03-2235(L)
03-2438

IN THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSE PADILLA, Donna R. Newman, as Next Friend of Jose Padilla,
Petitioner-Appellee-Cross-Appellant,
V.
DONALD RUMSFELD,
Respondent-Appellant-Cross-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSENTED-TO BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE,
THE CENTER FOR NATIONAL SECURITY STUDIES,
THE CONSTITUTION PROJECT,
THE LAWYERS COMMITTEE FOR HUMAN RIGHTS,
PEOPLE FOR THE AMERICAN WAY
AND THE RUTHERFORD INSTITUTE
IN SUPPORT OF PETITIONER-APPELLEE JOSE PADILLA
AND PARTIAL AFFIRMANCE AND PARTIAL REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES & LEGISLATIVE HISTORY

MISCELLANEOUS

STATEMENT OF AMICI CURIAE

Both parties – Petitioner (via Donna Newman) and Respondent (via Eric Bruce) – have consented to the filing of this brief.

AMICI'S INTEREST:

This brief addresses only one of the several questions certified for interlocutory review: whether the Executive has authority, without Legislative authorization, to detain people described as "enemy combatants." *Amici* include organizations with a range of viewpoints that have come together to support the traditional understanding of the separation of powers between the Legislative and Executive branches.

AMICI'S IDENTITY AND SOURCE OF THEIR AUTHORITY TO FILE:

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore limited constitutional government and secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme

Court Review, and files amicus curiae briefs with the courts. The instant case raises squarely the issue of civil liberties secured by the Constitution and thus is of central concern to Cato and its Center for Constitutional Studies.

The Center for National Securities Studies (the Center) is a nonprofit, nongovernmental civil liberties organization in Washington D.C. that was founded in 1974 to ensure that civil liberties are not eroded in the name of national security. The Center has worked for more than 25 years to protect the due process rights of Americans and to find solutions that protect both the civil liberties of individuals and the national security interests of the government. This case involves the interplay of national security and due process issues that concerns the Center.

The Constitution Project ("Project") is a nonprofit bipartisan organization based at Georgetown University's Public Policy Institute that seeks to build consensus and develop solutions to contemporary legal and constitutional issues through a unique combination of scholarship and public education. After September 11, 2001, the Project created its Liberty and Security Initiative, consisting of a bipartisan, blue-ribbon committee of prominent liberals and conservatives, to develop recommendations on such issues as the use of military tribunals and the detention of suspected terrorists. This case implicates issues at the core of the Project's work.

Since 1978, the Lawyers Committee for Human Rights ("LCHR") has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; promote fair economic practices by creating safeguards for workers' rights; protect refugees in flight from persecution and repression; work to ensure that domestic legal systems incorporate international human rights protections; and help build a strong international system of justice and accountability for the worst human rights crimes. LCHR believes that this case presents compelling issues of justice and the rule of law and is keenly interest in its outcome.

People For the American Way Foundation ("People For") is a non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, including Norman Lear, Father Theodore Hesburgh, and Barbara Jordan, People For now has over 600,000 members and supporters nationwide. One of People For's primary missions is to educate the public on the vital importance of our tradition of liberty and freedom, and to defend that tradition, through litigation and other means, against efforts to limit fundamental rights and freedoms, including the fundamental rights of American citizens at issue in this case.

The Rutherford Institute ("Institute") is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have appeared as counsel before the United States Supreme Court and federal appeals courts in many significant civil liberties cases and have filed *amicus curiae* briefs in numerous criminal procedure cases. Institute attorneys currently handle several hundred civil rights cases nationally at all levels of federal and state courts. The Institute has also published articles and educational materials in this area. The present case raises important criminal justice and civil liberties concerns, and so is of significance to the Institute.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises profound questions about the Executive's authority unilaterally to remove citizens from the constitutional protections that the Founders provided. Months after being arrested and imprisoned, defendant Jose Padilla has yet to be charged with a crime or permitted to see a lawyer. Law enforcement officials seized him on a material witness warrant issued by the District Court, pursuant to an Act of Congress. But even while proceedings were pending before the District Court, the Executive branch abruptly ordered military personnel to enter the Bureau of Prisons facility where Padilla was detained. They entered, seized Padilla, and transported him to a military brig. He has remained locked in the brig ever since, barred from asserting his innocence or communicating with his lawyer or family in any way. Except for his captors, no one has any idea what has happened to Padilla within the brig.

No congressional action justified this lawless entry, seizure or incommunicado detention. To the contrary, the Executive's action runs brazenly afoul of the constitutional principle of separation of powers and the statutory law that safeguards that principle. The executive actions challenged here directly violated 18 U.S.C. §4001(a), an express congressional directive forbidding the Executive from detaining American citizens without specific statutory

authorization. As this brief will demonstrate, Congress has given no such specific authorization to detain here.

The prohibition in §4001(a) did not arise by happenstance. It echoes the fundamental ban against indefinite executive detention set forth in the very structure of our Constitution. The Framers deliberately vested the Legislature with the power to make law, and denied to the Executive any unilateral authority to determine when people may be detained indefinitely without charge. The Constitution gives the Legislature—and only the Legislature—power to determine when, if ever, extraordinary circumstances authorize the fundamentally intrusive power of detention without charge. Judicial precedents have long denied to the Executive any power to invade individual liberty without specific congressional approval.

That the Executive has now labeled Padilla an "enemy combatant" changes none of this. The Commander-in-Chief power may empower the President to authorize soldiers to seize enemies found in a zone of active combat operations when our armed forces act pursuant to a congressional authorization. But that is a far cry from claiming an unfettered power to detain without charge any unarmed person seized *outside* a zone of active combat, particularly those on U.S. soil who are already subject to criminal process. The Executive's novel argument would allow it to exile anyone from the protection of our Constitution and laws simply

through the artifice of labeling him—without any visible standards—as an "enemy combatant."

James Madison long ago recognized that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Clinton Rossiter, ed. 1961). *Amici* ask this Court to bar that result by requiring that defendant Padilla be treated in accord with our nation's longstanding constitutional processes.

I. CONGRESS HAS EXPLICITLY PROHIBITED ANY DETENTION OF AMERICAN CITIZENS NOT GROUNDED IN STATUTE, AND NO STATUTE AUTHORIZES PADILLA'S DETENTION

More than a quarter century ago, Congress reviewed Executive misconduct at home during World War II and the Cold War, the most pressing national security crises of the twentieth century. *See, e.g., Korematsu v. U.S.*, 323 U.S. 214 (1944) (upholding Executive order that forced Japanese-Americans from their homes into detention centers).[1] To rein in what it considered Executive excess, in 1971 Congress passed 18 U.S.C. §4001(a), to ensure that the Executive would not detain American citizens without specific legislative authorization for the detention.

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[1] A writ of *coram nobis* was later granted in the case because of Executive branch misrepresentations. *Korematsu v. U.S.*, 584 F. Supp. 1406 (N.D. Cal. 1984).

