No. 05-6396

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSE PADILLA,
Petitioner-Appellee,

v.

COMMANDER C.T. HANFT, U.S.N. Commander,
Consolidated Naval Brig,
Respondent-Appellant.

On Appeal from the United States District Court
for the District of South Carolina, Charleston Division,
No. 02:04-2221-26AJ

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT-APPELLANT SUPPORTING REVERSAL

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302
Counsel for *Amici Curiae*

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to ensure that the federal government possesses the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Rumsfeld v. Padilla,* 124 S. Ct. 2711 (2004); *Hamdi v. Rumsfeld,* 124 S. Ct. 2633 (2004); *Rasul v. Bush,* 124 S. Ct. 2686 (2004); *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir., dec. pending); *Al Odah v. United States,* No. 05-5064 (D.C. Cir., dec. pending). WLF also filed an *amicus curiae* brief in the U.S. Court of Appeals for the Second Circuit when Respondent's habeas corpus petition was before that court. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd,* 124 S. Ct. 2711 (2004).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the federal courts on national security-related issues on a number of occasions.

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

STATEMENT OF THE CASE

Petitioner-Appellee Jose Padilla was taken into custody by the federal government in Chicago in May 2002 while he was attempting to re-enter the country on a commercial flight. On June 9, 2002, President George W. Bush issued an order designating Padilla an "enemy combatant" and directing that he be transferred to the control of the military. The President's order determined that Mr. Padilla "is closely associated with al Qaeda, an international terrorist organization with which the United States is at war," that he had "engaged in conduct that constituted hostile and war-like acts," and that he "represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." Padilla, a U.S. citizen, has been detained without criminal charges since June 2002 at a military facility in South Carolina.

According to Respondent-Appellant Hanft (Padilla's immediate custodian), Padilla's hostile actions spanned a period of two years. In the summer of 2000, Padilla traveled to Afghanistan where, in July, he applied to al Qaeda for jihad-

related military training. *See* Declaration of Jeffrey N. Rapp ("Rapp Decl."), ¶ 8.[1] In September and October of 2000, he received military training at an al Qaeda-affiliated training camp in Afghanistan. *Id.* For three months in late 2000, he served military duty, guarding a Taliban outpost north of Kabul; while doing so, he was armed with a Kalashnikov assault rifle. *Id.*

While in Afghanistan and Pakistan, Padilla plotted and trained for two separate missions designed to kill American civilians. In early 2002, Padilla plotted with a senior Osama bin Laden lieutenant regarding terrorist operations involving the detonation of explosive devices in the United States. *Id.*, ¶ 10. In furtherance of those plans, Padilla conducted research on construction of an atomic bomb at an al Qaeda safe house in Pakistan. *Id.*

Padilla also plotted to blow up apartment buildings in the United States, a task he accepted in the summer of 2001. *Id.*, ¶ 11. In furtherance of those plans, that summer Padilla underwent explosives training in Kandahar. *Id.* The apartment building plot was revived in March 2002 while Padilla was in Pakistan. *Id.*, ¶ 12. Pursuant to the plot, Padilla underwent further training, then accepted

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[1] For purposes of this appeal from the grant of Padilla's motion for summary judgment, the Court should construe the facts in the light most favorable to the federal government. *Bishop v. Wood,* 426 U.S. 341, 347 (1976).

$15,000 to assist in carrying out his mission and departed for the United States. *Id.* At the time of his capture in Chicago in May 2002, "Padilla was an operative of the al Qaeda terrorist organization with which the United States is at war." *Id.*, ¶ 13.

