03-2235(L), 03-2438

United States Court of Appeals *for the* Second Circuit

JOSE PADILLA, DONNA R. NEWMAN,
as Next Friend of Jose Padilla,
Petitioner/Appellee/Cross-Appellant,

v.

DONALD RUMSFELD,
Respondent/Appellant/Cross-Appellee.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND U.S. REPRESENTATIVES WALTER JONES, LAMAR SMITH, AND JOHN SWEENEY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT/APPELLANT/CROSS-APPELLEE, URGING AFFIRMANCE IN PART AND REVERSAL IN PART

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici curiae are filing this brief with the consent of both parties.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Demore v. Kim,* 123 S. Ct. 1708 (2003); *Zadvydas v. Davis,* 533 U.S. 678 (2001); *Center for National Security Studies v. U.S. Dep't of Justice,* 331 F.3d 918 (D.C. Cir. 2003); *Al Odah v. United States,* 321 F.3d 1134 (D.C. Cir. 2003); *Al Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001).

The Honorable Walter Jones, the Honorable Lamar Smith, and the Honorable John Sweeney are United States Representatives from North Carolina, Texas, and New York, respectively. They strongly support the efforts of the

Executive Branch to protect the American people by taking aggressive steps to defeat terrorist organizations that have declared war on the United States. All three supported the joint resolution adopted by Congress on September 18, 2001, Pub. L. 107-40, which authorized the President to use "all necessary and appropriate force" to defeat those organizations; they believe that the joint resolution unquestionably authorizes the President to detain enemy combatants (both citizens and aliens) who take up arms against the United States in support of those organizations.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici believe that when American military leaders determine that individuals should be detained as enemy combatants, the courts should be highly deferential to such decisions. *Amici* are concerned that the courts are ill-equipped to second-guess the President when, acting in his capacity as Commander in Chief, he makes decisions implicating sensitive matters of foreign

policy, national security, or military affairs.

Amici address only three of the six questions certified by the district court for interlocutory appeal: (1) whether the President has authority to detain as an enemy combatant an American citizen captured within the United States, and to continue the detention for the duration of the armed conflict; (2) whether such designations can withstand federal court review if supported by "some evidence"; and (3) whether the district court acted properly in granting Padilla access to counsel for the purpose of garnering evidence in support of his petition.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby adopt the Statement contained in the brief of Respondents/Appellants/Cross-Appellees.

Since September 11, 2001, the United States has been at war with al Qaeda, an international terrorist network that masterminded attacks on American civilians that day. Al Qaeda is an unconventional enemy; it does not control any sovereign territory of its own, and its troops do not wear uniforms in battle or otherwise comply with the rules of war. Nonetheless, there can be little doubt that the war continues even though al Qaeda has been largely dislodged from its sanctuary in Afghanistan. *See, e.g.* "Iraq Bombers Linked to Al Qaeda," *New*

York Times (August 9, 2003) at A4 (bombing of Jordanian embassy in Baghdad on August 7, 2003).

Because al Qaeda does not maintain a standing army, there is no theater of battle in the traditional sense. Rather, the battlefield stretches from Asia through Africa and Europe and into the United States. Indeed, al Qaeda leaders have made clear that their ultimate goal is to destroy major American cities and to bring an end to American civilization. Accordingly, al Qaeda operatives apprehended in the United States can legitimately be said to have been captured on the field of battle.

Petitioner Jose Padilla was taken into custody by the Justice Department in Chicago in May 2002 while he was attempting to re-enter the country on a commercial flight. On June 9, 2002, President George W. Bush issued an order designating Padilla an "enemy combatant" and directing that he be transferred to the control of the military, in whose custody he remains. According to Respondent, Padilla is an al Qaeda operative who was trained in Afghanistan in 2001 in the use of explosives and who entered the United States in 2002 for the express purpose of building and detonating a "radiological dispersal device" in a major American city. *See* Declaration of Michael H. Mobbs ("Mobbs Decl."),

¶¶ 5-9. The President "determined that Padilla posed a continuing, present and grave danger to the national security of the United States, and that detention of Padilla as an enemy combatant was necessary to prevent him from aiding Al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." *Id.*, ¶ 14. These determinations were based primarily on the statements of two senior al Qaeda leaders who have been taken into American custody and whose other statements have proven reliable. *Id.*, ¶ 3.

