

---

In The  
UNITED STATES COURT OF  
APPEALS

For The Second Circuit

Docket No. 03-2235  
03-2438

---

JOSE PADILLA, Donna R. Newman,  
as Next Friend of Jose Padilla,

Petitioner-Appellee-cross-Appellant,

V.

DONALD RUMSFELD,

Respondent-Appellant-cross-Appellee.

*On Appeal from the United States District Court  
for the Southern District of New York*

---

BRIEF OF *AMICI CURIAE* SPARTACIST LEAGUE AND PARTISAN  
DEFENSE COMMITTEE ON BEHALF OF JOSE PADILLA  
AND GRANTING HIS *WRIT OF HABEAS CORPUS*

---

RACHEL H. WOLKENSTEIN, ESQ.  
PAUL COOPERSTEIN, ESQ.  
67 Wall Street, Ste. 2411  
New York, New York 10005  
(212) 406-4252

Attorneys for *Amici Curiae* Spartacist League and Partisan Defense Committee

## TABLE OF CONTENTS

### Page

TABLE OF AUTHORITIES .....	iii
SUMMARY OF THE CASE .....	1
IDENTITY AND INTEREST OF <i>AMICI CURIAE</i> .....	3
LEGAL ARGUMENT .....	12
I. THE DISTRICT COURT'S DECISION .....	12
II. PADILLA IS NOT AN "ENEMY COMBATANT" BECAUSE THE WAR ON TERRORISM" IS NOT A WAR IN ANY MILITARY SENSE .....	15
A. The "War on Terror" is a Political Construct .....	15
B. The Imperial Presidency Demands Absolute Judicial Deference—a Move Towards a Police State .....	19
C. The Executive's "War on Terror" and Evisceration of Democratic Rights is Based on Fabrications .....	20
III. IT TOOK A CIVIL WAR TO ESTABLISH THE RIGHTS AND PRIVILEGES OF UNITED STATES CITIZENSHIP— PADILLA HAS BEEN FORCIBLY DEPRIVED OF HIS CITIZENSHIP AND ATTENDANT RIGHTS IN VIOLATION OF THE CONSTITUTION .....	24
IV. PADILLA IS DEPRIVED OF HIS LIBERTY IN VIOLATION OF DUE PROCESS .....	33
V. PADILLA'S DETENTION AS AN ENEMY COMBATANT POSES A GRAVE THREAT TO THE FIRST AMENDMENT RIGHTS OF EVERYONE .....	41
A. Padilla is Deemed an Enemy Combatant on the Basis of Alleged Association .....	42
B. The Government's Position is The Latest Extension of a Long History of Invoking Thought-Crime Laws and Detention During Times of War and Social Struggle .....	43
C. Section 4001(a) is Dispositive of this Case—The Executive's Denial that Section 4001(a) is Law and Binding on the President is Further Proof of the Executive's Political Agenda .....	52

D.	The Executive's Reliance on Moyer v. Peabody—Charging Insurrection in Response to a Union Struggle for the 8-Hour Day—is Further Proof of the Intent of this Imperial Presidency .....	55
CONCLUSION .....		59

## TABLE OF AUTHORITIES

### CASES

<i>Afroyim v. Rusk</i> , 387 U.S. 253 (1967).....	32, 33
<i>Civil Rights Cases</i> , 109 U.S. 3 (1883).....	30
<i>Debs v. United States</i> , 249 U.S. 211 (1919).....	46
<i>Demore v. Kim</i> , 123 S. Ct. 108 (2003) .....	39
<i>Dennis v. United States</i> , 341 U.S. 494 (1951).....	42
<i>Duncan v. Kahanamoku</i> , 327 U.S. 304 (1946).....	16, 20
<i>Dunne v. United States</i> , 138 F.2d 137, rev. den'd 320 U.S. 370 (1943).....	47
<i>Ex Parte Endo</i> , 323 U.S. 283 (1944).....	35
<i>Ex Parte Milligan</i> , 71 U.S. (4 Wall.) 2 (1866).....	17, 34
<i>Ex Parte Quirin</i> , 317 U.S. 1 (1942).....	18
<i>Foucha v. Louisiana</i> , 504 U.S. 71 (1992).....	34
<i>Hamdi v. Rumsfeld</i> , 2003 U.S.App. LEXIS 13719 (4 <sup>th</sup> Cir.2003) .....	19
<i>Korematsu v. United States</i> , 320 U.S. 214 (1944).....	19, 47, 48
<i>Korematsu v. United States</i> , 584 F.Supp 1406 (N.D. Cal. 1984).....	48
<i>Lochner v. New York</i> , 198 U.S. 45 (1905).....	31
<i>Marcus v. Search Warrant</i> , 367 U.S. 717 (1961).....	42
<i>Moyer v. Peabody</i> , 212 U.S. 78 (1909).....	55, 56, 57
<i>Padilla ex rel. Newman v. Bush</i> , 233 F.Supp.2d 564 (S.D.N.Y. 2002).....	13, 14
<i>Perez v. Brownell</i> , 356 U.S. 44 (1958).....	24, 33
<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896).....	30

<i>Plyer v. Doe</i> , 457 U.S. 202 (1982).....	38
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974).....	57
<i>Schenck v. United States</i> , 249 U.S. 47 (1919) .....	46
<i>Scott v. Sandford</i> , 60 U.S. (19 How.) 393 (1857).....	28, 29, 33
<i>Slaughter-House Cases</i> , 16 Wall. 35 (1873) .....	30
<i>Sterling v. Constantin</i> , 287 U.S. 378 (1932).....	34, 58
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958).....	24
<i>United States v. Cruikshank</i> , 92 U.S. 542 (1876).....	30
<i>United States v. Robel</i> , 389 U.S. 258 (1967).....	20
<i>United States v. United States District Court</i> , 407 U.S. 297 (1972) .....	44
<i>Wing Wong v. United States</i> , 163 U.S. 228 (1896).....	38
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1896) .....	38
<i>Youngstown Sheet &amp; Tube Co. v. Sawyer</i> , 345 U.S. 579 (1952).....	34
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001).....	38

## **CONSTITUTIONAL PROVISIONS:**

Article I .....	16
Amendment 1 .....	34
Amendment 4 .....	34
Amendment 5 .....	34
Amendment 6.....	34
Amendment 8 .....	34
Amendment 13 .....	29
Amendment 14 .....	30, 31, 34

Constitution.....	<i>passim</i>
-------------------	---------------

## STATUTES

18 USC sec. 4001 (a) .....	52
<i>Alien and Sedition Acts</i> (1798) .....	45
<i>Alien Registration Act</i> (1940) .....	46
<i>Anti-Terrorism and Effective Death Penalty Act</i> (1996) .....	43, 54
<i>Authorization for Use of Military Force (Joint Resolution)</i> Pub. L. No. 107-40, 115 Stat. 224 (2001) .....	8
<i>Civil Rights Act of 1866</i> .....	29, 30
<i>Espionage Act</i> (1917) .....	46
<i>Foreign Intelligence Surveillance Act</i> (1978) .....	43, 53
<i>Illegal Immigration reform and Responsibility Act</i> (1996) .....	39
<i>Internal Security Act of 1950</i> .....	<i>passim</i>
<i>Sedition Act</i> (1918) .....	46
<i>Sherman Anti-Trust Act</i> (1890) .....	45
<i>Taft-Hartley Act</i> .....	10
<i>Taylor Law</i> .....	10
<i>Uniform Code of Military Justice</i> 10 U.S.C. sec. 809 .....	16
<i>U.S.A. Patriot Act</i> .....	<i>passim</i>
<i>Violent Crime Control and Law Enforcement Act</i> (1994 ) .....	54

## TEXTS AND OTHER AUTHORITIES

AP, July 14, 2003 .....	22
-------------------------	----

Charles Beard, <i>President Roosevelt and the Coming of the War 1941</i> (New Haven: Yale University Press, 1948) .....	20
<i>Declaration of Independence</i> .....	26
<i>Department of Justice Inspector General Report</i> , issued June 2, 2003 .....	11
<i>Executive Order</i> #9066 .....	47
<i>Executive Order</i> #12947 .....	54
Mitchell Franklin, "The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution," <i>Howard Law Journal</i> , Vol. 4, June 1958) .....	6, 29
Robert Goldstein, <i>Political Repression in Modern America, 1870 to the Present</i> (Schenkman Publishing Co. 1978).....	47, 52, 56, 57
<i>The Guardian</i> , 13 June 2002 .....	23
<i>The Guardian</i> , 15 August 2002 .....	23
<i>Independent</i> , May 29, 2003 .....	22
<i>Independent</i> , May 30, 2003 .....	22
James Kettner, <i>Development of American Citizenship 1608-1870</i> (Univ. of N.C. Press, 1978) .....	27
Harold Laski, <i>The State in Theory and Practice</i> , (NY: The Viking Press, 1935) .....	5, 26, 31, 32
<i>New York Times</i> , 11 June 2002 .....	23
<i>Newsday</i> , May 15, 2003 .....	39
William Rehnquist, <i>All the Laws But One: Civil Liberties in Wartime</i> (Knopf/Vintage, 1998).....	44
San Francisco Labor Resolution, December 9, 2002.....	58
<i>Workers Vanguard</i> , No. 764, 14 September 2001 .....	7
<i>Workers Vanguard</i> , No. 770, 7 December 2001 .....	9

## **SUMMARY OF THE CASE**

The issue in this case is whether the President has the authority, as Commander in Chief, to declare a United States citizen, detained in the United States outside a battlefield, an "enemy combatant" in the "war against terrorism" and indefinitely imprison him without bringing charges, holding a hearing, or allowing representation by counsel. Stripped of legalese, what the President asserts is nothing less than the right to disappear citizens.

