No. 03-1027

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD H. RUMSFELD, *et al.*, Petitioners,
v.
JOSE PADILLA, *et al.*, Respondents.

On Writ of Certiorari to the
U.S. Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*[1]

Amicus American Center for Law and Justice (ACLJ) is a public interest organization committed to upholding the integrity of our constitutional system of government based on separation of powers. Jay Alan Sekulow, ACLJ Chief Counsel, has argued and participated as counsel of record in numerous cases involving constitutional issues before this Court. ACLJ attorneys have argued numerous cases involving constitutional issues before lower federal courts and state courts throughout the United States. The ACLJ is very concerned about attempts to subvert the well-established authority of the Executive to deal with the exigencies of war in all its facets and to transfer such authority to the criminal justice system and to the Judiciary. Since captured enemy combatants are held in preventive, not punitive, detention as a direct result of their belligerency, neither the domestic law of the United States nor the law of war permits captured enemy combatants—whether foreign nationals or United States citizens—to demand that they be tried in the domestic courts of the Detaining Power. Respondent Padilla is not being detained on criminal charges.[2] Instead, having been determined by the

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[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] This does not mean that criminal charges cannot be brought. As the Second Circuit aptly noted, there appear to be sufficient grounds to charge Padilla criminally. *See Padilla v. Rumsfeld*, 352 F.3d 695, 699 n.2 (2d Cir. 2003) ("These details should not be read to suggest that Padilla is in fact innocent or that the government lacked substantial reasons to be suspicious of him. *** As is evident from the government investigation,

President of the United States, acting pursuant to his Constitutional authority as Commander-in-Chief, to be an enemy combatant,[3] Padilla is being held in military custody (1) to ensure that he cannot accomplish the mission he was given by *al-Qaeda* operatives to reconnoiter sites within the United States where radioactive "dirty bombs"[4] might be exploded, and (2) to obtain information of intelligence value to thwart such terrorist attacks on targets within the United States. The ACLJ urges this Court to reverse the decision of the Second Circuit.

*** the government had ample cause to suspect Padilla of involvement in a terrorist plot."). Yet, during war, there are valid reasons to refrain from prosecuting such an individual criminally and, instead, to detain him in accordance with the law of war. Such reasons include ensuring that he does not rejoin the fight for the duration of hostilities and gathering intelligence. In such situations, the decision as to what to do with such an individual is a political decision to be made by the President without second-guessing by the courts. *See*, *e.g.*, *Hirabayashi v. United States* , 320 U.S. 81, 93 (1943) ("Where *** the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.").

[3] *See The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (noting that it is the President who determines whether those who threaten the Nation have "the character of belligerents," and, once that determination is made, the courts "must be governed by the decisions and acts of the political department of Government to which this power was entrusted").

[4] A "dirty bomb" is a "conventional explosive such as dynamite packaged with radioactive material that scatters when the bomb goes off. A dirty bomb kills or injures through the initial blast of the conventional explosive and by airborne radiation and contamination ****" *See* Council on Foreign Relations, *Terrorism: Questions and Answers*, available at http://cfrterrorism.org/weapons/dirtybomb.html.

SUMMARY OF ARGUMENT

The underlying facts at issue in this matter are well-known and need little elaboration. On September 11, 2001, the United States was brutally attacked by members of the *al-Qaeda*[5] international terrorist organization.[6] *Al-Qaeda* terrorists hijacked four civilian airliners to use as weapons to attack economic and political targets in the United States. Two airliners were crashed into the World Trade Center towers in New York City. A third airliner was crashed into the Pentagon in northern Virginia. The fourth plane crashed in Pennsylvania when airline passengers thwarted the hijackers' mission. Thousands of United States citizens, as well as hundreds of foreign nationals, were killed in the attacks. The President of the United States took immediate steps as Commander-in-Chief of the armed forces to protect the Nation against further such attacks.

Within days of the attacks, the United States Congress, agreeing with the President that the attacks on the United States constituted acts of war, authorized the President to use military force in response. The President ordered United States armed

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[5] Because Arabic words must be transliterated into English, there are often different spellings. For example, "*al-Qaeda*" is often transliterated as "*al-Qaida*" To avoid confusion, "*al-Qaeda*" will be used in this brief. Where that term is transliterated differently in a source cited in this brief, it will be changed to the above spelling without further notation.