Padilla was staying at an al Qaeda safehouse in the Kandahar vicinity at and following the time of al Qaeda's September 11, 2001 attacks on the United States. *Id.*, ¶ 9. After the U.S. launched combat operations against al Qaeda and the Taliban in Afghanistan, Padilla and other al Qaeda operatives "began moving from safehouse to safehouse in an effort to avoid being bombed or captured by U.S. or coalition forces." *Id.* As al Qaeda's military situation deteriorated, Padilla -- armed with a rifle and accompanied by other al Qaeda operatives -- began moving toward the Pakistan border. *Id.*, ¶ 10. As the Rapp Declaration pointedly notes, "Padilla was thus armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States and its coalition partners." *Id.* Padilla and other al Qaeda operatives, with the assistance Taliban escorts, eventually made their way into Pakistan where, as noted above, Padilla met with other al Qaeda operatives to resume their plotting against American targets. *Id.*

Following dismissal of his initial habeas corpus petition on jurisdictional grounds, Padilla filed this petition in U.S. District Court for the District of South Carolina in July 2004. The petition alleged that Padilla's detention without criminal charges violated his rights under the U.S. Constitution and 18 U.S.C. § 4001(a). The petition also alleged that, under the Fifth Amendment's Due Process Clause, he was entitled to a hearing at which he could contest the factual bases for the government's determination that he is an enemy combatant. Padilla subsequently moved for summary judgment on the issue of the President's authority to detain him without criminal charges.

In a Memorandum and Opinion dated February 28, 2005 ("Mem. Op."), the district court granted Padilla's summary judgment motion and directed Commander Hanft to release Padilla within 45 days. The court ruled that the under the U.S. Constitution, "the detention of a United States citizen by the military is disallowed without explicit Congressional authorization." Mem. Op. 16, 19-21. The court ruled that, far from authorizing such detentions, Congress had explicitly prohibited such detentions when it adopted the Non-Detention Act, 18 U.S.C. § 4001(a). *Id.* While acknowledging that § 4001(a) permits such detentions "pursuant to an Act of Congress," the court held that Congress had not

adopted any laws authorizing detention of citizens under the facts as alleged by the government.

Specifically, the court held that the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), was not an "Act of Congress" authorizing Padilla's detention outside of the criminal justice system. *Id.* 16-18. Stating that the AUMF does not *explicitly* authorize anyone's detention, the court held that the statute's language should be interpreted in light of a presumption "'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 17 (quoting *Ex Parte Endo,* 323 U.S. 283, 300 (1944)). Applying that presumption, the court concluded that the AUMF did not authorize Padilla's detention because "there is no language that 'clearly and unmistakably' grants the President authority to hold Petitioner as an enemy combatant." *Id.* at 17-18. Although the district court made no mention of the Supreme Court's interpretation of the AUMF in the *Hamdi* case,[2] it added this caveat to its AUMF

[2] In *Hamdi v. Rumsfeld* ["*Hamdi V*"], 124 S. Ct. 2633 (2004), the Supreme Court held that the AUMF "is explicit congressional authorization for the detention" of an American citizen who allegedly was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there. *Hamdi V*, 124 S. Ct. at 2639-40 (plurality); *id.* at 2679 (Thomas, dissenting) (same).

analysis:

> [W]hereas it may be a necessary and appropriate use of force to detain a United States citizen who is captured on the battlefield, this Court cannot find, in narrow circumstances presented in this case, that the same is true when a United States citizen is arrested in a civilian setting such as an United States airport.

Id. at 17.

This appeal followed. On April 11, 2005, the Court granted the federal government's motion to stay the judgment pending appeal.

SUMMARY OF ARGUMENT

Contrary to the district court's decision, Congress has not prohibited "enemy combatant" detentions of American citizens captured within the United States. As this Court recognized in *Hamdi v. Rumsfeld* ["*Hamdi III*"], 316 F.3d 450, 467-68 (4th Cir. 2003), *vacated and remanded on other grounds*, 124 S. Ct. 2633 (2004), it is highly doubtful that the Non-Detention Act, 18 U.S.C. § 4001(a), has any application to the detention of American citizens alleged to be enemy combatants. Moreover, even if § 4001(a) were applicable – and thereby prohibited the detention of an American citizen "except pursuant to an Act of Congress" – the Supreme Court has explicitly held that the AUMF is just such a congressional act. The Court held that the detention (for the duration of

