No. 03-1027

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,

Petitioner,

—v.—

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* ORIGINAL CONGRESSIONAL SPONSORS OF 18 U.S.C. § 4001(A) IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE

PAGE

Statutes And Legislative History

PAGE

Miscellaneous

INTEREST OF *AMICI CURIAE*

Amici curiae, current and former Members of Congress, are original sponsors of 18 U.S.C. § 4001(a). They urge this Court to hold that the detention of José Padilla violates the provisions of that Act.[1]

The Hon. John Conyers, Jr. represents the 14th Congressional District of Michigan in the House of Representatives, where he serves as Ranking Member of the House Judiciary Committee. During the 92nd Congress, Congressman Conyers was a Member of Subcommittee 3 of the House Judiciary Committee. He was one of the original sponsors of § 4001(a).

The Hon. Robert F. Drinan represented the 3rd Congressional District of Massachusetts from 1971–1973 and the 4th Congressional District of Massachusetts from 1973–1981. During the 92nd Congress, Father Drinan was a Member of the House Committee on Internal Security and a Member of Subcommittee 3 of the House Judiciary Committee. He was one of the original sponsors of § 4001(a).

The Hon. Robert W. Kastenmeier, a World War II veteran, represented the 2nd Congressional District of Wisconsin in the House of Representatives from 1959–1991. In the 92nd Congress, Mr. Kastenmeier chaired Subcommittee 3 of the House Judiciary Committee and was a primary sponsor of § 4001(a). Mr. Kastenmeier submitted the Committee Report on H.R. 234, the bill later codified at § 4001(a).

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[1] Written consent of all parties to the filing of this brief is on file with the Clerk of the Court. This brief has not been authored in whole or in part by any counsel for a party. No person, other than *amici curiae* and their counsel, has made any monetary contribution to the preparation or submission of this brief.

The Hon. Abner Mikva, a World War II veteran, represented the 2nd Congressional District of Illinois from 1969–1973 and the 10th Congressional District of Illinois from 1975–1979. During the 92nd Congress, Judge Mikva served on Subcommittee 3 of the House Judiciary Committee and was a primary sponsor of § 4001(a). He was appointed to the U.S. Court of Appeals for the D.C. Circuit in 1979 and became Chief Judge in 1991, before stepping down in 1994.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises profound questions about the appropriate balance of power between the Legislature and the Executive regarding the detention of U.S. citizens. The Executive has detained José Padilla, a U.S. citizen, for almost two years, but it has yet to charge him with any crime. Originally arrested on May 8, 2002, Mr. Padilla was seized by civilian authorities inside the United States. On June 9, 2002, the President designated him an "enemy combatant" and ordered him transferred to a military prison in South Carolina. He has remained at that prison ever since. For most of those twenty-two months, Mr. Padilla has been held in complete isolation, barred from communicating with his lawyers, the court, or the outside world in any way. On March 3, 2004, he was allowed to meet with his lawyers for the first time in nearly two years.

On December 18, 2003, the U.S. Court of Appeals for the Second Circuit determined that Mr. Padilla's detention violates 18 U.S.C. § 4001(a), a federal statute governing the detention of U.S. citizens. *See Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003). Passed in 1971, §4001(a) directs that "no U.S. citizen" be detained

"except pursuant to an Act of Congress." The Act codifying § 4001(a) also repealed the Emergency Detention Act of 1950 (EDA), which had granted the Executive limited powers of preventive detention.

Section 4001(a) was an assertion of Legislative over Executive authority. Congress was determined to declare its own primacy in matters concerning the detention of U.S. citizens. As the legislative history makes clear, § 4001(a) was meant to proscribe the detention of U.S. citizens unless and until the power to do so was explicitly grounded in statute. In this, it did not matter whether the Executive acted pursuant to its military or civilian powers.

Amici respectfully request that this Court enforce the unequivocal mandate of § 4001(a). In the face of plain statutory language and clear legislative history, Mr. Padilla's detention cannot be upheld under U.S. law.

ARGUMENT

I. THE TEXT OF 18 U.S.C. § 4001(A) MAKES CLEAR THAT *NO* U.S. CITIZEN MAY BE DETAINED ABSENT STATUTORY AUTHORIZATION

In construing a statute, this Court begins "where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The words Congress employs must be interpreted " 'in accordance with [their] ordinary and natural meaning,' " unless otherwise defined in the statute. *Johnson v. United States*, 529 U.S. 694, 715 (2000) (Scalia, J. dissenting) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute

what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992).

The language of 18 U.S.C. § 4001(a) is simple, direct and unambiguous: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2000). In enacting these nineteen words, Congress made clear that *no* American citizen could be detained by the United States unless Congress had acted to authorize the detention. The words themselves admit no qualification or exception. No contrary definitions were provided, and no ambiguity exists in the language. Congress's words must be given their ordinary meaning.