The Executive has imposed martial law on Jose Padilla, a citizen, on the pretext of an alleged "war on terrorism" which is in fact not a military conflict but a political agenda. This is an unprecedented assertion of imperial powers by the President. The District Court's deference to the President's determination of Padilla's status as an enemy combatant relegates to the President the role of sole arbiter of the exercise and applicability of democratic, constitutional rights. This is consonant with the rationale of a police state.

The treatment of Padilla is intended as both the precursor and legal justification for application of Executive unilateral prerogatives on a broader scale, denying due process protections in criminal prosecutions, immigration proceedings and civil challenges to government policy. It is a frontal assault on the very concepts of due process and citizenship itself. Padilla is being



forcibly expatriated, confined to a civil death. The imperial Presidency's objective is nullification of First Amendment rights and a qualitative diminution of all democratic rights. The target of the Executive is any and all perceived opponents of government policy, as evidenced most starkly by the secretly drafted legislation, the *Domestic Security Enhancement Act of 2003* (Patriot II), which would allow the Executive unchallengeable authority to strip citizenship from Americans who "provide material support" to an organization which at some time may be deemed "terrorist" by the U.S. government. Patriot II victims would be locked away indefinitely in military prison without any legal process.

The case of Jose Padilla tests the very existence of the fundamental rights of due process—liberty of the individual from the arbitrary, discriminatory power of the state—and the freedoms protected by the First Amendment. It poses the evisceration of the rights and privileges of citizenship embodied in the first Ten Amendments to the Constitution and secured on the battlefield of the Civil War and in class and social struggle over the past hundred and more years. If the imperial President is upheld, Padilla's detention threatens to become the Dred Scott case of our time, a declaration that "Citizens have no rights that the government is bound to respect."

## IDENTITY AND INTEREST OF *AMICI CURIAE*

The Spartacist League is a Marxist political organization with a history of almost forty years of activity in the United States, including running candidates for public office, holding classes and public forums on Marxist history and international and domestic politics, initiating and participating in protest demonstrations against government policies and inaugurating a bi-weekly newspaper, *Workers Vanguard*, and a theoretical journal, *Spartacist*.

The Spartacist League seeks to educate the working class in the historic necessity for all mankind for the reorganization of society on the basis of a planned economy where production is based on human need not profit. The Spartacist League seeks to educate workers and their allies to build a workers party which fights for a socialist future. It seeks to act, as Lenin described the role of the vanguard workers party, as a "tribune of the people." Thus the Spartacist League opposes *all* aspects of social oppression and government repression.

The Partisan Defense Committee (PDC) is a class-struggle, non-sectarian legal and social defense organization which champions cases and causes in the interest of the whole of the working people. This purpose is in accordance with the views of the Spartacist League. The PDC defends class-war prisoners, those imprisoned for standing up to racist, capitalist oppression

and has campaigned to "Free Mumia Abu-Jamal! Abolish the Racist Death Penalty." It has initiated united-front labor/black mobilizations against fascist organizations.

In February 9, 2002 the Partisan Defense Committee with the Bay Area Labor Black League for Social Defense initiated the first labor-centered united-front protest in the U.S. in defense of immigrants on the basis of the slogans, "Anti-Terrorist Laws Target Immigrants, Blacks, Labor—No to the USA-Patriot Act and Maritime Security Act! Down with the Anti-Immigrant Witchhunt!" *Amici* call for: "Full Citizenship Rights for Immigrants." The core of the demonstration was dock workers of the International Longshore and Warehouse Union (ILWU) Local 10, joined by other trade unionists, Asian and Near Eastern immigrants, blacks, college and high school students and supporters of the Spartacist League and other leftist organizations. The protest was organized with the understanding that defense of immigrants is defense of the whole working class. The Partisan Defense Committee is guided by a principle of the early labor movement of this country: the slogan of the Industrial Workers of the World (IWW), "an injury to one is an injury to all."

The Spartacist League and Partisan Defense Committee file this *Amici Curiae* brief in support of Jose Padilla because they are tenacious defenders of

their own legality and of those democratic rights won through bourgeois revolutions and revolutionary wars—the parliamentary partisans in the English Civil War, the U.S. Revolutionary War, the French Revolution and the American Civil War. It took a bloody civil war to end slavery and another century of social struggle before de jure segregation was ended. The history of the American working class is one of the bloodiest in history. “Free” labor struggled in the face of government troops, strikebreaking court injunctions and prosecutions under criminal syndicalist laws before winning the basic legal right to organize. Out of those struggles working people and minorities wrested some expansion of democratic rights, which under capitalism are highly reversible.

History demonstrates that particularly when the populace is being prepared for war, or the ruling class feels threatened, democratic rights are constrained or denied. As Marxists, *amici* understand that the contraction of constitutionally protected rights is rooted in the class nature of the capitalist state. Harold Laski explains in his treatise, *The State in Theory and Practice*, (NY: The Viking Press, 1935) at 244:

“... how accidental was the union of capitalism with democracy. It was the outcome, not of an essential harmony of inner principle, but of that epoch in economic evolution when capitalism was in its phase of expansion. It had conferred political power upon the masses; but it was upon the saving condition that political power should not be utilized to cut at the root of capitalist postulates. It would offer social

reforms so long as these did not jeopardize the essential relations of the capitalist system. When they did, as occurred in the post-war [World War I] years, the contradiction between capitalism and democracy became the essential institutional feature of Western civilization."

A tool of government repression is to declare political opponents of government policy "terrorists." This defines them as "outlaws" of civil society, providing the state with a license to suspend democratic rights, criminalize political activity and ultimately to engage in legalized murder. The terrorist label is a "brand, stain, or mark of infamy...a modern Star of David; it is the contemporary stocks." Mitchell Franklin, "The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution," *Howard Law Journal*, Vol. 4, June 1958, at 182. It was the fate of the Black Panther Party (BPP) to be deemed a "terrorist" organization and "the greatest threat to internal security" by the Federal Bureau of Investigation (FBI), and it was subjected to a Counter-Intelligence Program (COINTELPRO) campaign of harassment, surveillance and prosecution; government agents killed some 38 members of the BPP.

*Amici* have challenged prior government attempts to criminalize the expression of First Amendment rights by falsely targeting opponents of government policy as terrorists. The Spartacist League successfully sued the Attorney General and the FBI in 1983 after the FBI changed its Guidelines,

designating political organizations as “domestic security terrorist organizations.” As a result of that lawsuit, the FBI withdrew its witchhunting “definition” of the Spartacist League, thereby conceding that Marxist political principles and advocacy cannot be equated with violence, terrorism, or criminal enterprise.

Seizing on the September 11, 2001 criminal attack on the World Trade Center which killed thousands of innocent civilians, the Bush administration, with bi-partisan support, embarked on a so-called preventative and pre-emptive global “war against terrorism.” The next day, the Spartacist League/U.S. issued a statement:

“Yesterday’s attack on the World Trade Center, carried out through the hijacking of civilian airliners that killed hundreds of passengers and crew, was an indefensible act of criminal terror. While it may be viewed as a symbol of the wealth and global reach of U.S. imperialism, the World Trade Center had workers of all races, ethnicities and religions who were employed there... Those who perpetrated this horrific attack... embrace the same mentality as the racist rulers of America—identifying the working masses with their capitalist exploiters and oppressors! The ruling parties—Democrats and Republicans—are all too eager to be able to wield the bodies of those who were killed and wounded in order to reinforce capitalist class rule. It’s an opportunity for the exploiters to peddle ‘one nation indivisible’ patriotism to try to direct the burgeoning anger at the bottom of this society away from themselves and toward an indefinable foreign ‘enemy,’ as well as immigrants in the U.S., and to reinforce their arsenal of domestic state repression against all the working people.”

*Workers Vanguard*, No. 764, 14 September 2001.

In the pages of the Spartacist League's publications and in protests by the Sparta us Youth Clubs and the Partisan Defense Committee, the assumption of imperial power by the Executive, effectively suspending the application of the Bill of Rights to non-citizens and citizens alike has been denounced. Articles have discussed the Executive's wholesale evisceration of democratic rights, in new acts, regulations and decrees, including the near unanimous passage of the *Authorization for Use of Military Force*, (*Joint Resolution*) Pub. L. 107-40, 115 Stat. 224 (2001) by Congress on September 14, 2001, the *USA-Patriot Act*, Pub. L. 107-56 Stat. 424, new FBI Guidelines, creation of the Homeland Security Department and development of the *Terrorist Information Awareness Program* and *Computer Assisted Passenger Pre-Screening System* (CAPPS II), all-encompassing government spying programs. The coup de grace is the proposed *Domestic Security Enhancement Act*, (Patriot II).

*Amici* denounced the government's witch hunt of immigrants from Islamic/Arab countries and warned that minorities, blacks, labor and all perceived opponents of the government's policies would be targets of this "war on terror." The government's objective is to smear, chill, inhibit, criminalize and penalize dissenting opinion and political action in opposition to government policy as threats to national security and support for terrorism.

“The purpose of the new measures is to revive and deepen the broad-ranging repression and intimidation that marked the Cold War McCarthyite witchhunt of 50 years ago. The aim today as then is to coerce the entire population into ideological conformity, with the government wielding the spectre of seemingly pervasive ‘Islamic terrorism’ as a surrogate for Communism.”

*Workers Vanguard*, No. 770, 7 December 2001.

