

FILED

OCT 20 2004

LARRY W. PROPS, CLERK  
CHARLESTON, SC

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

Jose Padilla,

Petitioner

v.

Commander C.T. Hanft,  
U.S.N. Commander,  
Consolidated Naval Brig,

Respondent

) C/A No. 02:04-2221-26AJ

) Stipulations of Fact

In this Court's scheduling order of September 27, 2004, the Court directed the parties "to file stipulations of fact indicating with specificity the details of petitioner's arrest including precise information as to where, when, by whom and at what stage of his repatriation and entry into the United States the arrest occurred." In response to the Court's order, the parties stipulate as follows.

1. On May 8, 2002, petitioner Padilla boarded a flight in Zurich, Switzerland, bound for O'Hare International Airport, Chicago, Illinois. Agents of the Federal Bureau of Investigation (FBI) had become aware of which flight petitioner would be taking from Zurich to Chicago and monitored petitioner during the flight and upon his arrival at O'Hare International Airport.<sup>1</sup>
2. At approximately 12:55 P.M. (C.D.T.),<sup>2</sup> May 8, 2002, the United States District Court for the Southern District of New York issued a material witness warrant for petitioner's arrest in connection with grand jury proceedings.

<sup>1</sup> Petitioner does not stipulate to the content of paragraphs 1 and 2. Paragraphs 1 and 2 are factual averments of the respondent.

<sup>2</sup> Petitioner does not stipulate to the times indicated in any paragraph. The references to particular times are factual averments of the respondent.

3. Petitioner arrived at O'Hare International Airport on the flight from Zurich at approximately 1:00 P.M. (C.D.T.), May 8, 2002, wearing civilian clothing and carrying no weapons or explosives.

4. Passengers arriving on international flights at O'Hare International Airport must proceed to the Federal Inspection Service (FIS) area within the international arrivals terminal. The FIS area contains both an immigration inspection area and customs inspection area.

5. Passengers must first proceed to the immigration inspection area. Petitioner cleared the immigration inspection area where his United States passport was stamped "admitted" by an Immigration Inspector.

6. Petitioner then proceeded to the customs inspection area. After an initial interview with a Customs Inspector, petitioner was questioned further by Customs Inspectors in an interview room within the customs inspection area.

7. Subsequently, while remaining in the same interview room, petitioner was interviewed by FBI agents. Petitioner's interview with the FBI agents began at approximately 3:15 P.M. (C.D.T.).

8. At approximately 7:05 P.M. (C.D.T.), petitioner declined to continue the interview without the representation of an attorney.

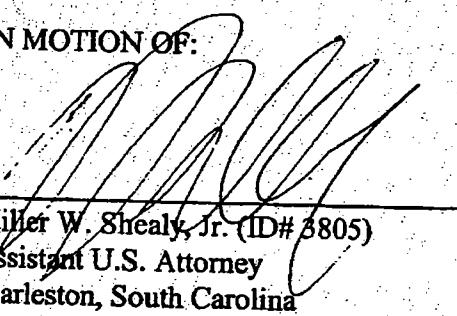
9. At approximately 7:35 P.M. (C.D.T.), while remaining in the same interview room, petitioner was presented with a grand jury subpoena in connection with grand jury proceedings in the Southern District of New York.

10. At approximately 8:10 P.M. (C.D.T.), while remaining in the same interview room, petitioner was arrested by the interviewing agents pursuant to the material witness warrant that had been issued by the United States District Court for the Southern District of New York.

11. After his arrest, petitioner was transferred to the custody of the United States Marshals Service for detention. The United States Marshals Service transported petitioner to New York City and incarcerated him in the Metropolitan Correctional Center, a civilian facility.

12. On June 9, 2002, the district court vacated the material witness warrant and petitioner was transferred to military control.

ON MOTION OF:

  
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Assistant U.S. Attorney  
Charleston, South Carolina

I CONSENT:

  
Michael P. O'Connell  
Attorney for Petitioner  
Charleston, South Carolina

4 JOSE PADILLA )  
5 Petitioner )  
6 -versus- | 2:04-2221  
7 COMMANDER C.T. HANFT, U.S.N. Commander )  
Consolidated Naval Brig | 1-5-05  
8 Respondent | Spartanburg, SC

10  
11 HEARING ON PETITIONER'S MOTION FOR SUMMARY JUDGMENT  
12 BEFORE THE HONORABLE HENRY F. FLOYD  
UNITED STATES DISTRICT JUDGE, presiding

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Court Reporter:

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Jean L. Cole, RMR

13 The proceedings were taken by mechanical stenography and the  
transcript produced by computer.

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1                   THE COURT: Welcome you to Spartanburg in the matter  
2 of Padilla versus Hanft. Mr. O'Connell, as local counsel would  
3 you introduce the folks you have with you.

4                   MR. O'CONNELL: Yes, sir. At the end of the table  
5 is Jonathan Freiman. He's admitted in Connecticut. Next to him  
6 is Jennifer Martinez who's admitted in Virginia. This is Andrew  
7 Patel who's admitted in New York. And this is Donna Newman who  
8 is also admitted in New York. They've all been admitted by your  
9 Honor pro hac vice.

10                  THE COURT: All right. Thank you. Mr. Shealy.

11                  MR. SHEALY: Yes, your Honor. Thank you. Your  
12 Honor, with me today is Mr. David Salmons from the Solicitor  
13 General's Office and also Mr. Daryl Jossepher of the Solicitor  
14 General's Office.

15                  THE COURT: Thank you. There are two hours set  
16 aside. If you run -- if you get through quicker, that's fine.  
17 If you run over, that's fine too. There may be some questioning  
18 back and forth. Judge Carr, who's been managing the case for me  
19 in Charleston is here today as well, and we've been conferring a  
20 little bit. I thought you should know that up front. So who's  
21 arguing for --

22                  MR. O'CONNELL: Mr. Freiman, your Honor.

23                  THE COURT: Mr. Freiman.

24                  MR. FREIMAN: Thank you, your Honor. I'd like to  
25 begin by thanking you for granting the application for pro hac

1 admission and to the court's hospitality to those of us from out  
2 of state.

3 May it please the court, never before in this  
4 nation's history has the president been granted the authority to  
5 imprison indefinitely and without charge an American citizen  
6 seized in a civilian setting in the United States. Your Honor,  
7 the constitution allows him no such power. History shows that  
8 the power to imprison citizens suspected of being enemies of the  
9 state is a power that is particularly subject to governmental  
10 abuse and to guard against the risk of that abuse the framers  
11 established numerous constitutional safeguards, safeguards that  
12 were fortified by constitution -- by congressional enactments in  
13 the wake of the ratification of the constitution and to the  
14 present day.

15 Yet today the executive asks to set aside those  
16 carefully constructed protections. It asks this court to  
17 sanction a radical new path, a shadow system of preventive  
18 detention without charge for any citizen it suspects of being an  
19 enemy of the state. Now, before the court can ratify such an  
20 unprecedented infringement of citizens' freedom congress must at  
21 a minimum enact a clear and unmistakable authorization, an  
22 authorization that specifies who may be detained, for how long  
23 and under what conditions.

24 Your Honor, the Authorization for the Use of  
25 Military Force is not such an authorization. It authorizes the

1 use of necessary and appropriate force, a phrase that the court  
2 in Hamdi found to include the well established detention of  
3 enemy combatants on a foreign battlefield, but the unprecedented  
4 detention without charge of Americans in America seized from  
5 civilian settings is neither necessary nor appropriate.

6 It's not necessary because the criminal justice  
7 system provides for the detention power. Nothing makes that  
8 clearer than the facts of this case. There was a warrant issued  
9 from a grand jury for Mr. Padilla's arrest. Mr. Padilla was  
10 arrested by law enforcement officials, civilian law enforcement  
11 officials. He was brought before a civilian judge. He was  
12 imprisoned in a civilian facility in New York. Everything  
13 occurred according to the civilian process in the way it was  
14 supposed to. And it's not only not necessary, but not  
15 appropriate. It's not appropriate because it directly conflicts  
16 with the limits on detention that congress has set by statute  
17 and the limits that the framers set on presidential power.

18 I'd like to begin with some of those congressional  
19 enactments, your Honor. The first one I'd like to bring your  
20 attention to is the Non-Detention Act, 4001(a) of Title 18 of  
21 the United States Code. The Non-Detention Act's text is  
22 perfectly clear. Citizens cannot be detained except on an act  
23 of congress. It contains no exceptions whatsoever. It's  
24 congress's extraordinarily clear statement on this issue.

25 But if one thought the text not clear enough, one

1 could turn to the legislative history. And in turning to the  
2 legislative history one would find that congress had in mind  
3 precisely the detention that we are here today arguing about.

4 In the wake of internments of Japanese Americans  
5 during World War II congress passed something called the  
6 Emergency Detention Act. That was at the time of what was  
7 thought to be a grave threat from a worldwide communist  
8 conspiracy to destroy capitalism and take over the United  
9 States. It was in fact at the heart of the cold war. And the  
10 Emergency Detention Act at the time expressed congress's  
11 understanding that there was a need for the president to have  
12 the detention power to detain spies and saboteurs who were  
13 working with such foreign agents as the Soviet Union and the  
14 Soviet Empire.

15 In passing that enactment congress also provided for  
16 procedural safeguards. There were limits on the periods of  
17 detention, ways in which the propriety of a presidential  
18 decision had to be determined. In short congress spoke clearly  
19 to who could be detained, how long the person could be detained  
20 and the manner in which the person could be detained.

21 In the wake of the Emergency Detention Act congress  
22 changed its mind. It determined that the president should not  
23 have the authority to detain suspected spies and saboteurs  
24 outside of the criminal process. In fact, nothing could be  
25 clearer than an interaction between the primary sponsor of the

1 bill, the author, a Representative Railsback, and a primary  
2 opponent of the bill, Representative Ichord who was at the time  
3 the chair of the House Internal Security Committee.

4                 The House Internal Security Committee opposed the  
5 act and Representative Ichord said that this would -- I'd like  
6 to quote here, your Honor, from those debates. And this is  
7 contained in some of the analysis that the Second Circuit set  
8 forth. Representative Ichord said, "Under the Youngstown Steel  
9 case this amendment would prohibit even the picking up at the  
10 time of a declared war, at a time of an invasion of the United  
11 States, a man who we would have reasonable cause to believe  
12 would commit espionage or sabotage."

13                 Representative Railsback in no way disagreed with  
14 Representative Ichord's statement. To the contrary he said the  
15 president would not have such power independent of the criminal  
16 laws, and he drew Representative Ichord's attention to the  
17 briefs of the Attorney General Hoover, who had been attorney  
18 general during the internment of Japanese Americans that was the  
19 subject of Korematsu case. Hoover had believed that the  
20 criminal laws provided the president with more than sufficient  
21 power to survey and detain those people who in fact were threats  
22 to the security of the United States.

23                 In the wake of this debate between the primary  
24 sponsor and the primary opponent of that bill congress made a  
25 clear determination not to vest the president with this power.

1 to repeal the Emergency Detention Act, but indeed not only to  
2 repeal the Emergency Detention Act, to go one step further, not  
3 to leave the president with whatever powers he might have absent  
4 any form of statutory enactment, but to speak clearly opposed to  
5 such detention powers, not only to say we take from you this  
6 statutory grant that in the past we have given you, but now we  
7 affirmatively prohibit you from doing such things. And the  
8 plain language of 4001(a) bears that out. That is congress's  
9 clear statement, your Honor.

10 Now, it is clear that an authorization to use force,  
11 a general authorization to use force does not satisfy the  
12 requirement of an act of congress that congress itself  
13 instituted through 4001. It does not do so because at the time  
14 of the Japanese internments there was, of course, a full-blown  
15 declaration of war against Nazi Germany. Even President  
16 Roosevelt did not claim the authority to detain the Japanese  
17 Americans merely on the existence of that authorization to use  
18 force that was implicit in the declaration of war. He sought  
19 further congressional action, congressional criminalization of  
20 military orders establishing the zones, exclusion zones to which  
21 Japanese Americans could not go and the curfews that were meant  
22 to fortify those exclusion zones. Even there the president  
23 would not have the authority to do this. That's what congress  
24 intended.

25 So two things, your Honor, to recap the repeal of

1 the Emergency Detention Act and the fact that congress clearly  
2 had in mind the Japanese American internments that were at issue  
3 in Korematsu, that's congress's clear statement in 4001 and its  
4 clear decision to repeal the authority and prohibit this sort of  
5 activity that it had given in the Emergency Detention Act.

6 I'd like to draw your Honor's attention now to  
7 another what I think is a key statutory marker for us here  
8 today, and that is the Patriot Act. The Patriot Act, as your  
9 Honor knows, was passed a mere five weeks after the  
10 Authorization to Use Military Force. The Patriot Act expressed  
11 congress's understanding that there was a need to provide the  
12 president with greater detention powers than he had had up to  
13 that date. That need came of course out of 9-11. In the wake  
14 of 9-11 congress gave the president the power to detain aliens  
15 who represented a threat to the United States because of their  
16 connections with terrorist activity; aliens, not citizens, your  
17 Honor.

18 Even that authorization came only on the heels of  
19 considerable congressional debate. That debate resulted in  
20 limitations on the president's power to detain aliens. There  
21 were time limits. There were provisions for judicial review,  
22 provisions for appeal, careful procedural mechanisms. In other  
23 words, congress had clearly said who was to be detained, for how  
24 long they would be detained and under what conditions they would  
25 be detained.

1       Now, the president's argument here is in essence  
2       that despite the fact that congress debated for a long time  
3       about the particularities of the president's power to detain  
4       aliens in the wake of 9-11 it silently authorized the detention  
5       of citizens five weeks earlier. Your Honor, not only does that  
6       violate the "clear statement" rule that we've set forth in our  
7       briefs, it violates plain old common sense. There is no way  
8       that anyone could look at the congressional record of that  
9       period, that five week period in American history following the  
10      horrible attacks of 9-11, and think that congress thought that  
11      it had authorized the detention of American citizens when it  
12      authorized the use of troops in battles.

13       Congress knows how to speak clearly. Congress knows  
14      how to authorize detentions. It authorized detentions in the  
15      Patriot Act. In the Authorization for the Use of Military Force  
16      it authorized the troops. I would point your Honor's attention  
17      to Section 2(b)(9) of the Authorization for Use of Force, which  
18      explicitly says that congress intended to grant authority to the  
19      president to continue the use of troops under the War Powers  
20      Resolution.

21       In other words, in this very authorization congress  
22      noted when it meant to satisfy a prior statute and yet it did  
23      not note that it meant to satisfy 4001, that it meant to give  
24      the president an unprecedented power of detention over American  
25      citizens. And, again, the debates five weeks later make

1 perfectly clear that congress had no such intent in mind.

2 Your Honor, not only does it violate the statutory  
3 enactments and thereby become palpably inappropriate under  
4 congress's authorization, it is also in violation of numerous  
5 constitutional provisions. We would state at the outset that  
6 this court need not reach those constitutional questions because  
7 the case can be easily resolved on the basis of the statutory  
8 enactments. But in the event this court feels necessary to go  
9 beyond an interpretation of the Authorization of Use of Military  
10 Force and beyond the traditional application of the "clear  
11 statement" rule, I would point your attention to the very  
12 separation of powers that the framers instituted in the  
13 constitution.

