INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, non-partisan organization with over 400,000 members dedicated to preserving the principles of individual liberty embodied in the Constitution. The New York Civil Liberties Union is one of its statewide affiliates.

Since its founding in 1920, the ACLU has consistently defended civil liberties principles, even in times of national emergency. It has, in numerous contexts, also challenged restrictions on habeas corpus and opposed arbitrary and indefinite detention as a violation of due process. This case involves each of these issues. We therefore submit this *amicus curiae* brief with the parties' consent.

INTRODUCTION

Jose Padilla has been held incommunicado in a naval brig since June 9, 2002. By the time this court hears argument, no one other than his jailers and interrogators will have seen or heard from him in over sixteen months.

The government has not charged Padilla with any crime and apparently does not intend to do so. It nevertheless contends that it can detain Padilla indefinitely – without charges, trial, or access to counsel – solely on the basis of a presidential proclamation that he is an "enemy

combatant," supported by "some evidence" in the form of a hearsay-ridden declaration reciting allegations that Padilla is not allowed to dispute.

In addition to depriving Padilla of the essential safeguards of due process and habeas corpus, the government's claim of unchecked power undermines the constitutional safeguards that ensure the integrity of the criminal justice system. The looming threat of designation as an "enemy combatant" will inhibit suspects and defendants from asserting their rights out of fear that an aggressive defense may lead to such designation and to the consequent indefinite and incommunicado detention at issue here.[1]

ARGUMENT

I. INDEFINITE MILITARY DETENTION WITHOUT CHARGES, TRIAL, OR ACCESS TO COUNSEL VIOLATES DUE PROCESS, UNDERMINES HABEAS CORPUS, AND SUBVERTS THE PRIMACY OF CIVILIAN AUTHORITY.

The detention of Jose Padilla violates two fundamental principles that lie at the core of our constitutional system. The first is embodied in the concept of due process of law. If the government seeks to detain an

[1] At least one criminal defendant has been transferred from the criminal system to military jurisdiction, *United States v. Al-Marri*, No. 03-10044 (C.D. Ill. June 23, 2003), *available at* http://news.findlaw.com/hdocs/docs/almarri/usalmarri62303dsmsord.pdf, and others reportedly were threatened with the "enemy combatant" designation before they pled guilty. *See, e.g.*, Lichtblau, *Threats and Responses: Terror; U.S. Cites Al Qaeda in Plot to Destroy Brooklyn Bridge*,

individual based upon a claim of wrongdoing, it must formally accuse him and prove its accusation at trial; only if the charges are sustained, may it then impose punishment as prescribed by the Legislature. Justice Cardozo highlighted this principle, which traces back to the Magna Carta, in one of the Supreme Court's earliest opinions addressing the contours of constitutional liberty: "Fundamental . . . in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense." *Palko v. Connecticut,* 302 U.S. 319, 327 (1937) (citations omitted).

The second principle involves the supremacy of civilian authority over military authority in our constitutional democracy. This principle also has deep historical roots. In listing the grievances against the English Crown, the Declaration of Independence expressly criticized conduct "render[ing] the Military independent of and superior to the Civil power." The Declaration of Independence para. 14 (U.S. 1776). Reflecting that grave concern, the Supreme Court in *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866), held that the government may not subject civilians to military trials, even in wartime, if the civilian courts are open and functioning. Since

---

N.Y. Times, June 20, 2003, at A1; Herbeck, *2 Defendants Feel Pressure for*

Milligan, the Court has repeatedly stressed the need to prevent military usurpation of civilian authority. *See infra* n.5.

The government does not and cannot contend that its actions in this case have respected those principles. Instead, it insists that it is entitled to disregard them because we are engaged in a war against terrorism. Without diminishing for a moment the seriousness of terrorism's threat, it does not justify the government's conduct here. If Padilla engaged in acts of terrorism or other criminal conduct, he can and should be prosecuted as numerous other suspected terrorists have been. But due process does not permit, and the writ of habeas corpus was designed to prevent, his continued confinement by military officials without charges, trial, or access to counsel.

