

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSE PADILLA,	:	
DONNA R. NEWMAN,	:	
as Next Friend of Jose Padilla,	:	
	:	
Petitioners,	:	
	:	
v.	:	02 Civ. 4445 (MBM)
	:	
GEORGE W. BUSH,	:	
DONALD RUMSFELD,	:	
JOHN ASHCROFT,	:	
COMMANDER M.A. MARR,	:	
	:	
Respondents.	:	

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS
THE AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

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**RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS
THE AMENDED PETITION FOR A WRIT OF HABEAS CORPUS**

Respondents hereby submit their reply memorandum in support of their motion to dismiss the amended petition for a writ of habeas corpus. Petitioners and their amici contend that the President acted without legal authority when he determined, in an exercise of his constitutional powers as Commander in Chief, that petitioner Jose Padilla is an enemy combatant closely associated with al Qaida and should be detained as such by the military in the course of the ongoing armed conflict. As our opening brief on the merits explains (at 18-19), the capture and detention of enemy combatants during wartime reflects settled historical practice, and the United States has detained enemy combatants in virtually every significant conflict -- whether or

not a formally declared war -- in the Nation's history. That established historical practice, as longstanding decisions of the Supreme Court and other courts make clear, is sanctioned by the laws and customs of war, is a well established exercise of the President's constitutional powers under the Commander in Chief Clause, and is consistent with federal law.

Petitioners do not directly dispute the authority of the armed forces, acting under the President's direction, to seize and detain enemy combatants in a time of war. Instead, they contend that the laws of war do not apply to the current conflict or to the facts and circumstances surrounding Padilla's detention. They thus assume that Padilla is being detained as a civilian under the domestic criminal laws rather than as an enemy combatant under the laws and customs of war, and assert that his detention violates the various constitutional protections that accompany criminal proceedings. As we have set forth in our opening brief and below, however, the settled authority of the military to detain enemy combatants in a time of war does not depend on a formal declaration of war, and it is fully applicable to those who attempt to extend the conflict beyond the traditional battlefield in violation of the laws and customs of war. Accordingly, the President's determination that Padilla is an enemy combatant subject to military detention is

proper and entitled to be given effect by this Court.

**I. THE AUTHORITY TO DETAIN AN ENEMY COMBATANT IN A TIME OF WAR
IS WELL ESTABLISHED AND IS DIRECTLY APPLICABLE HERE**

Petitioners' principal submission (Br. 4) is that, regardless of the deference owed the President's factual conclusions underlying his determination that Padilla is an enemy combatant, Padilla's detention, as matter of law, violates the Constitution and various federal statutes. That contention is without merit. Respondents' opening brief (at 17-21) elaborates the settled body of law recognizing the authority of the United States to detain enemy combatants for the duration of an armed conflict. That authority, contrary to the arguments of petitioners and their amici, fully applies in this case.

**A. This Case Squarely Implicates The President's
Authority To Detain Enemy Combatants In A Time Of War**

1. "[T]he authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2." Hamdi v. Rumsfeld, 296 F.3d 278, 281-282 (4th Cir. 2002). The capture and detention of enemy combatants presents a core exercise of the President's constitutional powers in wartime. As the Supreme Court explained in Ex Parte Quirin, "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces," and "[u]nlawful combatants are likewise subject to capture and detention." 317 U.S. 1, 30-31 (1942). See also Resp. Op. Br. at 10, 18 (citing additional authorities). Accordingly, the military detention of enemy combatants, a practice deeply rooted in the laws of war, is fully consistent with the Constitution. See Quirin, 317 U.S. at 27-28; see also United States v. Salerno, 481 U.S. 739, 748 (1987) ("[I]n times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous.").

2. Petitioners argue that, for various reasons, the settled authority to detain enemy combatants does not apply in the circumstances of this case. Each of the grounds put forward by petitioners does not withstand scrutiny.

a. Petitioners contend (Br. 5-6, 22) that, because Padilla is an American citizen, he is not subject to detention as an

enemy combatant. That is incorrect. As respondents' opening brief explains (at 19-20), the President's authority to detain an enemy combatant is unaffected by the individual's American citizenship. One of the belligerents in Quirin, in fact, was assumed to be a United States citizen. The Court made clear that his citizenship was irrelevant to his status as an enemy combatant, explaining: "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war." 317 U.S. at 37-38. A host of other decisions are to the same effect. See Hamdi, 296 F.3d at 283 (citing Quirin for proposition that "both lawful and unlawful combatants, regardless of citizenship, 'are subject to capture and detention as prisoners of war by opposing military forces'"); Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) ("petitioner's citizenship in the United States does not * * * confer upon him any constitutional rights not accorded any other belligerent under the laws of war"), cert. denied, 352 U.S. 1014 (1957); In re Territo, 156 F.2d 142, 145 (9th Cir. 1946).

