NO. 05-6396

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSE PADILLA,
PETITIONER-APPELLEE

v.

COMMANDER C.T. HANFT,
USN COMMANDER, CONSOLIDATED NAVAL BRIG,
RESPONDENT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW AS AMICUS-CURIAE IN SUPPORT OF AFFIRMANCE

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ATTORNEYS FOR AMICUS CURIAE

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INTEREST OF *AMICUS CURIAE*

The Brennan Center for Justice at New York University School of Law submits this *amicus curiae* brief in support of Petitioner-Appellee. Both parties to this litigation have consented to its filing.

The Brennan Center for Justice is a nonpartisan institute dedicated to a vision of effective and inclusive democracy. The Center unites the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures develop practical solutions to difficult problems in areas of special concern to the late Justice William Brennan, Jr.

The Brennan Center's Liberty & National Security Project seeks to promote thoughtful and informed discussion of how to address the threat of terrorism within our constitutional framework. Our efforts are rooted in the belief that accountability, transparency, and checks and balances are vital not only to the protection of civil liberties, but also to developing effective and sustainable strategies for fighting terrorism.

INTRODUCTION

The government asserts in this case that the threat of terrorism justifies the indefinite military detention of an American citizen arrested on American soil based on suspicion of involvement in terrorist activities. It asserts this power,

however, without having sought and obtained the requisite approval from Congress.

Separation of powers principles require any such grant of emergency domestic authority to be made through express and precise statutory language. The courts have emphatically enforced this "clear statement" rule in past conflicts, and it is no less critical in the current struggle against terrorism. Requiring a clear statement from Congress ensures that the nation's response to a continuing crisis is decided carefully and collectively, pursuant to full democratic debate rather than Executive fiat. No such debate has occurred with respect to the issues raised in this case. Were those issues properly taken to Congress, it is exceedingly unlikely that Congress would grant the sweeping power the Executive asserts here; the legislative process naturally tends toward more incremental, narrowly tailored measures that reflect compromise between competing values. The Court should reject the Executive's attempt to assume powers that it has made no effort to secure through the proper democratic channels.

ARGUMENT

I. A "CLEAR STATEMENT" RULE SERVES TO ENSURE THAT DEMOCRACY FUNCTIONS EFFECTIVELY IN TIMES OF CRISIS BY REQUIRING THAT ANY EMERGENCY DOMESTIC POWERS BE APPROVED IN A TRANSPARENT AND DELIBERATIVE FASHION BY CONGRESS.

In seeking to detain Jose Padilla outside the reach of any ordinary legal process, the government has claimed broad-reaching discretion for the Executive in deciding how to respond to the threat of terrorism, while envisioning comparatively trivial roles for the other two governmental branches. According to the government, the Executive now holds the power to place a U.S. citizen arrested on U.S. soil on suspicion of terrorism in indefinite military detention, just as if he were a prisoner of war captured on a foreign battlefield. The grave implications of such a power are obvious. *See Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2735 (2004) (Stevens, J., dissenting) ("At stake in this case is nothing less than the essence of a free society."). Yet, the government contends that, without a word of discussion of those implications, Congress nonetheless implicitly granted the Executive this extraordinary power simply by passing a generic authorization of the use of force to respond to the September 11th attacks. *See* Gov't Br. at 30-36 (relying on Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40 (2001)). The Article III courts, according to the government, are likewise to speak with a hushed voice in these matters, limiting themselves to a toothless, extremely

deferential form of review over the Executive's detention decisions. *See* Gov't Br. at 36 (stating that the district court should have not "undertak[en] its own . . . ill-informed assessment of the necessities of the war" but rather should have "deferr[ed] to the President's determination that Padilla's detention was necessary, appropriate, and therefore authorized").

Such an unbalanced state of affairs, in which Congress has inadvertently delegated itself out of the game and Article III courts are reduced to by-stander status, does not reflect the way our democracy was designed to work. In wartime no less than peacetime, ours is a government committed to the doctrine of separation of powers. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).[1] As the Supreme Court recently affirmed, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004) (plurality op.). Even "in times of

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[1] For a discussion of the development of the doctrine of separation of powers and its role in our constitutional system, *see* W.B. Gwynn, THE MEANING OF SEPARATION OF POWERS (1965); *see also* M.J.C. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 88-90 (1967); Charles de Montesquieu, THE SPIRIT OF THE LAWS 8-13 (T. Nugent trans. 1949); John Locke, THE SECOND TREATISE OF GOVERNMENT, *reprinted in* TWO TREATISES OF GOVERNMENT 382-84 (P. Laslett 2d ed. 1967).

conflict, [the Constitution] most assuredly envisions a role for all three branches when individual liberties are at stake." *Id*.