[6] *Al-Qaeda* is "a transnational organization with global ambitions. Its tactics are illegal, but its goals are political. Indeed, they are geopolitical—to drive American influence from the Islamic world, to establish a new caliphate there and to renew the medieval war for dominance between Islam and the West." David B. Rivkin, Jr., et al., *The Law and War*, part 1, WASH. TIMES, Jan. 26, 2004 ("Rivkin1"), at A19. Moreover, on 9-11, "*al-Qaeda* did what few modern states can do—it projected power." *Id.*

forces to seek out and destroy the terrorists responsible for the attacks and those who give them safe haven. Less than one month after the attacks on our soil, United States armed forces took the war to the enemy in Afghanistan. Many members of the *al-Qaeda* terrorist organization and their Taliban allies were killed or captured in the ensuing fight, and the global war on terrorism continues unabated.

The instant matter before this Court concerns Respondent Padilla's challenge to the legality of his detention by United States armed forces. Respondent Padilla, a United States citizen, was arrested in May, 2002, by the FBI as he arrived back in the United States from Pakistan. Intelligence agencies had determined that Padilla, while visiting Afghanistan and Pakistan, had met with senior *al-Qaeda* operatives and had received training in bomb-making. They determined further that Padilla had been sent back to the United States to reconnoiter potential sites to explode a radiological "dirty bomb." *Padilla v. Rumsfeld*, 352 F.3d 695, 699-701 (2d Cir. 2003).

On the basis of this intelligence, President Bush declared Padilla to be an enemy combatant and ordered Department of Justice (DOJ) officials to transfer custody of Padilla to the Department of Defense (DOD). The transfer was accomplished, and Padilla was taken to the Navy brig in Charleston, South Carolina, where he has remained in custody ever since. *Id.* at 700.

Respondent challenges the President's authority to designate him as an enemy combatant to be detained by DOD personnel until the cessation of hostilities in the war on terrorism. Yet, because the United States is in an actual war and because Respondent Padilla was determined by the President, based on available intelligence, to be an agent of the *al-Qaeda* terrorist

organization on a terrorist mission to reconnoiter possible sites to explode a radiological "dirty bomb," domestic criminal law must, under these circumstances, yield to the law of war.[7] The President must be free to carry out his Constitutional obligations to defend the Nation, including detaining United States citizens who, like Respondent, "associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts ****" *See Ex parte Quirin*, 317 U.S. 1, 37-38 (1942).

ARGUMENT

Respondents charge that detaining Respondent Padilla, a United States citizen, in the Navy brig in Charleston, South Carolina—without trial, without access to lawyers, and with no set date for his release—violates numerous constitutional rights, including the rights to due process of law, to a speedy and public

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[7] *See, e.g., Hirabayashi*, 320 U.S. at 93 (noting that Constitutional war power is "the power to wage war successfully" and that "[w]here *** the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs"); *In re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power *** is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy *** evils which the military operations have produced."); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)) (noting as "obvious and unarguable" that there is no governmental interest more compelling than security of the Nation); William Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (1998), at 222, 224-25 (noting that, in wartime, the balance between freedom and order "shifts in favor of the government's ability to deal with conditions that threaten national well-being" and the laws, though not silent, "speak with a somewhat different voice").

trial, and to counsel. *See generally* Brief in Opposition of Respondent, at 19-23. Yet, Respondent is not a criminal suspect. Rather, he is an enemy combatant arrested while entering the United States on a mission for *al-Qaeda* to reconnoiter possible sites to detonate a radiological "dirty bomb." His detention is preventive—to ensure that he does not carry out his assigned mission to terrorize the American public by detonating such a device—not punitive. Hence,

> [t]he most important legal question *** is whether the United States is actually "at war." *** Indeed, much of the opposition to the detentions [of *al-Qaeda* and Taliban members and their confederates] is based on an implicit (or explicit) denial that the United States is engaged in anything other than a new and challenging criminal law enforcement effort, more like "the war on drugs," than Vietnam, Korea, or World War I and World War II.[8]

If the United States is at war, then, pursuant to the law of war, enemy combatants—irrespective of their nationality—may be detained for the duration of hostilities without being charged with any crimes and without access to counsel to challenge the legality of their detention. If, on the other hand, the United States is not at war, then the law of war does not apply, and those detained must be dealt with pursuant to the criminal justice system, with its well-established rights, protections, and obligations.

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[8] Rivkin1 at A19; *see also* Petitioner-Appellee-Cross-Appellant Response Brief, at 44 (questioning application of law of war "to the conduct of an international criminal enterprise" and concluding that law of war is not relevant to this matter).