This Court has emphasized that when the meaning of a statute is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). In the face of unambiguous language, the "first canon [of statutory interpretation] is also the last: 'judicial inquiry is complete.' " *Conn. Nat'l Bank*, 503 U.S. at 253-54 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). "[P]arties should not seek to amend the statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

This Court has already affirmed that § 4001(a) means precisely what it says. *See Howe v. Smith*, 452 U.S. 473 (1981). *Howe v. Smith*, the only Supreme Court case to construe the statute, held that § 4001(a) "proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Id.* at 479 n.3 (emphasis in original). This means that, unless Congress has enacted a statute specifically authorizing Mr. Padilla's detention, the detention is forbidden by law.

Despite this clarity of language, the government now argues that § 4001(a), properly construed, applies much more narrowly than its words direct. *See* Petitioner's Brief at 44-45. According to the government, § 4001(a) does not apply to—and was not intended to apply to—the military's detention of U.S. citizens during wartime.[2] *Id.* Nothing in the statute's text suggests any such limitation, however. On the contrary, the language of § 4001(a) is unequivocal and straightforward in its reach: "*No* citizen" shall be detained "*unless* pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (emphases added).

II. CONGRESS SOUGHT TO PROHIBIT THE CIVILIAN OR *MILITARY* DETENTION OF ANY U.S. CITIZEN ABSENT *EXPLICIT* STATUTORY AUTHORIZATION

This ordinary understanding of the statute's language is fully supported by its legislative history. The legislative history of § 4001(a) makes clear that Congress intended to ensure that no U.S. citizen could be detained without an explicit statutory basis. In this, it did not matter whether the President acted under his military or civilian powers. Congress's intent in enacting H.R. 234—the bill now codified at § 4001(a)—is amply reflected in the Committee Report on the bill, the contemporaneous statements of its sponsors, and the debates on the House and Senate floors.[3] *See* H.R. 234, 92d Cong. (1971).

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[2] The government's argument that the court of appeals' reading of § 4001(a) would preclude the battlefield detention of U.S. citizens, *see* Petitioner's Brief at 48, is addressed below at note 6.

[3] This Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which '[represent] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' " *Garcia v. United States*, 469 U.S. 70, 76 (1984)

A. Congress Realized That Under *The Steel Seizure Case*, Mere Repeal Of The EDA Would Be Insufficient To Achieve This Goal.

The Committee Report on the bill, submitted by the House Committee on the Judiciary, reveals that the purpose of H.R. 234 was "twofold." *See* H.R. REP. NO. 92-116, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435 ("House Report"). Its first purpose was: "(1) to restrict the imprisonment or other detention of citizens of the United States to situations in which statutory authority for their incarceration exists. . . ." *Id.* Its second purpose was: "(2) to repeal the Emergency Detention Act of 1950," 50 U.S.C. §§ 811-26 (repealed 1971), Title II of the Internal Security Act of 1950, which had granted the Executive limited powers of preventive detention at the outbreak of the Korean War. H.R. REP. NO. 92-116, at 2, *reprinted in* 1971 U.S.C.C.A.N. at 1435-36; *see also infra* Section III.A. The legislative history of H.R. 234 reveals that Congress's second purpose, the repeal of the EDA, provided the impetus behind what was to become its larger first purpose—asserting broad congressional control over the detention of U.S. citizens.

The 92nd Congress acted to repeal the EDA in 1971 out of concern that its scheme of preventive detention was subject to "grave" constitutional challenge. H.R. REP. NO. 92-116, at 4, *reprinted in* 1971 U.S.C.C.A.N. at 1438. But the EDA, whatever its inadequacies, had at least established some affirmative limitations on preventive detention by the Executive Branch. *See infra*

(alteration in original) (citation omitted). The Court has also held that the "remarks . . . of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); *see also Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (such statements "deserve[ ] to be accorded substantial weight . . .").

Section III.B. The Judiciary Committee worried that repeal, standing alone, might leave the field unoccupied and free the Executive of all restraint.

> [T]he Committee believes that it is not enough merely to repeal the Detention Act. The Act, concededly can be viewed as not merely as an authorization for but also in some respects as a restriction on detention. Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation on the limits of executive authority. It has been suggested that repeal alone would leave us where we were prior to 1950.

H.R. REP. NO. 92-116, at 5, *reprinted in* 1971 U.S.C.C.A.N. at 1438.

Unwilling to turn back the clock, given the detention experiences of World War II, the Judiciary Committee added an amendment—the Railsback Amendment—which set forth the language now codified at § 4001(a). "The Committee believes that the imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists." *Id*.

Ironically, the sponsors of H.R. 234 were first alerted to the implications of simple repeal by Congressman Ichord, Chair of the House Committee on Internal Security and the leading opponent of the Railsback Amendment. The Committee on Internal Security had proposed H.R. 19163 (later H.R. 820 in the 92nd Congress), a rival bill that sought to amend, rather than repeal the EDA. *See* H.R. 19163, 91st Cong. (1970). This bill would have retained the EDA's preventive detention scheme, while incorporating additional procedural protections.

In the House Report on H.R. 19163, Congressman Ichord warned his fellow representatives that simple

repeal might grant even more power to the Executive. *See* H.R. REP. NO. 91-1599, at 12 (1970). He reminded his colleagues

> of the unfortunate occurrence during World War II when the President, in the exercise of his war powers and without congressional restraint, detained persons of Japanese ancestry on a group basis without regard to their status as American citizens and without regard to the question of individual loyalty, an action which in our opinion, at least in hindsight, must be regarded as a dark day in our history. Surely, a consideration of the fact that a repeal of the act removes all restraints on the Executive and would return us to the status existing in World War II should give us pause.

