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 AMICUS CURIAE OF LOUIS FISHER IN SUPPORT OF PETITIONER-APPELLEE URGING AFFIRMANCE

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CERTIFICATE OF COUNSEL

Pursuant to Circuit Rule 29(d), counsel for *amicus curiae* Louis Fisher certifies that this separate brief is necessary because the number of complex issues, the expedited briefing schedule, and the disparate interests and viewpoints of the *amici* make it impracticable for the *amici* to file a single brief.

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Dated: June 16, 2005

INTEREST OF AMICUS CURIAE

Amicus curiae, Louis Fisher, is Senior Specialist in Separation of Powers with the Congressional Research Service of the Library of Congress, where he has worked since 1970.[1] He is the author of numerous books and articles on constitutional law, the war power, and military tribunals and is frequently invited to testify before Congress. Dr. Fisher has conducted extensive research on military commissions and has written two books on the subject: *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (Univ. Press of Kansas, 2003), and *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (Univ. Press of Kansas, 2005). Based upon his expertise, he has an interest in providing the Court with a deeper understanding of the scope of presidential power in time of war and its relationship to separation of powers and constitutional principles.

SUMMARY OF ARGUMENT

Constitutional principles and practice do not support the Government's arguments that *Ex parte Quirin*, 317 U.S. 1 (1942) "controls this case," that the President has statutory or constitutional authority to indefinitely detain a U.S. citizen, or that 18 U.S.C. § 4001(a) limits civil authorities but not military authorities. Except in extraordinary times of martial law, which the Administration does not now assert, the Constitution does not permit the President to detain U.S. citizens for extensive periods without proceeding to trial with formal charges and assistance of counsel.

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[1] The views expressed in this brief are Mr. Fisher's own, and his institutional affiliations with the Library of Congress and Congressional Research Service are provided for identification purposes only.

U.S. citizens for extensive periods without proceeding to trial with formal charges and assistance of counsel.

ARGUMENT

I. *EX PARTE QUIRIN* (1942) DOES NOT "CONTROL THIS CASE" AND IS NOT AN APPROPRIATE PRECEDENT TO JUSTIFY THE INDEFINITE DETAINMENT OF PADILLA WITHOUT BEING CHARGED, TRIED, AND GIVEN ACCESS TO COUNSEL.

The Government argues that in *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004) the Supreme Court "strongly reaffirmed" *Ex parte Quirin*, 317 U.S. 1 (1942), "which remains a unanimous, binding, and apposite decision of the Supreme Court," that "*Quirin* controls this case," and that "the 'precise facts' of *Quirin* were indistinguishable in every material respect from the instant facts." Respondents's Opposition to the Motion for Summary Judgment, Padilla v. Hanft, Nov. 22, 2004 (D. S.C.), at 14-15. The Government further argues that *Quirin* "recognized the military's authority to seize and detain enemy combatants in factual circumstances indistinguishable from this case." Respondent's Answer to the Petition for Writ of Habeas Corpus (Ans.), Padilla v. Hanft, August 30, 2004 (D. S.C.), at 13. According to the Government, a comparison between the eight German saboteurs at issue in *Quirin* and the handling of Padilla demonstrates that "the factual parallels are striking." *Id.* at 14.

Because of serious problems with the manner in which the Supreme Court decided *Quirin* (Sections II and III, *infra*), there are substantial and unnecessary risks in trying to read too much into the decision to reach issues that were never fully addressed and settled. There is little reason to stray from the core holding, which was to sustain the jurisdiction of the military commission *to*

try the eight Germans on the basis of four charges and with the assistance of counsel. As the Court stated: "in our per curiam opinion, we have resolved those questions by our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue." *Quirin*, 317 U.S. at 25. There is therefore no need, or cause, to interpret *Quirin* as offering any support for the indefinite detention of U.S. citizens without ever charging them, bringing them to trial, and permitting access to counsel.

As to the "parallels" that the Government finds between *Quirin* and the treatment of petitioner, there are five fundamental differences:

A. Charges. In *Quirin*, the eight Germans were charged with four violations: the "law of war," Article of War 81, Article of War 82, and conspiracy. 39 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 5-8. No formal charges have been made against petitioner, other than claims and assertions included in such documents as the Mobbs Declaration (prepared by Michael H. Mobbs, August 27, 2002) and the Rapp Declaration (prepared by Jeffrey N. Rapp, August 24, 2004) to justify the designation of petitioner as an "enemy combatant."

B. Counsel. In *Quirin*, the Government assigned defense counsel to the eight German defendants. Military Order 9185, 7 Fed. Reg. 5103 (1942). Petitioner received the counsel of Donna Newman during his month as material witness in New York City, but after his designation as an enemy combatant on June 9, 2002 the Government either prohibited or severely curtailed her assistance as defense counsel.

C. Trial. In *Quirin*, the eight German defendants were tried before a military commission, which started its deliberations on July 8, 1942, less than two weeks after the eight

men were apprehended. Petitioner was arrested on May 8, 2002 on a material witness warrant. On June 9, 2002 he was designated an enemy combatant and transferred to the custody of the Defense Department. Three years later there has been no trial for petitioner and no plans for one.