As will be shown *infra*, the United States is actually "at war" in the sense of Vietnam, Korea, and the two World Wars rather than in the sense of "the war on drugs," which is, and always has been, primarily a law enforcement effort. Hence, it is the law of war that governs United States conduct regarding enemy combatants in United States custody, not the United States domestic criminal justice system. Respondent Padilla is being detained as an enemy combatant, not as a criminal suspect. As such, it is the law of war that applies to his detention, not domestic criminal law. The Second Circuit erred in concluding otherwise.

I. THE UNITED STATES IS ACTUALLY AT WAR.

A. Under the Laws of the United States, the Nation Is at War.

Following *al-Qaeda*'s unprovoked attacks on the World Trade Center towers in New York and on the Pentagon in Virginia and the crash in Pennsylvania of a fourth hijacked civilian airliner, President Bush, in his role as Commander-in-Chief, took immediate action to protect the Nation. Those heinous attacks, by themselves, created a state of war between the United States and *al-Qaeda* and its allies, obliging the President, as Commander-in-Chief, to take action.[9] *See The Prize Cases*, 67 U.S. (2 Black)

[9] Just as President Roosevelt noted, regarding the Japanese attack on Pearl Harbor, that a state of war existed between the United States and the Empire of Japan *prior to* a formal Congressional declaration of war, *see* http://bcn.boulder.co.us/government/national/speeches/spch.html, so, too, did a state of war exist immediately following the 9-11 attacks upon the United States, despite the lack of Congressional action. *See also The Pedro*, 175 U.S. 354, 363 (1899) (recognizing that war with Spain began prior to an actual declaration by Congress based upon a prior declaration of the Spanish government).

635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."); Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in* 3 *The Founder's Constitution* (Kurland & Lerner eds. 1987) ("when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war"). Further, it is the President, as Commander-in-Chief, who determines whether those who threaten the Nation have "the character of belligerents," and, once that decision is made, the courts "must be governed by the decisions and acts of the political department of Government to which this power was entrusted." *The Prize Cases*, 67 U.S. at 670; *see also In re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power *** is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy *** evils which the military operations have produced.").

The Congress, agreeing with the President that the attacks constituted acts of war, enacted legislation authorizing the President to use military force to respond to the attacks. Pub. L. No. 107-40, 115 Stat. 224 (2001) ("President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons"). This Congressional action constituted a *de jure* authorization of war and ratified the President's actions. *See*, *e.g.*, *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) (holding that how Congress gives its consent to engage in war is "a discretionary matter for Congress to decide in which form *** it

will give its consent"; "[a]ny attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences"); *see also The Prize Cases*, 67 U.S. at 668; *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (concluding that Congress may authorize use of armed force without a formal declaration of war); *Orlando v. Laird*, 443 F.2d 1039, 1042-43 (2d Cir. 1971) (same); Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in* 3 *The Founder's Constitution* (Kurland & Lerner eds., 1987) ("when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory").

B. Under International Law, the United States Is at War.

The United States military response was not only authorized by the laws of the United States, but by international law as well. *See*, *e.g.*, U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."). The right of the United States to defend itself was immediately reaffirmed by the UN Security Council in Security Council Resolution 1368, adopted on September 12, 2001. U.N.S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001). Resolution 1368 expressed the Security Council's determination "to combat *by all means* threats to international peace and security caused by terrorist acts." *Id.* (emphasis added).

Consistent with article 51 of the UN Charter, various regional alliances of which the United States is a member have also

determined the 9-11 attacks to be acts of war. Accordingly, those regional alliances have invoked the mutual defense provisions of their respective treaties. In fact, *for the first time in the history of the Alliance,* NATO implemented article 5 of the North Atlantic Treaty, which states "that an armed attack on one or more of [the Allies] in Europe or North America shall be considered an attack against them all." *See* North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243. Article 5 specifically authorizes the "use of armed force" as a means to deal with such attacks on member states. *Id.*

Similarly, the United States and Australia invoked, *for the first time in the history of the ANZUS Pact*, article IV of the ANZUS Treaty, which reads, in pertinent part: "Each Party recognizes that an armed attack *** on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger ****" *See* Security Treaty Between Australia, New Zealand and the United States of America, Sept. 1, 1951, 131 U.N.T.S. 83, 86; Press Release Announcing Application of the ANZUS Treaty, Sept. 14, 2001.[10]

Likewise, on September 21, 2001, the Foreign Ministers of the Organization of American States adopted a resolution recognizing that the attacks on the United States were also attacks against all American states that triggered the reciprocal assistance provision of the Rio Pact. *See* Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3(1), 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 95; OAS Resolution on Terrorist Threat

[10] *Available at* www.patriotresource.com/wtc/intl/0914/australia.html.

to the Americas, OEA/Ser.F/II.24, RC.24/RES.1/01, Sept. 21, 2001.[11]

* * *

Clearly, the events of 9-11 marked the entry of the United States into the war on terrorism every bit as much as the events of December 7, 1941, marked America's entry into the Second World War. The President, the Congress, U.S. allies, and key international bodies have all recognized that the attacks on the United States were acts of war and have responded accordingly.[12] Yet, despite the foregoing, the Second Circuit panel ruled that Respondent Padilla must be released from military custody and that he must be afforded the myriad rights and protections of the United States criminal justice system, thereby wrongly substituting its judgment for the judgment of the Executive and Legislative Branches on a question dealing with national security affairs. *See* discussion at Section III, *infra*.