Indeed, respect for separation of powers principles demands *heightened* inter-branch cooperation in these moments. *See* Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 412-13 (1982). Thus, where the Executive seeks to depart from established legal norms in times of crisis and to curtail ordinary liberties in the name of augmenting security, it must first put the matter before Congress; such decisions are simply not safely left to a single branch. *Cf. Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting) ("[T]he 'law' which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order."). As Justice Souter recently stated in *Hamdi*:

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other – that the private interest of every individual may be a sentinel over the public rights." THE FEDERALIST No. 51, p. 349 (J. Cooke ed. 1961). Hence the need for an assessment by Congress before citizens are

> subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.

Hamdi, 124 S. Ct. at 2655 (Souter, J., concurring). In short, any decision to alter the existing balance between liberty and security during times of crisis requires joint approval from the executive and legislative branches.

There are several important functions served by this "two-key" protocol. First, requiring the Executive to persuade Congress why new powers are needed forces the Executive to articulate precisely what national security interests are at stake and precisely why current laws inadequately serve those interests. Such a public accounting is critical to keeping the nation informed about the nature of the problems it faces and is a precondition to a transparent assessment of those problems. Moreover, Congress's shared capacity to investigate the factual underpinnings of the Executive's request for extraordinary powers provides a vital structural check against Executive overreaching, a check that the Article III courts, lacking independent investigatory authority, cannot as effectively provide.

Second, assuming the problems cited by the Executive have any merit, Congress is best situated to evaluate and develop appropriately tailored responses to those problems – responses that do not needlessly infringe on individual liberties or otherwise threaten the nation's democratic traditions. In part, this institutional advantage stems from the diversity of interests represented in Congress, in contrast to the unitary character of the Executive. Congress's advantage further stems from

the measured pace of the legislative process, which tends to foster consideration of the potential long-term, detrimental effects of a proposed policy and to prompt the development of narrower alternatives. As a result of both its representative and deliberative nature, congressionally approved outcomes inevitably emerge from compromise, and thus they are more likely to strike a careful balance between the competing demands of liberty and security. *See Loving v. United States*, 517 U.S. 748, 757-58 (1996) ("Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking.").

Third, requiring any new executive powers to be approved and delineated by Congress facilitates meaningful judicial review. In the absence of specific statutory guidance, the courts are poorly equipped to challenge executive claims that new powers are needed to address new threats. They lack the broad fact-finding process needed to assess whether security concerns truly justify the powers sought; and the courts' limited accountability to the public further counsels deference to the Executive. By contrast, Congress possesses both the fact-finding capacity and the proximity to the public will necessary to reach an informed and democratic resolution of such matters. In turn, a congressional decision, once rendered, provides the courts with a firm standard by which to assess whether the executive has stepped out-of-bounds in any particular instance. It is far easier for

the courts to recognize and resist executive overreaching when armed with a definite expression of the people's will. *Cf. Baker v. Carr*, 369 U.S. 186, 217 (1962) (effective judicial review requires judicially manageable standards).

These shared functions are designed to work as interlocking gears of the democratic process: requiring the Executive to consult Congress spurs Congress to act, which in turn promotes fuller debate and sounder policy, which in turn provides the courts a legislative standard by which to hold the Executive accountable. *See Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("[The Constitution] enjoins jupon its branches separateness but interdependence, autonomy but reciprocity.") It is the responsibility of the Article III judiciary to ensure that the Executive does not by-pass this entire mechanism. Thus, if the Executive has assumed emergency domestic powers without obtaining proper legislative approval, it is up to the courts to send the Executive back to Congress. While the courts may be ill-positioned to assess in the first instance what powers are required to meet the current crisis, the courts are perfectly well-positioned to regulate the *process* by which that question is decided – by ensuring that it receives the degree of congressional deliberation that it deserves. *Cf. Hamdi*, 124 S. Ct. at 2673 (Scalia, J., dissenting) ("I frankly do not know whether [existing] tools are sufficient to meet the Government's security needs . . . . It is far beyond my

competence, or the Court's competence, to determine that. But it is not beyond Congress's.").