Padilla has been detained at a military facility in South Carolina since June 9, 2002. He has not been charged with any crime, and he has been denied contact with visitors, including attorneys. The American military has determined that successful interrogation of Padilla requires that he be denied any such contact. Declaration of Vice Admiral Lowell E. Jacoby ("Jacoby Decl.") at 8-9.

On June 11, 2002, Donna Newman (an attorney acting as next friend) filed a habeas corpus petition on Padilla's behalf. The petition asked that Padilla be released from custody and be granted access to counsel. In a December 4, 2002 Opinion and Order (the "Order"), U.S. District Judge Michael Mukasey decided several important issues with respect to the petition. *Padilla v. Bush,* 223 F.

Supp. 2d 564 (S.D.N.Y. 2002). He ruled that President Bush had the authority to order the detention as an "enemy combatant" of an American citizen captured in the United States, and that detention may continue for the duration of hostilities regardless whether criminal charges have been filed. *Id.* at 587-99. He further ruled that American citizens so detained are entitled to file a federal court challenge to their designation as enemy combatants, but that that designation should be reviewed under a highly deferential "some evidence" standard. *Id.* at 605-08. He further ruled that Padilla should be granted immediate access to counsel, to assist Padilla in marshaling evidence to challenge his designation as an enemy combatant. *Id.* at 599-605.

On January 9, 2003, the government moved for reconsideration of that part of the Order that granted Padilla access to counsel. In connection with the motion, the government submitted the Jacoby Declaration, which asserted that granting Padilla access to an attorney would undermine its interrogation efforts. On March 11, 2003, Judge Mukasey affirmed his prior Order; he declined to credit Admiral Jacoby's statements regarding the value to the government of interrogating Padilla. *Padilla v. Rumsfeld,* 243 F. Supp. 2d 42 (S.D.N.Y 2003). On April 9, 2003, the district court certified six issues for interlocutory appeal,

including: (1) the extent of the President's authority to detain as an enemy combatant an American citizen captured within the United States; (2) the standard of review to be applied by federal courts to such enemy combatant designations; and (3) whether the district court acted properly in granting Padilla access to counsel for the purpose of garnering evidence in support of his petition. *Padilla v. Rumsfeld,* 256 F. Supp. 2d 218 (S.D.N.Y. 2003). On June 10, 2003, this Court granted the parties leave to take an interlocutory appeal.

SUMMARY OF ARGUMENT

The government has ably demonstrated that under the law of war as long understood, it is entitled to detain enemy combatants for the duration of the conflict without pressing any charges against those combatants. Padilla does not seriously challenge that demonstration but rather argues, for a variety of reasons, that the law of war is not applicable to his case. All such arguments are without merit. The Supreme Court has made clear that the government's power to detain enemy combatants extends to citizens as well as aliens; applies regardless where the enemy combatant is captured; applies regardless whether there has been a formal declaration of war; and applies regardless whether the enemy is a sovereign nation or maintains a standing army. While Padilla is entitled to a

hearing before being punished, he is not now being punished; he is simply being detained to prevent him from rejoining enemy forces. Padilla's reliance on international law is misplaced; the treaties he cites are not enforceable in American courts. Nor is there any serious doubt that Congress has authorized detention of all enemy combatants, regardless of citizenship.

Amici agree that Padilla is entitled to judicial review of President Bush's determination that he is an enemy combatant. But the district court correctly held that that determination should be subject to an extremely deferential standard of review. America's highest military leaders have determined that Padilla is an enemy combatant. "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his attention from" ongoing military offensives to "the legal defensive." *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950). The Mobbs Declaration provides more than enough evidence to uphold the determination that Padilla is an enemy combatant. Unless on remand Padilla's attorneys can introduce evidence sufficient to cast doubt on the Mobbs Declaration, the petition should be dismissed. Padilla's suggestion that he should be ordered released unless the

government can establish beyond a reasonable doubt that he is an enemy combatant is ludicrous; he cannot seriously claim, for example, that the government should be required to bring captured al Qaeda leaders into court and hope that they state under oath the same things they said about Padilla while being interrogated.