II. ARMED HOSTILITIES TRIGGER APPLICATION OF THE LAW OF WAR.

Under international law, the existence of armed conflict is sufficient to trigger the law of war and its rules for dealing with belligerents. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, art. 2, 6 U.S.T. 3316, T.I.A.S. 3364. And, part and parcel of any war is the capture and detention of enemy combatants. In fact,

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[11] *Available at* www.yale.edu/lawweb/avalon/sept_11/oas_0921a.htm.

[12] Rivkin1 at A19.

> [t]he right to detain enemy combatants during wartime is one of the most fundamental aspects of the customary laws of war and represented one of the first great humanitarian advances in the history of armed conflict. *** [T]he right to detain enemy combatants in wartime is so basic that it has rarely been adjudicated [in U.S. courts.] *** It is an inherent part of the president's authority as commander-in-chief, and was well-known to the Constitution's framers. Alexander Hamilton addressed this very point in 1801 **** Hamilton noted that "[w]ar, of itself, gives to the parties a mutual right to kill in battle, and to capture the persons and property of each other" and that the Constitution does not require specific congressional authorization for such actions, at least after hostilities have commenced. Indeed, he wrote, "[t]he framers would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and convenience."[13]

Further, this Court has held that United States citizens who take up arms against the United States on behalf of a foreign power may also be detained as enemy combatants. *Ex parte Quirin*, 317 U.S. at 30-31; *see also In re Territo*, 156 F.2d 142 (9th Cir. 1946). In *Ex parte Quirin*, this Court determined that captured Nazi saboteurs, including a United States citizen, were properly declared to be unlawful combatants who could lawfully be tried by Military Commission and executed for their unlawful belligerency. 317 U.S. at 37-38.

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[13] David B. Rivkin, Jr., et al., *The Law and War*, part 2, WASH. TIMES, Jan. 27, 2004, at A19 (quoting Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in* 3 *The Founder's Constitution* (Kurland & Lerner eds., 1987)).

Given the existence of armed hostilities and Respondent Padilla's involvement in a terrorist plot, planned and directed by *al-Qaeda* operatives, to detonate a dirty bomb in the United States, the President acted properly in declaring Padilla to be an enemy combatant[14] and in ordering him to be detained by the armed forces of the United States. *See* GPW art. 39 (requiring that captured enemy combatants be detained in locations "under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power"); *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (characterizing "as 'well-established' the power of the military to exercise jurisdiction over *** enemy belligerents, prisoners of war, or others charged with violating the laws of war"). The Second Circuit panel clearly erred in ordering Respondent released from military custody under these circumstances.

III. THE PRESIDENT'S DECISIONS REGARDING PADILLA ARE NONJUSTICIABLE POLITICAL QUESTIONS.

"It is well established that the federal courts will not adjudicate political questions." *Powell v. McCormack*, 395 U.S. 486, 518 (1969). "[I]t is the relationship between the Judiciary and the coordinate branches of the Federal Government *** which gives

[14] In fact, Padilla is an "unlawful" enemy combatant, since he "without uniform" entered the United States "for the purpose of waging war by destruction of life or property." *See Ex parte Quirin*, 317 U.S. at 31. To be a lawful combatant, one must meet the four rules laid down in the 1907 Hague Convention: (1) have a responsible command structure; (2) wear a fixed distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) operate in accordance with the laws and customs of war. *See* Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907), art. 1. Respondent met none of them.

rise to the 'political question,'" *Baker v. Carr*, 369 U.S. 186, 210 (1962), and the "nonjusticiability of a political question is primarily a function of the separation of powers." *Id.* "Restrictions derived from the separation of powers doctrine prevent the judicial branch from deciding 'political questions,' controversies that revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches." *Aktepe v. United States*, 105 F.3d 1400, 1402 (11th Cir. 1997) (citing *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). Further, "[s]eparation of powers is a doctrine to which the courts must adhere even in the absence of an explicit statutory command." *Id.* at 1402 (citing *Tiffany v. United States*, 931 F.2d 271, 276 (4th Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992)).