D. Evidence. In *Quirin*, the evidence against the Germans was clear and uncontested, including recovered boxes of explosives and fuses, their testimony, and the testimony of individuals in the United States who collaborated with them. *Nazi Saboteurs*, *supra*, at 29-32, 34-42, 80-84; *Military Tribunals*, *supra*, at 92-93, 126. The evidence against petitioner consists of third-hand hearsay in the form of the Mobbs and Rapp Declarations. Rapp states that he is "familiar with all the matters discussed in this Declaration" (Para. 3 of his Declaration), but his familiarity applies only to knowledge about the intelligence documents collected and presented to him. He has no personal knowledge of the facts or of the reliability of the informers who provided information to the Government.

E. Affected Population. The military order and proclamation issued by President Franklin D. Roosevelt applied to eight Germans who were "subjects, citizens or residents of any nation at war with the United States" and "who during time of war enter or attempt to enter the United States . . . to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war." Proclamation 2561, 7 Fed. Reg. 5101 (1942). The general language of that proclamation was followed by a military order the same day that specifically named the eight Germans. 7 Fed. Reg. 5103 (1942). The military order issued by President George W. Bush on November 13, 2001, which was patterned closely on language in the Roosevelt proclamation and military order, applies to all non-citizens who the President determines there is "reason to believe" (i) "is or was a member of the organization known as al Qaida," (ii) "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation

therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy," or (iii) has "knowingly harbored one or more individuals described in subparagraphs (i) and (ii)." 66 Fed. Reg. 57,834, sec. 2(a)(1). Whereas the Roosevelt proclamation and military order applied to eight named individuals, with trial personnel and counsel specified, the Bush military order covers a population of approximately 18 million non-citizens whose liberties are jeopardized by unilateral Government designations concerning their status as "enemy combatants."

II. THE NAZI SABOTEUR TRIAL: A DISCREDITED PRECEDENT.

Although the Bush military order was closely modeled on the Roosevelt proclamation and military order, and although the plurality in *Hamdi* referred to *Quirin* as "the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances," *Hamdi*, 124 S. Ct. at 2643, the Roosevelt administration concluded that its handling of the eight Germans in 1942 was not a model worth repeating. Secretary of War Henry L. Stimson was highly critical of the manner in which the military commission was assembled and the procedures it employed. He found it objectionable that Attorney General Francis Biddle would commit the time and energy in the middle of World War II to prosecute the case. *Diary of Henry L. Stimson*, July 1, 1942, at 136. Joining Biddle as co-prosecutor was Maj. Gen. Myron C. Cramer, Judge Advocate General of the Army. Stimson objected to that appointment as well, insisting that the Judge Advocate General should serve in an independent capacity after the trial to review the fairness of the proceedings.

On November 29, 1944, two more German agents (Erich Gimpel and William Colepaugh) arrived by submarine, reaching land in Maine and making their way to New York

City, where they were apprehended. The Roosevelt Administration was prepared to try them in the same manner as in 1942: by a military commission sitting on the fifth floor of the Justice Department in Washington, D.C., and with Biddle and Cramer again serving as co-prosecutors. This time, however, Stimson intervened forcefully to block their participation. He advised Roosevelt that Gimpel and Colepaugh should be tried by either court-martial or military commission, with the appointment authority placed not in the President but in the Army Commander in Boston or New York. At a Cabinet meeting, Stimson told Roosevelt that he "wouldn't favor any high-ranking officers as members of the tribunal and did not propose to have the Judge Advocate General personally try it." *Diary of Henry L. Stimson*, January 5, 1945, at 18-19.

Despite Biddle's opposition, Stimson prevailed. On January 12, 1945, President Roosevelt issued a military order to try Gimpel and Colepaugh. Unlike the 1942 military order, Roosevelt did not name the members of the tribunal, the prosecutors, or the defense counsel. He empowered the commanding generals, with Stimson's supervision, to appoint the military commission. Instead of the trial record going directly to the President, as in 1942, it would be processed within the Judge Advocate General's office, consistent with Article of War 50½. Military Order, 10 Fed. Reg. 549 (1945). The commanding general selected the officers to serve as prosecutors and defense counsel. The trial took place not in Washington, D.C. but at Governors Island, New York. *Nazi Saboteurs,* supra, at 143; *Military Tribunals*, *supra*, at 127-29. Through these actions, the Roosevelt Administration reconsidered and rejected the precedent of 1942.

III. DEFICIENCIES OF *QUIRIN*.

The Supreme Court decided *Quirin* under difficult circumstances, resulting in subsequent misgivings from Justices who participated in the decision and strong critiques from scholars.

A. Rush to Judgment. In *Quirin*, the Supreme Court labored under a number of procedural and substantive limitations. On July 23, 1942 it agreed to hear the case and on July 27 it publicly announced that oral argument would begin on July 29, before there had been any action by lower courts. Lewis Wood, "Supreme Court Is Called in Unprecedented Session to Hear Plea of Nazi Spies," *New York Times*, July 28, 1942, at 1. At 8 p.m. on July 28, a federal district court dismissed a motion by defense counsel for a writ of habeas corpus and held that *Ex parte Milligan*, 4 Wall. 2 (1866) was not "controlling in the circumstances of this petitioner." *Ex parte Quirin*, 47 F. Supp. 431 (D.D.C. 1942). At noon the following day, the Supreme Court began to hear the case. The briefs filed by opposing parties are dated the same day that oral argument began. 39 *Landmark Briefs*, at 395, 463, 495. As a result, the Justices were unprepared to analyze complex issues of military law and Articles of War that are rarely placed before the Court. The nine hours of oral argument, spread across two days, were as much for the benefit of the Justices as for the litigants.

