No. 03-2235

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSE PADILLA, DONNA R. NEWMAN,
as Next Friend of Jose Padilla,
Petitioner-Appellee-Cross-Appellant,
v.

DONALD RUMSFELD,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR AMICI CURIAE SUPPORTING
PETITIONER-APPELLEE-CROSS-APPELLANT

Barbara J. Olshansky
Jules Lobel
Michael Ratner
Shayana Kadidal
Nancy Chang
Jennifer Green
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, N.Y. 10012
212-614-6439

Counsel for Amici Curiae

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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 (*e.g.*, H. Rap Brown, the Chicago Seven) 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); *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975). As part of its advocacy on behalf of those whose civil, constitutional, and human rights have been violated, CCR represents several British and Australian citizens detained at Camp Delta in the Guantanamo Bay Naval Station.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through litigation, legal advocacy and dissemination of public information. AALDEF represented and assisted Japanese Americans in obtaining redress for the forced incarcerations without charges in World War II. The instant matter raises again many of the same issues of the Japanese Internment and many of same invalid rationales for the denial of rights.

The Center for Human Rights & Constitutional Law is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, indigenous peoples, children, and the poor.

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 President 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.

The National Immigration Project of the National Lawyers Guild is a social justice bar organization whose members regularly practice before the Executive Office of Immigration Review, the Board of Immigration Appeals, and the federal courts. The National Immigration Project provides technical assistance and training to state and federal public defender organizations, the private immigration bar, and international human rights organizations. It authors *Immigration Law and Crimes* (West Group 2002), a treatise on the intersection of criminal and immigration laws. The National Immigration Project has previously appeared as *amicus curiae* before the Fourth Circuit

in *Asliyalfani v. INS*, 208 F.3d 208 (4th Cir. 2000); *Kofa v. INS*, 660 F.3d 1084 (4th Cir. 1995); *De Osorio v. INS*, 10 F.3d 1034 (4th Cir. 1993); *M.A. A26851062 v. INS*, 899 F.2d 304 (4th Cir. 1990).

The National Lawyers Guild/Maurice & Jane Sugar Law Center for Economic & Social Justice ("GLC") is a national non-profit litigation/policy project of the National Lawyers Guild. The mission of the GLC is to provide legal advocacy and support to the powerless, the oppressed, the disenfranchised, and those seeking social change. The underlying principle which has directed the GLC since its founding in 1990 is the belief that economic rights and civil rights are inseparable. The government's extraordinary position in this case, seeking to deny basic constitutional protections to a U.S. citizen solely on the executive's bald assertion that he is an "enemy combatant," threatens the rights of all working and oppressed people, especially of those who openly express disagreement with our government and its policies.

Grounded in Unitarian Universalist principles that affirm the worth, dignity, and human rights of every person, and the interdependence of all life, the Unitarian Universalist Service Committee is a voluntary, nonsectarian organization working to advance justice throughout the world. The case of *Padilla v. Bush* tests one of the basic rights that any person can expect—the right to a fair and transparent legal forum in which to defend oneself.

The 130 legal scholars who have attached their names to this brief include among their number leading experts in constitutional law, criminal law and procedure, immigration law, and international human rights law. They include the following:

***law professors*:**
(Institutional affiliations of scholars are given for identification purposes only, and should not be taken to suggest that the institution is a party to this brief.)

William J. Aceves / Professor of Law, California Western School of Law
Jane H. Aiken / Professor of Law, Washington University School of Law
Barbara Bader Aldave / Stewart Professor of Law, University of Oregon School of Law
Alicia Alvarez / Clinical Associate Professor of Law, DePaul University College of Law
Elvia R. Arriola / Associate Professor of Law, Northern Illinois University College of Law
Frank Askin / Professor of Law and Robert Knowlton Scholar, Rutgers School of Law at Newark
James Francis Bailey, III / Professor of Law and Director of the Ruth Lilly Law Library, Indiana University School of Law
Milner S. Ball / Caldwell Professor of Constitutional Law, University of Georgia School of Law
Jon Bauer / Clinical Professor of Law and Director, Asylum & Human Rights Clinic University of Connecticut School of Law
Robert Benson / Professor of Law, Loyola Law School, Los Angeles
Paul Schiff Berman / Professor of Law, University of Connecticut School of Law
Arthur L. Berney / Professor of Law, Emeritus, Boston College Law School
Jerry Black / Associate Professor of Law, University of Tennessee College of Law
Cynthia Grant Bowman / Professor of Law, Northwestern University School of Law

Mark S. Brodin / Professor of Law, Boston College Law School
Rosa Ehrenreich Brooks / Associate Professor of Law, University of Virginia School of Law
Teresa Kissane Brostoff /Associate Professor and Director of Legal Writing, University of Pittsburgh School of Law
Sande Buhai / Clinical Professor and Faculty Public Interest Law Director, Loyola Law School, Los Angeles
Camilo Perez Bustillo / W. Haywood Burns Memorial Chair in Civil Rights Law, CUNY School of Law.
Burton Caine / Professor of Law, Temple University School of Law
Emily Calhoun / Professor of Law, University of Colorado School of Law
Arturo Carillo / Visiting Associate Professor of Clinical Law, George Washington Universty Law School
Anupam Chander / Professor of Law, University of California, Davis, School of Law
Erwin Chemerinsky / Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California Law School
Craig W. Christensen / Professor of Law, Southwestern University School of Law
Michael Churgin / Professor of Law, University of Texas School of law
Alan Clarke / Assistant Professor of Criminal Justice, University of Wisconsin Parkside
Sarah H. Cleveland / Marrs McLean Professor in Law, University of Texas School of Law
Marjorie Cohn / Professor of Law, Thomas Jefferson School of Law, San Diego
Liz Ryan Cole / Director of Semester in Practice, Vermont Law School
Robin Morris Collin / Professor of Law, Willamette University College of Law
Rhonda Copelon / Prof. of Law & Director, International Women's Human Rights Law Clinic (IWHR) City University of New York, School of Law
Michael H. Davis / Professor of Law, Cleveland State University College of Law
John Denvir / Porfessor of Law, University of San Francisco Law School
Michael Deutsch / Adjunct Professor of Law, Northwestern University School of Law.
Robert Dinerstein / Professor of Law and Associate Dean, American University, Washington College of Law
Bernardine Dohrn / Clinical Associate Professor of Law and Director of Children & Family Justice Center, Northwestern University School of Law
Robert F. Drinan, S.J. / Professor of International Human Rights and Constitutional law, Georgetown University Law Center
J. Soffiyah Elijah / Clinical Instructor, Harvard Law School
Susan J. Feathers, Esq. / Director, Public Service Program, University of Pennsylvania Law School
James L. Flannery / Assistant Professor of Law, University of Pittsburgh School of Law
Sally Frank / Professor of Law, Drake University School of Law
Eric M. Freedman / Professor of Law, Hofstra University School of Law
Niels W. Frenzen / Clinical Associate Professor of Law, University of Southern California
Nicholas Georgakopoulos / Professor of Law and John S. Grimes Fellow, Indiana Univ. School of Law, Indianapolis
Bob Golten / Director and Counsel, International Human Rights Advocacy Center, University of