Foreign policy and military affairs figure prominently among the areas where the political question doctrine has been implicated. *See, e.g.*, *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); *Aktepe*, 105 F.3d at 1403 (finding that political branches are accorded high degree of deference in area of military affairs). The Constitution commits the conduct of foreign affairs and national security to the legislative and executive branches of government. *See, e.g.*, *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *Johnson*, 339 U.S. at 786.

In *Baker v. Carr*, 369 U.S. 186 (1962), this Court identified six hallmarks of political questions, any one of which is sufficient to carry a controversy beyond justiciable bounds:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of

> judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. As shown *infra*, the issues before this Court independently meet each of the six hallmarks of nonjusticiable political questions, thereby precluding this, or any other, court from granting the relief sought by Respondents.

A. The Constitution Commits the Issues of Foreign Policy and National Security to the Legislative and Executive Branches.

The Constitution commits the issues raised in this matter to the political branches of government. *See*, *e.g.*, U.S. Const. art. I, § 8, cls. 11-16 (granting Congress the power to declare war and to provide for, organize, maintain, and govern the military); U.S. Const. art. II, § 1, cl. 1 (conferring on the President the "executive power"); U.S. Const. art. II, § 2, cl. 1 (providing that the President shall be the Commander-in-Chief of the armed forces); *Oetjen*, 246 U.S. at 302 (the Constitution commits the conduct of foreign affairs to the executive and legislative branches); *The Prize Cases*, 67 U.S. at 670 (when the President is acting as Commander-in-Chief, courts must recognize that it is the President who "determine[s] what degree of force the crisis demands" as well as whether those who threaten the Nation have "the character of belligerents"); *Haig*, 453 U.S. at 307 (concluding that foreign

policy and national security overlap and "cannot neatly be compartmentalized").

"The Supreme Court has repeatedly recognized that the President is the nation's 'guiding organ in the conduct of our foreign affairs,' in whom the Constitution vests 'vast powers in relation to the outside world.'" *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001) (quoting *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948), and citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) ("recognizing 'the generally accepted view that foreign policy is the province and responsibility of the Executive'") (citation omitted)); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. *** 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'") (quoting 6 Annals of Congress 613 (1816)).

The President also has broad authority as Commander-in-Chief. As this Court noted in *Hirabayashi*:

> The war power of the national government is "the power to wage war successfully." *** *It extends to every matter and activity so related to war as substantially to affect its conduct and progress*. *** It embraces every phase of the national defense **** Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them *wide scope for the exercise of judgment and discretion in determining the nature and extent of the*

> *threatened injury or danger and in the means for resisting it*. *** Where *** the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

320 U.S. at 93 (internal citations omitted) (emphasis added).

The underlying events in this matter stem from the United States' response to the 9-11 terrorist attacks perpetrated on our soil. The United States response involves both foreign policy and national security components. Militarily, the President, with the explicit approval of the Congress, *see* Pub. L. No. 107-40, 115 Stat. 224 (2001) ("President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons ****"), ordered the armed forces of the United States into action to seek out and destroy the terrorists and those who succor them. This led to active hostilities in Afghanistan aimed at destroying the *al-Qaeda* terrorist organization and the Taliban regime which gave the terrorists safe haven.

Since hostilities began, United States agencies and armed forces have been identifying, capturing, and taking into custody members of the *al-Qaeda* terrorist organization and their supporters—including Respondent Padilla in this matter. And, due to the demonstrated suicidal nature of the 9-11 terrorist acts and the *kamikaze* philosophy that motivates many of the captured

enemy combatants,[15] the President has determined that special security measures must be used to detain them. Such decisions are political decisions which implicate both the national security and foreign policies of the United States, whose execution rightly resides in the political branches. The Judiciary is ill-equipped to determine the possible impact of such decisions on the wartime foreign and national security policies of the Nation and should be wary of entering the realm of discretionary decision-making reserved to the President. *See Johnson*, 339 U.S. at 786 (characterizing "as 'well-established' the power of the military to exercise jurisdiction over *** enemy belligerents, prisoners of war, or others charged with violating the laws of war"). The Second Circuit panel inappropriately entered the political realm when it substituted its judgment that Respondent was not an enemy combatant subject to detention under the law of war for the President's contrary determination.[16]

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[15] *See, e.g.*, www.latimes.com/news/nationworld/world/la-092401alqaeda.story ("[*Al-Qaeda* members'] commitment is unyielding. They film their own suicide videos before they hop into Toyota pickup trucks loaded with hundreds of pounds of TNT, turn on audio cassettes chanting praise to those who will die for the cause, and blow themselves to bits to weaken the social foundation of their worst enemy: the United States.").