14 First and foremost, I'd like to note that nothing in  
15 our argument refutes the notion that we were at war and that we  
16 are at war with a vicious enemy. But the framers knew that this  
17 nation would face threats to its very existence. They knew more  
18 than anyone that this nation would face threats to its very  
19 existence and so they wrote into the constitution emergency  
20 powers. They created assurances in the constitution that it  
21 would not become a suicide pact.

22 The primary trigger for emergency power in the  
23 constitution is, of course, the Habeas Suspension Clause, a  
24 power given to congress. Congress may announce that times have  
25 become so grave by virtue of invasion or rebellion that the time

1 has come to give the president the power to detain individuals  
2 suspected of being a part of that danger without criminal  
3 charge, without warrant in the positive law, without  
4 specifications as to who may be detained, for how long he may be  
5 detained or under what conditions he may be detained.

6 Now, the president here seeks to take that power  
7 from congress, to exercise it unilaterally to determine who  
8 among our citizens should be ripped from the protections of the  
9 criminal laws. But the framers knew that that protection needed  
10 to be vested in congress because it knew that the decision as to  
11 the propriety of the onset of an emergency power could not be  
12 put in the hands of the entity that would wield that emergency  
13 power. The framers knew that it made no sense, that it was  
14 inconsistent with the notion of a free society to give to the  
15 president the power to enhance his own powers. Only people  
16 through their representatives could decide to provide such  
17 power.

18 The Habeas Suspension Clause, as I noted,  
19 contemplates war on our soil. That's what an invasion is.  
20 That's what a rebellion is. And congress has proven itself up  
21 to the task in our history of suspending habeas when it feels  
22 that it is warranted. Habeas has been suspended four times in  
23 our history.

24 And, your Honor, if the president of the United  
25 States feels that we have come to a pass as dire as those four

1 instances in our nation's history, it is open to him to go to  
2 congress and to request such a suspension. It is open to him to  
3 begin the process of democratic deliberation that the framers  
4 believed central to any beginning of emergency powers. He has  
5 not done so. He has not asked congress even to speak clearly  
6 and unmistakably.

7 In fact, in a nutshell the president's entire  
8 argument is that he need not be bothered with going to  
9 congress. The framers intended precisely the opposite. They  
10 intended that a decision about the onset of emergency powers,  
11 something that would bring us closer to a state of martial law,  
12 was a decision that needed to involve the nation that could not  
13 be made within the hallways and the confines of executive  
14 power.

15 Your Honor, there are other provisions of the  
16 constitution that augment and fortify the reading I have just  
17 given you of the Habeas Suspension Clause. The Treason Clause  
18 of the constitution is the only clause of the constitution  
19 mentioning a substantive crime. Treason, of course, involves  
20 making war against the United States or some outer boundary of  
21 war against the United States. And yet in the Treason Clause  
22 the framers provided heightened procedural protections. I think  
23 we see the theme here in both the Habeas Suspension Clause and  
24 in the Treason Clause, the suspension clause being the only  
25 common law writ constitutionally preserved and the Treason

1 Clause being the only substantive crime constitutionally  
2 provided for.

3 In these two provisions, the two provisions of the  
4 constitution envisioning war on American soil, the founders  
5 upped the ante. They didn't lower the bar. They didn't say in  
6 these conditions we give to the president enhanced power. No.  
7 In these conditions we give to the executive diminished power  
8 because this is where the risk comes in, because when the  
9 president acts on his oath to invoke emergency powers and to  
10 tear citizens from the fabric of the criminal law, that's  
11 precisely where the risk of error and abuse that the framers  
12 knew so well came into play.

13 Of course, the framers' experience was with King  
14 George. The framers' experience was with the British monarchy.  
15 And the entire history of the writ of habeas corpus in English  
16 law was of executive efforts to detain citizens suspected of  
17 being or associating with enemies of the state, and that was a  
18 history of abuse.

19 Your Honor, I'd like to turn for a moment to what I  
20 think is the government's primary argument, and that is  
21 essentially that the combination of the cases of Hamdi and  
22 Quirin gives the president the authority to detain Mr. Padilla  
23 and anyone who the government suspects of being or associating  
24 with an enemy of the state.

25 As the Fourth Circuit noted before its opinion was

1 vacated by the Supreme Court, the situation in Hamdi of a  
2 capture on a foreign battlefield of an enemy soldier and a  
3 detention of an American citizen on American soil in the United  
4 States is a comparison between apples and oranges.

5           Indeed one thing that the Fourth Circuit noted with  
6 particularity was the difference in the application of the  
7 Non-Detention Act, 4001(a). I draw your Honor's attention to  
8 the third Hamdi opinion, 316 F 3rd at 468, where the panel noted  
9 that 4001(a) functioned principally to repeal the Emergency  
10 Detention Act which had provided for the preventive apprehension  
11 and detention of individuals inside the United States deemed  
12 likely to engage in espionage or sabotage during internal  
13 security emergencies and that there is no indication that  
14 4001(a) was intended to overrule the longstanding rule that an  
15 armed and hostile American citizen captured on the battlefield  
16 could be detained.

17           Even the Fourth Circuit which was vacated by the  
18 Supreme Court knew there was a difference between foreign  
19 battlefield and the seizure of an American citizen in an  
20 American city in a civilian setting. That note additionally,  
21 unlike a battlefield capture in a traditional war, as far as we  
22 can tell the government intends this detention to last forever.  
23 As acting Solicitor General Clement noted in his arguments to  
24 both the Supreme Court and the Second Circuit Court of Appeals,  
25 he cannot perceive of an end to the war against al Qaeda. So

1 the government's justification for holding Mr. Padilla that he  
2 will rejoin the hostilities is a justification that knows no  
3 bounds.

4 Your Honor, just as the Hamdi case is apples and  
5 oranges to this case, so too is the Quirin case. In the Quirin  
6 case Mr. Quirin was charged with a crime and tried. A detention  
7 without charge is not some lesser included power of criminal  
8 charge, as the framers themselves knew. I'd point your Honor's  
9 attention to Alexander Hamilton's statement in Federalist 84  
10 where he noted that confinement of the person by secretly  
11 hurrying him to jail where his sufferings are unknown or  
12 forgotten is a less public, a less striking and therefore a more  
13 dangerous engine of arbitrary government than even execution.

14 In addition, your Honor, the Quirin case precedes  
15 the Non-Detention Act in so far as any of the dicta in the  
16 Quirin case could be read to authorize the detention without  
17 charge of American citizens. That, of course, was not its  
18 holding, but insofar as the dicta could be read that way it  
19 precedes the congressional determination to divest the president  
20 of such power in 4001.

21 Your Honor, there are only two ways to detain an  
22 American citizen who is suspected of associating with the enemy.  
23 There is charge and trial in the criminal process or there is a  
24 suspension of the writ of habeas corpus. Neither of those has  
25 here occurred.

1 Now, the government wants you to think that it's a  
2 small step from the foreign battlefield capture in Hamdi to a  
3 shadow system in America of preventive detention and arrest  
4 without charge, a small step from that criminal charge and  
5 military trial in Quirin to the indefinite military detention  
6 without charge here. It's not a small step.. It's the  
7 difference between apples and oranges.

8 It's why Judge Parker in the Second Circuit said  
9 that extending Hamdi to this situation would be to effect a sea  
10 change in the constitutional life of this country and is why the  
11 only Supreme Court justices to speak to the merits of this case  
12 noted that at essence in this case is nothing less than the  
13 essence of a free society. Before this court redefines the  
14 essence of a free society it should be absolutely sure that that  
15 is what congress wants. Because there's no evidence that  
16 congress wants this radical new path this motion should be  
17 granted.

18 Unless your Honor has any questions.

19 THE COURT: I don't at the moment.

20 MR. FREIMAN: Thank you, your Honor.

21 THE COURT: Mr. Salmons.

22 MR. SALMONS: Thank you, your Honor. May it please  
23 the court. The current motion requires the court to presume the  
24 truth of the government's factual submissions and determine  
25 based on those facts whether the president has the authority as

1 Commander in Chief during ongoing hostilities to detain  
2 petitioner as an enemy combatant.

3 The court should answer that question in the  
4 affirmative because the facts set forth in the government's  
5 return and the accompanying declaration place petitioner  
6 squarely within the category of persons that the Supreme Court  
7 has held in both Quirin and in Hamdi are subject to detention by  
8 the military as enemy combatants.

9 Those facts, again, that must be presumed true for  
10 purposes of this motion include that in July two thousand  
11 petitioner successfully completed an application for al Qaeda's  
12 al-Farouq training camp in Afghanistan where he received weapons  
13 and explosives training, that he closely associated with  
14 Mohammed Atef, a senior al Qaeda operative and military  
15 commander and other al Qaeda leaders and planners in Afghanistan  
16 both before and after the 9-11 attacks, that while armed with an  
17 AK-47 assault rifle he associated with Al Qaeda and Taliban  
18 military forces in Afghanistan during combat operations there by  
19 United States and coalition forces, that after eluding capture  
20 and destruction by coalition forces he entered Pakistan where he  
21 immediately met with Osama bin Laden lieutenant Abu Zubaydah, an  
22 al Qaeda leader, and 9-11 planner Kalid Sheik Mohammad, at which  
23 time he received additional training and accepted a mission to  
24 travel to the United States to carry out additional al Qaeda  
25 attacks on American citizens within our own borders.

1                   And lastly that when he was taken into custody  
2 attempting to enter the United States in Chicago O'Hare  
3 International Airport, he was carrying telephone numbers and  
4 e-mail addresses for his al Qaeda contacts, more than ten  
5 thousand dollars in cash, travel documentation and a cell phone,  
6 all of which had been given to him by the al Qaeda leaders and  
7 planners he conspired with in Pakistan. Under these facts it is  
8 clear that the president has the authority as Commander in Chief  
9 and under the authorization for use of military force enacted by  
10 congress in response to the 9-11 attacks to detain petitioner as  
11 an enemy combatant.

12                 Now, while the war against al Qaeda and its  
13 supporters may raise important legal questions that remain  
14 unsettled, it is important to recognize that with regard to the  
15 legal question currently before this court there is much that is  
16 settled. For example, as the controlling plurality opinion in  
17 the Hamdi decision makes clear, we know that when congress in  
18 responding to the savage attacks of 9-11 authorized the  
19 president to use all necessary and appropriate force against a  
20 nation's organizations or persons associated with the 9-11  
21 attacks, that congress's authorization included what the  
22 plurality in Hamdi referred to as the fundamental and accepted  
23 power of the Commander in Chief to detain as enemy combatants  
24 individuals who associated with Al Qaeda or Taliban forces and  
25 engaged in armed conflict against the United States and

1 coalition forces in Afghanistan.

2 It is equally clear, your Honor, that the power to  
3 detain al Qaeda and Taliban forces applies without regard to the  
4 citizenship of the detainee. As the Supreme Court unanimously  
5 held in Quirin and the four justice plurality and Justice Thomas  
6 reaffirmed in Hamdi, citizenship in the United States of an  
7 enemy belligerent does not relieve him of the consequence of his  
8 belligerency.

9 There is therefore no doubt that if petitioner had  
10 been captured in Afghanistan carrying his AK-47 without al Qaeda  
11 and Taliban forces before his escape into Pakistan and  
12 subsequent mission on behalf of al Qaeda to the United States,  
13 just like Hamdi, who was captured in similar circumstances,  
14 there is no question that he would be subject to detention as an  
15 enemy combatant. Indeed at that time the only difference  
16 between Hamdi and Mr. Padilla is that while Hamdi's association  
17 was limited to the Taliban, Mr. Padilla associated with Taliban  
18 forces and in addition was also a trained al Qaeda fighter.

19 THE COURT: How does the president characterize al  
20 Qaeda? Is it a military organization or a criminal  
21 organization? What is it characterized as?

22 MR. SALMONS: Well, I think, your Honor, it has been  
23 characterized in different ways, but fundamentally it is -- it  
24 has been characterized as a global terrorist network and  
25 organization at which we are at war. His determination that

1 designated Mr. Padilla as enemy combatant --

2 THE COURT: Why can't you fit it into one category  
3 or the other, military organization or a criminal organization?

4 Why can't you --

5 MR. SALMONS: Well, it certainly is -- well, let me  
6 just step back for one moment, your Honor, and say that I think  
7 that it is certainly true that the president of the United  
8 States, the executive, has the authority and has the ability to  
9 bring criminal charges against individuals who take actions on  
10 behalf of al Qaeda. Just as was the case in Quirin, the  
11 executive could have brought criminal charges against the Nazi  
12 saboteurs, including an American citizen or presumed American  
13 citizen. They were subject to criminal charge.

14 THE COURT: It wasn't presumed. It was conceded he  
15 was an American citizen, wasn't he?

16 MR. SALMONS: It was -- it was not contested in that  
17 case. That's correct, your Honor.

18 THE COURT: Okay.

19 MR. SALMONS: But the point being that he was  
20 treated as a citizen. Everyone assumed he was a citizen and he  
21 would have been subject to criminal charges, but nonetheless the  
22 president could bring -- could determine he was best handled by  
23 the military because of his combatant status. And the same is  
24 true with regard to al Qaeda. I think that -- that it's within  
25 the president's discretion both as Commander in Chief and as his

1 responsibility to take care that laws are faithfully executed to  
2 decide how best to address a particular case.

3           But fundamentally it is clear that not only this  
4 executive, but in fact the world has recognized that there is a  
5 war with al Qaeda and that it is, in fact, subject to the laws  
6 of war and it is a military organization as well. This --  
7 again, the Supreme Court in Hamdi made clear that the reason  
8 military force was used against the Taliban forces was because  
9 of their affiliation and protection and support of al Qaeda. It  
10 would be remarkable if an individual who was a fighter for al  
11 Qaeda would somehow be immune from the laws of war whereas  
12 forces for the Taliban that were protecting him and escorting  
13 him through Afghanistan would not be. Both are subject to the  
14 laws of war.

15           THE COURT: Well -- okay. You're operating under  
16 the theory that the power comes under the law -- laws of war.  
17 Well then, why don't protections of the conventions like Geneva  
18 and Hague have some play in this case?

19           MR. SALMONS: Well, your Honor, the president has  
20 made the determination that because al Qaeda is not a signatory  
21 to the Geneva conventions and because in any event they do not  
22 comply with the laws of war, for example, they are not entitled  
23 to POW status. Al Qaeda detainees are not entitled to a POW  
24 status because they don't wear uniforms and fixed emblems  
25 required by the laws of war. They target civilians so they do

1 not qualify for treatment as a prisoner of war.

2           But, again, I would refer your Honor to the Supreme  
3 Court's decision in Quirin. The court in Quirin made clear that  
4 by longstanding tradition and acceptance that there was a  
5 category of combatants that were deemed to be unlawful  
6 combatants because they did not comply with the laws of war.  
7 And on page thirty-five of the Supreme Court's decision in  
8 Quirin the court said our government has recognized there is a  
9 class of unlawful belligerents not entitled to the privilege of  
10 POW status, including those who though combatants do not wear  
11 fixed and distinctive emblems.

