No. 03-1027

In The

Supreme Court of the United States

DONALD H. RUMSFELD, Secretary of Defense,

Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN, as Next Friend Of Jose Padilla,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE OTHERS ARE US AND JONATHAN WALLACE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE*

Others Are Us and Jonathan Wallace respectfully submit this brief as *amici curiae* in support of Respondent's assertion that the Court of Appeals correctly granted the *habeas corpus* petition and held the detention of Respondent Jose Padilla to be illegal under the Constitution and laws of the United States.

Others Are Us is a New York state nonprofit corporation with federal 501(c)(3) status, based in New York City. The Others Are Us mission involves "using the arts as a vehicle for bringing individuals from different countries, cultures, backgrounds and beliefs together in community to establish mutual understanding, tolerance and cooperation." (From the Others are Us web site at *www.othersareus.org*.) The organization's current initiative, "Imagining You and Your World", enlists students in schools in the Arab world, Israel and the United States to exchange art and email with one another. In pursuit of this mission, Others Are Us works with, and the nonprofit's president has visited, schools and organizations in countries including Egypt, Israel and the Occupied Palestinian Territories.

Others Are Us executives and board members are well aware that, in the current political climate, such activities coordinated with schools and nonprofit organizations in Arab countries may be regarded with suspicion. Others Are Us engages in no illegal activities, but is well aware that it may fall under suspicion of doing

* The parties have consented to the filing of this brief. Their letters of consent are being lodged herewith. This brief has been authored in its entirety by undersigned counsel for the *amici curiae.* No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation and submission of this brief.

so. Others Are Us' president, Annette Swierzbinski, has already had the experience of being visited by law enforcement authorities interested in questioning her about the organization's contacts overseas. In the event of a law enforcement misunderstanding about the legitimacy of the organization's activities in support of international tolerance, understanding and cooperation, Others Are Us members place great reliance in the procedural safeguards guaranteed by the U.S. constitution, and are highly concerned by their apparent suspension in the case of Jose Padilla. They believe that, if the government's position in the case is upheld, anyone merely suspected, without hard evidence, of illegal activities related to the Arab world could disappear into federal custody, without access to an attorney or other safeguards allowing them to establish their innocence.

Wallace, an attorney admitted to the bar of this Court, is the editor and publisher of *The Ethical Spectacle*, *http://www.spectacle.org*, a monthly Web-based publication which has been extremely critical of the policies and actions of this administration. Wallace has written and spoken out against the war in Iraq and the administration's disregard for the civil liberties of Americans. Wallace has also attended demonstrations in New York City against the Iraq war, and wrote a statement which was read at an antiwar demonstration in New Jersey. Wallace has been the subject of unwelcome law enforcement attention on a number of occasions, including illegal search of his person and possessions, and interference with his right of assembly. As an American citizen, Wallace relies on the U.S. Constitution to protect him from government overreaction to his exercise of the rights of free speech and peaceful assembly. Wallace believes that the government's

arguments pertaining to Padilla could be used to justify the detention of any American on secret evidence.

Others Are Us and Wallace therefore file this *amicus* brief in support of respondent's rights of due process.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

Respondent Jose Padilla is a United States citizen, detained by the government upon arrival at a Chicago airport and held incommunicado in a military brig, without access to attorneys or notice of the charges against him. The Department of Defense, which has custody of Padilla, justifies its detention by labeling him an "enemy combatant". The executive branch, which denies the jurisdiction of this Court to consider Padilla's *habeas corpus* petition, has in effect acted both as legislature (determining the definition of "enemy combatant" and the rules under which such persons may be detained and held) and judge with regard to Padilla (determining the length of his detention, and the circumstances, if any, under which he may be advised of the charges against him, brought before a tribunal, and punished).

Amici argue that in arrogating to itself the right to discharge the functions of all three branches of government as pertains to Padilla's detention, the executive branch is acting in willful disregard of the clear intention of the Framers of the Constitution. The Framers knew that the executive power could not be trusted, being subject to corruption through the exercise of unchecked power. The Framers wisely created a system of checks and balances to keep the executive from infringing on the liberties of citizens

guaranteed by the Constititution. The executive, in claiming the right and ability to dispose of Padilla without clear authorization by the legislature and without judicial review, is asking for a absolute degree of trust which would have offended the Framers.

ARGUMENT

I.

DISTRUST OF EXECUTIVE POWER IS A CORNERSTONE OF THE AMERICAN CONSTITUTIONAL SYSTEM

The Framers of the United States Constitution were extremely aware of the propensity of rulers to become corrupted by power. Accordingly, they carefully crafted a system in which the three branches of government check each other to avoid this outcome. As James Madison wrote in *The Federalist* no. 47 (Jacob E. Cooke, ed., Wesleyan University Press 1961) (1787-1788):

> The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

He then cited Montesquieu, whom he regards as being the great progenitor of the concept of separation of powers:

> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*. Were it

> joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.