[16] For example, the Second Circuit panel majority concluded—despite the vicious 9-11 attacks on United States soil which led to deaths of thousands—that Respondent could not be designated as an enemy combatant and be detained by the United States armed forces because United States soil is "outside a zone of combat." *Padilla*, 352 F.3d at 698, 724. Yet, determining whether the United States is "outside a zone of combat" is itself a political decision, not a judicial decision. *See id.* at 728 (Wesley, J., concurring in part and dissenting in part) (questioning the majority's reasoning regarding "zone of combat" and who has the authority to define what a "zone of combat" is or "to designate a geopolitical area as such"). Moreover, the Second Circuit panel majority distinguished this case from the *Hamdi* case, *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003), by noting that Padilla was not arrested "on a

B. This Matter Lacks Judicially Discoverable and Manageable Standards.

No judicially discoverable and manageable standards exist for resolving the questions raised by the detention of the extremely dangerous enemy combatants in the war on terrorism. Decisions about prosecuting a war and dealing with captives must often be made on an *ad hoc* basis, depending on unique, often unpredictable, circumstances. Respondent Padilla is an enemy combatant who returned to the United States for the purpose of engaging in terrorist acts on United States soil. The day-to-day prosecution of war and decisions related directly thereto, such as the status and care of captured enemy combatants, rightly reside with the President in his capacity as Commander-in-Chief. *See, e.g., Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919) (concluding that war power includes power "to remedy the evils which have arisen from [a conflict-s] rise and progress") (quoting *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870)); *In re Yamashita*, 327 U.S. 1, 12 (1946) ("The war

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foreign battlefield or while actively engaged in armed conflict against the United States," *Padilla*, 352 F.3d at 711, implying that the President may, in fact, detain United States citizens as enemy combatants if arrested "inside" a zone of combat or if actively engaging in armed conflict. Yet, entering the United States on a mission to engage in hostile action (detonate a dirty bomb), even though stopped before it could be accomplished, does not make one any less an enemy combatant under the law of war. In such circumstances, the President is concerned with *preventing* such acts—he is not concerned in such a situation with vindicating our criminal justice system and punishing the offender, nor should he be. Moreover, regarding the events of 9-11, the President and the Congress are agreed that our enemies must be hunted down and defeated, wherever they may be found, including within the United States. *See* Pub. L. No. 107-40, 115 Stat. 224 (2001). Thus, the President's power is at its zenith. *Padilla*, 352 F.3d at 711 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

power *** is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy *** evils which the military operations have produced.") (citing *Stewart*, 78 U.S. at 507). Given the unique events of 9-11 and the unique nature of the war on terrorism, the President deserves the latitude and benefit of the doubt as he seeks to grapple with a heretofore unknown situation and to develop effective policies to restore peace.[17]

Despite the unique nature of the war on terrorism, the Second Circuit majority refused to defer to the President's judgment in this matter and substituted its own opinion about how best to deal with United States citizens who return home to engage in terrorist acts on behalf of an enemy power.[18] Not only are persons like Respondent especially dangerous (since they can "hide" in plain

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[17] *See* www.whitehouse.gov/news/releases/2001/09/20010913-12.html (When asked whether there can be a war without a formal enemy, White House Press Secretary Ari Fleischer replied: "[A]s the President has indicated, this is a different type of enemy in the 21st century. The President said, this enemy is nameless; this enemy is faceless; this enemy has no specific borders. *** It is a different type of enemy ****").

[18] In fact, the panel majority blithely dismissed the concerns about the dangers posed by Padilla by noting that, when he was being held under the control of the Bureau of Prisons, "[a]ny immediate threat he posed to national security had effectively been neutralized." *Padilla*, 352 F.3d at 700; *see also id.* at 715 n.24 (suggesting that "criminal mechanisms" exist to deal with "imminent acts of belligerency on U.S. soil"). Such reasoning, of course, does not take into account the President's responsibility to *prevent* attacks. Hence, such reasoning effectively precludes the possibility of intelligence gathering, since persons held in criminal custody enjoy the full panoply of rights under the criminal justice system, whereas persons held under the law of war do not. The panel majority recognized, but dismissed, this fact. *Id.* at 699 ("Under *any* scenario, Padilla will be entitled to the constitutional protections extended to other citizens." (emphasis added)).

view in American society), but such persons, when apprehended, may be treasure troves of vital intelligence information needed by the President to thwart other terrorist attacks. Hence, detaining such persons as enemy combatants under the law of war better serves the security interests of the United States than trying them for violations of the United States criminal code. Such policy decisions rightly reside with the President as Commander-in-Chief, not with the courts. Moreover, the President and the Congress are in agreement here. *See* Pub. L. No. 107-40, 115 Stat. 224 (2001). Further,

> [t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. *But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial*. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. *They are delicate, complex, and involve large elements of prophecy*. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. *They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry*.