hostilities) of citizens situated as is Padilla is "an exercise of the 'necessary and appropriate force' Congress [through adoption of the AUMF] has authorized the President to use." *Hamdi v. Rumsfeld* ["*Hamdi V*"], 124 S. Ct. 2633, 2640 (2004) (plurality); *id.* at 2679 (Thomas, J., dissenting). The district court argued that *Hamdi V* is distinguishable because Padilla was captured at O'Hare Airport in Chicago, while Yasser Hamdi, the citizen whose detention was at issue in *Hamdi V*, was captured on a foreign battlefield. But nothing in *Hamdi V* suggests that the place of capture affects the President's authority under the AUMF to detain American enemy combatants. Indeed, *Hamdi V*'s rationale for upholding the detention of American enemy combatants captured in Afghanistan applies equally strongly to the detention of American enemy combatants captured in Chicago.

The district court's reliance on Judge Wilkinson's "apples and oranges" comment is misplaced. *See Hamdi v. Rumsfeld* ["*Hamdi IV*"], 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring in the denial of rehearing *en banc*) ("To compare this battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges."). Judge Wilkinson was referring to potential differences in the government's evidentiary burden in establishing that an

American detainee is, in fact, an enemy combatant. Judge Wilkinson never suggested that the AUMF itself distinguishes between authorized and unauthorized detentions depending on the place of capture. Indeed, if the government can establish, after an evidentiary hearing, that Padilla is an enemy combatant, its authority under the AUMF to continue to detain him would be unassailable even if, contrary to its allegations, Padilla had not traveled to Chicago for the purpose of committing hostile acts within the United States.

Moreover, President Bush would be authorized to continue to detain Padilla even if Congress had not explicitly authorized the detention; or even if Congress had purported to prohibit it. Under Article II, § 2 of the Constitution, the President enjoys broad inherent powers as Commander in Chief of American armed forces "to detain those captured in armed struggle." *Hamdi III*, 316 F.3d at 463. *See also Hamdi v. Rumsfeld* ["*Hamdi II*"], 296 F.3d 278, 281-82 (4th Cir. 2002) ("The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2."). When national security is threatened, the President need not await authorization from Congress before undertaking a military response. *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 320 (1936).

ARGUMENT

I. THE GOVERNMENT'S DETENTION OF PADILLA DOES NOT VIOLATE § 4001(a) AND IS AUTHORIZED BY THE AUMF

A. The Supreme Court in *Hamdi V* Determined that Congress Has Authorized Detention of Americans Who Have Acted as Padilla Is Alleged to Have Acted

The district court acknowledged that the Congress, when it adopted the Non-Detention Act, excepted detentions "pursuant to an Act of Congress." Mem. Op. 16-17. The court held that the AUMF was not such an act; it held that although the AUMF authorizes the detention of a United States citizen captured on "the battlefield," it does not authorize the detention of a United States citizen captured "in a civilian setting such as an United States airport." *Id.* at 17.

The district court's interpretation of the AUMF is erroneous. The Supreme Court in *Hamdi V* held that the AUMF authorizes detention of U.S. citizens who have acted as Padilla is alleged to have acted. For purposes of its decision, the Supreme Court defined an "enemy combatant" as an individual who "was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." *Hamdi V*, 124 S. Ct. at 2639 (plurality) (internal quotations omitted).

The Court then held that Congress, when it adopted the AUMF, had authorized the detention of U.S. citizens falling within that category:

> We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they are captured, is so fundamental and accepted an incident of war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

Id. at 2640; *id.* at 2679 (Thomas, J., dissenting).

Accepting the allegations of the Rapp Declaration, Padilla falls precisely within the category of U.S. citizens whose detention, according to the Supreme Court, is authorized by the AUMF. Padilla quite clearly is alleged to have been "part of or supporting forces hostile to the United States or coalition partners in Afghanistan." He is alleged to have: (1) carried out military functions for the Taliban north of Kabul in 2000; (2) plotted and trained in Afghanistan with al Qaeda in 2001 and 2002 for two separate missions to kill American civilians; (3) been present with al Qaeda forces in Kandahar in the period following the launch of U.S. combat operations against al Qaeda and the Taliban in 2001; and (4) while fighting continued, armed himself with a rifle and accompanied other al Qaeda operatives traveling into Pakistan in late 2001. Rapp Decl. ¶¶ 8-13. By arming himself and being present in the combat zone during hostilities between al

Qaeda/Taliban forces and the armed forces of the United States and its coalition partners, Padilla also quite clearly "engaged in an armed conflict against the United States" in Afghanistan.