Id. Congressman Ichord reemphasized these points during the floor debate on H.R. 234 and suggested that his proposal to amend the EDA was therefore more "libertarian" than a proposal for outright repeal. 117 CONG. REC. 31,546 (1971). He also noted that it was only after he raised these issues that the House Judiciary Committee "went to work and they came up with the Railsback Amendment." *Id.*

Congressman Railsback described the genesis of his Amendment in similar terms. During the Judiciary Committee hearings, "it became apparent that what was said in the Internal Security report might be true." *Id.* at 31,549. The sponsors on the Judiciary Committee realized that with repeal alone,

> we would not be correcting what happened in the year 1942 when the citizens were rounded up . . . .
>
> . . . [T]he Committee on the Judiciary felt that it would be wise not only to repeal title II but to try to do something about what occurred in 1942 through

> President Roosevelt's Executive Order. So we came up with an amendment that says:
>
> > No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
>
> In other words, an Executive has to have some kind of congressional authorization before he can detain a citizen.

Id. at 31,549-50.

This analysis of simple repeal, by opponents and sponsors of H.R. 234 alike, was informed by their careful consideration of this Court's decision in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). As the Report of the Committee on Internal Security noted:

> [The *Youngstown*] decision teaches that where the 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 . . . .
>
> The question then is whether Congress shall express itself upon this subject, or whether it shall wipe the slate clean of such restraints as are now imposed on the executive power by the Emergency Detention Act of 1950.

Id. at 31,551 (quoting the Internal Security Report) (alteration in original).

Although the Committee on Internal Security had raised this question in connection with its own bill to amend the EDA, Congressman Railsback quoted back this language during the floor debate in support of his own Amendment. *See id.* He did so to emphasize that Congress did have the authority under *Youngstown* to

affirmatively prohibit Executive detention in wartime without the "prior consent of the Congress":

> To those who would view such a prohibition as in derogation of the Executive's wartime powers, I would refer them to the *Youngstown* steel seizure cases—343 U.S.C. [sic] 579—where the Supreme Court indicated even though a President might have broad wartime powers, they may be limited by acts of Congress.

Id. Given that the sponsors of H.R. 234 had determined that "[n]either modification nor repeal" of the EDA could "remove what amounts to a national disgrace," Congressman Railsback urged his fellow Members to enact the broad affirmative prohibition provided for in H.R. 234. *Id.* They did so on September 16, 1971, by a vote of 356-49.[4] *Id.* at 31,781.

B. Congress Endorsed The Broad Scope Of The Railsback Amendment And Understood Its Reach To Include Military Detentions In Wartime.

The language of the Railsback Amendment was debated extensively on the House floor, and the exchanges between the sponsors and opponents of H.R. 234 illustrate a Congress fully aware of the implications of the language used. Contrary to the government's position, Congress understood that the language of the proposed amendment was to apply to the military detention of citizens during wartime.

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[4] The Senate adopted the Railsback Amendment on September 16, 1971. Just before the measure came up for a vote, Senator Daniel Inouye, the primary sponsor of the Senate's companion bill to H.R. 234, urged his fellow Senators to vote for the language of the Railsback Amendment, characterizing the provision as "a valuable addition to my bill." 117 CONG. REC. 32,145 (1971).

Congressman Ichord led the fight against the Railsback Amendment, which he termed "this most dangerous committee amendment." *Id.* at 31,544. On the House floor, he warned that the Railsback Amendment

> would deny to the President the means of executing his constitutional duties, and could have the effect of rendering him helpless to cope with the depredations of those hard-core revolutionaries in our midst who, in the event of war, may be reasonably expected to attempt a widespread campaign of sabotage and bloodletting, including the assassination of public officials, in aid of the enemy.

Id.[5]

Congressman Ichord pressed Congressman Railsback on this point, asking whether the sponsors of H.R. 234 would really deny the President the authority to preventively detain U.S. citizens in wartime. The following exchange—in which Congressman Railsback emphasized that the President had other means at his disposal—illustrates that Congress fully explored the ramifications of the Railsback Amendment:

> Mr. ICHORD: . . . Does the gentleman believe that in this country today there are people who are skilled in espionage and sabotage that might pose a possible threat to this Nation in the event of a war with nations of which those people are nationals or citizens?

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[5] Congressman Williams, another opponent of the Railsback Amendment, cautioned his colleagues in similar terms:

> . . . I do not want to see the President's hands tied by the language of the Kastenmeier subcommittee proposal which would require an act of Congress before any likely subversive or would-be saboteur could be detained.

Id. at 31,544.

> Mr. RAILSBACK: Yes.
>
> Mr. ICHORD: Does the gentleman believe then that if we were to become engaged in a war with the country of those nationals, that we would permit those people to run at large without apprehending them, and wait until after the sabotage is committed?
>
> Mr. RAILSBACK: I think what would happen is what J. Edgar Hoover thought could have happened when he opposed [the detention of Japanese-Americans] in 1942. He suggested that the FBI would have under surveillance those people in question and those persons they had probable cause to think would commit such actions.

