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

REPLY BRIEF FOR THE APPELLANT

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ARGUMENT

Padilla attempts to distinguish this case from *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004), by arguing that he, unlike Hamdi, was captured in the United States and that the place of his capture should make a dispositive difference. But Padilla provides no convincing reason why the place of capture of an individual taking up arms on a foreign battlefield should be dispositive — or, more to the point, why the government should lose its conceded authority to detain a battlefield combatant

merely because the combatant escaped capture on the battlefield and came to the United States intent on committing further hostile acts here. Nor is there any such reason. The Court in *Hamdi* upheld the President's authority to detain enemy combatants who took up arms against the United States and its allies on foreign battlefields, and grounded that authority in the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001). It would blink reality to conclude that the Congress that enacted the AUMF on September 18, 2001, wanted to authorize capture on a foreign battlefield and detention in the United States, but not capture and detention in the United States, of one who waged war on a foreign battlefield, evaded capture, and came to the United States intent on committing warlike acts similar to those that prompted the AUMF's enactment.

Padilla's failure on that point is symptomatic of his broader refusal to come to terms with the Supreme Court's decision in *Hamdi*. There, the Court held, in the face of virtually all of the arguments that Padilla reprises before this Court, that the AUMF authorizes the detention of United States citizens who wage war against the United States on foreign battlefields. *Hamdi*, 124 S. Ct. at 2640-2641 (plurality); *accord id.* at 2679 (Thomas, J., dissenting). Nothing in *Hamdi* suggests that any of those unavailing arguments would be stronger in the context of a citizen who not only took up arms on a foreign battlefield but also returned to the United States to commit

further warlike acts. To the contrary, the Court reaffirmed *Ex parte Quirin*, 317 U.S. 1 (1942)—which upheld the military detention of a United States citizen captured in the United States—as the single most apposite precedent. *Hamdi*, 124 S. Ct. at 2643 (plurality); *accord id.* at 2682 (Thomas, J., dissenting).

Most of Padilla's arguments simply do not survive *Hamdi*. He contends that a clear statement is required to authorize detention, but *Hamdi* did not adopt any such test and in any event held that the AUMF is clear enough. 124 S. Ct. at 2639-2640 (plurality); *accord id.* at 2679 (Thomas, J., dissenting). Padilla relies on the Suspension Clause of the United States Constitution, but the *Hamdi* Court found no violation of the Clause. *Id.* at 2643 (plurality); *accord id.* at 2682 (Thomas, J., dissenting). And the logic of *Hamdi*, including its reliance on the broadly-phrased AUMF and its reaffirmance of *Quirin*, forecloses any attempt to distinguish *Hamdi* on the ground that Hamdi was captured on a foreign battlefield instead of in the United States.

I. The President Has Authority Under Congress's Authorization Of Force To Detain Padilla As An Enemy Combatant

The AUMF authorizes Padilla's detention no less than Hamdi's detention. Padilla claims that the Executive asserts authority to "detain any American, anywhere,

and at any time" as an enemy combatant. Br. 33; *see also id.* at 10, 27.[1] The actual question before the Court, however, is the much narrower one of whether the President may order Padilla's detention in light of the facts that he: trained with and was closely associated with al Qaeda both before and after September 11, 2001; engaged in armed conflict against the United States and allied forces in Afghanistan; and, after eluding our forces on the battlefields of Afghanistan, accepted a mission from al Qaeda to enter the United States and carry out attacks on our citizens within our own borders. *See* Gov't Br. 6-12; R. 23 (Ex. B), Rapp Dec. ¶¶ 8-15, App. 19-24.

Thus, it is Padilla, not the government, who seeks a truly broad holding. Under Padilla's view of the law, the *only* relevant facts are that he is a United States citizen and was first detained in a civilian setting in the United States. Br. 5.[2] That would be a broad holding indeed, because it would mean that such persons could never be detained as enemy combatants no matter what acts of war they had undertaken, or

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[1] Hereinafter, Padilla's brief is referred to as "Br." and the government's opening brief is referred to as "Gov't Br." As in that opening brief, "R." refers to the pertinent district court docket number; "App." refers to the joint appendix; "Rapp Dec." refers to the August 27, 2004, declaration of Jeffrey N. Rapp; and "Mem." refers to the memorandum in support of Padilla's October 20, 2004, motion for summary judgment.

[2] Padilla apparently views the place of *initial* capture as dispositive, because he focuses on his arrest in the customs inspection area of O'Hare airport as opposed to his subsequent transfer to the military in New York. *See* Br. 4.

were planning to undertake, against the United States. In contrast, the government merely seeks a reaffirmation of its authority to stop at the border an individual who is an enemy combatant under both *Hamdi* and *Quirin*.