B. The Two-Step Procedure. One of the first issues confronted during oral argument was the propriety of having the case placed before the Court without first hearing from the appellate court, the D.C. Circuit. 39 *Landmark Briefs*, at 499-501 The Court agreed to continue oral argument with the understanding that the defense counsel would present their papers to the D.C. Circuit. On July 31, after two days of oral argument, the Court received the papers from the D.C. Circuit at 11:59 a.m., granted certiorari, and one minute later issued a one-page per curiam that upheld the jurisdiction of the military commission. Myron C. Cramer, *Military*

Commissions: Trial of the Eight Saboteurs, 17 Wash. L. Rev. & State Bar J. 247, 253 (1942). The per curiam did not contain legal justifications. Instead, it promised that a full opinion "which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk." *Ex parte Quirin*, 63 S. Ct. 1, 2 (1942); the per curiam also appears as a footnote in *Quirin*, 317 U.S. at 18-19. The full opinion was not released until nearly three months later, on October 29.

C. Violations of the Articles of War. In drafting the full opinion, Chief Justice Stone worked with the knowledge that on August 8, after the military commission completed its deliberations and found the eight Germans guilty, six were electrocuted pursuant to an order from President Roosevelt. Yet the Court was aware that the Administration had failed to follow a number of Articles of War. On September 10, Stone wrote to Frankfurter that he found it "very difficult to support the Government's construction of the articles [of war]," adding that it "seems almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed and it is too late for them to raise the question if in fact the articles as they construe them have been violated." Only after the war, Stone said, would the facts be known, with release of the trial transcript and other documents to the public. By that time, the two surviving saboteurs could raise the question successfully, which "would not place the present Court in a very happy light." Letter from Chief Justice Harlan Fiske Stone to Justice Felix Frankfurter, September 10, 1942, *Papers of Felix Frankfurter*. If the survivors prevailed in court, Stone said "it would leave the present Court in the unenviable position of having stood by and allowed six to go to their death without making it plain to all concerned—including the President—that it had left undecided a question on which counsel strongly relied to secure

petitioners' liberty." *Papers of Harlan Fiske Stone*, "Memorandum re Saboteur Cases," September 25, 1942, at 2.

While the full opinion was being drafted, Justice Frankfurter prepared a memorandum that spoke with assurance that "there can be no doubt that the President did *not* follow" Articles of War 46 through 53. "Memorandum of Mr. Justice Frankfurter, In re Saboteur Cases," *Papers of William O. Douglas*, Box 77, at 1 (emphasis in original). Having already issued the per curiam, the Justices were in no position to look too closely, or at least publicly, on the question whether President Roosevelt had acted inconsistently with the Articles of War. In the words of Alpheus Thomas Mason: "Their own involvement in the trial through their decision in the July hearing practically compelled them to cover up or excuse the President's departures from customary practice." Mason, *Inter Arma Silent Leges*, 69 Harv. L. Rev. 806, 826 (1956). Years later, Justice William O. Douglas said that it was "unfortunate the court took the case," because while it was "easy to agree on the original per curiam, we almost fell apart when it came to time to write out the views." Douglas, *The Court Years, 1939-1975*, at 138-39.

D. Wiener's Critique. After the Court released the full opinion on October 29, Justice Frankfurter asked Frederick Bernays Wiener, one of his former students but by 1942 an acknowledged expert on military law, to evaluate the decision. Wiener told him that the "[w]eaknesses in the [Court's] decision flowed 'in large measure' from the [Roosevelt] Administration's disregard for 'almost every precedent in the books' when it established the military tribunal." "Observations of Ex parte Quirin," signed "F.B.W.," November 5, 1942, Papers of Felix Frankfurter, at 1. Wiener emphasized that court-martial procedures had "almost uniformly been applied to military commissions," and that it was "too plain for argument" that the President could not waive or override the required review by the Judge Advocate General's

office. Id. at 8. Wiener pointed out that the only precedent for using the Judge Advocate General of the Army as prosecutor—the trial of the Lincoln conspirators—was one which "no self-respecting military lawyer will look straight in the eye." Even in that sorry precedent, he said, "the Attorney General did not assume to assist the prosecution." *Id.* at 9. The letters from Wiener apparently had an impact on Frankfurter. In 1953, when the Court was considering whether to sit in summer session to hear the espionage case of Ethel and Julius Rosenberg, one of the Justices recalled that the Court had sat in summer session in 1942 to hear the Nazi saboteur case, and that it had issued a short per curiam upholding the jurisdiction of the military commission, followed by the full opinion three months later. Frankfurter noted that there was discussion about this two-step procedure and that Justice Robert H. Jackson "opposed this suggestion also, and I added that the *Quirin* experience was not a happy precedent." "Memorandum Re: *Rosenberg* v. *United States*, Nos. 111 and 687, October Term 1952," June 4, 1953, at 8, *Papers of Felix Frankfurter*, Harvard Law School, Part I, Reel 70, Library of Congress.

