No. 05-6396

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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JOSE PADILLA,
Petitioner-Appellee,
v.
COMMANDER C.T. HANFT, U.S.N. Commander,
Consolidated Naval Brig,
Respondent-Appellant

_____

On Appeal from the United States District Court for the District of South Carolina, Charleston Division, No. 02:04-22221-26AJ

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BRIEF OF JANET RENO, *ET AL.*, AS *AMICI CURAE* IN SUPPORT OF PETITIONER-APPELLEE SUPPORTING AFFIRMANCE

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INTERESTS OF AMICI CURIAE

Amici curae are lawyers with years of experience in government law enforcement and intelligence work. They submit this brief to assist the Court in understanding the mechanisms with which the United States has successfully monitored, searched, detained, and punished terrorists, and prevented terrorist attacks.[1]

Janet Reno served as Attorney General of the United States from 1993 to 2001. After working for three years in the Dade County State Attorney's Office in Florida, she became State Attorney for Dade County in 1978. She served in that office until she became Attorney General.

Philip B. Heymann was Deputy Attorney General of the United States from 1993 to 1994. He also served as Assistant Attorney General in charge of the Criminal Division of the Department of Justice between 1978 and 1981. He has held a number of positions in the Department of State, and has written three books about terrorism. Presently he is a professor of criminal law at Harvard Law School.

Eric H. Holder, Jr. was Deputy Attorney General of the United States from 1997 to 2001, and Acting Attorney General in 2001. For over 20 years, he was a

[1] This brief is an update to an *amicus* brief previously submitted to the Supreme Court. *See* Brief for Janet Reno et al. as *Amici Curiae* in *Rumsfeld* v. *Padilla*, 124 S. Ct. 2711, No. 03-1027.

trial attorney in the Criminal Division of the Department of Justice. In 1988, he became an Associate Judge on the Superior Court for the District of Columbia. From 1993 to 1997, he served as the United States Attorney for the District of Columbia.

Jeffrey H. Smith was the General Counsel of the Central Intelligence Agency from 1995 to 1996. In 1993, he was appointed by the Secretary of Defense to serve on the Commission to Review the Roles and Missions of the Armed Services. Previously, he chaired the Joint Security Commission established by the Department of Defense and the Central Intelligence Agency to review security policy and practices in the defense and intelligence communities.

Amici file this brief pursuant to Fed. R. App. P. 29 with the consent of all parties.

SUMMARY OF ARGUMENT

Appellant here claims the power to declare an American citizen arrested in the United States an "enemy combatant" and, on that basis alone, to detain him indefinitely in military custody. Respondent-Appellant's Br. at 12. The extraordinary powers appellant seeks are not necessary to meet the important policy interests appellant asserts. Indeed appellant's asserted basis for designating Mr. Padilla an "enemy combatant" provides ample grounds for his criminal arrest. The government's legitimate interests in preventing, disrupting and prosecuting

acts of terrorism are addressed by a vast array of existing and recently expanded federal laws.

As the district court correctly observed, the sole difference between the substantial powers now afforded the Executive under federal law "and the power claimed by the President here . . . is one of accountability." *Padilla v. Hanft*, 2005 WL 465691 at *13 (D.S.C.) (*citing* Brief for Janet Reno et al. as *Amici Curiae* in *Rumsfeld* v. *Padilla*, 124 S. Ct. 2711, No. 03-1027, at 3). The Executive could detain Mr. Padilla under existing statutes, but it would have to guarantee him access to counsel and review by the courts. The Executive could interrogate Mr. Padilla about his knowledge of terrorist activities, but it would have to at some point conclude its inquiry. By ignoring the specific powers of surveillance and arrest Congress has afforded, appellant seeks to deny Mr. Padilla the protections that attach. Instead, appellant claims a virtually unlimited right to ignore Congress's judgment about what powers are necessary to protect the country against terrorist attack, and indefinitely detain U.S. citizens arrested on U.S. soil. This outcome is not contemplated by the Constitution or laws of the United States, and, as *Amici* detail here, it is not required by the security challenges we now face.

ARGUMENT

I. THE EXECUTIVE ENJOYS BROAD POWER UNDER LAW TO PROTECT THE UNITED STATES FROM ATTACK

In the more than three years since the September 11 attacks, Congress has substantially and deliberately broadened the federal government's already significant powers to gather intelligence, and to detain those believed to pose a threat to the United States. Current law affords the Executive broad powers to discover and track potential domestic terrorist activities, including through surveillance, searches, and subpoenas. In cases of imminent danger, officials may conduct surveillance without first obtaining a warrant. Congress has expanded the number of punishable terrorism offenses. These and other criminal laws, in particular material support statutes, provide wide-ranging bases for arrest, detention, and questioning.[2]