A. Padilla Is A Classic Battlefield Combatant Subject To Military Detention Under *Hamdi*

In *Hamdi*, the Supreme Court held in no uncertain terms that the AUMF authorizes the President to detain as an enemy combatant "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." 124 S. Ct. at 2639 (plurality opinion) (internal quotation marks omitted); *accord id*. at 2679 (Thomas, J., dissenting).[3] Padilla's actions in Afghanistan fall precisely within that definition of enemy combatant and thus subject him to military detention pursuant to the AUMF, unless the place of initial detention has dispositive significance.

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[3] Contrary to Padilla's contention, the government has never claimed that "Justice Thomas's lone dissenting voice is * * * the narrowest grounds of those [Justices] who concurred in the judgment[ ]" in *Hamdi* and thus represents the holding of the Court. Br. 12 n.3 (internal quotation marks and emphasis omitted). Rather, the government has argued that "[t]he plurality opinion of Justice O'Connor in *Hamdi* is the controlling opinion with respect to the President's authority to detain enemy combatants." Gov't Br. 21 n.3. Padilla does not appear to dispute that point.

Instead of joining issue on that point, Padilla reiterates the same arguments he raised during the first round of this litigation, *before* it became clear that he, just like Hamdi, had carried an AK-47 assault rifle in Afghanistan and engaged in armed conflict against our forces there.[4] Most of Padilla's renewed arguments were rejected in *Hamdi*, and this Court need go no further than *Hamdi* to reject them again.

1. There is no clear-statement rule.

The *Hamdi* Court declined to adopt a rule requiring that military detention be "clearly and unmistakably" authorized. Br. 11-18. And, in any event, whatever degree of clarity is required, *Hamdi* plainly found that the AUMF authorized military detention of battlefield combatants with the requisite precision. Just as Padilla does here, Hamdi argued for a clear-statement rule based on *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946), *Ex parte Endo*, 323 U.S. 283 (1944), and *Brown* v. *United States*,

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[4] Although Padilla correctly notes that "[t]he government has always alleged that Padilla was in Afghanistan during the fighting in 2001-02," Br. 31 n.22, being in Afghanistan is a far cry from being an armed participant in military conflict there. *See Hamdi*, 124 S. Ct. at 2645 (plurality) ("An assertion that one *resided* in a country in which combat operations are taking place * * * certainly is not a concession that one was 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.' "). Thus, the record has changed substantially since the earlier round of litigation. *Compare* Mobbs Dec. ¶ 6 (filed in *Padilla ex rel. Newman* v. *Rumsfeld* (S.D.N.Y. No. 02-CIV-4445)) (noting Padilla's presence in Afghanistan in 2001), *available at* <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702mobbs.pdf> *with* Rapp Dec. ¶ 10, App. 20-21 (stating that Padilla was "armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States").

12 U.S. (8 Cranch) 110 (1814). *See* Petitioner's Brief, *Hamdi v. Rumsfeld* (U.S. No. 03-6696), 2004 WL 378715, at *46 & n.16; Petitioner's Reply Brief, *Hamdi v. Rumsfeld* (U.S. No. 03-6696), 2004 WL 865270, at *19. The controlling opinion never discussed, distinguished, or even cited any of the aforementioned cases in finding the detention authorized. That is hardly surprising, because none established a clear-statement rule for the military detention of enemy-combatant citizens, whether such combatants are captured abroad or stateside.

As detailed in the government's opening brief (Gov't Br. 48-49), *Endo* involved the prophylactic civilian detention of a concededly loyal citizen, not the military detention of one who, like Padilla and Hamdi, engaged in armed conflict against our forces abroad, or who, like Padilla and the *Quirin* combatants, "entered this country bent on hostile acts." *Quirin*, 317 U.S. at 37-38; *see Endo*, 323 U.S. at 297 ("not[ing] at the outset" that the Court was not confronted with "a question such as was presented in * * * *Quirin*"). Indeed, although *Quirin* noted in passing that Congress had "explicitly provided" for military tribunals, the relevant Articles of War (which remain on the books in relevant part, *see* 10 U.S.C. § 821) did so only by negative implication. Gov't Br. 47. In any event, the *Quirin* Court could not have held more plainly that no clear statement of authority is required and that, indeed, the applicable clear-statement rule runs in the *opposite* direction — the President's

directive to detain an enemy combatant in time of war is "not to be set aside by the courts without the *clear conviction* that [it is] in conflict with the * * * laws of Congress." *Quirin*, 317 U.S. at 25, 28 (emphasis added).