In *Federalist* 48, Madison cited Thomas Jefferson, in *Notes on the State of Virginia:*

> All the powers of government, legislative, executive and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government…An *elective despotism*, was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.

Madison concluded in *Federalist* 51 that the government's "several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the dangers of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on

> human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.

Madison concluded: "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other…"

The Framers devoted much attention to the benefits and dangers of a strong executive. In *Federalist* no. 70, Alexander Hamilton, while acknowledging the need for a strong executive able to act rapidly and with secrecy in appropriate circumstances, noted that the executive power must be counterbalanced by "Ist. a due dependence on the people, secondly a due responsibility."

Hamilton observed that a single strong executive can more easily be held responsible for error than a committee: "it is far more safe that there should be a single object for the jealousy and watchfulness of the people…."

In *Federalist* 84, Hamilton described the Constitution's provisions protecting individuals against the most despotic exercise of power imaginable, that of deprivation of life or liberty without trial. "[T]he practice of arbitrary imprisonments," he said, has "been in all ages the favourite and most formidable instruments of tyranny."

> The observations of the judicious Blackstone in reference to the latter, are well worthy of recital. "To bereave a man of life (says he) or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government." And as a remedy for this fatal evil, he is every where peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls "the BULWARK of the British constitution."

This Court has several times been called upon to resolve disputes involving the exercise of extraordinary executive power in wartime. It has usually done so with complete regard to the Framers' warnings about the importance of distrusting the unchecked actions of the executive branch. In *Ex Parte Milligan*, 71 U.S. 2 (1866), the Court was called upon to resolve, via a habeas corpus petition,

the legality of the appellant's trial and condemnation to death by a military tribunal upon a charge of treason against the United States during the Civil War. Milligan was a U.S. citizen who had been a resident of Indiana for twenty years. He had never served in the U.S. military, nor had he ever been a resident of any of the states opposing the federal government during the Civil War. The Court, in granting the writ, correctly noted that the case "involves the very framework of the government and the fundamental principles of American liberty." *Id.* at 109. "[I]t is the birthright of every American citizen, when charged with crime, to be tried and punished according to law… By the protection of 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." *Id*. at 119.

The Court noted that the Framers "secured in a written constitution every right which the people had wrested from power during a contest of ages." *Id.* at 119.

> 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. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.
>
> *Id*. at 120.

The Court concluded, in language that appears to control the present case and require affirmation of the holding below, that there was no justification, in the laws of war or elsewhere, for military tribunals in a state which "upheld the authority of the government, and where the courts are open and their process unobstructed." *Id.* at 121. Also, "no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in no wise connected with the military service." *Id.* at 121-122.

> [U]ntil recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack….[It is] a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity.
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> *Id.* at 123.

The Court rejected the argument that martial law allows the executive power, acting through its military commanders, to "substitute military force for and to the exclusion of the laws" and to punish individuals "without fixed or certain rules". *Id.* at 124. This, the Court said, would lead to the conclusion that "republican government is a failure, and there is an end of liberty regulated by law." *Id.* This concept of martial law and the Framers' idea of the preeminence of the civil liberties guaranteed by the Constitution, are "irreconcilable; and in the conflict, one or the other must perish." *Id.* at 125.

In 1946, in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), this Court over-ruled the U.S. military's exercise of martial law in Hawaii after Pearl Harbor. A military governor shut the civil courts, suspended habeas corpus, and prevented the use of juries, and then proceeded to try by military tribunal offences such as assault and embezzlement committed by civilians. This Court noted that "the term 'martial law' carries no precise meaning." *Id*. at 315. It is not mentioned in the Constitution, and no act of Congress has defined it. The Court held that "military trials of civilians charged with crime, especially when not made subject to judicial review, are….obviously contrary to our political traditions and our institution of jury trials in courts of law…." *Id.* at 317. "People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule which, according to the Government, Congress has authorized here." *Id.* at 319. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government." *Id*. at 322.

The Court again considered the war time powers of the executive branch in *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952). The Court held that President Truman's order seizing the steel mills was effectively an act of law-making. "[L]ike a statute, [it] authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution." *Id.* at 588. The Court noted that the Constitution's prescription that the President see that the laws are faithfully executed "refutes the idea that he is to be a lawmaker." *Id.* at 587. It

invalidated the President's seizure order, noting that "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times" based on "fears of power and the hopes for freedom." *Id.* at 589.

Justice Frankfurter, concurring, pointed out that the need for action is not enough in itself to create emergency power in the President.

> Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law. *Id*. at 603-604.

Justice Jackson, concurring, said that the argument that special executive powers exist when necessary to meet an emergency

> asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.