No contrary conclusion is suggested by Ex Parte Milligan, 71 U.S. (4 Wall) 2 (1866), on which petitioners and their amici chiefly rely. Pet. Br. 4-6; ACLU Br. 3-4, 10-12; NYSCDL Br. 3-6, 8-10. Milligan involved a citizen who, unlike Padilla, was not an enemy belligerent. Milligan had been a resident of Indiana, loyal territory, throughout the war, and he had no connection to the enemy's forces. See Quirin, 317 U.S. at 45; Milligan, 71 U.S. at 118, 121-122. A majority of the Supreme Court held that, in those circumstances, Milligan was not subject to trial and punishment by the military under the laws

of war. Id. at 122.¹

The Court later made clear in Quirin that Milligan did not apply outside the specific facts of that case. See 317 U.S. at 45 ("We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it."). The Court emphasized that Milligan had "never been a resident of any of the states in rebellion," and that, "not being part of or associated with the armed forces of the enemy, [he] was a non-belligerent, not subject to the law of war." Ibid. The Court found the rationale in Milligan "inapplicable" to the circumstances before it in Quirin. Ibid.; see also William H. Rehnquist, All the Laws But One 137 (1998) (noting that "[o]ne of the principal arguments made by lawyers for the petitioners [in Quirin] was that" Milligan controlled because "the civil courts were open at this time" and "there had been no invasion of any part of the country," and further noting that the Court rejected that argument by limiting Milligan to its particular circumstances). The Court explained that Quirin, unlike Milligan, involved persons who were associated with the armed forces of the enemy

¹ Four Justices, concurring in the judgment, concluded that Congress could have subjected Milligan to military jurisdiction consistent with the Constitution but had not exercised that authority. 71 U.S. at 132-142 (Chase, C.J., concurring).

and thus were enemy belligerents subject to military detention under the laws and customs of war. Quirin, 317 U.S. at 45; see id., at 30-31, 35-38.

This case is controlled by Quirin rather than Milligan. Milligan had remained in Indiana throughout the war and was not "part of or associated with the armed forces of the enemy." 317 U.S. at 45. Padilla, by contrast, was in Afghanistan and Pakistan after the attacks of September 11, 2001, where he met with senior al Qaida lieutenant Abu Zubaydah and senior al Qaida operatives, discussed plans to detonate a "dirty bomb" and conduct terrorist operations in the United States, received training in wiring explosives at the direction of al Qaida leaders, and then returned to the United States to explore and advance the conduct of further attacks on al Qaida's behalf. Mobbs Dec. ¶¶ 6-10. The President thus determined that Padilla is an enemy combatant "closely associated with al Qaeda, an international terrorist organization with which the United States is at war," Presidential Order (June 9, 2002) (Tab 1 to Mobbs Dec.). In addition, whereas Milligan was "not engaged in legal acts of hostility against the government," Milligan, 71 U.S. at 131, the President determined that Padilla "engaged in hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury

to or adverse effects on the United States," Presidential Order, supra.

Those determinations by the President are entitled to be given effect in this proceeding, see pp. 23-26 infra, and they make clear that Quirin, not Milligan, governs here. Indeed, the words of the Supreme Court in Quirin apply directly to this case: "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the * * * laws of war." 317 U.S. at 37-38.

b. Petitioners assert (Br. 27-28; see ACLU Br. 7; NYSCDL Br. 20-21) that the authority to detain an enemy combatant -- and the applicability of the laws of war more generally -- arises only in the context of a "war between two nation states." As an initial matter, whether a state of armed conflict exists to which the laws of war apply is a political question for the President, not the courts, to decide. See The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) ("Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to

be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."); see also Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation -- even by a citizen -- which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."). Petitioners' understanding of the laws of war, in any event, is flatly incorrect.