Denver
Carlos E. González / Associate Professor of Law, Interamerican University of Puerto Rico, School of Law
Nathaniel E. Gozansky / Professor of Law, Emory University, School of Law
Louise Halper / Professor of Law, Washington & Lee University School of Law
Sidney L. Harring / Professor of Law, CUNY Law School
Kathy Hessler / Professor of Law, Case Western Reserve University School of Law
Judith L. Holmes / Professor of Legal Studies, University of Massachusetts – Amherst
Marsha Huie / Professor of Law, The University of Tulsa College of Law
José R. Juárez, Jr. / Professor of Law, St. Mary's University School of Law
Lewis R. Katz / John C. Hutchins Professor of Law, Case Western Reserve University Law School
Michael J. Kelly / Assistant Professor, Creighton University School of Law
Walter J. Kendall III, Professor of Law, The John Marshall Law School
Eleanor D. Kinney, JD, MPH / Hall Render Professor of Law andCo-Director, The Center for Law and Health, Indiana University, School of Law, Indianapolis
Thomas Kleven / Professor of Law, Thurgood Marshall School of Law
Sylvia A. Law / Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry New York University Law School
Raneta Lawson Mack / Professor of Law, Creighton University School of Law
David P. Leonard / Professor of Law and William M. Rains Fellow, Loyola Law School, Los Angeles
Holly Maguigan / Professor of Clinical Law, New York University School of Law
Elizabeth McCormick, William R. Davis Fellow, University of Connecticut School of Law
Carlin Meyer / Professor of Law, New York Law School
David A. Moran / Assistant Professor of Law, Wayne State University Law School
Millard A. Murphy, Esq. / Lecturer, University of California, Davis School of Law
Reta Noblett-Feld / Clinical Law Professor, University of Iowa College of Law
Nancy K. Ota / Professor of Law, Albany Law School
Barrett Prettyman Fellowship Program, Georgetown University Law Center
William P. Quigley / Janet Mary Riley Distinguished Professor of Law, Loyola University, New Orleans School of Law
Martha Rayner / Associate Clinical Professor of Law, Fordham University School of Law
Deborah Rhode / Ernest W. McFarland Professor of Law, Stanford Law School
Florence Wagman Roisman / Michael McCormick Professor of Law, Indiana University School of Law – Indianapolis
Kermit Roosevelt / Assistant Professor, University of Pennsylvania Law School
David Rudovsky / Senior Fellow, University of Pennsylvania Law School
Leila Nadya Sadat / Professor of Law, Washington University in St. Louis
Natsu Taylor Saito / Professor of Law, Georgia State University College of Law
Robert A. Sedler / Professor of Law, Wayne State University, Detroit
Franklin Siegel / City University of New York School of Law
Abbe Smith / Professor of Law and Associate Director Criminal Justice Clinic & E.

Lloyd B. Snyder / Professor of Law, Cleveland State University
Marc Stickgold / Professor of Constitutional Law, Golden Gate University School of Law
John A. Strait / Attorney and Associate Professor of Law, Seattle University School of Law
David Thomas / Clinical Professor of Law, Chicago-Kent College of Law
Robert L. Tsai / Assistant Professor of Law, University of Oregon School of Law, William W. Knight Law Center
Deborah M. Weissman / Associate Professor of Law and Director of Clinical Programs, University of North Carolina School of Law
Mark E. Wojcik / Associate Professor of Law, The John Marshall Law School, Chicago
Clifford Zimmerman / Clinical Associate Professor of Law, Northwestern University

***individuals*:**

Hunter Gray, Federal Indian Law
Michael Letwin, Esq.
Michael Ignatieff

Introduction

The Center for Constitutional Rights, Asian American Legal Defense and Education Fund, National Lawyers Guild, National Immigration Project, Guild Law Center, Center for Human Rights and Constitutional Law, Unitarian Universalist Service Committee, and the named law professors and interested individuals respectfully submit this brief as *amici curiae* in support of the cross-appeal of Petitioner Jose Padilla.

Jose Padilla is a United States citizen who was arrested in the United States more than a year ago and has been held incommunicado and in solitary confinement without being charged with any crime and without being allowed access to counsel or to the courts. The Government's arguments seeking to justify this unprecedented action pose a grave threat to the constitutional rights of all American citizens. Under the guise of the President's power to act as Commander- in-Chief of the Armed Forces, the Government seeks to strip from those it labels "enemy combatants" the protections ordinarily afforded to all citizens under the Bill of Rights.

In support of his actions, the President relies exclusively on his Commander-in-Chief powers. This reliance is misplaced for at least three reasons. First, these powers do not extend so far as to authorize the indefinite detention without due process of an American citizen seized in the United States and not on the battlefield. Second, Congress has explicitly denied the President this authority and therefore the President's assumed power can only be affirmed if the anti-detention statute is found to be unconstitutional, which it is not. Third, international law denies the President the power to seize and detain individuals under the circumstances present here.

"History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. . . . [But] when we allow fundamental freedoms

to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602. 635 (1989) (Marshall and Brennan, JJ., dissenting).

Statement of Facts

Amici adopt and incorporate by reference the facts set forth in the brief submitted on behalf of Petitioner Padilla in support of his cross-appeal. The additional facts included below are those that specifically relate to the domestic constitutional and international law issues addressed in this submission.

On May 8, 2002, Padilla was arrested after disembarking a commercial airplane at O'Hare International Airport when he traveled to Chicago to visit his son. Padilla was arrested on the authority of a material witness warrant issued by the United States District Court for the Southern District of New York commanding his appearance before a grand jury. *Padilla v. Bush*, 233 F. Supp. 2d 564, 568, 571 (S.D.N.Y. 2002).

On June 9, 2002, two days before the initial hearing scheduled by the court on Padilla's motion seeking release pending his grand jury appearance, President Bush filed a declaration with the court designating Padilla an "enemy combatant" "consistent with U.S. law and the laws of war," and ordering the Secretary of Defense to take custody of Padilla and detain him. (J.A. at 51.) Padilla was immediately taken into military custody and flown to the Consolidated Naval Brig in Charleston, South Carolina, where he remains incarcerated today, more than a year later.

The Presidential Declaration of Padilla's "enemy combatant" status was supported only by a declaration submitted by Michael H. Mobbs ("Mobbs Declaration"). According to his declaration, Mr. Mobbs is a Special Advisor to the Under Secretary of Defense for Policy. (J.A. at 44.) Mr.

Mobbs does not indicate that he has any personal knowledge of any facts concerning the basis of Padilla's detention. All of his knowledge is based on hearsay from a review of what he apparently considered to be the relevant records and reports about Padilla. (J.A. at 44-45, ¶¶2-3.) In fact, Mr. Mobbs acknowledges in a footnote that the two detained confidential sources that he relied upon: i) "have been involved with Al Qaeda for several years," including the group's terrorist activities; ii) "have not been completely candid about their association with Al Qaeda and their terrorist activities;" iii) have provided uncorroborated information; and iv) may have been "part of an effort to mislead or confuse U.S. officials." (J.A. at 45, n.1.) Moreover, the Mobbs Declaration states that one of the sources subsequently recanted some of the information provided, *id.*, and the other source was "being treated with various types of drugs" during his interrogation. *Id.*

On the basis of the second-hand, uncorroborated, and admittedly unreliable information he reviewed, Mr. Mobbs states that Padilla moved to Egypt in 1998, traveled to Pakistan "in 1999 or 2000," and "also traveled to Saudi Arabia and Afghanistan." (J.A. at 46, ¶4.) Although the Mobbs Declaration alleges that during his time in the Middle East Padilla was "closely associated with known members and leaders of Al Qaeda," *id.*, it makes clear that the Government does not believe that Padilla is a "member" of Al Qaeda. (J.A. at 47, ¶10.) The Mobbs Declaration is silent as to the definition of "enemy combatant" status and as to what level of "association" or affiliation with Al Qaeda is necessary to warrant treatment by the government as an "enemy combatant."