Justice Douglas expressed regret about the procedure adopted by the Court in 1942. During an interview conducted on June 9, 1962, he remarked that the "experience with *Ex parte Quirin* indicated, I think, to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds, the examination of the grounds that had been advanced is made, sometimes those grounds crumble." Conservation between Justice William O. Douglas and Professor Walter Murphy, June 9, 1962, at 204-05, Seeley G. Mudd Manuscript Library, Princeton University. Knowledge of this checkered history probably explains Justice Scalia's observation that *Quirin* was "not this Court's finest hour." *Hamdi*, 124 S. Ct. at 2669.

E. Scholarly Evaluations. Alpheus Thomas Mason, in an article for the *Harvard Law Review* and in his biography of Chief Justice Stone, remarked that the Court could do little other than uphold the jurisdiction of the military commission, being "somewhat in the position of a private on sentry duty accosting a commanding general without his pass." Mason said that Stone was well aware that the judiciary was "in danger of becoming part of an executive juggernaut." Mason, *Inter Arma Silent Leges*, *supra*, at 830-31; Mason, *Harlan Fiske Stone* 665-66 (1956).

An article by Michal Belknap remarked that Chief Justice Stone went to "such lengths to justify Roosevelt's proclamation" that he preserved the "form" of judicial review while "gutt[ing] it of substance." Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 Mil. L. Rev. 59, 83 (1980). So long as Justices decided to march to the beat of war drums, the Court "remained an unreliable guardian of the Bill of Rights." *Id.* at 95. In a separate article, Belknap described an essay written by Frankfurter ("F.F.'s Soliloquy") in the midst of the drafting of the full opinion as the work of a "judge openly hostile to the accused and manifestly unwilling to afford them procedural safeguards." Belknap, *Frankfurter and the Nazi Saboteurs*, Yearbook 1982: Supreme Court Hist. Soc., at 66. (For language of the Soliloquy, see *Nazi Saboteurs*, *supra*, at 117-21; *Military Tribunals*, *supra*, at 116). David J. Danelski called the full opinion in *Quirin* "a rush to judgment, an agonizing effort to justify a *fait accompli*." Danelski, *The Saboteurs' Case*, 1 J. Supreme Court Hist. 61 (1996). The opinion represented a victory for the executive branch but for the Court "an institutional defeat." *Id.* at 80. The lesson for the Court is to "be wary of departing from its established rules and practices, even in times of national crisis, for at such times the Court is especially susceptible to co-optation by the executive." *Id.*

IV. THERE IS NO PRESIDENTIAL AUTHORITY TO INDEFINITELY DETAIN U.S. CITIZENS.

The Government offers a number of arguments, constitutional and statutory, to justify the President's authority to indefinitely detain U.S. citizens without trying them in court or giving them access to counsel. By reading the Commander in Chief Clause too broadly, the Government's general thrust is to support a form of martial law that is anathema to the principles of republican government and the intent of the Framers.

A. Revolutionary Period. The separation of powers has historically limited the authority of the President and military officials to establish military commissions or detain citizens without congressional authority. On June 30, 1775, the Continental Congress adopted rules and regulations for the military in a series of 69 Articles of War. *American Articles of War of 1775, reprinted in* William Winthrop, *Military Law and Precedents* 953-60 (2d ed. 1920). Thus, from the beginning, the punishment of offenses by the military was "wholly statutory, having been . . . enacted by Congress as the legislative power." Winthrop, *supra*, at 21; see also Alexander Macomb, *A Treatise on Martial Law and Courts-Martial* 19-20 (1809) (describing courts-martial jurisdiction under Articles of War). One of the complaints included in the Declaration of Independence was that King George III had "affected to render the Military independent of and superior to the Civil Power." *The Declaration of Independence*, para 14.

As Commander in Chief during the Revolutionary War, George Washington adhered to the Articles of War by reviewing death sentences imposed by courts-martial. 13 *Writings of George Washington* 136-40 (J. Fitzpatrick ed. 1931). Sometimes he overturned them for lack of legal basis. 11 *Writings of George Washington, supra*, at 262. Washington recognized that

changes in the military code "can only be defined and fixed by Congress." 17 *Writings of George Washington*, *supra*, at 239.

B. The War Power. American law borrows heavily from British precedents and customs, but in the area of the war power the Framers broke decisively with their English forebears. The great English jurist William Blackstone placed all of external affairs exclusively in the King: the power to declare war, raise and regulate fleets and armies, make treaties, appoint ambassadors, and issue letters of marque and reprisal. 2 William Blackstone, *Commentaries on the Laws of England* 238-62 (1803). The drafters of the U.S. Constitution decided that none of those powers should be placed solely in the President. Some are vested exclusively in Congress: the power to declare war (U.S. Const. art. I, § 8, cl. 11), to raise and regulate fleets and armies (U.S. Const. art. I, § 8, cl. 12-16), and to issue letters of marque and reprisal (U.S. Const. art. I, § 8, cl. 11). Other powers are shared between the President and the Senate: making treaties and appointing ambassadors (U.S. Const. art. II, § 2, cl. 2). In addition, the Constitution empowers Congress to "regulate Commerce with foreign Nations" (U.S. Const. art. I, § 8, cl. 3), to "constitute Tribunals inferior to the supreme Court" (U.S. Const. art. I, § 8, cl. 9), and to "define and punish Piracies ane Felonies committed on the high Seas, and Offences against the Law of Nations" (U.S. Const. art. I, § 8, cl. 10).

