To be argued by
DONNA R. NEWMAN
ANDREW G. PATEL

In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket No. 03-2235
03-2438

JOSE PADILLA, Donna R. Newman,
as Next Friend of Jose Padilla,

Petitioner-Appellee-cross-Appellant,

V.

DONALD RUMSFELD,

Respondent-Appellant-cross-Appellee.

On Appeal from the United States District Court
for the *Southern District of New York*

PETITIONER-APPELLEE-CROSS-APPELLANT BRIEF

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JURISDICTION

This Court has jurisdiction to hear this interlocutory cross-appeal pursuant to 28 U.S.C. ' 1292(b). Pursuant to an Order dated June 10, 2003 (A 203-04),[1] this Court granted Petitioner's motion to cross-appeal the Orders and Decisions issued by the Honorable Michael B. Mukasey, Chief Judge of the United States District Court of the Southern District of New York on December 4, 2002 (A117-152) and March 11, 2003 (A153-164). **QUESTIONS PRESENTED FOR CROSS-APPEAL** 1. Did the President have the authority to order the military to seize Jose Padilla, an American civilian citizen, in the United States and order the Secretary of Defense to indefinitely detain him incommunicado? 2. What constitutional burden must the Government meet prior to depriving a citizen of his constitutional rights? 3. Does Jose Padilla have the right to the unabridged assistance of counsel? **STANDARD OF REVIEW** This Court reviews *de novo* the district court's decision to grant or deny a petition for a writ of habeas corpus. *Brown v. Artuz*, 283 F.3d 492, 497 (2d Cir. 2002). This interlocutory appeal raises only issues of law as the Court below has made no findings of fact. Questions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

PRELIMINARY STATEMENT For over one year, Jose Padilla (APadilla@), an American citizen, has been held incommunicado on Order of the President in a military prison in Charleston,

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[1] The reference AA@ followed by a number is a reference to the page of the Joint Appendix.

South Carolina. During that time, Padilla has been unable to communicate with his family, his attorneys or the court. His attorneys have been prevented from meeting with him or communicating with him by any means.

Padilla is not a member of any military and has not expressed a willingness to die for any international terrorist organization. Padilla was not captured on a battlefield, in the theater of war, or in some foreign land. Rather, the military, as commanded by President Bush seized Padilla from his cell at the Metropolitan Correctional Center (MCC), where he was being detained pursuant to the order of an Article III court as a grand jury material witness. That warrant was served upon Padilla at O=Hare International Airport after Padilla deplaned from a commercial airliner. He carried no weapons, no bomb making material or literature, and no indicia of an association with an international terrorists organization. The Government claims a right to hold Padilla for interrogation, indefinitely, without bringing formal charges. This habeas petition was brought by his attorney as Anext friend,@ and asks this Court to affirm what should be beyond question: that the President has no unilateral power to order the military to seize and detain Padilla in a military brig, without counsel and without any other constitutionally mandated safeguards.

The Executive Branch's actions in this case are shocking and unprecedented. The President acting as Commander-in-Chief has usurped for himself both legislative and judicial powers that the Constitution textually entrusts to the other branches. In so doing, the President has laid claims to the unchecked and unreviewable power to imprison anyone on nothing more than his belief of evil intent. The Chief Executive has claimed unfettered discretion to decide whether to bring criminal charges in the civil justice system or simply to detain a citizen in a legal Ablack hole.@ If he is

granted that power, it is the President alone who will dictate what constitutional rights citizens can exercise. The danger inherent in the power the Executive now claims, goes beyond Padilla=s military detention[2] and because it would permit the President to arbitrarily detain citizens in a legal Ablack hole@ outside the checks of an Article III court as required by the constitution. The authority claimed, if not checked, constitutes Aa loaded weapon@ and threatens the rights of all citizens to defend themselves against suspicions of wrong-doing and the arbitrary deprivation of liberty. *Korematsu v. U.S.*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). The Government's treatment of Jose Padilla is lawless and unconstitutional, and this Court must reject it.

STATEMENT OF FACTS Jose Padilla, a United States citizen, born in Brooklyn, New York, traveled on May 8, 2001 to Chicago, aboard a commercial airliner, dressed in his own clothing, carrying his valid United States passport, intent on visiting his son in Chicago. (A 52). When Padilla arrived in Chicago, he did not possess a weapon, a bomb, nuclear material, or an instruction manual relating to even rudimentary bomb making. Upon leaving the airplane at O'Hare Airport, he was approached by law enforcement agents. He politely answered questions posed to him. He requested an attorney. He was placed under arrest pursuant to a Material Witness Warrant issued by a United States District Court Judge for his appearance before a grand jury sitting in the Southern District of New York. *Id.* The Material Witness Warrant issued upon an application by the United States Attorney=s Office for the Southern District of New York and included in support was the affidavit of Joseph Ennis, Special Agent of the Federal Bureau of Investigation. (A 123). Its contents remain sealed, except for Agent Ennis= statement that Padilla was unwilling to become

[2] Since the Government claims a right to detain citizens incommunicado, there is no way of knowing if other citizens have been likewise seized by the military and detained.

a martyr. (A116). Padilla arrived in New York City, late evening May 14, 2001 and was taken to the high security floor of the MCC. The next day, Padilla came before the Honorable Michael B. Mukasey, Chief Judge of the United States District Court for the Southern District of New York, who appointed Donna R. Newman, Esq. to represent him.(A 123). Padilla was brought to court in leg irons, shackles, and handcuffs. Counsel and Padilla were permitted to review the Ennis affidavit. For the next several weeks, counsel met with her client on a regular basis at MCC and filed motions on his behalf. Those motions asked the district court to find that a material witness for the grand jury could not be lawfully detained. Counsel anticipated receiving the Court's decision on the motions at the conference scheduled for June 11, 2002. That hearing did not happen as planned. *Id.*

On Sunday, June 9, 2002, President Bush executed a Military Order declaring Jose Padilla, a civilian, an Aenemy combatant@ and ordered his detention by the military. (A 51). On the same day, the Government made an *ex parte* application to Judge Mukasey to withdraw the Grand Jury subpoena, which the Court granted. *Id.* The Order signed by President Bush is a directive to the Department of Justice, which had custody of Padilla, to release him to the Secretary of Defense based on the President=s determination that Padilla: 1) was an enemy combatant; 2) was closely associated with al Qaeda, an international terrorist organization (although it did not describe him as a member of al Qaeda; 3) engaged in hostile and war-like acts, including preparation for acts of international terrorism; 4) possessed intelligence regarding personnel and activities of al Qaeda; and 5) represented a continual and grave threat to national security. (A51). Counselwas not advised of her client's seizure by the military until the next day. Attorney General John Ashcroft announced the transfer of Padilla to the military and Padilla=s detention in a military brig on June 10th via news conferences. (A 125). Deputy Secretary of Defense, Paul Wolfowitz, that same day, also at a news

conference, clarified that the alleged Adirty bomb@ plan had not in fact been hatched,[3] and the next day, he characterized the allegations as Asome loose talk.@[4] Attorney General Ashcroft stated that the Government was not interested in charging Padilla with a crime, but rather was holding him for interrogation. (A125, *citing* News Briefing, Department of Defense (June 12, 2002), 2002 WL 22026773). The White House explained its sudden decision to have Padilla taken by the military as one driven by a deadline of Tuesday, June 11, 2002. *See* Tom Brune & Craig Gordon, *American Arrested in ADirty Bomb@ Plot,* Newsday, June 11, 2002, at A5. No information has come to light to suggest that any other event, other than the district court=s hearingon the grandjury motion was to occur on that date. On June 12th, the district court continued Ms. Newman's appointment as counsel and appointed Andrew G. Patel, Esq. under the Criminal Justice Act to appear as co-counsel. (A3). Ms. Newman, on Tuesday, June 11, 2003 handed up to the Court a writ of habeas corpus[5]. (A 21). That petition was subsequently amended and named as respondents, George W. Bush, as ex officio Commander-in-Chief; Donald Rumsfeld,

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[3] Deputy Secretary Wolfowitz at Justice Department Press Conference, Monday, June 10, 2002, 11:39 a.m. EDT, News Transcript, *available at* http://www.defenselink.mil/news/June2002/t06102002-t0610dsd.html.

[4] CBS AEarly Show@ Interview, June 11,2002, transcript on the Web: http://usinfo.state.gov/topical/pol/terror/02061103.htm

[5]By consent that petition was redacted and the redacted petition was filed the following day. (A21)

Secretary of Defense; John Ashcroft, Attorney General; and Commander M.A. Marr, of the Consolidated Naval Brig in Charleston, South Carolina. (A26). In the petition, Ms. Newman, acting as Anext friend,@ asserts on Padilla's behalf that he is being held in violation of his Fourth, Fifth and Sixth Amendment rights, that his confinement constitutes an unlawful suspension of the privilege of the writ of habeas corpus and that his seizure by the military is in violation of the Posse Comitatus Act, 18 U.S.C. ' 1385. (A 26-35). Ms. Newman attempted to contact her client but was advised by the Department of Defense that her client was being held incommunicado and no communication would be permitted, including delivery of mail B legal or otherwise. (A 41-43, 52-53). The Government moved to dismiss the Petition on jurisdictional grounds and after full briefing on those issues, the district court ordered the parties to submit briefs on the merits. (A3-9). In support of its position, the Government submitted the declaration of Michael Mobbs, a civilian attorney in the Department of Defense, reciting the grounds for Padilla's detention. (A44-49). Scrutiny of Mr. Mobbs' affidavit suggests that the information provided to the President, and upon which the President relied in issuing his Order, was essentially the same information which had been provided to the judge who issued the material witness warrant, with the exception that the President does not appear to have been informed that Mr. Padilla was unwilling to become a martyr.(A 44-49).

In the declaration, Mr. Mobbs concedes that he has no personal knowledge of any of the facts which were offered to justify Mr. Padilla's detention and that his information is derived from two anonymous and uncorroborated intelligence sources. One of the sources admittedly was medicated when he provided the information and later recanted his statements. The other source has a history of intentionally providing false information to investigators to mislead them. (A 45). Neither the President's Order of June 9, 2002 nor the Mobbs= declaration, provides a reason why Mr. Padilla,

who was already detained in a secure facility by order of a civilian court, would be less of a threat or more willing to provide information, if he was detained by the military, as opposed to being compelled to testify under a grant of immunity before the grand jury. On December 4, 2002, Judge Mukasey rendered an Opinion and Order. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (A117-164) [hereinafter *Padilla I*]. The district court decided five major issues and related sub-topics. The court ruled that Donna Newman had standing as Anext friend@ to pursue a writ of habeas corpus on Padilla's behalf; that Secretary of Defense Donald Rumsfeld was a proper respondent and that the United States District Court for the Southern District of New York had jurisdiction over him and jurisdiction to hear this case. Thus, the court denied the Government=s motion to dismiss for lack of jurisdiction or transfer to the District of South Carolina. (A123-135). The court also found that the President had the authority as commander-in-chief to direct the military to detain as an enemy combatant an American citizen, not a member of any foreign army, who had been arrested in the United States. He also ruled that the Authorization for Use of Military Force, Pub.L.No.107-40, 115 Stat. 224 (2001) [hereinafter Joint Resolution] provided the congressional authorization for the President=s action here. (A 135-144). The court concluded that Padilla was entitled to some minimal judicial review to determine whether there was Asome evidence@ to support the detention. Finally, the court held that Padilla should be allowed to consult with counsel for the limited purpose of assisting him with pursuing a writ of habeas corpus. (A144-148). The court noted that under 28 U.S.C. ' 2243, a petitioner had a right to present evidence in support of his petition as well as facts to refute the Government's position. Thus, the district court ruled that to enable the court to properly perform its function in reviewing and deciding the Padilla petition, pursuant to the authority provided under the All Writs Act, 28 U.S.C. ' 1651(a), Padilla

was to have access to his attorneys for the limited purpose of presenting to the court facts and evidence in support of his petition.(A146). He ordered the parties to meet to attempt to agree on conditions under which defense counsel could meet with Padilla, and setting a court date of December 31, 2002, at which time if the parties had not come to an agreement, the court would order the conditions. (A 148, 152). Finally, Chief Judge Mukasey advised that in consideration of the deference to be accorded to the President in these matters, his review of the President=s designation of Padilla would be limited to whether the determination was supported by Asome evidence.@ The court also advised the parties, he would consider whether the evidence relied upon by the President had been mooted by events subsequent to Padilla=s detention.(A148-152).