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (citing *Coleman v. Miller*, 307

U.S. 433, 454 (1939); *Curtiss-Wright*, 299 U.S. at 319-21; *Oetjen*, 246 U.S. at 302) (emphasis added).

Additionally, unlike in previous conflicts, many of the detainees in this conflict appear to possess a zeal for suicidal attacks on Americans. This mindset makes the situation especially dangerous, and special measures and caution are called for. Such policy decisions are for the President and Congress to make, not the courts.

Given the unique nature of this war, a serious rethinking of how to handle such captives is required, and such rethinking involves the formulation and subsequent implementation of national policy to deal with such persons, clearly political matters reserved to the political branches, not the courts.

C. It Is Impossible to Decide This Matter Without an Initial Policy Determination of a Kind Clearly For Nonjudicial Discretion.

The President, as Commander-in-Chief, is charged with responsibility for prosecuting the ongoing war on terrorism, and this Court has noted as "obvious and unarguable" that there is no governmental interest more compelling than security of the Nation. *Haig*, 453 U.S. at 307 (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)); *accord Cole v. Young*, 351 U.S. 536, 546 (1956). Part and parcel of any resort to war is the issue of what to do with enemy combatants who may fall into United States hands. That is a political question which implicates a whole host of matters, such as, how to ensure that such persons are no longer able to take up arms against U.S. forces or harm their captors, how to ensure that perpetrators of war crimes are

properly identified and punished, how to ensure that information of intelligence value is timely obtained, and so forth.

Enemy belligerents are detained, not based on probable cause or other important domestic constitutional principles, but because of their armed belligerency, capture, and continuing threat to American interests. *Their detention, therefore, is preventive rather than punitive.* As mentioned earlier, there is an additional dynamic with the *al-Qaeda* captives—their willingness to be suicidally aggressive. This makes them especially dangerous because they may kill without compunction or hesitation. As such, the President is faced with a heretofore unknown and extremely grave situation, and it is his responsibility to formulate and implement policies to protect and defend the United States. It falls to the President to orchestrate national policy and balance benefits and risks. He both needs and deserves the latitude to develop such policies without undue interference by the Judiciary which, in any case, lacks the competence to deal with such situations. Moreover, to use Justice Goldberg's oft-quoted phrase, the Constitution "is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

The prosecution of a war involves both foreign policy and national security issues which generally fall outside the realm of judicial competence.

> [I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

People's Mojahedin Organization of Iran v. United States Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (quoting *Chicago & Southern*, 333 U.S. at 111). The same is true for military decisions. *See, e.g.*, *Hirabayashi*, 320 U.S. at 93 (noting the wide discretion given the political branches in dealing with war issues and recognizing that courts should not substitute their judgment for that of the political branches).

Respondent Padilla returned to the United States to engage in terrorist activities here. The President, as Commander-in-Chief, has determined that it is more important to national security to place him in preventive custody pursuant to the law of war than to punish him for any criminal acts. That is a political determination. The Second Circuit erred in substituting its opinion for the President's.

D. It Would Be Impossible to Undertake Independent Resolution Without Expressing Lack of Respect Due Coordinate Branches of Government.

Adjudicating this matter would express a lack of respect for the political branches of government by subjecting their discretionary military and foreign policy decisions to judicial scrutiny, notwithstanding the Judiciary's relative lack of expertise in such areas. The United States was attacked by international terrorists on 9-11. The President, in his role as Commander-in-Chief, took immediate action to protect the Nation. The Congress, agreeing with the President that the attacks on the Nation constituted acts of war, enacted legislation authorizing the President to use military force to respond to the attacks. Pub. L. No. 107-40, 115 Stat. 224 (2001). This Congressional action constituted a *de jure* authorization of war. *See Mitchell*, 488 F.2d at 615 (holding that how Congress gives its consent to engage in

war is "a discretionary matter for Congress to decide in which form *** it will give its consent ***"; "Any attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences. ***"); *see also The Prize Cases*, 67 U.S. at 668 ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."); *Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir.) (per curiam), *cert. denied*, 387 U.S. 945 (1967) ("The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.").