It was thus unsurprising that the court below questioned the necessity of military detention of a U.S. citizen, noting the numerous laws under which American citizens suspected of terrorist activity can be prosecuted. *Padilla v. Hanft*, 2005 WL 465691 at *12 (*citing Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2663 (2004) (Scalia, J., dissenting); *id*. at 2657 (Souter, J., dissenting in part)). No

[2] The recitation of the government's use of the many legal authorities in addressing terrorism does not necessarily reflect *amici*'s support of the use of that authority or the government's interpretation of that authority in each instance, but is descriptive of the government's post-9/11 preventive law enforcement approach.

investigation into the attacks of September 11 has blamed inadequate federal detention power for the failure to prevent the attacks. And no law among the many Congress has passed since the attacks contemplates the sweeping power asserted here.

A. Current Tools for Obtaining Intelligence on Potential Terrorists

1. Physical surveillance

The government has expansive powers to gather information through physical surveillance. Normally, no warrant is required when the surveillance does not entail physical or technological intrusion into the target's home or private area. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (surveillance of home with technology that is not in general public use requires warrant); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (upholding warrantless aerial surveillance of fenced-in backyard within curtilage of home).

Federal agents may freely conduct "[p]hysical or photographic surveillance of any person." U.S. Dep't of Justice, Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations § II(B)(6)(g), at 10 (May 30, 2002), *available at* http://www.usdoj.gov/olp/generalcrimes2.pdf. In addition, "[f]or the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place

and attend any event that is open to the public, on the same terms and conditions as members of the public generally." *Id.* § VI(A)(2), at 22.

2. Electronic Surveillance

The government may intercept communications of potential terrorists within the United States pursuant to either Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C. §§ 2510 *et seq*., or the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 *et seq*. The USA PATRIOT Act and the 9/11 Commission Act have further expanded these powers.[3] Under Title III, a federal court can issue an order authorizing surveillance upon a showing of probable cause to believe that an individual -- not necessarily the target of the surveillance -- has committed, or is about to commit, one of a large number of enumerated offenses, and that communications relating to that offense will be intercepted. 18 U.S.C. § 2518(3)(a), (b).

Even when there is insufficient evidence to commence a criminal investigation, FISA provides the government with tools to investigate "international terrorism." 50 U.S.C. §§ 1801 *et seq*. Electronic surveillance under FISA requires the government to obtain an order from the Foreign Intelligence

[3] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001); Intelligence Reform and Terrorism Prevention Act of 2004 (9/11 Commission Act), Pub. L. 108-458, 118 Stat. 3638 (2004)

Surveillance Court (FISC), based upon a showing of probable cause to believe that the target of the surveillance is "a foreign power or agent of a foreign power" and is using the facilities where the surveillance will occur. *Id.* § 1805(a)(3)(A)-(B). Here, a foreign power includes "a group engaged in international terrorism or activities in preparation therefor." *Id.* § 1801(a)(4). An agent of a foreign power can also include a U.S. citizen who "knowingly engages in . . . international terrorism, or activities that are in preparation therefor." 50 U.S.C. § 1801(b)(2)(C). And under recently amended law, the definition of an "agent of a foreign power" now also includes individual non-U.S. persons not affiliated with terrorist organizations or foreign entities. 9/11 Commission Act, Pub. L. 108-458, § 6001, 118 Stat. 3743, *codified at* 50 U.S.C. § 1801(b)(1)(C).

Furthermore, the USA PATRIOT Act reduced the standard for obtaining an order authorizing a physical or electronic search under FISA. An official need only certify that a "significant purpose" of conducting the search or surveillance is to gather foreign intelligence information, rather than certify that "*the* purpose" is to obtain such information. *See* USA PATRIOT Act, § 218, Pub. L. 107-56, 115 Stat. 291, *codified at* 50 U.S.C. § 1804(a)(7)(B) (emphasis added). The change in language has led to a significant increase in the number of applications sought and granted. In 2004, the FISC did not deny even one of the 1,758 applications for electronic surveillance and physical searches, almost double the number sought

and approved in 2001. *See* 2004 Annual FISA Report to Congress, *available at* http://www.fas.org/irp/agency/dpj/fisa/2004rept.pdf.