12           Petitioner's theory would be that those individuals,  
13 because they have not sought the benefit of the laws of war,  
14 would somehow be immune from the application of the laws of war  
15 to them. And in fact Quirin is exactly to the contrary and it  
16 would be a -- would be passing strange to reward individuals who  
17 violate the laws of war by immunizing them from application of  
18 the laws of war, your Honor.

19           And so I think at this -- as this case now comes  
20 before your Honor it is clear that individuals associated with  
21 al Qaeda, and in particular let me just use the definition that  
22 the Supreme Court in Hamdi, the controlling plurality decision,  
23 used with regard to enemy combatants, and it said that an  
24 individual who was part of or supporting forces hostile to the  
25 United States or coalition partners in Afghanistan and who

1 engaged in an armed conflict against the United States there  
2 were subject to detention as enemy combatants.

3 Mr. Padilla satisfies and fits squarely within that  
4 definition. He was part of and supporting forces hostile to the  
5 United States or coalition partners in Afghanistan. Again, the  
6 declaration attached to our return makes clear that he was  
7 carrying an AK-47 with al Qaeda and Taliban forces in  
8 Afghanistan while coalition forces and United States forces were  
9 engaged in combat operations. So there is no doubt that he fits  
10 within that definition of enemy combatant that the Supreme Court  
11 has adopted.

12 The only other time the Supreme Court has had  
13 occasion to define a category of United States citizens that are  
14 subject to detention as enemy combatant was the Quirin case, and  
15 the definition that the Supreme Court used in that case, your  
16 Honor, and this is on pages thirty-seven and thirty-eight of the  
17 Supreme Court's decision in Quirin is that citizens who  
18 associate themselves with the military arm of the enemy  
19 government and with its aid, guidance and direction enter this  
20 country bent on hostile acts are enemy belligerents and are  
21 subject to the laws of war. And again, Mr. Padilla fits that  
22 definition of enemy combatants.

23 So I think if you take it one step at a time it's  
24 clear that if he were -- if he were captured on the -- on the  
25 battlefield in Afghanistan carrying his AK-47 with Taliban and

1 al Qaeda forces, he would be subject to detention during -- for  
2 the duration of the hostilities just as Hamdi was, your Honor.

3 Then the only question is is there anything about  
4 the fact that he managed to elude capture or destruction in  
5 Afghanistan by our forces, make it into Pakistan where he met  
6 with al Qaeda leaders and undertook a mission to come to the  
7 United States to continue his hostile and warlike acts against  
8 our citizens here that relieves him of the status of an enemy  
9 combatant? And both the Supreme Court's decision in Quirin and  
10 common sense make clear that there is not.

11 And I would refer again, your Honor, to the  
12 rationale of the Supreme Court of the plurality decision in  
13 Hamdi where it noted that a United States citizen is just --  
14 poses just as much threat of returning to the battlefield and  
15 continued hostilities as a noncitizen. And so we know that an  
16 individual who just like Mr. Padilla came to the United States  
17 at the direction and with the aid of our enemy forces to carry  
18 out hostile and warlike acts here, this enemy combatant under  
19 Quirin is subject to military detention.

20 And there is no rational way to conclude that the  
21 congress that enacted the Authorization for Use of Military  
22 Force in the wake of the savage attacks of 9-11 would have  
23 wanted to authorize military force for an individual if he  
24 happened to have been caught overseas, but if that individual  
25 had eluded our capture and managed to make it to our borders

1 here in the United States bent on coming to carry out hostile  
2 and warlike acts, that the president lacked that authorization  
3 to use military force there.

4 THE COURT: Suppose in Quirin where they obviously  
5 were charged and convicted --

6 MR. SALMONS: They were charged before a military  
7 commission, your Honor, that's correct.

8 THE COURT: Suppose we frame the question  
9 differently. Does the president have the power to detain enemy  
10 combatants? Change the question based upon the facts and  
11 circumstances as they exist today with regard to Mr. Padilla.  
12 Does he still have that continuing power to detain him as an  
13 American citizen based on the facts and circumstances today?

14 MR. SALMONS: If I'm sure I understand your  
15 question, your Honor, it is knowing what we know today about Mr.  
16 Padilla, would the president today, if he got the same  
17 information that Mr. Padilla was attempting to enter the  
18 country, have the authority to detain him as enemy combatant?

19 THE COURT: And the passage of time.

20 MR. SALMONS: Yes, your Honor, he would. We are  
21 still at war with al Qaeda. Our forces are still in  
22 Afghanistan. There are tens of thousands of United States  
23 forces there still engaged in combat operations. Nothing has  
24 changed with regard to whether or not the president still has  
25 the authority to detain an individual as an enemy combatant. As

1 long as the hostilities are ongoing the president has that  
2 authority.

3 Now, precisely when the hostilities may end is a  
4 question that we do not know the answer to right now, but I  
5 would refer your Honor to what the Supreme Court -- excuse me,  
6 the plurality, again, of the controlling plurality opinion in  
7 Hamdi said about that, and that is that while there may be some  
8 questions with regard to applying the "during the course of  
9 hostilities" aspect of the president's authority to detain enemy  
10 combatants in this context, at least while there are forces  
11 still on the ground in Afghanistan that authority exists and  
12 that the habeas courts remain open.

13 And if at some point in time a challenge is brought  
14 on the theory, I guess, that perhaps the hostilities are now  
15 over or are sufficiently over or that some constitutional  
16 concern would override that authority because the amount of time  
17 that has elapsed, a court would be free to hear such a  
18 challenge. To date no challenge like that has been raised, and  
19 I think it's conceded -- we just heard it's conceded that we are  
20 still at war with al Qaeda.

21 And it seems to me that as long as that is true the  
22 president has the authority as the Commander in Chief. And if  
23 anything, your Honor, I would say that the unconventional nature  
24 of our current enemy should give the Commander in Chief more  
25 discretion and more deference with regard to how he determines

1 to exercise his inherent power as Commander in Chief as well as  
2 the broad authority granted him by the authorization for use of  
3 military force by congress.

4 We are in a situation, your Honor, that the Supreme  
5 Court noted in Youngstown and in times of war where you have a  
6 broad authorization by congress to use all necessary and  
7 appropriate military force and you also have the president as  
8 Commander in Chief exercising his inherent authority as  
9 Commander in Chief, and in that context courts have to be  
10 particularly careful and deferential to the Commander in Chief's  
11 determinations about who is an enemy combatant.

12 These are not determinations that are that different  
13 in -- they are not different in kind from the type of  
14 determinations about who to target or about what sites to target  
15 during warfare. These are decisions that certainly in the first  
16 instance the constitution leaves to the Commander in Chief  
17 subject to habeas review by this court.

18 But the question that this court is concerned with  
19 now is not what procedures may be due in a habeas proceeding,  
20 but simply whether there is any authority, either inherent  
21 authority for president as Commander in Chief or authority under  
22 the authorization for the use of force resolution that congress  
23 enacted in the wake of 9-11 to detain a United States citizen  
24 taken into custody at the borders of the United States  
25 attempting to enter at Chicago O'Hare International Airport.

1 Under any circumstances if it was, you know, no matter how close  
2 his affiliation with al Qaeda, no matter how many acts he had  
3 taken to carry out attacks in the United States the question is  
4 is there any authority on the part of the president to detain  
5 such an individual militarily? And we think the answer is yes.

6 THE COURT: Assuming that Mr. Freiman would make  
7 this argument, I'd like you to address that Quirin was decided  
8 pre Non-Detention Act and clearly Mr. Quirin said that he was a  
9 member of the German Army even though he was an American  
10 citizen. That fact was not challenged. Tell me how -- tell me  
11 from your point of view why the Non-Detention Act does not trump  
12 Quirin.

13 MR. SALMONS: Certainly, your Honor, and I would  
14 make a couple of points. First is that the Non-Detention Act  
15 -- again, I'm starting from the premise that I think that we're  
16 all starting from, which is a plurality -- the plurality opinion  
17 from the Supreme Court in Hamdi is the controlling opinion for  
18 purposes of this case and that in that case the plurality  
19 determined that the -- that Section 4001(a) doesn't preclude the  
20 detention of a United States citizen if they were captured -- if  
21 they had -- if they were part of or associated with Taliban  
22 forces in Afghanistan and engaged in armed conflict against the  
23 United States there.

24 Now, what petitioners want to do is to say, yeah,  
25 but he was captured overseas whereas Mr. Padilla was captured,

1 you know, while he was trying to enter the country at Chicago  
2 O'Hare International Airport. I would point your Honor to the  
3 various places in the Hamdi plurality decision where they  
4 defined the category of enemy combatants that are -- that's  
5 subject to detention as they're applying that term, and it makes  
6 no reference to where the individual was captured. It speaks in  
7 terms of an individual being part of or supporting forces  
8 hostile to the United States and engaged in armed conflict in  
9 Afghanistan. And as I've said, Mr. Padilla clearly satisfies  
10 that.

11 But even if you were to think that perhaps some  
12 difference should turn up where the individual was captured,  
13 nothing in 4001(a) turns on the locus of the capture. 4001(a)  
14 speaks in terms of the detention of a United States citizen.  
15 All of the arguments that petitioners are making now were made  
16 and were rejected by the plurality in Hamdi with regard to the  
17 application of 4001(a) and this context.

18 And what the plurality said in Hamdi, your Honor,  
19 and this is at page 26 -- 2641 of the Supreme Court's decision.  
20 That's 124 Supreme Court 2641 the court said that it was of no  
21 moment that the AUMF, the Authorization for Use of Military  
22 Force, does not use the specific language of detention or for  
23 that matter the specific language of citizen because the  
24 detention to prevent a combatant's return to a battlefield is a  
25 fundamental incident of waging war and permitting the use of

1 necessary and appropriate force congress has clearly and  
2 unmistakably authorized the detention in that case with regard  
3 to an individual that was part of or supporting enemy forces in  
4 Afghanistan and engaged in an armed conflict.

5 So they're left now without their best argument with  
6 regard to 4001(a), which is that you have to have some clear  
7 statement about detention, and now instead they're forced to  
8 make an argument that somehow the point of capture matters.  
9 But, again, the text of 4001(a) just speaks with regard to the  
10 detention of "a United States citizen and makes no distinction  
11 with regard to where he's captured.

12 And for the reasons that we've been discussing, your  
13 Honor, there is no supporting either law or logic as to why the  
14 locus of the capture should matter. The individual is either an  
15 enemy combatant or he is not. And if he is, he is subject to  
16 detention under the fundamental and accepted -- again, those are  
17 the words of the plurality in Hamdi -- authority of the  
18 Commander in Chief during wartime. And of course congress  
19 included that within its authorization for use of force.

20 The other point I would make, your Honor, is with  
21 regard to the authorization for use of force. You have to --  
22 you would have to read some limitation into the phrase  
23 "necessary and appropriate use of force", and they would -- I  
24 believe their argument is that necessary and appropriate would  
25 preclude the detention here because it's not necessary. There

1 are other charges that could be brought against him and it's not  
2 appropriate because he's a U.S. citizen and it's inconsistent  
3 with our constitutional tradition.

4 Again, both those arguments, I think, were rejected  
5 in Quirin, and I think they were also rejected -- at least with  
6 regard to an individual that was part of or associated with  
7 Taliban forces and engaged in armed conflict in Afghanistan in  
8 the Hamdi case.

9 But if you look at the Authorization for Use of  
10 Force, it begins by pointing out that because of the nature of  
11 the attacks on September 11 and because the forces that were  
12 responsible for those attacks continue to pose an unusual and  
13 extraordinary threat to the national security and foreign policy  
14 of the United States, that congress had determined -- and this  
15 is in the preamble -- that those acts rendered it both necessary  
16 and appropriate -- the same language -- that the United States  
17 exercise its rights to self-defense and to protect United States  
18 citizens both at home and abroad.

19 And, your Honor, I would respectfully submit that to  
20 understand whether the congress had enacted the authorization  
21 for use of military force was concerned about enemy combatants  
22 coming within our own borders, you have to put yourself back  
23 into the mind set that the nation had one week following the  
24 9-11 attacks. It's easy, I think, and tempting and somewhat  
25 dangerous now to look back after three years and to remind

1 ourselves that we have not had another attack within our borders  
2 during that time period and that instead our forces have been  
3 engaged exclusively or almost exclusively in combat on foreign  
4 battlefields.

5 But if one week following the 9-11 attacks I think  
6 it simply fictional to say that the congress that enacted that  
7 wasn't concerned about enemy forces, al Qaeda forces coming into  
8 the United States and carrying out hostile acts -- hostile acts  
9 here and that by authorizing the president to use all  
10 appropriate and necessary force to defend us both at home and  
11 abroad that there is no way that you can distinguish or think  
12 that congress meant to impose some limit on his ability to use  
13 military force against an enemy combatant when we are at the  
14 most vulnerable.

15 In other words, to put it sort of colloquially, an  
16 authorization to use force against an intruder on the outskirts  
17 of your property cannot rationally be construed to prohibit you  
18 from using force against the intruder when he's attempting to  
19 enter your living room. And that's essentially what you would  
20 have to think congress intended in authorizing use of military  
21 force here in order to impose some restriction that says you can  
22 use force if you capture him overseas, but if he escapes your  
23 forces there and then undertakes a mission to infiltrate our  
24 borders and to carry out hostile and warlike acts here, your  
25 hands are tied.

1 I just don't think that's what congress intended. I  
2 don't think there's any rational way to read congress's  
3 authorization for that. And there's nothing in 4001(a) that  
4 would support that distinction because, again, it does not speak  
5 to the locus of the capture. It speaks to the detention of  
6 United States citizens.

7 And the last thing I would say, your Honor, and I  
8 thought it was interesting that petitioner's counsel made  
9 reference to the Fourth Circuit's decision in Hamdi III with  
10 regard to the application of Section 4001(a). It has been the  
11 position of the United States all along throughout these cases  
12 that Section 4001(a) was never intended to apply to the  
13 detention of enemy combatants during wartime.

14 And that's how I read the Fourth Circuit's decision  
15 in Hamdi III. What the Fourth Circuit there says is that the  
16 detention was authorized by both the Authorization for Use of  
17 Military Force and by the provision that provides for funding of  
18 detention of combatants.

19 But in any event the court said there would be -- it  
20 would be very strange to read any restriction of 4001(a) onto  
21 the president's power as Commander in Chief to detain combatants  
22 because it was intended at most to deal with the situation where  
23 you're detaining, as in the context of the Emergency Detention  
24 Act, not combatants. The individuals that were detained under  
25 the Emergency Detention Act were not combatants, your Honor.

1           It was the type of concern that was motivated by the  
2 Supreme Court's decision in Korematsu, the detention of  
3 individuals not because they were engaged in hostile and warlike  
4 acts as part of the enemy have forces, but just because you  
5 suspected them of having some connection with the enemy or  
6 potentially, you know, committing acts of sabotage or  
7 espionage. And that it was that type of detention that 4001(a)  
8 was intended to preclude absent an authorization of congress,  
9 not the detention of enemy combatants during wartime, which is a  
10 fundamental and accepted aspect of the president's Commander in  
11 Chief power.