Hamdi V's definition of American "enemy combatants" whose detention is authorized by the AUMF says nothing about the location of capture. Thus, the AUMF authorizes the detention of Americans who act as Padilla is alleged to have acted, regardless that Padilla managed to escape from Afghanistan and reach Chicago before being captured.

Moreover, the rationale underlying *Hamdi V*'s interpretation of the AUMF is fully applicable here. As the Court recognized, throughout our nation's history, the military regularly has detained enemy combatants captured in connection with military operations – both Americans and aliens, and both within American territory and overseas. *Hamdi V*, 124 S. Ct. at 2640. Indeed, detention of enemy combatants without charges until the cessation of hostilities is the well-accepted norm under the laws of war. *See, e.g., Ex Parte Quirin*, 317 U.S. 1, 28, 31 (1942) ("An important incident to the conduct of war is . . . to seize" enemy combatants; both lawful and unlawful combatants "are subject to capture and detention"); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946)

("Those who have written texts upon the subject of prisoners of war agree that all persons who are active in opposing an army in war may be captured.").

The decision below stands in sharp contrast to that history. Without questioning the President's findings that Padilla is an enemy combatant who has committed hostile and war-like acts at the behest of al Qaeda and that his detention is necessary to prevent him from attacking the United States, the district court held that the President lacks the authority to order Padilla's detention. Mem. Op. 17. That challenge to the President's authority as Commander in Chief of American military forces is as misguided as it is unprecedented. Congress explicitly authorized the President to use "all necessary and appropriate force" against all nations or organizations (including, most obviously, al Qaeda) involved in the September 11, 2001 attacks on the United States. In light of the centuries-long military practice of detaining captured enemy combatants for the duration of hostilities, *Hamdi V*'s conclusion is unsurprising: Congress authorized the President to detain any and all Taliban and al Qaeda operatives who fought against the United States and its coalition partners in Afghanistan. *Hamdi V*, 124 S. Ct. at 2640.

Moreover, even if the AUMF had not authorized Padilla's detention, there

would be little basis for contending that Congress had intended to *bar* his detention – because, as the Court recognized in *Hamdi III*, it is highly doubtful that the Non Detention Act has any application to the detention of American citizens alleged to be enemy combatants. In rejecting Yasser Hamdi's contention that § 4001(a) barred his detention, the Court observed:

> It has been clear since at least 1942 that "citizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." [*Ex Parte*] *Quirin*, 317 U.S. [1,] 37 [(1942)]. If Congress had intended to override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit.

Hamdi III, 316 F.3d at 468. It is particularly noteworthy that the Court cited *Quirin* for this proposition – a case in which American and German enemy combatants had been captured within the United States, away from any traditional battlefield. Accordingly, the Court in *Hamdi III* plainly understood that its interpretation of § 4001(a) – that it did not apply to military detentions – was not dependent on whether an enemy combatant was captured on the field of battle.

But even if § 4001(a) were applicable, *Hamdi V* makes clear that that statute does not bar Padilla's detention. The district court arrived at its contrary conclusion only by reading far more into § 4001(a) than its language will bear. It

held that § 4001(a) permits detention of an American citizen only when Congress adopts legislation in which such an intent is "clearly and precisely indicated by the language they used." Mem. Op. 17. But § 4001(a) includes no such requirement; the statute permits detentions "pursuant to an Act of Congress." Nothing in the language of § 4001(a) suggests that Congress intended to prohibit detention of citizens captured in the U.S. in the absence of statutory language making explicit reference to detention, even when (as *Hamdi V* held) the natural reading of a subsequently enacted statute indicates that Congress intended to permit the detention of certain enemy combatants without regard to their citizenship.