C. Distrust of Military Power. The Framers' rejection of executive power as promoted by Blackstone and other writers was rooted in their study of history and the needs of representative government. Joseph Story, who served on the Supreme Court from 1811 to 1845, wrote about the essential republican principle of vesting in elected lawmakers the control over the military. The power to declare was "is not only the highest sovereign prerogative; . . . it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and

the successive review of all the councils of the nations." The decision to engage in war activities "never fails to impose upon the people the most burthensome taxes, and personal sufferings." The conduct of war "is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead." The cooperation "of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation." 3 Story, *Commentaries*, at 60-61.

The Framers feared that Presidents, in their search for fame and personal glory, would have an appetite for war. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 Corn. L. Rev. 695 (1997). John Jay warned in Federalist No. 4 that "absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people." *The Federalist* (B. Wright ed. 1961), at 101.

Many of these sentiments are underscored by the Framers. In 1793, James Madison called war "the true nurse of executive aggrandizement. . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which the are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and the most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace." 6 *Writings of James Madison* 174 (G. Hunt, ed. 1900-1910). Five years later, in a letter to Thomas Jefferson, Madison said that the Constitution "supposes, what

the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl." *Id.* at 312.

D. Commander in Chief. What the Framers left solely in the hands of the President was the power "to repel sudden attacks." 2 *The Records of the Federal Convention of 1787*, at 318 (M. Farrand ed. 1937). All three branches understood that the President could exercise defensive military powers but not offensive military powers. Louis Fisher, *Presidential War Power* 8-12, 17-51 (2d ed. 2004). The reason for removing the war power from the President centers on the qualities associated with creating a republic and the right of citizens to rule through their elected representatives.

The Government refers to the President's "inherent authority as Commander in Chief to detain a citizen as an enemy combatant" (Respondent's Opposition, *supra*, at 10; see also Respondent's Answer, *supra*, at 1, 11-12). It asserts that the "President's decision to detain petitioner as an enemy combatant represents a basic exercise of his authority as Commander in Chief to determine the level of force needed to prosecute the conflict against al Qaeda." Respondent's Opposition, *supra*, at 11. Other than rare moments of martial law, the Constitution contains no authority for the President to indefinitely detain an American citizen without charging the individual with criminal offenses, going to trial, and allowing the assistance of counsel.

The purpose of the Commander in Chief Clause is much more narrow. The Constitution designates the President as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States" (U.S. Const. art. II, § 2, cl. 1). Congress, not the President, does the calling. Congress is

empowered to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" (U.S. Const. art. I, § 8, cl. 15).

The Commander in Chief Clause has two objectives: to provide unity of command and to assure civilian supremacy. In Federalist No. 74, Alexander Hamilton explained that "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *The Federalist* (B. Wright ed.), at 473. Designating the President as Commander in Chief also represented an important technique for preserving civilian supremacy over the military. The person leading the armed forces would be the civilian President, not a military officer. Attorney General Edward Bates observed in 1861 that the President is Commander in Chief not because he is "skilled in the art of war and qualified to marshal a host in the field of battle." He is Commander in Chief for a different reason. Whatever soldier leads U.S. armies to victory against an enemy, "he is subject to the orders of the *civil magistrate*, and he and his army are always 'subordinate to the civil power.'" 10 Ops. Att'y Gen. 74, 79 (1861) (emphasis in original).

In the Steel Seizure Case of 1952, Justice Robert Jackson noted in his concurrence that the Commander in Chief Clause is sometimes put forth "as support for any presidential action, internal or external, involving the use of force, the idea being that it vests power to do anything, anywhere, that can be done with the army or navy." *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 641-42 (1952). To this claim he said that nothing would be "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 forces to some foreign venture." *Id.* at 642.

E. Other Court Rulings. The Government cites the Supreme Court for the proposition that the President, as Commander in Chief, "is bound to accept the [military] challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). Respondent's Answer, *supra*, at 12. However, the Court in 1863 read presidential power narrowly in the extraordinary context of the Civil War. Justice Grier carefully limited the President's power to defensive actions, noting that he "has no power to initiate or declare a war against either a foreign nation or a domestic State." 67 U.S. at 668. The executive branch adopted exactly the same position. During oral argument, Richard Henry Dana, Jr., who was representing the President, acknowledged that Lincoln's actions had nothing to do with "the right *to initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress." *Id.* at 660 (emphasis in original).

The Government cites three cases to demonstrate that U.S. citizenship "of an enemy belligerent does not relieve him from the consequences of [his] belligerency": *Quirin*, 317 U.S. at 37; *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957); *In re Territo*, 156 F.2d 142, 142-143 (9th Cir. 1946). Respondent's Answer, *supra*, at 12; Respondent's Opposition, *supra*, at 12-13. However, unlike the treatment of petitioner, the defendants in the first two cases were charged, tried, and given counsel, while Territo was held as a prisoner of war.