A. Due Process and Habeas Corpus Prohibit Padilla's Indefinite Detention.

The concept of due process derives from Article 39 of the Magna Carta, which promised that "[n]o free man shall be taken or imprisoned . . . or in any way destroyed . . . except by the legal judgment of his peers or by the law of the land." Magna Carta art. 39 (1215), *reprinted in Sources of Our Liberties* 17 (Perry ed., 1959). Parliament codified this principle in 1354, providing: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death,

---

Plea Deals, Buff. News, Apr. 6, 2003, at B1.

without he be brought to answer by due process of law." 28 Edw. 3, c. 3 (1354) (Eng.).

In his *Second Institutes*, published in 1642, Coke defined "due process of law" as prohibiting deprivations of liberty or property except "by indictment or presentment of good and lawfull men . . . or by writ originall of the common law." 2 Coke, *Institutes* *50. This was the Framers' understanding as well, as "Coke's writings . . . were the most frequent legal title[s] to be found among lawbooks in the hands of the colonists." Howard, *The Road from Runnymede* 122 (1968). In requiring "due process," the Framers built on Coke's understanding that the concept, at its core, was intended to safeguard the rights of accused persons. *See The Constitution of the United States, Annotated*, S. Doc. No. 92-82, at 1139 (1972).

A "due process" doctrine protecting those accused of wrongdoing was not the only guarantor of individual liberties that arose from England's turbulent political history to become part of our constitutional framework. During the seventeenth century, the writ of habeas corpus matured into a crucial means of ensuring that those detained by the executive for wrongdoing would be formally accused and tried in a judicial proceeding.

Habeas corpus developed as a counter to the King's assertions of an "executive prerogative" to detain subjects without formal charges in alleged

furtherance of the national interest. The issue came to a head in *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627), where five individuals (among hundreds similarly detained) unsuccessfully challenged their imprisonment for refusing to contribute to a forced loan that Charles I deemed critical to the defense of the kingdom, then at war with France and Spain. *See* Walker, *The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty* 59 (1960). The King's attorney asserted that the imprisonment was "by the special command of his majesty," 3 How. St. Tr. at 3 – a power that the King deemed necessary for those "matter[s] of state" that are "not ripe nor timely" for the ordinary criminal process. *Id.* at 37; *see also* Walker, *supra*, at 67. The prisoners' lawyers warned that unless the Crown were required to provide a charge for which the prisoners could be tried, their imprisonment "shall not continue on for a time, but for ever," and all people "may be restrained of their liberties perpetually" without remedy. 3 How. St. Tr. at 8; *see also* Walker, *supra*, at 67 (executive claim of "[r]eason of State lames Magna Charta") (quoting Coke).

Parliament responded to *Darnel's Case* with the Petition of Right, prohibiting imprisonment without due process and imposing restraints on the use of martial law. 3 Car. 1, c. 1. (1627) (Eng.). When the King continued

detaining individuals on vague, ill-defined charges,[2] Parliament enacted a statute known as the Habeas Corpus Act of 1641, commanding jailors to provide a lawful basis for confinement and requiring courts to act promptly by discharging, bailing, or remanding prisoners to custody for criminal trial. 16 Car. 1, c. 10, § 6 (Eng.) (courts shall promptly "examine and determine whether the cause of such commitment be just and legall or not"). The 1641 Act also eliminated the notorious Star Chamber and restricted the jurisdiction of the King's Privy Council, long associated with arbitrary executive imprisonment, secrecy and torture, particularly for suspected offenses against the State. *Id.* § 3; *see* Langbein, *Torture and the Law of Proof* 90, 136 (1976). The Habeas Corpus Act of 1679 provided reinforcement by requiring that, in cases of commitment for any "criminal or *supposed criminal matters*," prisoners either be released or quickly brought to trial. 31 Car. 2, c. 2 (Eng.) (emphasis added); *see also* Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 Colum. Hum. Rights L. Rev. 555, 563 (2002).

Through these developments, the Great Writ ensured that detention absent formal charges would not be permitted even when reasons of state

[2] *E.g.*, *Stroud's Case,* 3 How. St. Tr. 235, 240 (1629) (justifying imprisonment "for notable contempts . . . against our self and our government, and for stirring up sedition against us").

security were advanced.[3] 9 Holdsworth, *A History of English Law* 118 (3d ed. 1944) (describing writ as "the most effective weapon yet devised for the protection of the liberty of the subject"); 3 Blackstone, *Commentaries* *130 (habeas corpus is the "great and efficacious writ, in all manner of illegal confinement"); *see Brown v. Allen,* 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."); Chafee, *The Most Important Human Right in the Constitution*, 32 B. Univ. L. Rev. 144, 144 (1952).