The statute states simply that "No citizen shall be . . . detained by the United States except pursuant to an Act of Congress." 18 U.S.C. §4001(a). By this language, Congress made clear that henceforth, congressional silence should no longer be construed as acquiescence in unauthorized executive detentions. Congress passed §4001(a) to avoid exactly what has happened here: statutorily groundless detention of an American justified by the Executive's talismanic invocation of the terms "enemy combatant" and "national security." "Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart." *U.S. v. Robel*, 389 U.S. 258, 264 (1967). Key among those values is the separation of powers.[2]

A. The Text, Legislative History and Case Law of 18 U.S.C. §4001(a) Direct That *No* American Citizen May Be Detained Without Statutory Authorization

In construing a statute, this Court must "begin with the ordinary meaning of the words Congress employed." *Department of Army v. Blue Fox*, 525 U.S. 255, 262 (1999). 18 U.S.C. §4001(a) straightforwardly and unequivocally instructs that "*No* citizen shall be . . . detained by the United States except pursuant to an Act of Congress." 18 U.S.C. §4001(a) (emphasis added). The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it

[2] *Amici* do not address what process Padilla is due if the Executive were found to have power to detain him. That issue is addressed by the BRIEF OF AMICI CURIAE

means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (quotations omitted). No ambiguity exists here. Under §4001(a), no American citizen, including Jose Padilla, shall be detained by the United States except pursuant to a specific Act of Congress.

Section 4001(a)'s legislative history confirms that explicit statutory authorization is required for the detention of any United States citizen. The authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia v. U.S.*, 469 U.S. 70, 76 (1984) (citation omitted). Here, the House report declared that the "purpose of [§4001(a)] is (1) to restrict the imprisonment or other detention of citizens by the United States *to situations in which statutory authority for their incarceration exists*." H.R. Rep. No. 92-116, at 1, *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435 ("Judiciary Committee Report") (emphasis added). The Judiciary Committee Report further stated, "The Committee believes that imprisonment *or other detention* of citizens should be limited to situations in

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RETIRED FEDERAL JUDGES.

which statutory authorization, an Act of Congress, exists." *Id.* at 1438 (emphasis added).[3]

That primary purpose was accompanied by a second: "(2) to repeal the Emergency Detention Act of 1950 [EDA] . . . which both authorizes the establishment of detention camps and imposes certain conditions on their use." Judiciary Committee Report at 1435. Enacted during the Cold War, the EDA had provided the Executive with wide-ranging (but not unlimited) authority to detain American citizens during national security crises and was intended to give the President statutory flexibility to respond to what was then considered a grave national security emergency precipitated by an international threat: Communist spies and saboteurs. *See* Pub. L. No. 81-831, Title II, 64 Stat. 987, 1019 (1950) (codified as amended in scattered sections of 50 U.S.C.). While considering §4001(a), Congress concluded that the EDA should be repealed, but also that a repeal of the EDA alone would not provide American citizens with sufficient protection against future unauthorized emergency detentions by the Executive.

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[3] The Justice Department wrongly asserted below that then-Representative Mikva somehow agreed that the Executive Branch had a unilateral constitutional power to detain without congressional authorization. In fact, Congressman Mikva simply noted the obvious: that "*If* there is any inherent power of the President . . . to authorize the detention of any citizen of the United States, nothing in the House bill that is currently before this Committee interferes with that power, because obviously no act of Congress can derogate the constitutional power of a President." 117 Cong. Rec. 31,555 (Sept. 13, 1971) (emphasis added). There is no authorization. *See infra* Part II.

"Repeal alone," the Committee asserted, "might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority." Judiciary Committee Report at 1438 (emphasis added).[4]

In *Howe v. Smith*, 452 U.S. 473 (1981), the Supreme Court construed §4001(a) and reaffirmed the clear import of its unambiguous text and legislative history. The Court confirmed that "§4001(a) proscribe[s] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Id.* at 479 n.3. It follows that absent such a congressional grant of authority to detain, Padilla's ongoing detention must be strictly proscribed by law.

B. Congress Has Provided No Specific Statutory Authorization For Padilla's Current Detention

Congress has granted the Executive many tools with which to detain American citizens suspected of participation in terrorist activities.[5] As the Executive branch

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[4] Representative Kastenmeier, Chair of the House Judiciary Committee, author of the bill and manager of the floor debate, echoed this sentiment during the floor debate. *See* 117 Cong. Rec. 31,541 ("[T]he requirement of legislative authorization would close off the possibility that the repeal of the Detention Act could be viewed as simply leaving the field unoccupied. [§4001(a)] provides that *there must be statutory authority for the detention of a citizen by the United States.")* (emphasis added)*; cf. North Haven Bd. of Education v. Bell*, 456 U.S. 512, 526-27 (1982) ("remarks . . . of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.").

[5] *See, e.g.*, 18 U.S.C. §2339B (criminalizing conspiracy to provide material support and resources to terrorist organizations such as al-Qaeda); 18 U.S.C. §2384 (criminalizing seditious conspiracy, including conspiracy to levy war against the U.S.); 18 U.S.C. §2381 (criminalizing treason); 18 U.S.C. §2332b (criminalizing

has repeatedly shown since September 11, it knows very well how to use these powers.[6] But instead of using these familiar tools, the Executive ignores them, instead asserting a novel, unchecked right to hold U.S. citizens in military detention, without charge, forever. To justify its action under §4001(a)—as it must—the Executive now invokes two statutes that do not apply: the "Authorization for Use of Military Force" passed after the attacks of September 11, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), and a commonplace appropriations statute for the Department of Defense, 10 U.S.C. §956(5) (2002).

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acts of terrorism transcending national boundaries); 50 U.S.C. §1705(b) (criminalizing conspiracy to contribute services to terrorist organizations such as al-Qaeda); 18 U.S.C. §924(c) (criminalizing use of destructive device during and in relation to crime of violence); 18 U.S.C. §924(c)(1)(A)(iii) (criminalizing possession of firearms in furtherance of crimes of violence); 18 U.S.C. §2332a(a)(1) (criminalizing attempted use of a weapon of mass destruction); 18 U.S.C. §844 (criminalizing certain manufacture and handling of explosive materials); 18 U.S.C. §32 (criminalizing destruction of aircraft or aircraft facilities); 18 U.S.C. §2332 (criminalizing attempted homicide); 18 U.S.C. §1113 (same); 49 U.S.C. §46504 (same); 18 U.S.C. §1111 (criminalizing murder committed while conducting espionage or sabotage); 18 U.S.C. §1114 (criminalizing attempted murder of officer or employee of the U.S.); 18 U.S.C. §1117 (criminalizing conspiracy to murder); 49 U.S.C. §46505 (criminalizing aircraft piracy); 18 U.S.C. §371 (criminalizing conspiracy to commit offense against U.S.).

[6] *See, e.g., U.S. v. Zaccarias Moussaoui*, (E.D. Va. CR 01-455-A) (alleged "Twentieth Hijacker" charged with violations of criminal statutes); *U.S. v. Richard Reid* (D. Mass. CR 02-10013-WGY) (admitted "shoe bomber" charged with violations of criminal statutes); *U.S. v. John Walker Lindh* (E.D. Va. CR 02-37a) ("American Taliban" charged with violations of criminal statutes); *U.S. v. Battle* (D. Ore. CR 02-399 HA) (members of alleged Oregon terror cell charged with violations of criminal statutes); *U.S. v. Goba* (W.D.N.Y. 02-CR-214S) (members of "Lackawanna Six" charged with criminal statutes).

1. AUMF's Text And Legislative History Make Clear That It Does Not Authorize Padilla's Detention

Passed after al-Qaeda's homicidal attacks against New York and Washington, AUMF states that:

> the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

115 Stat. at 224. On its face, AUMF is tantamount to a declaration of war. Its primary goal is to authorize the President to use military force. By authorizing "all necessary and appropriate force," it implicitly invokes the law of war, authorizing captures incident to the proper use of military force.[7]

But the statute goes no further. Its language simply cannot be read to provide what Congress explicitly rejected in §4001(a): silent authorization for the indefinite detention without charge of an American citizen seized outside a zone of active hostilities. Neither the text nor legislative history of AUMF mentions any sort of power to detain—let alone any power to detain American citizens stopped on American soil in a civilian setting.