Recognizing the judiciary's role as procedural referee, the Supreme Court has been careful to enforce the separation of powers during wartime through the use of a clear statement rule: *viz.*, Congress must authorize any emergency domestic powers sought by the Executive, and it must do so *clearly*. *See Youngstown*, 343 U.S. at 585-89. The type of authorization required is of a different kind than that needed to guide the President in matters exclusively affecting military operations abroad. The President as Commander-in-Chief may be owed "the widest latitude of interpretation" in waging a duly authorized military campaign abroad, where the power of the military is "turned against the outside world for the security of our society." *Id.* at 645 (Jackson, J., concurring). But when the President's Commander-in-Chief power "is turned inward," the stakes are far different, and the President is owed "no such indulgence." *Id*. Absent some imperative circumstance that renders congressional consultation impracticable, the Executive's domestic powers may be expanded to meet an emergency only subject to clear congressional authorization – clear enough so that "[t]he public may know the extent and limitations of the powers that can be asserted, and persons affected may be informed from the statute of their rights and duties." *Id.* at 653. For

"emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them." *Id.* at 652.

The principles incisively captured in Justice Jackson's concurrence in *Youngstown* resound throughout the Supreme Court's wartime jurisprudence. Thus, during the War of 1812, the Supreme Court rejected the notion that a declaration of war against Great Britain by itself supplied authorization for executive officials to seize enemy persons or property inside U.S. territory. *Brown v. United States*, 12 U.S. 110, 126 (1814). As the Court explained, a declaration of war does not accomplish, "by its own force, any of those results . . . which are usually produced by ulterior measures of government." *Id.* How to treat enemy persons or property inside U.S. territory presents a question distinct from the decision to go to war, and accordingly the nation's will on that question must be expressed through a distinct act of Congress. *See id.* at 129 (given that the executive may "pursue only the law as it is written," the question must be put before "the consideration of the legislature, not of the executive").

In the Civil War case of *Ex parte Milligan*, 71 U.S. 2 (1866), similar logic met with unanimous acceptance by the Court. A five-four majority in *Milligan* held that the Constitution flatly prohibits the military trial of U.S. civilians arrested in U.S. territory if the federal courts are open and functioning. *See id.* at 118-31. But *all* the members of the Court agreed that Milligan's military trial was invalid

without congressional authorization for such a measure; and given that Congress had exempted Milligan's state from legislation suspending the writ of *habeas corpus*, the Court found such authorization to be lacking. *See id.* at 131; *id.* at 135-36 (concurring op.). It was not enough that a declaration of war was in effect; that the state where Milligan had been arrested "was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion," *id.* at 140 (concurring op.); "that a powerful secret association, composed of citizens and others, existed within the state . . . plotting insurrection," *id.*; and that the Executive insisted that Milligan was a member of that organization and had been captured as "a prisoner of war," *id.* at 131 (majority op.). As stated in the concurring opinion: "It was for Congress to determine the question of expediency" of employing military commissions in such circumstances, and Congress had declined to grant the necessary permission. *See id.* at 141.

In the World War II cases of *Ex parte Endo*, 323 U.S. 283 (1944) and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the Court further refined these principles, holding that where there is any doubt whether Congress intended to curtail civil liberties due to wartime exigencies, that doubt must be resolved in favor of the preservation of liberty. In *Endo*, the Court reviewed the effect of legislation that made it a crime to violate military orders being used at the time to remove Japanese citizens and aliens from the Pacific coast. While recognizing that

the legislative history showed that Congress had sought to authorize "the fullest possible protection against either espionage or sabotage," 323 U.S. at 300 (internal quotation marks omitted), the Court refused to construe the legislation as giving the executive broad discretion to detain individuals once they had been removed from exclusion areas. Noting "the silence of the legislative history and of the Act . . . on the power to detain," *id.* at 301, the Court reasoned:

> In interpreting a wartime measure we must assume that [Congress's] purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

Id. at 300.

In *Duncan*, the Court followed the same approach in construing congressional legislation that authorized "martial law" in Hawaii following the Japanese attack on Pearl Harbor. 327 U.S. at 315. Even though Congress's use of this term might seem directly to evoke the supplanting of civilian governance by military rule, the Court insisted on even more exacting precision, refusing to infer that Congress had meant to allow military tribunals to replace the Hawaiian civilian courts during this emergency. Rather, the Court presumed that even in authorizing "martial law" Congress

> had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always

> believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the [legislation in question].

Id. at 324.