This understanding of the writ as a vehicle to secure "due process" informed the Framers when they crafted our Constitution and Bill of Rights. *See* Meador, *Habeas Corpus and Magna Carta: Dualism of Power and*

---

[3] Nearly a century ago, one of England's leading constitutional scholars contemplated the type of threats we today label terrorism:

> Suppose, for example, that a body of foreign anarchists come to England and are thought by the police on strong grounds of suspicion to be engaged in a plot, say for blowing up the Houses of Parliament. Suppose also that the existence of the conspiracy does not admit of absolute proof. An English Minister, if he is not prepared to put the conspirators on their trial, has no means of arresting them, or of expelling them from the country. In case of arrest or imprisonment they would at once be brought before the High Court on a writ of *habeas corpus*, and unless some specific legal ground for their detention could be shown they would be forthwith set at liberty.

Liberty 24 (1966); *see also* The Federalist No. 84, at 443-44 (Hamilton) (Gideon ed. 2001) (characterizing writ as fundamental safeguard against arbitrary executive imprisonment). Suspension of the writ was generally understood as the *only* way to detain an individual for wrongdoing without formally charging and trying him. Wary of *any* executive's power to detain indefinitely, the Framers guaranteed the writ's availability in the Suspension Clause, U.S. Const. art. I, § 9, cl. 2, and the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82. Congress alone was granted the power to suspend the writ. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144, 148-49 (C.C.D. Md. 1861) (No. 9,487). Even that power was expressly confined to "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2; *see* 2 Story, *Commentaries on the Constitution of the United States* § 1342 (5th ed. 1891).

Moreover, so dominant were the Framers' concerns regarding unsubstantiated detention that, in addition to enshrining the writ, they devoted four of the original ten amendments to protecting the accused. A unanimous Court in *Chambers v. Florida* observed:

Dicey, *Introduction to the Study of the Law of the Constitution* 222 (7th ed. 1908) (footnote omitted).

> [A]s assurance against ancient evils, our country, in order to preserve 'the blessings of liberty', wrote into its basic law the requirement . . . that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed. The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes.

309 U.S. 227, 237 (1940) (footnote omitted). Padilla's detention is irreconcilable with this constitutional history.

B. Padilla's Prolonged Detention by the Military Offends the Constitutional Requirement that Civil Authority Predominate Over Military Authority.

The government's claim that it can detain Padilla indefinitely, without charges or trial, simply by transferring him to military custody further conflicts with the Constitution's commitment to the supremacy of civilian authority over the military. *Ex parte Milligan* exemplifies that commitment.

Milligan arose during the Civil War when Southern sympathizers in Indiana formed the Sons of Liberty, "a powerful secret association, composed of citizens and others . . . under military organization." 71 U.S. at 140 (Chase, C.J., concurring). The government alleged that this group conspired to engage in "insurrection, the liberation of the prisoners of war . . . , the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government." *Id.* Milligan, thought to

be a high-ranking member of this organization, was arrested by military officers and charged with "conspiracy against the Government of the United States," "affording aid and comfort to rebels against the authority of the United States," "inciting insurrection," "disloyal practices," and "violation of the laws of war." *Id*. at 6-7; *see* Rehnquist, *All the Laws But One* 93 (1998). Although not a member of either the Union or Confederate army, Milligan was tried, convicted and sentenced to death by a military commission. The Supreme Court reversed the conviction, holding that the military lacked jurisdiction to try Milligan while Indiana's civilian courts were open and functioning. 71 U.S. at 121-22.

The Court rejected the assertion that "in time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power . . . to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will* . . . ." *Id*. at 124. It insisted that "[m]artial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power' . . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Id.* at 124-25.

To the claim that military "jurisdiction is complete under the 'laws and usages of war,'" a claim resurrected here by the government, the Court replied:

> It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.

Id. at 121. The majority made clear that the Constitution allowed neither the President nor Congress to authorize the military to assume what was properly a judicial function. *Id*. at 121-22. Although the Civil War threatened the country's very existence, the Court concluded that wartime anxieties did not justify abandonment of basic constitutional values: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Id*. at 120-21.