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[7] The Executive cannot plausibly allege that the place where Padilla was seized–O'Hare Airport–was a zone of active hostilities. We concur with the BRIEF OF AMICI CURIAE INTERNATIONAL LAW PROFESSORS that the law of war provides Respondent no authority to detain Petitioner.

In determining whether AUMF satisfies §4001(a), this Court should recall that Congress intended to deny the Executive the power to detain without charge *even those Americans suspected of being spies or saboteurs*. Congress passed the Emergency Detention Act in 1950 to confront a global Communist threat, Pub. L. No. 81-831, Title II, 64 Stat. 987 (1950) (repealed) ("EDA"). The EDA had expressly authorized detention whenever "there is reasonable ground to believe that [a] person *probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage.*" *Id.* at 1019 (emphasis added).

The drafters of §4001(a) were fully aware of that authorization. The House Report explicitly noted that EDA "established procedures for the apprehension and detention, during internal security emergencies, of individuals deemed likely to engage in espionage or sabotage." 1971 U.S.C.C.A.N. 1435, 1436. Nevertheless, Congress chose to *revoke* that authorization for detentions without charge, reasoning that it was too dangerous to amass an unchecked, open-ended authority in the Executive to detain, indefinitely, based on allegation alone. As the House Report concluded, Congress saw "no compensating advantage to be derived from permitting this law [the EDA] to remain on the books." *Id.* at 1438. Under §4001(a), then, a declaration of war can only authorize the uncharged detention of

American citizens if it explicitly mentions and approves such detentions, which AUMF pointedly does not.[8]

Congress's subsequent enactments confirm AUMF does not authorize Padilla's detention.[9] Shortly after the September 11 attacks, the same Congress that passed AUMF passed the Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). Unlike AUMF, the Patriot Act expressly gave the Executive authority to detain without criminal charge *aliens* suspected of terrorist ties for short periods of time before initiation of criminal or removal proceedings.[10] The Act provided

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[8] The Supreme Court has long held that a statutory authorization for the use of force should not be read to permit the Executive to seize persons or property outside a zone of active combat, unless the statute explicitly does so. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804) (rejecting Executive claim of military necessity where Legislature authorized seizure of vessels sailing "*to*" France but Executive had seized ship sailing *from* France); *Brown v. U.S.*, 12 U.S. (8 Cranch) 110, 128-29 (1814) ("When war breaks out, the question, what shall be done with enemy property in our country, is a question . . . proper for the consideration of the legislature, not of the executive or judiciary."); *id.* at 122, 126 (the right "to take the persons and confiscate the property of the enemy" is "an independent substantive power" of Congress, not the Executive); *Conrad v. Waples*, 96 U.S. 279, 284 (1877) (property of man "engaged in the rebellion, as a member of the Confederate Congress, and giving constant aid and comfort to the insurrectionary government" could not be seized without congressional warrant).

[9] "[T]he meaning of one statute may be affected by other Acts, *particularly where* [the same] *Congress has spoken subsequently and more specifically to the topic at hand.*" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (emphasis added).

[10] The Patriot Act provides for the "[d]etention of terrorist aliens." 8 U.S.C. § 1226a(a). It permits the Attorney General to detain such aliens "until the alien is removed from the United States" or "until the Attorney General determines that the alien is no longer [a terrorist] alien." 8 U.S.C. § 1226a(a)(2). If "the alien is

no authority to detain *citizens* indefinitely and without charge for the period of time that Padilla has been held. If, as the government claims, AUMF had already, two months earlier, delegated to the Executive unfettered discretion to detain *anyone* without charge, whether or not a citizen, the Patriot Act's provisions would have been redundant. For the Patriot Act not to be redundant, one would have to conclude that Congress deliberately passed 8 U.S.C. §1226a of the Act to provide aliens with *more* protections than citizens, a supposition for which, in the wake of the September 11 attacks, there seems to be no credible support.[11]

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finally determined not to be removable, detention pursuant to [the Patriot Act] shall terminate." *Id. See also* 8 U.S.C. § 1226a(a)(5) (Executive must put terrorist alien in removal proceedings, charge with criminal offense, or release "not later than 7 days after the commencement of such detention"); 8 U.S.C. § 1226a(a)(6) & 8 U.S.C. § 1226a(b) (permitting renewal of detention on immigration charge, subject to judicial oversight and detainee's continuing ability to challenge detention).

[11] AUMF would also be unconstitutionally vague if read to authorize indefinite detention of Americans without charge. The Supreme Court has repeatedly held that a law is impermissibly vague if it "encourage[s] arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Construed as the government does, AUMF would. Of all those citizens stopped on American soil for suspected involvement in terrorist activities, the Executive has chosen to name only Padilla as an enemy combatant, charging all others detained with traditional crimes. *See e.g., Battle, supra; Goba, supra; see also U.S. v. McVeigh*, 119 F.3d 806 (10th Cir. 1997) (Oklahoma City bomber). The government effectively admitted this when "Justice Department and military officials said that . . . they could not set forth a broad policy on who is considered an enemy combatant." Eric Lichtblau, "Bush Declares Student an Enemy Combatant," *N.Y. Times*, June 24, 2003. A ranking Justice Department official has admitted that "'[t]here's no bright line'" in the way the "enemy combatant" label is used. *Id.* In fact, there is no line at all: only unlimited Executive discretion. "[W]hen an Act of Congress raises a serious doubt as to its constitutionality," courts must "first ascertain whether a construction of the statute is fairly possible by which the question may be

Nor, finally, can AUMF be read to authorize the detention of American citizens without running afoul of the statutory canon, set forth in the *Charming Betsy* case, which instructs that, "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." *Restatement (Third) of the Foreign Relations Law of the United States* §114 (2000) ("Restatement").[12] The international law of arbitrary detention squarely precludes detention that occurs without a law that provides sufficiently fair warning of the possibility of detention. *See, e.g.*, *Dougoz v. Greece*, 10 Eur. Ct. H.R. 306, ¶ 55 (2001); *Amuur v. France*, 22 Eur. Ct. H.R. 523, ¶ 50 (1996); *Ana Maria Garcia Lanza de Netto v. Uruguay*, Communication No. 8/1977 ¶ 45 (3 April 1980), U.N. Doc. CCPR/C/OP/1 (1984). Restatement §702 cmt. h.

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avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (internal quotation marks omitted). AUMF may be fairly construed to authorize the detention of people encountered on a battlefield, but not the detention without charge of suspected American saboteurs. Correctly construed, AUMF is thus constitutional, but does not expressly authorize Padilla's detention for purposes of §4001(a).

[12] This principle of statutory construction dates back to Chief Justice Marshall's opinion in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains."). *See also U.S. v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003).

As noted above, AUMF says nothing about detaining American citizens who are suspected of being saboteurs.[13] Silence provides no warning to American citizens—let alone sufficiently fair warning—that they may be stopped on American soil and held indefinitely without charge. Accordingly, under the *Charming Betsy* canon, AUMF should not be read to permit such a result unless no "other possible construction remains." *Charming Betsy*, 6 U.S. at 118. One does. AUMF could simply be read to mean what it says: that the President has authority to use force in battle, but not unfettered authority to remove any American he chooses from the protections of domestic constitutional law. AUMF 2(b)(1) at 115 Stat. 224.