By themselves, these precedents firmly establish that a grant of emergency domestic power cannot lightly be inferred. But after World War II, Congress amplified their force even further by enacting 18 U.S.C. § 4001(a), which declares that "[n]o citizen shall be imprisoned or detained by the United States except pursuant to an Act of Congress." *Id.*, Pub. L. No. 92-128, § 1(a) (1971). Passed at the same time that Congress repealed the Emergency Detention Act of 1950, which had authorized a system of preventive detention of persons suspected of plotting espionage or sabotage during a national emergency, § 4001(a) was intended to "restrict[] the powers of the President in an emergency situation." 117 Cong. Rec. 31,764 (statement of Rep. Ichord). In essence, Congress sought safety through redundancy. Members of Congress were aware that "[t]he Supreme Court ha[d] firmly rejected the argument that the role of Commander in Chief alone invests the President with extensive prerogatives to do whatever he feels is necessary in the time of war." *Id.* at 31,557 (statement of Rep. Mikva). But they wanted to leave no room for doubt that, "[i]f a real threat to our internal security should arise, it should be handled by the Legislative rather than the Executive branch." *Prohibiting Detention Camps: Hearings on H.R. 234 and Related Bills Before*

Subcomm. No. 3 of the House Comm. on the Judiciary, 92d Cong. 42, 82 (1971) (statement of Rep. Adams); *see also* 117 Cong. Rec. 31,563 (statement of Rep. Ichord) (stating that, if U.S. citizens must be detained during "an emergency situation, I want it to be done by law and I want the liberties of the individual protected as much as possible"). As one representative remarked, the enactment of § 4001(a) was intended to lead future courts to "look at the statute books and see the Congress did not mean for the President to take this kind of action [*i.e.*, detention of U.S. citizens]" based on "almost unlimited power in times of peril." 117 Cong. Rec. 31,756 (statement of Rep. Ashbrook).

In short, as both the Supreme Court and the Congress have long recognized, before the executive may restrict fundamental liberties in response to a threat to security, Congress must play its constitutionally assigned role – by fully considering and clearly authorizing any expansion of executive power it deems appropriate to the circumstances. Thus, the relevant question here is: has Congress deliberated upon and squarely decided the difficult issues raised by the President's action in this case, in the manner one would expect from a transparent, democratic government that respects the rule of law? If the answer to that question is in any way ambiguous, such ambiguity must be resolved in favor of sending the Executive back to Congress to obtain further clarification.

While there may be rare cases in which a threat is so imminent as not to allow time for such deliberation, this is plainly not one of them, as the petitioner has been detained now for over three years. *Cf. Hamdi*, 124 S. Ct. at 2659 (Souter, J., concurring) (noting such a possibility but finding it inapposite because such "an emergency power of necessity must at least be limited by the emergency; [and] Hamdi has been locked up for over two years"). There is thus *no* national security risk of requiring further deliberation from Congress under the circumstances.

By contrast, there are real risks, to liberty and security both, of allowing the Executive to proceed with a hastily improvised, unilaterally imposed detention policy, ostensibly to remain with us for as long as the threat of terrorism lasts. That approach, once sanctioned, can easily lead toward unforeseen – and undemocratic – directions. As Justice Jackson stated in *Youngstown*:

> In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.

Youngstown, 343 U.S. at 653 (Jackson, J., concurring).

II. CONGRESS HAS NOT GIVEN THE GRAVE POLICY QUESTIONS RAISED BY THIS CASE THE CAREFUL CONSIDERATION AND APPROVAL DEMANDED BY THE CLEAR STATEMENT RULE.

It is apparent that Congress has not carefully considered the difficult issues latent beneath the surface of this case. The Executive evidently has chosen to place Jose Padilla in military detention because it perceives the criminal process as imposing unwarranted constraints on its domestic powers to interrogate and detain terrorism suspects. Whether these concerns have merit and, if so, what to do about them are, however, questions for Congress to decide. Congress has not done so. Were those questions properly submitted for congressional consideration, it is hard to believe that Congress would grant the sweeping power that the Executive now claims before this Court.

The government insists that Congress has provided the requisite approval, pointing to the AUMF; but that enactment can in no way bear the weight the government seeks to place on it. Passed a mere week after the September 11th attacks, the AUMF is a bare authorization for the President to employ the armed forces to respond to those attacks – authorization urgently needed at the time to strike al Qaeda at its camps and hideouts *overseas*. *See* 147 Cong. Rec. S9423 (daily ed. Sep. 14, 2001) (statement of Sen. Biden) ("In extending this broad authority . . . , it should go without saying, however, that the resolution is directed only at using force abroad to combat acts of international terrorism.").