Mindful of the grave threat that Milligan posed, *id.* at 130, the Court nonetheless found the government's accusations insufficient to justify departure from core constitutional principles. In a manner that responds as forcefully today to the government's claim for detaining Padilla, the *Milligan* Court explained:

> If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired

> against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Id. at 122.[4] Since this seminal decision, the Court has continued to resist military encroachment upon civil authority.[5] In this case, as in *Milligan*, security and liberty can both be preserved by subjecting Padilla to criminal prosecution if the government believes that he has violated the law.

---

[4] In relation to its forceful rejection of military jurisdiction over civilians, the *Milligan* Court stressed the importance of the jury trial right, a right that is "not held by sufferance, and cannot be frittered away on any plea of state or political necessity." *Id.* at 123; *see also id.* at 122 ("Another guarantee of freedom was broken when Milligan was denied a trial by jury.").

[5] *See, e.g.*, *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (declaration of martial law in Hawaii during World War II did not authorize military trials of civilians); *id.* at 325 (Murphy, J., concurring) ("[I]n framing the Bill of Rights … [our nation's Founders] were careful to make sure that the power to punish would rest primarily with the civil authorities at all times. . . . This supremacy of the civil over the military is one of our great heritages."); *Toth v. Quarles*, 350 U.S. 11, 22 (1955) ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."); *see also Ex parte Orozco*, 201 F. 106, 117 (W.D. Tex. 1912) (executive detention based on mere suspicion places the liberty of all people "at the mercy of the President" and makes the military "independent of and superior to the civil power"); *infra* Point I.C.

C. *Quirin* Neither Overrules *Milligan* Nor Sanctions Padilla's Detention.

In upholding the government's authority to detain Padilla in military custody without formal charges or trial based on a minimal evidentiary showing, the district court relied principally upon *Ex parte Quirin*, 317 U.S. 1 (1942), a World War II case involving the military trial of German marine corps members. After secretly landing on U.S. shores from German submarines and burying their uniforms and explosives, the *Quirin* petitioners were arrested when their plan to sabotage U.S. military installations was discovered. As members of the enemy armed forces of Germany, the men were tried by a military commission as "unlawful combatants" for violating the law of war by crossing enemy lines in civilian dress to engage in sabotage. They were found guilty and sentenced to death. In a *per curiam* decision issued less than twenty-four hours after hearing argument in a special session (without full benefit of the parties' briefs which were filed the day argument began), the Supreme Court upheld the jurisdiction of the military commission. *Ex parte Quirin*, 317 U.S. 1, 63 S. Ct. 1 (1942) (per curiam); *see* Danelski, *The Saboteurs' Case*, 1 J. Sup. Ct. Hist. 61, 61 (1996). Nearly three months after six of the petitioners were executed, the Court explained its decision. 317 U.S. 1, 63 S. Ct. 2 (1942); *see* Danelski, *supra*, at 61.

Quirin has been much criticized,[6] and Members of the *Quirin* Court subsequently expressed serious regrets.[7] This court, of course, cannot ignore or overrule *Quirin.* But it need not extend *Quirin*'s holding beyond its specific facts, which are critically different from Padilla's. Contrary to the government's key assertion, *Quirin* simply does not control here.

First, *Quirin* applies only to members of a foreign sovereign's military force who violate the law of war. The individuals tried in *Quirin* were part of the German military while Germany and the United States were at war. As such, they were subject to the privileges and responsibilities of "combatants" under the law of war.[8] They were entitled to use lethal force against military targets and, if captured, to be treated as prisoners of war if

---

[6] *See, e.g.*, Danelski, *supra*; Fisher, *Military Tribunals: The Quirin Precedent* (CRS Report for Congress, Mar. 26, 2002); Katyal & Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002).

[7] Justice Frankfurter regarded it as "not a happy precedent," and Justice Douglas stated, "'Our experience with [the Saboteurs' Case] indicated . . . to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble.'" Danelski, *supra*, at 80 (citations omitted).