The reason why Padilla is entitled to judicial review is not because it is somehow un-American to hold an American citizen without charges; to the contrary, the propriety of such detention is well established when the citizen is an enemy combatant. Rather, judicial review is warranted to guard against the danger of abuse of power by the Executive Branch; it is possible that the Executive Branch may seek to detain its political enemies as "enemy combatants," and *amici* share the concern of all liberty-loving citizens that the judiciary always be on guard against such abuse. But the role of the judiciary should be to guard against clear abuse, not to second-guess the national security decisions of our elected leaders. Thus, if there is evidence that Padilla is being targeted because of his political views or based on racial stereotypes, or if large numbers of citizens find themselves detained without charges, by all means the courts should step in. But the courts are ill-equipped to judge whether military

leaders have acted properly in crediting the statements of captured al Qaeda leaders; such evaluations should be beyond the scope of judicial review.

The courts are similarly ill-equipped to judge whether a captured al Qaeda operative possesses valuable intelligence and how best to persuade him to tell what he knows. The Jacoby Declaration states that the military believes that Padilla may well be a valuable intelligence source, if only it is permitted to continue its interrogation unhindered by attorneys. In the absence of evidence that that declaration was made in bad faith, the military ought to be granted a reasonable period of time -- a minimum of three years -- to continue its unimpeded interrogation. Such interrogation need not prevent Padilla and/or those acting on his behalf from pursuing their habeas corpus challenge to the enemy combatant designation. Indeed, despite his inability to communicate with those acting on his behalf, Padilla has had the benefit of legal arguments put together by many of the leading members of the American bar. Moreover, if there is a strong factual basis for challenging the Mobbs Declaration -- for example, evidence that Padilla was not in Afghanistan or Pakistan at the times the government claims he was -- one would expect Padilla's family to be able to assist in putting together such evidence.

ARGUMENT

I. THE FEDERAL GOVERNMENT MAY DETAIN PADILLA AS AN ENEMY COMBATANT WITHOUT REGARD TO HIS CITIZENSHIP OR PLACE OF CAPTURE, OR TO THE UNCONVENTIONAL NATURE OF THE CURRENT WAR

Padilla is being detained by the federal government without charges. But that detention is simply not the cause for major alarm that Padilla and his *amici* allege it should be. Rather, detention of enemy combatants without charges until the cessation of hostilities is the well-accepted norm under the laws of war. *See, e.g., Ex Parte Quirin,* 317 U.S. 1, 28, 31 (1942) ("An important incident to the conduct of war is . . . to seize" enemy combatants; both lawful and unlawful combatants "are subject to capture and detention"); *In re Territo,* 156 F.2d 142, 145 (9th Cir. 1946) ("Those who have written texts upon the subject of prisoners of war agree that all persons who are active in opposing an army in war may be captured.").

Indeed, Padilla does not seriously dispute the basic contention that enemy combatants[1] are subject to detention without a hearing. Rather, he raises a

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[1] Despite Padilla's intimations to the contrary, there is nothing sinister about the government's use of the term "enemy combatant." That term has been used regularly throughout American history and applies broadly to anyone captured during wartime while fighting for the enemy. *See Hamdi v. Rumsfeld* ["*Hamdi III*"], 316 F.3d 450, 463 n.3 (4th Cir. 2003). It encompasses both

variety of legal arguments in support of his contention that the President lacks authority to classify him as an enemy combatant. Each of those arguments is without merit.

Most importantly, case law is unanimous that Padilla's status as an American citizen does not affect the President's authority to hold him as an enemy combatant. *Quirin* could not be clearer on that point. *Quirin* involved habeas corpus petitions filed by eight men detained as saboteurs fighting for Nazi Germany during World War II. The Supreme Court assumed that at least one of the eight was a U.S. citizen but held that citizenship was irrelevant to its decision:

> Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.

Quirin, 317 U.S. at 37-38. *See also Territo,* 156 F.2d at 145 ("We have reviewed the authorities with care and have found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle."); *Hamdi III*, 316 F.3d at 475 ("the fact that [the detainee] is a citizen does not affect the legality of his

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prisoners of war and those eventually classified as unlawful combatants.

detention as an enemy combatant.").