The Mobbs Declaration does not suggest that the Government has a basis to contend that Padilla is a member of Al Qaeda or that he took any steps in furtherance of any planned criminal activity. No allegations have been made that Padilla participated in the September 11th attacks or any terrorist or criminal act against the United States or that he took up arms against the United

States on behalf of any foreign army or terrorist organization. By contrast, in *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003) ("*Hamdi III*"), the Government placed great emphasis on the fact that Mr. Hamdi, another individual currently being detained by the Executive branch as an "enemy combatant," was captured in Afghanistan during the conflict, and was armed when captured, in reaching its conclusion that there was sufficient evidence to establish that he was an "enemy combatant." *See, e.g.*, Declaration of Michael H. Mobbs, sworn to on July 24, 2002, ¶¶4-9, submitted in *Hamdi III* ("*Hamdi* Mobbs Declaration").[1]

The contrasting circumstances of the *Hamdi* and *Padilla* cases are cast in further relief when one considers the Government's articulated justification for Padilla's treatment as an "enemy combatant." In support of its motion for reconsideration of the court's decision to permit access to counsel, the Government submitted a declaration from Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency ("Jacoby Declaration"). (J.A. at 55-63.) The Jacoby Declaration reveals the fact that Padilla is not being held because of any offenses that he has committed or any plans that he has made, but rather because "[his] potential intelligence value [is] very high." (J.A. at 55.) As Mr. Jacoby makes clear, Padilla is being held in indefinite detention without access to counsel or the courts *solely* because he may have information that the Government may be interested in at some point. Mr. Jacoby indicates that the Government intends to detain Padilla *indefinitely* because the "intelligence cycle is continuous," (J.A. at 59.), and "[t]here is a constant need to ask detainees new lines of questions as additional detainees are taken into custody." (*Id.*) Neither the Constitution, nor Congress, nor any court in this country has ever approved such an abuse of

[1]A copy of the Mobbs Declaration submitted in the *Hamdi* case is included in the Appendix to this brief as Exhibit 1.

executive authority. Detention for investigatory purposes has never been a constitutionally sanctioned practice in America. That the designation and detention of American citizens has occurred without so much as a nod in the direction of due process makes this departure from the rule of law all the more egregious and startling.

Our concern should be even greater here because the Government's justification for Padilla's detention under solitary confinement conditions – normally ordered only for serious crimes committed by those who have already been convicted and incarcerated – is that providing him with access to family or counsel may "threaten[] the perceived dependency and trust between [Padilla] and [the] interrogator." (J.A. at 59.) Elaborating on this justification, Mr. Jacoby states that "only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from [him]. . . ". (J.A. at 62.) For this reason, the Government asserts, there must be no "sign of counsel involvement." (*Id*.)

Mr. Padilla's and Mr. Hamdi's confinement in indefinite detention as "enemy combatants" contrasts greatly with the government's decision to prosecute John Walker Lindh, an American citizen who was arrested on the battlefield in Afghanistan while fighting for the Taliban government, in the criminal justice system rather than remanding him to indefinite detention.[2] As the differential treatment of these individuals makes clear, with the creation of this new designation, the Government has established a malleable category – the undefined rubric of "enemy combatant" status – that may be molded at will so as to include or exclude those deemed guilty of a range of

[2] Under Mr. Lindh's plea agreement, in exchange for Mr. Lindh's ongoing cooperation with government investigations, the Government expressly agreed to "forego any right it has to treat [Mr. Lindh] as an unlawful enemy combatant." Plea Agreement, *United States v. Lindh*, (E.D. Va. 2002) (No. 02-37-A), ¶21. A copy of the Lindh Plea Agreement is included in the Appendix to this brief as Exhibit 2.

"offenses" from specific, statutorily-defined military offenses, to crimes, to inchoate speculations about an individual's intention to act at some point in the future, to identification as a "potential intelligence" source.

Although in *Hamdi* the Government claimed that it had developed a set of criteria governing its determination of "enemy combatant" status, *see Hamdi* Mobbs Declaration ¶¶7, 8 (Exh. 1), to date, no such guidelines have been made available to counsel for Hamdi or counsel for Padilla. As a result, it is impossible to know who in the Executive branch participates in the decision to designate an individual an "enemy combatant," what factors are considered when this assessment is made, what standard of proof is required to support the assessment, who reviews the assessment and under what standard of review, and how the decision is made either to prosecute the individual in the criminal justice system or transfer him to military custody for indefinite executive detention. Given the absence of any of this information, the courts are compelled to examine these cases very closely to ensure that this country's citizens do not lose their liberty by dint of executive fiat.

Summary of Argument

The Presidential declaration that Jose Padilla is an "enemy combatant" who may be detained indefinitely for the duration of the government's "war on terrorism" is an attack not only on our most basic right of individual liberty, but also on one of the fundamental premises of our constitutional democracy, the separation of powers principle. This attack by the Executive branch has several faces, each of which engenders serious cause for concern.

The first, and overarching, issue involves the President's unlawful use of the Commander-in-Chief powers to address domestic affairs. Constitutional text, structure, doctrine, and theory make plain the severe limitations placed on the Executive's exercise of war powers within the United

States.

The second issue involves the Government's two-fold presumption that the power to create an undefined category of individuals – one that can reach American citizens arrested on U.S. soil – who may be detained indefinitely for investigatory reasons *exists*; and that this power resides *exclusively* in the Executive branch. There is, however, no constitutional, common law, or statutory basis for such an arrogation of power or its unfettered exercise. Indeed, the Executive's use of its newly "found" power fatally undermines the rule of law by running roughshod over Congress's prior enactments expressly intended to curtail the use of executive detention and its recent pronouncements about the proper scope of the war powers to be exercised in the wake of the September 11th attacks.

Third, the laws of war do not apply in every situation in which military force is exercised by the President in this "war on terrorism," and it is for the courts, not the President, to determine whether the laws of war or domestic criminal law governs Padilla's detention. The circumstances of Padilla's capture dictate that the latter apply.

I. THE SEPARATION OF POWERS DOCTRINE PRECLUDES THE PRESIDENT FROM USING HIS COMMANDER-IN-CHIEF POWERS DOMESTICALLY ABSENT EXPRESS CONGRESSIONAL AUTHORIZATION

The separation of powers principle was designed to implement a fundamental insight of the Framers: the concentration of power in the hands of a single branch is a threat to liberty. The structure of separation of powers protects our core constitutional values by providing three separate, overlapping and mutually reinforcing remedies – legislative, executive, and judicial – against unconstitutional federal conduct. By increasing the power of the President beyond what the Framers envisioned, the Executive's new "enemy combatant" policy compromises the liberty of this country's

citizens, "liberty which the separation of powers seeks to secure." *Clinton v. New York City*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

Assuming that the President may exercise at least *some* of his Commander-in-Chief powers under Article II in a time of undeclared war, the President cannot unilaterally expand his power to conduct military operations abroad to usurp Congressional and Judicial authority over domestic affairs. In this regard, the district court leaped, without analysis or foundation, from its initial presumption that the Constitution permits the President to use his Commander-in-Chief powers during an undeclared war, *see Padilla v. Bush*, 233 F. Supp. 2d 564 at 589-90, to the unprecedented conclusion that these powers can be employed to address domestic affairs within the United States absent express Congressional authorization.

Such an expansion of Presidential power is unconstitutional for two reasons. First, while the Executive undoubtedly has plenary power to conduct military operations abroad, he cannot unilaterally expand this power to intrude upon domestic affairs and detain U.S. citizens arrested on U.S. soil. Second, the President's aggrandizement of his military powers as Commander-in-Chief encroaches upon the constitutional authority of the Congress and the Courts over domestic affairs.

A. The Broad Discretion Accorded 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 that must be assessed when a court examines the scope of constitutional authority accorded a specific branch of government, and, in particular, when it assesses the Executive branch's exercise of its war powers. *See, e.g., United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 315 (1936) ("That there are differences between [external and internal affairs],

and that these differences are fundamental, may not be doubted."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward . . . it should have no such indulgence."). As Judge Torruella recently cautioned:

> Justice Jackson's argument is relevant to the circumstances presently under consideration: the distinction between congressionally unauthorized presidential actions directed at extraterritorial government activity as opposed to similar actions focused on the 'internal affairs of the country' is critical.

Hon. Juan R. Torruella, United States Court of Appeals for the First Circuit, *On the Slippery Slope of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. Pa. J. Const. L. 648, 660-61 (2002).