The current U.S. Attorney General has extolled changes implemented by the PATRIOT Act, declaring that law enforcement and intelligence "personnel may share information much more freely without fear that such coordination will undermine the Department's ability to continue to gain authorization for surveillance under FISA." *Oversight of the USA PATRIOT Act: Hearing Before the Senate Judiciary Comm.*, 109th Cong. 7 (2005) (statement of Alberto R. Gonzales, Attorney General).[4] Moreover, a Foreign Intelligence Surveillance Court of Review decision in 2002 made clear that prosecutors could direct a FISA operation. *In re Sealed Case No. 02-001*, 310 F.3d 717, 734-35 (F.I.S.C. Rev. 2002). In addition, information obtained through a FISA intercept may be used against a U.S. citizen at trial. *U.S. v. Hammoud*, 381 F.3d 316, 331-35 (4th Cir. 2004) (upholding admitting into evidence phone recordings of U.S. person suspected and ultimately convicted of various terrorist-related offenses obtained through a FISA wiretap), *cert. granted, vacated on other grounds,*125 S. Ct. 1051,

[4] *See* USA PATRIOT Act § 203(a), 115 Stat. at 278-80 (permitting disclosure of grand jury materials when matters involve foreign intelligence or counterintelligence), *codified at* Fed. R. Crim. P. 6(e)(3)(D); USA PATRIOT Act § 203(b)(1), 115 Stat. at 280 (allowing government officials to disclose contents of intercepted communications if contents include foreign intelligence or counterintelligence), *codified at* 18 U.S.C. § 2517(6).

reinstated in part, 405 F.3d 1034 (4th Cir. 2005). Importantly, both Title III and FISA allow the government to conduct emergency surveillance without a court order if exigency prevents obtaining court approval. 50 U.S.C. § 1805(f); 18 U.S.C. § 2518(7).

Investigators may also record the receipt and transmission of electronic data such as telephone records, e-mail, and internet usage. 18 U.S.C. § 3127(3)-(4). These methods do not constitute searches under the Fourth Amendment. *See Smith v. Maryland*, 442 U.S. 735, 745-46 (1979). To obtain a court order permitting the use of pen registers and trap and trace devices, the government need only assert that the information is relevant to a criminal investigation or to protection against international terrorism. 18 U.S.C. § 3123(a); 50 U.S.C. § 1842(a), (c)(2).

3. Physical Searches

The government must demonstrate probable cause to obtain warrants to search for and seize evidence of a crime. U.S. Const. amend. IV; *Illinois v. Gates*, 462 U.S. 213, 243-46 (1983); Fed. R. Crim. P. 41. Probable cause is a "practical, nontechnical conception that deals with the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (internal quotations omitted); *see also Hammoud*, 381 F.3d at 332. Some searches may be conducted incident to other law enforcement actions such as a routine traffic stop. *See Illinois v.*

Caballes, 125 S. Ct. 834, 838 (2005) (upholding the use of trained narcotics-detection dogs during a lawful traffic stop). Moreover, the government need not show probable cause to conduct searches at the border. *See United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004); *U.S. v. Ickes*, 393 F.3d 501, 505 (4th Cir. 2005) ("The realization that important national security interests are at stake 'has resulted in courts giving the broadest interpretation compatible with our constitutional principles in construing the statutory powers of customs officials.'") (*quoting United States v. Stanley*, 545 F.2d 661, 666 (9th Cir. 1976)).

The same standards applicable to electronic surveillance and in the case of emergencies, *see* Subsection I.A.2 *supra*, apply to physical searches in the FISA context. *See* 50 U.S.C. §§ 1823(a)(7)(B); 1824(a)(3); (e)(1). To protect national security and avoid alerting the targets of FISA searches, the government may also execute search warrants in secret or delay notification. *See* 50 U.S.C. § 1824(a) (authorizing *ex parte* order of FISA warrant); *id.* § 1822(4)(A)(i) (court may order assistance to protect secrecy). The government may also operate secretly in criminal investigations, delaying notice to the target of the use of a search warrant. *See* USA PATRIOT Act § 213, Pub. L. 107-56, 115 Stat. 285-86, *codified at* 18 U.S.C. § 3103a(b); *see Delayed Notice Search Warrants: A Vital and Time-Honored Tool for Fighting Crime*, U.S. Dep't of Justice (Sept. 2004) (recounting

uses of authority to prevent terrorist-related activities), *available at* http://www.lifeandliberty.gov/docs/patriotact213report.pdf.

4. Obtaining Records

The government has far-reaching powers to obtain records and evidence. It may use the grand jury process to issue subpoenas and to elicit information on potential terrorist attacks. There is no probable cause requirement for a grand jury subpoena. The "identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Blair v. United States*, 250 U.S. 273, 282 (1919). Hence, the scope of a grand jury's inquiry is quite broad. *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991).