The Spartacist League and Spartacus Youth Clubs organized Revolutionary Internationalist Contingents at anti-war demonstrations leading up to and during the U.S. war against Iraq, demanding “All U.S. Troops Out of the Near East Now! Down with U.S. Imperialism! Defend Iraq! For Class Struggle Against U.S. Capitalist Rulers!” When in February 2003, New York City officials, with assistance from the federal government, banned an anti-war march in the name of the “war on terror,” the Partisan Defense Committee issued a protest and with the Spartacist League filed a brief *Amici Curiae* in this Court.

That the ultimate targets of the “war against terrorism” are perceived political opponents of government policy and the labor movement is ever more apparent. Potential action by labor has been met with threats and government action. In December 2001, over 200 striking teachers in Middletown, New Jersey were jailed and their spokesman vilified as “the representative of the Taliban” by a school board member. When the longshoremen’s union on the West Coast was locked in a showdown with union-busting shipping bosses in



June 2002, Homeland Security chief Tom Ridge intervened to threaten that any strike action by the workers would be a threat to “national security.” Then the Government brought down the *Taft-Hartley Act* effectively against the union. When New York transit workers voted to go on strike, the media screamed that transit workers were launching a “jihad” and the strikebreaking Taylor Law was invoked. Firefighters who lost over 300 of their comrades trying to save people in the World Trade Center were declared a “clear and present danger to the United States” in a letter signed by Republican House majority leader Tom DeLay because they are unionized. On April 7, 2003, predicated on “intelligence” information in an anti-terrorism “advisory,” riot-equipped police at the Port of Oakland opened fire on legal observers, longshoremen and port truckers and anti-war protesters, including supporters of the Spartacist League, with wooden bullets and concussion grenades.

The growing popular opposition to the *USA-Patriot Act*, evidenced by the resolutions passed in over 142 communities and three states; the hundreds of thousands across the United States who marched in opposition to the war against Iraq; as well as the tepid concerns and criticisms expressed by some Congressmen and retired generals during the Iraq War, provoked irate denunciations by the Executive as aid and support of terrorism. In the face of the Attorney General’s own Inspector General report finding post-September

11 detainees were horribly abused even by the government's standards, the response was "no apologies" and a demand for increased repressive powers.

*Department of Justice Inspector General Report, June 2, 2003.*

*Amici* have written that the U.S. imperialist rulers seek to conduct their wars and military adventures as well as deal with the threat of domestic class struggle without the encumbrances of Congressional approval, judicial oversight, or even the theoretical nod toward the democratic expression of the populace. Since the collapse of the Soviet Union and ascendancy of the U.S. as the unchallenged military might on the globe, there has been a continuing pattern of consensual usurpation by the executive branch of powers constitutionally granted to the judicial and legislative branches. It is the strengthening of what has come to be known as the "imperial presidency." Over the last two decades, America's capitalists have secured a fabulous increase in their riches and profits through increasing the exploitation of the working class and slashing virtually all social programs benefiting the poor, particularly the black ghetto masses. America's rulers hate and fear the people. It is in the context of increasingly glaring social inequality—and the potential for an upsurge in social struggle—that the capitalists' state reinforces its arsenal of repression.

The historical forebears of the Spartacist League, the early Communist Party and the then-Trotskyist Socialist Workers Party were explicit targets of earlier government witchhunts, subjected to surveillance, intimidation tactics and criminal prosecutions for advocacy protected by the First Amendment. *Amicus* Spartacist League has likewise been subjected to government surveillance and falsely targeted by government agencies as “terrorist” for the expression of Marxist political principles. As an elementary act of self-defense, as well as in support of the democratic rights of all citizens, immigrants and others in the U.S., the Spartacist League and Partisan Defense Committee submit this *Amici Curiae* brief in support of Jose Padilla.

All parties have consented to *Amici Curiae's* filing of this brief.

## **LEGAL ARGUMENT**

### **I.**

#### **THE DISTRICT COURT’S DECISION**

It is undisputed that Jose Padilla is a U.S. citizen, detained on May 8, 2002 in the United States at Chicago O’Hare Airport by U.S. Department of Justice law enforcement officers pursuant to a material witness warrant. He was not—and has not been—charged with any crime. After being in federal custody for a month and assigned an attorney with whom he consulted, the “President designated Padilla as an enemy combatant associated with a terrorist network called al Qaeda—Padilla is now detained, without formal

charges against him or the prospect of release after the giving of testimony before a grand jury, in the custody of the U.S. Department of Defense at the Consolidated Naval Brig in Charleston, South Carolina.” *Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564, 565, S.D.N.Y. 2002. The Bush declaration states that Padilla’s detention is “necessary to prevent him from aiding al Qaeda in its efforts to attack the United States...”

The District Court found that the President of the United States has the authority as Commander in Chief to declare when a war is being waged without need for a Congressional declaration. Moreover, even if Congressional authorization was necessary, the District Court found that the *Joint Resolution* passed by Congress on September 14, 2001 suffices as that authorization since it authorizes the President to use necessary force “to prevent acts of international terrorism against the United States.” The District Court approved the Executive position that the U.S. is at war until al Qaeda is destroyed or the operations of al Qaeda end; and concomitantly that the military has the authority to detain an enemy combatant for the duration.

Thus, despite the fact that Padilla was not captured by soldiers during combat on a battlefield, but on American soil without a weapon, the District Court upheld the central thesis of the government. “The President is authorized under the Constitution and by law to direct the military to detain

enemy combatants in the circumstances present here, such that Padilla's detention is not *per se* unlawful." *Id.*, 268. The District Court upheld the President's power on the basis of "some evidence to support it." *Id.* "Some evidence" could be as slight as the assertion of association with al Qaeda.

(The Government's primary objection to the District Court rulings is the Court's ruling that Padilla must have access to his attorney and therefore have some ability to challenge the vague and hearsay allegations of the Mobbs Declaration, which the Government uses to make its declaration that Padilla is an enemy combatant. The Government has refused as a matter of principle to allow Padilla's attorney contact with him on the grounds that this would interfere with the interrogation process. *Amici Curiae* endorse Padilla's position that he is constitutionally entitled to access to his attorney and adopt his arguments, but this issue is not separately taken up in this brief since it is subsumed in the broader points discussed below.)

## II.

### **PADILLA IS NOT AN “ENEMY COMBATANT” BECAUSE THE WAR ON TERRORISM” IS NOT A WAR IN ANY MILITARY SENSE**

#### **A. The “War on Terror” is a Political Construct**

The entirety of the Executive’s legal justification for the denial of constitutional protections attendant to a criminal prosecution of Padilla are the emergency, preventative, national security needs of a putative on-going “war against terrorism” being waged throughout the globe and on U.S. territory. It is a “war” without a defined enemy, a war without end. There is no war by any military definition. There is no shooting war and no battle between state powers. The “war against terrorism” is a fiction, a political construct, not a military reality. It is a political crusade conducted in the name of ridding society of a perceived evil. It is no more a “war” in a military sense than “war against cancer,” “war against obesity” or a “war against immorality.” Like the “war against communism” and the “war against drugs,” this “war” is a pretext to increase the state’s police powers and repressive apparatus, constricting the democratic rights of the population. The Executive’s declaration that its “war against terrorism” forfeits constitutional protections for designated individuals, echoes the regimes of shahs and colonels and presidents “for life” from the Near East to Africa to Latin America, to justify the mass imprisonment and

unmarked graves of political dissidents. Like them, the Executive is proclaiming the *right to disappear* citizens of its choosing.

International law envisages two kinds of war: international armed conflicts between two or more countries, and civil wars occurring within the territory of a single state. Neither the Geneva Convention nor additional protocols ever acknowledged armed conflict between a state and a transnational organization. The Geneva Convention addresses unlawful combatants, but not in the context of a transnational organization against a country or an alliance of countries. What the Executive has done is selectively apply martial law, placing a U.S. civilian citizen under military authority. This is in violation of the Constitution under Congress' enumerated "war powers" under Article I. *See, Uniform Code of Military Justice*, 10 U.S.C. sec. 809; *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); Brief *amici curiae* by National Association of Criminal Defense Attorneys.

The disregard for what is black letter law on the issue of application of laws of war and imposition of martial law is further evidence that the "war against terrorism" is not a "war" or "armed conflict" but a political campaign for political purposes. It is established legal principle that the Constitution forbids military detention of a citizen captured on American soil, so long as the "[civilian] courts are open, and in the proper and unobstructed exercise of their

jurisdiction. It is also confined to the locality of the actual war.” *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866). The imperial President knows the “war against terrorism” is not a war, as evidenced by the disavowal that the Geneva Convention protections apply to designated enemy combatants like Padilla, or to the Guantanamo detainees who were reportedly picked up Afghanistan and Pakistan.

Taking the Executive’s position to its conclusion, the assertion of its right to apply martial law means not only that the imperial President can detain enemy captives until the war ends, i.e., indefinitely; but also he has the prerogative to shoot enemy combatants engaged in active hostilities. In the “war against terrorism” that translates to the right to assassinate anyone, anywhere in the world alleged to be a terrorist, not just on foreign soil (as the U.S. has already claimed the right to do), but within the United States. Following the Executive’s own logic, Padilla could have been shot to death in the Chicago O’Hare airport, just as well as being taken into custody. Thus the rationale of the “war against terrorism” is a construct justifying not only the right to disappear citizens, but the right to assassinate them as well.