Finally, the Government cites a concurrence by Judge Silberman in a D.C. Circuit case. He concluded that the President "has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected." Respondent's Answer, supra, at 12, citing *Campbell* v. *Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000). While to Judge Silberman courts lack competence to review military actions

by the President, a concurrence by Judge Tatel in the same case concluded that courts possess competence in war power disputes and have exercised a review function over the course of the republic. *Campbell* v. *Clinton*, 203 F.3d at 37-41 (Tatel, J., concurring).

V. SECTION 4001(a) LIMITS BOTH CIVILIAN AND MILITARY DETENTION

In 1971, Congress passed legislation to repeal the Emergency Detention Act of 1950 and to enact new language: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Pub. L. No. 92-128, 85 Stat. 347 (1971). The new language is codified at 18 U.S.C. § 4001(a), also called the "Non-Detention Act."

The Government argues that Section 4001(a) "does not apply to the military's wartime detention of enemy combatants." Respondent's Opposition, *supra*, at 20. By the Government's analysis, Section 4001(a) "has no bearing on the military's authority to detain enemy combatants in wartime," in part because Section 4001(a) is a separate enactment "to an existing provision in United States Code Title 18 ('Crimes and Criminal Procedure') rather than Title 10 ('Armed Forces') or Title 50 ('War and National Defense')." *Id.* at 29. The Government states that the existing provision "was directed to the Attorney General's control over federal prisons; its terms, which remain unchanged, stated that the 'control and management of Federal penal and correctional institutions, *except military or naval institutions*, shall be vested in the Attorney General.'" *Id.* (emphasis in original).

To accept this analysis, one would have to believe that Congress, in 1971, intended to limit imprisonment or detention by civilian authorities (unless specifically authorized by Congress), but allowed military authorities to imprison or detain without an Act of Congress. The legislative history does not support that interpretation, which would give a green light to a form of ongoing, unlimited, and unchecked martial law in the United States.

A. An Atmosphere of Fear and Anxiety. The purpose of Section 4001(a) is clarified by understanding the political pressures that emerged with the urban riots that spread across the nation after 1964. In signing the 1971 legislation, President Richard M. Nixon explained that the Administration was "wholeheartedly" in support of the repeal of the Emergency Detention Act, and he wanted "to underscore this Nation's abiding respect for the liberty of the individual. Our democracy is built upon the constitutional guarantee that every citizen will be afforded due process of law. There is no place in American life for the kind of anxiety—however unwarranted—which the Emergency Detention Act has evidently engendered." *Public Papers of the Presidents*, 1971, at 986. His statement appears to cover both domestic and military detention, for it would do little to alleviate anxiety if individuals and groups knew they were vulnerable to detention by military authorities.

President Nixon added: "This strong country has no reason to fear that the normal processes of law—together with those special emergency powers which the Constitution grants to the Chief Executive—will be inadequate to deal with any situation, no matter how grave, that may arise in the future." *Id.* He did not elaborate on the "special emergency powers" available from the Constitution rather than from statutes. Did his additional remark suggest that, under the constitutional power as Commander in Chief, the President could order the military to arrest and detain individuals and groups without statutory authority? Such a claim would conflict with his promise that "every citizen will be afforded due process of law." The legislative history of the Non-Detention Act of 1971 offers no support for the proposition that the President could use the military to detain U.S. citizens.

Congress acted legislatively in 1971 under pressure from two sources. In 1968, the Japanese American Citizens League, with more than 25,000 members and 92 chapters in 32

states, spearheaded a nationwide drive to repeal the Emergency Detention Act. 117 Cong. Rec. 31,535 (statement of Rep. Evins). Second, in 1968 the House Committee on Un-American Activities submitted a report that recommended the possible use of detention camps for certain black nationalists and Communists. H.R. Rep. No. 1351, at 59 (1968); S. Rep. No. 91-632, at 3 (1969) (letter of Senator Inouye).

It was in this climate that Deputy Attorney General Richard G. Kleindienst wrote to the Senate Committee on the Judiciary in 1969, recommending repeal of the Emergency Detention Act. He explained: "In the judgment of this Department, the repeal of this legislation will allay the fears and suspicions—unfounded as they may be—of many of our citizens." S. Rep. No. 91-632, at 4 (1969). Leaving citizens vulnerable to military detention would not allay those fears and suspicions.

In 1969, the Senate passed legislation to repeal the Emergency Detention Act. Senator Daniel Inouye, who introduced the bill, said he became "aware of the widespread rumors circulated throughout our Nation that the Federal Government was readying concentration camps to be filled with those who hold unpopular views and beliefs. These rumors are widely circulated and are believed in many urban ghettoes as well as by those dissidents who are at odds with many of the policies of the United States. Fear of internment, I believe, lurks for many of those who are by birth or choice not 'in tune' or 'in line' with the rest of the country." 115 Cong. Rec. 40,702 (1969). The Senate passed the bill by voice vote. *Id.*

The House did not act on the Senate bill. Instead, the House Committee on Internal Security reported legislation in 1970 to amend certain provisions of the Emergency Detention Act "so as to relieve any misapprehension as to the circumstances in which is may be applied . . . [M]isinformation regarding the terms and possible application of the act, by which it is made to

appear that the title would authorize the establishment of 'concentration camps' for the incarceration of racial groups, has received wide dissemination within recent years." H.R. Rep. 91-1599, at 1 (1970). As part of the amendments, the committee proposed adding this language: "No citizen of the United States shall be apprehended or detained pursuant to the provisions of this title on account of race, color, or ancestry." *Id.* at 17. The dissenting view of Rep. Louis Stokes in this report said that the new language would no nothing "to quash the fears and rumors in the black community." *Id.* at 23.