Id. at 31,551-52.[6]

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[6] In addition to arguing that there were means other than preventive detention at the Executive's disposal, the sponsors of § 4001(a) emphasized that the Railsback Amendment did not (and could not) impinge on the President's inherent powers, *if* the President had any inherent power to detain U.S. citizens. Congressman Abner Mikva noted, "If there is any inherent power of the President . . . to authorize the detention of any citizen of the United States, nothing in the House bill that is currently before this Congress interferes with that power, because obviously no act of Congress can derogate the constitutional power of a President." *Id.* at 31,555.

In its brief, the government argues that the Second Circuit's construction of § 4001(a) raises "serious constitutional questions" as it "would preclude the military's detention even of an American citizen seized while fighting for the enemy in the heat of traditional battlefield combat." Petitioner's Brief at 48. Even if the government was correct, however, these facts are not presented by this case. Mr. Padilla was not seized on a "traditional battlefield," foreign or domestic. He was arrested by civilian authorities at Chicago's O'Hare Airport. The military became involved a month later, when military personnel seized Mr. Padilla from his civilian jail cell in New York, and transferred him to a military brig.

Congressman Ichord also denounced the Railsback Amendment as impractical, arguing that Congress might not be able to move quickly enough in times of crisis:

> But this is the nuclear age. We cannot expect an enemy to hold to the ancient etiquette of war by making formal declarations before undertaking their attack. In this nuclear age we should not expect to be forewarned. Nor is it likely that Congress will be able to sit. If it cannot sit, it cannot legislate. Under no circumstances, therefore, can we afford the luxury of an amendment, which is so clearly unwise, unnecessary, and dangerous.

Id. at 31,545.

The sponsors of H.R. 234 pushed back. Congressman Mikva, one of its primary sponsors, stated that in his view, the EDA was "an unwarranted delegation of unnecessary power" to the President. *Id.* at 31,566. He emphasized that in a future crisis, he would rather "leave it to the Congress to judge under what circumstances an American citizen should be detained." *Id.* He explained to his fellow Members:

> By repealing the statute, Congress would terminate the President's ability to incarcerate people whenever he determines that an emergency exists. It would be Congress['s] responsibility to restore that power to the President if necessary, along with whatever other emergency powers he might require, in the event that Congress found a state of emergency to exist. It is difficult to envision a situation in which the President would need this particular kind of authority on an emergency basis without even the 24 hour notice which would be necessary for Congress to act.

Id. at 31,557.

Contrary to Congressman Ichord's assertions, Congressman Railsback explained that H.R. 234 would not prevent the President from acting in a situation of martial law—at a time when the "processes of government cannot function in an orderly way." *Id.* at 31,755. He emphasized that the Supreme Court had explicitly "noted this exception in *Ex parte Milligan*," a Civil War case holding that civilians may not be tried by military tribunal unless the civilian courts are closed and obstructed under the proper application of martial law. *See* 71 U.S. (4 Wall.) 2, 127 (1866) (noting that "[m]artial rule can never exist where the courts are open" and "capable of administer[ing] criminal justice according to law"). Congressman Railsback explained that, as long as Congress and the courts were able to function, Congress could properly limit the Executive's military detention authority under *Youngstown* and under "article I, section 8 of the Constitution." 117 CONG. REC. 31,755 (1971).

Thus, Congress understood the language of § 4001(a) to generally include (and to bar) military detention of U.S. citizens in wartime. That understanding is made even more explicit elsewhere in the legislative history. For example, in emphasizing that his Amendment sought to prevent the recurrence of World War II detentions, Congressman Railsback noted that Japanese-Americans were held "under the 1942 Executive order, which incidentally delegated authority to the military instead of civilians to execute the order." *Id.* at 31,552. Congressman Ichord—in condemning the World War II detentions—explained that President Roosevelt had issued Executive Order 9066 under his Commander-in-Chief powers, and had delegated authority under the Order to "the Secretary of War and the military commanders who

he may from time to time designate."[7] H.R. REP. NO. 91-1599, at 8.

Ignoring this legislative history, the government argues that Congress did not intend for § 4001(a) to apply to military detentions, because the detention of Japanese-Americans was "administered by a civilian agency, the War Relocation Authority, *not by the military*." Petitioner's Brief at 46 (emphasis in original). Although it is true that the civilian War Relocation Authority (WRA) was created to administer the relocation centers,[8] the restrictive powers of the WRA were delegated to it by Lt. General John De Witt, Military Commander of the Western Defense Command. *See Ex parte Endo*, 323 U.S. 283, 289 (1944). As the official designate of the Secretary of War, General De Witt was responsible for carrying out the duties prescribed by Executive Order 9066. *Id.* at 286. It was General De Witt who issued the orders that prevented evacuees from leaving the relocation centers. *See id.* at 289 (noting that General De Witt promulgated a series of restrictive

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[7] The authority for the World War II detentions stemmed from Executive Order No. 9066, issued on February 19, 1942. *See Ex parte Endo*, 323 U.S. 283, 285-98 (1944).