Accepting the Government’s premise of an actual war, the District Court held that a U.S. citizen can be detained on the grounds that detention is intended to keep the combatant off the battlefield—for however long the



“battle” continues. The pretext of “war” is being used by the Executive to circumvent the fact that if Padilla were alleged to be part of some criminal terrorist conspiracy, the government would be constitutionally required to charge Padilla criminally and accord him a trial with the rights and protections of the Fourth, Fifth, Sixth and Eighth Amendments.

The Government and District Court’s reliance on *Ex Parte Quirin*, 317 U.S. 1 (1942) is misplaced. In that case, a German saboteur during World War II claimed U.S. citizenship, and the Supreme Court held that for violation of the laws of war even an American citizen could be treated as an “enemy combatant.” Unlike the present case, *Quirin* involved a real shooting war between state powers. Moreover, *Quirin* did not hold that a person designated as an enemy combatant could not challenge that designation or that the Executive would not be required to substantiate it. On the contrary, in *Quirin* there was a legal process (albeit a military tribunal) to determine Quirin’s guilt, considerably more process than the Executive or the District Court below has accorded Padilla. And finally, *Quirin*, after consultation with counsel, stipulated to the facts supporting the enemy combatant designation.

**B. The Imperial Presidency Demands Absolute Judicial Deference—a Move Towards a Police State**

Based on the false proposition of an on-going global “war against terrorism,” the Executive asserts that it has the unchallengeable authority to decide who is a terrorist and apply martial law, demanding absolute and complete deference by the judiciary. This demand of unfettered power by the Executive is a move toward bonapartism, a police state, and relies on a compliant judiciary. Padilla’s case is important not only because of the fate of this one man (and the others deemed enemy combatant by this President) but because the legal principles decided will provide precedent for other judicial challenges and justification for new legislation. As Justice Jackson warned in his dissent in the *Korematsu* decision, when the Executive “overstep[s] the bounds of constitutionality,...it is an incident,” but when a court “review[s] and approve[s], that passing incident becomes the doctrine.” *Korematsu v. United States*. 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). Deference to the Executive to deem a citizen an “enemy combatant” on the basis of hearsay “eradicates the Judiciary’s own Constitutional role: protection of the individual freedoms guaranteed to all citizens...Courts must be vigilant in guarding Constitutional freedoms, perhaps never more so than in times of war.” *Hamdi v. Rumsfeld*, 2003 U.S. App. LEXIS 13719 (4<sup>th</sup> Cir. 2003) (Hamdi IV) (Motz,

J., dissenting). *See also, Duncan, supra.*, 327 U.S. at 322-23; *United States v. Robel*, 389 U.S. 258, 264 (1967).

**C. The Executive's "War on Terror" and Evisceration of Democratic Rights is Based on Fabrications**

History has demonstrated that in the context of foreign relations and national security, deference to the Executive is dangerous to the concept of liberty. Such deference to the Executive is even more deadly when the relied on "factual" representations come from an Administration with a publicly documented propensity for blatant prevarication. American history is replete with examples of outright fabrications and manipulation of truth used to coerce a reluctant populace to go to war and justify other military depredations. Americans marched into this country's first imperialist slaughter, the 1898 Spanish-American War, under the bloodcurdling call to "Remember the Maine," based on the fiction that the battleship Maine was blown up by an enemy mine. In truth the explosion was caused by a faulty construction design. In order to reverse isolationist sentiment, President Franklin Delano Roosevelt deliberately provoked the Japanese into attacking U.S. military forces, thereby assuring U.S. entry into World War II. Many historians believe the administration knew the attack was coming and did nothing about it to make it that much easier to declare war. *See, Charles Beard, President Roosevelt and the Coming of the War 1941* (New Haven: Yale University Press, 1948).

President Truman dropped two atom bombs on Hiroshima and Nagasaki despite knowledge that the Japanese were already trying to surrender, both as an act of pure racist spite and to intimidate the Soviet Union and affect the post-war world order. In 1964 the Johnson administration manufactured a Vietnamese attack on American warships on the Gulf of Tonkin to line up Congressional support for a vast expansion of American bombing and ground troops to Vietnam.

Comparably the “war against terrorism” and the “war against Iraq” have fabricated origins. Recognizing the “opportunity” provided by the murderous attack on September 11, the Bush Administration decided within hours to use the terrorist attack as a pretext for war against Iraq. A link between al Qaeda and Iraq was asserted, although there was no evidence of any cooperation between Saddam Hussein and Osama bin Laden. Even with the passage of time and the interrogation of some 3000 Qaeda operatives around the world, the Bush Administration can’t manufacture the promised “bulletproof evidence” of such a link.

The war against Iraq (which was in reality a one-sided slaughter) was demanded by the President on the basis of purported hard factual evidence that Iraq possessed “weapons of mass destruction (WMD)” which posed an imminent threat to the U.S. Not only have none been found over three months

into the U.S. occupation of Iraq, but there are also daily press exposes of intelligence information documenting the falsity of Administration representations of the existence of Iraqi chemical and biological weapons and the actuality of nuclear capacity. Defense Secretary Donald Rumsfeld has conceded that WMD may not exist. *Independent*, May 29, 2003. During an interview in the July 2003 issue of *Vanity Fair* magazine, Deputy Secretary of Defense Paul Wolfowitz admitted, "For bureaucratic reasons, we settled on one issue, weapons of mass destruction (as justification for invading Iraq) because it was the one reason everyone could agree on." *Independent*, May 30, 2003. The White House responded to questions raised by Congress, national and international press about the veracity of the purported evidence presented in support of the war in Iraq with a sneering dismissal—questions are a "bunch of bull." *AP*, July 14, 2003.

In the days immediately following September 11, 2001, the mass round-up of non-U.S. citizens from Islamic countries was justified on the basis of suspicion of terrorism. The Department of Justice's own Inspector General Report, issued June 2, 2003, found a "pattern of physical and verbal abuse" and that detainees were classified as terrorism suspects without evidence. Not one terrorism charge came from that round-up and subsequent registration of 80,000 non-citizen males from Arab countries, but resulted in some 13,000

deportation proceedings, solely for immigration violations. In the face of blatant proof of the Executive's lies and abuses, Attorney General John Ashcroft not only disclaims wrongdoing but demands from Congress additional state repressive powers—to make their actions “legal.”

Jose Padilla's case is itself an example of Administration falsification. One year ago, Attorney General Ashcroft announced Padilla's apprehension to a widely publicized press conference in Moscow: “We have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive ‘dirty bomb.’” That the government knew there was no such “terrorist plot” was revealed in short order. Deputy Defense Secretary Wolfowitz conceded on national television, “I don't think there was actually a plot beyond some fairly loose talk.” *The Guardian*, 13 June 2002. Former Defense Secretary James Schlesinger stated that the prospect that Padilla had anything to do with a “dirty bomb” was “not realistic” making clear that the issue was “intent” and “threat,” not criminal acts. *New York Times*, 11 June 2002. “FBI officials speaking to the Associated Press on condition of anonymity, said their investigations had concluded that Mr. Padilla was probably no more than a ‘small fish’ with no ties to al Qaeda in the U.S.” *The Guardian*, 15 August 2002.

This Court must grant Padilla's *writ of habeas corpus* on the most basic grounds, beginning with disavowal of the President's imperial authority to assert martial law in the United States and indefinitely detain a U.S. citizen on the false bases that he is an enemy combatant and that the U.S. is engaged in a timeless and limitless military "war" with al Qaeda.

### III.

#### **IT TOOK A CIVIL WAR TO ESTABLISH THE RIGHTS AND PRIVILEGES OF UNITED STATES CITIZENSHIP— PADILLA HAS BEEN FORCIBLY DEPRIVED OF HIS CITIZENSHIP AND ATTENDANT RIGHTS IN VIOLATION OF THE CONSTITUTION**

What is presented in the Padilla case is a frontal assault on the very notion of citizenship. Padilla's designation as an enemy combatant, forfeiting all constitutional protection, constitutes *involuntary expatriation*, precluded under the Constitution. As Chief Justice Earl Warren stated:

*"Citizenship is man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen....His very existence is at the sufferance of the state...deprived of the right to assert any rights. This government was not established with power to decree this fate."*

*Perez v. Brownell*, 356 U.S. 44, 64-65 (1958) (Warren, J., dissenting) [emphasis added].

In *Trop v. Dulles*, 356 U.S. 86 (1958) decided the same day as *Perez*, the Supreme Court declared legislation depriving a person of citizenship

following military conviction for desertion from military service during war-time unconstitutional on Eighth Amendment “cruel and unusual punishment” grounds. “Denaturalization as punishment may involve no physical mistreatment, no primitive torture. There is instead the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community....In short, the expatriate has lost the right to have rights.” 350 U.S., at 101. That is the fate—*civil death*—the Government seeks to impose on Padilla in this case.

The rights of citizenship in the United States are the cumulative product of not only the American Revolution, but the bloody battlefields of the Civil War and the class and social struggles of the 19<sup>th</sup> and 20<sup>th</sup> centuries. The expatriation of Padilla, if upheld by this Court, would undo over 200 years of hard-fought gains that have extended the very definition of citizenship. To understand the historic stakes posed in this case, it is necessary to review the historic struggles that are embodied in the current legal concept of citizenship.