[8] The international law treatises upon which *Quirin* relied indicated that, to qualify as a "combatant" or "belligerent" as those terms were used, one had to be "armed by a sovereign government and take[] a soldier's oath of fidelity." 2 Hyde, *International Law* § 648, at 290 n.1 (1922) (quoting 7

their belligerent conduct comported with the law of war. When they changed out of uniform to engage in clandestine operations behind U.S. military lines, they violated the law of war and lost their privileged status as "lawful combatants," allowing the government to try them as "unlawful combatants."

While acknowledging the distinction between lawful and unlawful combatants, the district court in this case overlooked the necessary predicate determination by failing to distinguish Padilla from the military personnel captured and tried in *Quirin.*[9] Unlike the *Quirin* petitioners, Padilla is a *civilian* who (like Milligan) is thought to have been a member of a clandestine, paramilitary organization with violent and unlawful aims, but who (again like Milligan) is not part of a formal military unit of a belligerent state.

Moore, *Digest of International Law* § 1109, ¶ 57), *cited in Quirin*, 317 U.S. at 31 nn.7-8.

[9] The district court relied on *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), to find that a formal declaration of war is not needed to repel attacks and detain the enemy's soldiers, but it neglected to note that *The Prize Cases* carefully distinguished between belligerents and insurgents and hinged its conception of war on conflict between sovereignty-claiming entities "*act[ing] as States*" within a defined boundary. *Id.* at 673. Furthermore, the question whether war exists is distinct from the question whether a specific individual's status renders him unprotected by the Bill of Rights.

In *Quirin*, the government acknowledged and relied on this distinction to justify its assertion of military jurisdiction. Brief for Respondent in *Ex parte Quirin* at 10 ("Milligan never wore the uniform of the armed forces at war with the United States. The petitioners did."); *id.* at 45 ("Milligan was a civilian; the present defendants are imprisoned combatants of an enemy nation."). Now, the government has shifted gears and would like to obscure a distinction that was critical in both *Quirin* and *Milligan*.

Specifically, the *Quirin* Court held that *Milligan* was not controlling precisely because it involved a non-combatant. 371 U.S. at 45. And, in *Milligan*, the Court expressly relied on the distinction between combatants and non-combatants to reject the government's claim that Milligan could be held as "a prisoner of war as if he had been taken in action with arms in his hands," 71 U.S. at 21. Despite his role as a leader of the Sons of Liberty, the Court said:

> [H]e was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

Id. at 131. This case compels a similar conclusion. If the government seeks to detain Padilla based on an accusation of wrongdoing, it must charge and try him in the Article III courts so long as they are open and functioning.[10]

Even if Padilla could somehow be treated as a "combatant" under the law of war, *Quirin* does not authorize the government's conduct in this case. The *Quirin* petitioners were formally accused of being unlawful combatants and *tried* by military commission for their violations of the law of war. Padilla, in contrast, is being held by military officials without charges or trial. The district court acknowledged that "the particular issue before the Court in *Quirin* – whether those petitioners could be tried by a military tribunal – is not precisely the same as the one now before this court – whether Padilla may be held without trial . . . ." *Padilla v. Bush*, 233 F. Supp. 2d 564, 594 (S.D.N.Y. 2002). But the district court improperly presumed that because the government could try the *Quirin* petitioners by military commission and sentence them to death, it necessarily has the

[10] *Quirin* is further distinguishable because it was decided on the basis of *stipulated* facts establishing that the petitioners were German combatants engaged in unlawful belligerency. And, the Court made clear that its jurisdictional decision rested on a close examination of the specific law-of-war offense charged. The Court emphasized, "We may assume that there are acts regarded . . . as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by jury." 317 U.S. at 29.

authority to detain Padilla without charges or trial, and without granting him any recognized status under international law. The *Quirin* Court contemplated detention *for trial.* 317 U.S. at 18, 46, 48. Detention *incident to trial* is not the same as detention *in lieu of trial,* either logically or legally.

Finally, both the government and the district court have misplaced *Quirin* and *Milligan* in our constitutional history. They read *Milligan* as a fact-specific holding that *Quirin* narrowed to the point of near-extinction. The opposite is true. As the *Quirin* opinion was crafted, Justice Black expressed concern that the draft too broadly approved trials by military tribunals in a note to Chief Justice Stone:

> "In this case I want to go no further than to declare that these particular defendants are subject to the jurisdiction of a military tribunal because of the circumstances and purposes of their entry into this country as part of the enemy's war forces. Such a limitation, it seems to me, would leave the *Milligan* doctrine untouched, but to subject every person in the United States to trial by military tribunals for every violation of every rule of war which has been or may hereafter be adopted . . . might go far to destroy the protections declared by the *Milligan* case."