In addition, Congress recently lifted restrictions on national security and intelligence investigations, expanding the types of items that can be requested as well as the types of entities from which information may be compelled. The FBI may seek an order for "the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information . . . or to protect against international terrorism." USA PATRIOT Act, § 215, 115 Stat. 287 (2001), *codified at* 50 U.S.C. § 1861. Disclosure of the order, even by the recipient, is prohibited. *Id.* § 1861(d). As of

April 2005, the Justice Department has reported to Congress six instances in which it employed section 215.[5]

In terrorism investigations the government can also obtain certain records without court order by the use of so-called "national security letters." *See* 12 U.S.C. § 3414(a)(1)(A)-(C), (a)(5)(A). As under FISA, a government request under this provision may not be disclosed. *Id.* § 3414(a)(3), (a)(5)(D). National security letters may also be used to obtain credit records and transactional records of wire and electronic communications. 15 U.S.C. § 1681u; 18 U.S.C. § 2709(a). *But see Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) (enjoining FBI officials from issuing national security letters under 18 U.S.C. § 2709).[6]

5. Interviews and Interrogation

The government is empowered to obtain information by questioning persons who may be associated with, or have information about, terrorists. The government is not restricted in questioning persons in a non-coercive setting; agents are free to ask any question of any person. *See, e.g.*, *Florida v. Royer*, 460 U.S. 491, 497-98 (1983). If the agent has a reasonable suspicion of criminal activity, he or she may briefly detain the person for questioning. *Terry v. Ohio*, 392

[5] USA PATRIOT Act Hearing, 19 *supra at* pp. 7-8 (statement of Attorney General Gonzales).

[6] The government recently appealed that decision. *See White House Wants Search Limits Overturned*, Associated Press, May 28, 2005, *available at* http://www.usatoday.com/news/washington/2005-05-28-search-limits_x.htm?csp=34.

U.S. 1 (1968). A law enforcement officer may also require a suspect to disclose his identity during a *Terry* stop. *Hiibel v. Sixth Judicial District Court of Nevada*, 124 S. Ct. 2451, 2459 (2005). Persons who have been taken into custody can be questioned after they have been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) and, in the presence of counsel if requested.

Even where information gleaned from initial interrogation sessions is deemed inadmissible due to insufficient *Miranda* warnings, law enforcement agents may cure later sessions by providing the proper advice, facilitating admission of that information. *United States v. Bin Laden*, 132 F. Supp. 2d. 168, 192-93 (S.D.N.Y. 2001) (finding *Miranda* did not require that U.S. agents compel Kenyan police to adhere to U.S. criminal procedural requirements where suspect was in Kenyan custody). "*Miranda* only prevents an unwarned or involuntary statement from being used as evidence in a domestic criminal trial; it does not mean that such statements are never to be elicited in the first place." *Id.* at 189.

Appellant has argued that guaranteeing Mr. Padilla free access to counsel would hamper its ability to obtain information, and that indefinite, uncounselled detention is required for effective interrogation of terrorists. *See Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 49-53 (S.D.N.Y. 2003). But provision of an attorney has no necessary relationship to gaining information through interrogation. In a study of interrogation of criminal suspects, over three-quarters

of the suspects waived their Miranda rights, and almost two-thirds provided incriminating information after being warned.[7] In fact, many terrorists who have been arrested and provided counsel have decided to cooperate and provide valuable information to the government. *See infra*. pp. 22-24.[8] Others might not cooperate even if detained indefinitely. In any case, the Constitution plainly precludes indefinite and unreviewable executive detention. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650-52 (2004); *id*. at 2653 (Souter, J., concurring in part); *id*. at 2660-62 (Scalia, J., dissenting).

B. Current Powers of Arrest and Detention

The government has many authorities under which it can arrest and detain those suspected of posing a threat to the United States. Most obviously, a person can be arrested if there is probable cause to believe that he or she has committed a crime. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). In addition,

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[7] Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 276 tbl.3, 280-81 tbl.7 (1996). On the other hand, denial of counsel can certainly hamper the chances of successful prosecution. Deputy Attorney General James Comey said of information obtained from Mr. Padilla: "I don't believe that we could use this information in a criminal case because we deprived him of access to his counsel and questioned him in the absence of counsel." *Transcript of News Conference on Jose Padilla*, June 1, 2004, *at* http://www.cnn.com/2004/LAW/06/01/comey.padilla.transcript/index.html.

[8] Under post-September 11 regulations, the Attorney General may authorize the monitoring of communications between inmates and lawyers for the purpose of deterring future acts that could result in death or serious bodily injury to persons or property. *See* Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (2001), *codified at* 28 C.F.R. §501.3(d) (2002).

informants' identities need not be disclosed at preliminary hearings for determining probable cause. *See McCray v. Illinois*, 286 U.S. 300, 312 (1967). The 9/11 Commission Act also created a rebuttable presumption of pretrial detention for those charged with federal crimes of terrorism.[9] Finally, numerous federal statutes provide for arrest and prosecution of those who commit terrorist acts.[10]

In recent years, Congress has passed a number of statutes expanding and supplementing the government's authority to prosecute would-be terrorists before they strike. These include prohibitions on providing or concealing "material support or resources," when intended for use in preparing or carrying out a terrorist offense, 18 U.S.C. § 2339A; a prohibition on providing "material support or resources" to any terrorist organization designated by the Secretary of State, *id.* § 2339B;[11] a prohibition on providing or collecting funds intending that they will be

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[9] *See* 9/11 Commission Act § 6603(b), Pub. L. 108-458, 118 Stat. 3762, *codified at* 18 U.S.C. § 3142(e).