It is true that the American enemy combatant at issue in *Quirin*, Herbert Haupt, was also being charged before a military tribunal as an *unlawful* combatant (because he was alleged to have sneaked into the United States to destroy war industries). But the Court made quite clear that Haupt was subject to detention as an enemy combatant without regard to the claim that he had violated the laws of war. *See, e.g., Quirin,* 317 U.S. at 31.

The American Civil War well illustrates the proposition that American citizens can be detained as enemy combatants without hearing. During the course of that war, thousands of American citizens were detained without hearing as prisoners of war after being captured while fighting for the Confederate army, yet *amici* are aware of no case law challenging the federal government's authority to engage in such detentions. Indeed, in support of its contention that unlawful combatants can be tried and ordered executed by military tribunals without interference from civilian courts, *Quirin* cited numerous cases involving Americans detained, tried, and punished by military tribunals for their unlawful conduct during the Civil War on behalf of the Confederate army. *Id.* at 31-33 &

n.10.[2]

Nor does the fact that Padilla was detained in Chicago bar the government from subjecting him to the laws of war. Padilla may not have been detained on a foreign battlefield, but neither was Herbert Haupt,[3] yet that fact did not prevent the Court in *Quirin* from holding Haupt subject to the laws of war. The Court explained that the key prerequisite to application of the laws of war was whether an individual was "a part of or associated with the armed forces of the enemy," *id.* at 45, not the location of capture. Similarly, in *The Prize Cases,* the Court held that nonmilitary cargo belonging to American citizens living in Confederate states was properly seized under the laws of war as "enemies' property"

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[2] *Quirin* also makes clear that Padilla's reliance on *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866), is not well placed. *Milligan* held that a civilian may not be tried by a military tribunal "where the courts are open and their process unobstructed." *Id.* at 121. *Quirin* pointed out that the Court in *Milligan* had relied heavily on the fact that Milligan was a resident of Indiana (a State not in rebellion during the Civil War) and, although alleged to have engaged in insurrection, had no direct connection to the Confederate army. *Quirin* construed *Milligan* not to limit the power of the federal government to apply the law of war to American citizens, but rather to mean only that the law of war is inapplicable to those "not being a part of or associated with the armed forces of the enemy." *Quirin,* 317 U.S. at 45.

[3] He and the seven other Nazi saboteurs were arrested in Chicago and New York City after sneaking into the United States by sea at Ponte Vedra Beach, Florida and Long Island, New York.

regardless that the property was seized on the High Seas and not in any military zone. *The Prize Cases,* 67 U.S. (2 Black) 635, 674 (1862). *See also Hamdi v. Rumsfeld* ["*Hamdi IV*"], ___ F.3d ___, 2003 U.S. App. LEXIS 13719 at *80-*83 (4th Cir., July 9, 2003) (Luttig, J., dissenting from denial of rehearing *en banc*) (location of capture of American citizen is irrelevant to government's power to detain him as enemy combatant).[4]

Padilla's efforts to distinguish *Quirin* on the ground that war had formally been declared with Nazi Germany are unavailing. The Supreme Court in *The Prize Cases* rejected challenges to President Lincoln's authority to impose a blockade on Confederate ports (and to otherwise invoke the laws of war) based on a claim that such actions were unauthorized in the absence of a formal declaration of war by Congress. The Court explained that "war may exist without a declaration on either side"; and that when the United States is attacked, the President not only is authorized by the Constitution to take appropriate

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[4] Although the Fourth Circuit in *Hamdi III* limited its decision to uphold the detention of American citizens as enemy combatants to detentions of those captured on foreign battlefields, members of the Fourth Circuit panel have taken pains to make clear that their decision was not meant to express disapproval of the detention of American citizens captured elsewhere. *See, e.g., Hamdi IV,* 2003 U.S. App. LEXIS 13719 at *43 (Traxler, J., concurring in the denial of rehearing *en banc*).

counter measure (including invoking the laws of war), but also "is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases,* 67 U.S. at 668. President Bush unquestionably is entitled to retaliate against al Qaeda for the September 11 attacks, and that power includes the power to detain al Qaeda operatives for the duration of hostilities.