[8] The Director of the War Relocation Authority explained that it "was established for the primary purpose of relieving military establishments of the burden of providing for the relocation of persons excluded from military areas by order of the Secretary of War or by designated military commanders acting pursuant to Executive Order No. 9066, dated February 19, 1942." *See War Relocation Centers: Hearing on S. 444 Before Subcomm. of Senate Comm. on Military Affairs*, 78th Cong. 61 (1943) [hereinafter *War Relocation Hearings*] (testimony of Dillon S. Myer, Director of the War Relocation Authority). The relocation centers were set up only after "it was found necessary to take care of these people who were moved out [of military exclusion zones], until we could work out another program for them." *Id.* at 47.

orders prohibiting the evacuees from leaving relocation centers "except pursuant to an authorization from General De Witt's headquarters"). "By letter of August 11, 1942, General De Witt authorized the War Relocation Authority to issue permits for persons to leave these areas. By virtue of that delegation . . . the War Relocation Authority was given control over the ingress and egress of evacuees from the Relocation Centers." *Id.* at 290.

Even then, the military continued to play an important role with respect to the relocation centers. The perimeters of the centers were patrolled not by civilian officials, but by Army soldiers, who checked "the passes of people going in and of people coming out." *War Relocation Hearings, supra*, at 6 (1943) (testimony of Dillon S. Myer, Director of the WRA). And during any internal disturbance, it was understood that "the military police [were] called in by the director [of the WRA] and given full charge during that period of disturbance." *Id.*

Furthermore, not all Japanese-Americans were held at relocation centers. Some were detained at domestic "internment camps," which were run by the Army. *Id.* at 39. Any person of Japanese descent (combatant or civilian) who was determined to be disloyal was transferred from a relocation center to an Army internment camp, where he or she was held for the duration of the conflict.[9] *Id.* Although the Army interned non-citizens without prior judicial procedure, U.S. citizens could be interned in these Army camps if (and only if) they were "proven subversive on being put through the court procedure, but only through that process." *Id.* at 40. Thus,

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[9] In his Senate testimony, Director Myer emphasized that "prisoners of war" and "proven enemies" were held in Army internment camps, not WRA relocation centers. *Id.* at 45.

contrary to the government's arguments, it simply cannot be maintained that the detention of Japanese-Americans in World War II was "administered by civilian authority," to the exclusion of the military.

And of course, Members of Congress understood that the EDA itself had been enacted to cope with the threat of domestic espionage and sabotage during a "war-related emergency." H.R. REP. NO. 91-1599, at 4. The EDA was passed at the outbreak of the Korean War in response to fears that dissident American Communists might seek to sabotage the war effort at home. *See infra* Section III.A. The EDA operated both as an authorization for and restriction upon the preventive detention of U.S. citizens. *See* H.R. REP. NO. 92-116, at 2-3, *reprinted in* 1971 U.S.C.C.A.N. at 1436. The Executive could detain citizens under the Act only pursuant to warrants issued by the Attorney General and only if there was "reasonable ground to believe" that the suspects might engage in acts of sabotage or espionage. 50 U.S.C. § 813(a) (1970). Any suspect so detained had the right to administrative and judicial review of the Attorney General's decision. *See id.* §§ 814-21; *see also infra* Section III.B.

Seeking to create a distinction between military and civilian detention where none exists, the government emphasizes that the EDA delegated detention authority to a "civilian official." Petitioner's Brief at 46. Although it is true that the EDA authorized the President to "act[ ] through the Attorney General," 50 U.S.C. § 813(a), the Executive could not have sidestepped the EDA's procedural requirements by ordering that citizens be detained under military, rather than civilian authority. The EDA was intended to regulate preventive detention and limit Executive discretion. *See, e.g.*, Richard Longaker, *Emergency Detention: The Generation Gap, 1950-1971*, 27

W. POL. Q. 395, 396 (1974) ("At a minimum, the [EDA] presumed that short of the invocation of martial law, the use of unfettered discretion by the President in a wartime emergency had died with World War II.").[10] By directing that the Executive act "through the Attorney General," the EDA in effect barred the preventive detention of U.S. citizens by the military.

C. Congress Intended To Proscribe Any Detention Of A U.S. Citizen Not Explicitly Grounded In Statute.

Congress did not believe that a general statute—one that did not explicitly confer detention authority on the Executive—would be enough to satisfy the demanding language of the Railsback Amendment. The evolution of that language makes clear that the sponsors of H.R. 234 envisioned that any enabling statute would have to deal specifically with the Executive's authority to detain.

Initially, the language of H.R. 234 provided that no one could be imprisoned or detained except in conformity with the provisions of Title 18 of the U.S. Code. During the Subcommittee hearing on the bill, however, Robert Mardian, appearing on behalf of the Department of Justice, pointed out that this falsely "assume[d] that all provisions for the detention of convicted persons are contained in title 18." *Prohibiting Detention Camps: Hearings on H.R. 234 and Related Bills Before Subcomm. 3 of the House Comm. On the Judiciary*, 92d

[10] The EDA was "the brainchild of a group of beleaguered liberal senators caught in a rising wave of intense anticommunism," who had been offended by "the dragnet procedures of 1942" and considered the EDA "an improvement." Longaker, *supra*, at 395-96 (1974). In the debates on H.R. 234, Congressman Ichord emphasized that the EDA had been introduced by Senators whose "libertarian credentials" no-one could question. *See* 117 CONG. REC. 31,542 (1971).