The Government refused to agree to any conditions permitting access to counsel, taking the position that it would oppose any attorney-client contact. (A98). On January 9, 2003, the Government moved for reconsideration of that part of the Order which granted Padilla access to his counsel. Another full round of briefing followed. (A13-16). In support of their motion for reconsideration, the Government submitted a Declaration from Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency. (A 55-63). The Declaration spoke generally about the intelligence process, interrogation techniques, the use of interrogation in the AWar@ on Terrorism and opined that Padilla may have some general intelligence information about al Qaeda regarding recruitment, training and planning.(A 61). On March 11, 2003, the district court granted the Government's motion for reconsideration in part and upon reconsideration, affirmed its earlier decision. *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003). (A153-165). The court characterized Vice Admiral Jacoby's statements relating to Padilla's value as a source of intelligence as Aspeculative.@ (A60). On the issue of counsel's access to Padilla, Judge Mukasey reasoned that

A[t]here is no dispute that Padilla has the right to bring this petition@ and that Athere is no practical way for Padilla to vindicate that right [to bring facts before the court] other than through a lawyer.@ (A 161). The court rejected the Government's argument that under the Asome evidence@ standard that the court need only examine the facial sufficiency of the evidence presented by the Government. *Id.* Judge Mukasey once again emphasized that he could not confirm that Padilla was not being Aarbitrarily detained without giving him an opportunity to respond to the Government's allegations.@ *Id.* Thereafter, on March 31, 2003, the Government moved the district court for certification for an interlocutory appeal of the Court's ruling that counsel are to meet with Padilla, the court's ruling on jurisdiction,and the court's determinationthat Ms. Newman was a proper Anext friend.@ (A18). Padilla opposed the motion for certification and, in the alternative, sought certification on all other rulings contained in the December 4, 2002 and March 31, 2003 Orders and Decisions. (A 18). On April 9, 2003, the district court certified six questions for interlocutory appeal. (A168). However, the district court, specifically, did not certify for appeal, its ruling that Ms. Newman had standing as Anext friend,@ finding that this question did not meet the requirements for an interlocutory appeal because Athere was no reasonable grounds for disagreement under existing law on the propriety of her serving as Anext friend.@= *Id.* Application was made to this Court by the Government for permission to take an interlocutory appeal and expedited appeal. (A169-185). Padilla also sought leave from this Court to take an interlocutory cross-appeal. (A188- 201). On June 10, 2003, this Court granted the parties leave to take an interlocutory appeal. (A 203- 204).

LEGAL ARGUMENT

I. THE MILITARY SEIZURE AND DETENTION OF PADILLA IS

UNCONSTITUTIONAL

The authority of the federal government over United States citizens is limited to the enumerated powers of our constitution. U.S. Const. amend. X. The President=s power to order the military to seize and detain Padilla must stem from the Constitution or a specific act of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *see also Ex parte Milligan*, 71 U.S. (4 Wall) 2, 114-16 (1866). Where Congress has not specifically authorized executive action, but has instead legislated on the subject matter at issue, the President is without authority to proceed in a manner that is inconsistent with that legislation. *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring); *see also* Juan R. Torruella,[6] *On the Slippery Slopes of Afghanistan: Military Commissions and The Exercise of Presidential Power*, 4 U.Pa.J.Const.L.648 (May 2002); David G. Adler, *The Steel Seizure and Inherent Presidential Power*, 19 Const. Commentary 155, 173 (Spr. 2002) (A[U]nder the banner of executive power a president may not lay claim to any of the powers, express or implied, that are allocated to either Congress or judiciary.@). Simply put, the President, regardless how well-intentioned, is not above the law. *Cf. Clinton v. Jones*, 520 U.S. 681 (1997); *United States v. Nixon*, 418 U.S. 683 (1974).

The authority for the President=s military seizure and detention of Padilla is not to be found in the text of the Constitution, nor in any congressional act. There is absolutely no judicial precedent confirming any constitutional power of the President, without the express authorization of Congress, to take military action against Padilla. Rather, the military imprisonment of a civilian citizen is prohibited by the Constitution.[7] Indeed, Congress has specifically prohibited the action

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[6] Judge, U.S. Court of Appeals, First Circuit.

[7] Absent a *bona fide* declaration of martial law. *See, e.g.*, *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

taken here, (18 U.S.C. ' 4001(a)), and the Supreme Court has repeatedly rejected similar attempts by the Executive to exercise the rights claimed here. *See, e.g., Youngstown,* 343 U.S. 579; *Ex Parte Milligan,* 71 U.S. 2.*; Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Toth v. Quarles,* 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957).

A. The Authority Granted to the Executive as Commander-in-Chief Does Not Empower Him to Order the Military to Seize and Detain Padilla.

The district court ruled that the President=s duties as Commander-in-Chief were broad enough to encompass the military arrest and detention of Padilla, indefinitely, without congressional authorization. (A 141-42). The district court could not and did not point to any express constitutional authorization as a grant of the power claimed by the President here.

The Supreme Court has repeatedly recognized that ours is a government of separated and limited powers. It has emphatically rejected the exercise of military power over civilian affairs. As Justice Jackson noted, A[the President=s] command power is not such an absolute as might be implied from that office in a militaristic system, but is subject to limitations consistent with a constitutional Republic whose law and policy making branch is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the military.@ *Youngstown*, 343 U.S. at 645-66 (Jackson, J., concurring). That statement, made during the Korean War, stands as testament to the Judiciary=s ongoing commitment to preserve our system of government even during times of war. As the Supreme Court noted during the height of the Cold War: AOurs is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny.@ *Reid v. Covert,* 354 U.S. 1, 40 (1957). The Framers crafted a Constitution that confined the nature and power of the presidency. *Federalist,* Nos. 69,

71(Hamilton); *Federalist,* No. 48 (Madison).

The Supreme Court=s most explicit description of the place of the Commander-in-Chief power in the Framers= balanced design came in *Youngstown,* 343 U.S. 579. There, like here, a President sought to arbitrarily expand his Commander-in-Chief powers during a perceived national security crisis. In the midst of the Korean War, steelworkers threatened a national strike. President Truman, concluding that an end to steel production would seriously jeopardize the national defense, ordered the military to take over the steel mills. *Id.* at 583. The Supreme Court repudiated President Truman=s claim that he could seize the steel mills for the war effort. The Court found that no such authority flowed from any of the sources that President Truman claimed; i.e. the Commander-in-Chief power, the obligation faithfully to execute the laws, or any unenumerated power, inherent or implied. *Id.* at 587-88. To the contrary, the Court recognized that prior cases had upheld the President=s exercise of Commander-in-Chief powers only where it directly related to day-to-day fighting in a zone of active combat operations. *Id*.

Youngstown was not the first time the Supreme Court stayed the hand of a wartime President straying into domestic civilian matters. In *Ex parte Milligan*, the Government was rebuffed in its attempt to prosecute a citizen for a violation of the law of war by a military commission. 71 U.S. (4 Wall) 2 (1866). The Supreme Court ruled that, where civil courts are functioning, whether in time of peace or war, a civilian may not be tried for violations of the law of war by the military. *Id.* at 120-21.

The facts of *Milligan* are strikingly similar to this case. In 1864, Milligan, a citizen of Indiana, was arrested by the military and charged with violations of the laws of war. The Government alleged that Milligan was a member of a militia B the Order of American Knights B that

aimed to overthrow the Government of the United States. Milligan and others were alleged to have conspired to assist the Confederate Army by seizing ammunition, building an arsenal of weapons, releasing prisoners and kidnaping the Governor. *Id*. at 5-6. They were tried before a military commission and sentenced to death. *Id*. at 107. Milligan petitioned for a writ of habeas corpus, claiming that trial by a military commission violated his constitutional rights. *Id.* The Government argued then, as it does here, that Milligan B a civilian B had violated the laws and usages of war, and therefore was subject to military jurisdiction. *Id*. at 26-27. The Supreme Court disagreed. Milligan, a civilian B who was not seized in a zone of active combat operations and who was not a member of the Confederate Army B could not be tried by a military commission as an enemy soldier without congressional authorization. *Id*. at 122.

The district court relied heavily on *Ex parte Quirin*, 317 U.S. 1 (1942),[8] concluding that it relates more closely to Padilla=s situation than *Milligan*. *(*A143). It does not. The *Quirin* Court considered the habeas petitions of German soldiers who had landed on the shores of the United States in order to engage in acts of military sabotage during World War II. The saboteurs admitted their status as German soldiers. The only issue before the Supreme Court was whether the President could order the saboteurs tried before a military commission rather than a civilian criminal court. *Id*. at 24-25. In a narrow holding, *Quirin* held that President Roosevelt had the authority to order the trial by military commission of German soldiers who had come behind our Alines,@ to perform hostile acts during a declared war. *Id.* at 47. That *Quirin* was applicable only to members of the enemy=s military forces, is readily apparent by the prosecution of the *Quirin* co-conspirators, who

[8] Reliance is also placed upon *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). *Colepaugh*, like *Quirin*, concerned a German soldier who attempted to infiltrate the United States. *Colepaugh* relied exclusively upon *Quirin* and *Quirin*=s analysis to find that Colepaugh could be

were civilians, in federal district court. *See, e.g.*, *Haupt v. United States*, 330 U.S. 631 (1947); *Cramer v. United States*, 325 U.S. 1 (1945). If the Government=s argument was correct, Haupt and Cramer would have also been deemed Aenemy combatants@ and dealt with by the military. That they were not, should be dispositive herein.

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tried by a military commission.