[10] *See, e.g.*, 18 U.S.C. § 2332b(g)(5) (listing over fifty federal terrorism offenses); *see also* 18 U.S.C. § 924(c)(1)(A)(iii) (possession of firearms in furtherance of crimes of violence); *Id.* § 2381 (treason). With Mr. Padilla's alleged conduct apparently in mind, Congress recently made possession, attempt to possess, or conspiracy to possess a radiological weapon a criminal offense subject to potential life imprisonment. *See* 9/11 Commission Act, § 6803(c), Pub. L. 108-458, 118 Stat. 3768, *codified at* 18 U.S.C. § 832(c).

[11] The 9/11 Commission Act, § 6603(b) Pub. L. 108-458, 118 Stat. 3762-63, *codified at* 18 U.S.C. § 2339B(a)(1), clarified the defendant must have knowledge the organization has been designated a foreign terrorist organization. As of March 2005, the Secretary of State had identified 40 groups as foreign terrorist

used to carry out a terrorist act, *id.* § 2339C; and a prohibition on receiving "military-type training" from a terrorist organization, *id.* § 2339D. Notably, "material support" for terrorism includes not only weapons and personnel but also training, safehouses, lodging, false documentation, communications equipment, financial services, currency and tangible or intangible property. *Id.* § 2339A(b)(1).[12] The government has used the authority to prosecute individuals associated with terrorism tactics long before any terrorist act has been committed.[13]

The government has also relied on the International Emergency Economic Powers Act (IEEPA)[14] to promulgate far-reaching regulations to disrupt the

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organizations, including al Qaeda. *See* Fact Sheet, Dep't of State, Foreign Terrorist Organizations (Mar. 23, 2005), *available at* http://www.state.gov/s/ct/rls/fs/37191.htm.

[12] *Humanitarian Law Project v. Dep't of Justice*, 393 F.3d 902 (9th Cir. 2004) (vacating earlier court of appeals decision regarding the terms "training" and "personnel" in light of Congress' amending § 2339A to clarify the terms' meanings and remanding to district court for further proceeding). *See* 9/11 Commission Act, § 6603(b) Pub. L. 108-458, 118 Stat. 3762; *see also U.S. v. Al-Arian*, 308 F. Supp. 2d 1322, 1338-39 (M.D. Fla. 2004) (upholding section 2339B and implying knowledge requirement).

[13] As of May 2004, "the [Justice] Department has charged over 50 defendants with [material support] offenses in 17 different judicial districts." *Aiding Terrorists – An Examination of the Material Support Statute, Hearing Before the Senate Judiciary Comm*. 108th Cong. (2004) (statement of Christopher Wray, Assistant Attorney General), *available at* http://judiciary.senate.gov/print_testimony.cfm?id=1172&wit_id=3391.

[14] 50 U.S.C. § 1701(a) (providing the President with broad authority "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States if the President declares a national emergency with respect to such threat").

funding of terrorist activity. *See*, *e.g.*, Continuation of Emergency with Respect to the Taliban, 66 Fed. Reg. 35,363 (2001). Under IEEPA regulations, "no U.S. person may deal in property or interests in property of a specially designated terrorist, including the making or receiving of any contribution of funds, goods, or services to or for the benefit of a specially designated terrorist." 31 C.F.R. § 595.204 (2003).[15] As of May 2005, the government has charged more than 100 persons with terrorist financing-related crimes, half of whom were convicted or pled guilty and frozen $136 million in assets worldwide. *See Preserving Life and Liberty: Waging the War on Terror*, Dep't of Justice, http://lifeandliberty.gov/subs/a_terr.htm.

U.S. citizens associating themselves with terrorist groups will often be subject to prosecution under other statutes as well. The seditious conspiracy statute prohibits plotting to overthrow the United States or levying war against the nation. 18 U.S.C. § 2384. The Neutrality Act of 1794 prohibits various acts of war against entities with whom the United States is at peace. *Id.* §§ 958-62. The reach of these statutes is not limited to traditional conflicts between nations; it extends to

[15] *See United States v. Lindh*, 212 F. Supp. 2d 541, 560-64 (E.D. Va. 2002) (upholding IEEPA regulations in prosecution of American who fought alongside the Taliban in Afghanistan).

terrorist activities.[16] Finally, statutes of more general applicability may also reach inchoate terrorist activity. *See*, *e.g.*, 18 U.S.C. § 371 (conspiracy to violate federal law); *id.* § 2332a(a)(1) (attempted use of a weapon of mass destruction). Hence the government need not await the actual commission of a terrorist act to arrest, prosecute, and convict a would-be terrorist.