In passing the AUMF, Congress gave no consideration whatever to whether military force was needed to incapacitate terrorism suspects arrested at home. The nation has a robust and comprehensive law enforcement system available to intercept criminal activity at home, finely calibrated over time to protect citizens' security while at the same time preserving fundamental liberties. To the extent that this system is not adequately equipped to deal with citizens arrested at home on suspicion of terrorist activity, such deficiencies were not addressed – let alone addressed clearly – when Congress enacted the AUMF. Congress addressed such matters instead in the USA PATRIOT Act, Pub. L. No. 107-56 (Oct. 26, 2001). If further adjustments to the nation's law enforcement apparatus need to be made, *Congress* must be told why and *Congress* may make those adjustments as it deems appropriate.

Indeed, this case exhibits all of the deficiencies that the clear statement rule is designed to prevent. *First*, the Executive has yet to articulate in full the reasons behind its decision to detain Jose Padilla outside the criminal process. From the start, those reasons have been unclear. The criminal justice system provides the government with great flexibility to detain and prosecute terrorism suspects. The government needs only probable cause to make an arrest, which it can establish through an *ex parte* submission. *See Gerstein v. Pugh*, 420 U.S. 103, 120 (1975). If a suspect poses a danger to the community, he may be detained pending trial.

See 18 U.S.C. § 3142; *United States v. Salerno*, 481 U.S. 739 (1987).[2] And the government has access to a "well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit." *Hamdi*, 124 S. Ct. at 2657 (Souter, J., concurring) (collecting statutes).

Executive officials have vaguely cited two concerns in attempting to explain their decision not to avail themselves of these tools and instead to place Padilla under indefinite, unregulated military detention. The first is the need to allow for effective interrogation, which, officials have contended, required interrogating Padilla outside the presence of counsel. *See, e.g.*, *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 50 (S.D.N.Y. 2003) (describing declaration by Defense Department official stating need to interrogate without counsel). The second is the need to protect intelligence sources, which, it has been perfunctorily claimed, a criminal prosecution could have jeopardized. *See* U.S. Dep't of Justice, Remarks of Deputy Attorney General James Comey Regarding Jose Padilla, Jun. 1, 2004, *available at* http://www.usdoj.gov/dag/speech/2004/dag6104.htm (stating

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[2] The required showing of dangerousness can be made on the basis of hearsay evidence, or possibly even evidence submitted *ex parte* if extraordinary circumstances warrant. *See, e.g.*, *United States v. Accetturo*, 783 F.2d 382, 390-91 (3rd Cir. 1986); *United States v. Acevedo-Ramos*, 755 F.2d 203, 208-09 (1st Cir. 1985).

that "to make a case against Jose Padilla through our criminal justice system" at the time he was arrested was "something that I as the United States Attorney in New York could not do at that time without jeopardizing intelligence sources").

These assertions beg for further elaboration, so that the nation can know precisely how the criminal justice system falls short and intelligently consider how to remedy those shortcomings. Yet whether the Executive's criticisms of the criminal justice system are at all well-founded remains unexplored by Congress. The relevant issues have not been meaningfully pursued in legislative hearings or probed in any serious fashion through congressional factfinding.

Second, as a result, the powers sought by the Executive have not been tempered through the legislative process; more carefully tailored alternatives, which clearly exist, have not been pursued. Take first the claim that the Executive's treatment of Padilla is justified by the need for effective interrogation. Even assuming *arguendo* that the government's interest in interrogation could not adequately be met within the confines of the criminal system – by itself a highly controvertible question[3] – it hardly follows that Congress would approve indefinite

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[3] As an initial matter, interrogation without counsel could have taken place after Padilla's arrest had he agreed to waive his *Miranda* right to counsel. Or, even if not, an arrangement could have been made to interrogate Padilla without counsel during pre-trial detention while walling off the prosecution. *See Padilla*, 243 F.

military detention as a remedy. By no means can the AUMF be interpreted as sanctioning such a step; even with respect to a citizen captured on a foreign battlefield, the Court in *Hamdi* rejected any such implication. *See Hamdi*, 124 S. Ct. at 2641 (plurality op.) ("Certainly, . . . indefinite detention for the purpose of interrogation is not authorized [under the AUMF]"); *cf. Padilla*, 124 S. Ct. at 2735 (Stevens, J., dissenting) (stating that, while executive detention may sometimes be