Several features set the *Quirin* case apart from the case at bar. To begin, Quirin and his compatriots acknowledged their status as soldiers of a foreign army. *Id.* at 20. Padilla never has. Second, the *Quirin* Court found that Congress in the articles of war had established the crimes that the saboteurs were charged B a fact that the *Quirin* court considered crucial.[9] *Quirin* 317 U.S. at 26-27.[10] The Court clarified its reliance on congressional action in subsequent cases. *See In re Yamashita*, 327 U.S. 1, 7 (1946) (AIn *Ex parte Quirin* . . .[we] pointed out that Congress, in the exercise of the power conferred upon it by Article I, ' 8, Cl. 10 of the Constitution . . .of which the law of war is a part, had by the Articles of War . . . recognized the military commission appointed by military command@) (internal citations omitted); *Madsen v. Kinsella*, 343 U.S. 341, 355 n.22 (1952) (A[T]he military commission=s conviction of [the *Quirin*] saboteurs . . . was upheld on charges of violating the law of war *as defined by statute*@) (emphasis added). Unlike the Quirin Petitioners, Padilla has not been charged with a crime established by Congress. In *Quirin*, the President, during a declared war, acted in an area close to the traditional Commander-in-Chiefpower

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[9] In the context of the opinion the court=s use of the phrases, Anation at war,@ Aduring time of war,@ Aconduct of war,@ was a reference to a congressionally declared war. *Id*. at 20, 21, 22, 23, 25, 26, 28, 35, 37, 38, 42. *See* Torruella, J., *Slippery Slope*, at 668 n.132**.** It is clear, *Quirin* considers the extent of the Executive=s powers only in the context of a declared war. 317 U.S. at 26 (stating that A[t]he Constitution thus invests the President, as Commander in Chief, with the power to *wage war which Congress has declared*@) (emphasis added); *see also id.* at 25, 35, 42 (all limiting analysis to Atime of war@). In a declared war, the Executive=s powers are considerably larger than they are in an undeclared conflict. *See Bas v. Tingy*, 4 U.S. (7 Dall.) 37, 43 (1800) (AIf a general war is *declared*, its extent and operations are only restricted and regulated by the *jus belli*, . . . but if a partial war is *waged*, its extent and operation *depend on our municipal [i.e., national] laws*.@) (emphasis added).

[10] Indeed, Attorney General Francis Biddle, who argued the case on the President=s behalf, argued before the Supreme Court that the military commissions and the president=s proclamation were based on congressional acts B the Alien Enemy Act and the Articles of War. Francis Biddle, *In Brief Authority* 594-95 (New York: Doubleday & Company, Inc. 1962).

B the detention and trial of combatants who were self-acknowledged soldiers of a foreign enemy nation B and he acted pursuant to congressional authorization[11]. Here, the President acts far outside the traditional Commander-in-Chief power, and without congressional authorization[12]. In sum, the difference between these two cases is stark.

It is thus *Milligan*, and not *Quirin*, that provides the proper framework for determining whether the President has the power indefinitely to detain Padilla without a formal charge. The *Milligan* court understood well that validating the President=s claims would give the military vast power over the citizenry B at the expense of the Legislature and of individual liberty:

> No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people, for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By that protection or the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.

71 U.S. at 118-19. *Milligan=s* observations are no less true today than they were then. AThis general principle of *Milligan*-a principle never repudiated in subsequent cases-leaves the President little unilateral freedom to craft an order to detain people on his own suspicion for indefinite warehousing or trial at his pleasure in a system of military justice.@ Neal K. Katyal & Laurence H.

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[11]In addition, *Quirin* provides no support for the indefinite detention of Padilla without trial or access to counsel; the *Quirin* defendants were granted counsel and a chance to defend themselves and present evidence on their behalf.

[12]It should also be noted that the statutory premise for *Quirin*, the Articles of War, was repealed and replaced by a comprehensive and complete revision of AMilitary Law@ when Congress in 1950 enacted the Uniform Code of Military Justice, 10 U.S.C. ' 801, *et. seq*. which interpreted in does not give the Commander-in-Chief military jurisdiction over civilians. *See Toth v. Quarles,* 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1(1957).

Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1279-80 (2002) [hereinafter Katyal &d Tribe].

As in *Youngstown* and *Milligan*, the President has overstepped the authority granted to him by the Constitution. This exercise of unbridled power can not stand. That has been a bedrock of constitutional law since the Supreme Court in *Little v. Barreme* held that the President=s Commander-in-Chiefpowers could not exceed the Article I, AWar Power@ of Congress. 6 U.S. 170 (1804).

B. The President Has Engaged In Unlawful Executive Law Making

The President has unilaterally redefined the term Aenemy combatant@ to include any unarmed person outside a zone of combat who has contemplated a hostile act and has an alleged relation of some sort to an international criminal organization. This constitutes an unauthorized expansion of the definition of an unlawful belligerent and is impermissible executive law making.

The Constitution gives to Congress, not the President, the power to make rules concerning captures on land and water, Art. I, ' 8, cl. 14, and Ato define and punish . . . Offences against the Law of Nations.@ Art. I, ' 8, cl.10. There is no doubt that the right of the sovereign in wartime Ato take the persons and confiscate the property of the enemy@ is Aan independent substantive power@ of Congress, not the President. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 122, 126 (1814). AIn the framework of our Constitution,@ *Youngstown* held, Athe President=s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.@ 343 U.S. at 587. Congress has considered the conduct which the President alleges Padilla undertook. *See, e.g.*, 18 U.S.C. ' 2332(b) (conspiracy to kill United States nationals); 18 U.S.C. ' 844 (bombing and bombing

conspiracy); 18 U.S.C. ' 2332a(a)(1) (conspiracy to use weapons of mass destruction); 18 U.S.C. ' 2441 (defining war crimes).

No court has ever before held that an individual not found in a zone of active combat operations and not an acknowledged member of a foreign army, may be designated an enemy combatant. As noted above, the *Quirin* defendants acknowledged that they were members of the German army acting under orders of the German High Command. 317 U.S. at 21. So did the defendants in *Colepaugh*, 235 F.2d at 432, another case cited by the Court below. Likewise, the habeas petitioner *In re Territo*, 156 F.2d 142 (9th Cir. 1946) was a member of the Italian army captured on the Afield of battle,@ and General Yamashita was prosecuted for his role as a commander in the Japanese army during the battle to liberate the Philippines, 327 U.S. at 5 . In fact, a reading of *Quirin, Yamashita, Territo, and Colepaugh* shows that the Supreme Court=s use of the term Aenemy combatant@ was synonymous with the term Aenemy soldier,@ which both the military petitioners in *Quirin* and General Yamashita obviously were. More recently, the Fourth Circuit upheld the classification of Yasser Hamdi as an Aenemy combatant@ precisely because he was seized by the military in a zone of active combat. *Hamdi v. Rumsfeld,* 2003 U.S. App. LEXIS 13719, *4 (4th Cir. 2003)(*Hamdi IV)* (Wilkinson, J., concurring). Under the law of war, combatants are defined principally as Amembers of the armed forces of a Party to a conflict.@ Protocol I Additional to the Geneva Conventions art. 43(2); *see also* Third Geneva Convention, Prisoners of War, art. 4(2) (further defining those combatants entitled to prisoner of war status to include certain members of militias). The President=s unilateral definition falls outside these provisions of the 1949 Geneva Conventions, the Law of Armed Conflict, and Other Customary Norms of

International Law. Thus, no statute, treaty or judicial opinion has ever defined the term Aenemy combatant@ as the President has.

The President, instead of executing the laws B as he is duty-bound to do B has impermissibly created new law. Succinctly, the President=s novel definition is merely an avenue to trespass on the prerogatives of Congress.

C. Padilla=s Detention is Specifically Prohibited by 18 U.S.C. ' 4001(a).

Congress has explicitly barred the Executive from detaining any citizen without specific congressional authorization. 18 U.S.C. ' 4001(a) states that ANo citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.@ The language of the Act is direct and unambiguous. *Howe v. Smith*, 425 U.S. 473, 479 n.3 (1981); (A143.).

The history of the Act makes clear that it applies here. Section 4001(a) was enacted to repeal the Emergency Detention Act of 1950, 50 U.S.C. ' 812, 64 Stat. 1019 (1950). (AEmergency Detention Act@). *See*, H.R. Rep.92-116, 1971 U.S.C.C.A..N.1435, 1438. (AHouse Report@). The Emergency Detention Act, enacted at the height of Cold War fears of communist invasion, authorized the President Ain time of invasion, declared state of war, or insurrection in aid of a foreign enemy,@ to proclaim an AInternal Security Emergency@ and to apprehend and detain persons as to whom there was reasonable ground to believe that they Aprobably will engage in, or probably will conspire with others to engage in, acts of espionage or of *sabotage*.@ *Id*. at " 812, 813. (emphasis added).

Though Congress had considered simply repealing the Emergency Detention Act, it feared that repeal alone would not make sufficiently clear that the Executive branch was strictly prohibited from detaining citizens without specific congressional approval. ARepeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority,

. . . the Committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an act of Congress exists.@ *Id.*

In short, the text and legislative history establish without a doubt that Congress intended to prohibit the President from detaining any American B including suspected spies and saboteurs B without congressional authorization. As the next section makes clear, Congress has not authorized Padilla=s detention.

D. The Joint Resolution Does Not Provide the President With Authority To Order the Military To Seize and Detain Padilla.

Though the district court acknowledged that 18 U.S.C. ' 4001(a) bars Padilla=s current detention, in the absence of congressional authorization, the court found that the Joint Resolution provided the authority for the detention. (A143). The district court erred.

Specifically, the district court relied on ' 2(a) of the Joint Resolution, which states that:

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

Pub. L. No. 107-40, 115 Stat. 224 ' 2(a). Every applicable canon of statutory construction mandates the conclusion that Section 2(a) provides no justification for the military detention without charge

of an unarmed civilian within the United States, seized by military personnel far from any zone of combat.

The Supreme Court has repeatedly held that a general statute cannot take precedence over a specific statute, unless the general statute contains a clear statement asserting that Congress intends for it to control. *See, e.g., Busic v. United States*, 446 U.S. 398 (1980); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974). This principle is no less true even when the general statute is the later-enacted (i.e., last-in-time) statute. As the Court held in *Guidry v. Sheet Metal Workers Nat=l Pension Fund*, 493 U.S. 365 (1990), A[i]t is an elementary tenet of statutory construction that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment.@ *Id.* at 375 (internal quotations omitted).

Section 2(a) authorizes the President Ato use all necessary and appropriate force@ against those who contributed to the horrors of September 11. It is a broad statute, rapidly enacted four days after the terrorist attacks in order to allow the President to launch a concerted assault against al-Qaeda and its Taliban protectors, consistent with the War Powers Resolution. On the other hand, 18 U.S.C. ' 4001(a) is a specific statute, tailored precisely to the question of executive detention of American citizens. Section 2(a) does not specifically address American citizens. 18 U.S.C. ' 4001(a) does. Section 2(a) does not speak of detention. 18 U.S.C. ' 4001(a) does. In short, the only way to conclude that Section 2(a) authorizes the detention of American citizens is to *infer* that specific authorization from the broad words of the resolution. That is precisely what the Supreme Court has continually warned courts against doing. *See, e.g., Guidry*, 493 U.S. at 375. Absent a clear

statement, no general authorization for the use of force may be permissibly interpreted to authorize the detention without charge of an American citizen. The district court ignored this cardinal rule of statutory interpretation, and in so doing erred.

Under the cases giving precedence to specific statutes over general statutes, that result would be clear enough. This fundamental principle becomes clearer when the Government claims that a general enactment allows it to invade the liberty of citizens. As the Supreme Court has held:

> 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.

Ex parte Endo, 323 U.S. 283, 300 (1944).