Danelski, *supra*, at 76 (citation omitted). "Stone responded by revising the opinion sufficiently to satisfy Black," *id.*, as reflected in the Court's carefully drawn, narrow holding. 317 U.S. at 46 ("We hold only that *those particular acts* constitute an offense against the law of war which the

Constitution authorizes to be tried by military commission.") (emphasis added).

In contrast to *Quirin*, the core principles of *Milligan* have flourished. For example, in *Reid v. Covert*, 354 U.S. 1, 40 (1957) (plurality), the Court declined to depart from the constitutionally enshrined tradition that military power be subservient to civilian authority, noting that "the business of soldiers is to fight . . . wars, not to try civilians for their alleged crimes," *id.* at 35. Tracing a long history that made "clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections," *id*. at 30, the Supreme Court called *Milligan* "one of the great landmarks in this Court's history," fifteen years after *Quirin* was decided. *Id*.; *see also id*. at 31 ("Duncan . . . reasserted the principles enunciated in Ex parte Milligan and reaffirmed the tradition of military subordination to civil authorities and institutions."); *id.* at 33 ("The Milligan, Duncan and Toth cases recognized and manifested the deeply rooted and ancient opposition in this country to the extension of military control over civilians. In each instance an effort to expand the jurisdiction of military courts to civilians was repulsed.").

The attack of September 11th and the understandable fear that resulted do not negate this legacy. With all the resources and criminal statutes at the

government's disposal, there is no need to grant to the Executive a power that the Framers viewed as antithetical to liberty and justice. As the Supreme Court aptly stated in *Reid*, "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government." *Id*. at 14.

II. EVEN IF PADILLA WERE NOT ENTITLED TO CRIMINAL PROCEEDINGS, DUE PROCESS AND HABEAS CORPUS REQUIRE AN ADVERSARIAL PROCEEDING, ACCESS TO COUNSEL, A SEARCHING REVIEW OF THE FACTS, AND A HEIGHTENED SHOWING BY THE GOVERNMENT.

The Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects."). Detained on American soil by American officials, Padilla is entitled to invoke this protection, regardless of the ostensible justification for confinement. "The 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 . . . ." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring); *see also Matthews v. Diaz*, 426 U.S. 67, 77 (1976).

The Supreme Court has emphasized that "commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection." *Jones v. United States*, 463 U.S. 354, 361 (1983) (emphasis added; punctuation and citation omitted). Thus, *even if* the government could subjugate the criminal process and impose military detention on a civilian arrested domestically, outside any zone of active combat, the Constitution nonetheless would require that Padilla be allowed to contest the government's allegations and that the government be held to a burden of proof commensurate with the significance of the deprivation imposed.

Whether Padilla's detention is characterized as regulatory or punitive, due process demands an adversarial proceeding – requiring the government to prove the propriety of detention and allowing Padilla to defend his liberty with the assistance of counsel.[11] *See, e.g.*, *Kansas v. Hendricks*, 521 U.S.

[11] While other briefs address Padilla's right to counsel more fully, we note that we (like the government) are unaware of any case, including *Quirin*, in which a court has sanctioned wholesale denial of access to counsel for a prisoner to challenge the basis of his confinement. *Cf., e.g.*, *Chandler v. Fretag*, 348 U.S. 3, 10 (1954) ("A necessary corollary [of the right to be

346 (1997); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (detainee is "entitled to constitutionally adequate procedures to establish the grounds for his confinement"); *United States v. Salerno*, 481 U.S. 739 (1987); *Addington v. Texas*, 441 U.S. 418 (1979). Due process is meaningless without Padilla's participation.

Moreover, a habeas corpus proceeding without such basic procedural safeguards would eviscerate the Great Writ's function as a check on arbitrary executive power and as a shield for personal liberty.[12] *See INS v.*

---

represented by counsel] is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth.").

