No. 05-6396

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

JOSE PADILLA,

Petitioner-Appellee,

—v.—

COMMANDER C.T. HANFT,
U.S.N. COMMANDER, CONSOLIDATED NAVAL BRIG,

Respondent-Appellant.

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

BRIEF OF *AMICI CURIAE* ORIGINAL CONGRESSIONAL SPONSORS OF 18 U.S.C. § 4001(A) IN SUPPORT OF PETITIONER-APPELLEE SUPPORTING AFFIRMANCE

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Only one form need be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of individual parties as well as corporate parties. Disclosures are required from amicus curiae only if amicus is a corporation. Counsel has a continuing duty to update this information. Please file an original and three copies of this form.

No. 05-6396 Caption: Padilla v. Hanft

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See Appendix A (name of party/amicus) who is Amici Curiae (appellant/appellee/amicus),

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   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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APPENDIX A

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Name of *Amici Curiae*:

Original Congressional Sponsors of 18 U.S.C. § 4001(a)

The Hon. John Conyers, Jr.
The Hon. Robert F. Drinan
The Hon. Robert W. Kastenmeier
The Hon. Abner Mikva

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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 Jose Padilla violates the provisions of that Act.

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. During 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).

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.

Amici are filing this brief with the consent of all parties pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

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 Jose Padilla, a U.S. citizen, for more than three 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 and imprisoned at the Metropolitan Correctional Center in New York. On June 9, 2002, the President designated Mr. Padilla an "enemy combatant" and ordered him transferred

into military custody. That same day, the Department of Defense removed Mr. Padilla from his civilian jail cell and transferred him to a military prison in South Carolina. He has remained at that prison ever since – held indefinitely in solitary confinement.

On February 28, 2005, the U.S. District Court for the District of South Carolina 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. Hanft*, 2005 WL 465691 at * 10 (D.S.C. 2005) (Floyd, J. presiding). Judge Floyd emphasized in his opinion that Mr. Padilla's "present confinement is in direct contradiction to the mandate of [§ 4001(a)]." *Id.* at * 9.

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, courts begin "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)). The Supreme 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.

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 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). "[P]arties should not seek to amend a statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

The Supreme Court has already affirmed that § 4001(a) means precisely what it says. In *Howe v. Smith*, 452 U.S. 473 (1981), the Court 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). *See also Padilla v. Rumsfeld*, 352 F.3d 695, 721 (2d Cir. 2003)

("[T]he statute is unambiguous."); *Padilla v. Hanft*, 2005 WL 465691 at * 9 ("In clear and unambiguous language, [§ 4001(a)] forbids *any* kind of detention of an United States citizen, except that which is specifically allowed by Congress.") (emphasis in original).

Despite this clarity of language, the Government now argues that § 4001(a), properly construed, applies much more narrowly than its words direct. *See* Appellant's Opening Brief at 59-60. 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. *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) (emphasis added).

II. CONGRESS SOUGHT TO PROHIBIT THE CIVILIAN OR *MILITARY* DETENTION OF ANY U.S. CITIZEN ABSENT *CLEAR* 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.[1] *See* H.R. 234, 92d Cong. (1971).

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 (1970) (repealed 1971), Title II of the Internal Security

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[1] The Supreme Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] 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) (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 . . .").

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. 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. The EDA had "established procedures for the apprehension and detention, during internal security emergencies, 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. In advocating for its repeal, the sponsors of H.R. 234 emphasized that the procedures enacted by the EDA suffered from serious due process failings:

> 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.

117 CONG. REC. 31,550-51 (1971) (Congressman Tom Railsback).[2]

But the EDA, whatever its inadequacies, had at least established some affirmative limitations on preventive detention by the Executive Branch.[3]

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[2] The Senate was in full agreement on the need for repeal of the EDA. Senator Daniel Inouye, the primary sponsor of S. 592 (the Senate's companion bill to H.R. 234) 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.

[3] Under the EDA, for example, 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), (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.* §§ 815-821.

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 Richard Ichord, Chair of the House Committee on Internal Security and the leading opponent of H.R. 234. 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.[4]

Congressman Ichord warned that simple repeal might grant even more power to the Executive than the EDA had provided. *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.

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[4] H.R. 820 would have granted detainees financial support in securing the assistance of counsel, for example, as well as assistance in obtaining investigative, expert, or other services necessary for their defense. H.R. REP. NO. 91-1599, at 2. It would also have narrowed the grounds under which the EDA could have been invoked. *Id.* Members of Congress rejected this bill as inadequate, however, deciding that it did not (and could not) go far enough. Congressman Drinan, a co-sponsor of H.R. 234, declared 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).