These fundamental principles apply equally in times of peace and war. Time and again, our courts have considered Executive branch claims that a broad authorization for the use of force should be interpreted implicitly to permit seizures away from zones of active combat. Time and again, they have held that an authorization to use force provides no such implicit authority. *See Little v. Barreme*, 6 U.S. (2 Cranch) at 177 (imposing financial liability on a naval officer who had seized a ship as a prize of war pursuant to orders from the President authorizing the seizing of sailing *from* France, when Congress had authorized the seizure only of ships sailing *to* France); *Brown v. U.S.*, 12 U.S. (8 Cranch) 110, 128-29 (1814) (AWhen war breaks out, the question, what shall be done with enemy property in our country, is a question . . . proper for the consideration of the legislature, not of the executive or judiciary.@); *id.* at 126 (the right Ato take the persons and confiscate the property of the enemy@ is Aan independent substantive power@ of Congress); *Conrad v. Waples*,

96 U.S. 279, 284 (1877) (property of man Aengaged in the rebellion, as a member of the Confederate Congress, and giving constant aid and comfort to the insurrectionary government@ could not be seized without congressional warrant); *Salamandra v. New York Life*, 254 F. 852, 859 (2d Cir. 1918) (Awherever the enemy is present, and where his property is situate, Congress may determine there exists the element of danger, and to the extent of the jurisdiction of Congress the power exists, not only of seizure, but of disposition to the limits of the necessity.@).

Furthermore, in the months immediately after the horrific events of September 11, Congress did act to increase the President=s authority to punish and detain suspected terrorists. The United States PATRIOT ACT, Pub. L. No. 107-56, 115 Stat. 272 (2001), passed after the Joint Resolution, specifically authorized the President to detain aliens suspected of having terrorist ties. Such detentions can occur for limited periods of time and are governed by procedural safeguards. *See*, 8 U.S.C. ' 1226(a). Notably, the PATRIOT ACT did not amend or suspend the clear provisions of 18 U.S.C. ' 4001(a) - a fact that must be given credence in evaluating the Executive branch=s current claim of congressional authorization.

The district court=s interpretation of Section 2(a), thus not only violates the principles of statutory construction that the Supreme Court has set forth, it also illogically presumes that Congress set forth specific guidelines for the detention of aliens but authorized the President to detain citizens indefinitely without any guidelines. Clearly, when enacting Section 2(a), Congress did not intend the section to authorize the detention of American citizens seized outside zones of active combat. In summary, Section 2(a) cannot, consonant with elementary tenets of statutory construction, be read to authorize the military seizure and detention without charge of American citizens. Its language reflects no Aunmistakable intent@ to grant the Executive the power

to detain American citizens without charge B a power denied to it in '4001(a). Section 2(a) simply cannot be read to authorize Padilla=s military detention.

E. No Other Judicial Decision Supports the District Court=s Finding

Neither the *Prize Cases*, 67 U.S. 635, nor *Ex parte Quirin*, 317 U.S. 1, nor *Moyer v. Peabody*, 212 U.S. 78 (1909), all of which were relied on by the district court, support the court=s findings.

As previously stated, the *Prize Cases* considered the claims of ship owners whose property was seized by United States forces in zones of active combat. 67 U.S. at 666. The Supreme Court found the President had authority as Commander-in-Chief to seize property in what had become enemy territory by virtue of the secession. *Id*. at 670-71. However, the Court also found it crucial that Congress had likewise authorized the President=s use of force for the situation presented there -- specifically, an insurrection.[13] 67 U.S. (2 Black) at 668. On the other hand, as the prior section made clear, the Joint Resolution cannot legitimately be read to permit the detention without charge of an American citizen. The circumstances surrounding the detention of Padilla, in short, cannot be compared to the circumstances surrounding initiation of the blockade of the southern ports during the Civil War. The broad stroke application the district court gave to the *Prize Cases,* does not hold up to critical review.

Ex parte Quirin supports the decision no more strongly. President Roosevelt=s actions were tethered to congressional legislation, including the Articles of War. Further, as stated above, the *Quirin* saboteurs were acknowledged members of a foreign army (unlike Padilla), who were held pursuant to congressional statutes (unlike Padilla) and were given an opportunity to assert innocence

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[13] To be sure, the President has the authority to Adetermine what degree of force the crisis demands.@ *Prize cases,* 67 U.S. at 670. However, the discretion to determine the appropriate level of force does not somehow give him a mandate to act in excess of the authority that has been given

(unlike Padilla). *See* 317 U.S. at 21.

There are additional reasons to view with skepticism the extension of the *Quirin* case to Padilla=s facts and circumstances. Most significantly, *Quirin* predated 18 U.S.C. ' 4001(a). For more than thirty years now, Congress has precluded any detention of an American citizen not grounded in statute. But that is not the only reason to view the case as faded. Justice Frankfurter has referred to *Quirin* as not Aa happy precedent.@ David J. Danelski , *The >Saboteurs= Case*, 1 J. S.Ct. Hist. 61, 80 (1966) (questioning the continued validity of the *Quirin* decision) [hereinafter Danelski]. More than one commentator has concluded that the *Quirin* saboteurs were tried in military commissions rather than criminal courts because the Executive branch feared that criminal trials would lead to disclosure of intelligence agency incompetence: one of the saboteurs, George Dasch, had tried several times to turn himself into the FBI and reveal the scheme, but the FBI failed to take him seriously and repeatedly rebuffed him. Fisher, Military Tribunals, The *Quirin* Precedent Congressional Service, March 26, 2002 at 1-4 (hereinafter AFisher at CSR1-4"); Danelski at 63-64. Avoiding its usual procedures, the Supreme Court issued a summary order denying the *Quirin* defendants= writ of habeas corpus almost immediately after the oral argument. Six of the eight saboteurs were quickly executed. It was not until months after the execution of those petitioners that the Court handed down an opinion to justify its summary order. By then, coming to a different conclusion was impossible. *Id.* Professors Katyal and Tribe have suggested that *Quirin* Ais more plausibly classified with those decisions like *Korematsu*, whose force as precedent has been diminished by subsequent events, rather than with those whose undiminished momentum counsels

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him.

maintenance under principles of stare decisis.@ Katyal & Tribe at 1304.

Reliance upon *Moyer* is likewise misplaced. 212 U.S. 78. *Moyer* does not support the asserted proposition that the Commander-in-Chief clause authorizes Padilla=s military detention. In *Moyer*, the governor of Colorado, then a frontier state seeking to establish the rule of law, confronted a labor action by union officials that the governor deemed an insurrection. In an exercise of emergency power *explicitly provided by a state statute*, the Governor detained without charge those union officials whom he considered to be leaders of the incipient insurrection. *Id*. at 84. The Supreme Court affirmed the action, noting that it was undertaken with legislative authorization. 212 U.S. at 84. Unlike the situation here, Moyer=s detention occurred pursuant to a specific state statute. Never before has a President designated as an Aenemy combatant@ a citizen who had not sworn allegiance to a foreign national by joining its armed forces and who was not in the zone of combat. This unprecedented action by the Executive has no support in text of the Constitution, violates a specific mandate of Congress and is unsupported by judicial authority. In our system of government, the Legislature, not the President defines the basis on which a citizen can be deprived of liberty. Where, as here, the President exceeds his authority, it is the obligation of the Judiciary under Article III to safeguard the liberty of each individual citizen by prohibiting the President from exceeding his lawful authority.

II. PADILLA IS PROTECTED BY THE DUE PROCESS CLAUSE

A. THE DUE PROCESS CLAUSE REQUIRES THAT PERSONS DEPRIVED OF LIBERTY TO BE GIVEN NOTICE AND AN ADVERSARIAL HEARING

Shortly before Padilla=s scheduled court hearing concerning the legality of his detention as a grand jury material witness, President Bush ordered the military to seize Padilla from his cell at the MCC. No notice was given to Padilla. No notice was given to his attorney. He was not provided with the basis for his seizure, nor was he given an opportunity to dispute the evidence against him. He remains in a naval brig in South Carolina, unable to communicate with anyone from the outside world, including his attorney. Over one year later, he still has not been allowed to participate in any kind of hearing, in any forum, and he has no knowledge of the reasons for his detention. He has remained for over one year in a legal -- if not physical B Ablack hole.@

Padilla as a citizen, enjoys the full protection of the Constitution and can not be deprived of his liberty without due process of law. U.S. Const. amend. V. It is fundamental that a citizen=s right to due process does not evaporate even in time of war. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *see also Joint Anti-fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) (AThe requirement of >due process= is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble@); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (AEven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection of the Due Process Clauses of the Fifth and Fourteenth Amendments.@); *McGrath*, 341 U.S. at 168, (Frankfurter, J. concurring) (The Aright to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society); *Washington*

v. Texas, 388 U.S. 14, 19 (1967) (holding that Athe right to present the defendant=s version of the facts as well as the prosecution=s is a fundamental element of due process of law@); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) (One principle that has remained Aimmutable in our jurisprudence is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government=s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.@); *In re Oliver*, 333 U.S. 257, 273 (1948) (AA person=s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense . . . are basic in our system of jurisprudence@).

In *United States v. Salerno*, 481 U.S. 739 (1987), the Supreme Court upheld the Bail Reform Act of 1984 which permitted the pre-trial detention of an individual charged with a crime on the grounds of risk of flight and danger to the community. The Court held that the Act=s Aextensive safeguards@ satisfied procedural due process. *Id.* at 752. The Court emphasized that the accused had the right to counsel, to testify, to proffer evidence, and to cross-examine witnesses; that the government was required to prove its case for detention by clear and convincing evidence; and that an independent judge guided by Astatutorily enumerated factors@ must issue a written decision subject to Aimmediate appellate review.@ *Id.* at 751-52; *see also Morrissey v. Brewer*, 408 U.S. 471, 483-89 (1972) (parolee entitled to written notice of violation, disclosure of evidence against him, opportunity to be heard, and present witnesses and documents, right to confront and cross-examine adverse witnesses, hearing before and determination to be made by neutral detached body, and a written statement by the fact finders as to the evidence and the evidence relied upon to reach determination); *Wolff v. McDonnell*, 418 U.S. 539, 563-72 (1974) (before an inmate can lose good time credits, the inmate is entitled to notice and an opportunity to be heard); *Kent v. United States*,

383 U.S. 541, 554 (1966) (before a case is transferred from juvenile court to Aadult@ court, a juvenile must receive notice and be afforded a hearing with the assistance of counsel).

Beyond even the criminal context, where the risk of deprivation of liberty makes the stakes particularly high, the Supreme Court has held in the civil context that procedural due process requires, at a minimum, notice and a hearing before a property right or privilege can be permanently terminated. *See e.g.*, *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Lipke v. Lederer*, 259 U.S. 557 (1922) (Taxpayer must be given fair opportunity for hearing before taxes can be levied in accord with constitutional guarantee of due process); *Goss v. Lopez*, 419 U.S. 565, 582 (1975) (student facing a short-term suspension from public school is constitutionally entitled to Aan opportunity to present his side of the story@); *Bridges v. Wixon*, 326 U.S. 135 (1945)(essential standards of fairness, inherent in due process requires that alien not be deported based on unsigned, unsworn hearsay allegations that alien was active in Communist Party); *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 206 (D.C. Cir. 2001) (before an organization can be designated as a foreign terrorist organization under AEDPA[14] with the resultant interference with the members= constitutional rights, the organization must be put on notice of the Secretary=s intention and must be afforded a hearing).