B. Restricting Both Civilian and Military Authorities. The legislative history of Section 4001(a) provides ample evidence that Congress intended to limit all government power, whether exercised by civil or military authorities. In 1971, the House Committee on Internal Security again reported a bill to amend the Emergency Detention Act. H.R. Rep. No. 92-94 (1971). However, the House was moving in the direction of the Senate bill and chose to repeal rather than amend the Emergency Detention Act. Initially, the House Judiciary Committee adopted an amendment by Rep. Spark Matsunaga, stating: "No person shall be detained except pursuant to title 18." 117 Cong. Rec. 31,755 (statements by Reps. Ichord and Railsback). As explained below, the Justice Department advised Congress that the power of government to detain individuals is not limited to Title 18, but appears in other Titles of the U.S. Code.

As a consequence, the House Judiciary Committee reported legislation to repeal the Act and to add this language to Title 18: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." H.R. Rep. No. 92-116, at 1 (1971). Nothing in the report implies that the provision on imprisonment and detention applied only to civilian authorities (covered by Title 18) and indirectly or by implication recognized an independent power by the President or the military to imprison or detain. The committee was

responding to the political situation described by Assistant Attorney General Robert Mardian in his testimony. He said that the Justice Department was "unequivocally in favor" of repealing the Emergency Detention Act, and reminded the committee of a letter written by Deputy Attorney General Kleindienst, who regarded continuation of the Act as "extremely offensive to many Americans. In the judgment of this Department, the repeal of this legislation will allay the fears and suspicions—unfounded as they may be—of many of our citizens." *Id.* at 3. Those fears and suspicions would not be allayed if military authorities possessed independent power to imprison and detain U.S. citizens suspected of posing a danger to national security.

The committee left unchanged the following language as part of Section 4001: "The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General . . . ." *Id.* at 6. The Government interprets the exception clause as a green light to military imprisonment and detention, but the exception merely recognizes that the Attorney General's jurisdiction does not cover military or naval institutions. The exception clause did not sanction military detentions.

During House debate, several Members acknowledged that Congress was about to place limits not merely on the Attorney General but also on the President and the military. Rep. H. Allen Smith expressed concern that the proposed legislation would interfere with the kind of emergency actions taken by President Roosevelt immediately after Pearl Harbor, including taking aliens into custody. In 1942, Roosevelt had authorized the military to order the curfew and detention of Japanese-Americans without first receiving statutory authority. Smith supported the repeal of the Emergency Detention Act but objected strongly to adding new language: "[I]f the President were absolutely handicapped by this language that no citizens shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress, what could he

possibly do if there were an emergency?" 117 Cong. Rec. 31,536. The Justice Department had testified to Congress that "[t]here is a considerable amount of statutory authority to protect the Internal Security interests of our country from sabotage and espionage or other similar attacks." *Id.*

Rep. Thomas F. Railsback, who sponsored the new language, responded to Smith in this manner: "If we are concerned about what happened in 1942 when there really was not a statute existing upon which the President relied, then we have to do something in addition if we really want to prevent some kind of recurrence of what happened in 1942." *Id.* at 31,537. In this way Railsback argued that mere repeal of the Emergency Detention Act would not suffice. Only the adoption of new language would prevent the President from detaining U.S. citizens until he received statutory authority.

The question of whether Section 4001(a) was confined to detention by civilian authorities under Title 18 was debated extensively in the House. Rep. Abner Mikva recalled that a Justice Department official had testified "very wisely, that many of the provisions that do allow detention and imprisonment appear in other sections than title 18. He made reference to them including 26 and 49, and in response to the Department of Justice opposition to that over extension, the Railsback amendment came into being, which made it very clear that we are not talking about title 18 but any detention authorized by an act of Congress." *Id.* at 31,538.

Rep. Robert Kastenmeier, who managed the bill, also spoke of detention and imprisonment authorities outside of Title 18. He referred to testimony from a Justice Department official that it was a mistake to assume "that all provisions for the detention of convicted persons are contained in title 18. He pointed to a number of criminal provisions that appear in other titles; for example, titles 21—narcotics; 50—selective service; 26—internal revenue; and

49—airplane hijacking." *Id.* at 31,540. Kastenmeier explained why the Railsback Amendment would restrict both civilian and military authorities:

> To alleviate these problems raised by the Department of Justice, the committee recommends an amendment that would take the place of sections 1 and 2. The amendment provides that no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress.
>
> In this way, the legislation also avoid the pitfalls that might be created by repealing the Detention Act by leaving open the possibility that people might nevertheless be detained without the benefit of due process, merely by executive fiat.
>
> In other words, the requirement of legislation authorization would close off the possibility that the repeal of the Detention Act could be viewed as simply leaving the field unoccupied. It provides that there must be statutory authority for the detention of a citizen by the United States. Existing detention practices are left unaffected. Incarceration for civil and criminal contempt, and detention of mental defectives, for example, are already covered by statutes. *Id.* at 31,541.