The principle is well-established that great deference is given to the President's authority as Commander-in-Chief to act in external affairs, even in the absence of an express congressional grant of authority. *See, e.g.*, *Youngstown*, 343 U.S. at 635-36 n.2 (Jackson, J., concurring). Yet the Supreme 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.[3] *See Youngstown*, 343 U.S. at 642 (Jackson, J.,

[3] The Supreme Court has cited only two potential circumstances in which the President might exercise his Commander-in-Chief powers internally absent congressional authorization, neither of which is present in this case: (1) defending against an invasion by a foreign nation or (2) defending against states organized in rebellion. *See The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). The Court has not had occasion to squarely decide the question of the constitutionality of the President's internal exercise of his Commander-in-Chief authority absent congressional authorization. *See, e.g., id*. at 671 ("Without admitting that such [a congressional] act was necessary under the circumstances, it is plain that if the President had in any manner assumed

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 "in *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). *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. 2 (4 Wall.) 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."). In this regard, Justice Jackson declared in *Youngstown* that "no

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powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, '*omnis ratihabitio retrotrahitur et mandato equiparatur*,' this ratification has operated to perfectly cure the defect."). As discussed *infra*, the President's use of military authority within the United States has historically received either prior authorization or subsequent ratification by Congress.

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." *Id.*, at 642.

Constitutional text, structure, doctrine, and theory recognize that Congress, and not the President, holds the authority to permit the imposition of military power within the domestic arena. When the Framers drafted the Constitution, they weakened the possibility of a military with a dominant role in American society by subordinating it to civilian control both by appointing the President as its civilian head, and more significantly, by authorizing the other two branches of the government to exercise control over the armed forces. Of those branches, Congress has the most practical and determinative authority to exercise influence over the military.[4] As Justice Jackson concluded in *Youngstown*, even the specter of war does not detract from this constitutional principle:

> Thus, even in war time [the President's] seizure of needed military housing [within the United States] must be authorized by Congress. It was also left expressly to Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel Invasions . . . ." Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.

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[4] Thus, the Framers gave Congress, not the President, the authority to declare war. U.S. Const. art. I, § 8, cl. 11. Congress also has the authority to raise and support an Army, *id.* at cl. 12, and a Navy. *Id.* at cl. 13. Congress may make rules and regulations for the military, *id.* at cl. 14, and call forth the militia. *Id.* at cl. 15. Congress must provide advice and consent to the President's appointment of officers. *Id.* at art. II, § 2, cl. 2. Perhaps most significant is the constitutional requirement that Congress "raise and support Armies, but no Appropriation of Money to that use shall be for a longer Term than two Years." *Id.* at art. I, § 8. This limitation on long-term military funding ensures that Congress maintains an active, regular role in regulating the affairs of the military.

Id. at 644 (Jackson, J., concurring). The *Youngstown* opinions are all the more relevant today considering that these limitations on the internal use of the Commander-in-Chief powers were affirmed in the face of the global threat to security created by the Korean War – concerns about which were as serious then as are our present-day concerns about global terrorism. *See id.* at 668 (Vinson, C.J., dissenting) (describing the circumstances surrounding the case as follows: "A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict.").

The Government and the district court rely upon those instances in which the Executive branch's domestic exercise of its war powers was a product of the combined constitutional authority given to Congress to make laws and to the President to enforce the laws as Executive and Commander-in-Chief – a deliberate and express concentration of governmental power that is absent in this case. *See Ex Parte Quirin*, 317 U.S. 1, 28 (1942) (finding that the Articles of War explicitly authorized the President's order establishing the military commissions at issue); *The Prize Cases*, 67 U.S. at 697 (stating that Congress subsequently ratified all of the President's "acts, proclamations and orders"); *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (relying upon the reasoning of and authority cited in *Quirin*). Without express congressional authorization, however, the exercise of Commander-in-Chief powers in domestic affairs is an unconstitutional aggrandizement of the Executive's power. The President's expansion of war powers to encroach upon domestic affairs thus embodies the threat to the separation of powers that the Court has cautioned against repeatedly. *Youngstown*, 343 U.S. at 632 (Douglas, J., concurring) ("If we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency.").

II. THE ARROGATION OF POWER CONTEMPLATED BY THE EXECUTIVE BRANCH HERE UNCONSTITUTIONALLY ENCROACHES UPON CONGRESSIONAL AUTHORITY

The Court's analysis of the scope of the Executive's Commander-in-Chief powers within our constitutional framework must begin with the Supreme Court's decision in *Youngstown*. As the Supreme Court noted in *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981), Justice Jackson's concurrence in *Youngstown* provides the most pragmatic and useful approach to assessing the exercise of executive power when the national security is under threat.

In *Youngstown*, Justice Jackson emphasized the fact that the President's emergency powers are derived from the Constitution and are shared with Congress. 343 U.S. at 652 (Jackson, J., concurring). Indeed, according to Justice Jackson, such power could only arise from an interaction between the legislative and executive branches: "Presidential powers are not fixed but fluctuate, *depending upon their disjunction or conjunction with those of Congress*." *Id.* at 635 (emphasis added). Thus, key to Justice Jackson's analysis was how congressional action or inaction affects presidential authority.

Looking at the interaction between the legislature and the executive, Justice Jackson described three categories of presidential power. The first category is exemplified by the power exercised by the President in *Quirin* and *U. S. v. Curtis-Wright Export Corp.,* 299 U.S. 304 (1936). "When the President acts pursuant to an express or implied authorization of Congress," the President's authority "is at its maximum, for it includes all that he possesses in his own right plus *all that Congress can delegate*." *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring)(emphasis added). In the second category, "when the President acts in absence of either a congressional grant

or denial of authority he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. Finally, the third category includes those situations where, as is the case here, "the President takes measures *incompatible* with the expressed or implied will of Congress." *Id.* (emphasis added). Under these conditions, "[the President's] 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." *Id.*; *see also Haitian Ctrs. Council v. McNary*, 969 F.2d 1350, 1366 (2d Cir. 1992). As the Supreme Court stressed in *Dames & Moore*, where the President acts in contravention of the will of Congress, "the Court can sustain his actions 'only by disabling the Congress from acting upon the subject.'" 453 U.S. at 669 (quoting *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring)).

An examination of the current situation under Justice Jackson's paradigm plainly shows that the Executive's Commander-in-Chief powers do not provide authority for the actions at issue here.

A. There Has Been No Affirmative Grant of Authority to the Executive Branch Permitting the Indefinite Detention of American Citizens Seized in the U.S. As Enemy Combatants

The President's actions designating and detaining U.S. citizens arrested in a civilian setting as "enemy combatants" plainly does not fall within Justice Jackson's first category. There is no statute that expressly authorizes the President to detain individuals without due process indefinitely merely upon his designation that they are "enemy combatants," there is no act of Congress from which this power may be properly implied, and there is no constitutional well from which the President can draw this prerogative. *See Youngstown*, 343 U.S. at 586-88. In fact, to the contrary, both Congress and the courts have acted emphatically to limit the Executive's power to detain American citizens without review under circumstances like those present here. *See, e.g.*, 18 U.S.C.

§ 4001(a) (2001); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 114-16 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304, 323-24 (1946); *Reid v. Covert*, 354 U.S. 1, 17 (1957).

The court below cited *Quirin* as authority for an affirmative grant or acknowledgment of the Presidential authority to declare and detain American citizens as "enemy combatants." *Padilla*, 233 F. Supp. 2d at 595-96. However, in *Quirin*, as in *Curtis-Wright* and *The Prize Cases*, *supra* at 12, the President's Commander-in-Chief authority pursuant to Congress's declaration of war was expressly augmented by Congress to permit the internal use of specific aspects of military power. In *Quirin*, the Supreme Court emphasized that:

> By the Articles of War, and especially Article 15, *Congress has explicitly provided*, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress . . . has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions . . . . And the President, as Commander-in-Chief, by his Proclamation in time of war has *invoked that law*. By his Order creating the present Commission he has undertaken to exercise the *authority conferred upon him by Congress*, and also such authority as the Constitution itself gives the Commander-in-Chief to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in a time of war.