Even in the *Prize Cases*, the owners of the property subject to seizure were able to appear in court, represented by counsel, and to introduce evidence to contest the legality of the seizure. 67 U.S. at 674. It is also notable for the issues presented by this Petition that the Emergency Detention Act, which was later repealed, included numerous due process procedural safeguards. For

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[14] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996)

example, the act required that within forty-eight hours of a detainee=s arrest, he was to be informed of: 1) the grounds for detention; 2) his right to be represented by counsel; 3) the privilege against self-incrimination; 4) the right to introduce evidence and cross-examine witnesses. Pub.L.No. 82-831, 64 Stat. 987 (1950)(codified as amended in scattered sections of 50 U.S.C.). Indeed, even aliens who are subject to removal, receive substantial due process both in terms of pre-removal hearing and even periodic review of their detention. 8 U.S.C. " 1537(b)(1), (c)(2); *see also Zadvydas v. Davis*, 533 U.S. 678, 719 (2001) (Kennedy, J., dissenting).

The concept of due process is flexible and calls for such procedural protections as the particular situation demands. *Mathews*, 424 U.S. at 334. The exact nature of the process due is determined by the balancing of three factors: 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and 3) the Government=s interest, including the function involved and the cost and administrative burdens of the procedure. *Id*. at 335 (*citing Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)).

Application of the *Mathews* factors to the Padilla case weighs heavily in favor of a hearing similar to that prescribed under the Bail Detention Act, albeit with a higher burden of proof . The private interest at stake is enormous: liberty and the right to communicate with the world. In addition, Padilla has been deprived not only of his physical liberty for over one year, but also all of his other constitutional rights, and basic human rights, such as his right to see and speak with his family. The risk of erroneous deprivation is high given that to date Padilla has not had a chance to dispute the Government=s hearsay evidence.

Moreover, as history has taught, the risk of an erroneous deprivation is particularly great,

where as here, the Government cloaks its evidence under claims of Anational security@ and secrecy. In *Korematsu v. United States*, 323 U.S. 214 (1944), the only incident in which American citizens were detained without due process under Anational security@ claims, it came to light years later that the Government had knowingly submitted false and misleading information to the Court regarding the military necessity of the internment measures taken. *Korematsu v. United States,* 584 F.Supp. 1406, 1418 (N.D. Cal.1984) (writ of *error coram nobis* granted and conviction reversed upon finding that the Government had misrepresented throughout the case the existence of Aintelligence@ justifying or providing a clear, military necessity for the evacuation orders); *see also Hirabayashi v. United States*, 627 F.Supp. 1445 (W.D. Wash. 1986) (reversing in part some of convictions on same grounds).[15] False claims of Anational security@ were also proffered to the Court during the AWatergate@ affair as a basis to avoid compliance with Grand Jury subpoenas. *See* John Siricca, U.S. District Court Judge, District of D.C., *To Set the Record Straight* 155 (NY:W.W.Norton & Co. 1979).[16] There are numerous examples of misguided investigations where information relied upon to detain individuals for various lengths of time proved to be false. *See, e.g., Kiareldeen v. Reno*, 71 F.Supp. 2d 402 (D.N.J. 1999)(false accusations by ex-wife basis for arrest on terrorism charges.); *In re application of the United States for Material Witness Warrant*, 214 F.

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15 *See* Peter Irons, *Justice at War* (NY: Oxford Univ. Press 1983)(the author, an attorney and professor, documents and traces the government=s presentation of intentional falsehood citing files that disclose the altercation and destruction by War Department officials of crucial evidence in the Japanese internment cases.

16 The misrepresentations of various Commanders in Chief exercising their purported Awar power,@ have been extensively documented. *See, e.g.,* H.R. McMaster, Major, U.S. Army, *Dereliction of Duty: Lyndon, Johnson, Robert McNamara, the Joint Chiefs of Staff, and the Lies that Led to Vietnam* (NY: Harper Collins 1997); Sirica, *op cit.*

Supp. 2d 356 (S.D.N.Y. 2002) (Mr. Higazy was detained on the basis of a false report that a communications device was in his hotel room near the World Trade Center); *see also*, Robert E. Pierre, *FBI Apology Fails to Dissipate Cloud: 8 Terrorism Suspects Confined on Bogus Tip*, Wash. Post, May 24, 2003, at A39 (describing how terrorist suspects learned that Aa lover=s quarrel had done them in@ and that Athe wife of [a] fellow detainee apparently in anger@ gave the FBI a false tip).

As to the third prong of the *Mathews* test, the Government interest in national security must be addressed through the tailoring of the procedures used, not through dispensing with procedures altogether The Government=s interest may even affect the time at which a hearing must be held, i.e. whether immediately or after a short but reasonable delay.[17] However, an extensive delay would be contrary to the purpose of procedural due process. Indeed, the Supreme Court has recognized that even in the gravest emergencies, pressing crises, there is

> The imperative necessity for safeguarding these rights to procedural due process ...[because it is then] that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action ... AIf society is disturbed by civil commotionBif passions of men are aroused and the restraints of law weakened, if not disregardedBthese safeguards need, and should receive, the watchful care of those entrusted with guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.@

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165 (1963) (*quoting Ex Parte Milligan*, 71 U.S. 2 (1866)).

The minimum procedural due process required by *Mathews,* the right to be heard A>at a meaningful time and in a meaningful manner=@, has been denied to Padilla. *See Id.* at 424 U.S. 348-49 (citations omitted). There simply is no precedent for the military=s seizure of Padilla, his transfer from the civil justice system, without notice to counsel, and without notice of the basis for his designation and detention, or an opportunity to contest the allegations or otherwise be heard in a meaningful manner. The action of the President in unilaterally designating Padilla as an Aenemy combatant@ and the ordering his detention by the military, in the total absence of any form of due

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17 Particularly given that Padilla was already in federal custody and could present little threat to the public from the MCC, he should have been given an opportunity to contest the

process, is an affront to the Constitution.

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evidence against him before he was transferred from this civilian jail to military custody.

B. THE INTERROGATION OF PADILLA BY METHODS INTENDED TO COERCE SHOCKS THE CONSCIENCE.

Beyond the Fifth Amendment=s guarantee against depriving one of life, liberty or property without due process, the Fifth Amendment also protects an individual against being compelled to give evidence against himself. U.S.Const.amend. V. The district court found the latter protection applicable only where an individual is charged in a criminal proceeding because it is only at the introduction of the coerced confession at trial that it ripens to a constitutional violation. (A 145). While an infringement of the right against self-incriminationdoes not ripen into a violation until trial, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), nonetheless, the invocation of the privilege has been held applicable to proceedings other than criminal trial. *See, e.g., Counselman v. Hitchcock*, 142 U.S. 547(1892)(right applicable to grand jury proceedings); *McCarthy v. Arndstein,* 266 U.S. 34 (1924) (right applicable to congressional investigation); *Watkins v. United States*, 354 U.S. 178 (1957) (right applicable to juvenile proceedings). But more to the point here, as the Supreme Court recently stated A[t]he proper scope of the Fifth Amendment=s Self-Incrimination Clause [does] not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial.@ *Chavez v. Martinez*, 123 S.Ct. 1994, 2004 (2003) (remand to determine substantive due process claim).

Due process protects against government action which either Ashocks the conscience,@ or interferes with rights Aimplicit in the concept of ordered liberty,@ *Chavez,* 123 S.Ct. at 2011 (Steven, J., dissenting)(citing, *Rochin v. California*, 342 U.S. 165, 172 (1952) and *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937)). The Supreme Court recognized on numerous occasions that Aunusually coercive interrogation@ techniques do violate that standard. *Id.* note 1; *cf.*

Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (the due process clause may be violated where there has been deprivation of liberty caused by egregious official conduct). Thus, even where there is no trial, or charges are not brought, law enforcement does not have free reign to interrogate a citizen for any length, by any means, for any purpose. *See Chavez* 123 S.Ct. at 2004.

An understanding of the origins of the due process right against self-incrimination assists in understanding of its significance to this case where the Government freely concedes that it is employing coercion in its effort to extract information from Padilla[18] but states it has no current intention of charging Padilla with a crime.[19] *See* A 55-63. AThe privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago.@ *Michigan v. Tucker*, 417, 433 (1974) (*citing* L. Levy, Origins of the Fifth Amendment (1968); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L.Rev. 1 (1949); 8 Wigmore ' 2250). It was this evil which the Framers sought to protect against. *Id*. Historically, use of techniques which are aimed at coercing information from a suspect have met with disdain by our courts. *See e.g., Brown v. Mississippi*, 297 U.S. 278 (1936) (third-degree torture); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (prolonged isolation from family or friends

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[18]This assumes, of course, that Padilla has or had information to provide. We do not concede this point and nothing the Government has submitted suggests Padilla does have information, beyond their speculation.

[19] The Government has not said that it would not bring criminal charges against Padilla in the future.

in a hostile setting); *Watts v. Indiana*, 338 U.S. 49 (1949) (prolonged interrogation which subjects suspect to physical and mental exhaustion).

The Government states that Padilla is kept completely isolated to cut him off from his counsel, his family, his friends, and the world. (A 58-59). There are reports of government use of sensory deprivation and other techniques to achieve their goals.[20] The Government resists counsel=s meeting with Padilla stating the fear that counsel will learn of the interrogation techniques which have been employed. (A 57). The Government resistence raises a specter of suspicion that the Government is employing interrogation techniques which cross the line of decency. Actual concern for counsel=s dissemination of any information is easily addressed by stipulation between counsel or court order.

It Ashocks the conscience@ to realize that Padilla is being held under conditions which are more severe and harsh then those to which any convicted murderer, any prisoner of war, and any one convicted of war crimes are subjected. Padilla has endured these conditions for over one year. If the concept of substantive due process has any meaning, this Court must find that the Constitution of the United States does not permit the interrogation of a citizen under such onerous conditions.

C. THE SCOPE OF JUDICIAL REVIEW OF PADILLA=S DETENTION MUST BE *DE NOVO* AND NOT ASOME EVIDENCE@

The Asome evidence@ standard accepted by the district court is a standard of review that may be applied only after the original decision-maker has complied with the requirements of due process when it created a record to be reviewed. Here, no process has yet been afforded Padilla. Therefore, the district court cannot apply the Asome evidence@ standard to evaluate the lawfulness of his detention. The standard of review to be applied by the district court must be *de novo* B that is, the court must provide Padilla with plenary review of the basis for the President=s designation of him as an Aenemy combatant.@ Further, as a court deciding a habeas petition, the court should conduct a *de novo* review of the jurisdiction of the detaining authority, including review of jurisdictional facts.

1. The Jurisdiction of the Detaining Authority Has Historically Been Subject

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[20] *See* Mayer, *Annals of Justice: Lost in the Jihad*, The New Yorker (Mar. 10, 2003),

to *De* *Novo* Review

Unlike the context of federal habeas corpus petitions by prisoners who have already had at least one and often multiple opportunities for full judicial process in state or federal courts, *see* 28 U.S.C. " 2254 (d)(1) - 2255, the case before this Court arises instead in the context of executive detention, a context in which the petitioner has never had his claims reviewed by any neutral fact finder. *See, e.g., Henderson v. INS*, 157 F.3d 106, 120 (2d Cir. 1998) (AThe cases [immigration removal] before us arise instead in the totally dissimilar setting of executive detention, a context in which the petitioners have never had their claims reviewed by any court, federal or state.@). This circumstance places Mr. Padilla=s petition squarely within the context of the primary historical use of the writ of habeas corpus. *See id.* at 121; *see also Felker v. Turpin*, 518 U.S. 651, 663 (1996) (noting that the writ originally only extended to prisoners who were not Adetained in prison by virtue of the judgment of a court@) (internal quotations omitted)); *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977); *id.* at 385-86 (Burger, C.J. concurring) (joined by Blackmun and Rehnquist, JJ.)(Athe traditional Great Writ was largely a remedy against executive detention@); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the result) (AThe historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.@).