None of the cases cited by Padilla is to the contrary because none of them deals with the military detention of enemy combatants. At issue in *Duncan* was whether the Hawaiian Organic Act authorized the Governor of Hawaii to order that *civilians* charged with garden-variety *civilian* offenses be tried before military tribunals. *See* 327 U.S. at 309-310 (noting that petitioners were charged with "embezzling stock" and "engag[ing] in a brawl"). Thus, the Court explicitly distinguished cases involving military detentions like Padilla's: "Our question does not involve the well-established power of the military to exercise jurisdiction over * * * enemy belligerents, prisoners of war, or others charged with violating the laws of war." *Id*. at 313-314 (footnotes omitted).

Brown is likewise distinguishable; the Court there held that the declaration of war in the War of 1812 did not of its own force permit seizure of personal property belonging to an enemy alien found in this country. 12 U.S. at 125-126. That holding was founded on a law-of-war rule concerning personal property unconnected to hostilities, a rule that has no application to personal property usable for a war-related purpose, much less to detention of enemy combatants. *See* William Winthrop,

Military Law and Precedents 780 (2d ed. 1920) ("Private property * * * is now in general regarded as property exempt from seizure except where suitable for military use or of a hostile character.").

Padilla's reliance on an administrative determination of President Madison is likewise misplaced. *See* Br. 13-14. After an individual named Elijah Clark had been convicted of espionage by a military tribunal and sentenced to death, the military suspended the execution so that the President could opine on whether Clark fell within the statutory definition of a spy. 1 Military Monitor 121, 121-122 (1813). Although the President concluded that Clark was not a spy under the statute that was then limited to aliens (but subsequently amended to cover citizen-spies, *see* Br. 14 & n.4), and that Clark should therefore be arraigned for a different offense or discharged, the President said *nothing* about a clear-statement rule, and offered *no* opinion on whether the military could have held Clark for the duration of the hostilities as an enemy combatant — a question that apparently was not presented to him. *See id.* at 122.[5]

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[5] The other cases Padilla cites in support of a clear-statement rule (Br. 11-12, 15, 17) do not even remotely "involve the well-established power of the military to exercise jurisdiction over * * * enemy belligerents." *Duncan*, 327 U.S. at 313; *see Zadvydas* v. *Davis*, 533 U.S. 678 (2001) (involving removal of aliens who are inadmissible or likely to be a crime risk); *INS* v. *St. Cyr*, 533 U.S. 289 (2001) (involving deportable aliens convicted of a crime); *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991) (involving applicability of Age Discrimination in Employment Act to judges);

Padilla's attempt to derive a clear-statement rule from 18 U.S.C. § 4001(a) (Br. 18-23) fares no better. For reasons explained previously (Gov't Br. 54-56), Section 4001(a) does not apply to military detentions of enemy combatants. Contrary to Padilla's belief (Br. 19), *Howe* v. *Smith*, 452 U.S. 473 (1981), does not hold otherwise. *Howe* involved the temporary federal civilian detention of a Vermont prisoner and did not speak to military detention of enemy combatants. *Id*. at 475-479. Thus, taken in context, the passing statement in one of *Howe*'s footnotes that Section 4001(a) "proscrib[es] detention *of any kind* by the United States," *id*. at 479 n.3, plainly refers to any detention—whether temporary or permanent, and whether "at the pleasure" of a State or the federal government, *ibid*.—by the Attorney General and other *civilian* authorities.

2. The AUMF provides a clear statement of authority to detain in any event.

In any case, the discussion of the extent to which Section 4001(a) or any other source of law requires a clear statement is beside the point, because *Hamdi* confirms

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Gutknecht v. *United States*, 396 U.S. 295 (1970) (involving legality, under the Military Selective Service Act, of Selective Service delinquency regulations as applied to conscientious objector); *Greene* v. *McElroy*, 360 U.S. 474 (1959) (involving legality of government's revocation of security clearance granted to privately-employed aeronautical engineer); *Raymond* v. *Thomas*, 91 U.S. 712 (1875) (involving legality, under post-Civil War statutes, of military order purporting to nullify state court decree regarding amount due on a mortgage).

that the AUMF provides whatever degree of clarity is required. As the Court explained, "the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe": *i.e.*, "individual[s] who"—like Padilla—"[were] 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." 124 S. Ct. at 2639-2641 (plurality) (internal quotation marks omitted); *accord id.* at 2679 (Thomas, J., dissenting).[6]