If petitioners' argument were accepted, it would mean that the attacks on the United States of September 11, 2001, could not qualify as an act of war within the meaning of the laws of war, and that the military lacks authority in the current conflict to capture and detain enemy soldiers even in the heat of battle. As the Fourth Circuit recently observed, however, "[t]he unconventional aspects of the present struggle do not make its stakes any less grave" or diminish the military's settled authority to detain enemy combatants. Hamdi, 296 F.3d at 283. It is well established, in particular, that the laws of war apply to armed conflicts involving groups or entities other than traditional nation-states. See The Prize Cases, 67 U.S. at 666 (1862) ("[I]t is not necessary to constitute war, that both

parties should be acknowledged as independent nations or sovereign states."); I. Detter, The Law of War 16 (2d ed. 2000) ("Parties which engage in war do not have to be recognised as States by their enemy. A country, nation, or group can be a belligerent in spite of non-recognition."); id. at 134 ("non-recognition of groups, fronts or entities has not affected their status as belligerents nor the ensuing status of their soldiers as combatants").

The President thus acted well within his authority in invoking the laws of war on determining Padilla's close association with al Qaeda, an "organization with which the United States is at war." Presidential Order (June 9, 2002); see Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57833 (2001) (finding that "a state of armed conflict [exists] that requires the use of the United States Armed Forces"). Moreover, that al Qaida and its supporters eschew the hallmarks of the armed forces of traditional nation-states -- by, inter alia, failing to distinguish themselves from the civilian population and targeting innocent civilians -- only demonstrates that they have violated the laws of war, not that they are entitled to an exemption from application of those laws. See pp. 11-12 infra.

c. Petitioners also attach significance (Br. 20, 27, 29) to the fact that Padilla was not seized as an armed enemy soldier on the battlefield. The authority to detain enemy combatants, however, applies not just to conventionally armed soldiers engaged in battlefield combat, but extends to all belligerents, including any individuals who associate with enemy forces in furtherance of their hostile actions. See Territo, 156 F.2d at 145 ("[A]ll persons who are active in opposing an army in war may be captured."). In particular, Quirin makes clear that an individual cannot immunize himself from treatment as an enemy combatant by attempting to extend the battle beyond the traditional battlefield. As the Court explained, "[n]or are petitioners any less the belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." Quirin, 317 U.S. at 38. Padilla, according to the President's determination, has "engaged in conduct that constituted hostile and war-like acts" against the United States and its citizens, "including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States." Presidential Order (June 9, 2002). Those findings amply demonstrate that he is an enemy belligerent subject to detention. See Quirin, 317 U.S. at 35-

38.

It likewise does not affect Padilla's status as an enemy combatant that he was wearing "civilian clothes" rather than a uniform when seized or that he is associated with forces that do not constitute an "organized army" according to the laws of war. Pet. Br. 27. Those considerations pertain to whether Padilla is a "lawful" or "unlawful" combatant under the laws of war. Lawful combatants comply with the requirements for lawful belligerency under the laws of war, such as wearing insignia identifying them as members of combatant forces and distinguishing them from the civilian population, and they are entitled to treatment as prisoners of war when captured and detained. See A. Rosas, The Legal Status of Prisoners of War 305 (1976). Combatants who fail to comply with the requirements for lawful belligerency are unlawful belligerents. They are not entitled to prisoner-of-war status and also are subject to trial and punishment for violating the laws of war. See Quirin, 317 U.S. at 31 ("an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property" is a "familiar example[] of [a] belligerent[] who [is] generally deemed not to be entitled to the status of prisoners of war, but to be [an] offender[] against the law of war subject to trial and punishment by

military tribunals").

The distinction between lawful and unlawful combatants does not affect the President's authority to detain Padilla. All enemy combatants, whether lawful or unlawful, are subject to capture and detention for the duration of an armed conflict. Id. at 30-31; Hamdi, 296 F.3d at 283; Colepaugh, 235 F.2d at 432. Accordingly, the President's authority to detain Padilla - - contrary to the suggestion of the ACLU (Br. 13-14) -- does not turn on whether Padilla should be treated as a prisoner of war. Although the President has determined that those affiliated with al Qaida and the Taliban are not entitled to prisoner-of-war status under the Geneva Conventions (see Resp. Op. Br. 19 n.5), that determination bears on the conditions of their detention, not the antecedent question whether they may be detained in the first place. As to that question, Padilla, like all enemy combatants, is subject to long-settled authority of the military in times of war to detain enemy belligerents during the course of the conflict.