The government has also detained individuals suspected of having information related to terrorist activity as a material witness before it had evidence sufficient to support a criminal arrest or indictment. The material witness statute, 18 U.S.C. § 3144, permits the detention of a person whose testimony is "material in a criminal proceeding" if "it may become impracticable to secure the presence of the person by subpoena."[17] The government has obtained these warrants with relative ease. For a grand jury witness, the required showing has been made by a good faith statement by a prosecutor or investigating agent that the witness has information material to the grand jury and is a flight risk. *United States v. Awadallah*, 349 F.3d 42, 49-66 (2d Cir. 2003) (upholding the arrest and detention of grand jury witnesses in connection with September 11 attacks), *cert. denied*, 125

[16] *See*, *e.g.*, *United States v. Rahman*, 189 F.3d 88, 123 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000) (seditious conspiracy); *United States v. Khan*, 309 F. Supp. 2d 789, 824-26 (E.D. Va. 2004) (Neutrality Act, 18 U.S.C. § 2390).

[17] As of December 2004, the government has detained more than 70 material witness detentions in connection with counterterrorism investigations. *See* Anjana Malhotra, *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims Without Charges*, *in* 2004 ACLU International Civil Liberties Report 2 (2004), *available at* http://www.aclu.org/iclr/malhotra.pdf.

S. Ct. 861 (2005); *Bacon v. United States*, 449 F.2d 933, 939-43 (9th Cir. 1971). Neither has establishing that a witness with information poses a flight risk been an onerous task. *See Awadallah*, 349 F.3d at 69 (bail denied in part because witness failed to come forward with material testimony concerning terrorist attack). Finally, the government has employed the material witness statute in preventing terrorist acts by incapacitating those who turn out to be engaged in criminal activity. Where investigations revealed evidence that a material witness was part of a terrorist conspiracy or committed perjury before the grand jury, the government has re-arrested him as a criminal suspect, without release. *See Awadallah*, 349 F.3d at 47, 63, 70; *In re Material Witness Warrant (Doe)*, 213 F. Supp. 2d 287, 303 (S.D.N.Y. 2002) (*citing United States v. Regan*, 103 F.3d 1072, 1079 (2d Cir. 1997)).[18]

C. Current Tools to Protect Classified Information

Prosecution of terrorists often requires balancing the defendant's constitutional rights and the government's legitimate interest in protecting national security. Federal law recognizes these national security interests and protects them in a variety of contexts. Federal grand jury proceedings, and proceedings ancillary to the grand jury, are secret. Fed. R. Crim. P. 6(e); *see In re Newark Morning*

[18] For example, Terry Nichols, one of the perpetrators of the Oklahoma City bombing, was initially arrested and detained as a material witness, and was not actually charged with the crime for eighteen days. *In re Material Witness Warrant*, 77 F.3d 1277, 1278-79 (10th Cir. 1996).

Ledger, 260 F.3d 217, 226 (3d Cir. 2001). For example, in the present case the material witness warrant for Mr. Padilla's arrest and the affidavit submitted by the government in support of that warrant remain sealed. In many circumstances the government is permitted to withhold the identity of informants altogether. *See*, *e.g.*, *Roviaro v. United States*, 353 U.S. 53, 59-61 (1957). And, as happened in this case, courts will frequently permit the government to file papers under seal if disclosure of the information in those papers could harm national security. *See*, *e.g.*, *United States v. Ressam*, 221 F. Supp. 2d 1252, 1264 (W.D. Wash. 2002) (denying press requests to unseal classified documents filed under seal).

The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, gives courts additional powers to protect classified materials during criminal prosecutions.[19] CIPA permits courts to authorize the government to delete classified information from any materials disclosed to the defendant, to substitute a summary of such classified documents, or to substitute admissions regarding the relevant facts that the classified information would tend to prove. *Id.* § 4. In addition, a defendant must notify the government and the court in writing before disclosing classified information. *Id.* § 5(a).

[19] CIPA's constitutionality has been upheld. *See*, *e.g.*, *United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (rejecting Fifth and Sixth Amendment challenges); *United States v. Lee*, 90 F. Supp. 2d 1324, 1326-29 (D.N.M. 2000) (same). *But cf. Crawford v. Washington*, 541 U.S. 36 (2004) (holding that Confrontation Clause generally prevents use of testimonial statements by prosecution when defendant lacks opportunity to cross-examine witness).