Instead of identifying all the Titles of the U. S. Code that authorize imprisonment and detention, the committee decided to replace the original sections 1 and 2 with a single provision: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress." *Id.* (Rep. Richard Poff). The political climate of the Non-Detention Act (fear and anxiety by U.S. citizens of arbitrary imprisonment and detention) combined with the

legislative history provide persuasive evidence that the purpose of repealing the Emergency Detention Act and adding the Railsback Amendment was to strip from the executive branch—both its civilian and military components—of any claim of independent authority to round up, imprison, and detain disfavored individuals or groups.

C. Limiting Executive and Presidential Actions. The constitutional protections of due process apply fully to the Administration because Section 4001(a) limits not merely the authority of the Attorney General over civilian institutions, under Title 18, but it limits more generally *executive* and *presidential* actions. Kastenmeier emphasized that "[r]epeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority." *Id.* at 31,541. Rep. Poff noted that the bill's sponsors and the House Judiciary Committee "did not content themselves with a simple repeal of the Emergency Detention Act, because it is far from certain what effect a simple repealer would have on the President's powers to detain persons during an internal security emergency." *Id.*

Rep. Richard Ichord, who opposed the Railsback Amendment, warned that "this most dangerous committee amendment [would] deprive the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises. Hence the amendment also has the consequence of doing patent violence to the constitutional principle of separation of powers." *Id.* at 31,542. Railsback's 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 31,544. Rep. Lawrence Williams opposed the Railsback Amendment because he did "not want to see the

President's hands tied," objecting to language that "would represent an arrogant invasion of the emergency powers of the President." *Id.* at 31,554.

Railsback stated that his amendment "eliminates whatever authority the President would have on his own to establish detention camps except in those cases of emergency when martial law may properly be invoked. . . . Nothing Congress does can affect executive martial-law powers which arise when the processes of government cannot function in an orderly way. For that is truly a 'nonlaw' situation." *Id.* at 31,755.

With the House prepared to repeal the Emergency Detention Act, Ichord urged that the following amendment be adopted in the nature of a substitute for the Judiciary Committee amendment:

> That the prior enactment and repeal herein of provisions of Title II of the Internal Security Act of 1950 (50 U.S.C. 811-826) shall not be construed to preempt, disparage, or affect the powers accorded to or the duties imposed upon the President under the Constitution and other laws of the United States: provided, however, that no citizen of the United States shall be apprehended or detained for the prevention of espionage or sabotage solely on account of race, color, or ancestry. *Id.* at 31,545.

Ichord's amendment failed to pass, the House voting 124 to 272. *Id.* at 31,766-67. An earlier Ichord amendment, to revise some of the provisions of the Emergency Detention act, failed by a vote of 22 to 68. *Id.* at 31,761. After the Judiciary Committee amendment (adapted by Railsback) was agreed to, 290 to 111, the bill passed the House 356 to 49. *Id.* at 31,768 and

31,781. The Senate passed the House bill by voice vote. *Id.* at 32,145. The Supreme Court has interpreted Section 4001(a) to proscribe "detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe* v. *Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original).

VI. VIOLATING THE SEPARATION OF POWERS

The treatment of the petitioner has done much to impair the rights of defendants, going far beyond the boundaries mapped out by the Supreme Court in *Quirin*. The Administration claims the right to hold U.S. citizens as "enemy combatants" and detain them indefinitely without being charged, given counsel, or tried. The Framers rejected political models that concentrated power in a single branch, especially over matters of war. They relied on a system of checks and balances, separation of powers, review by an independent judiciary, and republican principles.

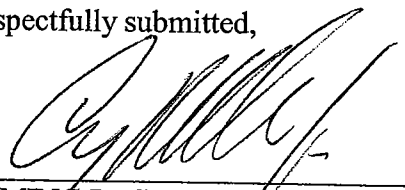
The Supreme Court has repeatedly expressed concern about vesting power in a single branch. In 1946, it emphasized the important constitutional principle that courts "and their procedural safeguards are indispensable to our system of government," and the Framers "were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws." *Duncan* v. *Kahanamoku*, 327 U.S. 315, 322 (1946). In 1957, the Court warned that if the President "can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials." *Reid* v. *Covert*, 354 U.S. 1 (1957). Such a concentration of power runs counter to the core constitutional principle of separation of powers.

Other federal judges have sounded the same alarm. U.S. District Judge Herbert Stern, in 1979, rejected the Government's position that the executive branch can determine by itself the

incommunicado, to deny an accused the benefit of course, to try a person summarily and to impose sentence—all as a part of the unreviewable exercise of foreign policy." *United States v. Tiede*, 86 F.R.D. 227, 243 (U.S. Court for Berlin 1979). The Framers designed the Constitution for times of peace and war and expected republican government and procedural safeguards to meet the common danger.

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I, Coming B. Gibbs, Jr., hereby certify that the foregoing Brief *Amicus Curiae* of Louis Fisher in Support of Petitioner-Appellee Urging Affirmance complies with the type-volume limitations under Federal Rules of Appellate Procedure 32(a)(7) and Circuit Rule 32(a) and contains 8512 words.

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