Quirin, 317 U.S. at 28 (emphasis added).

Here, in contrast, Congress has *neither* issued a formal declaration of war *nor* enacted specific provisions authorizing the designation and detention of U.S. citizens as "enemy combatants." The Government, however, contends that at least one of two legislative actions must have vested this extraordinary power in the President: either the congressional resolution authorizing the use of force to respond to the attacks of September 11, 2001, Authorization for the Use of Military Force, Pub. Law No. 107-40, § 2(a), 115 Stat. 224 (2001) ("Joint Resolution"), or the congressional statute appropriating funds relating to the detention of prisoners of war. 10 U.S.C. §

956 (2002). Neither of these congressional acts constitute a grant of authority to the Executive branch in the nature of that sought to be exercised here.

The Joint Resolution permits the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States . . . .". Act of Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001). This general authorization to use force against those responsible for the September 11 attacks does not constitute express congressional authorization for the designation and detention of U.S. citizens as enemy combatants in order to prevent or investigate future acts of terrorism. Both the timing of the enactment – four days after the attacks – and its plain language attest to the fact that Congress intended to limits its applicability to those organizations and individuals who participated in the September 11th attacks. The limited discussion surrounding the adoption of the Joint Resolution shows that Congress understood that it was specifically and narrowly authorizing the use of force in Afghanistan to overtake those responsible for the attacks and the government supporting them. 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." 115 Stat. 224. Further, the congressional record makes clear that "[t]hose persons, organizations or nations that were not involved in the September 11 attack are, by definition, outside the scope of this authorization." 147 Cong. Rec. S. 9948, 9949. There was no discussion in Congress of extending the President's power to seize and detain American citizens on American soil who were not alleged to have any role in the September

11th attacks.[5] In fact, the Senate deleted the 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.* Given these facts, Padilla's situation plainly does not fall within the boundaries of the Joint Resolution.

For similar reasons, the Government's reliance below on the appropriations law provides no support for the Executive branch's new "enemy combatant" authority. The statute specifies that it is intended to appropriate funds for "maintenance ... of prisoners of war [and] other persons in the custody of the [military] whose status is determined . . . to be similar to prisoners of war." 10 U.S.C. § 956(5) (2002). Nothing in the text of the appropriations statute cited by the Government implies an expanded delegation of detention powers from Congress to the President. The district court did not see fit to address this argument, *Padilla*, 233 F. Supp. 2d 564 at 598-99, and the Government does not pursue it in their brief on appeal here.

In sum, neither of these statutes contain any language explicitly authorizing the detention of citizens. In a similar context, the Supreme Court has explained that the broad power to detain citizens advanced by the Executive here can be found only in the most clear and unmistakable 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

[5] As Representative John Conyers, Jr. stated on the House floor during discussion over the Joint Resolution, "By not declaring war, the resolution preserves our precious civil liberties. This is important because declarations of war trigger broad statutes that not only criminalize interference with troops and recruitment, but also authorize the President to apprehend 'alien enemies.'" 147 Cong. Rec. H5680 (September 14, 2001).

> 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). The statutes cited by the Government certainly do not contain clear and unmistakable language authorizing detention. In fact, they do not even "use the language of detention." *Id.* at 300.

B. Congress Has Expressly Precluded Any Detention of American Citizens That Has Not Been Explicitly Authorized by Statute

The President's actions also do not fall within Justice Jackson's second category of Presidential power. It is beyond dispute that Congress has not "left open" any issue concerning the legality of detaining U.S. citizens arrested in a civilian domestic setting, regardless of whether the United States is at war or involved in a military conflict abroad.[6] Rather, Congress has expressly prohibited this type of investigative/preventative detention through its enactment of the anti-detention statute. 18 U.S.C. §4001(a) (2000).

1. The text and legislative history of 18 U.S.C. § 4001(a) requires specific statutory authorization for the detention of citizens.

Congress's anti-detention statute, 18 U.S.C. § 4001(a),[7] provides that "No citizen shall be

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[6] Congress has granted the specific authority to the Executive it thought necessary and appropriate to enable it to address security threats from abroad. It criminalized specific terrorism-related conduct through the enactment of numerous statutes. *See, e.g.,* U.S.C.

It also considerably broadened the Executive branch's law enforcement powers to permit greater surveillance and monitoring of suspected terrorists and those associated with terrorist organizations. *See* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[7] Section 4001(*b*), a provision vesting certain administrative powers over federal prisons in the Attorney General, is completely unrelated to § 4001(*a*). The Government has argued that

imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The text is unambiguous, permitting no exceptions to its proscription of Executive detentions that have not been specifically authorized by statute. *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2149 (2003) ("Where . . . [a] statute's words are unambiguous the judicial inquiry is complete."); *Demore v. Kim*, 123 S. Ct. 1708 (the word "no" is unambiguous and precludes judicial review despite presumption to contrary); *see also Padilla*, 233 F. Supp. 2d at 597.

The legislative history of § 4001(a) makes clear Congress's intent to deprive the Executive of authority to detain American citizens during *wartime* without an explicit statutory authorization. The statute was enacted specifically to ensure that wartime detentions of American citizens without due process – like the internments of Japanese-Americans during World War II – do not happen again. Congressman Railsback, who introduced the provision now codified as 18 U.S.C. § 4001(a), stated 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. 31535, 31550 (1971). Railsback emphasized that the Judiciary Committee wanted to "do something affirmative . . . to make sure that we have restricted the President's *wartime* powers." Hearing on H.R.234 and other Bills Prohibiting Detention Camps Before the House Comm. on the Judiciary, 92nd Cong. 79 (1971)

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§4001(a) should be read in the context of § 4001(b), thus restricting § 4001(a)'s proscription to the "control of civilian prisons and related detentions." *See Hamdi III* Gov't. App. Br. at 53; *see also* Open letter from William J. Haynes II, General Counsel, Department of Defense, to Alfred P. Carlton, Jr., ABA President, and ABA membership, Sep. 23, 2002, at 3. The district court here seemed to accept this argument at face value. *See Padilla*, 233 F.3d at 597-98. However, §4001(b), passed in 1948, *preexisted* § 4001(a) (1971) by 23 years. *See* 62 Stat. 847 (June 25, 1948). The 1971 Act moved the old section 4001, governing control of prisons, to subsection 4001(b), and gave the new hybrid section, its current hybrid title ("limitation on detention; control of prisons"). *See* 18 U.S.C.A. § 4001 (2002), "Amendments." Current subsection (b) was unchanged. *See* H.R. Rep. No. 92-116 at 6. Therefore, reference to subsection 4001(b) is entirely irrelevant to the interpretation of subsection 4001(a).

(hereafter "Hearings"). *Cf. 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 constitution").

The House Report indicates that the "purpose of the ... bill" was, as an initial matter, "to repeal the Emergency Detention Act of 1950 ... which both authorizes the establishment of detention camps and imposes certain conditions on their use." H.R. Rep. No. 92-116, at 2. The Emergency Detention Act ("EDA") had authorized the Attorney General, during internal security emergencies, to apprehend and detain "each person as to whom there is reasonable cause to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage."[8]

The House Report on § 4001(a) stated that the "mere continued existence" of the EDA had "aroused much concern among American citizens, lest the Detention Act become an instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views." H.R. Rep. No. 92-116, at 2. But § 4001(a) was intended to be more than a negation of the EDA:

> it is not enough to merely repeal the Detention Act. The Act concededly can be viewed as not merely an authorization but in some respects as a restriction on detention. Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority. It has been suggested

[8] 50 U.S.C. § 813(a) (1970). 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, 81st Cong. 2d Sess. (Sep. 23, 1950) at §§ 2(1), 2(7), 101(1), 101(6). "Congress passed the Emergency Detention Act ... to lay the groundwork for any future need to detain large groups of people in times of emergency. A number of the [Japanese-American] detention camps were 'mothballed' for future use." Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 Hawaii L. Rev. 649, 664 (1997).