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available at http://www.newyorker.com/printable/?fact/030310fa_fact2.

At common law, Awhile habeas review of a court *judgment* was limited to the issue of the sentencing court=s jurisdictional competency, an attack on an *executive order* could raise all issues relating to the legality of the detention.@ *Developments in the Law B Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1238 (1970) (emphasis supplied); *see also Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833). Historically, and continuing up through the present, the review of executive determinations regarding custody and detention has been comprehensive. *See, e.g., Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-07 (1830)(drawing a crucial distinction between superior courts of general jurisdiction, empowered to enter judgments that are entitled to a presumption of validity in subsequent litigation, and inferior tribunals B such as executive tribunals B whose determinations could be reexamined on habeas);[21] *Randolph*, 20 F. Cas. at 245.

The breadth of habeas inquiry into executive detention also authorized the identification and resolution of issues of fact on the grounds that certain issues of fact are determinative of jurisdiction. *See, e.g., McClaughry v. Deming*, 186 U.S. 49, 62 (1902); *Ex parte Randolph*, 20 F. Cas. 242, 251 (C.C.D. Va. 1833); *Meade v. Deputy Marshall*, 16 F. Cas. 1291, 1293 (C.C.D. Va. 1845); *In re Kaine*, 14 F. Cas. 84, 88, 90 (C.C.S.D.N.Y. 1852); *Nelson v. Cutter*, 17 F. Cas. 1316 (C.C.D. Ohio 1844); *see also*, Gerald Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98

[21] *Watkins* distinguished the closer examination available in cases like *Bollman*, in which habeas was used to challenge pretrial detention and no final judgment stood in the way of relitigation. *See Watkins*, 28 U.S. (3 Pet.) at 207-08; *see also Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807) (explaining that Court can discharge prisoner from pretrial detention due to lack of probable cause to believe that offense was committed). In that context, the grounds of unlawfulness of detention included both commitment without probable cause and unlawful denial of bail.

Colum. L. Rev. 961, 984 (1998).

Significantly, this fact-finding authority of the federal habeas courts was expressly expanded in the 1867 Act that extended the writ to all persons restrained of liberty in violation of federal law.[22] *See Townsend v. Sain*, 372 U.S. 293, 311 (1963) (The 1867 Act expressly affirmed the power of the federal courts to take testimony and determine facts *de novo* in Athe largest terms, restating what apparently was the common-law understanding.@); *see also Fay v. Noia*, 372 U.S. 391, 416 n.27 (1963) (AThe language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.@) 372 U.S. at 312.

Of further relevance to the issue of the proper scope of review are the decisions dealing with habeas challenges to a detainee=s status as an enemy alien under the Alien Enemies Act of 1798**.** As explained above, that Act authorized the President to detain, relocate, or deport enemy aliens in time of war. 50 U.S.C. " 21-24. The decisional authority interpreting this statute unequivocally holds that courts can review whether war has been declared, whether the detainee is an alien, and whether the detainee is among the Anatives, citizens, denizens, or subjects of a hostile nation@ within the meaning of the Act. *See Ludecke v. Watkins*, 335 U.S. 160, 161 (1948); *see also United States ex. rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 902 (2d Cir. 1943); *United States ex rel. De Cicco v. Longo*, 46 F. Supp. 170, 172 (D. Conn. 1942); *Minotto*

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[22] *See* Act of Feb. 5, 1867, 39 Cong. ch. 27, 14 Stat. 385 (the A1867 Act@). The 1867 Act provided that the Apetitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the Constitution or laws of the United States,@and required the court to Aproceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested....@ *Id.*

v. Bradley, 252 F. 600, 602-03 (N.D. Ill. 1918).

2.The Constitution Mandates *De Novo* Review of Decisions Made Without Due Process

Constitutional due process requirements mandate plenary, *de novo,* review in situations where an initial decision has been made without a hearing before an administrative tribunal in accordance with due process.[23] In light of the circumstances of this case B the absence of any hearing or fact-finding by any tribunal prior to the designation and detention of Mr. Padilla B it is clear that *de novo* review is required. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). In the administrative context, the Supreme Court has held that *de novo* review is required when Athe action is adjudicatory in nature and the agency fact-finding procedures are inadequate,@ and Awhen issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.@ *Id.* at 415.

The fact that Anational security@ is involved does not change this due process requirement. The Supreme Court has explained, for example, that *de novo* review is required for claims that a court-martial did not adequately consider.

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[23] For example, this Court reviews *de novo* claims that a criminal conviction rests on insufficient evidence, and in so doing inquires whether there was sufficient evidence by which a reasonable factfinder could have found guilt beyond a reasonable doubt. *See, e.g., U.S. v. Szur*, 289 F.3d 200, 219-20 (2d Cir. 2002). By analogy, even if the Asome evidence@ test were somehow relevant in the Aenemy combatant@s context, it could not conceivably apply in the way the Government suggests; instead, a court would have to determine *de novo* whether there was Asome evidence@ by which a reasonable fact finder (after an adversarial hearing using procedures that comport with due process) could have found Padilla an Aenemy combatant@ beyond a reasonable doubt. But that is not this case, for here there has been no underlying proceeding in accordance with due process to which the Court must defer. Moreover, even if there had been a fair hearing, the@some evidence@test would still not apply for the independent reason explained above, namely that the court has the *de novo* authority in cases of executive detention to conduct plenary review of jurisdiction, including review of jurisdictional facts.

> Had the military courts manifestly refused to consider those claims, the district court was empowered to review them *de novo*. For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers--as well as civilians--from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.

Burns v. Wilson, 346 U.S. 137, 142 (1953). Because Mr. Padilla has never been given any sort of hearing at which he was allowed even the minimum due process elements of notice and an opportunity to be heard, he is entitled to *de novo* review of his claims.

3.The District court Erred When It Adopted the ASome Evidence@ As a Standard of Proof

The district court erroneously conflated the issue of the *scope of judicial review* with the issue of the *standard of proof* to be employed by the court in evaluating the evidence proffered by the government. (A 151). The Asome evidence@ standard is the standard of review applied to evaluate the record findings of a decision-maker who has complied with the requirements of due process in a hearing. *See* Gerald L. Neuman, *The Constitutional Requirement of ASome Evidence,@* 25 San Diego L. Rev. 631, 663-64 (1988) [hereinafter *Some Evidence*]. Because there was never any hearing that complied with due process in this case and there is no record here, the district court cannot apply the Asome evidence@ standard to evaluate the lawfulness of Padilla=s detention.

For nearly a century, the Supreme Court has articulated the procedures that must be employed by the original decision-maker before a reviewing court can

determine whether there is Asome evidence@ to support the decision-maker's judgment. *But there has never been a case, in nearly a century of federal jurisdiction, in which the Court upheld a record on the Asome evidence@ in which the claimant had no right to participate*.[24] The district court erred, therefore, in assuming that its inquiry was governed by the Asome evidence@ standard; it cannot apply that standard to this record, because the predicate process has not yet taken place.

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[24] The court below does not disagree A[n]o court of which I am aware has applied the >some evidence= standard to a record that consists solely of the government's evidence, to which the government's adversary has not been permitted to respond. Rather, courts have applied that standard to review the decisions of tribunals where petitioners had a chance to contest the evidence against them.@(A162).

The Asome evidence@ standard has historically been understood as a fundamental guarantee of the due process norms that ensure the integrity of adjudicative procedures. *See* Neuman, *Some Evidence*, 25 San Diego L. Rev. at 636-658. This standard of review first appeared in the early 1900s as a due process requirement applicable to habeas corpus review of decisions by immigration officials to exclude Chinese immigrants. The Supreme Court repeatedly stressed, in a series of decisions, that immigration officials were not free either from due process constraints, or from the Court=s review of their compliance with these constraints. *See, e.g., Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) (ABut this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in >due process of law= as understood at the time of the adoption of the Constitution.@)[25]; *Chin Yow*, 208 U.S. 8, 12-13 (1908) (*de novo* review of citizenship claim appropriate upon a showing of hearing office misconduct, including the hearing officers failure to follow hearing rules); *see also Kwock Jan Fat v. White*, 253 U.S. 454 (1920) (Secretary of Labor abused its power and violated due

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[25] The courts have long enjoyed the authority to review the Executive=s legal determinations. *See Gegiow v. Uhl*, 239 U.S. 3, 9 (1915)(AThe statute by enumerating the conditions upon which the allowance to land may be denied, prohibits denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon *habeas corpus*.@) AIn case after case, courts have answered questions of law in habeas corpus proceedings brought by aliens challenging executive interpretations of the immigration laws.@ *INS v. St. Cyr*, 533 U.S. 289, 306-07 (2001); *see also Kessler v. Strecker*, 307 U.S. 22, 35 (1939)(holding that Aas the Secretary erred in the construction of the statute, the writ must be granted@); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)(rejecting on habeas the government=s interpretation of the statutory term, >entry=).

process by failing to permit the claimant to confront the witnesses against him, and failing to record important portions of the testimony of witnesses favorable to the claimant=s assertion of citizenship.); *United States v. Woo Jan*, 245 U.S. 552, 556 (1918) (administrative proceeding lacks >safeguards of impartiality and providence= that judicial proceeding offers).

Though the Asome evidence@ standard first developed in the *Chinese Exclusion Cases*, the Supreme Court has since applied it in a few substantive areas. In the past ninety years, the Court has applied the standard to review the Interstate Commerce Commission=s decisions regulating railroad operations, *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913), extended it as an exception to the finality of selective service classification decisions, *Dickinson v. United States*, 346 U.S. 389 (1953), and applied it to determinations made by officials in state prison disciplinary proceedings, *Superintendent v. Hill*, 472 U.S. 445 (1985). In *every* case, however, the Court has universally recognized that application of the Asome evidence@ standard by a reviewing court presupposes the existence of a fair process by the underlying decision-maker.

In the prison disciplinary context, one of the limited circumstance in which the Asome evidence@ standard is still regularly applied, the application of the standard has been deemed to require an agency adjudicative process in which the dictates of due process have been followed. As the Supreme Court made clear in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and then later in *Hill*, 472 U.S.445, 452-53,[26] in

[26] After *Hill*, the federal courts have repeatedly recognized that the Asome evidence@ standard, though deferential, nonetheless requires a fundamentally fair process by the underlying decision-maker. For example, as the Seventh Circuit has

accordance with the requirements of due process, in light of the liberty interest at stake, inmates are to be afforded notice of the charges against them, a hearing at which to contest those charges, the right to present evidence, and a written statement of the fact-finder of the evidence relied on and the reasons for the disciplinary action taken. *See also Kalwasinski v. Morse*, 201 F.3d 103, 108 (2d Cir. 1999) (applying the Asome evidence@ standard to review an inmate=s loss of good time credit only after the Second Circuit had examined the due process protections afforded to the inmate).