12           And the Fourth Circuit, I would submit, in Hamdi III  
13 held both that it was satisfied and also that it didn't apply  
14 because it doesn't apply to detention of enemy combatants. And,  
15 of course, the Supreme Court vacated that on other grounds, but  
16 if you were to look to what was the Fourth Circuit's guidance on  
17 that, I would, again, encourage your Honor to look at that.  
18 That's at 316 F.3rd 468 and see what the Fourth Circuit said  
19 with regard to the application of 4001(a). I think the best  
20 reading of that statute is it doesn't apply at all.

21           Now, the Supreme Court didn't resolve that issue in  
22 Hamdi because it found that the authorization for use of  
23 military force in fact authorized the detention because --  
24 because it found that the -- it was so fundamental and accepted  
25 an incident of war to be an exercise necessary and appropriate

1 to the use of force that the detention of enemy combatants, even  
2 U.S. citizens in that context.

3 So the question, again, your Honor, I think is that  
4 we should start with what we know what is settled law after the  
5 Supreme Court's decision in Hamdi. We know that if the United  
6 States forces in Afghanistan had managed to capture Mr. Padilla  
7 there, that he would be subject to detention as an enemy  
8 combatant. I don't think there's any dispute about that.

9 The only question left is that is there anything  
10 about the fact that he escaped capture or destruction in  
11 Afghanistan and then accepted a mission on behalf of al Qaeda to  
12 come to the United States to commit hostile and warlike acts  
13 here that make him less of an enemy combatant? And there's just  
14 no basis in law or logic to conclude that that -- that that  
15 would reduce the president's authority.

16 A few other points, your Honor, and that is one of  
17 the petitioner's principal arguments in response to that is to  
18 suggest that if you piece together a portion of the dissenting  
19 opinion in Padilla with the opinions in Hamdi, you can -- they  
20 can count the five votes they think for the proposition that you  
21 cannot apply -- you cannot detain a United States citizen if  
22 they are captured here in the United States.

23 And there are several problems with that, your  
24 Honor. The first is that both the Supreme Court and the Fourth  
25 Circuit have repeatedly admonished lower courts not to engage in

1 that type of speculation about what the Supreme Court might do  
2 when it hears an issue. And that's particularly true when  
3 you're piecing together parts of concurring and dissenting  
4 opinions in different cases.

5 And that's a fundamentally different exercise than  
6 trying to determine what the Supreme Court actually held in a  
7 case such as Hamdi where you have a fairly fractured court and  
8 you have to determine what the actual holding of the court was.

9 I think however you try to undertake that analysis with regard  
10 to what the holding of Hamdi was, you end up with the conclusion  
11 that the holding was necessarily that the president had the  
12 authority to detain Mr. Hamdi and that more procedures were due  
13 on remand. And that's the plurality decision authored by  
14 Justice O'Connor.

15 Again, that admonition not to speculate about what  
16 the Supreme Court might do is all the more appropriate here  
17 because the dissent that they rely on is just a one sentence  
18 footnote in the Padilla decision and it's a prediction about  
19 what Justice Breyer would do. Even though he joined the dissent  
20 it was Justice Stevens' dissent.

21 And but most fundamentally the main reason why it  
22 would be inappropriate to do that in this context -- and this, I  
23 think, bears emphasis, your Honor -- is that the record that  
24 would -- that the Supreme Court would have before it if this  
25 case ever makes it back there would be fundamentally different

1 this time around than it was before, because at the time that  
2 the record was established in the Southern District of New York  
3 it was still fairly soon after Mr. Padilla had been taken into  
4 custody as an enemy combatant and we know a lot more about his  
5 activities on behalf of al Qaeda now than we did then, including  
6 all of activities with al Qaeda and Taliban forces in  
7 Afghanistan during combat operations there. And it just remains  
8 to be seen what difference those facts will have on the Supreme  
9 Court if they ever are called upon to decide this issue at some  
10 future date.

11 THE COURT: Well, as I understand it, the two sides  
12 agreed to have this question answered, and I'm assuming you're  
13 going straight up the ladder once the question is answered  
14 here. How is the record going to be any different?

15 MR. SALMONS: Well, your Honor, again, the way this  
16 issue has been -- is teed up now for the court is that they have  
17 filed what they've styled a motion for summary judgment that  
18 essentially says even if you assume all the truth -- excuse me,  
19 if you assume the truth of all of the government's factual  
20 submissions, the president still lacks the authority to detain  
21 Mr. Padilla as an enemy combatant. So that is a legal question,  
22 but it assumes all of the facts that we have put into evidence  
23 through our return and the accompanying declaration.

24 Now, they want to make some quibbles about those  
25 facts and whether they were admissible or whether they're

1 sufficient, but they've it seems to me for purposes of this  
2 motion sort of put aside those objections and they're required  
3 to assume the facts -- those facts are true and make a legal  
4 argument the president still doesn't have the authority.

5 So if that issue were to go back to the Supreme  
6 Court now, it would be in the context of a case that contain  
7 factual allegations not just that he was acting on behalf of al  
8 Qaeda when he attempted to enter the United States and was bent  
9 on hostile acts, but also that he was an enemy combatant in the  
10 true Hamdi sense, your Honor, that he was -- again, this is the  
11 definition the Supreme Court applied in Hamdi -- an individual  
12 who was part of or supporting forces hostile to the United  
13 States or coalition partners in Afghanistan and was engaged in  
14 armed combat against the United States there. He fits that  
15 definition under the facts that we have alleged. He also fits  
16 the definition from Quirin, and so it may very well be the  
17 case.

18 I guess there would be a question with regard to  
19 whether to certify that legal issue for an interlocutory appeal  
20 as to the timing as to when it might get up to the Supreme  
21 Court, but certainly there is that possibility that this issue  
22 will get there. But for purposes of this court deciding this  
23 motion now the type of speculation about what the Supreme Court  
24 would do isn't the proper analysis. It's what the Supreme Court  
25 has done, and for that you have to look at the unanimous

1 decision of the Supreme Court in Quirin and the controlling  
2 plurality decision by Justice O'Connor of the Supreme Court in  
3 Hamdi. And for purposes of deciding the scope of the  
4 president's authority to detain a United States citizen as an  
5 enemy combatant that's -- those are the best sources that we  
6 have.

7 And, again, the Supreme Court in Hamdi referred to  
8 the Supreme Court's decision in Quirin as the most apposite  
9 precedent that we have on the question of the president's  
10 authority to detain a citizen as an enemy combatant. And so  
11 their attempts to suggest that Quirin is -- doesn't apply  
12 because the Non-Detention Act -- excuse me, 4001(a) hadn't been  
13 enacted yet or because they were enrolled members of the German  
14 Army and the like, we have provided responses to that in our  
15 opposition to the motion for summary judgment.

16 I don't think that's actually an accurate  
17 characterization of the facts of Quirin. The individuals there  
18 in fact were not enrolled members of the German Army in the  
19 ordinary sense. They had been recruited because they had --  
20 they had an affiliation with the United States because one was a  
21 citizen. They had lived here and they were assigned this  
22 mission to come in as saboteurs, but they were not typical or  
23 regular members of the German Army.

24 But all of that is beside the point. Again,  
25 whatever definition that would be applied you would be bound by

1 Quirin, you would be bound by the plurality decision in Hamdi.  
2 And under both those definitions Mr. Padilla's actions place him  
3 squarely within the category of individuals that are subject to  
4 detention as enemy combatants.

5 Again, he trained with al Qaeda. He filled out an  
6 application for them to enroll in al Qaeda terrorist training  
7 camp. He was affiliated with Taliban and al Qaeda forces,  
8 carried an AK-47 on the battlefield in Afghanistan. And the  
9 only difference is he escaped and then signed up on a mission to  
10 come here and to carry out hostile and warlike acts against us  
11 within our own borders. That's an enemy combatant, your Honor.

12 The only other point I would make, your Honor, if  
13 you don't have any other questions is that their "clear  
14 statement" rule that they rely heavily on is entirely misplaced  
15 in this context. All of the cases that they rely on for the  
16 proposition that there is some heightened "clear statement" rule  
17 required are cases that do not involve the detention of enemy  
18 combatants.

19 They may be cases that arose in the context of  
20 national security concerns or war, but they were all -- this  
21 includes Ex parte Endo, Duncan versus Kahanamoku, Brown versus  
22 United States. These were all cases that while they arose  
23 during a time of hostilities, involved the application of  
24 military law to regular civilians or to individuals who were not  
25 in any way alleged to have engaged in hostile and warlike acts

1 or otherwise to be combatants, so they are inapposite.

2                 The best case we have, again, for what type of  
3 "clear statement" rule, if any, would be applied when the  
4 president exercises his authority as Commander in Chief pursuant  
5 to a broad declaration of -- or authorization, excuse me, from  
6 congress with regard to the use of force is Quirin itself. And  
7 what Quirin again said is the fact it applied a "clear  
8 statement" rule in the opposite direction. It said that the  
9 detention ordered by the president in the declared exercise of  
10 his powers as Commander in Chief of the Army in a time of war  
11 and of grave public danger is not to be set aside by the courts  
12 without the clear conviction that they are in conflict with the  
13 constitution or laws of congress constitutionally enacted.

14                 So if you're looking for a "clear statement" rule,  
15 that's the one the Supreme Court applied in this context. And  
16 if you look at the Authorization for Use of Military Force,  
17 there is no way to read it that would preclude the use of force  
18 against an enemy combatant if he manages to make it to our  
19 borders, and it would be irrational to do so. It would, again,  
20 tie the Commander in Chief's hands at the precise moment when we  
21 are in the most danger from that combatant. And in the wake of  
22 9-11 I think there is no way to think congress would have  
23 intended that result. And, again, nothing in 4001(a) would  
24 support that type of distinction.

25                 THE COURT: Thank you.

1 MR. SALMONS: Thank you, your Honor.

2 THE COURT: Mr. Freiman, let me ask you a couple of  
3 things before you go where you intend to.

4 MR. FREIMAN: Yes, your Honor.

5 THE COURT: At the oral arguments in Padilla before  
6 the Second Circuit there's a statement in the opinion in the  
7 dissent that says that Mr. Padilla's attorneys conceded that the  
8 president could detain a terrorist without congressional  
9 authorization if an attack were imminent. One, was that -- are  
10 you familiar? -- do you know whether or not that was said?

11 MR. FREIMAN: Yes, your Honor. I was there.

12 THE COURT: Let me take it to the next step before  
13 you get me off track here. I don't know why you -- why the  
14 petitioner made a decision not to go forward with the due  
15 process hearing and the conscious decision made by y'all and the  
16 government agreed to handle it this way. But aren't you locking  
17 me in based on the fact that I have to take those facts in those  
18 -- in their affidavit as true for purposes of the motion? Not  
19 that you're conceding them, but as true. Which then leads me to  
20 the third part of the question, is if there -- if I'm bound by  
21 that and does the -- does where Padilla was arrested make any  
22 difference in light of Hamdi?

23 MR. FREIMAN: Yes, your Honor. Be happy to answer  
24 those questions.

25 THE COURT: And, well, I guess it wouldn't do me any

1 good to find out why you didn't want to have the due process  
2 hearing to start with, because it sure would make my job a lot  
3 easier.

4 MR. FREIMAN: I'm happy to be entirely frank with  
5 your Honor about that. The reason that we did not want to move  
6 forward immediately with the due process hearing is there are a  
7 number of constitutional questions of great magnitude that we  
8 think would arise in that proceeding. We don't think that it  
9 would allow us to move forward in any sort of an expeditious  
10 manner at all.

11 Just to set out -- sketch out some of the questions  
12 that might arise, we know that the plurality opinion in Hamdi  
13 joined by Justice Souter's concurrence sets out the requirement  
14 of there being some sort of hearing that complies with due  
15 process, neutral decision maker, opportunity to be heard  
16 presumably in an Article III court. But the opinion itself, as  
17 I'm sure your Honor knows, is full of caveats and conditional  
18 tenses, all which I imagine we would be arguing over.

19 As a threshold matter we would be arguing over  
20 whether this case is a case sufficiently like the Hamdi case to  
21 allow the reduction of due process rights that the Hamdi  
22 plurality presumes, that is that's a battlefield capture.  
23 Nobody has any doubt that there are all kinds of evidentiary  
24 difficulties that arise in the context of a battlefield  
25 capture.

1           But this is not a battlefield capture. This is a  
2 seizure in an American city and the evidentiary issues might be  
3 very different. The difficulties might not be here. So we  
4 would be arguing over, one imagines, whether in fact the  
5 government had the burden of proof as it ordinarily does in a  
6 2241 habeas action. We would be arguing over the admissibility  
7 of materials that would not ordinarily be admissible under the  
8 federal rules of evidence, whether in fact there was some sort  
9 of exception carved out. Perhaps the government would argue  
10 under the Commander in Chief power to supersede the rules of  
11 evidence, et cetera.

12           There would be all sorts of constitutional questions  
13 that would come in there, and there would be constitutional  
14 questions that would precede that. What sort of discovery are  
15 we entitled to? As we indicated in our motion, the government  
16 hasn't yet come forward with any sort of admissible evidence.  
17 Well, ordinarily speaking, Rule 56(e) requires the government to  
18 come forward with admissible evidence in a 2241 hearing and if  
19 the government doesn't, that motion has to be granted.

20           We understand this isn't an ordinary case. We  
21 understand that the government probably has to be given an  
22 opportunity to come forward with whatever evidence it does have  
23 other than this hearsay affidavit taken under conditions that  
24 have no indicia of reliability. All of those sorts of questions  
25 would come up, your Honor.

1                   So rather than moving ourselves into a track where  
2 we would be litigating weighty constitutional questions for  
3 potentially quite a while we thought it made a lot more sense to  
4 try to resolve the threshold issue, the question of presidential  
5 power at the outset, the thought being that if your Honor and  
6 whatever appellate authority was relevant might in fact rule on  
7 our behalf, those questions would be mooted. They would not  
8 need to be addressed at this time and the courts and the parties  
9 and the petitioner would be saved all that work.

10                  THE COURT: Well, if you give the president's  
11 material a fair reading, one could say that he thought that a  
12 terrorist attack was imminent by Mr. Padilla coming back into  
13 the United States. So could he detain him?

14                  MR. FREIMAN: Yes, your Honor, that goes back to  
15 your other question. Our view, as I believe expressed by  
16 counsel before the Second Circuit, is in fact that the president  
17 does have power to detain. That power is in fact primarily  
18 under the criminal law. It's what happened here. There was a  
19 warrant, a civilian warrant for Mr. Padilla's arrest. He was  
20 arrested by civilian law enforcement officials. He was brought  
21 before a civilian judge and he was in fact detained in a  
22 civilian facility.

23                  The president has that power. One can turn to the  
24 criminal process decisions of the Supreme Court. County of  
25 Riverside makes clear that the government need not bring an

1 individual before a magistrate for a forty-eight hour period  
2 after detention. There's leeway that the government has under  
3 the criminal laws. It has a material witness warrant statute  
4 which it used here. The government has a lot of tools is of  
5 course the reason why Mr. Hoover thought that those tools were  
6 sufficient. This is the reason why there's the brief of former  
7 law enforcement officials that says the government has an entire  
8 tool box to protect this nation.

9 Now, if in fact the president thinks that those  
10 tools are not enough, even though they clearly worked here, if  
11 the president thinks those tools are not enough, he can of  
12 course go to congress. He can ask for additional authority and  
13 it's up to congress to determine how much authority to give  
14 him.