2. 10 U.S.C. §956(5) Does Not Authorize The Detention

10 U.S.C. §956 is a straightforward appropriations bill providing that:

> Funds appropriated to the Department of Defense may be used for . . . (5) *expenses* incident to the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of the Army, Navy, or Air Force pursuant to Presidential proclamation.

Id. (emphasis added). Appropriations bills do not authorize government actions; they fund them. Nor do they amend substantive law absent manifest congressional

[13] The law of war provides combatants in a zone of active hostilities and soldiers of regularly constituted armies with sufficient notice of the possibility of detention as prisoners of war or unprivileged combatants. *See infra* n.27.

intent to do so. *See, e.g., Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992).

Nothing in the text authorizes any particular sort of detention. By its own terms, §965(5) addresses only expenses. All that §956(5) did was codify an outlay previously included in the Defense Department's annual appropriations measure. *See, e.g.*, D.O.D. Appropriation Act of 1984, Pub. L. No. 98-212, §706, 97 Stat. 1421, 1437-38 (1983), *repealed by* D.O.D. Authorization Act of 1985, Pub. L. No. 98-525, §1403(a)(1), 98 Stat. 2492, 2621 (1984).

The Fourth Circuit concluded that "[i]t is difficult . . . to understand how Congress could make appropriations for the detention of persons 'similar to prisoners of war' without also authorizing" the detention of American citizens deemed to be enemy combatants. *Hamdi v. Rumsfeld*, 316 F.3d 450, 467-68 (4th Cir. 2003). That reading is wrong. International and domestic law authorize the detention of certain categories of persons "similar to prisoners of war." The Fourth Circuit ignored those well-settled categories, reflected in army regulations that have long permitted the detention of "Retained Personnel" such as enemy chaplains or medical personnel and foreign "Civilian Internees" for security reasons pursuant to the Fourth Geneva Convention. *See, e.g.*, U.S. Army Reg.

190-8. Section 956(5) therefore need not and should not be read as a blanket backdoor authorization to create a new extra-legal class of enemy combatants.[14]

That much is clear from *Ex parte Endo*, 323 U.S. 283 (1944), in which the Executive similarly argued that an appropriations statute funding the War Relocation Authority (WRA) had implicitly ratified the WRA's detention of Japanese Americans. The Supreme Court rejected the argument in no uncertain terms. For Congress to use an appropriations act to authorize Executive action, the Court said, it

> must plainly show a purpose to bestow the precise authority which is claimed. We can hardly deduce such a purpose here where a lump appropriation was made for the overall program of the [WRA] and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees [i.e., detainees] without ratifying every phase of the program.

Id. at 304 n.24 (citations omitted). In this case, the claim of authorization is even weaker. 10 U.S.C. §956 does not mention enemy combatants, let alone "plainly

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[14] Were 10 U.S.C. §956(5) interpreted as congressional authorization for the detention without charge of American citizens, 18 U.S.C. §4001(a) would have been meaningless *ab initio*. Similar language first appeared in an appropriation ten days after Pearl Harbor, *see* Military Appropriation Act, 77th Cong., ch. 591, Title III, § 103, 55 Stat. 810, 813-14 (Dec. 17, 1941), and was used to fund the Japanese-American internments. The §4001(a) drafters intended to preclude such detentions without explicit congressional approval, and clearly did not view the old but extant appropriation to constitute such explicit approval.

show a purpose to bestow the precise authority" on the Executive to detain without charge Americans stopped on American soil.[15]

II. THE CONSTITUTION FORBIDS DETENTION ON AMERICAN SOIL THAT IS NOT AUTHORIZED BY LAW

Even absent §4001(a), the Executive would have no power to detain Padilla. In effect, the Executive asks this Court to sanction a new law that Congress never passed or condoned. Reduced to writing (a task the Executive has avoided), the new law would say simply this:

> Notwithstanding any other provision of law, including Section 4001(a), Executive officials may indefinitely detain anyone stopped on American soil whom they deem to be an 'enemy combatant,' without charge, access to counsel or due process protections.

Two bedrock constitutional principles deny the Executive authority to aggrandize its power in this way.

First, the principle of separation of powers makes clear that imposing detentions without charge is "a job for the Nation's lawmakers, not for its military authorities." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). The Constitution grants the Executive the power and obligation faithfully to

[15] For the reasons stated *supra* at pp. 11-14, Congress's subsequent enactment of the Patriot Act, the *Charming Betsy* canon and the void-for-vagueness doctrine all further confirm that 10 U.S.C. §956 does not authorize Padilla's detention.

execute the laws, but denies him the power to make law.[16] That principle is reflected in both the Due Process Clause of the Fifth Amendment and the Suspension Clause of Article I. Art. I § 9, cl. 2. The Due Process clause forbids any deprivation of liberty not authorized by law. The Supreme Court has repeatedly made clear that due process of law requires legislative authorization for deprivations of liberty even during national security crises. And the Suspension Clause makes clear that the President has no authority to detain without charge. By placing the right to suspend the writ of habeas corpus in Article I, the Framers gave the power to authorize detentions without charge to the Legislature—not the Executive.

Second, the Commander-in-Chief power does not trump these constitutional restraints. The President's authority to detain under his Commander-in-Chief power is limited to detention of persons seized in a zone of active hostilities and members of the armed forces of an enemy nation. The Executive does not allege that Padilla fits either category. And as *Youngstown* made clear, just as the President may not constitutionally invoke his Commander-in-Chief power in the domestic realm to legislate the indefinite seizure of American property, he may not constitutionally invoke those powers domestically to legislate the indefinite seizure

[16] As *Youngstown* made clear, within "the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a law*maker*." *Id.* (emphasis added).

of American citizens on U.S. soil. That is confirmed by the Suspension Clause. By giving only Congress the authority to suspend the writ of habeas corpus "in Cases of Rebellion or Invasion," the Constitution clearly foresaw that American combatants might be detained on American soil, but denied the President the right, even in situations of rebellion or invasion, unilaterally to detain Americans without charge.

Finally, whatever power the President might have to detain Americans in the face of congressional silence, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Here, as already demonstrated, the Executive's indefinite detention without charge of an American citizen seized on American soil violates the express will of Congress, as stated in §4001(a). *Youngstown* bars the Executive from stretching the Commander-in-Chief clause this far into those domestic matters as to which Congress has specifically legislated.

A. The Executive is Constitutionally Barred from Detaining American Citizens Without Legal Authority

1. Due Process Requires That Deprivations of Liberty Occur Only Pursuant to Law

The Fifth Amendment prohibits deprivations of liberty "without due process of law." The Constitution grants to Congress—not the Executive—the power to

make law, and confers on Congress specific law-making authority in the national security context.[17]

The Executive has the power and the obligation faithfully to execute the laws that Congress enacts, but has no power to make law. *Youngstown*, 343 U.S. at 587 ("the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute"). As even the Framers' most enthusiastic advocate of a strong Executive power observed, the Executive's powers as Commander in Chief

> amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.

The Federalist No. 69, at 418 (Alexander Hamilton) (emphasis in original).