Cong. 73 (1971) [hereinafter *H.R. 234 Hearings*] (statement of Robert Mardian, Assistant Attorney General, Internal Security Division, DOJ). Mr. Mardian emphasized that other titles of the U.S. Code also contained detention provisions, and that H.R. 234, as written, might unintentionally suggest that Congress wanted to repeal all those other provisions. *Id.* at 76.[11]

The Subcommittee considered various solutions to this problem, including the possibility of enumerating all such titles within the text of H.R. 234.[12] But Congressman Railsback devised a simpler solution, and Subcommittee 3 amended H.R. 234 with the broader language of

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[11] For example, the following exchange occurred:

> Mr. MIKVA: The gentleman is correct that presently they are scattered. Would not the Department's concern though, be allayed if sections 1 and 2 were amended to require conforming with the procedure specified in this title, title 21, title 50, and so forth?
>
> Mr. MARDIAN: I am not convinced that we have all the titles.
>
> Mr. CONYERS: I am not either.
>
> Mr. MIKVA: But you understand it was not a procedure concern.
>
> Mr. MARDIAN: I think that is clear. I don't think there was any intention to repeal the authority of the Government or the President to commit people convicted of crimes other than those contained in title 18.
>
> Mr. CONYERS: I am glad to hear the gentleman make that statement for the record.

H.R. 234 Hearings, *supra*, at 76.

[12] Among the provisions unintentionally excluded by the original language of H.R. 234 were those that provided for circumstances in which the *military* could detain and try a U.S. citizen accused of spying. *See* 10 U.S.C. §§ 906–906(a). Mr. Mardian's intervention ensured this did not happen, preserving detention authority for the military and further undermining the government's claim that § 4001(a) was not intended to cover military detentions. *See supra* Section II.B.

his proposal. At no point did any of the sponsors suggest that the Railsback Amendment might expand the permissible range of enabling statutes beyond those dealing specifically with detention.

But this possibility was raised—and discounted—on the House floor. In a particularly telling exchange, Congressman John Ashbrook, a supporter of the rival bill, H.R. 820, claimed that the Railsback Amendment, although meant to restrict Executive authority, would actually "open up the President's power." 117 CONG. REC. 31,547 (1971). He warned his colleagues that Congress had already enacted "many statutes" authorizing the President to declare a national emergency, and suggested that in such an emergency, the President might seek to carry out preventive detentions using this general statutory authority. *Id.* He emphasized:

> I, for one, would feel very much better if all of the written restraints in H.R. 820 were on the books, operating to restrain the President, operating to prevent the President from the abuse of power under a declaration of national emergency . . . .
>
> . . . [With the Railsback Amendment,] [e]very declaration of emergency, I say to my fellow Members here, would come from an act of the Congress which would be the enabling act and which would give the President the precise power that we are here trying to check.

Id. at 31,548.

No other Member of Congress supported this analysis, however. Congressman Ichord, the primary sponsor of H.R. 820, took pains to contradict Congressman Ashbrook on this point:

> Madam Chairman, I would say to the gentleman from Ohio [Mr. Ashbrook] that I do not entirely

> agree with the gentleman. I do feel that the language of the amendment drafted by the gentleman from Illinois [Mr. Railsback] would prohibit even the picking up, at the time of a declared war, at the 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 31,549. But Congressman Ashbrook went on to suggest that the Railsback Amendment granted no more protections to U.S. citizens than had been available to Japanese-Americans during internment. Congressman Railsback ended the exchange by making clear that this was the whole point of his Amendment:

> Mr. ASHBROOK: . . . I would certainly point out to my friend, the gentleman from Illinois, the right to a trial by jury is not new. It was available to those people in 1941 and 1942. The only exception was that they did not get it.
>
> Mr. RAILSBACK: That is right; they did not get their constitutional rights.
>
> Mr. ASHBROOK: There is no guarantee. From what the gentleman is saying, he thinks there would be these guarantees in the future. The same laws were on the books. The same Constitution was operating. They did not get it. How can he say they would get it now?
>
> Mr. RAILSBACK: Because we are saying in here that detention cannot occur unless pursuant to an act of Congress.

Id. at 31,552. Following on this discussion, Congressman Robert Eckhardt, a supporter of H.R. 234, emphasized to his colleagues that contrary to Congressman Ashbrook's remarks: "You have got to have an act of

Congress to detain, and that act of Congress must authorize detention . . . .” *Id.* at 31,555.[13]

III. THE PROTECTIONS AFFORDED MR. PADILLA FALL FAR SHORT OF PROTECTIONS ONCE AVAILABLE UNDER THE EDA

Despite the plain language and clear legislative history of § 4001(a), Mr. Padilla has already been held in preventive detention for nearly two years. In that time, the Executive has denied him the most basic of procedural protections. The conditions of Mr. Padilla's confinement fall far short of the protections that were once available under the EDA, the statute repealed in 1971 for procedural inadequacies.