Hamdi is also fatal to Padilla's remarkable contention that congressional authorization must not only be clear, but must also "specif[y] precisely who may be detained, for how long, and under what conditions." Br. 6; *see also id.* at 23. By advancing that contention, Padilla shows that he is not advocating a mere clear-statement rule but rather a separate-statement rule that Congress must explicitly authorize the detention of enemy combatants separate and apart from its authorization for the use of military force. Although Padilla is correct that Congress did not seek to micro-manage the conduct of the war with the level of detail he envisions, *Hamdi*

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[6] Padilla relies heavily on a single passage in the *Hamdi* opinion in which the Court stated that "Justice Scalia largely ignores the context of this case: a United States citizen captured in a *foreign* combat zone." 124 S. Ct. at 2643 (plurality). In describing the scope of its holding, however, the Court made clear that it referred to combatants falling within the definition quoted in the text, *supra*, without regard to locus of capture. *Id.* at 2639.

confirms that there is no requirement that Congress do so. As the Court explained, "[i]n light of these principles, *it is of no moment that the AUMF does not use specific language of detention*." 124 S. Ct. at 2641 (plurality) (emphasis added); *accord id.* at 2675-2679 (Thomas, J., dissenting).

The "principles" to which the Court referred were the settled law-of-war principles that it had discussed in the two preceding paragraphs, including: the purpose of detention is to prevent the detainee from taking up arms against the United States once again, *Hamdi*, 124 S. Ct. at 2640 (plurality); " '[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of * * * the law of war,' " *ibid.* (quoting *Quirin*, 317 U.S. at 37-38); "[a] citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States,' " *id.* at 2640-2641; and "such a citizen, if released, would pose the same threat" to the Nation's security as would an alien, *id*. at 2641.

Significantly, those "principles" do *not* include locus of capture. Nor is the locus of capture relevant to those principles. To the contrary, *Hamdi* relied partly on *Quirin* to find that the AUMF provides authority to detain, and *Quirin* upheld the military detention of saboteurs who, just like Padilla, "enter[ed] this country bent on

hostile acts" and were then arrested in the United States, unarmed, by civilian authorities in a civilian setting. *See* Gov't Br. 37-41. Thus, the AUMF authorizes Padilla's detention with whatever amount of specificity is required, irrespective of Padilla's escape from the battlefield in Afghanistan. *Cf. In re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power * * * is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict.").[7]

Indeed, Padilla can point to *nothing* in the text of the AUMF that would justify the conclusion that it provides a sufficiently clear statement regarding detention of enemy combatants captured on a foreign battlefield but not regarding detention of enemy combatants who escaped from a foreign battlefield and were captured when they attempted to enter the United States to commit more warlike acts. The *Hamdi* Court relied on the AUMF's general authorization for the use of " 'all necessary and appropriate force' against 'nations, organizations, or persons' associated with the September 11, 2001, terrorist attacks." 124 S. Ct. at 2640 (plurality); *accord id.* at 2679 (Thomas, J., dissenting). Significantly, that provision draws no distinction based on the locus of capture. Quite the contrary, Congress specifically found that it is "both *necessary and appropriate* that the United States exercise its rights to self-

[7] *Hamdi* is also fatal to Padilla's contention that different legal principles should apply to the current conflict because it is different than other wars. *See* Br. 33; *Hamdi*, 124 S. Ct. at 2641-2643 (plurality).

defense and to protect United States citizens both *at home and abroad*," in order "to prevent any future acts of international terrorism against the United States." 115 Stat. 224, Preamble and § 2(a) (emphases added).

That is hardly surprising, because Congress was responding to an attack launched within the United States by persons within our borders. Accordingly, Padilla can point to no reason why Congress would have been more concerned with enemy combatants outside of the United States than with those who attempt to enter our country in order to launch the very types of attacks that Congress sought to prevent.

Padilla notes that the September 11 hijackers were aliens (Br. 26 n.16), but Congress was concerned with preventing the *next* attempted attack, which—as Padilla's intentions prove—would not necessarily be limited to aliens. Moreover, *Hamdi* makes clear that the AUMF's authorization of military detentions is not limited to aliens. 124 S. Ct. at 2640-2641 (plurality); *accord id.* at 2679 (Thomas, J., dissenting). Padilla also argues (Br. 26 n.16) that the September 11 hijackers could have been arrested through other means, and that Congress separately augmented the Executive's authority to detain some aliens (without regard to whether they are enemy combatants) in the Patriot Act. In addition to their other flaws (*see infra* pp. 17-18), those arguments would be equally applicable to *alien* enemy combatants found within

our borders, and not even Padilla contends that the President lacks authority to detain such aliens for the duration of the hostilities.