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

Id. at 5. Congress was concerned that mere repeal of the EDA would leave the field in Justice Jackson's second category (congressional silence), and possibly allow courts to imply some executive detention powers over citizens when the next wartime crisis arose. The intent of Congress in passing § 4001(a), and of President Nixon in signing it, was to ensure that if a future president sought to invoke wartime preventative detention powers, the courts would analyze them under the "severe test" of Justice Jackson's third category (explicit congressional disapproval) and foreclose application of all executive detention powers.

Obviously, with § 4001(a), Congress expressed a clear public policy against the detention of citizens, in wartime or at peace, even for citizens "likely to engage in espionage or sabotage." H.R. Rep. No. 92-116, at 2. Congress did so in a time of war, with widespread domestic dissent focused on that war, and in a climate of major political assassinations and even domestic terrorism. The Supreme Court, addressing the applicability of the statute, 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, 479 n.3 (1981) (emphasis in original). Nothing in the legislative history, the text or its subsequent construction by courts indicates that the clear proscription of § 4001(a) should be ignored here.

2. A declaration of war or other general congressional authorization of force does not constitute the explicit congressional authorization required under 18 U.S.C. § 4001(a).

The Government's argument, accepted by the court below, is that Congress's authorization of the use of force against those nations, organizations or persons who planned the September 11 attacks, satisfies Section 4001(a)'s requirement of statutory authorization for executive detention. The Government's argument makes a mockery of Congress's intent and would eviscerate the statute.

Congress's clear purpose in enacting § 4001(a) was to remove whatever wartime authority a President may have had to detain citizens whom he believes to be enemy agents in order to prevent a repetition of what happened in 1942. If a declaration of war or other 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 would be rendered meaningless. Congress then 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.

In addition, the legislative history makes clear that in enacting 18 U.S.C. § 4001(a), Congress intended for that law to require the adoption of a statute *explicitly* authorizing the detentions of citizens before the Executive could employ this power, and *not* a general enactment such as the Joint Resolution. The legislative history shows that the phrase "except pursuant to an Act of Congress" was included to ensure that *all* of the provisions of the U.S. Code explicitly authorizing detentions would continue in force and effect for use by the Executive (and not merely the specific provisions contained in Title 18 as the original statute had read). H.R. Rep. No. 92-116, at 4. The original language of what eventually became 18 U.S.C. § 4001 provided that "no person shall be committed

to imprisonment or otherwise detained except in conformity with the provisions of Title 18." *Id*. at 1. 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 sections of the U.S. Code besides Title 18. *Id.* Rather than attempt to delineate every section of the U.S. Code authorizing Executive detention, the judiciary committee solved the problem by creating an exception to the prohibition on detention for *those detentions expressly permitted by an Act of Congress*. This amendment to the original proposed language was considered a technical change to meet the Justice Department's objection without altering Congress's intent.

Further evidence of congressional intent can be found in the objections of a number of key Congressmen to an interpretation of § 4001(a) propounded by Congressman Ashbrook. Ashbrook's interpretation, using virtually the identical reasoning the President uses in this case, would have allowed the President to rely upon a general statute creating broad emergency authority as the statutory authorization required by § 4001(a). Cong. Rec., at 31547. Congressman Ichord, the Chairman of the House Internal Security Committee, explicitly disagreed with Ashbrook's interpretation, stating that the language of the Section should be interpreted to "prohibit even the picking up, as the time of 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. Congressman Railsback, the author of the amendment now codified as 18 U.S.C. § 4001(a), also explicitly rejected Ashbrook's interpretation, stating that § 4001(a) ensured that future Presidents could not detain citizens without due process because its language provides that "detention cannot occur unless pursuant to an Act of Congress." *Id.* at 31552. *See also id.* at 31550, 31551 (comments of Railsback that "no detention of citizens be undertaken by the Executive without the prior consent

by the Congress."). Congressman Eckhardt concurred with Ichord and Railsback that § 4001(a) required an explicit congressional authorization of detention: "You have got to have an act of Congress to detain, and the act of Congress *must authorize detentions*." *Id.* at 31555 (emphasis added). No Congressman agreed with Ashbrook's interpretation, clearly indicating that only an *explicit* congressional authorization of detention power can overcome Section 4001(a)'s express prohibition.

3. Congress's intent to limit the Executive's power to detain U.S. citizens is further evinced by its passage of the PATRIOT Act.

Not only did Congress expressly preclude the President from using his Executive powers to detain American citizens stopped on American soil, but its recent enactments demonstrate that it never intended to provide the Executive with such vast and unprecedented authority. Shortly after the September 11 attacks, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, (the "PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). The PATRIOT Act expanded the Government's authority to detain aliens suspected of terrorist ties for short periods of time, without charge, prior to the initiation of criminal or removal proceedings. 8 U.S.C. § 1226a(a) (2000). These provisions demonstrate that Congress, in passing the Joint Resolution just two months earlier, and in passing § 4001(a) many years earlier, did not believe it had delegated to the Executive the unfettered authority to detain citizens or non-citizens without charge. *See id*. Passed less than two months after the Joint Resolution, the PATRIOT Act vested the Executive branch (the Attorney General) with the extraordinary, but nonetheless limited, power to detain non-citizens suspected of terrorism. The PATRIOT Act mandates that once a non-citizen has been has detained as a suspected terrorist, the

Executive must either commence removal proceedings or charge the individual with a criminal offense "not later than 7 days after the commencement of such detention." *Id.* at § 1226a(a)(5); *see id.* at §1226a(a)(1), (3). If the non-citizen is determined not to be removable or is no longer suspected of terrorism, the Executive must terminate the detention, and either indict the individual on criminal or immigration charges or release him. *See id.* at § 1226a(a)(2). The Government's reading of the authority conferred on the Executive by the Joint Resolution and the limitations upon that authority created by the PATRIOT Act, would result in a construction in which the PATRIOT Act would provide greater protections to non-citizens than it would provide to citizens – a result that plainly would not comport with the Constitution.

C. The President's Designation and Detention of U.S. Citizens as Enemy Combatants is an Unconstitutional Encroachment Upon Congress's Authority

1. Congress has the power to regulate the detention of citizens. . . . . .

The President here seeks to unilaterally expand his Commander-in-Chief power, not only in the absence of express congressional authorization, but in the face of incompatible congressional acts. Thus, not only is the President's Commander-in-Chief power at its "lowest ebb" as an initial matter, it cannot be upheld *at all* without an affirmative disabling of Congress's authority in this area. *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring). Thus, for this Court to uphold the President's actions here, it must find that § 4001 is an unconstitutional limitation of the Executive's Commander-in-Chief powers.

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 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. *See Brown v. United States*, 12 U.S. (8 Cranch) 110, 115-16 (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). 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.

2. The Executive's "enemy combatant" policy usurps Congress's lawmaking authority.

The President's "enemy combatant" policy also impermissibly disrupts the balance of powers between the legislative and executive branches by usurping Congress's legislative power. Article I, section 1 of the Constitution vests the power to make laws in Congress. *Myers v. United States*, 272 U.S. 52 (1926). The Executive power, by contrast, is to "Take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Congress may not delegate its inherent lawmaking power to another branch, and no other branch may assert this power. *See, e.g., Loving v. United States*, 517

U.S. 748, 758 (1996) ("[T]he lawmaking function belongs to Congress. . . and may not be conveyed to another branch or entity."); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

Because the President lacked congressional authorization for his Enemy Combatant Declarations generally, and his June 9, 2002, order regarding Padilla specifically, these orders constitute Executive lawmaking. *Youngstown*, 343 U.S. at 588 ("The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress – it directs that a presidential policy be executed in a manner prescribed by the President."). Indeed, the Declaration highlights the problems that arise when the President engages in lawmaking under the guise of exercising his Commander-in-Chief power. Without clear standards and limits emerging from a congressionally defined authorization to detain U.S. citizens, there is no official articulation of what constitutes an "enemy combatant," what circumstances will trigger the President's designation, and when the detention of a citizen shall cease.