A. Congress Repealed The EDA Over Concerns About Its Due Process Failings.

The EDA, enacted as Title II of the Internal Security Act of 1950, “established procedures for the apprehension and detention, during internal security emergencies,

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[13] As noted in the court of appeals' opinion, however, the plain language of the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), “contains no language authorizing detention,” particularly “the detention of American citizens captured on United States soil.” *Padilla*, 352 F.3d at 722. In addition, 10 U.S.C. § 956(5), a commonplace appropriations statute, authorizes “nothing beyond the expenditure of money,” and is therefore insufficient both under § 4001(a) and *Ex parte Endo*, 323 U.S. at 304 n. 24. *See Padilla*, 352 F.3d at 724. In *Ex parte Endo*, this Court held that an appropriations statute must contain language “plainly” authorizing the precise authority claimed. 323 U.S. at 304 n. 24. There is no such language here.

The government's interpretation of § 956(5) would have rendered § 4001(a) moot *ab initio*. Similar language appeared in a World War II appropriations statute used to fund the detention of Japanese-Americans, *see* Military Appropriation Act, 77th Cong., ch. 591, tit. III, § 103, 55 Stat. 810, 813-14 (Dec. 17, 1941). Given that § 4001(a) was meant to bar a recurrence of World War II preventive detention, the 92nd Congress clearly did not mean for the old but surviving appropriations language to constitute explicit authorization under § 4001(a).

of individuals deemed likely to engage in espionage or sabotage," if there was "reasonable ground to believe" that they would "probably" do so. *See* 50 U.S.C. § 813 (1970) (repealed 1971). Congressman Spark Matsunaga, a primary sponsor of § 4001(a), explained that Congress enacted the EDA over President Truman's veto "in the then prevalent atmosphere of the Korean conflict, when being 'soft on communism' was thought by many to be treasonable." 117 CONG. REC. 31,571 (1971). Congressman Chet Holifield, another sponsor of § 4001(a), emphasized that the EDA was "passed during a time of great national hysteria and uncertainty":

> We heard wild accusations of Communists in Government, and witnessed spectacular trials of members of the Communist Party, espionage agents, and conspirators. The terms "fifth column," "fellow traveler," and "soft on communism" filled every newspaper and broadcast. Any Congressman or public official who spoke in defense of basic human or constitutional rights was labeled a Communist sympathizer.

Id. at 31,566.

According to Congressman Matsunaga, the EDA was "more or less forgotten" as the "hysteria of anticommunism of the early 1950's" began to wane. *Id.* at 31,572. It was forgotten, that is, until "about 3 years ago [in 1968]," when "rumors were rampant that the Government was again preparing detention camps . . . for dissidents, activists, militants, and others with whom those in control of the Government might disagree." *Id.* Congressman Mikva explained that these rumors had been sparked by a "1968 report of the House Committee on Un-American Activities (now House Internal Security Committee)," which "recommended using the detention camps provided for by Title II" for certain black nation-

alists and Communists. *H.R. 234 Hearings*, *supra*, at 42; *see also* 117 CONG. REC. 32,144 (1971).

As the House Report reveals, the EDA had become a profound concern for Congress by 1971:

> Although no President has ever used or attempted to use these provisions, the mere continued existence of the Emergency Detention Act has aroused much concern among American citizens, lest the Detention Act become an instrumentality for apprehending and detaining citizens who hold unpopular beliefs or views.

H.R. REP. NO. 92-116, at 2, *reprinted in* 1971 U.S.C.C.A.N. at 1436. In response to these concerns, the House Committee on Internal Security wanted to amend, rather than repeal the EDA. *Id.* But "more than 157 Members of the House" sponsored or cosponsored bills calling for outright repeal. *Id.*

In unanimously endorsing H.R. 234, the House Judiciary Committee determined that the EDA was "beyond salvaging, [could] not be adequately amended, and should be repealed in toto." *Id.* at 1438. Its members concluded that the Act served "no useful purpose," but only "engender[ed] fears and resentment on the part of many of our fellow citizens." *Id.* at 1437. They also emphasized that its scheme of preventive detention was subject to "grave" constitutional challenge, in large part because of "inadequate" judicial review and other due process failings. *Id.* at 1438.

In advocating for the repeal of the EDA, the sponsors of H.R. 234 highlighted the EDA's glaring procedural deficiencies. Congressman Railsback warned that the EDA raised "serious constitutional questions." 117 CONG. REC. 31,550 (1971).

> The person detained is not brought before an impartial judge but before a "preliminary hearing officer" appointed by the prosecution. . . .
>
> And how, under such procedures, does a detainee prove his innocence. How does he defend the vague charge that someone believes he will commit a criminal act sometime in the future?
>
> At both the hearing and review board level, the detainee is deprived of substantial due process guarantees. There is no right to jury trial. The right to be appraised of the grounds on which detention was instituted or of the full particulars of the evidence, the right to confront one's accusers, and the right to cross-examine witnesses, are all severely limited if, in the Attorney General's—not a court's—opinion, to divulge information would be dangerous to national security.

Id. at 31,550-51.