The Asome evidence@ standard has never been applied as a burden of proof but only as a standard of review. The district court bases its intention to use this novel, and constitutionally inappropriate, use of the Asome evidence@ standard out of deference to the Executive in war time. Ironically, the court below based its deference on the reasoning expressed in *Hamdi,* 296 F.3d at 282 and other historical precedents. (A 145). Yet, the Fourth Circuit distinguished the battle zone seizure of Hamdi from the designation and detention of Padilla. *Hamdi IV* 2003 U.S.

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repeatedly observed, A[a] prison disciplinary body may not arbitrarily refuse to consider exculpatory evidence offered by a prisoner simply because the record already contains the minimal evidence suggesting guilt required by *Hill.@ Viens v. Daniels*, 871 F.2d 1328, 1336 (7th Cir. 1989); *see also Whitford v. Boglino*, 63 F.3d 527, 536-37 (7th Cir. 1995) (AThe adjustment committee may not arbitrarily refuse to consider exculpatory evidence simply because other evidence in the record suggests guilt.@); *Cornell v. Woods*, 69 F.3d 1383, 1389 (8th Cir. 1995)(although the prison disciplinary finding was supported by Asome evidence,@ it was nonetheless unjustified, since the prison disciplinary board applied its disciplinary rules in retaliation).

App. LEXIS 13719, *11 (Wilkinson concurring)(ATo compare this battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges.@). Further the *Prize Cases*, gave no deference to the battlefield decisions of the military, and *Youngstown Sheet & Tube Co. v. Sawyer,* rejected the deference shown by the court below.

The district court=s suggestion that a review of the President=s actions should be left to Ademocratic process,@ (A149), rather than an Article III court has been repudiated by history. In *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court gave deference to a war time determination of Amilitary necessity@ without sufficient factual support. As Congress later found, the internment of Japanese American citizens was based on Awartime hysteria, and a failure of political leadership,@ 50 App. U.S.C.A ' 1989a(a). The court below cites no authority for this apparent abandonment of the judicial constitutional obligation to act as a check on the Apolitical branches@ of government.

In short, since the Asome evidence@ standard presupposes a predicate set of procedural protections of which Padilla received none, the district court had no basis for employing the Asome evidence@ standard. *See* Neuman, *Some Evidence*, 25 San Diego L. Rev at 678.

4. Due Process Requires Proof Beyond A Reasonable Doubt Before a Person May Be Imprisoned

The Court must determine what standard of proof the district court is to apply in evaluating the evidence placed before it. *See* Stein, Mitchell & Mezines, Administrative Law, ' 51.04 at 51-200 (noting the distinction between the scope of review and the reviewing standard); *see also Modica v. United States*, 518 F.2d 374, 376 (5th Cir. 1975); *Saunders v. United States*, 507 F.2d 33, 36 (6th Cir. 1974). In as

much as Mr. Padilla has been deprived of his liberty for punitive reasons and placed in detention under extraordinary conditions, the only appropriate of standard of proof here is that of proof beyond a reasonable doubt.

The function of a standard of proof, under the Due Process Clause in the realm of fact-finding, is to instruct the fact finder as to the degree of confidence our society thinks the fact finder should have in the correctness of his or her factual conclusions. *Addington v. Texas*, 441 U.S. 418, 423 (1979) (AIn cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty.@) (internal quotations omitted). The *Addington* court recognized a continuum of standards of proof that satisfy the dictates of due process in different contexts. The standards along the continuum range from the Apreponderance of the evidence@ standard to Aclear and convincing evidence@ to Aproof beyond a reasonable doubt.@[27] *Id.* at 423. In criminal matters, because liberty is at stake, the Supreme Court held that the interests of the defendant Aare of such magnitude@ that the use of the Abeyond a reasonable doubt@ standard is required to Aexclude as nearly as possible the likelihood of an erroneous judgment.@ *Id*.

The reasonable doubt standard is derived from the Due Process Clause and is the historical barrier to arbitrary deprivation of freedom in the criminal justice system. *In the Matter of Winship*, 397 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307

[27] Because it is solely a standard of review, the Asome evidence@ standard does not make the list as a constitutionally valid fact finding standard of proof in due process cases.

(1979), *reh=g denied*, 444 U.S. 890 (1979). The standard requires the Government to prove, within a fair procedural framework, that a person is unquestionably guilty of the crime for which he is to be incarcerated. The principle is well established that punitive detention may be imposed only pursuant to a conviction under the criminal law. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (invalidating a statute permitting civil commitment based on finding of dangerousness alone, reasoning that A[a]s Foucha was not convicted, he may not be punished); *see also Wong Wing v. INS*, 163 U.S. 228 (1896) (invalidating a statute that imposed imprisonment at hard labor on deportable noncitizens because it imposed punishment without a criminal conviction).

According to the *Zadvydas* court, Agovernment detention violates . . . [the Due Process] Clause@ unless it is imposed as punishment in a criminal proceeding conforming to the rigorous procedures constitutionally required for such proceedings, or Ain certain special and >narrow= non-punitive circumstances.=@ *Zadvydas*, 533 U.S. at 667. The use of the beyond a reasonable doubt standard has also been required in non-criminal matters. *See, Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)(upholding the constitutionality of the Kansas Sexual Predator Acts, which permits non-criminal detention of individuals who have been convicted at trial on proof beyond a reasonable of a sex crime, and found at a second trial by proof beyond a reasonable doubt to be a sexual predator); *See also, Kansas v. Crane*, 534 U.S. 407 (2002).

There can be no doubt that Padilla=s detention is punitive in nature. The accusations made against Padilla and the measures imposed upon him by the Government bear all of the features of a punitive scheme. *Kennedy v. Mendoza-*

Martinez, 372 U.S. 144 (1963).[28] First, the accusations against Padilla clearly evince the government=s determination that he has participated in a conspiracy to commit one or more federal crimes. *See, e.g.,* 18 U.S.C. ' 2339(b) (criminalizing conspiracy to provide material support and resources to terrorist organizations such as al Qaeda); 18 U.S.C. ' 2384 (criminalizing conspiracy to levy war against the United States); 18 U.S.C. ' 2381 (criminalizing treason); 18 U.S.C. ' 2332b (criminalizing international terrorism); 18 U.S.C. ' 2332a(a)(1) (criminalizing attempted use of a weapon of mass destruction); 18 U.S.C.. ' 844 (criminalizing manufacture and handling of explosive materials). Second, the conditions of Padilla=s confinement are punitive in nature. He is isolated from all other prisoners, prohibited from having visitors, and cannot make contact by telephone. This Aexclusion from human associations@ constitutes

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[28] The *Kennedy* factors employed by the courts in determining whether a sanction is penal or regulatory in character are:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned....

Id. at 168-69. *See Doe v. Pataki*, 919 F. Supp. 691 (S.D.N.Y. 1996) (applying *Kennedy* factors), *aff=d in part, reversed in part*, 120 F.3d 1263 (2d Cir. 1997).

solitary confinement, a Apunishment of the most important and painful character.@ *In re Medley*, 134 U.S. 160, 168, 171 (1890). Solitary confinement is normally ordered only for serious crimes committed by those who are already incarcerated. Nor can it be dispute that this sanction is intended to reach behavior that is Aalready a crime.@ *Kennedy*, 372 U.S. 144, 168-69. Further, there is no more comprehensive affirmative restraint extant in the criminal justice system today. *Id.*

Finally, the conditions of Padilla=s confinement are unequivocally intended to serve a traditional goal of punishment B deterrence B and have led to excessively harsh results. *Kennedy*, 372 U.S. at 168-69. The traditional aspect of deterrence is evidenced by the Government=s use of Padilla=s circumstances B the legal Ablack hole@ B as a means to coerce others charged with terror offenses to cooperate and plead guilty.[29] Together, these factors establish that Padilla=s detention is punitive. Accordingly, the appropriate standard of proof to apply in this matter is proof beyond a reasonable doubt.

Even if this Court were to determine that Padilla=s detention was preventive rather than punitive, the district court=s Asome evidence@ standard still would not be constitutionally appropriate here. Precisely because preventive detention involves depriving individuals of their physical liberty without an adjudication of criminal guilt, a

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[29] See paragraph 21 of the plea agreement of John Walker Lindh, to so called AAmerican Taliban@ that limited the government=s ability to classify him as an Aenemy combatant.@

available at http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf

Press reports indicates that six men charged in Lackawana, New York with conspiring to provide material support to terrorists, all entered into cooperation agreements with the Government rather than face the possibility of being classified as Aenemy combatants.@ *See* Paltrow, *U.S. Exerts Unusual Pressure On Group of Terror Suspects*, Wall Street Journal, April 1, 2002, at A8

heightened standard of proof is required by due process constraints. In *Salerno*, the Supreme Court addressing a due process challenge to the Bail Reform Act, held that the Act=s imposition of civil nonpunitive detention required both a showing of probable cause for arrest and clear and convincing evidence, established in a Afull-blown adversary hearing,@ that Ano conditions of release can reasonably assure the safety of the community or any person.@ *Id.* at 749-50.

At a minimum, the Government, to comply with due process, must be held to the demanding standard of proof that is required in the preventive detention circumstances of bail, civil commitment, or deportation. *See Salerno,* 481 U.S. 739*; Kansas v. Hendricks*, 521 U.S. 346 (1997)*; Addington v. Texas*, 441 U.S. 418*,* 427 (1983); *Woodby v. INS*, 385 U.S. 276, 285 (1996). Where B as here B the case involves a restraint of liberty, constitutional due process requirements mandate the use of a stringent standard of proof rather than the Asome evidence@ administrative standard of review.

POINT III
PADILLA=S RIGHT TO COUNSEL CAN BE FOUND UNDER BOTH THE SIXTH AND FIFTH AMENDMENTS.

The Government=s persistent denial of Padilla=s constitutional right to access to and communication with his counsel, violates his basic constitutional rights and amounts to a *de facto* illegal suspension of the privilege of the writ of habeas corpus. While the Government has not thwarted Padilla=s constitutional right to file his petition for a writ of habeas corpus, they have totally frustrated all meaningful efforts to effectuate the Aprivilege@ of the great writ- *i.e.* to actually litigate the illegality of his detention with the assistance of his counsel and receive meaningful judicial review. The court below correctly exercised its discretion pursuant to the *All Writs Act*, 28 U.S.C. ' 1651(a) to permit Padilla to consult with counsel to prosecute this Petition.[30] (A 147). The district court, following a doctrine of constitutional avoidance, declined to find Padilla=s right of access to counsel under the Sixth Amendment or under the Due Process Clause of the Fifth Amendment, relying instead upon statutory grounds provided for in the *All Writs Act*. (A146). The court was undoubtedly correct in finding that Padilla should be allowed to meet with his attorneys. However, the extremely limited statutory access envisioned by the district court would deny Padilla the full assistance of counsel that is constitutionally required under these circumstances. *Id.* The Sixth Amendment mandates full unfettered access to

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[30] We do not contest the validity of this finding under the All Writs Act, and indeed support the district court=s conclusion. But we note that the conditions under which counsel are to meet with Padilla have not been established, and it is our position that there should be no restrictions on his meetings with counsel, regardless of whether the basis for finding that he is entitled to access to counsel is statutory or constitutional. In this regard, *Quirin* is instructive as a review of the Arecord@ filed with the Supreme Court shows that a military order was promulgated to insure unrestricted access by counsel to the eight defendants-subject to normal >security@ provisions.

counsel, as does the Fifth Amendment due process right to counsel. The court below erred in finding that Padilla had no right to counsel under the Sixth Amendment and in declining to reach the Fifth Amendment issue.[31] (A 145).