This is not the first time that the Executive has claimed that a national security crisis vested it with legislative power to invade fundamental rights protected by the Constitution. In *Youngstown,* the Court rejected the Executive's

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[17] *See* U.S. Const. art. I, § 8, cl. 14 (Congress, not Executive, has authority "[t]o make Rules for the Government and Regulation of the land and naval Forces"); *see also id.* cl. 10 (Congress, not Executive, has power to define and punish offenses against the law of nations); *id.* cl. 11 (Congress, not Executive, has power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules Concerning Captures on Land and Water"); *id.* cl. 12 (Congress, not Executive, has power to raise and maintain military forces); *id.* cl. 15 (Congress, not Executive, has power to raise and maintain national guard).

assertion that it had the wartime power to seize American steel mills prior to an anticipated strike, in order to maintain the steel supply essential to the war effort in Korea. 343 U.S. at 583. Justice Black, writing for the Court, rejected outright the Executive's claim that it could seize citizens' property in order to further the war effort. *Id.* at 587. Significantly, the Court rebuffed the Executive's attempt to cite cases "upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war." *Id.* Though the availability of steel supply was crucial to the nation's war effort, the Court had little difficulty concluding that a governmental seizure away from a zone of active combat operations required the sanction of Congress. *Id.*

As Justice Jackson noted in his concurrence in *Youngstown*, "The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President *and represents an exercise of authority without law.*" *Id.* at 343 U.S. at 655 (Jackson, J., concurring) (emphasis added). For that reason, the Supreme Court has repeatedly rejected Executive branch efforts to invade the liberty of American citizens without congressional authorization, even in the name of national security. *See Kent v. Dulles*, 357 U.S. 116 (1958); *Valentine v. U.S.*, 299 U.S. 5 (1936); *see also U.S. v. U.S. Dist. Court*, 407 U.S. 297, 324 (1972); *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 719 (1971). In *Valentine*, for example, a United States citizen

brought a habeas petition arguing that the Executive lacked authority to extradite him to France to stand trial. The President claimed that his inherent authority to conduct foreign affairs permitted him to extradite Valentine, but the Supreme Court disagreed, holding that the extradition power "is not confided to the Executive in the absence of treaty or legislative provision" enacted by Congress. *Id.* at 8. Thus, even the Executive power to protect this nation through the conduct of foreign affairs could not trump the Legislature's exclusive control over invasions of personal liberty. Writing for the Court, Justice Sutherland made clear that the Executive may not invade individual rights without explicit congressional authorization: "the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law . . . it is not enough that statute or treaty *does not deny* the power to surrender. It must be found that statute or treaty *confers* the power." *Id.* at 9 (emphasis added); *cf. U.S. v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) (citing *Valentine* with approval).[18]

Nor does the invocation of "national security" provide the President with powers beyond those enumerated in the Constitution or delegated by Congress. As

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[18] In the same year that Justice Sutherland wrote these lines, he also wrote the Court's opinion in *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), which spoke of "the very delicate, plenary and exclusive powers of the President as the sole organ of the federal government in the field of international relations." Yet nothing in *Curtiss-Wright* holds that the separation of powers stops at the water's edge. In any event, *Valentine* and *Curtiss-Wright* were perfectly consistent:

this Court noted long ago, "emergency does not create power." *Home Building and Loan Ass'n v Blaisdell*, 290 U.S. 398, 425 (1934); *see also N.Y. Times Co. v. U.S.*, 403 U.S. 713, 719 (1971) (Black, J., concurring) ("The word 'security' is a broad, vague generality [that] should not be invoked to abrogate the fundamental law" of the Constitution). Thus, in *Kent v. Dulles*, 357 U.S. 116 (1958), the Executive claimed that Congress had delegated it the authority to withhold passports from citizens deemed part of a Communist organization thought to constitute a global threat to the United States. *See id.* at 133 (Clark, J., dissenting) (maintaining Kent was "a Communist whose travel abroad would be inimical to our national security."). Despite the invocation of national security, the Supreme Court held that Executive restriction of a fundamental liberty interest required explicit congressional authorization: "The right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." *Id.* at 129 (citing *Youngstown*). Absent Congress's clear statement "in explicit terms" that the Executive could interfere with such a fundamental liberty interest, the Executive had no power "to restrict the citizens' right of free movement." *Id.* at

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whatever the scope of the President's authority may be *outside* the United States, he has no power unilaterally to abrogate individual rights *within* the United States.

130.[19] *See also U.S. v. U.S. Dist. Court*, 407 U.S. 297, 313, 324 (1972) (rejecting claim that need to protect "national security" gave Executive power, without express congressional authorization, to perform warrantless electronic surveillance of suspected terrorist attempting to blow up C.I.A. building in U.S.).

Absent *any* statement by Congress, much less the clear statement demanded by *Kent*, the Executive now reaches for a power more awesome than those it has been denied in the past: the power to seize not steel, but citizens, and to hold them behind bars indefinitely without charge. Such power strikes at "the heart of the liberty that the [Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). The Executive again claims that "national security" requires it to wield this unilateral power. The claim should be rejected, as before.

Amici do not minimize the pressures brought on our nation by September 11. But even when domestic insurgents conspire to take up arms against the nation, the Constitution's enumerated separation of powers—and not passing claims of pressing need—has always set the limits of Presidential authority. The President remains "controlled by law, and has his appropriate sphere of duty, which is to

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[19] Congress may be deemed to have explicitly authorized an Executive policy when the policy is longstanding, has been consistently enforced, and Congress has not rejected it. *See Haig v. Agee*, 453 U.S. 280, 303 (1991). No such authorization exists here. Before Padilla, the Executive had no policy – let alone a consistently enforced and longstanding policy – of detaining without charge American citizens suspected of plotting terrorist acts. *See, e.g., McVeigh, supra* (criminal charges, not detention without charge); *Battle, supra* (same); *Goba, supra* (same).

execute, not to make, the laws." *Ex Parte Milligan*, 71 U.S. 2, 121 (1866). Like Padilla, Milligan was a citizen suspected of grave and treasonous crimes: conspiring to seize U.S. weapons, liberate enemy prisoners of war, kidnap elected officials, and raise a Northern army to join with the Confederacy in destroying the United States.[20] But the gravity of the emergency precipitated by Milligan and his comrades did not increase the Executive's power. Even during the Civil War, the division between Executive and Legislative powers remained the same, "no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety." *Id.* at 119. Like every other citizen not taking part in active hostilities and not apprehended in a State governed by martial law, Milligan could not be detained without trial. The Executive was constitutionally required to charge him with violations of Congress's laws, in an ordinary court.

2. The Suspension Clause Confirms that the Executive Cannot Deprive Persons of Liberty Except in Accordance With Law

The Due Process requirement that deprivations of liberty occur only pursuant to law does not in any way hobble the nation's ability to defend itself in crises. The Framers understood that "the Constitution . . . is not a suicide pact."

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[20] The Executive has claimed that *Milligan* is inapposite because "Milligan involved a "non-belligerent" in the Civil War." Habeas Response at 31 n.8. But Milligan, like Padilla, was suspected of having conspired to aid the enemy in violent acts, 71 U.S. at 2.

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).[21] They foresaw that in extraordinary times, national security exigencies might require the federal government to suspend ordinary due process and Constitutional criminal protections. Their chosen, exclusive mechanism was congressional suspension of the writ of habeas corpus, the Founders' primary safeguard against lawless Executive detentions. *See* Art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.").