[12] Habeas law demands that the prisoner be produced to ensure meaningful review; here, that requires at an absolute minimum that Padilla be allowed to consult with counsel. Modern habeas practice allows a petition's adjudication without the prisoner's production *if* the outcome turns on a question of law; the prisoner must be produced if his presence is needed to resolve factual disputes. *See* 28 U.S.C. § 2243 ("Unless the application for the writ and return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."); *Walker v. Johnston*, 312 U.S. 275, 285 (1941) ("[I]f an issue of fact is presented . . . issu[ing] the writ, hav[ing] the prisoner produced, and hold[ing] a hearing at which evidence is received . . . is, we think, the only admissible procedure.").

Padilla's participation in these proceedings will not only allow the requisite resolution of factual matters, but will also accord with the writ's historical requirement that the jailer produce in court both the prisoner and the cause for his commitment. Habeas Corpus Act of 1641, 16 Car. 1, c. 10, § 6 (Eng.); 6 *Encyclopædia of the Laws of England* 130 (Renton ed. 1898); *see also* Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § 5 (Eng.) (imposing sanctions for failure to produce the prisoner). Production of the prisoner

St. Cyr, 533 U.S. 289, 301 (2001) ("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."). At a minimum, the writ provides *de novo* review of the committing body's authority to detain an individual.[13] In the case of the military, in particular, habeas courts have carefully scrutinized the factual and legal basis for confinement to ensure that the military has not exceeded its "special and limited jurisdiction." *Givens v. Zerbst*, 255 U.S. 11, 19 (1921); *McClaughry v. Deming*, 186 U.S. 49, 62-63 (1902); *see Farley v. Ratliff*, 267 F. 682, 684 (4th Cir. 1920); *Ver Mehren v. Sirmyer*, 36 F.2d 876, 881 (8th Cir. 1929)

---

makes possible meaningful judicial review of executive detention. Even where the writ of habeas corpus was purportedly suspended, the prisoner had access to counsel to challenge detention. *See* Habeas Petition quoted in *Ex parte Merryman*, 17 F. Cas. at 145 ("all access to [the prisoner was] denied except to his counsel and brother-in-law"). Padilla, having disappeared into a virtual black hole on the word of the Executive, is a reminder that time has not tempered the imperative of the writ's historic function nor vitiated the basic due process concerns that have historically guided its use.

[13] *E.g.*, *Frank v. Magnum*, 237 U.S. 309, 331 (1915) (habeas court "to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear on the record or not"); *see also* Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 987 (1998) (habeas petitioners could disprove facts on which jurisdiction of committing officer or tribunal was based in cases of pretrial commitment and extradition).

(careful review of "grave step" of enlistment with "grave consequence[]" of subjecting individual "to military law instead of to the ordinary common and statutory law"); *United States ex rel. Helmecke v. Rice*, 281 F. 326, 329 (S.D. Tex. 1922) ("it is incumbent upon the military to put their finger" on factual predicates that confer jurisdiction); *cf. Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

Even during wartime, meaningful habeas review has always been available to test the military's authority over detainees.[14] For example, *In re Territo*, 156 F.2d 142, 143-45 (9th Cir. 1946), upheld petitioner's detention only after the district court concluded a hearing and found facts establishing Territo's prisoner-of-war status, and *In re Toscano*, 208 F. 938, 943-44 (S.D. Cal. 1913), allowed petitioners' temporary detention as foreign belligerents only upon determining that, on the stipulated facts, international law essentially required it. *Quirin*, on which the government relies so heavily,

[14] *E.g.*, *United States ex rel. Zdunic v. Uhl*, 137 F.2d 858, 860 (1943) (reviewing whether relator was a "native, citizen, denizen, or subject" of Germany, and thus subject to detention as an "alien enemy"); *United States ex rel. De Cicco v. Longo*, 46 F. Supp. 170, 172 (D. Conn. 1942) (reviewing "essential jurisdictional fact" of petitioner's citizenship in "alien enemy" case); *Ex parte Gilroy*, 257 F. 110, 114-19 (S.D.N.Y. 1919) (detailed finding of facts following hearing to determine whether petitioner was "alien enemy"); *see also Goldswain's Case,* 96 Eng. Rep. 711 (C.P. 1778) (reviewing impressment of sailor into British Navy despite King's claim that ships were "short of men").

allowed trial by military commission only after finding that the "conceded facts" demonstrated "plainly" that the soldiers fell "within th[e] boundaries" of the commission's jurisdiction. 317 U.S. at 46; *accord Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (trial by military commission authorized based on conceded facts). The same judicial scrutiny is required here, where the government seeks an unprecedented stretching of the bounds of the narrow, "grudgingly conceded" exception to the supremacy of civilian authority. *Reid*, 354 U.S. at 23.