A. The Sixth Amendment Right To Counsel Applies

[31] Indeed, in finding that access was appropriate under the All Writs Act, the district court looked at the same elements that are relevant under a constitutional due process analysis. (A146-149). Accordingly, for the reasons articulated by the district court, Padilla=s right to counsel is found under Fifth Amendment Due Process Clause.

The right to counsel under traditional Sixth Amendment jurisprudence attaches at the commencement of criminal proceedings.[32] *United States v. Gouveia*, 467 U.S. 180 (1984). The right attaches Aat or after the initiation of adversary judicial proceedings--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.@ *Id*. at 188 (*quoting Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). The right to assistance of counsel is not limited to trial. A[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.@ *Maine v. Moulton,* 474 U.S. 159, 169 (1985). The right to the assistance of counsel depends upon the need for counsel to protect liberty and prevent the sealing of the accused=s fate. *See id*. The guarantee includes the A[s]tate=s affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right.@ *Id*.at 176. This means that the Government may not exploit a situation in which counsel is not present nor may the Government circumvent the right by creating opportunities to interrogate the accused when counsel is not present. *Id*. Here, the Government has circumvented Padilla=s Sixth Amendment right by claiming a right to detain him but without charges. Thus, they have created a means to technically avoid the attachment of the Sixth Amendment right to counsel. Essentially, the Government posits a right to make an impermissible Aend-run@ around the Constitution.

The district court concluded that the Sixth Amendment did not apply because Padilla had not been charged with a crime in a traditional criminal proceeding. (A 145). As the district court acknowledged, it is not the name given to the proceeding that necessarily determines whether it is

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[32] The Sixth Amendment to the Constitution states that Ain all criminal prosecution, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence..@ U.S. Const. amend. VI.

a criminal proceeding. A proceeding is for constitutional purposes a Acriminal proceeding@, if there are elements present which are so similar to a traditional criminal proceeding that the two are not sufficiently distinguishable. *Id*. This case presents all the elements of a criminal proceeding.

Application of the *Mendoza-Martinez* test reveals the penal nature of the action taken. 372 U.S. at 168. The President=s Order reads like a complaint in that it alleges a crime and provides the basis for the belief. [33] Padilla has been imprisoned in a military brig without access to his family or anyone in the outside world. This isolation fits within the traditional criminal law concept of restraint serving as a punitive function as well as a deterrence function. This is confirmed by Padilla=s place of detention- a brig, which is a penal facility. Further, historically, being housed in a prison, military or civilian, has been regarded as punishment. The language of the Executive Order which alleges that Padilla had Aengaged in conduct that constituted hostile and war-like acts, including preparation for act of international terrorism, speaks in terms of a scienter, or intent to commit a Abad act.@ (A 51). Not only did the President accuse Padilla of violating the law of war but also pointed to conduct Congress has defined as criminal under Section 18 of the U.S.Code. *See, e.g.*, 18 U.S.C. ' 2332(b). Finally, in consideration of the *Kennedy* factors, Padilla=s detention is excessive in relation to the purpose assigned to it. The Government claims that the purpose is not to charge Padilla with a crime, but to extract information. In all likelihood, the intelligence that Padilla may have had has long become stale

[33] This is borne out by comparing the Affidavit of Special Agent Ennis submitted in support of the grand jury material witness warrant for Padilla=s arrest (remains under seal) and the Executive Order, ordering Padilla=s seizure and detention by the military. (A 51)

and worthless.[34] Specifically, the action taken here comports with a criminal proceeding, except, of course, Padilla has been denied all due process, and has the traditional objectives of a criminal punishment B retribution and deterrence.

In all of the cases relied upon by the court below and the Government individuals who were detained by the military as an enemy belligerent received full representation of counsel. *See, e.g., Ex parte Quirin*, 317 U.S. 1; *Hirato v. MacArthur*, 338 U.S. 197 (1949); *In re Territo,* 156 F.2d 142 (9th Cir. 1946); *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Bollman*, 8 U.S. 75 (1807); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

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[34] *See* Jacoby Declaration (AThe information that Padilla may be able to provide is time-sensitive and perishable.@) (A 62).

Detention, even under the law of war, does not deprive one of the right to counsel. Pursuant to the Protocols to the Geneva Convention, detainees held in relation to an armed conflict, regardless of their category are entitled to basic human rights. 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3. Those basic human rights include the right to communicate with a qualified lawyer. *Commentary: Additional Protocols of June 8, 1977 to the Geneva Conventions of 12 August 1949,* International Committee of the Red Cross, Geneva, 1987 (AICRC@). The International Covenant on Civil and Political Rights (AICCPR@), to which the United States is a signatory, [35] likewise requires detainees to have access to counsel. Under Article 14 of the ICCPR, a detainee is entitled to due process rights, including the right to counsel from the early stages of detention. (Article 14(d)). The United Nations General Assembly in 1988 adopted the Body for Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[36] Principle 17(1) provides that: A[a] detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.@[37]

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[35] ICCPR was adopted by the General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on March 23, 1976, *available at* http://ww.unhchr.ch/html/menue3/b/a_ccpr.htm.

[36] UN General Assembly Resolution 43/173(1988), *available at* http://www.unhchr.ch/html/menue/b/h_comp36.htm.

[37] The rights contained in Principle 17 are further explained and amplified in Principle 18, which requires:

> 1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspend or restricted save in exceptional circumstances, to be specific by law or lawful regulations, when it considered indispensable by a judicial or other authority in order to maintain security and good order.

Thus, international law provides another basis upon which Padilla=s right to counsel can be found. AWe do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution.@ *Yamashita*, 327 U.S. at 16. *See also Reid v. Covert,* 354 U.S. 1 (1957);*The Paquete Habana*, 175 U.S. 677, 700 (1900); *Gisbert v. United States Attorney General*, 988 F.2d 1437, 1447-48, *amended,* 997 F.2d 1122 (5th Cir. 1993); *Garcia-Mir v. Smith*, 766 F.2d 1478, 1483 (11th Cir. 1985), *cert. denied,* 475 U.S. 1022 (1986). A[T]he courts administer international law, including the common law of war, but when this law is displaced by statute or treaty, it becomes the duty of the Court to administer this superceding municipal law.@ Wormuth & Firmage, *To Chain the Dog of War: the War Power of Congress in History and Law*, 112 (Dallas: SMU Press, 1986).

Few, if any, defendants have found themselves in as complex a circumstance with as many prosecutorial resources ranged against them as Padilla faces.[38] No citizen has been locked-up, with the prospect of indefinite imprisonment, and has been denied counsel. Padilla has a Sixth Amendment right to counsel that must be recognized in this case.

B. Due Process Mandates That Padilla Has the Right to Counsel

Even if this Court finds that Padilla does not have a right to counsel under the Sixth Amendment, this Court should find a right to counsel under the Fifth Amendment Due Process Clause. *See*, U.S. Const. amend. V. The touchstone of due process is Afundamental fairness.@

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[38] The document that resulted in Padilla=s current detention was not signed by an law enforcement agent, but by the President of the United States, who in this appeal is represented by both the United States Attorney for the Southern District of New York and the Solicitor General of the United States.

Lassiter v. Dep=t of Social Service of Durham County, 452 U.S. 18, 24 (1981). Thus, in *Gagnon v. Scarpelli*, the Supreme Court found that a probationer facing revocation should be appointed an attorney where he asserts innocence to the alleged violation or, though admitting the violation, there are mitigating circumstances which are complex or difficult to present. 411 U.S. 778 (1973). The due process right to counsel has never been limited to criminal cases. *See, e.g., Project Release v. Prevost*, 722 F.2d 960, 976 (2d Cir. 1983); *Vitek v. Jones*, 445 U.S. 480, 496-97 (1980); *United States v. Budell*, 187 F.3d 1137 (9th Cir. 1999). An asserted denial of due process is to be tested by Aan appraisal of the totality of facts in a given case.@ *Betts v. Brady,* 316 U.S. 455, 462 (1942). There is no blanket exception to the protections of due process of law.

Certainly, a factor in determining whether due process has been offended here is a consideration of the consequences of denying Padilla full access to counsel. Padilla is facing indefinite incommunicado detention, which is more severe than a life sentence. Padilla has an absolute right to contest not only the legal arguments in opposition to his petition but also to contest the factual allegations. 28 USC ' 2246 . The Supreme Court has made clear that where the Apleadings present any material issues of fact, the petitioner is entitled to have those issues determined in the manner prescribed by [statute], that is, by hearing the testimony and arguments.@ *United States ex rel Zdunic v. Uhl*, 137 F.2d 858, 860 (2d Cir. 1943)(citations omitted). Yet, by blocking Padilla=s access to his attorneys, the Government has effectively blocked Padilla=s ability to present a defense to the Acharges.@ He also is prevented from pressing facts in support of his petition. In other words, he has been denied meaningful access to court.

The Aright to access to counsel and the right to access to the courts are interrelated.@ *Benjamin v. Fraser* 264 F.3d 175, 186 (2d Cir. 2001). Indeed, in the context of habeas corpus, the Supreme Court has said, ASince the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.@*Johnson v. Avery*, 393 U.S. 483, 485 (1969). In the pre-trial context, prison regulations that excessively hamper a pre-trial detainee=s access to his attorney have been held to violate the defendant=s Sixth Amendment right to counsel. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520 (1979); *Benjamin***,** 264 F.3d at 185*; Smith v. Coughlin*, 748 F.2d 783 (2d Cir. 1984); *Wolfish v. Levi,* 573 F.2d 118 (2d Cir. 1978). The same analysis, i.e. it unfairly infringes on the ability of the accused to defend, is applicable to a due process Fifth Amendment right to counsel.

The court below acknowledged that an individual needs the assistance of counsel when Aa defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.@ (A 147) (*citing* *Kirby v. Illinois*, 406 U.S. 682, 689, (1972). Forty years ago, the Supreme Court recognized that, without counsel, the accused has no meaningful voice.

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. His is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires,

> the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Gideon v. Wainwright, 372 U.S. 335, 344 (1963)(internal quotations omitted); *Powell v. Alabama*, 287 U.S. 45 (1932).

We, as a nation, have always held ourselves to the highest standards of fundamental fairness. Basic fairness requires that Padilla have full and unimpaired right to counsel.

Conclusion

This is a nation of laws, not men. *Marbury v. Madison*, 5 U.S. 137 (1803). The President is not above the law and he cannot order the military detention of a citizen without congressional authorization. No citizen can be detained, much less under the conditions that Mr. Padilla has endured for over a year now, without an opportunity to be heard with the assistance of counsel. No such detention can be sanctioned without a *de novo* review of the Government=s evidence, which must establish the allegations by proof beyond a reasonable doubt. The detention of Jose Padilla by the military violates the rights guaranteed to every citizen by the Constitution of the United States of America. This Court should remand to the district court with instructions that the Court grant Jose Padilla=s petition and release him from his unlawful detention. In the alternative, this Court should remand to the district court with instructions that its review of the President=s action must be plenary and the Government must establish beyond a reasonable doubt the basis for Padilla=s detention.

Dated: New York, New York
July 23, 2003

Respectfully submitted,

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