Nor can Padilla escape detention by insisting that he is not enlisted as a soldier in any regular army and/or that al Qaeda cannot be deemed an enemy force. While it is true that al Qaeda is an unconventional enemy -- it controls no sovereign territory and does not maintain a regular army in the field -- there is no reason to suppose that the United States should have *fewer* powers to defend itself from al Qaeda than it would have in defending itself against a more conventional enemy.[5] Indeed, such an argument turns the logic of the laws of war on its head. In wartime, nations are expected to exercise those powers (and only those powers) authorized by the laws of war, with the understanding that their compliance may induce their enemies to behave similarly. The fact that al

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[5] Nor may Padilla invoke the protections of *Milligan* by pointing to the Mobbs Declaration's admission that he may not be a formal "member" of al Qaeda. For the federal government to detain an individual by invoking the laws of war, it is sufficient that the individual be "a part of or associated with the armed forces of the enemy." *Quirin*, 317 U.S. at 45. The Mobbs Declaration provides all the evidence necessary to establish such an association.

Qaeda to date has demonstrated an unwillingness to abide by the laws of war should, if anything, authorize use of *greater* retaliatory force than would normally be allowed under the laws of war, not (as Padilla argues) diminish the federal government's authority to respond. Nor is there any substance to Padilla's comparison of the war against al Qaeda to "the war on drugs." Padilla Response Br. 44. There is a vast difference between loosely organized criminal gangs (whose purpose generally is limited to generating income from illicit activity) and al Qaeda, which has established a world-wide military network dedicated to destroying American civilization.

Padilla is correct that the Constitution prohibits the federal government from punishing him without providing him with a hearing at which he can rebut any evidence presented against him. But he is wrong in suggesting that his detention as an enemy combatant constitutes punishment in the constitutional sense. Padilla Br. 43-45. As the Fourth Circuit noted in *Hamdi III,* the detention of enemy combatants serves at least two "vital purposes," neither of which is punitive in nature:

> First, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies. "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from

> the front. . ." *In re Territo,* 156 F.2d 142, 145 (9th Cir. 1946). In this respect, "captivity is neither a punishment nor an act of vengeance," but rather "a simple war measure." W. Winthrop, *Military Law and Precedents* 788 (2d ed. 1920). And the precautionary measure of disarming hostile force for the duration of a conflict is routinely accomplished through detention rather than the initiation of criminal charges. To require otherwise would impose a singular burden upon our nation's conduct of war.
>
> Second, detention in lieu of prosecution may relieve the burden on military commanders of litigating the circumstances of a capture halfway around the globe.

Hamdi III, 316 F.3d at 465. Nor can it be said that the government is using the "enemy combatant" designation as a means of avoiding judicial review while simultaneously punishing Padilla by detaining him indefinitely. Not only is judicial review not being avoided (as this habeas corpus petition attests), but Padilla's detention is strictly limited in duration: barring charges, he must be released as soon as hostilities with al Qaeda cease.[6]

Padilla's efforts to invoke international law in support of his position are misplaced. Padilla Br. 49-50. He cites: (1) the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949; (2) the International Covenant on Civil

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[6] Moreover, the Constitution imposes enforceable limits on the conditions under which the government may detain Padilla. For example, due process prohibits the government from imposing torture. *Zadvydas v. Davis,* 533 U.S. 678, 704 (2001) (Scalia, J., dissenting).

and Political Rights (ICCPR); and (3) the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the United Nations General Assembly in 1988. *Id.* None of those documents provides Padilla with any enforceable rights. For example, in ratifying the ICCPR and every other major human rights treaty ratified over the past 15 years, the U.S. Senate has adopted reservations, understandings, and declarations ("RUDs") making clear that rights created under those treaties were not enforceable in federal court. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PENN. L.REV. 399, 400-01, 413-422 (2000). Federal courts lack jurisdiction to hear claims arising in connection with alleged treaty violations "absent a statute granting such jurisdiction." *Princz v. Federal Republic of Germany,* 26 F.3d 1166, 1175 n.1 (D.C. Cir. 1964).