15 Now, congress has been quite responsive in the past  
16 to requests for this sort of enhanced authority. They've also  
17 subjected those requests to the deliberative process that the  
18 framers intended. Look at the Patriot Act, for example. In the  
19 Patriot Act as to the detention of aliens the president had  
20 initially asked for indefinite detention. Congress decided that  
21 detention of aliens in the wake of 9-11 was warranted, but not  
22 indefinite detention, so they set time limits and they set  
23 procedures.

24 And that's the sort of process that should have  
25 happened here and that hasn't happened here. I have no doubt,

1 your Honor, that were the president to go to congress and  
2 request enhanced authority, he would receive some sort of  
3 enhanced authority, as he nearly always has in the past.

4 Your Honor, I think that -- let me make sure first  
5 since those took a little bit longer to answer than I might have  
6 expected that I answered all three of your Honor's initial  
7 questions.

8 THE COURT: Sure.

9 MR. FREIMAN: Okay.

10 THE COURT: What do you do about Article VIII -- I  
11 mean Article II, Section 8, Clause 11 about congress having the  
12 power to make rules concerning captures on land and on water?

13 Is there any other -- can the president act on his own except in  
14 an imminent situation?

15 MR. FREIMAN: Well, your Honor, there's very little  
16 case law on the make -- on the make rules regarding captures  
17 clause that I know about, but what that is that's one of several  
18 clauses that give to congress tremendous authority not just for  
19 rule making, but for rule making in the martial context, in the  
20 context of war. In fact, the president's powers in the war  
21 context are limited to the Commander in Chief powers, and the  
22 framers intended that to be a very limited notion.

23 It's what -- boy, I hope I don't get this wrong --  
24 either Justice Scalia or Justice Rehnquist referred to as the  
25 George Washington powers at oral argument before the Supreme

1 Court. These were -- these were the powers in fact to direct  
2 the military, but not to make rules, not to make rules either  
3 within the military -- of course, the uniform code of military  
4 justice is promulgated by congress, not by the president -- but  
5 also to make rules for citizens in wartime. This is a  
6 quintessential legislative issue. It's not an executive issue.

7 And this is the situation that we had in Youngstown,  
8 your Honor, where Justice Jackson pointed out very clear that  
9 it's not the president's prerogative to be a law maker, he is  
10 the executor of the laws. So that clause, I think, fits into  
11 the overall structure that I've been discussing here today.

12 Your Honor, I want to address one thing which I  
13 think has a kind of an intuitive appeal. In fact it is to my  
14 adversary's credit that he can take apples and oranges and make  
15 them into fruit salad. He asked why it would be that it would  
16 have been okay under the Hamdi decision for Mr. Padilla to have  
17 been seized and detained as an enemy combatant when he was  
18 allegedly on a field of battle in Afghanistan, but why it was  
19 not okay for him to be seized and detained in Chicago when he  
20 came to the United States. And he said there was no reason in  
21 law or logic for such a rule.

22 I'd say, your Honor, there's a reason both in logic  
23 and in law and they are reasons that the framers themselves  
24 contemplated and sought to give meaning. The reason in logic is  
25 that when an individual is seized on a foreign battlefield

1 capturing a rifle, the odds of that individual not being who the  
2 government thinks he is are pretty low, and consequently the  
3 risk of governmental error and abuse that the framers sought to  
4 guard against is consequently low.

5 Now, when an individual citizen is seized in a  
6 civilian city in the United States on information allegedly  
7 received from an informant whom the government itself  
8 acknowledges has lied to them in the past, well then, the odds  
9 of the government being wrong are quite a bit higher and the  
10 risk of error and abuse that the framers sought to guard against  
11 is much higher. That's why there's a difference.

12 And that is reflected, that logical distinction is  
13 reflected in the law, in the doctrine. The habeas suspension  
14 clause speaks of invasions and rebellions. These are things  
15 that happen on American soil. An invasion doesn't happen in  
16 Afghanistan in a constitutional sense. It happens here. This  
17 is why the framers and congresses in the past have been  
18 particularly concerned with what happens here to American  
19 citizens.

20 This is why Youngstown, which we've both spoken of  
21 today, noted that president's powers at home were much less than  
22 they are abroad, let alone on a foreign field of battle. Here  
23 it's congress's powers that are predominant. That's the reason  
24 in law and it underscores the reason in logic. This whole thing  
25 is about the framers' desire to lower the risk of governmental

1 error and abuse, and that's why there's distinction between  
2 those two situations.

3 Your Honor, I have some smaller points that I'd like  
4 to make in response to the conversation that preceded. The  
5 first is, and I think this is obvious from everything that we've  
6 all talked about today, but even if Mr. Padilla were determined  
7 to fit some definition of enemy combatant, our position is that  
8 he is constitutionally and statutorily not subject to  
9 detention. Invasions and rebellions have enemy combatants. The  
10 text of 4001 is unequivocal. So it's not just a question of  
11 whether he fits into some definition of enemy combatant. It's a  
12 question of whether the president has the power to detain an  
13 American citizen seized from an American civilian setting.

14 Second, contrary to my opponent's statements the  
15 limits in Hamdi are multifarious. We cite easily ten of them in  
16 our briefs where the plurality opinion constantly reiterates the  
17 narrow circumstances of the decision. I need not belabor those  
18 here today.

19 It is worth noting one additional thing. The Hamdi  
20 plurality opinion is controlling in a sense in that it certainly  
21 announces the judgment of the court, but as the government  
22 acknowledges, it was a fractured opinion and in fact in a  
23 particularly odd circumstance the judgment arrived at only  
24 because two concurring justices joined in the judgment despite  
25 their misgivings about the court's conclusion on the very issue

1 that we are talking about here today in the context of foreign  
2 battlefield.

3                 The opinion is limited in essence to the judgment  
4 and what the government is asking you to do is count votes. I  
5 think they get the vote count wrong. I think five justices of  
6 the Supreme Court have been pretty clear, but were your Honor to  
7 wish to disregard those views it would not behoove this court to  
8 do the vote counting that the government recommends by adding  
9 Justice Thomas' opinion to the opinions in the plurality.

10                 Justice Thomas, of course, was a dissenting justice  
11 and he did not concur in the opinion, as such his opinion's not  
12 legal force under the Marks decision that we cite in our  
13 briefs. In any event, your Honor, the Hamdi opinion noted that  
14 4001 was satisfied, was a battlefield capture, was clear and  
15 unmistakable, was clearly unmistakably authorized in the  
16 Authorization to Use Military Force.

17                 Your Honor, before I leave off, I'd like to make  
18 three final points. The Quirin case is about where somebody got  
19 tried. Was it going to be in military court? Was it going to  
20 be in civilian court? It didn't involve the question of  
21 detention without charge. As such most of the issues we are  
22 discussing here today, the applicability of the Habeas  
23 Suspension Clause, simply weren't raised in that case, weren't  
24 briefed. They weren't argued and surely weren't decided.

25                 The constitution contemplates a military justice

1 system. The Fifth Amendment to the constitution expressly  
2 relaxes two constitutional requirements in the context of that  
3 military justice system. This is a constitutionally  
4 contemplated means for the trying and ultimate detention of  
5 citizens.

6 That's not what the government is seeking here  
7 today. The government is not seeking to put Mr. Padilla before  
8 a military court to charge him with crimes which they believe he  
9 has committed and give him an opportunity to defend himself  
10 there. The Quirin opinion is thus not relevant to this  
11 situation, just doesn't raise the same issues.

12 Finally, your Honor, as to the -- I should say  
13 penultimately, second to last, the passage of time, as your  
14 Honor and everyone at counsel table on both sides is well aware,  
15 it has been nearly three years since Mr. Padilla was seized by  
16 the military. And the Supreme Court has made clear in that even  
17 a battlefield does not last forever.

18 I point your attention now to the Duncan case,  
19 Duncan versus Kahanamoku. In the Duncan case there was, in  
20 fact, a suspension of habeas corpus. There was the organic acts  
21 for why we had given the executive branch the power to declare  
22 martial law in that territory and when Pearl Harbor was attacked  
23 in World War II martial law was declared.

24 But in the Duncan case the court found that two  
25 years after the attack on Pearl Harbor martial law could no

1 longer be allowed to supplant civilian courts in that instance  
2 with military courts. Military power on a battlefield did not  
3 extend so far even though while still under threat of invasion  
4 -- this case was decided in the midst of World War II, still  
5 under threat of invasion -- battlefields don't last forever.  
6 The military power doesn't last forever, even at its apex.

7 We are now three years out. That makes a world of  
8 difference. And it's not just that we don't know when this war  
9 is going to end, as the attorney for the government here said.  
10 It's that in fact the government has conceded it doesn't believe  
11 this war will ever end. The president said that himself. We  
12 cite that in the brief. In addition to the president's  
13 statement acting Solicitor General Paul Clement said that before  
14 the U.S. Supreme Court.

15 We're not talking about another year, another three  
16 years, another five years. We are talking about we're pretty  
17 sure probably never. So if there's going to be a transfer of  
18 power of this magnitude to the president, it's going to be an  
19 unlimited transfer of power, a transfer of power that has no  
20 end, potentially permanent change to the constitutional system.

21 Your Honor, my final point now for real is the  
22 government remarked on the broad authorization for use of  
23 military force that it believes was passed in the wake of the  
24 9-11 attacks. For reasons set forth before we don't believe  
25 they're nearly as broad as the government does, but even if it

1 was required, it's not breadth, but specificity. There needs to  
2 be clear unmistakable authorization for detention of citizens.  
3 And in fact even if Quirin found there was a clear  
4 and unmistakable authorization for a military trial of Haupt and  
5 his Nazi comrades by virtue of the fact the articles of war duly  
6 enacted by congress had provided for such military jurisdiction,  
7 Quirin found that clear and unmistakable statement. And a clear  
8 and unmistakable statement would be what's required here. And  
9 indeed that's been the understanding of the Authorization to Use  
10 Military Force since the beginning of the republic.

11 The first real battle this nation faced was the  
12 battle with France prior to the declared war of eighteen twelve,  
13 around the turn of the century, seventeen ninety-eight to  
14 eighteen oh two or so. And in that instance congress had  
15 authorized the president to seize ships going to France. Well,  
16 the president took upon himself to seize ships coming from  
17 France and the Supreme Court said no, authorization to use  
18 military force cannot be read broadly. It must be read  
19 specifically. You do not have the additional power to seize  
20 ships coming from France. That was Chief Justice Marshal.  
21 Chief Justice Marshal in the war of eighteen twelve reiterated  
22 this necessary limited reading of authorization to use military  
23 force.

24 And it's worth taking just a moment to paint a  
25 picture of the war of eighteen twelve because we all see

1 ourselves in extraordinary times now and the war of eighteen  
2 twelve was a time when, of course, British forces invaded the  
3 United States. There was a full-blown declaration of war.  
4 British forces captured parts of Washington, burned the capital  
5 and White House to the ground. Just as today's terrorist do,  
6 they chose symbolic targets in the heart of America to destroy  
7 and they succeeded.

8 Moreover, at the time President Madison believed New  
9 England was on the verge of succession and Great Britain tried  
10 to foster that impression by in fact having an embargo around  
11 all American ports except those in New England. In other words,  
12 the young nation felt itself to be at a moment of extraordinary  
13 peril. It felt its very survival to be threatened.

14 In addition to the declaration of war congress  
15 passed an authorization to seize the bodies of enemy aliens in  
16 the United States in the Alien Enemy Act, and President Madison  
17 sought to read into that authorization the greater authority to  
18 seize the property of aliens, their timber. Justice Marshal  
19 again said no, the declaration of war was not sufficient. An  
20 additional provision of authority to seize the bodies of aliens  
21 was not enough. It did not provide the additional authority to  
22 seize their timber. That was the framers' own understanding of  
23 the constitution. That authorization for use of military force  
24 ought to be read narrowly.

25 All the more so here we are talking about not

1 timber, not ships, but people. We are talking about the bodies  
2 of citizens, your Honor. We are talking about the most  
3 irreducible quantum of human freedom. This tradition of our  
4 nation from the time of its founding has been to require the  
5 clear statements for such detention not expressed here.

6 THE COURT: Let me ask you three unrelated  
7 questions. One with regard to the Patriot Act, was not congress  
8 speaking of detaining any aliens, not just enemy combatant  
9 aliens?

10 MR. FREIMAN: Your Honor, it is accurate to say the  
11 category of enemy combatants as the government defines here  
12 today, it's been defined variously by the government, but as  
13 defined here today a category of persons subject to detention  
14 under the Patriot Act is not precisely the same. I think it's  
15 very much the same insofar as aliens go that if you go through  
16 the particular provisions of the U.S. Code referenced in the  
17 relevant section of the Patriot Act you see there's a wide  
18 variety of terrorist activities that threaten national security  
19 that would be covered, but there are certainly some minor  
20 differences.

21 The import of my drawing the court's attention to  
22 the Patriot Act is not to say exactly the same authority was  
23 provided in the Patriot Act as would have been provided in the  
24 authorization for use of military force. It's just that in the  
25 Patriot Act we have a very good example of what happens when

1 congress thinks about who ought to be detained, how long they  
2 ought to be detained and what the conditions in regard to  
3 detention ought to be. So we have an example of what congress  
4 does.

5 This is a crucial piece of data when it's thinking  
6 about this kind of question. In the Authorization for Use of  
7 Military Force there's no such discussion. The government's  
8 argument is well, even though we know that congress is able to  
9 define with meticulous care who, for how long and what  
10 conditions, we shouldn't concern ourselves with the fact that  
11 they didn't do it here and they didn't talk about it here. It  
12 should be silently implied into an Authorization to Use Military  
13 Force in contravention of the entire history that I have set  
14 forth today.

15 THE COURT: Another question. Obviously the  
16 government's filings and some of the writings on the issue  
17 balances citizens' rights to security, national security. Does  
18 the criminal law, including treason and habeas suspension,  
19 provide adequate opportunity to interrogate a citizen enemy  
20 combatant to assure the security of the country and foreign  
21 policy?

22 MR. FREIMAN: Your Honor, I'll say one thing that I  
23 have no doubt the government will agree with, that's that I'm in  
24 no position to tell you. I don't have an expertise to know  
25 that, and it's not my job to know that. I'm the body, and it's

1 the government that has obligation to make that sort of decision  
2 in congress. It's up to congress to determine what's an  
3 appropriate extent of authority for the president.

4 THE COURT: Lastly. Lastly, in the materials there  
5 have been distinctions drawn between lawful and unlawful enemy  
6 combatants. In the material with regard to unlawful enemy  
7 combatant it's always followed with the phrase something like  
8 this, they are prosecuted criminally whereas lawful enemy  
9 combatants are treated differently. Do you agree with that  
10 proposition?

11 MR. FREIMAN: Yes, your Honor. As the doctrine of  
12 the law of war, a person who is a lawful combatant is a person  
13 who is entitled to the privilege. That person has the right to  
14 shoot members of the enemy. That's a special category, I  
15 believe, for war. To ordinarily murder, of course, is to pick  
16 up a gun, shoot a person, but if you have belligerent, you have  
17 belligerence privilege, you have lawful combatant.