Padilla also relies heavily on the contention that captures of enemy combatants on foreign battlefields affect a smaller number of people and therefore pose a smaller risk of governmental error and abuse than captures of enemy combatants in the United States. Br. 50-51. Yet, at least with respect to the type of enemy combatant at issue here, it is far from clear why that would be so. Contrary to Padilla's hyperbole, this case does not involve "millions of Americans who could be arrested in civilian settings in the United States." *Id.* at 50. Instead, it involves the subset of the number (which Padilla asserts is small) of people who engage in warlike acts on foreign battlefields, *and* escape capture there, *and* then come here to commit more such acts. That group is surely both small and well within the authority recognized in *Hamdi* and *Quirin*. Indeed, since September 11, 2001, this is the only case involving a United States citizen who both associated with enemy forces on the battlefields of Afghanistan and came to the United States bent on hostile acts.[8]

[8] Padilla's doomsday scenario of "Washington bureaucrats" (Br. 18) rounding up a "little old lady" who sends money to what she believes is "a charity that helps orphans in Afghanistan" but turns out to be a front to finance al-Qaeda activities (*id.* at 9) is based solely on one statement taken out of context from an oral argument transcript. On the next day, in the same court, the quoted government attorney clarified that "it would be up to the military applying its process and in going through its classification function to determine" factually whether the hypothetical "little old

Padilla raises the specter of arbitrary detentions based on mere Executive "suspicion of wrongdoing" (Br. 51), but that contention ignores both the extraordinary type of wrongdoing at issue here and the hearing procedures mandated by *Hamdi* to guard against erroneous detentions. Although Padilla argues (Br. 11, 51) that the Executive asserts "unchecked and unbalanced power" to determine unilaterally, based on mere "suspicion," that an individual is in fact an enemy combatant, *Hamdi* confirmed that enemy combatants are entitled to a due-process hearing undertaken pursuant to the requirements of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), as refined in *Hamdi* itself. 124 S. Ct. at 2645-2650 (plurality). At such a hearing, which Padilla eschewed in order to pursue this legal challenge to the Executive's detention authority, the government will put forth evidence of an individual's enemy-combatant status, and the individual will be entitled to an opportunity to rebut that evidence. *Id.* at 2649. Thus, Padilla is wrong to suggest that detentions are based on mere "unchecked" "suspicion."

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lady" actually believed she was sending money to charity or if "there was some reason to believe this woman did know that she was financing a terrorist operation," and that she could be detained in the latter event. *Benchellali* v. *Bush*, No. 04-CIV-1142, D.D.C., 12/2/2004 Tr. 119. In any case, it is beside the point that hypotheticals can be conjured up to test the outer limits of the enemy-combatant definition; this case does not test those limits because Padilla's actions place him comfortably within the bounds of both *Hamdi* and *Quirin*.

Nor can Padilla derive any support from the fact that the Patriot Act separately authorizes limited detentions of aliens based on factors having nothing to do with whether they are enemy combatants. Br. 24-26. Hamdi made the same argument in the Supreme Court, *see* Petitioner's Reply Brief, *Hamdi v. Rumsfeld* (U.S. No. 03-6696), 2004 WL 865270, at *19-*20, but the controlling opinion did not even mention the Patriot Act in concluding that the AUMF authorized the President to detain Hamdi as an enemy combatant. *Hamdi*, 124 S. Ct. at 2639-2643 (plurality).

The Court's silence underscores the irrelevance of the Patriot Act's distinct detention provisions to military detentions. Those provisions have nothing to do with military detention or force, but instead pertain to the Attorney General's detention, pending removal proceedings or criminal prosecution, of resident aliens suspected of terrorist activity, espionage, illegal export, or "any other activity that endangers the national security." 8 U.S.C. § 1226a(a) (Supp. I 2001). The provisions apply without regard to whether an alien is associated with an enemy and, indeed, without regard to the existence of an armed conflict. Padilla's contention that the Patriot Act's provisions would be "redundant" if he could be detained as an enemy combatant (Br. 25 n.14) cannot be squared with the fact that the provisions permit civilian detentions of individuals who are *not* enemy combatants — a form of detention that is not a traditional incident of war and was therefore circumscribed more narrowly by

Congress. Thus, the Patriot Act has no bearing on the President's authority to detain enemy combatants (whether aliens or citizens) in a time of war.

