the authority to limit the President's Commander-in-Chief power to capture ships on the high seas during a time of military conflict, it certainly must have the constitutional authority to limit the President's power to detain American citizens in the United States during wartime. Thus, any attempt to raise constitutional doubts as to Congress's power to preclude Padilla's detention without process is spurious.

active military operations," "confined to the locality of actual war"—and intended to leave that power undisturbed. Hearings at 41; *see also* 117 Cong. Rec. 31570 (1971) (statement of Congressman Seiberling). Therefore, unless "Courts are actually closed, and it is impossible to administer criminal justice according to law," analogous to a domestic battlefield situation, § 4001(a)'s prohibition was meant to apply.[10] *Id.; see also id.* at 31551 (statement of Rep. Railsback that there is only one exception under *Milligan*—"that of impossibility, that is situations calling for martial law"). The statute thus prohibits executive detention unless martial law exists and the civilian courts are closed. Congressman Coughlin expressed Congress's understanding thus:

> In the case of invasion or insurrection, the President has the power to proclaim martial law and take extraordinary measures to maintain order. There is no argument, to my knowledge, that the President should not possess such power.
>
> The bill simply says that in the absence of a martial law situation and when the courts are functioning, then we should use the judicial process.

117 Cong. Rec. 31777.

The President claims, however, that in the war against Al Qaeda, "the territory of the United States is part of the battlefield." App. Br. at 19.

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[10] This case obviously does not raise any question of whether Padilla was detained where "the courts are actually closed" and martial law applies.

Congress rejected that argument in 1971. First, many Representatives cited *Milligan* and used its language of active military operations where the courts are closed to describe where they thought their authority to proscribe detentions ended. *See* Hearings at 40-41 (statement of Rep. Railsback); 117 Cong. Rec. 31551 (1971) (statement of Rep. Railsback); *id.* at 31570 (statement of Rep. Abzug); *id.* at 31779 (statement of Reps. Drinan and Pepper); Hearings at 45 (statement of Rep. Matsunaga); *id.* at 63 (statement of Rep. Anderson). They therefore intended that the plain meaning of the statute apply except where "impossibility" prevented its application. Hearings at 41 (statement of Rep. Railsback); 117 Cong. Rec. 31570 (1971) (statement of Rep. Abzug). Moreover, Congress was fully aware of the total war, global battlefield argument, and explicitly rejected it. The situation Congress explicitly addressed—the detention of Japanese-American citizens during World War II—involved almost precisely the same executive argument made here. There too, U.S. territory had been attacked and military officials believed that further attacks on the West Coast might be imminent; there too, the President and his military commanders claimed that "military necessity" justified the detentions. *See Korematsu v. U.S.*, 323 U.S. 214, 227 (1944) (citing Public Proclamation No. 1, 7 Fed.Reg. 2320 (1942)). Congress's indisputable intent to ensure that such detentions never

happen again precludes the argument the government makes here that the statute should be read to permit a broad battlefield exemption extending throughout the United States even in the absence of active military operations.

The Congressional reading of the implied limits to its power to preclude the Executive from detaining American citizens comports with the Supreme Court's reading of what constitutes a battleground. *See Milligan*, 71 U.S. at 121 (the laws and usages 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"). In addition to *Milligan*, the Court in *Youngstown* used the language of "day to day fighting in a theater of war" to determine that the United States was not a battleground to which President Truman would have been able to issue an executive order to seize and operate steel mills. *Youngstown*, 343 U.S. at 587. Five years later in *Reid v. Covert*, Justice Black's opinion held that the military power to try American citizens in tribunals only extended to "an area of actual fighting." 354 U.S. 1, 33-35 (1957). Padilla's detention does not meet that standard.

C. *Quirin* Does Not Support the Executive's Claim of Authority to Detain Citizens Indefinitely by Labeling Them Enemy Combatants

The Government relies heavily on the Supreme Court's opinion in *Quirin*, 317 U.S. 1 (1942) as authority for its power to detain Padilla as an enemy combatant and its reading of 18 U.S.C. § 4001(a) as not applicable to this case. *Quirin* provides no such support.

Quirin decided the question of whether "admitted enemy invaders" could be detained "for trial by Military Commission", pursuant to Congressional authorization for such a trial. 317 U.S. at 47; *see also id.* at 18, 29. Here, by contrast, the Government seeks to indefinitely detain without charge or trial a citizen without Congressional authorization, in the face of a Congressional statute whose plain text forbids such detention.

As an initial matter, the *Quirin* decision predated the passage of § 4001(a). Therefore, any support the *Quirin* decision lends for holding citizens in Executive detention is undercut by the subsequent Congressional action forbidding such detention unless specifically authorized by Congress.