18 Now, you can lose the belligerence privilege in  
19 various ways. And if you lose the belligerence privilege  
20 wherein you can be prosecuted for murder, then the fact you  
21 picked up a gun and shot somebody on the other side is no longer  
22 a privileged act. You could be prosecuted. That's the  
23 distinction that's being talked about in the decisions.

24 There is not in the law of war I should say any kind  
25 of authorization to detain individuals of any sort if the law of

1 war is the body of law that sets conditions on individuals who  
2 have been detained. It's what the Hague Conventions do. It's  
3 what the Geneva Conventions do. The question of whether there  
4 is authority to detain an individual is a question that was  
5 ultimately lost -- left to the laws of each individual nation.

6 THE COURT: Well, does -- the government argued  
7 while ago that Taliban and al Qaeda are not signatories to the  
8 convention, so therefore persons associated with that group  
9 could not be entitled to those protections. That's the position  
10 they take.

11 MR. FREIMAN: I believe the government -- I could be  
12 mistaken. I believe that the government acknowledges that the  
13 Taliban government by virtue of being the government of  
14 Afghanistan was a signatory, but not al Qaeda.

15 THE COURT: Al Qaeda's not.

16 MR. FREIMAN: So I'm sorry. Your Honor's question?

17 THE COURT: Make sure I heard what I heard. Thank  
18 you.

19 MR. FREIMAN: Thank you, your Honor.

20 THE COURT: Mr. Salmons, briefly in reply.

21 MR. SALMONS: Just a few things if that's all right,  
22 your Honor. First, your Honor, I just want to address the  
23 Patriot Act just very briefly and say we agree with the point  
24 that your Honor -- with the point of your Honor's question. I  
25 don't know if that was necessarily, your Honor, the point of

1 your question was that the Patriot Act is different from the  
2 detention of enemy combatant. It has nothing to do with the  
3 fact of war and with enemy combatant. It has to do with  
4 detaining aliens under certain circumstances would apply,  
5 whether or not we were at war and whether or not someone was  
6 affiliated or part of the enemy forces.

7 With regard to the Treason Clause and Suspension of  
8 the Habeas Writ Clause of the constitution, and I think this is  
9 very important, that argument as well as the argument about the  
10 Patriot Act and others has been rejected by the Supreme Court in  
11 Hamdi. And it was also rejected by the Supreme Court in  
12 Quirin.

13 If petitioners are correct that the United States  
14 citizen that enters this country bent on hostile and warlike  
15 acts and comes in at the direction and with the aid of enemy  
16 forces can only be prosecuted for treason or the writ has to be  
17 suspended, then Quirin would have to be overturned. That was  
18 unanimous decision of the Supreme Court.

19 And with regard to the detention of such an  
20 individual you can't draw distinction from Quirin based on the  
21 fact those individuals there were charged with war crimes and  
22 were prosecuted and were executed. There's a fundamental  
23 difference between detaining someone during the duration of  
24 hostilities to prevent them from reentering the battle and  
25 engaging in warlike acts against us. That is a preventative

1 detention. It is not punitive detention.

2 And detaining someone because they have committed a  
3 war crime, that requires a prosecution. There are certain  
4 rights that attach. Individuals may be subject to prosecution  
5 for war crimes and then for punishment, be it a term of years or  
6 be it execution for violation of the laws of war. That is  
7 different in kind from the nature of the detention of enemy  
8 combatants during ongoing hostilities.

9 And the Supreme Court, again, in the controlling  
10 plurality of the Supreme Court in Hamdi noted this argument that  
11 the petitioners made in Hamdi with regard to Quirin in trying to  
12 distinguish Quirin because those individuals were charged and  
13 the Supreme Court said while the American citizen in Quirin --  
14 Haupt was tried for violation of the law of war -- nothing in  
15 Quirin suggests citizenship would have precluded mere detention  
16 for the duration of the relevant hostility does not provide a  
17 basis for distinguishing Quirin.

18 And the Supreme Court again in the controlling  
19 opinion from plurality rejects that just with regard to what  
20 holding Supreme Court in Hamdi, so there is no way you can  
21 conclude that the Supreme Court in Hamdi did not hold that the  
22 president had the authority to detain Hamdi as an enemy  
23 combatant notwithstanding the fact that Authorization for Use of  
24 Military Force did not specifically reference detention for  
25 citizens.

1                   What the judgment of the Supreme Court was in that  
2 case was vacating the decision of the court of appeals, upheld  
3 the detention and ordered the denial of the petition. It  
4 vacated that and remanded for further proceedings to provide  
5 whatever process the Supreme Court had determined was due for  
6 him to challenge the substance of that.

7                   There is no way the Supreme Court could have  
8 rendered that judgment without first concluding that the  
9 president had the authority to detain him. Otherwise you would  
10 have had an inappropriate advisory opinion. And you do have the  
11 four justices in the plurality written by Justice O'Connor that  
12 reached that conclusion. You do have Justice Thomas reaches  
13 that conclusion in the dissenting opinion, which essentially in  
14 part is a concurring in part, dissenting in part opinion.

15                  But you also for that issue have the two justices,  
16 Justice Souter and Ginsberg, who although they would have  
17 dissented from that portion of the holding, nonetheless in order  
18 to render a judgment and to achieve the answer on the second  
19 question -- again, two distinct questions in Hamdi -- does the  
20 president have the authority and what process is due and in  
21 order to render a judgment to the second they were willing to  
22 cast their votes with the plurality on the first, so that is a  
23 holding that is binding on this court.

24                  I just want to point out that your Honor had asked  
25 for a stipulation of facts with regard to whether the parties

1 thought Mr. Padilla was in sort of -- where he was in the  
2 process of entering the country. And I just want to make clear  
3 to the court what the government's position is on that, your  
4 Honor, and that is although we don't think much really turns on  
5 that legal matter, if you wanted to describe accurately the  
6 facts precisely where he was in the process, he was still at the  
7 border of the United States because he was within a secured  
8 customs facility of Chicago O'Hare International Airport.

9                 And I would refer your Honor to a case that's not  
10 cited in our papers, recently decided case from the Ninth  
11 Circuit called Sidhu versus Ashcroft, 368 F 3rd 1169. And that  
12 was a case involving an alien who had come through Immigration,  
13 had passport stamped, admitted, but had not yet cleared Customs,  
14 was in a similar position and the court has determined she had  
15 not yet entered because she was still subject to restraint.

16                 THE COURT: Case law even in Hamdi uses the  
17 terminology "on American soil". I don't know what difference  
18 that makes.

19                 MR. SALMONS: Well, I want to be very clear, your  
20 Honor, we actually don't think anything turns on it, but it is  
21 true that in each of the cases where we have had the Supreme  
22 Court decide whether citizens can be held as an enemy combatant,  
23 it has been very circumspect, very careful to narrow the holding  
24 to facts before it and only define the enemy combatant, the  
25 definition only as far as they needed to in order to render the

1 decision in that case.

2 And so you have the court in Quirin talking about  
3 enemies associated with the enemy and coming here bent on  
4 hostile acts, doesn't go beyond that, although provides lots of  
5 examples of people being held as enemy combatant, including  
6 citizens.

7 THE COURT: One other fact, somehow when I read  
8 everything both sides submitted, after -- what happened to  
9 Padilla after he was interrogated and arrested as a material  
10 witness? Was he admitted to bail, allowed to go to New York on  
11 his own?

12 MR. SALMONS: No, your Honor. He was arrested, held  
13 on a material witness warrant in a federal detention center in  
14 New York and he was there -- was there at the time the president  
15 -- on June ninth president determined he was an enemy combatant.

16 THE COURT: How did he get from Chicago to New  
17 York?

18 MR. SALMONS: My understanding he was placed in a  
19 secured Customs area of the airport in Chicago and was taken to  
20 New York where he was held.

21 And the last point I would make, your Honor, is that  
22 while there is an awful lot of talk about the executive and the  
23 risk that he may round up individuals and hold them indefinitely  
24 without charge and the like, it bears to keep in mind that the  
25 executive here has only determined two United States citizens

1 were enemy combatants and were subject to detention.

2 As such both of those individuals were engaged in  
3 armed combat against the United States or coalition forces on  
4 the battlefield in Afghanistan. One of them, Mr. Padilla, then  
5 escaped and tried to come here, was stopped at the boarder on  
6 his way to carry out further hostile and warlike acts against  
7 us. This case does not present the sort of slippery slope that  
8 petitioners are concerned about. Thank you, your Honor.

9 THE COURT: Thank you. Thank y'all. As far as  
10 timing of the decision I'm going -- I won't commit myself, but  
11 we will do our best to be in the thirty to forty-five day  
12 range. No promises.

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14 I certify that the foregoing is a correct transcript from the  
15 record of proceedings in the above entitled matter.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

JOSE PADILLA,  
Petitioner,

vs.

COMMANDER C.T. HANFT,  
USN Commander, Consolidated Naval Brig,  
Respondent.

§  
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CIVIL ACTION NO. 2:04-2221-26AJ

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MEMORANDUM OPINION AND ORDER

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**I. INTRODUCTION**

This is a 28 U.S.C. § 2241 *habeas corpus* action. The Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1331. Pending before the Court is Petitioner's Motion for Summary Judgment as to Counts One and Two.<sup>1</sup> The sole question before the Court today is whether the President of the United States (President) is authorized to detain an United States citizen as an enemy combatant under the unique circumstances presented here.

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<sup>1</sup>In Count One of the petition, Petitioner claims that his detention without being criminally charged violates the United States Constitution, including the Fourth, Fifth and Sixth Amendments, as well as the *habeas* suspension clause found in Article Two and the treason clause found in Article III. In Count Two of the petition, Petitioner maintains that his detention violates the Non-Detention Act. 18 U.S.C. § 4001(a).

## II. FACTUAL AND PROCEDURAL HISTORY

### A. *Factual history*

The relevant facts as briefly recited by the Supreme Court in *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2715-16 (2004) are as follow:

On May 8, 2002, Padilla flew from Pakistan to Chicago's O'Hare International Airport. As he stepped off the plane, Padilla was apprehended by federal agents executing a material witness warrant issued by the United States District Court for the Southern District of New York (Southern District) in connection with its grand jury investigation into the September 11th terrorist attacks. Padilla was then transported to New York, where he was held in federal criminal custody. On May 22, acting through appointed counsel, Padilla moved to vacate the material witness warrant.

Padilla's motion was still pending when, on June 9, the President issued an order to Secretary of Defense Donald H. Rumsfeld designating Padilla an "enemy combatant" and directing the Secretary to detain him in military custody. App. D to Brief for Petitioner 5a (June 9 Order). In support of this action, the President invoked his authority as "Commander in Chief of the U.S. armed forces" and the Authorization for Use of Military Force Joint Resolution, Pub.L. 107-40, 115 Stat. 224 (AUMF),<sup>2</sup> enacted by Congress on September 18, 2001. June 9 Order 5a. The President also made several factual findings explaining his decision to designate Padilla an enemy combatant.<sup>3</sup> Based on these findings, the President concluded that it

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<sup>2</sup>The AUMF provides in relevant part: "[T]he 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224.

<sup>3</sup>In short, the President "[d]etermine[d]" that Padilla (1) "is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;" (2) that he "engaged in . . . hostile and war-like acts, including . . . preparation for acts of international terrorism" against the United States; (3) that he "possesses intelligence" about al Qaeda that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States"; and finally, (4) that he "represents a continuing, present and grave danger to the national security of the United

is "consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant." *Id.*, at 6a.

That same day, Padilla was taken into custody by Department of Defense officials and transported to the Consolidated Naval Brig in Charleston, South Carolina.<sup>4</sup> He has been held there ever since.

Further, for the purposes of this proceeding, except where noted, the parties, in an October 20, 2004, filing with this Court titled "Stipulations of Fact," have agreed to the following facts:

1. On May 8, 2002, petitioner Padilla boarded a flight in Zurich, Switzerland, bound for O'Hare International Airport, Chicago, Illinois. Agents of the Federal Bureau of Investigation (FBI) had become aware of which flight petitioner would be taking from Zurich to Chicago and monitored petitioner during the flight and upon his arrival at O'Hare International Airport.<sup>5</sup>
2. At approximately 12:55 P.M. (C.D.T.),<sup>6</sup> May 8, 2002, the United States District Court for the Southern District of New York issued a material witness warrant for petitioner's arrest in connection with grand jury proceedings.
3. Petitioner arrived at O'Hare International Airport on the flight from Zurich at approximately 1:00 P.M. (C.D.T.), May 8, 2002, wearing civilian clothing and carrying no weapons or explosives.
4. Passengers arriving on international flights at O'Hare International Airport must proceed to the Federal Inspection Service (FIS) area within the international arrivals terminal. The FIS area contains both

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States," such that his military detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." June 9 Order 5a-6a.

<sup>4</sup>Also on June 9, the Government notified the District Court *ex parte* of the President's Order; informed the court that it was transferring Padilla into military custody in South Carolina and that it was consequently withdrawing its grand jury subpoena of Padilla; and asked the court to vacate the material witness warrant. *Padilla ex rel. Newman v. Rumsfeld*, 233 F.Supp.2d 564, 571 (S.D.N.Y. 2002). The court vacated the warrant. *Ibid.*

<sup>5</sup> Petitioner does not stipulate to the content of paragraphs 1 and 2. Paragraphs 1 and 2 are factual averments of the respondent.

<sup>6</sup> Petitioner does not stipulate to the times indicated in any paragraph. The references to particular times are factual averments of the respondent.

- an immigration inspection area and customs inspection area.
5. Passengers must first proceed to the immigration inspection area. Petitioner cleared the immigration inspection area where his United States passport was stamped "admitted" by an Immigration Inspector.
  6. Petitioner then proceeded to the customs inspection area. After an initial interview with a Customs Inspector, petitioner was questioned further by Customs Inspectors in an interview room within the customs inspection area.
  7. Subsequently, while remaining in the same interview room, petitioner was interviewed by FBI agents. Petitioner's interview with the FBI agents began at approximately 3:15 P.M. (C.D.T.).
  8. At approximately 7:05 P.M. (C.D.T.), petitioner declined to continue the interview without the representation of an attorney.
  9. At approximately 7:35 P.M. (C.D.T.), while remaining in the same interview room, petitioner was presented with a grand jury subpoena in connection with grand jury proceedings in the Southern District of New York.
  10. At approximately 8:10 P.M. (C.D.T.), while remaining in the same interview room, petitioner was arrested by the interviewing agents pursuant to the material witness warrant that had been issued by the United States District Court for the Southern District of New York.
  11. After his arrest, petitioner was transferred to the custody of the United States Marshals Service for detention. The United States Marshals Service transported petitioner to New York City and incarcerated him in the Metropolitan Correctional Center, a civilian facility.
  12. On June 9, 2002, the district court vacated the material witness warrant and petitioner was transferred to military control.

*B. Procedural history*

On June 11, Padilla's counsel, claiming to act as his next friend, filed in the Southern District a habeas corpus petition under 28 U.S.C. § 2241. The petition, as amended, alleged that Padilla's military detention violates the Fourth, Fifth, and Sixth Amendments and the Suspension Clause, Art. I, § 9, cl. 2, of the United States Constitution. The amended petition named as respondents President Bush, Secretary Rumsfeld, and Melanie A. Marr,<sup>[7]</sup> Commander of the Consolidated Naval Brig.