B. Congress Has Specifically Supported, Not Prohibited, The President's Actions.

Petitioners assert that Congress has not authorized -- and in fact has specifically prohibited -- the detention of enemy combatants in the circumstances of this case. Pet. Br. 6-13, 33-34. That contention lacks merit. Petitioners' effort to minimize the broad scope of the congressional authorization is unavailing, and the various federal statutes alleged to prohibit Padilla's detention have no application here.

1. a. The President's exercise of his constitutional powers as Commander in Chief does not require the authorization of Congress. See The Prize Cases, 67 U.S. at 668 ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."). Here, however, the President's exercise of his Commander-in-Chief powers comes with full "statutory authorization from Congress," and his constitutional authority therefore is at its broadest. Hamdi, 296 F.3d at 281; see Dames & Moore v. Regan, 453 U.S. 654, 668-669 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Congress recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and Congress

specifically supported the President's use of "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, * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). As the laws of war and the long-settled historical practice make clear, the authority to use force in an armed conflict necessarily embraces an attendant authority to capture and detain enemy combatants. See, e.g., Ex Parte Quirin, 317 U.S. at 28, 30-31. It follows that the broad terms of the congressional authorization to use "all necessary and appropriate force" and to "prevent any future acts of terrorism" includes the detention of enemy combatants. See Hamdi, 296 F.3d at 281, 283.

b. Petitioners nonetheless assert (Pet. Br. 9-12; see also ACLU Br. 7; NYSCDL Br. 21) that Congress's support is "limited" and does not encompass the capture and detention of enemy combatants. That assertion is baseless.

Petitioners rely principally on the absence of a formal declaration of war by Congress. As Congress understood when framing its resolution, however, the President's prerogative to

invoke the laws of war in a time of armed conflict -- including in respect to the capture and detention of enemy combatants -- in no way turns on a formal congressional declaration. See Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800); J. Ely, War and Responsibility 25 (1993) (the suggestion "that congressional combat authorizations must actually be labeled 'declarations of war'" is "manifestly out of accord with the specific intention of the founders -- most eighteenth-century wars were not 'declared' in so many words, a fact of which the founders took specific and approving note"); The Federalist No. 25, at 159 (Alexander Hamilton) (P. Ford ed. 1898) ("the ceremony of a formal denunciation of war has of late fallen into disuse").² Accordingly, the United States military has routinely exercised its authority to capture and detain enemy combatants in recent conflicts such as the Gulf, Vietnam, and Korean wars, none of which involved a formal congressional declaration. See Broussard v. Patton, 466 F.2d 816, 819 (9th Cir. 1972), cert. denied, 410 U.S. 942 (1973).

Petitioners also submit (Pet. Br. 11-12) that Congress's resolution is "limited to those associated directly with 9/11,"

² See also A. Roberts & P. Guelff, Documents on the Laws of War 2 (3d ed. 2000) ("The application of the laws of war does not depend upon the recognition of the existence of a formal state of 'war,' but (with certain qualifications) comprehends situations of armed conflict whether

and that "[n]othing in the Mobbs Declaration ties Padilla to the 9/11 attacks." Petitioners' crabbed reading of the congressional authorization is contradicted by its plain terms. Congress broadly supported the President's use of force against "those nations, organizations, or persons he determines planned, authorized, committed, or aided" the attacks of September 11, 2001, and Congress authorized the President "to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224. The President, in determining that Padilla is an enemy combatant, found: that Padilla is "closely associated with al Qaeda"; that Padilla "represents a continuing, present and grave danger to the national security of the United States"; and that Padilla's detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." Presidential Order (June 9, 2002). Those findings place Padilla's detention squarely within the letter of the congressional enactment.