Finally, Padilla predicts (Br. 34-35) that a majority of the Supreme Court—including Justice Breyer, who joined the plurality opinion in *Hamdi* but joined Justice Stevens' dissent in *Rumsfeld* v. *Padilla*, 124 S. Ct. 2711 (2004)—would conclude that the AUMF does not authorize his detention. But Padilla's attempt to predict Justice Breyer's vote based on Justice Stevens' dissent rests entirely on one sentence in one footnote phrased in the first-person, singular. That solitary sentence cannot bear the weight Padilla would give it. For one thing, the sentence was drafted at a time when the record in this case did *not* reflect that Padilla had associated with the enemy on the battlefields of Afghanistan, and it therefore does *not* reflect anyone's views on whether Padilla is similarly situated to Hamdi based on that critical fact. *See supra* p. 6 n.4. For another, the sentence is ambiguous: it states Justice Stevens' belief that Section 4001(a) prohibits "the protracted, *incommunicado* detention of American citizens arrested in the United States." 124 S. Ct. at 2735 n.8 (Stevens, J., dissenting) (emphasis added). Because Padilla is no longer held incommunicado, the sentence in question does not necessarily speak to the current circumstances of this case.

More fundamentally, Padilla's vote-counting technique fails *ab initio* because the task of district and circuit courts "is not to predict what the Supreme Court might do but rather to follow what it has done." *West* v. *Anne Arundel County*, 137 F.3d 752, 757 (4th Cir.), *cert. denied*, 525 U.S. 1048 (1998). Padilla's vote-counting method is especially inappropriate here, where he relies on dissenting opinions in *different* cases. Br. 35 (relying on *Hamdi*, 124 S. Ct. at 2652-2660 (Souter, J., concurring in part and dissenting in part); *id*. at 2660-2674 (Scalia, J., dissenting); *Padilla*, 124 S. Ct. at 2735 n.8 (Stevens, J., dissenting)).

B. Padilla Fits Squarely Within The Category Of Citizens Subject To Detention As Enemy Combatants Under *Quirin*

Under *Hamdi*, the fact that Padilla armed himself with an AK-47 assault rifle and aligned himself with al Qaeda and Taliban forces against the United States and its coalition partners in Afghanistan is dispositive, and this Court need go no further. Still, it bears emphasis that Padilla's escape from Afghanistan and attempt to enter this country not only do not remove his enemy combatant status, they also bring him squarely within the enemy-combatant definition employed in *Quirin* and thus provide an additional basis for his military detention.

Although Padilla erroneously contends that military detention of United States citizens captured in the United States is "entirely unprecedented" (Br. 7), *Quirin*

upheld the military's authority over a United States citizen who was captured in the United States after he "associate[d] * * * with the military arm of the enemy government, and with its aid, guidance and direction enter[ed] this country bent on hostile acts." *Quirin*, 317 U.S. at 37-38. The *Hamdi* Court reaffirmed *Quirin* as "the most apposite precedent that we have on the question of whether citizens may be detained" as enemy combatants. 124 S. Ct. at 2643 (plurality); *see also id.* at 2682 (Thomas, J., dissenting).

If anything, *Quirin* is more relevant here than in *Hamdi* because of the striking factual similarities between the Nazi saboteurs and Padilla. In *Quirin*, the saboteurs affiliated with German forces during World War II, received explosives training in Germany, came to the United States with plans to destroy war facilities, and were seized by civilian authorities in civilian settings. 317 U.S. at 21. Here, in like fashion, Padilla was closely associated with al Qaeda both before and after September 11, received explosives training at al Qaeda training camps, and came to the United States with plans to detonate apartment buildings. *See* Gov't Br. 6-11.

Padilla would have this Court believe that his case is starkly different from *Quirin* because, *inter alia*, "each defendant in *Quirin* asserted military status." Br. 37-38. That attempt to distinguish *Quirin* is factually misleading and legally misguided. First, it is factually incomplete to assert that the *Quirin* saboteurs "entered

the United States wearing military uniforms" (Br. 37), because "[i]mmediately after landing they buried their uniforms * * * and proceeded in civilian dress." 317 U.S. at 21. As the District Court for the Southern District of New York observed in the first iteration of this case, the saboteurs had donned the partial uniforms only to preserve a plausible claim to prisoner-of-war status should they have been captured during the landing. *Padilla ex rel. Newman* v. *Rumsfeld*, 233 F. Supp. 2d 564, 594 n.12 (S.D.N.Y. 2002). Of course, the *Quirin* saboteurs were not captured during the initial landing; they were initially seized and detained in a civilian setting days after their partial uniforms had been abandoned.