Before any classified information may be used at trial or pretrial, the government can request a hearing to determine its relevance and admissibility. *Id.* § 6(a). This hearing may be held *ex parte* and *in camera*. If the court determines that the evidence is admissible, the government must then find an alternative method for getting the information to the jury that is less harmful to national security, such as providing an unclassified summary of the relevant information or admitting certain facts. 18 U.S.C. App. III, § 6(c); *United States v. Noriega*, 117 F.3d 1206, 1215 (11th Cir. 1997). If no adequate substitute can be found, the court has the authority to strike certain counts, preclude certain evidence, or even dismiss the case, if it is necessary in the interest of justice. 18 U.S.C. App. III, § 6(e)(2); *see also United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (applying CIPA framework in considering September 11 terrorist conspiracy suspect's request for access to enemy combatant witnesses and vacating order imposing sanctions despite the government's refusal to produce witnesses), *cert. denied*, 125 S. Ct. 1670 (2005). A recent examination of the use of CIPA showed that charges are rarely dismissed.[20]

II. THE EXECUTIVE'S POWERS ASSERTED HERE ARE UNNECESSARY

[20] Comm. on Communications and Media Law, *The Press and The Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 57 The Record 94, 161 n.263 (2002) (authors found only one case in which a court dismissed charges pursuant to § 6(e)).

Through the past decade and certainly in the past nearly four years, the laws described above have been used in many cases not only to identify, arrest, and punish those who have committed terrorist acts,[21] but also to disrupt and thwart terrorism before it occurs.

A partial listing of cases illustrates the effectiveness of the investigative tools here described to stop terrorists before they carry out their plans:

- Sheikh Omar Abdel Rahman and his followers were convicted of plotting a "day of terror" against New York City landmarks, including the United Nations building, the Lincoln and Holland Tunnels and the George Washington Bridge. The government used physical surveillance, search warrants, and informants to track the activities of this group and arrested them when they had begun building an explosive device. *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999).
- Ahmed Ressam, the so-called "Millennium Bomber," was arrested in December 1999 as he attempted to enter the United States in a rental

[21] *See*, *e.g.*, *United States v. Yousef*, 327 F.3d 56 (2d Cir.), *cert. denied*, 540 U.S. 933 (2003) (affirming convictions of defendants involved in 1993 World Trade Center bombing and conspiracy to hijack airliners); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998), *cert. denied*, 526 U.S. 1028 (1999) (affirming convictions of defendants involved in 1993 World Trade Center bombing); *Kasi v. Virginia*, 508 S.E.2d 57 (Va. 1998), *cert. denied*, 527 U.S. 1038 (1999) (affirming conviction of defendant who murdered CIA employees).

car containing homemade explosives and timers. Ressam pleaded guilty and cooperated extensively with the government in its prosecution of others involved in the planned attacks. He also provided information about al Qaeda and its training camps in Afghanistan and identified potential terrorists.[22]

- Iyman Faris pleaded guilty to providing material support for terrorism. Faris visited an al Qaeda training camp in Afghanistan and investigated the destruction of bridges in the United States by severing their suspension cables. The government secured evidence through physical and electronic surveillance and a search of his residence. After his arrest Faris cooperated with investigators, leading to the indictment of Nuradin Abdi for plotting to blow up a Columbus, Ohio shopping mall.[23]
- Several members of a terrorist cell in Portland, Oregon were indicted on conspiracy, material support, and firearms charges. One of the defendants pleaded guilty and testified against the others, securing guilty pleas from them. Six of the men had attempted to travel to

[22] *See* Blaine Harden, *U.S. Contests Terrorist's Request for Reduced Sentence*, Wash. Post, April 27, 2005, at A9.
[23] *See Somali Is Indicted for Plan to Bomb Ohio Shopping Mall*, Associated Press, June 14, 2004; Jerry Markon, *Ohio Man Gets 20 Years for al Qaeda Plot*, Wash. Post, Oct. 29, 2003, at A2.

Afghanistan to assist the Taliban. The government used electronic surveillance and the authorities of the USA PATRIOT Act to gather evidence in the case.[24]

- Six residents of Lackawanna, New York pleaded guilty to charges arising from their travel to Afghanistan and attendance at al Qaeda training camps. The evidence against them was gathered from electronic surveillance. They agreed to cooperate with government investigations of terrorist activities.[25]
- Sami Al-Arian, a university professor, and seven others were indicted for conspiring to finance terrorist attacks. The Justice Department reports that the evidence against Al-Arian was gleaned from extensive FISA wiretaps, which could be used in the criminal case because of the new procedures enacted by the USA PATRIOT Act.[26]

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[24] See Lynn Marshall & Tomas Tizon, *Three Members of Terrorist Cell Sentenced; One of the 'Portland Seven' Expresses Sorrow for Trying to Join the Taliban After 9/11*, L.A. Times, Feb. 10, 2004, at A12; *see also* Press Release, Dep't of Justice, *Two Defendants in "Portland Cell" Case Plead Guilty to Conspiracy to Contribute Services to the Taliban, Federal Weapons Charges* (Sept. 18, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_crm_513.htm.