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 the Supreme 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 observed:

> [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 his Amendment: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *Id.* They did so on September 16, 1971, by a vote of 356-49.[5] *Id.* at 31,781.

B. Congress Understood The Railsback Amendment 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 reveal a Congress finely attuned to the broad implications of the language used. Although the Government contends that Congress "intended Section 4001(a) to speak solely to civilian detentions," Appellant's Opening Brief at 59, the legislative history makes clear that Congress intended the statute to apply not only to civilian detentions, but to military detentions in wartime. This is hardly surprising. In adopting § 4001(a), Congress was reacting specifically against the excesses of two wartime measures – the internment of Japanese-Americans and the passage of the EDA.

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[5] The Senate adopted the Railsback Amendment on September 16, 1971. Just before the measure came up for a vote, Senator 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).

1. Congress Was Fully Aware That The Amendment Would Broadly Constrain Executive Detention Powers In Wartime.

During the debate on H.R. 234, opponents of the Railsback Amendment highlighted what they claimed would be its detrimental impact on presidential authority in wartime. Congressman Ichord warned, for example, that the Railsback Amendment would leave the President powerless in a time of war in the face of domestic subversives and violent revolutionaries. 117 CONG. REC. 31,544 (1971). On the House floor, he declared that "this most dangerous committee 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. at 31,542, 31,544.[6]

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[6] 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 31,554.

Pressing this point in the floor debate, Congressman Ichord asked Congressman Railsback whether the sponsors of H.R. 234 would really deny the President authority to preventively detain U.S. citizens in wartime. The following exchange – in which Congressman Railsback emphasized that the President had other, adequate means at his disposal – illustrates that Congress had explored the full 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?
>
> 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 internment 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.[7]

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[7] 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 Mikva noted, "If there is any inherent

Congressman Ichord also denounced the Railsback Amendment as impractical, arguing that Congress might not be able to move quickly enough in a time of military 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, emphasized that the detention power rested properly with Congress and that the EDA had been "an unwarranted delegation of unnecessary power" to the President. *Id.* at 31,556. He argued 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

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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.

> 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.

As Congressman Railsback went on to explain, moreover, H.R. 234 would not handicap the president in the event that Congress was *truly* unable to act – namely, in a situation of martial law when the "processes of government cannot function in an orderly way." *Id.* at 31,755. He pointed out that the Supreme Court had explicitly noted this "exception in *Ex parte Milligan*," a Civil War case holding that the Executive may not try civilians by military tribunal *unless* the civilian courts are closed and obstructed under the application of martial law. *See* 71 U.S. (4 Wall.) 2, 127 (1866) (explaining that "[m]artial rule can never exist where the courts are open" and capable of "administer[ing] criminal justice according to law"). Congressman Railsback emphasized 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) the military detention of U.S. citizens in wartime.

2. Congress Recognized The Military's Role In The Detention Of Japanese-Americans.

Despite this legislative history, the Government attempts to argue that Congress did not really intend for § 4001(a) to apply to military detentions, because the Railsback Amendment was specifically directed at "the detention camps instituted for Japanese-Americans during World War II." Appellant's Opening Brief at 60. In support of this, the Government points out that in *Ex parte Endo*, 323 U.S. 283 (1944), the Supreme Court noted that the detention of Japanese-Americans was "administered by a civilian agency, the War Relocation Authority, not by the military." *Id.* (quoting *Ex parte Endo*, 323 U.S. at 298).

This argument is supported neither by the legislative history of § 4001(a) nor by the history of the detention camps, themselves. In enacting § 4001(a), Congress was centrally aware of the role that the military had played in the detention of Japanese-Americans. For example, in emphasizing that his Amendment sought to prevent a recurrence of the World War II detentions, Congressman Railsback pointed out that Japanese-Americans were held "under the 1942 Executive order, which incidentally

delegated authority to the military instead of civilians to execute the order." 117 CONG. REC. 31,552 (1971). 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 his authority under the Order to "the Secretary of War and the military commanders who he may from time to time designate." H.R. REP. NO. 91-1599, at 8.

And although *Ex parte Endo* did note that a civilian War Relocation Authority (WRA) had been created to administer the relocation centers,[8] the Supreme Court's decision also made clear that 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. at 289-90. As the official designate of the Secretary of War, General

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[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." *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.

De Witt was responsible for carrying out the duties prescribed by Executive Order 9066.[9] *Id.* at 286. It was General De Witt who issued the orders that prevented evacuees from leaving the relocation centers. *Id.* at 289 (noting that General De Witt promulgated a series of restrictive orders prohibiting the evacuees from leaving relocation centers "except pursuant to an authorization from General De Witt's headquarters").[10] "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 after this delegation, the military continued to play an important day-to-day 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 (testimony of Dillon S. Myer, Director of

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[9] 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. at 285-98.