Therefore, at the time of their capture, the *Quirin* saboteurs were clearly not asserting military status by wearing uniforms, even assuming *arguendo* that they had done so earlier. If Padilla's theory is that the saboteurs' *prior* acts of wearing military clothes could make them enemy combatants at the time of their subsequent capture, then *a fortiori* Padilla's prior actions on the battlefields of Afghanistan make him an enemy combatant at the time of his capture. Wielding an AK-47 on a foreign battlefield surely qualifies as an assertion of military status.

More fundamentally, whether and when the *Quirin* saboteurs asserted military status is legally irrelevant. The *Quirin* Court did not rest its decision on whether the saboteurs had asserted military status, but rather held that a person who is "a part of

or associated with the armed forces of the enemy" is subject to detention and trial as an enemy combatant. 317 U.S. at 45 (emphasis added); *see id*. at 37-38 (persons "who *associate* themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of * * * the law of war" (emphasis added)); *id*. at 35 n.12 (describing as "war crimes" those "acts * * * committed within enemy lines by persons in civilian dress *associated with* or acting under the direction of enemy forces" (emphasis added)). The Court's use of the disjunctive—"or associated with"—precludes any argument based on the reality or assertion of formal membership in a military.[9]

Hamdi likewise held that an individual who is "part of *or supporting* forces hostile to the United States" is an enemy combatant, and the Court therefore engaged in no analysis of whether Hamdi had ever asserted or conceded his military status. 124 S. Ct. at 2639-264 (plurality) (emphasis added). To the contrary, the Court

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[9] The *Quirin* Court did not "plainly assum[e] that [the saboteurs] were soldiers." Br. 37 n.27 (citing *Quirin*, 317 U.S. at 21-22). Nothing on the cited pages of *Quirin*, or anything else in the opinion, indicates that the Court erroneously believed that the saboteurs were formally enrolled in the German army. *See* Michael Dobbs, *Saboteurs: The Nazi Raid on America* 204 (2004) (of the *Quirin* saboteurs, "only two of them, Burger and Neubauer, were formally enrolled in the German army"). To the contrary, the government's brief in *Quirin* emphasized that "civilians as well as soldiers are all within th[e] scope" of the war crimes charged. Gov't Br. 39, *Quirin*.

expressly rejected Justice Scalia's attempt to distinguish *Quirin* on the ground that the saboteurs had conceded their enemy combatant status in that case. *Id.* at 2643.

Padilla's other attempts to distinguish *Quirin* (Br. 36-38) are addressed at length in the government's opening brief. Gov't Br. 37-43. It bears emphasis, however, that most of those arguments are likewise foreclosed by *Hamdi*. For example, Padilla strains to distinguish *Quirin* on the ground that the *Quirin* saboteurs were tried by a military tribunal (and sentenced to death), whereas the President has chosen to detain Padilla during the hostilities. Br. 16 n.5, 36 & n.26. But *Hamdi* could not have been clearer that "nothing in *Quirin* suggests that [a saboteur's] citizenship would have precluded his mere detention for the duration of the relevant hostilities. Nor can we see any reason for drawing such a line here." 124 S. Ct. at 2640 (internal citations omitted). Because Padilla falls within the holdings of both *Hamdi* and *Quirin*, the President has authority under the AUMF to detain him as an enemy combatant.

II. The President Has Constitutional Authority To Detain Padilla As An Enemy Combatant

The Court's decisions in *Hamdi* and *Quirin* make it unnecessary to deviate from the Court's path in *Hamdi* and reach the questions of the President's constitutional authority to detain Padilla or the precise scope and constitutionality of

Section 4001(a). Nonetheless, the President has inherent authority as Commander in Chief to detain Padilla as an enemy combatant. The President's constitutional authority to defend the Nation against attack provides ample basis for the detention of a person who, like Padilla, attempts to enter this country bent on hostile acts. *See* Gov't Br. 52-54.

Padilla argues that *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), and *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), limit the President's constitutional authority in this regard. Br. 39, 46-48. In *Youngstown*, however, the Court held only that the President's wartime powers did not include authority to seize steel mills. 343 U.S. at 587. That domestic economic initiative is far different from the military's traditional authority to detain enemy combatants — especially those who, like Padilla, took up arms against United States and coalition forces on an overseas battlefield. Padilla's reliance on *Milligan* is an even greater stretch, because *Quirin* confined *Milligan* to its facts, *see Quirin*, 317 U.S. at 45, and *Hamdi* confirmed that *Quirin* is "the most apposite precedent," especially because it "both postdates and clarifies *Milligan*." 124 S. Ct. at 2643 (plurality); *accord id.* at 2682 (Thomas, J., dissenting).