Even if Padilla's detention as an enemy combatant were not encompassed by Congress's resolution, Congress has otherwise made clear its acceptance and assumption that the President's Commander-in-Chief powers in a time of war encompasses the

or not formally declared or otherwise recognized as 'war.'").

detention of enemy belligerents. In 10 U.S.C. 956(5), Congress authorized the use of appropriated funds for "expenses incident to the maintenance, pay, and allowance of prisoners of war" and "other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war." By explicitly supporting the expenditure of funds for the detention of "prisoners of war" and persons -- such as enemy combatants -- "similar to prisoners of war," Congress indicated its understanding that the military, consistent with its longstanding historical practice, would capture and detain enemy combatants during times of armed conflict.³

2. Petitioners, invoking various provisions in the criminal code, assert that Congress has specifically prohibited Padilla's detention by the military. None of those criminal provisions speaks to the President's constitutional authority as Commander in Chief to capture and detain enemy combatants in a time of war.

³ Petitioners, citing Ex Parte Endo, 323 U.S. 283, 304 n.24 (1944), assert that it is "absurd" to suggest that an "appropriation bill provides authority for the President's action." Br. 17. But the statute at issue here -- unlike the provision addressed in Endo -- is not merely a lump sum appropriation containing no specific allocation of sums for the particular purpose in question. Indeed, 10 U.S.C. 956(5) is not an "appropriation bill" at all. Instead, it authorizes the use of appropriated funds for the specific purpose of detaining "prisoners of war" and others "similar to prisoners of war."

a. Petitioners and their amici place principal emphasis on 18 U.S.C. 4001(a). See Pet. Br. 6-8; ACLU Br. 8; NYSCDL Br. 13-14. That provision, not raised by petitioners in their amended petition, states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Nothing in Section 4001(a) signals an intention by Congress to impede the settled authority of the Executive to capture and detain enemy combatants in wartime. To the contrary, Congress placed the provision in Title 18 of the United States Code, which governs "Crimes and Criminal Procedure," not in Title 10 or Title 50, which address the "Armed Forces" and "War and National Defense." Cf. In re Application of United States for Material Witness Warrant, 213 F. Supp. 2d 287, 293 (S.D.N.Y. 2002) (concluding that grand jury proceedings are "criminal proceedings" for purposes of the material witness statute, 18 U.S.C. 3144, in part because provisions concerning operation of grand juries are contained in Title 18).

Section 4001(a) thus pertains to civilian detentions for law enforcement and other related purposes. Accordingly, the immediately ensuing subsection of the statute, 18 U.S.C. 4001(b), addresses "control and management of Federal penal and correctional institutions," and exempts from its coverage

"military or naval institutions." That language informs the proper interpretation of Section 4001(a), the subsection relied on by petitioners. See Owasso Indep. Sch. Dist. v. Falvo, 122 S. Ct. 934, 939-940 (2002). The legislative history described by petitioners (Br. 7-8) contains no indication that Congress intended for Section 4001(a) to affect the wartime detention of enemy belligerents.⁴

Moreover, the canon of constitutional avoidance forecloses any interpretation of 18 U.S.C. 4001(a) that would impede the constitutional authority of the President as Commander in Chief to detain enemy combatants in a time of war. See Jones v. United States, 529 U.S. 848, 857 (2000); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). The canon applies with special force where, as here, the "constitutional issues * * * concern the relative powers of the coordinate branches of government." Public Citizen v. Department of Justice, 491 U.S. 440, 467 (1989). Petitioners' reading of Section 4001(a) would directly interfere with the President's ability to detain an enemy combatant who claims American citizenship, no matter what may be

⁴ To the contrary, as Congressman Mikva, one of the sponsors of the legislation, explained: "nothing in the House Bill * * * interferes with [the Commander-in-Chief] power, because obviously no act of Congress can derogate the constitutional power of a President." 117

the nature of the combatant's actions and allegiances or the circumstances of his capture and detention. Petitioners' reading also would mean that Section 4001(a) effectively overruled Quirin and Territo, and yet nothing in the legislative history suggests such a result. There is no warrant for inferring that a provision directed to civilian detentions is intended to interfere with the core authority of the Executive to detain enemies pursuant to the Commander-in-Chief power.⁵

Finally, as we have explained (pp. 13-17 supra), Congress has supported the President's actions in the current conflict. See 18 U.S.C. 4001(a) (exempting detentions undertaken "pursuant to an Act of Congress"). Congress's support of the President's use of "all necessary and appropriate force against those [that] he determines" were responsible for the terrorist acts "in order to prevent any future acts" necessarily encompasses the authority to seize and detain individuals that he determines are enemy combatants. 115 Stat. 224; see Hamdi, 296 F.3d at 281,

Cong. Rec. 31555 (Sept. 13, 1971).