[25] See John Kifner & Marc Santora, *Feds Say One in N.Y. Cell Arranged Training*, Pitts. Post-Gazette, Sept. 18, 2002, at A6; *see also* Press Release, Dep't of Justice, *Mukhtar Al-Bakri Pleads Guilty to Providing Material Support to al Qaeda* (May 19, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/May/03_crm_307.htm.

[26] *See* John Mintz, *Trial to Reveal Reach of U.S. Surveillance*, Wash. Post, June 5, 2005, at A3.

- Mohammed Junaid Babar, a New York City taxi driver, pleaded guilty to providing material support to terrorism related to a plot to blow up restaurants, bars and train stations in Britain. Authorities were able to disrupt the plot based on information obtained through monitoring Babar's e-mail communications at a local library.[27]
- Tarik Ibn Osman Shah, a New York musician, and Rafiq Sabir, a Florida doctor, were charged with conspiring to provide material support to terrorism related to efforts to train fighters in martial arts and provide medical assistance to those injured. The evidence against Shah and Sabir was obtained through surveillance, including recorded phone calls, personal conversations and the use of an informant.[28]

As this discussion demonstrates, there is a vigorous and wide-ranging legal framework to combat terrorism and a demonstrated history of successful use of those authorities without resorting to the extraordinary power claimed here by the Executive.

The record in the instant case demonstrates that these authorities were available, and were actually used, to deal with Mr. Padilla himself. Mr. Padilla

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[27] *See* Bill Hutchinson, *Ashcroft Cites New York Public-Library Records in Foiling al Qaeda Plot*, N.Y. Daily News, Jan. 17, 2005; Diane Cardwell and William K. Rashbaum, *Plea Accord for American Linked to Plot in Britain*, N.Y. Times, June 18, 2004, at B3.

[28] William K. Rashbaum and Benjamin Weiser, *Scheme by 2 to Train Terrorists Is Outlined in U.S. Court Papers*, N.Y. Times, May 31, 2005, at B1.

was arrested on May 8, 2002, pursuant to a material witness warrant. *Padilla v. Hanft*, 2005 WL 465691 at *1 (*citing Rumsfeld v. Padilla*, 124 S. Ct. 2715-16). The court issued the warrant in connection with a grand jury investigation of the September 11 attacks. *Id*. Mr. Padilla was transported to New York, where he was detained and counsel appointed. *Id*. Mr. Padilla thus posed no threat to the United States when the government asked the court to vacate the material witness warrant and transfer Mr. Padilla to the custody of the Department of Defense. *Id.*

The court below correctly observed that when Mr. Padilla "was arrested pursuant to the material [witness] arrest warrant, any alleged terrorist plans that he harbored were thwarted. From then on, he was available to be questioned -- and was indeed questioned -- just like any other citizen accused of criminal conduct." *Id*. at *12. Indeed, the facts set forth in the President's findings and the facts presented to the district court appear sufficient to support criminal charges against Mr. Padilla, including providing material support to designated terrorist organizations, 18 U.S.C. § 2339B; providing material support to terrorists, *id.* § 2339A; carrying an explosive during commission of a felony, 18 U.S.C. § 844(h)(2); and conspiracy to use a weapon of mass destruction, 18 U.S.C. § 2332a.[29] Finally, Mr. Padilla's travel history, previous criminal record, and

[29] Appellant alleges that Mr. Padilla received training at an al Qaeda camp in Afghanistan and met with senior al Qaeda leaders Mohammed Atef, Abu Zubaydah, Ramzi Bin al-Shibh and Khalid Sheikh Mohammed, that he carried an

terrorism-related activities clearly justified detaining him. 18 U.S.C. § 3142(e). In short, the procedures of the law as passed by Congress provided more than sufficient basis to detain Mr. Padilla, to interrogate him, and to keep him from carrying out any violent acts. It is difficult to imagine a circumstance in which a terrorist would meet the standards for designation as an "enemy combatant" described by the government, *see* Respondent-Appellant's Br. at 12, and not be subject to arrest as a material witness or a suspected criminal.

Amici well recognize the possibility that constitutional limitations might impede the investigation of a terrorist offense in some circumstances. But this is an inherent consequence of maintaining a government of limited power. It is *amici*'s belief that given the expansive authorities that otherwise exist, the risk to the nation from denying the Executive the authority it seeks in this case is minimal. If additional Executive authority to detain citizens found within the United States is deemed necessary to protect against terrorism, that authority should come through congressional action, where the boundaries of that power can be defined, the terms of any such detention can be set, and the procedure can be subject to regular judicial review.

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assault weapon after U.S. attacks in Afghanistan, that he proposed and researched terrorist operations involving an atomic bomb, and that he accepted a mission to blow up buildings in the United States with natural gas. Respondent-Appellant's Br., at 7-11.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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