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Supp. 2d at 51 (suggesting possibility of such an arrangement; collecting cases). *Miranda* only prohibits the prosecution from using such an interrogation as part of its case-in-chief (just as the military's interrogation of Padilla is inadmissible now). *See generally United States v. Patane*, 124 U.S. 2620 (2004). Moreover, it is not at all clear that the presence of defense counsel ordinarily poses a hindrance to effective interrogation. Indeed, providing a defendant with counsel can often be highly *useful* in helping the government to elicit information. Counsel, as a trusted intermediary, can play a crucial role in convincing the defendant to cooperate with the government in exchange for leniency. *Cf. Padilla*, 243 F. Supp. 2d at 52-53 (finding government's view that effective interrogation requires withholding of counsel to be speculative, and finding it at least equally plausible that counsel could help convince Padilla to cooperate). Indeed, both before and after September 11th, the government has been able to turn a number of terrorism defendants into cooperating informers within the confines of the criminal process. *See, e.g.*, Lisa Anderson & Stephen J. Hedges, *Terror Web Pulled into Daylight; Ex-Aide Tells of bin Laden's Anti-U.S. Effort*, CHICAGO TRIBUNE, Feb. 11, 2001, at C1 (describing cooperation supplied in return for guilty plea by former Al Qaeda member in connection with embassy bombings trial); *Hearing on the USA PATRIOT Act Before the House Comm. on the Judiciary*, 108th Cong. (Jun. 5, 2003) (testimony of Attorney General) (stating that since September 11th, the government has secured plea agreements from more than 15 individuals in exchange for providing "critical intelligence about al Qaeda and other terrorist groups").

justified to intercept attacks, it may not be justified "by the naked interest in using unlawful procedures to extract information," including "[i]ncommunicado detention for months on end").

Were Congress to determine any change in the law to be appropriate, surely it would not approve so radical a departure from existing law. By point of comparison, where other democratic countries have allowed for periods of incommunicado detention for purposes of interrogating terrorism suspects, they have done so by enacting a statutory framework carefully regulating the conditions and duration of such detention. The detention periods allowed have been measured in *days*, in contrast to the *years* that Padilla's detention has spanned. *See* Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906 (2004) (describing British and Israeli detention practices).

As for the other reason vaguely cited for the military detention of Padilla – the fear that prosecuting him would entail divulging intelligence sources – this concern, too, would surely find a more measured solution through the legislative process. Indeed, the government already has a variety of tools available within the criminal justice system to enable prosecution of terrorism cases without disclosing sensitive information. *See* Serrin Turner & Stephen J. Schulhofer, Brennan Center for Justice at N.Y.U. School of Law, *The Secrecy Problem in Terrorism Trials* 9-

46 (2005), *available at* http://www.brennancenter.org/secrecyproblem.pdf (discussing tools already available to the government and successful prosecutorial record in espionage and terrorism cases). Of particular importance, Congress has specifically passed legislation to address the problem of protecting classified information in criminal trials before, in the form of the Classified Information Procedures Act ("CIPA"), *see* Pub. L. No. 96-456 (1980) (codified at 18 U.S.C. app. 3). CIPA sets forth a detailed procedural scheme allowing unclassified "substitutions" to be used in place of classified information where relevant to criminal discovery or trial, so long as fairness to the defendant is preserved. *See id.* §§ 4-8.

The care with which CIPA was crafted underscores that Congress is far better suited than the Executive to address these issues with the appropriate nuance. And the statute further discredits any notion that Congress would casually approve indefinite, unregulated detention as a means of avoiding disclosure of classified information in a criminal prosecution. Indeed, given the success government prosecutions have enjoyed under CIPA, such a radical step would be wholly unjustified. *See* S. Rep. 107-51 (2001), at 34 (intelligence committee report stating, shortly before September 11th, that CIPA "has proven to be a very successful mechanism for enabling prosecutions that involve national security

information to proceed in a manner that is both fair to the defendant and protective of the sensitive national security intelligence information").

CIPA is not the only relevant tool Congress has made available to the Executive; its "well-stocked statutory arsenal" is another. Prosecutors' ability to determine the scope of an indictment gives the government broad power to define the evidence relevant to a case – and thereby to avoid the need to disclose classified information. Even where prosecution on certain charges would risk unacceptable intelligence disclosures notwithstanding CIPA's protections, prosecutors can still often bring lesser, more readily provable charges that avoid the need to disclose intelligence but still carry substantial penalties.