The United States Constitution is in reality three Constitutions, each of which codifies in legal formulations the outcome of vital historic changes in American social history. Each of these Constitutions embodies an expanding



conception of citizenship. The First (1787) Constitution arose out of the American War of Independence. That period of bourgeois revolutionary struggle both coincided with and was part of the Age of Enlightenment, characterized by an ideological adherence to natural rights, hostility to monarchy and suspicion of centralized government. Under feudal monarchies, which justified their power as divinely derived, the bulk of the population was no more than subjects of the crown, i.e.; a subjugated population without any political rights. The process of colonization and incorporation of successive waves of aliens into the colonial community resulted in an American citizenship that was not simply a substitution of allegiance to the republic replacing loyalty to the British crown. The ideological conception of citizenship in the American republic was that the Government derived its "just powers from the consent of the governed." *Declaration of Independence*.

Yet, in reality, full participation in the American political community was limited to white male property owners.

"[T]he birth of the liberal tradition can only be explained by the shift in the residence of economic power which accompanied it. At bottom it was a way of justifying the transfer of political authority from a land-owning aristocracy to a commercial middle-class; and, like all philosophies which seek to justify such a transfer, it stated its principles in a logic wider in theory than it was prepared to admit in practice....[B]y the 'rights of man' they meant in actual fact the rights of that limited class of men who owned the instruments of production in society." Laski, *supra.*, p. 37.

As John Jay succinctly put it: “the people who own the country ought to run it.”

The conception of the 1787 Constitution was that of separation of powers, including between the states and the federal government. This was called federalism and behind its shield American slavery existed and developed for over half a century before it was destroyed on the battlefields of the Civil War. In substance the 1787 Constitution codified two co-existing and battling social systems, the Southern plantation economy based on slavery and the developing Northern system of capitalism requiring “free labor.”

Within two years, the Second Constitution was introduced through the Bill of Rights consecrated in the first Ten Amendments to the Constitution. But consistent with the federalist “compromise,” the Bill of Rights was intended as a protection only against potential excesses of the federal government and not as a protection against the exercise of state governmental authority. The existence of slavery was thus “a major reason why the Supreme Court delayed so long in attempting to enunciate an authoritative doctrine of citizenship. Any effort to eliminate the inconsistencies and ambiguities in the law ultimately would have to address the problem of Negro citizenship.”

James Kettner, *Development of American Citizenship 1608-1870* (University of N.Carolina Press, 1978), at p. 324.

In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) the Supreme Court attempted to resolve that question by denying that black citizenship was a possibility. The central holding of *Dred Scott* was that black people—whether slave or free—were not, and *could not be*, citizens of any of the states or of the United States. This was the underlying position for Chief Justice Taney’s infamous declaration that black people “had no rights which the white man was bound to respect.” Reflecting the hold of the slavocracy’s interests on the Supreme Court, and indicating that the conflict between social systems would not be settled short of civil war, the *Dred Scott* decision held that the Fifth Amendment Due Process clause guaranteed and protected the property rights of the slaveholders; therefore the provision in the Missouri Compromise banning slavery in the territory was an unconstitutional deprivation of property. It was the dissenting justices in the *Dred Scott* case who stated that, “The most general and appropriate definition of the term citizen is ‘a freeman.’”

It took the defeat of the slavocracy in the Civil War—including participation by 180,000 black troops—to make that concept of citizenship a reality. Only with the defeat of the slavocracy were “the feudal fetters on political and economic freedoms broken or transcended.” The competition between the dual economic systems was eliminated. “The Third Constitution

codifies the completion of the American bourgeois democratic revolution creating a national American state, founded on the hegemony of the first ten Amendments and of the Reconstruction Amendments, subordinating the federalism of the First Constitution.” Franklin, *supra.*, p.173-4. The Thirteenth Amendment (1865) abolished slavery.

As a first step towards defining the rights of citizens, the Civil Rights Act of 1866 was passed to overturn in law the *Dred Scott* decision. The Act defined all persons born in the U.S. as national citizens and established affirmative rights of free labor to be enjoyed regardless of race: including making contracts, bringing lawsuits, owning property, receiving equal treatment in courts and by government officials. The Act provided that no action by state or local custom could deprive an individual of these basic rights. The Fourteenth Amendment (1866), for the first time, provided a Constitutional definition of national citizenship, applying to “all persons born on U.S. soil or naturalized.” The Fourteenth Amendment also prohibited states’ restrictions on privileges and immunities of citizens without due process of law or denying equal protection. The Fourteenth Amendment thereby not only recognized national citizenship, but also guaranteed the qualities of citizenship, without which it would be citizenship without content.

Within a mere five years after the passage of the Fourteenth Amendment, its purpose was vitiated by decisions of the U.S. Supreme Court, reflecting the emergence of the American imperialist state and the defeat of the great democratic effort of Radical Reconstruction. In the *Slaughter-House Cases*, 16 Wall. 35 (1873), the Supreme Court denied the due process claims of individual butchers against a state-authorized slaughterhouse monopoly, declaring that the Fourteenth Amendment did not make the core rights of national citizenship—due process and equal protection—binding on the states. In *US v. Cruikshank*, 92 U.S. 542 (1876), and the *Civil Rights Cases*, 109 U.S. 3 (1883), Fourteenth Amendment protection was specifically denied in the arena of civil rights. The 1896 *Plessy v. Ferguson*, 163 U.S. 537 decision declared “separate but equal” the law of the land, holding that state-required racial segregation did not violate the equal protection clause. During this period, the Fifteenth Amendment mandate that “the rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude” was totally disregarded.

Even while Fourteenth Amendment due process and equal protection were denied to the U. S. citizens for whom it was adopted, the Supreme Court ruled that *corporations were “persons”* within the meaning of the Constitution

and protected from government regulation under the doctrine of substantive due process. *See, for example, Lochner v. New York*, 198 U.S. 45 (1905).

From 1886-1912, only two Supreme Court cases restrained or overturned state action involving discrimination against black people, while 39 times the Court did so in cases involving corporations. As Laski explains:

“[O]nce that issue [supremacy of industrial capitalism] was clearly posed... the driving motivation of the court was to protect the needs of expanding industry, even if its decisions were... ‘to incense a mighty army of sixty million citizens.’ By 1880 the Supreme Court had become the passionate exponent of economic laissez-faire. It remained thus for a quarter of a century. During this period its dominating purpose was simply to prevent interference with business enterprise by government regulation, whether state or federal. It evolved conceptions of liberty of contract, of due process of law, of the police power, of reasonableness, all of which operated to protect business men in the unhampered pursuit of profit... [T]hey illustrate the inevitability that constitutional law must be subordinated in a capitalist society to the needs of capitalism.”

*Supra.*, pp. 157-8.

Hence, although many today would take it for granted that American citizenship is a birthright of anyone born here, that modern conception is actually a recent and reversible victory. It took a full century of further class and social struggle after the Civil War for the rights and privileges promised in the Fourteenth Amendment under its due process and equal protection clauses to be held as a matter of law applicable to all citizens of this country. It took the social upheaval of the mass civil rights movement and United States war in Vietnam to break the social and legal lock created during the Cold War with

post-World War II Soviet Union. Moreover, in the context of international competition with the Soviet Union, the American capitalist class found it convenient to play the card of “human rights.” Yet that card had limited utility while American citizens were visibly being deprived of the most basic rights. Thus it was only in 1967 that the Supreme Court for the first time acknowledged the principle that the Fourteenth Amendment established citizenship as “the constitutional birthright of every person born in this country.” In the midst of the civil rights movement, *Afroyim v. Rusk*, 387 U.S. 253 (1967) held that once a person becomes a citizen, Congress cannot deprive him of that status. *Afroyim* fundamentally adopted Chief Justice Earl Warren’s dissent in *Perez*.

*Afroyim* is relevant to Padilla; its holdings preclude Padilla’s *de facto* expatriation by the President. Neither Congress nor the Executive can use the implied Constitutional powers to deal with foreign affairs or national security to override the fundamental constitutional right of citizenship and its attendant rights and privileges. *Id.*, 263. “There is no indication of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment must reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted,

canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.” *Id.*, p.262.

Just as the reality of citizenship for the vast majority of Americans has been the product of convulsive social struggles, the rights of citizenship are reversible in the context of social reaction. With the decline of the social struggles of the 1960s, and particularly with the collapse of the Soviet Union in 1991-92, the American bourgeoisie has taken aim at the rights gained through those earlier struggles. Under the guise of the “war on terrorism,” the Executive is now taking aim at the most fundamental right of all—the “right to have rights”—i.e., citizenship.

What is posed here is whether Padilla will become the Executive’s implementation of a revision of the infamous *Dred Scott* decision: *Citizens have no rights that the government is bound to respect.*

#### IV.

### **PADILLA IS DEPRIVED OF HIS LIBERTY IN VIOLATION OF DUE PROCESS**

The detention of Jose Padilla as an “enemy combatant” cuts at the heart of the core protections of the First, Fourth, Fifth, Sixth and Eighth Amendments which provide the content to the rights and privileges of citizenship. The Fifth Amendment clearly decrees that “no person” shall “be



deprived of life, liberty, or property, without due process of law.” It is beyond cavil that Mr. Padilla, who is behind bars for what could be the rest of his life, is being denied his liberty. Freedom from physical restraint “has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Foucha v. Louisiana*, 504, U.S. 71, 80 (1992). The Supreme Court has long recognized both substantive and procedural limits placed on government capacity to restrain individual liberty by this provision as well as the Fourteenth Amendment. Over 150 years ago the Supreme Court ruled that this held true even in the face of a “national emergency” or war, so long as civilian courts were functioning. *See, Ex Parte Milligan, supra. See also, Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex Parte Endo*, 323 U.S. 283 (1944), and *Sterling v. Constantin*, 287 U.S. 378 (1932). There is not a single sentence in the Constitution that declares exceptions to these principles, let alone an exception for a citizen detained outside a battlefield as an “enemy combatant.”