Id. at 649-650.

The clearly stated philosophy of the Framers, in fashioning our Constitution, was that the unchecked

exercise of power corrupts a ruler, and that the three branches of government should serve to balance each other in order to avoid this outcome. More plainly put, the Framers believed that government, without checks and balances, is inherently untrustworthy, due to the problems of human nature ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary"). Thus, the petitioner's extraordinary seizure and continuing custody of Jose Padilla, coupled with the petitioner's insistence that its actions are not reviewable by the courts via habeas corpus or otherwise, are directly contrary to the philosophy of the Federalist and this Court's cases cited above.

II.

PETITIONER IS ASKING FOR AN INAPPROPRIATE AND EXCESSIVE DEGREE OF TRUST

Petitioner, in justifying its seizure of Padilla and insisting that its actions are not reviewable by the courts, is asking for a degree of trust unprecedented in the American system, and highly inimical to the philosophy of the Framers as expressed in the Federalist. Petitioner is claiming the right to legislate its own rules for the extrajudicial seizure and holding of American citizens, to execute such arrests, and then detain these citizens indefinitely without trial. In other words, the petitioner is insisting upon the right to act as legislature and court in addition to performing its executive duties, while maintaining that neither of the other branches of government is

competent to intervene and review its treatment of Padilla.

Petitioner's acts therefore constitute the exact behavior warned against by the Framers and the philosophers upon whom they drew. John Locke, in *The Second Treatise of Government* (Thomas P. Peardon ed., Prentice Hall 1952) (1690) a work much relied upon by the Framers, said:

> it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community contrary to the end of society and government....

Id. at section 143.

In *Common Sense* (Isaac Kramnick ed., Penguin Classics 1986) (1776), his elegant and influential argument to the American colonists that the time had come to separate from England, Thomas Paine argued that kings are not equipped to exercise absolute judgment because, by their nature, they are insulated from the affairs of the world:

> There is something exceedingly ridiculous in the composition of monarchy; it first excludes a man from the means of information, yet empowers him to act in cases where the highest judgment is required. The state of a king shuts him from the world, yet the

> business of a king requires him to know it thoroughly; wherefore the different parts, unnaturally opposing and destroying one another, prove the whole character to be absurd and useless.

Id. at 69.

He asks trenchantly: "*How came the king by a power which the people are afraid to trust, and always obliged to check?*" *Id.* at 70. Such power, he concludes, can only be human-granted, not divine: "neither can any power, *which needs checking*, be from God." *Id.* But if it is human-granted than it can, and should, be revoked or supervised by humans.

In *Ex Parte Milligan*, 71 U.S. at 125, this Court stated:

> This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right [of military trial of citizens] is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them….[but] they secured the inheritance they had fought to maintain, by incorporating in a written constitution, the

safeguards which *time* had proved were essential to its preservation.

Petitioner's insistence that it may dispose of Jose Padilla, a U.S. citizen, solely at its own discretion, without authorization of Congress or review by the Courts, sets us on the slippery slope feared by the Framers, and foreseen by this Court in the *Milligan* and *Youngstown* cases.

In its brief filed March 17, 2004, Petitioner argues that Padilla is an enemy combatant who can appropriately be detained without charges or trial by the President pursuant to his war powers. The radical subtext to this argument, not acknowledged by Petitioner, is that the President must be trusted, without judicial intervention or review, to make this determination *as to American citizens detained on American soil, in peaceful areas in which the courts are open, and not immediately engaged in acts of combat when captured.* Petitioner's vague assertion, that the entire United States has been rendered a combat zone by Al Quaeda, is an alarming attempt to cast the executive's war power as broadly as possible, and has no support in the Framer's intentions or this Court's precedent. In *Ex Parte Milligan, supra*, this Court, had it followed the same argument, would have reached an opposite conclusion, holding martial law to be appropriate in Indiana, because a war was being fought elsewhere on the soil of the United States.

The decree of trust requested by Petitioner to make such determinations is completely inappropriate and unprecedented. What it effectively means is that the Department of Defense, acting on presidential

order, could take custody of any American citizen, and hold him or her incommunicado, based on secret evidence such as that contained in the classified Mobbs Declaration. Under the interpretation of the Constitution and laws urged by the Petitioner, the implication that the executive power will detain without trial or access to attorneys only citizens who deserve it, while not mistakenly or maliciously detaining your next door neighbor, your sibling or child, or you yourself, is based on a blind trust of the government which is wholly inappropriate under the Constitution. The Framers wisely designed the system's checks and balances, not merely to obviate the need for such a degree of trust, but because they knew that such trust of executive power without any countervailing force has led to disastrous results through-out history. As Justice Jackson said in his concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. at 640: "The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."

CONCLUSION

The decision of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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