Indeed, the government has leveled a host of allegations against Padilla, seemingly providing a variety of prosecutorial options. *See* Declaration of Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism (Aug. 27, 2004), attached to Respondent's Answer to the Petition for Writ of Habeas Corpus as Exh. B. If, for example, the government could prove simply its allegation that Padilla completed a training application at an al Qaeda camp in Afghanistan, *see* Rapp Decl. ¶ 8, a prosecution would appear viable under the material support statute, 18 U.S.C. § 2339B. *Cf. United States v. Goba*, 220 F. Supp. 2d 182, 193-94 (W.D.N.Y. 2002) (upholding use of material support statute to prosecute the so-called "Lackawanna Six" for attending an al Qaeda training

camp); *United States v. Lindh*, 212 F. Supp. 2d 541, 577 (E.D. Va. 2002) (upholding use of statute to prosecute John Walker Lindh for attending a terrorist training camp).[4] Similarly, if the government could prove merely its allegation that, upon his arrest in Chicago, Padilla falsely denied to FBI agents that he had ever been to Afghanistan, *see* Rapp Decl. ¶ 14, it could proceed to prosecute Padilla for making a false representation to a federal officer, in violation of 18 U.S.C. § 1001. *Cf. United States v. Mohamed*, Crim. No. 03-3433, slip. op. (S.D. Ca. Jan. 26, 2005) (finding classified information sought by the defendant to be irrelevant in § 1001 prosecution for lying to government officer about ties to charities linked to terrorist fund-raising).[5] These sorts of options are far superior alternatives to the raw power to place citizens in indefinite military detention that the Executive claims here. Without requiring clear guidance from Congress before such power is granted, the Executive has little incentive to explore such alternatives.

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[4] A violation of the material support statute is punishable by up to 15 years' imprisonment. *See* 18 U.S.C. § 2339B(a)(1).

[5] A violation of 18 U.S.C. § 1001 is punishable by up to 8 years' imprisonment where the violation occurs in connection with a terrorism investigation. *See* 18 U.S.C. § 1001(a).

Third, in the absence of congressional consideration and guidance with respect to these matters, the courts are put at a severe disadvantage in conducting judicial review in this case. Whatever national security concerns may lie behind the Executive's detention of Padilla, they have been only hazily identified so far. Unassisted, the courts have limited means of evaluating what license should be given to the Executive in response to those concerns and what lines should be drawn. The courts should not be left to guess at these matters. Both prudence and respect for the separation of powers demand that the Executive obtain direct answers from Congress before the courts proceed any further.

Indeed, it is particularly inappropriate for the Executive to seek new detention powers in the courts rather than Congress in the context of this litigation, given that the original rationale cited for the military detention of Padilla – the need for effective interrogation – is now *moot*. The government stated at the very beginning of the second round of this litigation that "[t]he military has ceased its interrogation of petitioner . . . and has no present intention to resume interrogation of him." Respondent's Answer to the Petition for Writ of Habeas Corpus at 24 (filed Aug. 30, 2004). Why Padilla's military detention continues to be necessary is thus left a mystery, especially given the wealth of prosecutorial options seemingly open to the government if its allegations against Padilla have merit. One cannot know the government's true motives for pressing ahead with this

litigation in its current posture. But it is entirely possible that the government seeks to use this litigation simply as a test case to establish the bounds of its detention power in future cases.

That function, however, is one of law-making that properly belongs to the legislature; the courts do not sit to issue advisory opinions. If there are lessons to be learned from this case – if permanent changes to our laws need to be made in order to enable the Executive to detain and interrogate terrorism suspects in the future – then the Executive needs to take the matter to Congress where it can be considered in full. The Executive cannot be permitted to skip this step of the democratic process and use the courts as an advisory sounding board in the legislature's place. "[T]he Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. . . . The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." *Youngstown*, 343 U.S. at 588-89.

III. THE SUPREME COURT'S DECISION IN *HAMDI* IS FUNDAMENTALLY DISTINGUISHABLE AND CANNOT JUSTIFY DEPARTING FROM THE CLEAR STATEMENT RULE IN THIS CASE.

As the foregoing considerations demonstrate, from a functional perspective, a finding of congressional authorization here is unwarranted, for Congress has not given appropriate consideration to the weighty policy issues at stake. It is thus unsurprising that the government advances a formalistic, rather than functional,

argument in support of its position: the government argues that this case is indistinguishable from *Hamdi* in that Padilla and Hamdi both allegedly allied themselves with enemy forces during U.S. military operations in Afghanistan in 2001; hence, the AUMF must be read to authorize military detention of Padilla in the same fashion as Hamdi. Gov't Br. 23-24.

The government's attempt to retrofit this case to meet the specifications of *Hamdi*, however, ignores "the context of [the *Hamdi*] case: a United States citizen captured in a *foreign* combat zone." *Hamdi*, 124 S. Ct. at 2643 (emphasis in original). Regardless of whether Padilla was in Afghanistan in the fall of 2001 and allied with enemy forces there, the fact remains that he was arrested months later by law enforcement authorities at Chicago's O'Hare International Airport.