Nor can there be any question that Padilla’s deprivation of liberty is being done without due process of law, which at a minimum means the right to be apprised of charges against him and to challenge these charges in a judicial forum with the benefit of legal counsel. It also requires that he be *presumed innocent* until proven guilty beyond a reasonable doubt. Central to the

Executive's treatment of Jose Padilla is its assertion that any "fact" tending to support the President's designation of Padilla as an "enemy combatant" mandates he be deemed so, and as a consequence stripped of all constitutional rights. While Padilla is deprived of the presumption of innocence guaranteed in the Fifth Amendment's due process clause, the Government is bestowed an irrebuttable presumption of veracity. *Amici* adopt the arguments made by Padilla regarding deprivation of due process protections by the imperial President's determination that he is an enemy combatant.

With the cases of Jose Padilla, as well as Yasser Esam Hamdi, John Walker Lindh and Zacarias Moussaoui, and the hundreds detained at Guantanamo, the Government seeks to institutionalize in the American justice system the arbitrary deprivation of rights that are the hallmarks of right-wing dictatorships propped up around the world by U.S. imperialism. *Amici* would point out that the "anti-terrorism" laws of Peru, which provided for trial by hooded judges, with no right of the accused to call witnesses or confront their accusers, granted more rights than this Executive has accorded Padilla. Peru recently declared those laws to be unconstitutional. In short, the Executive is establishing a parallel legal system, one with no laws or rules, for anyone the President chooses to disappear.

---

The U.S. government is holding hundreds of prisoners, including youth, as enemy combatants at the American base in Guantanamo, Cuba, refusing to treat them according to international conventions as "prisoners of war." Though never charged with any crime they are held under torturous conditions, such that there have been numerous suicide attempts. These prisoners have been deprived access to lawyers, communication with family and even an opportunity to speak with other prisoners who speak their own language. They face possible military tribunals and death sentences; many have been led to believe they will never be released. In March a federal Court of Appeals declared that these prisoners have no standing to seek redress in the American courts because Guantanamo is under Cuban sovereignty!

Additionally, the Executive is gutting "fair trial"/due process protections applied in criminal prosecutions. The conduct of the Government in the Moussaoui case is evidence of this point. In claiming that the Moussaoui case is "special" due to "national security" reasons, the government is in fact using it as a precedent to eliminate due process protections that are supposed to adhere in criminal prosecutions. In the first instance Moussaoui faced a death sentence on charges of conspiring with the September 11 hijackers, although federal prosecutors knew he had nothing to do with the September 11 attacks. Not only is he tried in proceedings closed to any public scrutiny, but,

Moussaoui, who is proceeding *pro se*, is literally legally blindfolded—denied even the right to review evidence on which his life hangs because he is not cleared for security proceedings. When the District Court ordered the government to allow Moussaoui to interview an al Qaeda leader who may provide exculpatory evidence, the Executive's response was to threaten to do away with the criminal proceedings altogether by declaring him an "enemy combatant." If the judge doesn't acquiesce to the government's claim of national security exemptions to the fundamental right to present a defense, especially exculpatory evidence, there will be no trial at all. This issue is pending before the District Court.

Additionally, the Executive is wielding the threat of declaring individuals charged in the criminal courts as "enemy combatants" in order to coerce "cooperation" or guilty pleas. Naturalized American citizen Iyman Faris (Mohammed Rauf) was detained incommunicado for three months before pleading guilty in a sealed federal courtroom in Virginia to a ludicrous and impossible plot to destroy the Brooklyn Bridge. In the face of a refusal to cooperate and the possibility that Qatari student Ali Saleh Kahliah al-Marri, who had been held for over 18 months, would be acquitted on charges of lying to the FBI and of credit card fraud, the Government declared him an enemy

combatant, subjecting al-Marri to the same fate as Padilla. Who knows how many more cases are secretly pending or soon to follow.

Prior to September 11, the Supreme Court repeatedly held that due process and equal protection rights embodied in the Fifth and Fourteenth Amendments are applicable to immigrants as well as citizens, *Plyer v. Doe*, 457 U.S. 202 (1982), *Wing Wong v. U.S.*, 163 U.S. 22(1896), *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Zadvydas v. Davis* , 533 U.S. 678 (2001). But by the very fact that non-citizens have no inalienable right to be in the United States, without citizenship there is no “right to have rights.” For example, while the First Amendment formally grants immigrants the same speech and association rights as U.S. citizens, the exercise of those rights carries with it the risk and fear of detention and deportation. Consider the case of Farouk Abdel-Muhti, arrested over a year ago, held in solitary confinement where he is locked down 23 hours and 15 minutes a day solely for being an outspoken defender of Palestinian rights.

In the wake of the post September 11 anti-immigrant witchhunt, the Supreme Court recently upheld a provision of the draconian 1996 *Illegal Immigration Reform and Responsibility Act* mandating imprisonment of legal immigrants who are facing deportation for even the most minor convictions at

some point in their lives. *Demore v. Kim*, 123 S. Ct. 1708, (2003).

Georgetown University Law Professor David Cole pointed out,

“History shows that what the government does to foreign nationals in the name of national security eventually gets extended to U.S. citizens. The guilt-by-association campaign of the McCarthy era was an extension to citizens of tactics first deployed against foreign nationals in the Palmer Raids of 1919-20. The internment of 70,000 American citizens of Japanese descent during World War II was an extension to citizens of the historical treatment of ‘enemy aliens’ during wartime.”

*Newsday*, May 15, 2003.

Among other reasons this underscores why *amici* call for full citizenship for all immigrants.

In short, the decision on Padilla’s case will impact on the imperial Presidency’s wholesale assault on democratic rights following September 11. It is intended by the Executive to provide a post-facto legal basis for what the government has been doing pre-emptorily since September 11. Asserting “national emergency,” some 1,200 immigrants from Arab/Islamic countries were rounded up and detained as putative “terrorists.” The Executive, with bipartisan support, rammed through Congress the draconian *USA-Patriot Act* authorizing widespread wire-tapping, surveillance and break-ins on the basis of political advocacy and establishing sweeping legal authority for secret mass detentions and deportations of immigrants; implemented new FBI guidelines reviving the deadly COINTELPRO campaign of surveillance, intimidation,

disruption and frame-up; ordered military tribunals for non-citizens seized in Afghanistan and Pakistan, holding them in torturous conditions in Guantanamo. All-encompassing government spying apparatus are being prepared, from the Pentagon's Big Brother *Terrorist Information Awareness Program* to surveillance of travel via the *Computer Assisted Passenger Pre-Screening System* (CAPPS II).

The President's assertion of the prerogative to strip citizens of their rights as citizens and lock them away indefinitely without charges, lawyers or trials and denying all known formal protections of the First, Fourth, Fifth and Six Amendments is an unprecedented assertion of imperial power. It is codified in the Justice Department's secretly drafted *Domestic Security Enhancement Act* (Patriot II), which would provide the Executive with the authority to detain terrorist suspects or those allegedly providing "material support" to purported terrorists. It explicitly denies the right to counsel or *habeas corpus* review. Internationally, the U.S. has kidnapped foreign nationals suspected of terrorism, imprisoned suspects indefinitely and authorized assassinations, overriding international conventions and its own long-standing ban on assassinations.

Under the pretext of the "war against terrorism," the Executive has dismantled those formal protections and limitations on police and government

powers—particularly in the application of all forms of secret surveillance, detention plans, anti-immigrant policies and counter-intelligence disruption techniques, including murder and legal frame-ups—that were won in the quarter century encompassing the mass civil rights movement, the U.S. defeat in Vietnam and the Watergate exposure that government dirty tricks extended even to representatives of the capitalist ruling class. The substantial danger and significance of the new laws, orders and directives lie in the fact that they constitute a full-scale legalization and mandate for the state to conduct its spying, harassment, prosecution and worse against immigrants, blacks and all perceived political opponents. What the government previously did in secret it can now conduct with the authority of a legal mandate.

## V.

### **PADILLA'S DETENTION AS AN ENEMY COMBATANT POSES A GRAVE THREAT TO THE FIRST AMENDMENT RIGHTS OF EVERYONE**

The Executive has set in motion the current anti-immigrant, “anti-terrorist” witchhunt to mold its own particular strategy for retooling the government’s machinery of repression. In doing so, it has created a new, more dangerous form of thought-crime conspiracy laws, whose victims are prosecuted on the basis of political views and associations rather than conduct or actions. No aspect of citizenship is more fundamental than the



rights accorded by the First Amendment. The First Amendment is the “keystone of our Government,...the freedoms it guarantees provide the best insurance against destruction against all freedom,” stated Mr. Justice Black, dissenting in *Dennis v. United States*, 341 U.S. 494, 580 (1951). It was to protect the exercise of the political freedoms codified in the First Amendment that the proscriptions on unlawful search and seizure, prohibition on excessive bail (i.e., indefinite detention), right to counsel and the due process clauses were adopted as part of the first Ten Amendments to the U.S. Constitution. *See, Marcus v. Search Warrant*, 367 U.S. 717, 724, (1961).

**A. Padilla is Deemed an Enemy Combatant on the Basis of Alleged Association**

The Presidential Order declaring Padilla an enemy combatant is based on assertions that “Padilla is closely associated with al Qaeda....engaged in hostile and war-like acts” including unspecified “conduct in preparation for acts of international terrorism,” possesses information that would be helpful in preventing al Qaeda attacks, and represents a “continuing, present and grave danger to the national security of the United States.” His incarceration is not based on the commission of any crime, or even the allegation thereof. Instead it is expressly based upon his purported associations. Padilla cannot be deprived of his liberty based on undefended allegations of association and

vague hearsay assertions of intent to commit some future act. With the sweep of his hand, the President has simply declared Padilla an enemy combatant, thereby denying him those fair trial protections accorded to criminal prosecutions.