Finally, *amici* concur with the district court's well-reasoned conclusion that Congress's resolution authorizing President Bush to use "all necessary and appropriate force" to defeat al Qaeda includes an authorization to detain enemy combatants (both citizens and aliens) who take up arms against the United States in support of al Qaeda. *Padilla v. Bush,* 223 F. Supp. 2d at 596-99. *Amici* will

not dwell on the point, except to take issue with Padilla's effort to compare his detention to detention under the (repealed and largely discredited) Emergency Detention Act of 1950, 50 U.S.C. § 812, 64 Stat. 1019 (1950). That act permitted the President to detain individuals if he had reason to believe that they "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." *Id.* at § 813. While the repeal of the Emergency Detention Act is a strong indication that Congress has not authorized detention of citizens based on a mere suspicion of *future* criminal activity, Padilla is not being detained on such grounds. Rather, he is being detained because the government has determined that he is an al Qaeda operative and has already conspired to build and detonate "dirty bombs" in major American cities. Mobbs Decl. ¶¶ 5-9.

II. THE GOVERNMENT'S DETERMINATION THAT PADILLA IS AN ENEMY COMBATANT IS SUBJECT TO JUDICIAL REVIEW UNDER AN EXTREMELY DEFERENTIAL STANDARD OF REVIEW

Amici strongly support Padilla's right to seek judicial review of his detention. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr,* 533 U.S. 289, 301

(2001). Particularly where, as here, Padilla is being detained without having had the benefit of a hearing, it is important that he be provided a meaningful opportunity to demonstrate that his detention is wholly arbitrary and/or unjust.

Nonetheless, the district court correctly determined that an extremely deferential standard of review must be applied to the government's determination that Padilla is an al Qaeda operative (and thus an enemy combatant). The Constitution invests Congress with the power to authorize military action and the President with the power to wage war. As the Supreme Court explained in *Quirin*:

> The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.

Quirin, 317 U.S. at 26.

In contrast, Article III of the Constitution grants to the judiciary "nothing analogous to the specific powers of war so carefully enumerated in Articles I and II." *Hamdi III,* 316 F.3d at 463. Accordingly, the Supreme Court "has shown great deference to the political branches of government when called upon to decide cases implicating sensitive matters of foreign policy, national security, or

military affairs." *Hamdi v. Rumsfeld* ["*Hamdi II*"], 296 F.3d 278, 281 (2003). Noting that the political branches have expertise and experience in these matters that the judiciary has no way of duplicating, the Fourth Circuit explained that deference is required because "the executive and legislative branches are organized to supervise the conduct of overseas conflicts in a way that the judiciary simply is not." *Hamdi III*, 316 F.3d at 463.

The Supreme Court has counseled judicial deference to the military decisions of the other branches of government in decisions too numerous to list here. *See, e.g., Zadvydas v. Davis,* 533 U.S. at 696 ("heightened deference to the judgments of the political branches with respect to foreign policy" is particularly warranted with respect to terrorism-related issues); *Rostker v. Goldberg,* 453 U.S. 57, 66 (1981); *Quirin*, 317 U.S. at 25; *The Three Friends,* 166 U.S. 1 (1897); *The Prize Cases,* 67 U.S. (2 Black) at 670. The unconventional nature of the war against al Qaeda does not render such deference any less appropriate: "[N]either the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches." *Hamdi III,* 316 F.3d at 464.

Deference is particularly warranted with respect to "enemy combatant"

detention decisions because such decisions so directly impact the ability of military commanders to wage war. As the Supreme Court held in a related context, "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his attention from" ongoing military offensives to "the legal defensive." *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

The government argues that this Court should uphold the district court's adoption of a "some evidence" standard of review. *Amici* do not believe it matters greatly what name the Court applies to the standard of review it adopts, provided only that the standard is extremely deferential to the Executive Branch's decision-making process. So long as the President can satisfy the courts that he had a good-faith basis for determining that Padilla is an enemy combatant, the courts are ill-equipped to second-guess that decision.

Amici agree with the district court that Padilla and his attorneys should have a right on remand to present evidence in an effort to challenge the good-faith nature of the government's evidence. As the record now stands, the Mobbs Declaration provides the district court with more than enough evidence to

determine that the government has a good-faith basis for designating Padilla an enemy combatant. Unless on remand Padilla's attorneys can introduce evidence sufficient to cast doubt on the Mobbs Declaration, the petition should be dismissed.