The unfettered and undefined nature of the power which the President seeks is an unconstitutional effort to usurp Congress's authority to define violations of domestic law as well as violations of the Law of Nations. The President's unconstitutional seizure of citizens, no less than the seizure of steel, through Executive lawmaking, bypasses constitutional limits upon Executive power:

> The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limits of their rights.

Youngstown, 343 U.S. at 655 (Jackson, J., concurring).

The Constitution requires that both the amendment and the repeal of statutes also conform with Article I requirements of bicameral passage and presentment to the President. U.S. Const. art. I, § 7, cl. 2.; *INS v. Chadha*, 462 U.S. 919, 954 (1983). The President violated these Article I requirements when he acted to effectively cancel 18 U.S.C. § 4001(a), a statute duly enacted by Congress that expressly prohibited the type of detention at issue here. A law can only be repealed or amended through another, independent legislative enactment, which itself must conform with the requirements of Article I. The President's policy thus violates Article I's "single, finely wrought and exhaustively considered procedure," *Chadha*, 462 U.S. at 951, and is therefore unconstitutional on these grounds as well.

3. The Executive's view of the scope of judicial review improperly expropriates Congress's Suspension Clause power.

The Constitution explicitly guarantees the legislative branch a role in any curtailment of habeas corpus. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2 (the "Suspension Clause"). Courts have consistently refused to recognize executive discretion to add further exceptions to the Constitutional text. During the early days of the Civil War, Chief Justice Taney stated that neither the President's officers nor the President himself could suspend the writ, and that no exception could be made "in any emergency or in any state of things." *Ex parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.). By denying Padilla access to counsel and the opportunity to challenge the Government's evidence, and by urging the court to apply the "some evidence" standard which forecloses meaningful review of the jurisdictional

facts underlying his "enemy combatant" status, the Government has effectively suspended the writ of habeas corpus and trenched on Congress's exclusive power in this field. *See generally* Brief Submitted by the American Civil Liberties Union and New York Civil Liberties Union as *Amici Curiae.*

III. THE DISTRICT COURT ERRED IN APPLYING THE LAWS OF WAR TO PADILLA

The district court held that the President's designation and detention of Padilla as an "enemy combatant" was authorized by the laws of war.[9] *Padilla*, 233 F. Supp. 2d 564, 588. Yet, outside of a war or armed conflict situation, this body of law does not apply. Unlike the Fourth Circuit in *Hamdi III*, the court below based its findings not on the conflict in Afghanistan, but rather on the United States' on-going, self-proclaimed "war" with Al Qaeda and mere suspicion of Padilla's association with that organization. *Padilla*, 233 F. Supp. 2d at 590. The issue of whether the President can, under his Commander-in-Chief powers, conduct a war domestically against an amorphous, transnational terrorist organization – an organization that is not associated with or part of any nation-state and has a presence in 80 countries worldwide – was not addressed. The court simply accepted that he could. *Id.*

However, neither domestic nor international law recognizes an amorphous, worldwide struggle against terrorism as a "war" in which individuals can be captured and detained as "enemy

[9] The laws of war, also known as the "law of armed conflict" or "international humanitarian law" is a subset of the law of nations. *Quirin*, 317 U.S. at 27-28. It has many sources, including treaties, customary international law, statutes, and military regulations. The most important of these sources are the four Geneva Conventions and their two additional protocols. *See, e.g., Documents on the Laws of War* 2 (Adam Roberts and Richard Guelff, eds. 2000).

combatants,"any more than the law recognizes a "war" against an international drug cartel or a "war" on poverty. While the President can rely upon his Commander-in-Chief powers under the laws of war to remove the Taliban Government in Afghanistan and to root out members of Al Qaeda present there, *Hamdi III*, 316 F.3d at 465, an expansion of these powers into the domestic sphere goes far beyond what the laws of war permit. Moreover, even if the laws of war were applicable here, the President would still be required to exercise his Commander-in-Chief powers in a manner consistent with those laws. The circumstances of Padilla's detention do not meet this requirement.

A. The Laws of War Do Not Apply To Padilla's Detention

The Court must make an initial determination as to whether the laws of war apply. Mapping out the boundaries of the application of the laws of war for purposes of the President's Commander-in-Chief powers under the Constitution falls squarely within the mandate of the courts. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be *ascertained and administered by the courts of justice* of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination."); *Colepaugh*, 235 F. 2d at 431 (regarding "access to the courts for determining the *applicability of the law of war to a particular case*," the Executive "could not foreclose judicial consideration of the cause of the restraint, for to do so would deny the supremacy of the Constitution and the rule of law under it as construed and expounded in the duly constituted courts of the land…").

If courts were precluded from making such an assessment, the President would be permitted to unilaterally declare that any violent situation in which military force is used is a "war" and to

apply the laws of war to permit actions that Congress has expressly proscribed. If there were no limits on the President's power to designate a situation a war, the "war against drugs," for example, could be designated as such: a war in which the armed forces and persons associated with the drug cartels are recognized combatants, creating a battlefield which encompasses the globe, and authorizing both sides to exercise the extraordinary powers of detention of combatants and civilians alike.

This Court must exercise caution in determining whether the laws of war are applicable here. Because a terrorist organization such as Al Qaeda is not a recognized nation state[10] and its members are not uniformed soldiers of a recognized army, the activities of the organization do not meet the requirements to fit under the rubric of the laws of war.[11] The laws of war recognize only two types of "war" or "armed conflict" – international and internal. An international armed conflict involves two or more nation states,[12] whereas an internal conflict involves a legitimate state engaged in a conflict with an armed insurgency.[13] Non-state actors are given only limited recognition under the

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[10] Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in formal relations with other entities. *See, e.g., Restatement (Third) of the Foreign Relations Law of the United States*, § 201 (1987).

[11] Ruth Wedgewood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 Yale J. Int'l L. 559 (1999).

[12] Common Art. 2 stipulates that the Convention "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties…". The International Committee of the Red Cross (ICRC) Commentary to this article provides that "armed conflict" comprises of "Any difference arising between two states and leading to the intervention of members of the armed forces …". International Committee of the Red Cross, *Commentary on Geneva Convention IV*, 20 (J.S. Pictet, ed., 1958). *See also United States v. Noriega*, 808 F. Supp. 791, 795 (S.D. Fla. 1992).

[13] Common Art. 3 contemplates the possibility of armed conflict against a non-state actor. However, even in this context, recognition of non-state actors is limited to protracted hostilities within the confines of a single state; a civil war type situation. The ICRC in its commentary on such conflicts explicitly excludes from its scope "a mere act of banditry or an unorganized and

laws of war; either in a civil war context, or in a context in which the non-state actor is acting at the behest and with the active support and direction of another state.[14] Neither scenario is applicable to the actions of Al Qaeda. *See, e.g., Bas v. Tingy*, 4 U.S. 37, 40 (1800) (defining war as "every contention by force between two nations"); *The Prize Cases*, 67 U.S. 635, 666 (1862) (war is a "state in which a nation prosecutes its rights by force"); *Pan Am World Airways, Inc. v. Aetna Casualty & Sur. Co*., 505 F. 2d 989, 1012-15 (2d Cir. 1974) (citing to international law definition of war and finding that "war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty" and that the terrorist organization the PFLP did not meet this criterion."). *See also Holiday Inns, Inc. v. Aetna Ins. Co*., 571 F. Supp. 1460, 1500 (S.D.N.Y.1983); *New York Life Ins. Co. v Bennion*, 158 F. 2d. 260 (10th Cir. 1946). Most recently, the Fourth Circuit in *Hamdi v. Rumsfeld* acknowledged that "historical concepts of war," required state action. 2003 WL 21540768 at *15 (4th Cir. July 9, 2003) (Traxler, J., concurring in denial of rehearing en banc). In distinguishing Padilla's arrest and detention from that of Hamdi, Judge Traxler noted that, in Hamdi's case, "the President exercised his power to detain an American citizen found within the boundaries of Afghanistan during our military efforts to overthrow its governing regime," *id.* at *10, that "Afghanistan is an identifiable nation state [and] Hamdi was in a conventional war situation," and that Hamdi was captured in a "zone of active hostilities." *Id.* at *11.