The basis for Padilla's unlawful detention in the absence of any crime even being charged, let alone committed, is mirrored in both the Patriot Act and its proposed reinforcement, Patriot II. Both Acts threaten a wide scale of government attacks from wiretapping and break-ins to indefinite detention and if Patriot II is passed, loss of citizenship. The trigger of such repressive measures is the nebulous act of providing "material support to terrorism." What constitutes "material support" can be anything the government doesn't like. And what organizations are deemed "terrorist" can vary from day to day, depending on the Administration's whims. As the case of attorney Lynne Stewart illustrates, this provision, in the earlier 1996 *Anti-Terrorism Act* provided the basis for the government to indict a political activist attorney as a terrorist co-conspirator.

**B. The Government's Position is The Latest Extension of a Long History of Invoking Thought-Crime Laws and Detention During Times of War and Social Struggle**

The seminal case arising out of the Nixon Administration's use of politically motivated and warrantless surveillance against opponents of the

U.S. war in Vietnam is *United States v. United States District Court*, 407 U.S. 297 (1972), which precluded the Executive from assuming power in violation of the Constitution.

“History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the government attempts to act under so vague a concept as the power to protect ‘domestic security.’”

407 U.S., at 313.

In his book, *All the Laws But One: Civil Liberties in Wartime* (Knopf/Vintage, 1998), Chief Justice William Rehnquist asserts that “in times of war, the law is silent,” and admiringly quotes Francis Biddle, Roosevelt’s attorney general: “The Constitution has not greatly bothered any wartime president.” Rehnquist further states that, “In times of war, presidents may act in ways that push their legal authority to its outer limits, if not beyond.” Those assertions are consistent with the history of this country, for particularly in times of war, or fear for “national security” in the face of revolutionary upheaval abroad or class struggle at home, the government has whipped up hysteria as a pretext to justify denying First Amendment rights and other core constitutional protections to the population. In virtually every instance the courts upheld the government’s acts, while some time later, retrospectively,

hold them to have been in violation of fundamental constitutional protections – or at least unconstitutional as applied.

The Bill of Rights was less than a decade old in 1798 when war hysteria prompted by the Jacobin French Revolution prompted the Federalist-dominated United States Congress to enact the *Alien and Sedition Acts*. Constitutional challenges to the Acts were generally precluded in the federal courts. The American bourgeoisie's emergence as an imperialist power was also prepared by, and fueled, attacks on the U.S. working class, particularly targeting immigrant workers. From the national railway strike of 1877 to the execution of the Haymarket martyrs in 1887 to the 1892 steel strike in Homestead, Pennsylvania, the class struggle was marked by one labor massacre after another. The 1890 *Sherman Anti-Trust Act* was used to criminalize labor unions. A 1902 anti-anarchist law in New York became the model for state and federal "criminal syndicalism" laws which targeted organizations and individuals seeking "a change in industrial ownership or control, or effecting any political change." In 1903 Congress passed the first legislation barring immigrants who "believe in or advocate the overthrow by force and violence" of the U.S. government, the first such law criminalizing political beliefs since the *Alien and Sedition Acts* of 1798.

During World War I and in fearful reaction to the Russian Revolution, first the *Espionage Act* (1917) and then the *Sedition Act* (1918) were passed, authorizing government to conduct surveillance, search and seize private property, censure writings, open mail and restricting freedom of speech and the right of assembly. The targets of these Acts were not "German spies" but labor agitators, opponents of U.S. entry into World War I, anarchists, and "reds," thousands of whom were imprisoned. Among them was Socialist Party leader Eugene V. Debs, for a speech containing the incendiary message to workers: "You need to know that you are fit for something better than slavery and cannon fodder." The U.S. Supreme Court upheld Debs' conviction, denying any First Amendment violation, in *Debs v. United States*, 249 U.S. 211 (1919), following the ruling of *Schenck v. United States*, 249 U.S. 47 (1919), which denied First Amendment protection. The notorious Palmer Raids in 1919 resulted in the detention and deportation of thousands of immigrants accused of being anarchists or "reds."

In 1940 Congress, concerned with the increased possibility of the United States entering into World War II, passed the *Alien Registration Act* (better known as the *Smith Act*). The first to be prosecuted for their opposition to the impending inter-imperialist war were the Trotskyists of the Socialist Workers Party, many of whom had played a leading role in the 1934

Minneapolis Teamsters strike. The convictions for “seditious conspiracy” were affirmed by the Court of Appeals, *Dunne v. United States*, 138 F2d 137, and the Supreme Court refused review, 320 U.S. 370 (1943).

The history of state repression also includes many instances of threatened and actual mass detentions, targeting leftists, working people and racial minorities. The internment of American citizens of Japanese descent during World War II, *Korematsu v. United States*, *supra*. is a notorious example of trampling on democratic rights of citizens during wartime. It also represented a monumental fraud on the Court by the President. The internment of Japanese-Americans from the American west coast was presaged by massive arrests and martial law in Hawaii, based on an Executive Order by Democratic President Franklin Roosevelt and explicitly disregarding the lack of any evidence of subversion. Roosevelt’s position was, “I do not worry about the constitutional question. The whole matter is one of immediate and present war emergency.” Robert Justin Goldstein, *Political Repression in Modern America* (Cambridge: Schenkman Publishing Co., 1978), p. 265. Martial law in Hawaii continued for almost three years after Pearl Harbor.

In February 1942, Roosevelt issued Executive Order 9066, which authorized detention and relocation of Japanese residents in the U.S., in the majority native-born U.S. citizens into concentration camps. Congress quickly

ratified the order. The government argued war emergency and military necessity and the Supreme Court upheld the imposition of martial law stating, "When under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger." *Korematsu v. U.S.*, *supra*. Forty years later, in *Korematsu v. United States*, 584 F. Supp 1406 (N.D. Cal. 1984), his conviction was reversed on the grounds that the government misrepresented the existence of "intelligence" justifying or providing a clear, military necessity for evacuation orders in the first place.

Although there are only four known "enemy combatants" detained in the U.S., in addition to the hundreds in Guantanamo in the current the "war on terrorism," the Executive has asserted an even greater degree of unilateral power now than it did during World War II. Here the President does not rely on the *Joint Resolution* as the basis of his authority, nor does he think any Congressional authorization necessary. The Japanese Americans were relocated, costing them loss of real and personal property, but they were not held incognito, nor denied access to the civilian courts, as today's "enemy combatants" are.

Following World War II, plans were laid for additional mass detentions at the height of the McCarthyite anti-communist witchhunt. Deeming the

Smith Act to be insufficient protection against threats to internal security, in 1950 Congress enacted the *Internal Security Act of 1950*, 50 USC 781-798, 811-826, amended 1968, more commonly known as the McCarran Act. This Act went beyond prohibiting advocacy of force and violence. Title I was an elaborate scheme of registration for certain types of organizations, known as the *Subversive Activities Control Act*; Title II was a separate criminal sedition law. Title III of the Act was the *Emergency Detention Act*, permitting detention of suspected subversives in periods of emergency. It also provided for the deportation of aliens found to be Communists at any time in their lives. During the Cold War a "Security Index" kept by FBI headquarters contained nearly 12,000 "leaders" while the "Communist Index" added another 17,000 members. The anti-Communist Security Index, supposedly dismantled in the 1960s--was resurrected as the Administrative Index (ADEX). The Spartacist League was among 16 organizations designated on the ADEX file for "special attention."

In 1961, after almost eleven years of litigation challenging the registration law on First Amendment grounds, the *Subversive Activities Control Act* was upheld by the U.S. Supreme Court against the Communist Party on the grounds that what was required was a simple matter of disclosure. However, Government attempts to enforce the subsequent registration order



proved fruitless—each attempt was successfully challenged on the grounds that prosecution of individuals for failure to register violated the Fifth Amendment protection against self-incrimination. Ultimately the Supreme Court concurred, striking down the prosecutions on Fifth Amendment grounds but leaving the Act in force. The criminal sedition law was never invoked as a basis for prosecution.

The *Emergency Detention Act* has an illuminating history, directly relevant to the Padilla case. The original Mundt-Nixon bill contained the registration provisions and the criminal sedition law sections of the McCarran Act. It was the liberal stalwarts of the Democratic Party who were the proponents of the detention provisions. The Emergency Detention bill was introduced by liberal Senators who argued that the only danger from the Communist Party would come in times of emergency. As a result they advocated the emergency detention provisions as a substitute bill. Goldstein, *supra.*, at 366.

These detention provisions were to spring into operation upon the President's proclamation of an emergency in the event of an invasion, declaration of war, or insurrection in aid of a foreign enemy. When such an emergency was declared, the Attorney General was authorized "to apprehend and by order detain... each person as to whom there is reasonable ground to

believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage.” There was no provision for judicial proceedings before detention and only limited review, in which the evidence could be withheld, after detention occurred.