Padilla nonetheless contends that the Suspension and Treason Clauses of the Constitution forbid his detention and require that he be charged with a crime or

released immediately. Br. 40-44 & n.34. Those contentions are meritless. The Suspension Clause provides 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." U.S. Const. art. I, § 9, cl. 2. Hamdi also attempted to rely on that clause, but only two Justices accepted that effort; a majority expressly rejected it and instead addressed the nature of the proceedings under the non-suspended writ in these special circumstances. 124 S. Ct. at 2643 (plurality); *accord id.* at 2682 (Thomas, J., dissenting).

Padilla contends once again that *Hamdi* is inapplicable because it supposedly addresses only the status of citizens captured in foreign combat zones, as opposed to those captured in civilian settings in the United States. Br. 43. But as the *Hamdi* Court noted, "the writ of habeas corpus remains available to *every* individual *detained* within the United States." 124 S. Ct. at 2644 (plurality) (emphases added); *see also Padilla*, 124 S. Ct. at 2722 (holding that habeas jurisdiction attaches to place of confinement). Because the writ is implicated by the place of detention, not capture, and Hamdi was detained in the United States just as Padilla has been, *Hamdi* is directly on point, and thus fatal to Padilla's Suspension Clause arguments. Moreover, because the Suspension Clause provides extraordinary authority during times of rebellion or invasion, it underscores the obvious point that domestic threats pose even

greater dangers than foreign ones. Nothing in the Suspension Clause's provision of suspension authority in the face of domestic threats reflects an illogical intent to impose greater restraints on the President's authority to address military threats at home than abroad.

A similar analysis applies to Padilla's passing reliance (Br. 44-45 n.34) on the Treason Clause, which requires that treason be proved by two witnesses or confession in open court. U.S. Const. art. III, § 3, cl. 1. Because Padilla has not been charged with treason, the Treason Clause is inapplicable by its own terms. *Cramer* v. *United States*, 325 U.S. 1, 45 (1945). Moreover, the Treason Clause makes no reference to the place of capture, and draws no distinction between treason at home and treason abroad. It therefore provides no basis for distinguishing *Hamdi*.[10]

III. The Government Has Carried Its Burden On Summary Judgment

Finally, Padilla contends that the government has not met its evidentiary burden on summary judgment because it has stood on the factual averments of the Rapp Declaration. Br. 53-55. That contention is flatly contrary to the tactical

[10] Although Padilla contends that United States citizens are "entitled to greater liberty at home than overseas" (Br. 30), neither of the cases he cites stands for any such general proposition. *Youngstown* merely held that the President could not seize steel plants. *See supra* p. 24. And, if anything, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), refutes Padilla's position by upholding the President's foreign affairs authority to prohibit the sale, *in the United States*, of arms to the enemy. *Id.* at 311, 319-320.

decision Padilla made in the district court to address only the legal issues in an initial round of summary judgment briefing based on the assumption that the government's allegations are true, and to withhold consideration of factual issues until the legal issues are decided. *See* R. 29, Tr. of 9/14/04 Status Conf. 23-24, 27-38, App. 47-48, 51-62; Gov't Br. 13. Based on Padilla's decision to proceed in that way, the district court correctly noted at the summary judgment hearing that Padilla had "lock[ed] in" the court because "I have to take those facts in those—in [the government's] affidavit as true for purposes of the motion." R. 47, Tr. of 1/5/05 Mot. Hearing 43, App. 137.

In any event, Padilla's contention (Br. 53-55) that the Rapp Declaration would be "[in]admissible in evidence" "at trial," and is therefore insufficient to "stave off summary judgment," is just one more argument that is flatly contradicted by *Hamdi*. The determination of whether there exists a genuine issue of material fact "must be guided by the substantive evidentiary standards that apply to the case." *Anderson* v. *Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). As *Hamdi* detailed at length, the evidentiary standards that would apply in any factual proceedings on remand in this case would not be as rigorous as those that apply in the civilian context. 124 S. Ct. at 2645-2652 (plurality). "Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding." *Id.* at 2649.

Thus, "a habeas court in a case such as this may accept affidavit evidence like that contained in the [government's] Declaration, so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return." *Hamdi*, 124 S. Ct. at 2652 (plurality). Especially because Padilla has presented no such rebuttal evidence, the Rapp Declaration would raise a genuine issue of material fact even if Padilla had not agreed that "the facts *pleaded* by the Executive [B]ranch are assumed to be true" for purposes of this motion. Mem. 1 (emphasis added).

* * *

CONCLUSION

For the foregoing reasons, and those stated in the government's opening brief, the district court's grant of summary judgment should be reversed and its order mandating Padilla's release should be vacated.

Respectfully submitted,

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