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<sup>7</sup>Commander Marr has since been replaced by Commander C.T. Hanft.

The Government moved to dismiss, arguing that Commander Marr, as Padilla's immediate custodian, is the only proper respondent to his habeas petition, and that the District Court lacks jurisdiction over Commander Marr because she is located outside the Southern District. On the merits, the Government contended that the President has authority to detain Padilla militarily pursuant to the Commander in Chief Clause of the Constitution, Art. II, § 2, cl. 1, the congressional AUMF, and this Court's decision in *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 (1942).

The District Court issued its decision in December 2002. *Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564. The court held that the Secretary's "personal involvement" in Padilla's military custody renders him a proper respondent to Padilla's habeas petition, and that it can assert jurisdiction over the Secretary under New York's long-arm statute, notwithstanding his absence from the Southern District. *Id.*, at 581-587. On the merits, however, the court accepted the Government's contention that the President has authority to detain as enemy combatants citizens captured on American soil during a time of war. *Id.*, at 587-599.

The Court of Appeals for the Second Circuit reversed. 352 F.3d 695 (2003). The court agreed with the District Court that Secretary Rumsfeld is a proper respondent, reasoning that in cases where the habeas petitioner is detained for "other than federal criminal violations, the Supreme Court has recognized exceptions to the general practice of naming the immediate physical custodian as respondent." *Id.*, at 704-708. The Court of Appeals concluded that on these "unique" facts Secretary Rumsfeld is Padilla's custodian because he exercises "the legal reality of control" over Padilla and because he was personally involved in Padilla's military detention. *Id.*, at 707-708. The Court of Appeals also affirmed the District Court's holding that it has jurisdiction over the Secretary under New York's long-arm statute. *Id.*, at 708-710.

Reaching the merits, the Court of Appeals held that the President lacks authority to detain Padilla militarily. *Id.*, at 710-724. The court concluded that neither the President's Commander-in-Chief power nor the AUMF authorizes military detentions of American citizens captured on American soil. *Id.*, at 712-718, 722-723. To the contrary, the Court of Appeals found in both our case law and in the Non-Detention Act, 18 U.S.C. § 4001(a), a strong presumption against domestic military detention of citizens absent explicit

congressional authorization. 352 F.3d, at 710-722. Accordingly, the court granted the writ of habeas corpus and directed the Secretary to release Padilla from military custody within 30 days. *Id.*, at 724.

[The United States Supreme Court] granted the Government's petition for certiorari to review the Court of Appeals' rulings with respect to the jurisdictional and the merits issues, both of which raise[d] important questions of federal law. 540 U.S. ----, 124 S.Ct. 1353, 157 L.Ed.2d 1226 (2004).

*Padilla*, 124 S.Ct. at 2716-17 (footnotes omitted).

On June 28, 2004, the Supreme Court ruled “[t]he District of South Carolina, not the Southern District of New York, was the district court in which Padilla should have brought his habeas petition. We therefore reverse the judgment of the Court of Appeals and remand the case for entry of an order of dismissal without prejudice.” *Id.* at 2727.

This case was commenced on July 2, 2004, with the filing of the petition discussed herein. Respondent filed his Answer on August 30, 2004.

On October 20, 2004, Petitioner filed a Motion for Summary Judgment to Counts One and Two of his Petition, as well as his Memorandum of Law in Support of the Motion (Petitioner's Motion). The parties jointly submitted their Stipulations of Fact on the same day. Subsequently, on November 22, 2004, Respondent filed his Opposition to Petitioner's Motion (Respondent's Opposition). Petitioner filed a Reply to Respondent's Opposition on December 13, 2004. Oral arguments were held on January 5, 2005. The case is now ripe for adjudication.

### **III. STANDARD OF REVIEW**

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law." The moving party bears this initial burden of informing the Court of the basis for its motions, and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Court reviews the record by drawing all inferences most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654 (1962)).

"Once the moving party carries its burden, the adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The adverse party must show more than "some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. If an adverse party completely fails to make an offer of proof concerning an essential element of that party's case on which that party will bear the burden of proof, then all other facts are necessarily rendered immaterial and the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 322-23. Hence, the granting of summary judgment involves a three-tier analysis. First, the Court determines whether a genuine issue actually exists so as to necessitate a trial. FED. R. CIV. P. 56(e). An issue is genuine "if the evidence is such that a reasonable [trier of fact] could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Second, the Court must ascertain whether that genuine issue pertains to material facts. FED. R. CIV. P. 56(e). The substantial law of the case identifies the material facts, that is, those facts that potentially affect the outcome of the suit. *Anderson*, 477 U.S. at 248. Third, assuming no genuine issue exists as to the material facts, the Court will decide whether the moving party shall prevail solely as a matter of law. FED. R. CIV. P. 56(e).

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327. The primary issue is whether the material facts present a sufficient disagreement as to require a trial, or whether the facts are sufficiently one-sided that one party should prevail as a matter of law. *Anderson*, 477 U.S. at 251-52. The substantive law of the case identifies which facts are material. *Id.* at 248. Only disputed facts potentially affecting the outcome of the suit under the substantive law preclude the entry of summary judgment.

#### **IV. CONTENTIONS OF THE PARTIES**

Petitioner maintains that Congress has not authorized the indefinite detention without trial of citizens arrested in the United States. He also argues that the President's inherent constitutional powers do not allow him to subject United States citizens who are arrested in the United States to indefinite military detention.

Conversely, respondent contends that the President has the constitutional authority to detain Petitioner as an enemy combatant without charging him criminally. Furthermore, according to Respondent, the Non-Detention Act, 18 U.S.C. § 4001(a), does not constrain the President's authority to detain Petitioner as an enemy combatant.

## V. DISCUSSION

### A. Three Supreme Court cases

Respondent maintains that the decisions of the Supreme Court in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004) and *Quirin*, 317 U.S. 1 “reaffirm the military’s long-settled authority--independent of and distinct from the criminal process--to detain enemy combatants for the duration of a given armed conflict, including the current conflict against al Qaeda.” Respondent’s Opposition at 8. According to Respondent, “[t]hose decisions squarely apply to this case.” *Id.* Petitioner, on the other hand, maintains that *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866) is controlling. The Court will consider each case in turn.

#### 1. *Hamdi*

The petitioner in *Hamdi* was an American citizen captured while on the battlefield in Afghanistan. In that case, the Supreme Court had before it the threshold question of “whether the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’” *Hamdi*, 124 S.Ct. at 2639.

While the Court noted that there was some debate and no full exposition by the Government of the proper scope of the term “enemy combatant,” it was clear in *Hamdi* that, the “enemy combatant that [the Government was] seeking to detain [was] an individual who, it allege[d], was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Hamdi*, 124 S.Ct. at 2639 (internal quotation marks and citations omitted). The Court also noted that, “the basis asserted for detention by the military is that Hamdi was *carrying a weapon against American troops on a foreign battlefield*; that is, that he was an enemy combatant.” *Id.* at 2642 n.1 (emphasis added).

Against this backdrop, the Supreme Court found that authority existed to detain Mr. Hamdi.

The Court reasoned,

[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant. . . . A citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," Brief for Respondents 3; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention *in the narrow circumstances considered here.*

*Hamdi*, 124 S.Ct. at 2640-41 (emphasis added).

Thus, it is true that, under some circumstances, such as those present in *Hamdi*, the President can indeed hold an United States citizen as an enemy combatant. Just because something is sometimes true, however, does not mean that it is always true. The facts in this action bear out that truth.

In the instant case, Respondent would have this Court find more similarities between Petitioner here and the petitioner in *Hamdi* than actually exist. As two other courts have already found, however, the differences between the two are striking.

The first to distinguish the difference was Judge Wilkinson when he noted that "[t]o compare this battlefield capture [in *Hamdi*] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges." *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring).

Not long thereafter, the Supreme Court, in responding to Justice Scalia's dissent, specifically noted

"Justice Scalia largely ignores the context of [*Hamdi*]: a United States citizen captured in a *foreign combat zone*." *Hamdi*, 124 S.Ct at 2643 (emphasis in original).<sup>8</sup>

Nevertheless, Respondent would have the Court find that the place of capture is of no consequence in determining whether the President can properly hold Petitioner as an enemy combatant. According to that view, it would be illogical to find that Petitioner could evade his detention as an enemy combatant status just because he returned to the United States before he could be captured. The cogency of this argument eludes the Court.

In *Hamdi*, the petitioner was an American citizen who was captured on the battlefield. Petitioner is also an American citizen, but he was captured in an United States airport. He is, in some respects, being held for a crime that he is alleged to have planned to commit in this country.<sup>9</sup>

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<sup>8</sup>In fact, in the plurality opinion, Justice O'Connor noted at least nine additional times that the Court's holding that Mr. Hamdi's detention as an enemy combatant was constitutionally permissible was limited to the facts of that case. *Id.* at 2635 ("Congress authorized the detention of combatants in the *narrow circumstances* alleged here.") (emphasis added); *Id.* at 2639 ("We therefore answer only the *narrow question* before us.") (emphasis added); *Id.* at 2639-40 ("[W]e conclude that the AUMF is explicit congressional authorization for the detention of individuals in the *narrow category* we describe.") (emphasis added); *Id.* at 2640 ("We conclude that the detention of individuals falling within the *limited category* we are considering . . . is an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.") (emphasis added); *Id.* at 2641 ("Congress has clearly and unmistakably authorized detention in the *narrow circumstances* considered here.") (emphasis added); *Id.* at 2642 ("*Ex parte Milligan* . . . does not undermine our holding about the Government's authority to seize enemy combatants, *as we define that term today*.") (emphasis added); *Id.* at 2642 n.1 ("Here the basis asserted for detention by the military is that Hamdi was *carrying a weapon against American troops on a foreign battlefield*; that is, that he was an enemy combatant.") (emphasis added); *Id.* at 2643 (noting with disapproval that "Justice Scalia finds the *fact of battlefield capture* irrelevant . . .") (emphasis added); *Id.* ("Justice Scalia can point to no case or other authority for the proposition that those *captured on a foreign battlefield* . . . cannot be detained outside the criminal process.") (emphasis added).

<sup>9</sup>The Court finds Respondent's argument concerning whether Petitioner had actually entered the country unavailing. Respondent has not provided, and this Court has not found, any case law that supports Respondent's position that an United States citizen, is not "in" the United

No one could rightfully argue that “[t]he exigencies of military action on the battlefield present an entirely different set of circumstances than the arrest of a citizen arriving at O’Hare International Airport.” Brief of *Amici Curiae* Janet Reno et al. at 5, *Padilla*, 124 S.Ct. 2711 (No. 03-1027).

It cannot be disputed that the circumstances in *Hamdi* comport with the requirement of the AUMF, which provides that “the President is authorized to use all *necessary and appropriate force* against those . . . persons, in order to prevent attacks by al Qaeda on the United States.” That is, the President’s use of force to capture Mr. Hamdi was necessary and appropriate. Here, that same use of force was not.

Again, Petitioner in this action was captured in the United States. His alleged terrorist plans were thwarted at the time of his arrest. There were no impediments whatsoever to the Government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing. Also at the Government’s disposal was the material witness warrant. In fact, the issuance of a material witness warrant was the tool that the law enforcement officers used to thwart Petitioner’s alleged terrorist plans. Therefore, since Petitioner’s alleged terrorist plans were thwarted when he was arrested on the material witness warrant, the Court finds that the President’s subsequent decision to detain Petitioner as an enemy combatant was neither necessary nor appropriate. As accurately observed by counsel for Petitioner,

[i]t’s not necessary because the criminal justice system provides for the detention power. Nothing makes that clearer than the facts of this case. There was a warrant issued from a grand jury for Mr. Padilla’s arrest. Mr. Padilla was arrested by law enforcement officials, civilian law enforcement officials. He was brought before a civilian judge. He was imprisoned in a civilian facility in New York. Everything

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States when he or she is “in” a United States airport. Such a failure is fatal to the claim.

occurred according to the civilian process in the way it is supposed to. And it's not only not necessary, but not appropriate. It's not appropriate because it directly conflicts with the limits on detention that [C]ongress has set by statute and the limits that the framers set on presidential power.

Transcript of January 5, 2005 hearing at 5:6-5:17.

2. *Quirin*

*Quirin* involves the *habeas* petitions of seven German soldiers, all of whom had lived in the United States at some point in their lives. The soldiers came to the United States bent on engaging in military sabotage. One of the seven, Haupt, claimed to be an American citizen.

In denying the soldiers' petitions, the Supreme Court held that "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." *Id.* at 37.

Respondent maintains that that *Quirin* is wholly on point and, thus, for purposes of this motion, is controlling. The Court is unconvinced.

Although seemingly similar to the instant case, it is, in fact, like *Hamdi*, starkly different. As the Second Circuit has already noted, "the *Quirin* Court's decision to uphold military jurisdiction rested on the express congressional authorization of the use of military tribunals to try combatants who violated the law." *Hamdi*, 352 F.3d 695, 715-16.

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules

and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

*Quirin*, 317 U.S. at 27-28 (footnote omitted).

Respondent goes to great lengths to argue that the Court in *Quirin* did not rest its decision on a "clear statement from Congress." Respondent's Opposition at 22. The Court is unconvinced.

Contrary to Respondent's argument, it is clear from *Quirin* that the Court found that Congress had "explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases." *Id.* at 28. Therefore, since no such Congressional authorization is present here, Respondent's argument as to the application of *Quirin* must fail.<sup>10</sup>

### 3. *Ex parte Milligan*

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

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<sup>10</sup>Other differences include, but are not limited to, the fact that:

- 1) In *Quirin*, Mr. Quirin was charged with a crime and tried by a military tribunal. In the instant case, Petitioner has not been charged and has not been tried.
- 2) *Quirin* involves a prisoner whose detention was punitive whereas Petitioner's detention is purportedly preventative.
- 3) *Quirin* is concerned more with whether the petitioner was going to be tried by a military tribunal or a civilian court. The case at bar is concerned with whether Petitioner is going to be charged and tried at all.
- 4) The decision in *Quirin* preceded the Non-Detention Act.
- 5) *Quirin* involved a war that had a definite ending date. The present war on terrorism does not.

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. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence.

*Id.* at 12-21.

*Ex parte Milligan* involves a United States citizen during the Civil War who was neither a resident of one of the Confederate states, nor a prisoner of war, but a citizen of Indiana for twenty years. He had never been in the military or naval service. Milligan was arrested while at home.

The Court held in *Milligan* that the military commission lacked any jurisdiction to try Milligan when the civilian "courts are open and their process unobstructed." *Id.* at 121. The President may not unilaterally establish military commissions in wartime "because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws." *Id.* at 121.<sup>11</sup>

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<sup>11</sup>The court in *Hamdi*, 124 S.Ct. at 2642, observed, however, that the *Milligan* court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.

(citation and footnote omitted).

While not directly on point, and limited by *Quirin*, *Milligan's* greatest import to the case at bar is the same as that found in *Quirin*: the detention of a United States citizen by the military is disallowed without explicit Congressional authorization.