The provisions of the *Emergency Detention Act* were never invoked, and were ultimately repealed as one of the democratic gains emanating from the social struggle of the Civil Rights and Vietnam anti-war movements of the 1960s and early 70s. A federal lawsuit was filed in November 1968 against the existence of detention camps as a “depressant effect upon the system of freedom of expression.” Although the case was dismissed on the government’s motion in May 1969, in December, 1969 Congress repealed the *Emergency Detention Act*. Then Attorney General Richard Kleindienst testified before a Congressional hearing that the continuation of the Act “was 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. This benefit outweighs any potential advantage which the Act may provide in a time of internal security emergency.” When the *Emergency Detention Act* was repealed, the Congressional Report ends with: “Repeal of the Act alone might leave citizens

subject to arbitrary executive action, with no clear demarcation of the limits of executive authority.” See, Goldstein, *supra.*, at 393.

**C. Section 4001(a) is Dispositive of this Case—The Executive’s Denial that Section 4001(a) is Law and Binding on the President is Further Proof of the Executive’s Political Agenda**

In early 1970, just as Congress was repealing the *Emergency Detention Act*, it also passed a law stating: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” 18 USC sec. 4001 (a). By the plain language of the statute as well as the legislative history, Section 4001(a) is determinative of this case. Yet, the Government denies the applicability of Section 4001(a) to Padilla, and the District Court below concurred.

Section 4001(a)’s clear, straightforward disavowal of Presidential imperial power to detain citizens without lawful authority is the sole legislative constraint on the Executive’s police power to come out of the brief period of expansion of judicial recognition of democratic rights during the civil rights movement and Vietnam war period. Those democratic rights, won through social struggle, are reversible, and have been chipped away over the past 30 years. Yet the steady erosion of Section 4001(a) did not initially come through new legislative enactment, but through a series of Executive actions contrary to that law. These Executive fiats reach their culmination in the present case,

in which the Executive asserts its unilateral right to disappear citizens under the guise that they are “enemy combatants.”

In 1970, as the country was rocked by mass antiwar protests and ghetto upheavals, a proposal was drafted calling for martial law and the establishment of “relocation” camps for black people in the event of a black uprising. In California, then-governor Ronald Reagan actually organized a series of “war games” involving state and local police, the California National Guard and elements of the U.S. Sixth Army to train for the imposition of martial law.

In 1978, the *Foreign Intelligence Surveillance Act (FISA)* was passed authorizing secret electronic surveillance and physical searches of agents of a foreign power, including U.S. citizens at home and abroad. The 1983 FBI Domestic Security/Terrorism Guidelines replaced more restrictive self-imposed FBI rules in the wake of the Watergate, CIA and FBI/COINTELPRO exposures. These regulations redefined what had been deemed “subversive” activity as “terrorist,” authorizing investigation of left wing organizations although no crimes had been committed or even alleged.

In 1984, the Reagan Administration drafted plans to empower the Federal Emergency Management Agency (FEMA) to appoint military commanders to run state and local governments in the event of a national emergency. This plan was drawn up as the U.S. sponsored a death squad

regime in El Salvador and the CIA's *contras* waged a war of terror in Nicaragua. It established ten "military detention camps" for jailing 400,000 Central American "aliens" as well as some 28,000 U.S. citizens. After the U.S. bombing of Libya in 1986, the Immigration and Naturalization Service drew up a similar "contingency plan" for "alien terrorists and undesirables" that called for rounding up thousands of Arab immigrants and herding them into an already prepared concentration camp in Louisiana.

Clinton's 1994 *Violent Crime Control and Law Enforcement Act* of 1994 and the *Anti-Terrorism and Effective Death Penalty Act* of 1996, had the combined impact of a legislative roll back of various court decisions enforcing constitutional rights. The Crime Bill allowed evidence seized in an illegal search to be admitted into evidence, provided billions of dollars to build prisons and increase the number of police on the streets. In February 1995, Clinton issued Executive Order 12947, allowing physical searches (under FISA) without obtaining a search warrant, authorized electronic surveillance in the name of national security and allowed this information to be used as evidence in a criminal court. The 1996 Anti-Terrorism Law, passed in the aftermath of the Oklahoma City bombing, established a wide range of anti-immigrant procedures and incorporated Executive Order 12947. The law defined foreign terrorism, provided for the Secretary of State to designate

foreign terrorist organizations and made it a crime to provide “material support” to any proscribed terrorist organization and a crime to support terrorist activity abroad and is the direct precursor to the even more sweeping *USA-Patriot Act* and the proposed Patriot II. “Alien removal procedures” were effectuated which prohibited the accused from seeing the evidence against them and permitted the government to accuse, try and deport them without even appearing in court. Additionally electronic surveillance laws were expanded to allow wiretaps without a warrant of those suspected of foreign terrorism or support to terrorism. Most of the immigrants being held in post-September 11 detentions are being held under the 1996 Anti-Terrorism Law.

In its legal filings in the District Court, it was notable that the Government did not rely on any of the above referenced conspiracy and thought-crimes legislation or the mass detentions of the First and Second World Wars as precedents for its summary detention of Padilla. Yet in reality the Executive’s present position is nothing less than the extension of that sordid history to a new level of repression.

**D. The Executive’s Reliance on *Moyer v. Peabody*—Charging Insurrection in Response to a Union Struggle for the 8-Hour Day—is Further Proof of the Intent of this Imperial Presidency**

It is significant that the Government relies heavily on a labor case, *Moyer v. Peabody*, 212 U.S. 78 (1909), to justify its claim that a determination

by the President in his capacity as Commander in Chief is unassailable and beyond challenge in court. Moyer's due process claim against summary detention was rejected by the Supreme Court in a decision by Justice Holmes on the ground of emergency action by a state commander in chief during a local "state of insurrection." The *Moyer* case is "instructive," but not, as the government would have it, because it represents the state of law today, but rather that the so-called "war powers" asserted by the government can and will be used against domestic political opposition, including labor unions, particularly when engaged in the organized withholding of labor—i.e., a strike.

In *Moyer*, the Governor of Colorado declared a 1902 strike for an 8-hour day by the Western Federation of Miners to be an "insurrection," called out the militia and imprisoned the union's leaders, without probable cause that any crime had been committed. Some 400 miners were forcibly deported from the state by troops disregarding *habeas corpus* orders. Over 175 miners were arbitrarily thrown in local jails, among them union leader Charles Moyer, who was held as a military prisoner for three months. In response to an application for a writ of *habeas corpus*, militia General Sherman Bell declared, "*Habeas corpus*, hell! We'll give 'em post mortems." Answering complaints that the military was violating the constitution, Militia Lt. McClelland pronounced, "To hell with the constitution; we aren't going by the constitution." Goldstein,

*supra.*, p. 72. McClelland is distinguishable from President Bush and Attorney General Ashcroft only by his honest declaration of open contempt for the Constitution.

The fundamental holding of *Moyer*—that the courts should defer to the executive in its implementation of its police powers and reject due process claims on the basis of good faith assertions of state of emergency—was explicitly rejected 65 years later in *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In *Scheuer*, personal representatives of the estates of students killed by the National Guard at Kent State University in 1970 brought a civil rights action against the Governor of Ohio and other state officials. In an 8-0 decision authored by Nixon appointee Chief Justice Warren Burger the court overturned a lower court ruling upholding the contention that the state executive had absolute immunity from such suit. The Chief Justice pointed out: “The District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that ‘mob rule existed at Kent State University.’ There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the courts from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive



conclusion could not be judicially noticed.” *See also, Sterling v. Constantin, supra.* (Constitution may not be replaced by the “fiat of a state Governor”).

This Court should take judicial notice of the Resolution passed by the San Francisco Labor Council on December 9, 2002:

“Since the tragic events of September 11, 2001, we have seen the beginning of a relentless new assault on labor—from the employers, and from the government acting on their behalf and whereas, using the so-called ‘war on terrorism’ and ‘national security’ as a pretext, the Bush Administration has spearheaded a renewed assault on organized labor, starting with the use of Taft-Hartley (and threats to militarize the ports) against West Coast dockworkers...wholesale threats to the job security and union rights of 170,000 federal workers...the racist firings of experienced airport screeners...threats to curtail the right to strike and organize; and the impending contracting out hundreds of thousands of federal jobs. On more than one occasion, government spokespersons have referred to union actions defending our jobs, working conditions and living standards as akin to terrorism, or as ‘aiding and abetting terrorists,’ or as a ‘threat to national security’;”

What this Court decides regarding the fate of Jose Padilla has direct and immediate ramifications way beyond the particulars of this case. To grant the Executive the power to declare any perceived political opponent a “terrorist” and therefore an “enemy combatant”—which is precisely the power that the President asserts in this case—would eviscerate the rights of the working people, minorities and the oppressed to associate in common struggle against oppression and exploitation. At the most basic level, Padilla’s case will be critical to establishing whether this Executive will obtain blanket judicial approval for a wholesale evisceration of democratic rights. In demanding

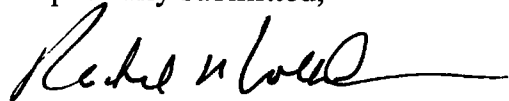
deference as Commander in Chief, the President is asking for nothing less. This bald attempt to substitute Executive fiat as the Supreme Law of the Land must not be countenanced.

### CONCLUSION

For the reasons stated above, *Amici Curiae*, Spartacist League and Partisan Defense Committee support the appeal of the denial of the petition of *habeas corpus* filed by Jose Padilla and request that this Court direct the District Court below to grant the writ *habeas corpus* and release Jose Padilla.

July 29, 2003

Respectfully submitted,



RACHEL H. WOLKENSTEIN, ESQ.

PAUL COOPERSTEIN, ESQ.

67 Wall Street, Ste. 2411  
New York, NY 10005  
(212) 406-4252

On behalf of *amici curiae* Spartacist League and Partisan Defense Committee