The Senate was in full agreement on the need for repeal of the EDA. Senator Inouye, the primary sponsor of S. 592 (the Senate's companion bill to H.R. 234), highlighted the fallout from the House Un-American Activities Report, for example, and stressed that the EDA's preventive detention scheme was "at odds with normal judicial procedure." 117 CONG. REC. 32,144 (1971). He warned that the EDA transformed "the presumption of innocence [into] a presumption of guilt for the accused" and urged his fellow Senators to repeal this "definite threat to every American's freedoms and constitutional rights." *Id.* at 32,144-45.

B. Mr. Padilla Has Been Afforded Far Fewer Due Process Protections Than The EDA Would Have Provided.

Even the EDA would have granted Mr. Padilla more due process protections than the Executive is now willing to provide. Under the EDA, a detainee was to be brought before a preliminary hearing officer within 48 hours of his detention or as "soon thereafter as provision for it be made." 50 U.S.C. § 814(d) (1970). At this preliminary hearing, the detainee was to be advised of his right to counsel and informed of the grounds for the detention. *Id.* § 814(d)(1) and (2). Although the Attorney General could withhold evidence on national security grounds, the detainee was permitted to present evidence on his own behalf and to cross-examine the witnesses who appeared against him. *Id.* § 814(d)(5). The EDA also directed that a written record of the proceeding be kept. *Id.*

If the hearing officer upheld the detention, a detainee had the right to appeal that decision, first to a Detention Review Board and then to the federal courts. *Id.* §§ 815-21. The Detention Board was to have consisted of nine members, appointed by the President with the advice and consent of the Senate. *Id.* § 815. The detainee was entitled to "a full hearing before the Board with all the rights normally accorded in courts of law, including the full opportunity to be represented by counsel, the right at hearings of the Board to testify, to have compulsory process for obtaining witnesses in his favor, and to cross-examine adverse witnesses." H.R. REP. NO. 91-1599, at 5. The detainee was also entitled to learn the particulars of the evidence against him, except to the extent that the Attorney General determined that providing this information would harm national security. *Id.* If the Board denied relief, further appeal was allowed to

the appropriate federal appeals court and eventually to the U.S. Supreme Court. 50 U.S.C. § 821. The EDA also specified that "nothing contained in this Title shall be construed to suspend or authorize the suspension of the privilege of the writ of habeas corpus." *Id.* § 826.

Mr. Padilla has not been afforded due process protections in any way comparable to those provided by the EDA—the same EDA that Congress deemed inadequate. Mr. Padilla has not been allowed to attend any hearing, confront any witness or present evidence on his own behalf. Until recently, he was barred from all communication with his court-appointed attorneys. According to the Executive, he is now permitted access to counsel only as a matter of Executive discretion.[14]

C. Even The Internal Security Committee Bill That Was Rejected As Inadequate In 1971 Would Have Provided Further Protections For Mr. Padilla.

H.R. 820, the rival Internal Security Committee bill which sought to amend (rather than repeal) the EDA, would have at least incorporated more protections into the statute. The bill would have granted detainees financial support in securing the assistance of counsel, as well as assistance in obtaining investigative, expert, or other services necessary for their defense. H.R. REP. NO. 91-1599, at 2. The bill also would have narrowed the grounds under which the EDA could have been invoked. *Id.* The EDA, as adopted in 1950, authorized the preventive detention of citizens in the event of: (1) an invasion; (2) a declaration of war by Congress; or (3) an insurrection within the United States in aid of a foreign enemy. *See* 50 U.S.C. § 812. H.R. 820 would have sig-

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[14] United States Department of Defense, "News Release: Padilla Allowed Access to Lawyer," Feb. 11, 2004.

nificantly limited this third category by requiring that any determination of an insurrection be made by concurrent resolution of Congress. H.R. REP. NO. 91-1599, at 2.

But Congress rejected H.R. 820 as inadequate. Members of Congress decided that the bill did not (and could not) go far enough.[15] Congressman Emanuel Celler, Chair of the House Judiciary Committee and a co-sponsor of H.R. 234, expressed this directly to Congressman Ichord:

> The distinguished gentleman from Missouri (Mr. Ichord) . . . seeks to make the retention substitute more palatable by sugar coating it with some procedural changes. However, there is an old saying that you cannot make a purse of silk out of a sow's ear. You might be able to put a dog's tail in a mold, but you cannot make the dog's tail straight. Try as hard and as sincerely as the gentleman from Missouri will—and he is sincere—he cannot remove the evil out of the substitute. He can change the label, but he cannot change the contents of the bottle.

117 CONG. REC. 31,553 (1971).

In line with these sentiments, Congress rejected H.R. 820 in favor of the broad prohibition against preventive detention now codified at § 4001(a). Despite this, Mr. Padilla has been held in preventive detention for twenty-two months under conditions that fall far short of the due process protections provided for in the EDA itself.

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[15] Congressman Robert F. Drinan, a co-sponsor of H.R. 234, argued that H.R. 820, like the EDA, was "defective in procedural safeguards" and emphasized that the amendments proposed "would leave untouched the heart of the law." 117 CONG. REC. 31,778-79 (1971).

CONCLUSION

For all the foregoing reasons, *Amici* respectfully request that the Court affirm the judgment of the court of appeals.

Respectfully submitted,

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