⁵ If Section 4001(a) in fact involved a congressional effort to interfere with this basic executive power, despite all indications to the contrary, it would be unconstitutional. See, e.g., Public Citizen, 491 U.S. at 482 (Kennedy, J., concurring) (Congress cannot "encroach[] upon a power that the text of the Constitution commits in explicit terms to the President"); INS v. Chadha, 462 U.S. 919 (1983); Barenblatt v. United States, 360 U.S. 109, 111-112 (1959); United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1871). This Court need not confront that constitutional question, however, because Section 4001(a) was not intended to limit the President's Commander-in-Chief authority.

284. And Congress's authorization for the military to expend appropriated funds for the detention of "prisoners of war" and persons "similar to prisoners of war," 10 U.S.C. 956(5), indicates that Congress accepts and endorses the need of the military to detain enemy combatants during an armed conflict.

b. Petitioners' reliance (Br. 33-34) on the Posse Comitatus Act, 18 U.S.C. 1385, is misplaced for largely the same reasons. The Posse Comitatus Act, like 18 U.S.C. 4001(a), is directed to civilian law enforcement, and it generally prohibits the military from engaging in the process of enforcing domestic criminal law. See Op. Br. 29-30. Padilla's detention as an enemy combatant does not involve the military in civilian law enforcement. Instead, it entails the exercise of a core military function to safeguard the national security in a time of war. In any event, the Posse Comitatus Act by its terms has no application where, as here, the military action falls within the President's powers as Commander in Chief and is supported by congressional enactments. See 18 U.S.C. 1385 (exempting "cases and * * * circumstances expressly authorized by the Constitution or Act of Congress").

c. Finally, petitioners assert (Br. 17-18; see ACLU Br. 14-15) that the enactment of various criminal prohibitions against the conduct of terrorist activity somehow limits the

authority to detain Padilla as an enemy combatant. That contention is without basis. Congress's enactment of criminal prohibitions does not -- and could not -- diminish the President's exercise of his constitutional powers as Commander in Chief in wartime. The President's powers to enforce the criminal laws is entirely distinct from his authority to prosecute a war. And detention for civilian law enforcement purposes serves a different function, and is subject to a different legal framework, from detention for military purposes in a time of war. The purpose of detaining an enemy combatant in wartime is not to exact criminal punishment. Instead, it is to prevent the individual from aiding the enemy forces and to gather intelligence in furtherance of the war effort. See Territo, 156 F.3d at 145 ("The object of capture is to prevent the captured individual from serving the enemy."); W. Winthrop, Military Law and Precedents 788 (2d ed. 1920) ("Captivity is neither a punishment nor an act of vengeance," but rather "a simple war measure.").

To be sure, an "unlawful" combatant whose belligerency violates the laws of war is potentially subject to trial and punishment for his offenses. See Quirin, 317 U.S. at 30-31. Moreover, the same conduct that renders his belligerency unlawful under the laws of war might also violate domestic

criminal law. The conduct of the conspirators in Quirin, for instance, might well have violated United States criminal law. But there is no hierarchy in those circumstances that compels the executive to prosecute an individual as a suspect under domestic criminal laws rather than to detain him as an enemy combatant under the laws and customs of war. That choice is a quintessential exercise of executive and prosecutorial discretion. And the fact that an unlawful belligerent might eventually face trial and punishment does not bear on the legality of detaining all enemy combatants, whether lawful or unlawful, during the course of an armed conflict. See pp. 11-12 supra. Cf. In re Yamashita, 327 U.S. 1 (1946) (upholding authority to convene military commission after the cessation of hostilities to try belligerents for violating the law of war during the conflict). Indeed, the vast majority of belligerents captured in wartime are never charged with a particular offense but are detained during the conflict pursuant to the laws of war. Padilla's detention as an enemy combatant fits squarely within that settled practice.⁶

⁶ Because Padilla is being detained as an enemy combatant under the laws of war, the decisions relied on by the ACLU involving civil and criminal detentions are inapposite. See ACLU Br. 5-6, 16-17 (discussing Zadvydas v. Davis, 533 U.S. 678 (2001) (immigration); Foucha v. Louisiana, 504 U.S. 71 (1992) (criminal defendant); United States v. Salerno, 481 U.S. 739 (1987) (criminal defendant)). Insofar as those decisions might bear on this case, they only