The Constitution confides only in the Legislature the power to determine when our nation is so imperiled that We the People must tolerate detentions without charge. In Article I, the Framers made clear that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." Art. I §9, cl. 2. By placing the right to suspend the writ in Article I, the Framers gave the power to authorize detentions without charge to the Legislature—not to the Executive. *Cf. INS v. Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of the articles delegating and separating powers under Articles I, II, and II exemplify the concept of separation of powers . .

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[21] *Kennedy* itself held that though Congress has "broad and far-reaching" powers to require military service, it may not penalize draft-dodging by stripping dodgers of citizenship without due process. 372 U.S. at 165. In national security crises, the Court found, due process must be safeguarded because "there is the greatest temptation to dispense with fundamental constitutional guarantees." *Id.*

. ."). Thus, while the Framers foresaw the fundamental need for a Constitutional order that, in extraordinary times, could bend without breaking, they entrusted the power to determine the *onset* of extraordinary times to the Legislature. When Congress—not the Executive—determines that "Rebellion or Invasion" so threatens the public safety, it may choose to vest the Executive with the awesome and invasive power to detain individuals without charge. Indeed, by referring to "Cases of Rebellion or Invasion"—events that can occur within the United States—the Suspension Clause unequivocally anticipated the presence of American "enemy combatants" on American soil. Yet the Framers gave to Congress—not the President—the authority to keep those American combatants outside the criminal justice system by suspending the writ of habeas corpus.

However one may assess the *policy* of detaining citizens without charge, the Executive's *constitutional* argument would give every President the unchecked power to detain, without charge and forever, all citizens it chooses to label as "enemy combatants."[22] But even in time of rebellion and invasion, the Executive has no inherent power to suspend the writ based on its own sense of emergency, and the Framers gave it none. As the Supreme Court has held, "If at any time the

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[22] As Justice Jackson wrote, "[a]side from suspension of the privilege of the writ of habeas corpus . . . [the Founders] made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work . . . ." *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring); *id.* at 650 (it would not "be wise" to amend the constitutional design).

public safety should require the suspension of [habeas] . . . it is for the *legislature* to say so." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (emphasis added).[23]

It was no accident that the Framers required explicit legislative approval for the detention without charge of Americans. The Framers sought to prevent repetition of a recent history in which a tyrannical Executive—King George and his colonial governors—had "affected to render the Military independent of and superior to the Civil Power" and had "deprive[ed them], in many Cases, of the Benefits of Trial by Jury." DECLARATION OF INDEPENDENCE paras. 14, 20 (U.S. 1776). The Executive's present claim to re-take the power by depriving Padilla of a "Trial by Jury" and authorizing detention without charge overseen by a "Military independent of and superior to the Civil Power" thus turns the Framers' intent on its head and wreaks havoc with their design.

As James Madison wrote, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." The Federalist, No. 47. By carefully separating the power to apprehend from the power to detain without

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[23] *See also Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (Taney, C.J.) (President has no power to suspend habeas); *cf.* Act of Mar. 3, 1863, 12 Stat. 755 (1863) (congressional delegation of power to suspend writ to fight Confederacy); Act of April 20, 1871, 17 Stat. 13, 14-15 (congressional delegation of power to suspend writ to fight Ku Klux Klan).

charge, the Framers ensured that no detention without charge could occur without the active concurrence of all three branches: congressional suspension, executive apprehension, and judicial approval. Each branch has the power to prevent detention without charge, and each must act affirmatively to authorize such detention.[24]

It is thus no coincidence that the Executive has long treated even those Americans believed to be wartime spies or saboteurs in accord with explicit congressional directives. For example, in *Smith v. Shaw*, 12 Johns. 257 (Mil. Trib. 1815), Smith was charged before a military tribunal with espionage during the War of 1812, the first declared war to follow the entry into force of the Constitution. But because the federal espionage statute then in force criminalized espionage by *aliens* but not by citizens, Smith was ordered released. *Id.* at 265.[25] Likewise, in *Elijah Clark's Case*, an American citizen living in British Canada was charged with having spied on American encampments near the border. Clark was convicted and sentenced by a military tribunal near the battlefield of the "Niagara

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[24] *See U.S. v. Brown*, 381 U.S. 437, 443 (1965) (separation of powers provides "bulwark against tyranny" because "if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will").

[25] *See also* William Winthrop, Military Law and Precedents 766 (2d ed. 1920). Tribunals sometimes tried alleged American spies, but the decisions were regularly reversed. *Id.*

Frontier" to "hang until dead." Military Monitor, Vol. I, No. 23, Feb. 1, 1813, pp. 121-22. Clark appealed, and his case ultimately reached the desk of President James Madison, who sat as an ultimate court of review for appeals from convictions of military commissions. *Id.* at 122. *See also Ex Parte Quirin*, 317 U.S. 1, 42 n.14 (1942) (describing case). Madison, a key architect of the Constitution, understood the limitations of Executive power. He did not claim any inherent right to detain; rather, he ordered Clark released.[26]

Indeed, the Supreme Court has never validated an Executive branch attempt indefinitely to detain American citizens on American soil without charge. Even *Korematsu* relied on a congressional statute criminalizing violation of the Executive branch exclusion orders that forced Japanese Americans from their homes. *See also Hirabayashi v. U.S.*, 320 U.S. 81 (1943) (upholding congressional statute criminalizing disregard of Executive branch curfews targeting Japanese Americans); *Ex parte Endo*, 323 U.S. at 287-88 (interpreting congressional statute criminalizing violation of Executive branch internment orders as authorization of Executive action).

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[26] Congress long ago amended the federal espionage statute to apply to citizens, thus filling the gaps that once existed in the federal criminal and military code. *See* 12 Stat. 339, 340, 34 U.S.C. §1200, art. 5; see also 12 Stat. 731, 737, 34 U.S.C. §1200, art. 5 (both *cited in Quirin*, 317 U.S. at 42 n.14). To *Amici*'s knowledge, no Executive until now has ever ignored the criminal law and asserted the power to hold a suspected saboteur without charge.

B. The Commander-In-Chief Clause Does Not Authorize Padilla's Detention

Ignoring the Due Process Clause and the Suspension Clause, the Executive argues that the President, as Commander-in-Chief, has inherent authority to designate someone as an "enemy combatant and detain him without charges or trial under the "laws of war". See Brief of Respondent-Appellant pages 14, 37. But the Commander-in-Chief power does not reach so far.

Contrary to the Executive's assertions, the law of war treats as combatants only persons wielding weapons in a zone of active hostilities and members of an enemy nation's armed forces. Persons outside those categories, like Padilla, may be treated as criminals but not as combatants. There is no authority—and the government cites none—that approves the detention away from the battlefield of an American citizen who has not taken part in hostilities and is not a member of an enemy nation's armed forces.[27] The government does not allege that Padilla fits into either of these categories and therefore it may not detain him without charge.

This point is confirmed by *Ex parte Quirin*, 317 U.S. 1 (1942), the principal case on which the Government relies. *Quirin* upheld the trial by military commission of acknowledged members of an enemy military for crimes defined by

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[27] *See* authorities cited in BRIEF OF AMICI CURIAE INTERNATIONAL LAW PROFESSORS.