Further, the *Quirin* Court declined to determine whether the President had any broad Commander-in-Chief power to try suspected spies before military commissions "without the support of Congressional legislation." 317 U.S. at 29. As the District Court noted, "it is clear from *Quirin* that the

Court found that Congress had 'explicitly provided... that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.'" *Padilla*, 2005 U.S. Dist. LEXIS at *24 (quoting *Quirin*, 317 U.S. at 28). Here, by contrast, as the District Court held, Congress has expressly disapproved the detention of American citizens by the Executive without due process and pursuant to some explicit statutory authority.

In fact, in *Milligan*, the Court held that civilians could not be tried before military tribunals except in times of martial law. *Milligan*, 71 U.S. at 121 *Milligan*'s factual scenario closely resembled this case: an unarmed citizen arrested in his home, far from any battlefield, without a Congressional act authorizing his detention. The Court in *Hamdi* made clear that capture on a battlefield where active combat is ongoing was "central" to the *Milligan* Court's holding and ultimately to its own analysis. *Hamdi*, 125 S. Ct. at 2642 (stating that "had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different... he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen"). While limited and postdated by *Quirin*, *see id.* at 2643, "*Milligan's* greatest import to the case at bar is the same as that found in *Quirin*: the detention of a United States

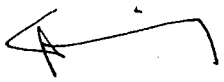
citizen by the military is disallowed without explicit Congressional authorization." *Padilla,* 2005 U.S. Dist. LEXIS at *27.

In sum, nothing in the Supreme Court's decision in *Quirin* calls into question the constitutionality of § 4001(a) in proscribing the executive detention of Padilla.

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,



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APPENDIX

AMICI STATEMENTS OF INTEREST

Bruce A. Ackerman is Sterling Professor of Law and Political Science at Yale University. He is an internationally renowned expert on constitutional law, and has published widely and testified before numerous Congressional committees on constitutional history and structure, separation of powers, and civil liberties in times of national crisis.

Erwin Chemerinsky is the Alston & Bird Professor of Law at Duke Law School. Professor Chemerinsky is one of the nation's leading experts in the fields of constitutional law and federal jurisdiction.

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Martha Minow is Jeremiah Smith, Jr. Professor of Law, Harvard Law School and one of the world's leading human rights scholars. She has published widely on the topics of war crimes and special postwar tribunals.

Peter Shane is Joseph S. Platt/Porter Wright Morris & Arthur Professor of Law and Director of the Center for Law, Policy, and Social Science at Ohio State University. A former Justice Department lawyer, Professor Shane is a constitutional and administrative law scholar and the author of casebooks in both separation of powers and administrative law.

Geoffrey R. Stone is the Harry Kalven, Jr. Distinguished Service Professor of Law at the University of Chicago. He is the former Dean of the University of Chicago Law School and former Provost of the University of Chicago. He was written extensively in the field of constitutional law and is an editor of the Supreme Court Review.

Peter L. Strauss is Betts Professor of Law at Columbia Law School. He served in the office of the Solicitor General from 1968 to 1971 and has chaired the Separation of Powers Committee (among others) of the ABA's Section on Administrative Law and Regulatory Practice.

The **Center for Constitutional Rights** ("CCR") is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. Founded in 1966 during the Civil Rights Movement, CCR has a long history of litigating cases on behalf of citizens accused of seditious behavior or thought to pose a national security threat during wartime, *see, e.g.*, *United States v. United States District Court*, 407 U.S. 297 (1972). As part of its advocacy on behalf of those whose civil, constitutional and human rights have been violated, CCR has led the campaign to appoint counsel and ensure meaningful process to detainees held at Guantánamo Bay, Cuba. *See Rasul v. Bush*, 124 S. Ct. 2686 (2004).

The **National Lawyers Guild** is a national non-profit legal and political organization dedicated to using the law as an instrument for social amelioration. Founded in 1937 as an alternative to the then-racially segregated American Bar Association, the Guild has a long history of representing individuals who the government has deemed a threat to national security. The Guild represented the Hollywood Ten, the Rosenbergs, and thousands of individuals targeted by the House Un-American Activities Committee. Guild members argued *United States v. United States District Court*, the Supreme Court case that established that Richard Nixon could not ignore the Bill of Rights in the name of national security and led to the Watergate hearings and Nixon's resignation. Guild members defended FBI-targeted members of the Black Panther Party, the American Indian Movement, the Puerto Rican independence movement and helped expose illegal FBI and CIA surveillance, infiltration and disruption tactics (COINTELPRO) that the U.S. Senate "Church Commission" hearings detailed in 1975-76 and which led to enactment of the Freedom of Information Act and other specific limitations on federal investigative power.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the foregoing Brief of *Amicus Curiae* Professors of Constitutional Law, Center for Constitutional Rights, and National Lawyers Guild in Support of Petitioner-Appellee by first-class mail this 17th of June, 2005, upon each of the following counsel:

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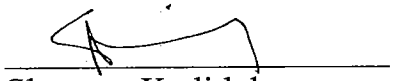

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