[10] *See also Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2656 n.2 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting that in World War II "the relocation and detention of American citizens was ordered by the military under authority of the President as Commander in Chief").

the War Relocation Authority). 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 administered by the WRA. 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.[11] *Id.* Although the Army interned non-citizens without prior judicial procedure, U.S. citizens could be interned in these military 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, contrary to the Government's arguments, it simply cannot be maintained that the detention of Japanese-Americans in World War II was by a civilian agency, to the exclusion of the military.

[11] 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.

3. Congress Understood That The EDA Was A Wartime Measure.

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. 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.* §§ 814-821.

Seeking to create a distinction between military and civilian detention where none exists, the Government emphasizes in its brief that the EDA delegated detention authority to the Attorney General, a civilian official. *See* Appellant's Opening Brief at 60. 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.").[12] By directing that the Executive act "through the Attorney General," the EDA also 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 Clearly Grounded In Statute.

Congress did not believe that a general statute – one that did not clearly and unmistakably confer detention authority on the Executive – would be enough to satisfy the demanding language of the Railsback Amendment. The evolution of that language establishes that the sponsors of

[12] 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.

H.R. 234 envisioned that any enabling statute would have to deal specifically with the Executive's authority to detain.[13]

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 Cong. 73 (1971) [hereinafter *H.R. 234*

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[13] The Government inaccurately claims in its brief that the plurality in *Hamdi v. Rumsfeld* rejected the notion that § 4001(a) requires an enabling statute to contain clear and specific language authorizing the detention of U.S. citizens. *See* Appellant's Opening Brief at 54 (citing *Hamdi*, 124 S.Ct. at 2640-41). Far from rejecting this principle, the plurality in *Hamdi* reiterated the clear statement requirement and held that in the limited circumstances of that case (and only in those circumstances), a sufficiently clear congressional statement had been provided. *See Hamdi*, 124 S.Ct. at 2640 ("[W]e conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required . . ."); *see also id.* at 2654 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("In requiring that any Executive detention be 'pursuant to an Act of Congress,' then, Congress necessarily meant to require a congressional enactment that clearly authorized detention or imprisonment."); *id.* at 2671 (Scalia, J., dissenting) (arguing that the AUMF did not authorize the detention of a citizen "with the clarity necessary to overcome the statutory prescription" of § 4001(a)).

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.[14]

The Subcommittee considered various solutions to this problem, including the possibility of enumerating all such titles within the text of H.R. 234.[15] But Congressman Railsback devised a simpler solution, and

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[14] 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.

Id.

[15] 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) (2000). Mr. Mardian's intervention ensured this did not happen, preserving detention authority for the military and further

Subcommittee 3 amended H.R. 234 with the broader language of his proposal.[16] 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

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undermining the Government's claim that § 4001(a) was not intended to cover military detentions. *See, supra,* Section II.B.

[16] The legislative history of Mr. Mardian's intervention negates the Government's argument that the placement of § 4001(a) in Title 18 was somehow evidence of Congress's intent to limit the applicability of § 4001(a) to the detention provisions of Title 18. *See* Appellant's Opening Brief at 59. *See also Hamdi*, 124 S.Ct. at 2655-56 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting that the legislative history of § 4001(a) "shows its placement in Title 18 was not meant to render the statute more restricted than its terms").

> 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.

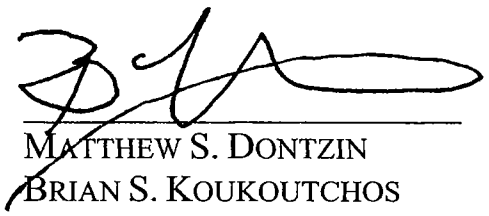
Id. at 31,552. Following on this discussion, Congressman Robert Eckhardt, a supporter of H.R. 234, emphasized to his colleagues that contrary to Congressman Ashbrook's remarks: "You have got to have an act of Congress to detain, and that act of Congress must authorize detention . . . ." *Id.* at 31,555.

CONCLUSION

Despite the plain language and clear legislative history of § 4001(a), Mr. Padilla has been held in preventive detention for more than three years. *Amici* respectfully request that this Court uphold the mandate of § 4001(a) and affirm the judgment of the district court.

Dated: June 14, 2005

Respectfully submitted,



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FOR THE FOURTH CIRCUIT

No. 05-6396 **Caption:** JOSE PADILLA v. C.T. HANFT

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