Congress. 317 U.S. at 42.[28] In *Quirin,* armed German soldiers (one of them possibly a U.S. citizen), wearing German uniforms, were surreptitiously landed by German submarine in the United States. After apprehending the saboteurs, the Executive established a military tribunal and tried the saboteurs with war crimes pursuant to statutes enacted by Congress. The Supreme Court upheld the conviction of those saboteurs it deemed to be "enemy combatants": namely, those defendants who were members of the armed forces of Nazi Germany, had landed in uniform and then shed their uniforms in a plot to commit acts of sabotage. 317 U.S. at 21-22. Significantly, their accomplices—citizens who advanced the sabotage plots but who were not members of the German army—were not held without charge as "enemy combatants," but were instead charged with crimes and tried in civilian courts.[29] *Quirin* thus accorded with *Ex parte Milligan*, in which the Supreme Court had held that criminal law—not military law—governed a citizen who had conspired to commit sabotage during wartime but who was not a member of the enemy armed forces.

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[28] At the same time, however, the *Quirin* Court assumed that even where Congress has declared war *and* the Executive provides detainees with opportunity to prove innocence, some offenses against the law of war are still "constitutionally triable only by a jury." *Id.* at 29.

[29] *See, e.g., U.S. v. Haupt*, 136 F.2d 661 (7th Cir. 1943); *Cramer v. U.S.*, 325 U.S. 1 (1945).

The "laws of war" thus cannot justify Padilla's detention without charge. Just as critically, the Executive acted in *Quirin pursuant to statutes enacted by Congress.*[30] By permitting trial by military tribunal of spies or saboteurs *pursuant to an Act of Congress*, *Quirin* validated a longstanding Executive practice. *See Quirin*, 317 U.S. at 42 n.14 (collecting cases). But nothing in *Quirin* validated detentions without trial premised on *no* relevant statutory authority. Here, by contrast, the Executive acts without statutory warrant (despite Congress's enactment of several statutes that may fit the Executive's allegations, *see supra* n.5), and accords Padilla, the suspected saboteur, no opportunity whatsoever to confront the evidence against him. There is a profound difference between promptly trying soldier-saboteurs for crimes defined by Congress (as the Executive did in *Quirin*) and detaining indefinitely, without charge or congressional

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[30] *See* 317 U.S. at 27 ("Articles 81 and 82 [of the congressionally enacted Articles of War, 10 U.S.C. §§1471-1593] authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying."); *id.* at 28-30 ("For here *Congress has authorized* trial of offenses against the law of war . . . . It is no objection that *Congress* in providing for the trial of such offenses has not itself undertaken to . . . to enumerate or define by statute all the acts which that law condemns. . . . *Congress* had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law . . . ." (emphasis added); *id.* at 38 (same). *See also Madsen v. Kinsella*, 343 U.S. 341, 355 n.22 (1952) (describing *Quirin* as case in which the "conviction of saboteurs . . . was upheld on charges of violating the law of war *as defined by statute.*") (emphasis added).

authorization, American citizens suspected of advancing sabotage plots (as the Executive does now).

A decade after *Quirin*, *Youngstown* drew a clear line between the President's constitutional authority in foreign battlefield and domestic civilian settings. The Court rejected the applicability to civilian settings of the Executive's citations "upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war," concluding that "we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces" may extend his power that far. 343 U.S. at 587. As Justice Jackson noted, "[t]hat military powers of the Commander in Chief were not to supersede representative government of *internal* affairs seems obvious from the Constitution and from elementary American history. . . . Congress, not the Executive, should control utilization of the war power as an instrument of *domestic* policy." *Id.* at 644 (concurring opinion) (emphasis added). If the *Youngstown* case barred the President from invoking the Commander-in-Chief power in the domestic realm to legislate the indefinite seizure of American property, it *a fortiori* bars him from invoking those powers in the domestic realm to legislate the indefinite seizure of American citizens.

Whatever the Executive's inherent power to detain may be in a zone of active combat operations, outside such zones—and particularly within the United

States—that power is limited, as it was in *Quirin*, to those actions necessary and proper to the faithful execution of congressional statutes. *Cf. Hamdi v. Rumsfeld*, 2003 WL 21540768, at *3 (4th Cir. July 9, 2003) (en banc) (Wilkinson, J., concurring) ("To compare this battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges."). Were it otherwise, the Executive's military power to detain American citizens without charge could easily swallow up domestic criminal law. The Executive could evade the constitutional criminal procedures established by the Founders merely by declaring an individual an enemy combatant.[31]

The Framers never intended such an imbalance of power, and the Constitution recognizes none. As Alexander Hamilton, a forceful proponent of Executive power, noted, the Commander-in-Chief power "amount[s] to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy." The Federalist No. 69, at 418. As Justice Jackson noted in *Youngstown*, the Commander-in-Chief power

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[31] To implement a war on terror, the Executive could transfer any accused terrorist – including Black Panthers, Timothy McVeigh, or members of the old African National Congress – from the criminal system to a system of indefinite detention without charge. Following an authorization to implement a war on drugs, the Executive could similarly transfer any accused drug criminal – whether cartel *capitán* or street-level dealer – from the criminal system to indefinite Executive detention without charge. *Cf.* D.O.D. Authorization Act, Pub.L.No. 97-86, §905, 95 Stat. 1099, 1114-16 (1982) (codified as amended at 10 U.S.C. §§371-80)

> is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. . . . No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.

Youngstown, 343 U.S. at 654-46 (Jackson, J., concurring).

In short, the Commander-in-Chief clause grants the President no inherent power to detain Padilla without charge.[32] Even if it did, *Youngstown* makes clear

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(authorizing Secretary of Defense to provide military equipment and personnel to help enforce drug laws).

[32] Nor do any of the Executive's other cases cited below avail it. Several of the government's citations purportedly asserting the need for deference to the Executive actually omit key language mandating deference to *Legislative* judgments. In *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-21 (1936), for instance, Justice Sutherland held that Congress permissibly delegated to the Executive the power to make the sale of arms to certain nations illegal. Contrary to the Executive's assertions, *Curtiss-Wright* "involved, not the question of the President's power to act without congressional authority, but the question of his right to act *under and in accord with* an Act of Congress." *Youngstown*, 343 U.S. 579, 637 n.2 (1952) (Jackson, J., concurring) (emphasis added); *see also Able v. U.S.*, 155 F.3d 628, 632 (2d Cir. 1998) ("we are required to give great deference to *Congressional* judgments in matters affecting the military"); *Rostker v. Goldberg*, 453 U.S. 57, 61, 64-66 (1981) ("[t]his case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded *Congress* greater deference") (emphasis added); *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948) (upholding Executive power to deport dangerous enemy aliens following declaration of war, pursuant to longstanding *congressional* authorization).

The Executive's remaining citations are likewise inapposite. In *Moyer v. Peabody*, 212 U.S. 78 (1909), the Supreme Court held that a state governor could detain suspected insurrectionists without charge, so long as the governor acted pursuant to an enumerated state constitutional power and a legislative authorization, and so long as the detention did not last too long. *Id.* at 84-85. The Executive here does

that whatever power the President might have to detain Padilla in the face of congressional silence, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." 343 U.S. at 637; *see Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (embracing analysis).[33] In 1942, when *Quirin* was decided, Congress had passed no legislation prohibiting the detention without statutory authorization of American citizens. As noted above, EDA authorized the sort of detention the Executive now effectuates. But as discussed above, Congress deliberately withdrew that authorization in 1971 and stated plainly in Section

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not does not act pursuant to authorization from the Legislature. Finally, the *Prize Cases* provide no refuge to the Executive. 67 U.S. (2 Black) 635 (1862). The Supreme Court there held that the Executive could seize *property* in a combat zone where Congress had authorized the use of force. *Id.* The case had nothing to do with the seizure of a *person* outside a combat zone.