Padilla's effort to compare his detention to detention under the (repealed and largely discredited) Emergency Detention Act of 1950, 50 U.S.C. § 812, 64 Stat. 1019 (1950), is not well taken.[3] That act permitted the President to detain individuals if he had reason to believe that they "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." *Id.* at § 813. While the repeal of the Emergency Detention Act is a strong indication that Congress has not authorized detention of citizens based on a

[3] The Emergency Detention Act of 1950 was repealed in 1970 by the Non-Detention Act.

mere suspicion of *future* criminal activity, Padilla is not being detained on such grounds. Rather, he is being detained because the President has determined that he is an al Qaeda operative who fought against American forces in Afghanistan.

Contrary to the district court's suggestions, there is no similarity between the President's decision to detain an American citizen without criminal charges as an enemy combatant and the World War II detention of thousands of American citizens of Japanese ancestry. The internment of those citizens has been justly condemned because there was no showing that any of the detainees was disloyal or posed a threat to national security; rather, they were detained based solely on racial consideration. *Ex Parte Endo*, 323 U.S. 283, 302 (1944) ("A citizen who is concededly loyal presents no problem of espionage or sabotage. . . . When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized."). Conversely, once the President determined that Padilla is an al Qaeda operative who supported forces hostile to the United States in Afghanistan, he would have been derelict in his duties as Commander in Chief were he not to detain Padilla for the duration of hostilities.

B. The District Court's Reliance on Judge Wilkinson's "Apples and Oranges" Comment Is Misplaced

In holding that the AUMF authorizes detention of American enemy combatants only if they are captured on a foreign battlefield, the district court relied in part on Judge Wilkinson's concurring opinion in *Hamdi IV*. Mem. Op. 10. That reliance is misplaced; Judge Wilkinson's comments were unrelated to the meaning of the AUMF, an issue that played no part in *Hamdi IV*.

In response to contentions that place of capture is irrelevant to the government's evidentiary burden in demonstrating that an American citizen is, in fact, an enemy combatant, he wrote: "To compare this battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges." *Hamdi IV,* 337 F.3d at 344 (concurring in the denial of rehearing *en banc*). That issue was not decided by the Supreme Court in *Hamdi V*; it declined to provide any precise guidance regarding how much evidence the government would need to provide in order to establish that an American is, indeed, and enemy combatant. There may be sound reasons for imposing a somewhat lesser evidentiary burden on the government when an American being detained as an enemy combatant was captured on a foreign battlefield. It is somewhat more likely that an American found armed on a foreign battlefield is an enemy combatant than it would be if

that same American were found unarmed at O'Hare Airport. But those evidentiary issues are not now before the Court; this appeal turns on the meaning of the AUMF. Nothing in Judge Wilkinson's comments suggests that the place of capture is relevant to the government's detention authority under the AUMF.

Moreover, if the government can establish, after an evidentiary hearing, that Padilla is an enemy combatant, its authority under the AUMF to continue to detain him would be unassailable even if, contrary to its allegations, Padilla had not traveled to Chicago for the purpose of committing hostile acts within the United States. If, for example, he had come to Chicago wearing an al Qaeda uniform but intent only on visiting his family, he would still have been just as much an "enemy combatant" under the definition adopted by the Supreme Court in *Hamdi V.* Indeed, the fact that his detention is not dependent on his having come to the United States for the purpose of killing Americans puts to rest the district court's contention that – because the government believes that Padilla came here for criminal purposes – it may only detain him if it chooses to deal with him through the criminal justice system. That contention leads to the illogical result that the government could have dealt with Padilla much more harshly if he had come to the United States without any hostile intent.

II. The President Has Inherent Authority to Detain Padilla

President Bush would be authorized to continue to detain Padilla even if Congress had not explicitly authorized the detention; or even if Congress had purported to prohibit it. Under Article II, § 2 of the Constitution, the President enjoys broad inherent powers as Commander in Chief of American armed forces "to detain those captured in armed struggle." *Hamdi III*, 316 F.3d at 463. *See also Hamdi v. Rumsfeld* ["*Hamdi II*"], 296 F.3d 278, 281-82 (4th Cir. 2002) ("The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2."). When national security is threatened, the President need not await authorization from Congress before undertaking a military response.