None of the cases cited by the district court stand for a contrary proposition: *The Prize Cases*, upon which the district court placed primary reliance, involved a civil war situation and thus

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short-lived insurrection." International Committee of the Red Cross, *Commentary on Geneva Convention IV*, 36 (J.S. Pictet, ed., 1958).

[14] *See, e.g., Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), 1986 ICJ Rep. 14, 25 I.L.M 1023 (1986), para. 209.

fell within the category of armed insurrection. All of the other cases cited concerned international armed conflicts. *Padilla*, 233 F. Supp. 2d at 589-90. Amici have found no authority from either a domestic or international tribunal holding that the laws of war are applicable absent a conflict between two or more nation states or the existence of an armed insurrection.

Moreover, this Court should not engraft the laws of war to a situation where Congress has acted expressly to define the scope of Executive powers to be exercised under the circumstances. *See, e.g.*, PATRIOT Act; U.S.C.

See Point II, *supra*.

B. The President's Asserted Commander-in-Chief Power To Detain Padilla Must Be Consistent With The Laws of War

The Supreme Court has made clear that the President's Commander-in-Chief powers are limited by the laws of war. *Bas v. Tingy*, 4 U.S. 37, 43 (1800) ("if a general war is declared, its extent and operations are only restricted by the *jus belli*, forming part of the law of nations …"); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814) (during war, the President "cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims."); Milligan, 71 U.S. at 19 (finding that in time of war, "the President. . . is controlled by law and has his appropriate

[15] The mere authorization for the use of force in the Joint Resolution does not necessarily imply that the laws of war are applicable to Padilla's case.

sphere of duty, which is to execute the laws."); *Dooley v. United States*, 182 U.S. 222, 231 (1901) (quoting 2 Henry W. Halleck, International Law 444 (1st. ed. 1861)) (noting that executive military powers during a foreign occupation are "regulated and limited … directly from the laws of war … from the law of nations.").

1. Padilla's detention violates the Third Geneva Convention.

Relying principally on *Quirin*, the district court held that under the laws of war the President can unilaterally designate an American citizen captured on American soil an "enemy combatant" and detain him for the duration of hostilities. Significantly, the court found that "no principle in the Third Geneva Convention impedes the exercise of that authority." *Padilla*, 233 F. Supp. 2d at 596. The Government claims that the laws of war prohibit "enemy combatants" from communicating with counsel for the duration of their detention unless charged with a criminal offense. Govt. Br. at 37. Both interpretations of the laws of war are incorrect.

First, the Third Geneva Convention, the "supreme Law of the Land," U.S. Const. art. VI, § 2, and customary international law provide that where there is a doubt as to the legal status of an individual captured in time of war, a competent tribunal must determine his status. This determination is not a matter for Presidential discretion, but rather is a legal one to be made in accordance with the laws of war. Second, the circumstances of Padilla's detention are such that the laws of war, properly applied, would allow him the right to counsel.

2. Under the laws of war Padilla is entitled to a determination of his legal status.

The treatment of all persons who fall into enemy hands during war depends upon the status of the person as determined by the laws of war. Under the laws of war, no person can be held without legal status or legal protection. According to the International Committee of the Red Cross

("ICRC") Commentary on the Fourth Geneva Convention:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside the law.

International Committee of the Red Cross, *Commentary on the Geneva Convention IV*, 51 (J.S. Pictet, ed., 1958) (emphasis in original).[16]

Article 5 of the Third Geneva Convention, *Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, Article 5, 6 U.S.T. 3316, 75 U.N.T.S 135, reflects the importance given to a determination on a person's legal status under the laws of war. Under this provision, Padilla when captured, was immediately entitled to treatment as a POW; and, if there was any doubt with regard to that status – which there clearly is here – he was entitled to a hearing before a competent tribunal, as mandated by Article 5. The principle that the customary international laws of war require that an independent and impartial tribunal or court determine Padilla's status and rights was recently upheld by the Inter-American Commission on Human Rights of the Organization of American States in relation to the United States government's detention of persons at Guantanamo Bay, Cuba. *See Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba)* Inter-Am. C. H. R. (Mar. 12, 2002), reprinted in 41 I.L.M. 532, 533-34 (2002).

3. Under the laws of war, Padilla is entitled to due process protections.

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[16] The International Criminal Tribunal for the Former Yugoslavia has recently affirmed this principle, stating that "there is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war … he or she necessarily falls within the ambit of [the Fourth Convention], provided that its article 4 requirements [defining a protected person] are satisfied." *Prosecutor v. Delalic et al*. Judgment, ICTY, IT-96-21, ¶ 271 (Nov. 16, 1998).

The district court found that Padilla was being held for preventative reasons. *Padilla*, 233 F. Supp. 2d at 593. The Goverment asserts that he can be held in this manner, without access to counsel or the courts, "for the duration of the conflict." Gov't Br. at 38. The factual circumstances of his detention, however, indicate that his confinement is punitive in nature. *See* Padilla Br. at 43-45. Therefore, under the laws of war he is entitled to due process protections.

The laws of war describe two categories of detention: "internment," the normal mode of detention in prisoner of war camps, and "confinement," meaning criminal-style detention. *Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Sec. II ("Internment of Prisoners of War"); Art. 21 (distinguishing "close confinement" from ordinary expected conditions of confinement, and restricting circumstances where close confinement is allowed); Art. 103 (prisoners of war "shall not be confined" unless "essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months."). The legislative history to the Third Geneva Convention indicates that punitive "confinement" requires due process. It indicates that the Conventions were designed to outlaw a practice that had developed during World War II of housing prisoners in "interrogation camps" before sending them to normal prisoner of war facilities. Accordingly, whenever subject to punitive confinement, prisoners of war are entitled to procedural guarantees necessary to ensure a fair trial, including an explicit right to legal representation. *Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, arts. 82-88 and 99-107, 6 U.S.T. 3316, 75 U.N.T.S. 135. Similar protections extend to all persons, irrespective of legal status, held under conditions of

punitive confinement.[17] In so far as a right to counsel is required to ensure a "regular judicial procedure," Padilla, as a starting point, must be afforded such a right. *See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I), (June 8, 1977), art. 75(3) - (4)(a), 1125 U.N.T.S. 3.

[17] The U.S. has expressly stated that it considers Art. 75, binding upon it as a matter of customary international law. *See* Meron, *Human Rights and Humanitarian Norms As Customary Law*, 65 (Clarendon, 1991). *See also* Common Art. 3 of the Geneva Conventions.

CONCLUSION

For all of the foregoing reasons, Amici respectfully submit that the Court should find that the Executive detention of Mr. Padilla is unlawful under the Constitution and the laws of war.

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Respectfully submitted,

By: _____
Barbara J. Olshansky (BO3635)

Jules Lobel
Michael Ratner
Shayana Kadidal
Nancy Chang
Jennifer Green
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, N.Y. 10012
Tel. (212) 614-6439
Tax (212) 614-6499

Counsel for Amici Curiae

On the Brief:
Steven Macpherson Watt, LL.B [Hons.]; LL.M.
Gita Guttierez, J.D.
Ryan Golten
Maissa Boulos
Shakti Belway
Kenavon Carter
Jill Meyers