B. *The Non-Detention Act, 18 U.S.C. § 4001(a)*

The Non-Detention Act, also referred to as the "Railsback Amendment," after its author Representative Railsback, provides that "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a).

Respondent asserts that the Non-Detention Act does not constrain the President's authority to detain Petitioner as an enemy combatant. He contends that 1) the Joint Resolution for Authorization for Use of Military Force (AUMF), passed by Congress on September 18, 2001, is an "Act of Congress" authorizing Petitioner's detention and 2) the Non-Detention Act does not apply to the military's detention of the military's wartime detention of enemy combatants to fulfill this statute. The Court finds these contentions to be without merit.

1. *Authorization*

The AUMF provides, in relevant part, that

[t]he 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. Joint Resolution § 2(a) (emphasis added).

When interpreting a statute, this Court begins "where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In clear and unambiguous language, the Non-Detention Act forbids *any* kind of detention of an

United States citizen, except that which is specifically allowed by Congress. *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) ("[T]he plain language of § 4001(a) proscrib[es] detention of *any kind* by the United States, absent a congressional grant of authority to detain.") (emphasis in original). Contrary to Respondent's contentions otherwise, the Court finds that 1) the AUMF does not authorize Petitioner's detention and 2) Petitioner's present confinement is in direct contradiction to the mandate of the Non-Detention Act.

As the Second Circuit stated,

While it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the Joint Resolution that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not arrayed against our troops in the field of battle.

*Padilla*, 352 F.3d at 723 (internal quotation marks and citation omitted).

To be more specific, whereas it may be a necessary and appropriate use of force to detain a United States citizen who is captured on the battlefield, this Court cannot find, in narrow circumstances presented in this case, that the same is true when a United States citizen is arrested in a civilian setting such as an United States airport.

In sum, "[i]n interpreting a war-time measure we must assume that [the purpose of Congress and the Executive] was to allow for the greatest possible accommodation between those liberties and the exigencies of war." *Ex parte Endo*, 323 U.S. 283, 300 (1944). "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.* In the case *sub judice*, there is no language in the AUMF that "clearly and

“unmistakably” grants the President the authority to hold Petitioner as an enemy combatant.

Therefore, Respondent’s argument must fail.<sup>12</sup>

Respondent next argues that,

Even if there were any doubt about whether the AUMF encompasses combatants seized within the United States, such doubt would be resolved in favor of the President’s determination that Congress did in fact authorize petitioner’s detention. President’s Order, Preamble (declaring that petitioner’s detention is “consistent with the laws of the United States, including the Authorization for Use of Military Force”).

Respondent’s Opposition at 26.

Certainly Respondent does not intend to argue here that, just because the President states that Petitioner’s detention is “consistent with the laws of the United States, including the Authorization for Use of Military Force” that makes it so. Not only is such a statement in direct contravention to the well settled separation of powers doctrine, it is simply not the law. Moreover, such a statement is deeply troubling. If such a position were ever adopted by the courts, it would totally eviscerate the limits placed on Presidential authority to protect the citizenry’s individual liberties.

## 2. *Application to wartime detention*

In arguing that the Non-Detention Act has no application to Petitioner, Respondent first maintains that the placement the Act – in Title 18 (“Crimes and Criminal Procedure”), with directions regarding the Attorney General’s control over federal prisons, and not in Title 10 (“Armed Forces”) or Title 50 (“War and National Defense”) – indicates that it speaks only to civilian detentions. Second, Respondent argues that the legislative history of the Non-Detention Act renders the same result. The Court is unpersuaded by either argument. Simply stated, the statute is clear,

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<sup>12</sup>To the extent that Respondent maintains that the Non-Detention Act was impliedly repealed by the AUMF, the Court rejects the argument. It is black letter law that repeal of a statute by implication is strongly disfavored in the law.

simple, direct and ambiguous. It forbids *any* kind of detention of an United States citizen, except that it be specifically allowed by Congress. Therefore, since Petitioner's detention has not been authorized by Congress, Respondent's argument must again fail.

### C. Inherent authority

Having found that the Non-Detention Act expressly forbids the President from holding Petitioner as an enemy combatant, and that the AUMF does not authorize such detention, neither explicitly nor by implication, the Court turns to the question of whether the President has the inherent authority to hold Petitioner.

Respondent states that

The Commander-in-Chief Clause grants the President the power to defend the Nation when it is attacked, and he "is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). An essential aspect of the President's authority in this regard is to "determine what degree of force the crisis demands." *Id.* at 670; see *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir.) (Silberman, J., concurring) ("[T]he President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."), cert. denied, 531 U.S. 815 (2000). The President's decision to detain petitioner as an enemy combatant represents a basic exercise of his authority as Commander in Chief to determine the level of force needed to prosecute the conflict against al Qaeda.

Respondent's Opposition at 10.

As a preliminary matter, the Court strongly agrees that "great deference is afforded the President's exercise of his authority as Commander-in-Chief." *Hamdi*, 352 F.3d at 712 (internal citation omitted). However, "[w]here the exercise of Commander-in-Chief powers, no matter how well intentioned, is challenged on the ground that it collides with the powers assigned by the Constitution to Congress, a fundamental role exists for the courts." *Hamdi*, 352 F.3d at 713 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)).

Pursuant to the seminal case of *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), in a case such as this, where the President has taken steps that are inconsistent with the will of Congress – both express and implied – the President's authority is “at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Youngstown*, 343 U.S. at 637.

Simply stated, Respondent has not provided, and this Court has not found, any law that supports the contention that the President enjoys the inherent authority pursuant to which he claims to hold Petitioner. The *Prize* cases are chiefly concerned with enemy property, not enemy combatants, and *Campbell* concerns air strikes in another country. Obviously, neither of those issues are present here. Thus, the Court finds the two cases of little guidance.

As Justice Jackson stated, “Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.” *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). “There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute [the President] also Commander-in-Chief of the country, its industries and its inhabitants. *Id.* at 643-44.

Accordingly, and limited to the facts of this case, the Court is of the firm opinion that it must reject the position posited by Respondent. To do otherwise would not only offend the rule of law and violate this country’s constitutional tradition, but it would also be a betrayal of this Nation’s commitment to the separation of powers that safeguards our democratic values and individual liberties.

For the Court to find for Respondent would also be to engage in judicial activism. This Court sits to interpret the law as it is and not as the Court might wish it to be. Pursuant to its interpretation,

the Court finds that the President has no power, neither express nor implied, neither constitutional nor statutory, to hold Petitioner as an enemy combatant.

*D. Other matters and concerns*

*1. A law enforcement matter*

It is true that there may be times during which it is necessary to give the Executive Branch greater power than at other times. Such a granting of power, however, is in the province of the legislature and no one else – not the Court and not the President. “The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times.” *Youngstown*, 343 U.S. at 589. “[A] state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” *Hamdi*, 124 S.Ct. at 2650 (internal citation omitted).

Simply stated, this is a law enforcement matter, not a military matter. The civilian authorities captured Petitioner just as they should have. At the time that Petitioner was arrested pursuant to the material arrest warrant, any alleged terrorist plans that he harbored were thwarted. From then on, he was available to be questioned –and was indeed questioned – just like any other citizen accused of criminal conduct. This is as it should be.

There can be no debate that this country’s laws amply provide for the investigation, detention and prosecution of citizen and non-citizen terrorists alike. For example, in his dissenting opinion in *Hamdi*, 124 S.Ct. at 2664, Justice Scalia lists the following criminal statutes that are available to the Government in fighting terrorism: 18 U.S.C. § 2381 (the modern treason statute which essentially tracks the language of the constitutional provision); 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities); 18 U.S.C. § 2332a (use of weapons of mass destruction); 18 U.S.C. § 2332b (acts of terrorism transcending national boundaries); 18 U.S.C. § 2339A (providing material support to terrorists); 18 U.S.C. § 2339B (providing material support to certain terrorist organizations); 18

U.S.C. § 2382 (misprision of treason); 18 U.S.C. § 2383 (rebellion or insurrection); § 2384 (seditious conspiracy); 18 U.S.C. § 2390 (enlistment to serve in armed hostility against the United States); 31 CFR § 595.204 (2003) (prohibiting the “making or receiving of any contribution of funds, goods, or services” to terrorists); and 50 U.S.C. § 1705(b) (criminalizing violations of 31 CFR § 595.204). In his concurrence, in addition to these statutes, Justice Souter lists 18 U.S.C. § 3142(e) (pretrial detention). *Id.* at 2657.<sup>13</sup>

[I]n declaring Padilla an enemy combatant, the President relied upon facts that would have supported charging Padilla with a variety of offenses. The government thus had the authority to arrest, detain, interrogate, and prosecute Padilla apart from the extraordinary authority it claims here. The difference between invocation of the criminal process and the power claimed by the President here, however, is one of accountability. The criminal justice system requires that defendants and witnesses be afforded access to counsel, imposes judicial supervision over government action, and places congressionally imposed limits on incarceration.

*Amici Curiae* at 3.

## 2. *Suspension of the writ of habeas corpus*

“The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Const. Art. 1, § 9, cl. 2. This power belongs solely to Congress. Since Congress has not acted to suspend the writ, and neither the President nor this Court have the ability to do so, in light of the findings above, Petitioner must be released.

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<sup>13</sup>As for concerns about national security during the judicial process, it is axiomatic that the government has a legitimate interest in the protection of the classified information that may be necessarily be used in the prosecution of an alleged terrorist such as Petitioner. This Court is of the firm opinion, however, that federal law provides robust protection of any such information. E.g. The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III.

3. *Other measures*

If the law in its current state is found by the President to be insufficient to protect this country from terrorist plots, such as the one alleged here, then the President should prevail upon Congress to remedy the problem. For instance, if the Government's purpose in detaining Petitioner as an enemy combatant is to prevent him from "returning to the field of battle and taking up arms once again[.]" *Hamdi*, 124 S.Ct at 2640, but the President thinks that the laws do not provide the necessary and appropriate measures to provide for that goal, then the President should approach Congress and request that it make proper modifications to the law. As Congress has already demonstrated, it stands ready to carefully consider, and often accomodate, such significant requests.

**VI. CONCLUSION**

Accordingly, in light of the foregoing discussion and analysis, it is the judgment of this Court that Petitioner's Motion for Summary Judgment on Counts One and Two of the Petition, as well as his Petition for a writ of *habeas corpus* must be **GRANTED**. Accordingly, Respondent is hereby directed to release Petitioner from his custody within forty-five (45) days of the entry of this Order.<sup>14</sup>

**IT IS SO ORDERED.**

Signed this 28th day of February, 2005, in Spartanburg, South Carolina.

s/ Henry F. Floyd  
HENRY F. FLOYD  
UNITED STATES DISTRICT JUDGE

<sup>14</sup>Of course, if appropriate, the Government can bring criminal charges against Petitioner or it can hold him as a material witness.

AO450 - Judgment in a Civil Case

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

Jose Padilla,

Petitioner

JUDGMENT IN A CIVIL CASE

Case Number: 2:04-2221-26AJ

vs.

Commander C. T. Hanft,  
U.S.N. Commander, Consolidated  
Naval Brig,

Respondent

**Decision by Court.** This action came to hearing before the Court, the Honorable Henry F. Floyd, United States District Judge, presiding. The court having granted the petitioner's motion for summary judgment as to Counts One and Two in his Petition for Writ of Habeas Corpus which was filed pursuant to 28 United States Code, Section 2241.

**IT IS ORDERED AND ADJUDGED** that Summary Judgment is entered for Jose Padilla, the petitioner, as to Counts One and Two in his Habeas Corpus Petition; Counts Three and Four are moot.

**IT IS FURTHER ORDERED AND ADJUDGED** that the respondent release the petitioner from custody within forty-five (45) days of the Court's order, document number 48, which was entered on February 28, 2005.

LARRY W. PROPES, Clerk

By s/Susan K. Sanders  
Deputy Clerk

March 4, 2005

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

Jose Padilla,	)	
	)	
Petitioner	)	
	)	
v.	)	C/A No. 02:04-2221-26AJ
	)	
Commander C.T. Hanft,	)	NOTICE OF APPEAL
U.S.N. Commander,	)	
Consolidated Naval Brig,	)	
	)	
Respondent	)	
	)	

Notice is hereby given that the Respondent, above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Summary Judgment Order of The Honorable Henry F. Floyd, United States District Court Judge, entered in this case on the 28th day of February 2005.

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March 11, 2005



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

JOSE PADILLA,

Petitioner,

vs.

CIVIL ACTION NO. 2:04-2221-26AJ

COMMANDER C.T. HANFT,

USN Commander, Consolidated Naval Brig,  
Respondent.

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AMENDED ORDER GRANTING RESPONDENT'S MOTION TO STAY PENDING APPEAL

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This is a 28 U.S.C. § 2241 *habeas corpus* action. The Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1331.

Pending before the Court is Respondent's Motion for Stay Pending Appeal. In determining whether such a stay is appropriate, the Court is required to balance the following four factors: 1) whether the movant has made a strong showing that he is likely to prevail on the merits of the case, 2) whether the movant will be irreparably injured absent a stay, 3) whether issuance of the stay will substantially injure the non-movant, and 4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

Although this Court is of the firm opinion that Respondent will not ultimately succeed on the merits, it is, nevertheless, mindful that this case presents novel issues that need to be addressed by the appellate courts. Serious and complex issues of law are involved in the case. Moreover, the Court is aware that reasonable jurists who have been presented with similar issues as to the ones presented in the instant action have reached a different conclusion than did this Court. Therefore, as to this factor, Respondent is given the benefit of the doubt.

The Court is not convinced that either party will be irreparably, substantially, or significantly injured whether the stay is granted or denied. That is, since Petitioner will likely remain incarcerated in the short term, whether by the military or by civilian authorities, this Court cannot find that 1) Respondent will be irreparably injured if the Motion to Stay is denied or 2) Petitioner's continued incarceration in military custody, as opposed to civilian custody, will substantially injure Petitioner.<sup>1</sup> Accordingly, these factors fail to tip the scales in either party's favor.

As to the public interest factor, the Court is of the opinion that this factor does not shift the balance in either party's favor either. It is in the public interest that Petitioner, an United States citizen who was captured in the United States, not be illegally detained.<sup>2</sup> It is also true, however, that the President acts with the public interest in mind in matters such as these and matters of national security are in the public interest.

Accordingly, having carefully considered Respondent's Motion, Petitioner's Opposition, the record, and the applicable law, in light of the novel issues presented here, the Court is of the opinion that Respondent's Motion must be GRANTED.

**IT IS SO ORDERED.**

Signed this 11<sup>th</sup> day of April, 2005 in Spartanburg, South Carolina.

s/ Henry F. Floyd  
HENRY F. FLOYD  
UNITED STATES DISTRICT JUDGE

<sup>1</sup>This finding is based on the Court's assumption that the case will proceed quickly through the appellate courts.

<sup>2</sup>In its Memorandum Opinion and Order, dated, February 28, 2005, this Court found that, *limited to the facts of this case*, Petitioner, an United States citizen who was captured in the United States, cannot be lawfully held as an enemy combatant.

## CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that the foregoing Joint Appendix was this day delivered by overnight mail to the Clerk of the Court and to counsel for the petitioner-appellee, Jose Padilla, at the following addresses:

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