The President has declared that Padilla is an (unlawful) enemy combatant based on allegations that he aligned with al Qaeda and plotted to build and detonate a "dirty" bomb. Padilla must be allowed to contest these allegations and the government must prove them. Because the alleged justification for Padilla's confinement is an accusation of wrongdoing, the predicate for his detention should be established through the criminal process by proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970); *cf. Bell v. Wolfish*, 441 U.S. 520, 535 ("[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). If that standard is deemed inapplicable, the government must satisfy the test of clear and convincing evidence, at the very least. Even where detention serves an ostensibly non-punitive function, a heightened showing

– typically clear and convincing evidence – of the factual predicate for detention is still required. *Addington*, 441 U.S. at 427; *see also Foucha*, 504 U.S. at 86; *Salerno*, 481 U.S. at 751; *cf. Hendricks*, 521 U.S. at 353 (statute required trial be held to determine "beyond a reasonable doubt" that person was a sexually violent predator).

In any case, "some evidence" is indisputably an inappropriate test of Padilla's detention. "Some evidence" has *never* been a standard of proof. It is instead a method of review that has been applied when a petitioner has sought judicial scrutiny of a *prior* adjudicatory proceeding at which he was able to present evidence and challenge the government's factual allegations. *See generally* Neuman, *The Constitutional Requirement of 'Some Evidence,'* 25 San Diego L. Rev. 631 (1988). Here, there has been no prior proceeding with an adjudication that can be measured for "some evidence." Instead, indefinite solitary confinement has been imposed without the detainee ever having had any opportunity to dispute the government's allegations or to present his own evidence.

Unable to offer a single case to validate "some evidence" as a standard of proof (let alone precedent for a standard that bars one party from offering or challenging any evidence), the government falls back on a claim for near-total deference that essentially calls for judicial abdication.

Repeated citations to *Hamdi v. Rumsfeld*, however, cannot dull the Fourth Circuit's pointed insistence that a foreign battlefield capture is wholly unlike Padilla's domestic arrest and confinement. *See* 316 F.3d 450, 465 (4th Cir. 2003); *see also Hamdi v. Rumsfeld*, No. 02-7338, 2003 U.S. App. LEXIS 13719, at *11 (4th Cir. July 9, 2003) (Wilkinson, J., concurring in denial of rehearing en banc) ("To compare [Hamdi and Padilla] is to compare apples and oranges.").[15] Nor can the government's invocation of the Executive's warmaking powers mask the fact that the power to wage war is no more at issue here than it was in *Milligan*.[16] And, significantly, the government does not cite a single relevant authority to support its potentially limitless claim that its desire to interrogate Padilla outside the presence of counsel is a constitutionally sufficient justification for incommunicado, indefinite detention.

As the Administration has frequently noted, the struggle against terrorism has no discernible end and is unlikely ever to have a definitive

[15] Moreover, the court found that Hamdi had conceded the factual basis for his detention. 316 F.3d at 459. That is not the case here.

[16] Absent here are the concerns of *Johnson v. Eisentrager,* 339 U.S. 763 (1950), which focused on enemy soldiers from distant battlefields in the throes of war outside the U.S. and held only that the Court's jurisdiction did not extend to such persons.

conclusion. Due process and habeas corpus must not be allowed to become casualties of that struggle.

CONCLUSION

For the reasons stated above, the petition should be granted.

Respectfully submitted,

Steven R. Shapiro (SS-9900)
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2611

Arthur N. Eisenberg (AE-2012)
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 344-3005

Lucas Guttentag (LG-0329)
Robin L. Goldfaden
Jonathan L. Hafetz
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street
New York, NY 10004-2400
(212) 549-2617

July 29, 2003

_____
Arthur N. Eisenberg

_____
Steven R. Shapiro

_____
Robin L. Goldfaden