Requiring the government to supply additional evidence to support its designation of Padilla as an enemy combatant simply is not feasible. For example, it would serve no purpose to require the government to provide a more detailed explanation regarding why it has decided to credit the statements of captured al Qaeda leaders who have implicated Padilla. Even if the government did so, the courts would lack the background to evaluate whether government experts acted reasonably in crediting the statements.[7] Padilla's claim that detention should not be permitted unless the government can prove beyond a reasonable doubt that he is an al Qaeda operative presumably would require the government to provide the in-court testimony of the captured al Qaeda leaders. It is unlikely that the government ever would be able to elicit such testimony;

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[7] *See* William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (1998) at 205 ("[J]udicial inquiry into the entire question of military necessity . . . seems an extraordinarily dubious proposition. Judicial inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays, is ill-suited to determine an issue such as 'military necessity.'").

even if it could, any attempt to do so would be so highly disruptive of the war effort that one could be reasonably certain that military leaders would release Padilla before resorting to such an attempt.

The reason why Padilla is entitled to judicial review is not because it is somehow un-American to hold an American citizen without charges; to the contrary, the propriety of such detention is well established when the citizen is an enemy combatant. Rather, judicial review is warranted to guard against the danger of abuse of power by the Executive Branch; it is possible that the Executive Branch may seek to detain its political enemies as "enemy combatants," and *amici* share the concern of all liberty-loving citizens that the judiciary always be on guard against such abuse. But the role of the judiciary should be to guard against clear abuse, not to second-guess the national security decisions of our elected leaders.

Evidence that the government has abused its power would include evidence that Padilla is being detained based on some racial stereotype. *See Korematsu v. United States,* 323 U.S. 214, 235 (1944) (Murphy, dissenting) (exclusion of defendant from the West Coast was based not on an individual finding of dangerousness, but rather on the unreasonable assumption that all citizens "of

Japanese ancestry must have a dangerous tendency to commit sabotage and espionage."). But Padilla to date has introduced no such evidence of unreasonable racial stereotyping. For example, Padilla is of Hispanic heritage, while those of Arab descent are the citizens most likely to be unfairly stereotyped as al Qaeda operatives. Moreover, the Mobbs Declaration does not recite generalizations regarding groups of which Padilla happens to be a member; rather, it recites specific facts regarding Padilla's actions in support of the al Qaeda war effort.[8]

Nor to date has Padilla cited other evidence suggesting abuse of power. Padilla has no history of outspoken political opposition to the federal government, so there is no reason to believe he is being retaliated against for his speech. Moreover, *amici* are aware of only one other American citizen being held as an enemy combatant in connection with the current war: Yaser Esam

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[8] Nothing in their dissents suggests that the three *Korematsu* dissenters would have had any objection to Padilla's detention. The dissenters made clear that they would not have objected to evacuation orders directed to persons deemed by military leaders (based on individualized evidence) to be potential saboteurs. Indeed, in his dissent, Justice Jackson went out of his way to make clear that courts had absolutely no basis for second-guessing the soundness of military determinations. He dissented solely because the evacuation orders were based on blatant racial discrimination, not on military considerations, and because he deemed it inappropriate for the Court to attach its seal of approval to such discrimination. *Id.* at 245-48.

Hamdi. In the absence of evidence that large numbers of citizens are being detained under circumstances similar to Padilla's, there is no reason to suspect that the President is detaining Padilla based on anything other than a considered judgment that Padilla is, in fact, an al Qaeda operative.

The Supreme Court has rightly been concerned by government efforts to detain citizens based solely on predictions of future dangerousness and has imposed significant constitutional restrictions on such detentions. *See, e.g., Kansas v. Crane,* 534 U.S. 407 (2002); *United States v. Salerno,* 481 U.S. 739 (1987). But such cases have not arisen in the military context, where the Constitution demands judicial deference to the decisions of the elected branches of government. More importantly, Padilla is not being detained based on predictions of future dangerousness; he is being detained in light of a determination that (based on his past conduct) he is an al Qaeda operative. Once that determination is made, the laws of war permit the government to detain Padilla for the duration of the conflict, regardless of whatever evidence Padilla may present that he does not pose a danger to the American people.