II. THE PRESIDENT'S DETERMINATION THAT PADILLA IS AN ENEMY COMBATANT IS ENTITLED TO BE GIVEN EFFECT BY THE COURTS.

Although petitioners principally raise legal challenges to the President's determination that Padilla is an enemy combatant, they also argue (Br. 18-23) that this Court should conduct a "searching inquiry" into the factual conclusions underlying the President's determination. As the Fourth Circuit explained in Hamdi, however, the "executive is best prepared to exercise the military judgment attending the capture of alleged combatants," 296 F.3d at 283, and "the President's wartime detention decisions are to be accorded great deference from the courts." id. at 282. That is especially so with respect to factual determinations of the kind relied on by the President in concluding that Padilla is an enemy combatant. The "development of facts may pose special hazards of judicial involvement in military decision-making that argument of questions of pure law may not." Id. at 284.

Petitioners submit (Br. 19) that deference to the factual basis for the President's determination is unwarranted in this case because congressional authorization "is lacking." The

confirm that Padilla's detention as an enemy combatant is lawful. See Zadvydas, 533 U.S. at 696 ("Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."); Salerno, 481 U.S. at 748 ("Even outside the exigencies of war, we have found that sufficiently compelling governmental

President's determinations made in his capacity as Commander in Chief warrant deference even where Congress has not acted. That deference is reinforced where, as here, Congress acts in support of the President's actions. Hamdi, 296 F.3d at 281. Congress supported the President's use of "all necessary and appropriate force" against those persons or entities "he determines" were responsible for the September 11 attacks "in order to prevent any future acts." 115 Stat. 224 (emphasis added); see Hamdi, 296 F.3d at 283. The Supreme Court likewise has explained that, "in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous." United States v. Salerno, 481 U.S. at 748 (emphasis added).⁷

Giving effect to the President's determination in this case would not entail enforcing a "Presidential whim." Pet. Br. 32.

interests can justify detention of dangerous persons.").

⁷ Petitioners assert (Br. 20) that lesser deference is warranted here on the theory that, when the President "exercis[es] his power as Commander-in-Chief at home," his actions are "unrelated to foreign policy, national security, or military affairs." That is flatly wrong. When the President acts in response to attacks on domestic soil and "to prevent any future acts of international terrorism against the United States," 115 Stat. 224, as is the case here, his exercise of military authority pertains directly to foreign affairs and national security and it is highly deserving of deference. See Hirota v. MacArthur, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say."). Moreover, the courts consistently accord substantial deference to the President's judgments in his capacity as Commander-in-Chief outside the context of his conduct of war on a foreign battlefield. See

The Mobbs Declaration sets out the ample factual basis for the President's conclusion that Padilla is an enemy combatant, and it more than demonstrates the existence of "some evidence" supporting the President's determination. Application of that standard, more generally, would ensure that the Executive's determination does not rest on a mere "whim."

Applying a more searching review, however, would entangle the judiciary in highly sensitive judgments about the reliability of foreign intelligence sources and the assessment of military justifications. Petitioners, for instance, seek to verify the "reliability of the sources" (Br. 29) by examining the number of channels through which information of Padilla's association with al Qaida passed before reaching the President and the degree to which intelligence sources corroborated Padilla's actions while in Afghanistan and Pakistan. The judiciary is ill-equipped to conduct that manner of second-guessing of sensitive executive judgments, which lie at the heart of the President's exercise of his authority as Commander in Chief in wartime. A contrary conclusion "would stand the warmaking powers of Articles I and II on their heads." Hamdi, 294 F.3d at 284.

generally Able v. United States, 155 F.3d 628, 633 (2d Cir. 1998).

* * * * *

Finally, with the briefing on the merits now complete, not only is it clear that the President has the authority to determine that Padilla is an enemy combatant, but it also is clear that the legal questions concerning that authority are distinct from the issues addressed in respondents' motion to dismiss or transfer on jurisdictional grounds. Accordingly, respondents respectfully suggest that this Court should dismiss or transfer this case based on the jurisdictional defects in the petition, before addressing the merits of petitioners' challenge to the President's authority. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

CONCLUSION

For the foregoing reasons, as well as the reasons explained in our opening brief, the amended petition for a writ of habeas corpus should be dismissed.

Respectfully submitted,

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