Although the government would dismiss this critical distinction as a newfangled "locus-of-capture rule" invented by the district court, Gov't Br. at 24, it is hardly a novel or frivolous concept. Once the Executive's control of the military is allowed to be "turned inward," *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring), the liberties of the entire citizenry are exposed. Accordingly, the Supreme Court has long recognized that, notwithstanding the broad deference owed the President in his conduct of military operations abroad, "Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy." *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). The

foreign/domestic dividing line has thus long served as a clear Rubicon, which the Executive *qua* Commander-in-Chief cannot cross without clear authorization from Congress.

Extending the holding in *Hamdi* to this case would erase that bright-line boundary; and no principled intermediary position lies in sight. The government suggests that the extension of *Hamdi* it seeks here is a limited one: *Hamdi* allowed military detention of a U.S. citizen captured on a foreign battlefield; here, the government claims that it merely seeks military detention of a U.S. citizen who allegedly was on that same battlefield at one time, even though not captured there. But this latter limitation is artificial and highly unstable – especially given the government's broad and fluid conception of the "battlefield" in the context of the global struggle against terrorism.[6] There are indeed no crisp distinctions to be drawn between the fact pattern in this case – a U.S. citizen arrested inside the United States, alleged to have received al Qaeda training in Afghanistan and to

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[6] *See, e.g.*, *In re Guantanamo Detainees*, Civ. No. 02-0299 (D.D.C. Dec. 1, 2004), Tr. on Mot. to Dismiss. The district court at the hearing noted that many Guantanamo detainees have been captured far from Afghanistan and thus asked government counsel, "[W]hat and where is the, quote, battlefield?" Counsel responded that, while the initial war after September 11 was fought in Afghanistan, the nation's broader conflict with Al Qaeda is of "global reach," and "there's nothing in the [*Hamdi*] opinion that would suggest that this broader conflict . . . is beyond the reach of military force." *Id.* at 19-21.

have been there during U.S. military operations in 2001 – and various other fact patterns that have arisen already to date and will likely continue to arise in the future, *e.g.*:

- a U.S. citizen arrested in the United States, alleged to have received al Qaeda training in Afghanistan but to have left before U.S. military operations began in 2001[7];

- a U.S. citizen arrested in the United States, alleged to have received al Qaeda training while U.S. military operations were ongoing in Afghanistan, but elsewhere than in Afghanistan[8]; or

- a U.S. citizen arrested in the United States, alleged to have joined or provided support to al Qaeda or any other terrorist group inimical to U.S. interests, at any time or at any place.[9]

The clear statement rule exists precisely to ensure that courts are not left without compass as the nation moves into uncharted territory. It *must* have

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[7] *Cf., e.g.*, Matthew Purdy & Lowell Bergman, *Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 13, 2003, at A1 (discussing facts of the Lackawanna Six prosecution).

[8] *Cf., e.g.*, Dean E. Murphy & David Johnston, *California Father and Son Face Charges in Terrorism Case*, N.Y. TIMES, Jun. 9, 2005, at A18 (discussing arrest of two U.S. citizens alleged to have attended al Qaeda training camp in Pakistan over the past two years).

[9] *Cf., e.g.*, Eric Lichtblau, *Ex-Professor Is Called Terrorist Leader*, N.Y. TIMES, Jun. 7, 2005, at A18 (describing case of University of Florida professor alleged to have been U.S.-based leader of Palestinian Islamic Jihad, described by prosecution in its opening statement as "one of the most deadly terror organizations on earth").

application in this case if it is to have any traction at all in an age of terrorism. An ambiguous Congressional authorization that by all appearances was addressed to military operations abroad cannot obviate the need for a clear statement where, as here, the Executive seeks to oust Article III courts from their core responsibility of adjudicating the guilt of an American citizen arrested on American soil. Nothing in *Hamdi* suggests otherwise.

CONCLUSION

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

Dated: June 14, 2005 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of *Amicus Curiae* in Support of Affirmance complies with the type and length requirements specified in Federal Rule of Appellate Procedure 29(d) and 32(a)(7). The Brief contains 6,460 words, exclusive of the Table of Contents, Table of Authorities, and Certificates of Counsel.

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Serrin Turner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the foregoing Brief of *Amicus Curiae* in Support of Affirmance by first-class mail this 14th of June, 2005, upon each of the following counsel:

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