III. THE GOVERNMENT'S DETERMINATION THAT EFFECTIVE INTERROGATION OF PADILLA REQUIRES THAT HE BE HELD INCOMMUNICADO IS ENTITLED TO DEFERENCE

The courts are similarly ill-equipped to judge whether a captured al Qaeda operative possesses valuable intelligence and how best to persuade him to tell what he knows. The Jacoby Declaration states that the military believes that Padilla may well be a valuable intelligence source, if only it is permitted to continue its interrogation unhindered by attorneys. Jacoby Decl. at 8-9. In the absence of evidence that that declaration was made in bad faith, the military ought to be granted a reasonable period of time to continue its unimpeded interrogation.[9] Judge Mukasey's order to the contrary should be reversed.

Amici recognize that not permitting Padilla to consult with his attorneys could impede their ability to prepare an effective challenge to the enemy combatant designation. Accordingly, *amici* support imposing presumptive time limits on the period during which an enemy combatant could be denied access to counsel. *Amici*'s uninformed guess is that three years should be sufficient. It

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[9] It is hardly unreasonable for the government to conclude that Padilla is less likely to tell all he knows if he is allowed to consult with an attorney. *See, e.g.*, Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment,* 90 NORTHWESTERN U. L. REV. 387 (1996) (after the Supreme Court required in *Miranda* that criminal defendants be read their rights to consult an attorney, fewer voluntary confessions were obtained in custodial interrogations).

seems likely that any information that the government is ever likely to obtain will be elicited within the first three years. Moreover, any information that the government could obtain after more than three years may be so stale by the time it is elicited that it is of little value. If the government wishes to continue unimpeded interrogation beyond this presumptively reasonable period, it should be required to meet an ever-increasing burden of demonstrating that denying access to counsel could well result in the disclosure of valuable intelligence.

Nonetheless, *amici* disagree with Judge Mukasey's basic premise that barring attorney-client contact prevents attorneys from putting together what would otherwise be effective challenges to "enemy combatant" designations. If the government is abusing its power in making such designations, *amici* strongly suspect that evidence of such abuse could be gathered from sources other than the detainee himself. Indeed, despite his inability to communicate with those acting on his behalf, Padilla has had the benefit of legal arguments put together by many of the leading members of the American bar. Moreover, if there is a strong *factual* basis for challenging the Mobbs Declaration -- for example, evidence that Padilla was not in Afghanistan or Pakistan at the times the government claims he was -- one would expect Padilla's family to be able to

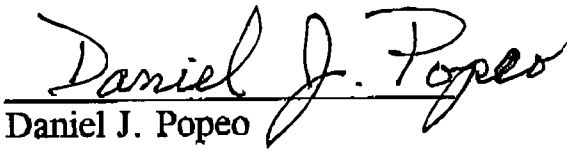
assist in putting together such evidence.

Admiral Jacoby has concluded that permitting Padilla access to counsel "may substantially harm our national security interests." Jacoby Decl. 8. Judge Mukasey notes correctly that the Jacoby Declaration is couched in speculative language and that Admiral Jacoby has no way of knowing for sure that continued unimpeded interrogation could uncover valuable intelligence. But more to the point, the judiciary has no way of knowing for sure that it will *not* result in valuable intelligence being uncovered. Where, as here, military authorities have made a reasonable determination that denying Padilla access to counsel will serve national security interests, the courts are in no position to second-guess that determination.

CONCLUSION

Amici curiae respectfully request that the district court's order be affirmed to the extent that it: (1) upheld the President's authority to designate as an enemy combatant an American citizen captured in the United States and to order his detention; and (2) mandated application of a highly deferential standard of review to the President's decision to designate Jose Padilla as an enemy combatant. *Amici* request that the Court reverse the district court's order granting Padilla access to counsel.

Respectfully submitted,



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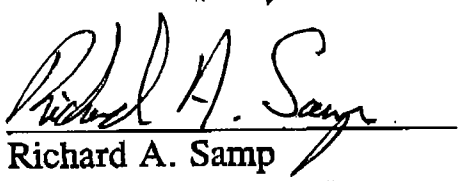

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Counsel wish to thank Christopher Canon, a student at Texas Tech University Law School, for his assistance in preparing this brief.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 9.0), the word count of the brief is 6,707, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of August, 2003, I deposited two copies of the *amicus curiae* brief of the Washington Legal Foundation, *et al.*, in the U.S. Mail, First Class postage prepaid, addressed to the following:

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