The prosecution of war includes the capture and detention of enemy belligerents. Detaining enemy combatants is a political matter, and allowing enemy combatants to challenge the legality of their detention in the domestic courts of the detaining power would "bring aid and comfort to the enemy" and would constitute "a conflict between judicial and military opinion highly comforting to enemies of the United States." *Johnson*, 339 U.S. at 779. Furthermore, in his June 9, 2002, Order to the Secretary of Defense, the President stated, *inter alia*, the following concerning Respondent: (1) he is an enemy combatant; (2) he is associated with *al-Qaeda*; (3) he engaged in hostile conduct and war-like acts of international terrorism aimed at the United States; (4) he possesses intelligence information about *al-Qaeda* that would help prevent attacks on the United States; (5) he represents a continuing danger to the security of the United States; and (6) it is in the interest of the United States to detain him as an enemy combatant. *Padilla*, 352 F.3d at 724-25. Despite this clear

recitation of the rationale for detaining Respondent in military custody as an enemy combatant, the Second Circuit panel majority dismissed the President's reasons and substituted its opinion for the President's.

E. There Is a Need For Unquestioning Adherence to the Political Decision Already Made by the President.

The situation faced by the United States today is without historical precedent. The United States has suffered well-planned, coordinated attacks on the political and economic centers of this Nation. The President, with the explicit concurrence of the Congress, has taken decisive steps to meet the threat and protect the Nation. Such steps should not be subjected to second-guessing by the Judiciary. *See Haig*, 453 U.S. at 307 (concluding it to be "obvious and unarguable" that there is no governmental interest more compelling than security of the Nation) (citing *Aptheker*, 378 U.S. at 509); *accord Cole*, 351 U.S. at 546; *Hirabayashi*, 320 U.S. at 93 (nation's war power is "the power to wage war successfully").

We are facing an enemy which willingly commits the most horrendous, suicidal acts against innocent civilians and which will do so again if it can. Because this situation is without historical precedent, no one can know for sure how much success emerging policies will have. As such, it would be inappropriate for the courts of the United States to enter the political fray and attempt to second-guess the policies adopted by the President to meet this threat.

Any appearance of official opposition to decisions within the discretion of the President will surely bring aid and comfort to the

enemy while demoralizing the men and women in the U.S. armed forces who are daily putting their lives at risk to track down and destroy the confederates of those who planned the 9-11 attacks and seek to repeat them. In this case, the President is acting pursuant to his authority as Chief Executive, *see The Prize Cases*, 67 U.S. at 668 ("The Constitution confers on the President the whole Executive power."); as Commander-in-Chief, U.S. Const. art. II, § 2, cl. 1; and with statutory authority granted by the Congress. Pub. L. No. 107-40, 115 Stat. 224 (2001). Moreover,

> [w]hen the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. *In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation* ****"

Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube*, 343 U.S. at 637 (Jackson, J., concurring)) (emphasis added). Given this agreement between the President and the Congress, the Second Circuit should have upheld the President's action.

F. There Is Potential For Embarrassment From Multifarious Pronouncements by Various Departments on One Question.

The President is Chief Executive of the United States and Commander-in-Chief of its armed forces. U.S. Const. art. II, §§ 1-2. As such, it is his responsibility to make decisions concerning the whole host of issues involved with the building of coalitions and prosecution of the war on terrorism. Those issues include how to treat enemy belligerents taken captive by United States armed

forces. This is especially important given the nature of the war and the fact that nationals from countries friendly to the United States are numbered among the enemy combatants being detained by the United States. It is, therefore, necessary that the President have the leeway to deal with United States citizens who have taken up arms against the United States the same as the United States deals with captured enemy combatants from other nations. Because of the unique nature of this war and the need to maintain coalitions with a broad array of foreign governments, it is necessary for the Nation to speak with one voice. *See, e.g.*, *Baker*, 369 U.S. at 211 (recognizing the special importance of our nation speaking with one voice in the field of foreign affairs). It is the Executive who has been given the responsibility to speak for the Nation as a whole, and, given the high stakes involved, the Judiciary must tread lightly so as to avoid undermining the President's ability to successfully prosecute the ongoing war. The issue of the fair and equal treatment of enemy combatants detained by the United States in the war on terrorism is an important and emotional issue for many nations. It is the President who must determine the risks and benefits of national policy, not the courts, and it is in times of grave national crisis and danger that the courts must defer to the elected leaders to craft appropriate policies in the Nation=s interest. This is such a time. The Second Circuit erred in substituting its judgment for the President's.

CONCLUSION

For the foregoing reasons, *Amicus* American Center for Law and Justice urges this Court to reverse the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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March 17, 2004