[33] Since AUMF does not authorize the detention without charge of suspected American saboteurs, the Executive "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." 343 U.S. at 637. To paraphrase *Youngstown*, "the current seizure [can] be justified only by . . . holding that seizure" of persons suspected of engaging in sabotage is "within [the Executive's] domain and beyond control by Congress." *Id.* at 640. The detention of suspected saboteurs is not beyond Congress's powers. Congress can authorize criminal detentions (which it has), can preclude unauthorized detentions (which it has), and can authorize Executive detention by suspending habeas (which it has not). *See also id.* at 662 ("I cannot sustain the seizure in question because here, as in *Little v. Barreme*, Congress had prescribed methods to be followed by the President in meeting the emergency at hand.") (Clark, J., concurring). Congress has prescribed methods under our criminal law to detain suspected saboteurs.

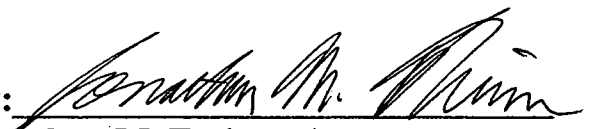
4001(a) that no detention of Americans believed to be saboteurs or spies could occur except pursuant to congressional statute. *See supra* at 6-7.

Whatever *Quirin* might mean when Congress is silent, it has no application in this case, where for more than thirty years Congress has explicitly forbidden the unauthorized detentions of American citizens. *See* 117 Cong. Rec. 31540 ("[T]he requirement of legislative authorization would close off the possibility that the repeal of the Detention Act could be viewed as simply leaving the field unoccupied. It provides that *there must be statutory authority for the detention of a citizen by the United States."*) (statement of bill's author, also Chairman of House Judiciary Committee) (emphasis added); *see also* 1971 U.S.C.C.A.N. 1435, 1438 (House Report) (stating purpose of §4001(a) is to create "clear demarcation of the limits of executive authority"). The Executive's indefinite detention without charge of an American citizen stopped on American soil flouts Congress's unambiguous will, as stated in Section 4001(a).

CONCLUSION

This Court should not sanction this continuing violation of Congress's will and the Constitution's design. Padilla must be treated in accord with our nation's longstanding constitutional processes.

Respectfully submitted,



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Federal Rules of Appellate Procedure Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[X] This brief contains 9,972 words**, excluding the parts of the brief exempted by Fed.R.App. P. 32(a)(7)(B)(iii), **or**

[ ] This brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

**There are 2,972 words in excess pursuant to the Cato *amici's* pending motion for permission to file an *amici curiae* brief exceeding the 7,000 words provided by Rule 32(a)(7)(B) and 28(g)

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14 point type Times New Roman type style, **or**

[ ] This brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

CERTIFICATION

This is to certify that on this 28th day of July, 2003, a copy of the foregoing was sent postage pre-paid by Federal Express to all counsel of record as follows:

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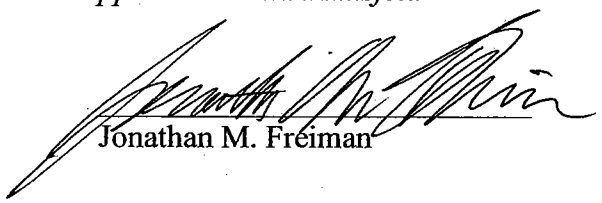

Jonathan M. Freiman

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Caption [use short title]

Docket Number(s): 03-2235(L), 03-2438

Motion for: Leave to file oversize amici brief of 10,000 words

Padilla v. Rumsfeld

Set forth below precise, complete statement of relief sought:

Motion for leave to file oversize amici brief of 10,000 words for amici parties the Cato Institute, the Center for Nat'l Sec. Studies, the Constitution Project, the Lawyers Comm. for Hum. Rts., People for the American Way & the Rutherford Institute

MOVING PARTY: Cato Institute, et al., Amici Curiae

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: See Attached

MOVING ATTORNEY: Jonathan M. Freiman, Esq.

[name of attorney, with firm, address, phone number and e-mail]

Lawyers Committee for Human Rights
and Wiggin & Dana LLP
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OPPOSING ATTORNEY [Name]: See Attached

[name of attorney, with firm, address, phone number and e-mail]

Court-Judge/Agency appealed from: Hon. Michael B. Mukasey, Chief Judge, U.S. District Court

Please check appropriate boxes:

Has **consent** of opposing counsel:

A. been sought? ☑ Yes ☐ No

B. been obtained? * ☐ Yes ☐ No

*Petitioner's Counsel consents & Respondent's Counsel takes no position

Is **oral argument** requested? ☐ Yes ☑ No

(requests for oral argument will not necessarily be granted)

Has **argument** date of appeal been set? ☐ Yes ☑ No

If yes, enter date _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made **below**? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

N/A

Signature of Moving Attorney: [signature] **Date:** 7/28/03

Has **service** been effected? ☑ Yes ☐ No

[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED** **DENIED.**

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk of Court

Date: _____ By: _____

Form T-1080 (Revised 10/31/02).

Padilla v. Rumsfeld
Case No. 03-2235 (L); 03-2438

ATTACHMENT TO Motion T-1080 form for Leave to File Oversized *Amici* Brief

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CERTIFICATION

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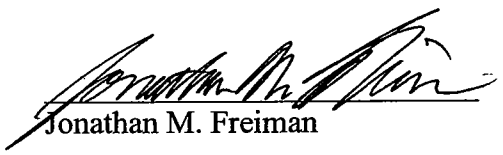

Jonathan M. Freiman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PADILLA v. RUMSFELD	:	**NO(s). 03-2235 (L); 03-2438**

AFFIDAVIT OF JONATHAN M. FREIMAN
IN SUPPORT OF UNOPPOSED MOTION
BY THE CATO INSTITUTE, ET. AL.
TO PERMIT "OVERSIZE" BRIEF OF 10,000 WORDS

Pursuant to 28 U.S.C. § 1746, JONATHAN M. FREIMAN hereby declares under penalty of perjury that the following is true and correct.

1. I am counsel to the Cato Institute, the Center for National Security Studies, the Constitution Project, the Lawyers Committee for Human Rights, People for the American Way and the Rutherford Institute (collectively, the Cato *amici*).

2. Donna Newman, Counsel for Petitioner, has consented to submitting a brief of 10,000 words. Eric Bruce, Counsel for Respondent, takes no position on the Cato *amici*'s request for additional words.

3. The issues addressed in this case are novel. They involve the analysis of complex constitutional issues and rarely reviewed historical case law that cannot fit in a readable manner within the 7000 words granted to an amicus under Fed. R. App. Proc. 29(d) & 32(a)(7).

4. Initial drafts of the Cato *amici* brief have approached 15,000 words. We have made significant efforts to reduce the size of the draft brief, and therefore request only an additional 3000 words, for a total of 10,000 words. Reductions beyond this would make the complex historical and constitutional analysis difficult to follow. The modest amount of additional words we request would therefore serve, rather than burden, this Court.

WHEREFORE, the Cato *amici* respectfully move this Court for leave to file an oversize brief of 10,000 words.

Respectfully submitted,

Dated: July 28, 2003

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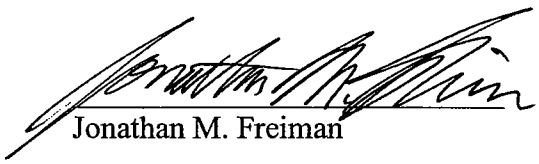

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