The government's brief has thoroughly catalogued the President's inherent authority under the Constitution; *amici* will not repeat those arguments here. Suffice to say, the President's pre-eminent role in military and foreign policy matters was recognized by the Founding Generation and has continued to be recognized by this Court. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'")

(quoting U.S. Representative John Marshall (10 *Annuls of Cong.* 613 (1800))). *See also Zadvydas v. Davis,* 533 U.S. 678, 696 (2001) ("heightened deference to the judgments of the political branches with respect to foreign policy" is particularly warranted with respect to terrorism-related issues); *Rostker v. Goldberg,* 453 U.S. 57, 66 (1981); *Quirin*, 317 U.S. at 25; *The Three Friends*, 166 U.S. 1 (1897); *The Prize Cases*, 67 U.S. (2 Black) at 670. As Alexander Hamilton reasoned in the Federalist Papers:

> [T]he direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms [a vital] and essential . . . definition of the executive authority.

The Federalist No. 74 at 447 (Clinton Rossiter, ed., 1961).

In his first *Pacificus* essay, his 1793 defense of President Washington's proclamation of neutrality, Hamilton outlined his vision of the President's broad authority over military and foreign policy matters. He observed:

> It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly -- and ought to be extended no further than is essential to their execution.

15 *The Papers of Alexander Hamilton* 42 (Harold C. Syrett, ed., 1969). *See*

generally, H. Jefferson Powell, "The Founders and the President's Authority Over Foreign Affairs," 40 WM. & MARY L. REV. 1471 (1999).

The district court nonetheless insisted that the President's Commander-in-Chief powers do not authorize him to detain U.S.-citizen enemy combatants captured in the United States. Mem. Op. 20. The court held that Executive actions taken in the "domestic" sphere are subject to control by Congress: "'Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.'" *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 644 (1952) (Jackson, J., concurring)).

The district court's reliance on *Youngstown* is misplaced. The court misperceived the distinction *Youngstown* attempted to draw between the external and domestic spheres. That case was a challenge to President Truman's April 1952 executive order, temporarily taking possession of steel plants to avoid a work stoppage arising from a labor dispute between steel companies and organized labor. In striking down the executive order, the Court held that the President's military powers could not justify seizing steel mills (based on a claim that steel production was critical to the Korean War effort):

> The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed

> Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military commanders.

Youngstown, 343 U.S. at 587.

The quoted passage makes clear that the President's military powers were unavailing *not* because he was attempting to invoke them within the borders of the United States. Rather, those powers were unavailing because labor disputes at privately owned domestic steel mills could not reasonably be deemed a part of the "theater of war." In contrast, President Bush's decision to detain Padilla after determining that he is an enemy combatant is precisely the type of decision routinely made by military commanders in the exercise of their military powers. *Youngstown* makes clear that the President is not prohibited from exercising those powers in this case simply because the "theater of war," for the first time since the Civil War, now includes U.S. territory. Indeed, it makes little sense to suggest that the President's constitutional authority over military affairs is less extensive in a war fought to repel foreign invasion than in an oversees war.

In sum, any decision that would interpret the AUMF as denying the President authority to detain U.S.-citizen enemy combatants captured domestically would raise serious concerns regarding the AUMF's constitutionality. In order to avoid those concerns, the Court should interpret the AUMF as authorizing Padilla's detention.

CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court reverse the district court's grant of summary judgment to Petitioner-Appellee.

Respectfully submitted,

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Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for *amicus curiae*

Dated: May 17, 2005

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation (WLF), *et al*. Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 6.0), the word count of the brief is 5,267, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

_____

Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 17th of May, 2005, I deposited two copies of the *amicus* brief of Washington Legal Foundation, *et al.,* in the U.S. Mail, postage prepaid, addressed as follows:

Stephen E. Oestreicher
U.S. Dept of Justice
PO Box 899, Ben Franklin Station
Washington, DC 20044

Jonathan Marc Freiman
Wiggin & Dana
195 Church St.
PO Box 1832
New Haven, CT 06508

_____
Richard A. Samp