UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Jose Padilla, Petitioner, vs. **Commander C. T. Hanft**, USN Commander, Consolidated Naval Brig. Respondent	**C/A No. 2:04-2221-26AJ** **PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT WITH ATTACHED APPENDIX**

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MISCELLANEOUS

Petitioner Jose Padilla's motion for summary judgment should be granted because neither the Constitution nor any statute grants the Executive branch the authority to detain, without criminal charge, an American citizen seized in a civilian setting on American soil as an "enemy combatant." Accordingly, petitioner is entitled to judgment as a matter of law even if all of the facts pleaded by the Executive branch are assumed to be true. See Fed. R. Civ. Proc. 56(c).

Statement of Material Facts

Since June 9, 2002, Jose Padilla – an American citizen born in Brooklyn, New York – has been held in solitary confinement in a military prison. He has not been charged with any crime or violation of the law of war. For almost two years, Padilla was denied any contact with a lawyer, his family, or non-military personnel. Even now, the Government claims the discretionary power to restrict his communications with his lawyers and family. The Government claims that it can hold Padilla under these conditions at its discretion or until the unforeseeable end of the "war on terrorism."

Padilla was not captured in combat. He was not captured on an overseas battlefield. To the contrary, his initial seizure occurred in an ordinary civilian context: civilian law enforcement agents arrested Padilla pursuant to a court-issued material witness warrant following his arrival via a regularly scheduled commercial airliner at Chicago O'Hare Airport on May 8, 2002. Padilla had already passed the immigration checkpoint and been admitted to the United States as a returning citizen before he was pulled aside in the customs inspection area. *See* Stipulations of Fact (filed concurrently with this motion). At the time of his arrest, Padilla was wearing civilian clothing and carrying a valid United States passport. Exhibit A. He had no weapons or explosives. *Id.*

After his arrest, the Government brought Padilla to New York, where the grand jury that had issued the material witness warrant was convened. The district court appointed counsel, and Padilla was allowed communications with his lawyer. Two days before the scheduled district court hearing on the motion to quash the warrant, the ordinary procedures by which the Government had operated and under which Padilla had been arrested were swept aside. The President, claiming the power to detain citizens seized in civilian settings in the United States without charge, signed an order declaring Padilla an "enemy combatant" whom the Government believed to be "associated" with al Qaeda. Order of June 9, 2002 (Exhibit B). Pursuant to this order, agents of the Department of Defense seized Padilla from the maximum security civilian detention facility where he was being held and transported him to a military brig in South Carolina. In the two and a half years since he was seized from his jail cell by the military, Padilla has never been charged with a crime. Nor has Congress authorized a new regime of domestic detention without charge by suspending the writ of habeas corpus or other legislative action.

These are the only facts relevant to this motion. To be sure, the Government has alleged other facts – allegations about where it believes Padilla traveled, to whom he spoke, what he planned. But while those allegations would matter in a factual dispute over whether Padilla is what the Government claims he is, they are irrelevant in the legal dispute over whether the President has the power to detain, indefinitely and without charge, unarmed citizens seized in civilian settings in the United States.[1]

[1] For the sake of clarity, Petitioner reiterates that he reserves his right to seek discovery and to dispute each and every one of the Government's factual allegations against him. The parties have agreed to have the threshold legal issue of the President's authority decided now because it may materially advance the termination of the case and allow this court to avoid ruling on many difficult procedural and evidentiary issues of constitutional dimension. Petitioner also notes, as

Procedural History

Donna R. Newman, the attorney appointed to represent Padilla in the material witness proceeding, filed a writ of habeas corpus seeking Padilla's immediate release from military custody at the district court hearing previously scheduled to hear argument on the motion to quash the material witness warrant. Following briefing, Chief Judge Mukasey of the U.S. District Court for the Southern District of New York ruled that the President had authority to detain without charge persons seized in the U.S. as "enemy combatants," but rejected the Government's argument that Padilla could be held indefinitely without access to counsel or a meaningful hearing. Instead, the court concluded that Padilla was entitled to present facts to rebut the claim that he was an "enemy combatant" and that he was entitled to speak to his lawyers. Claiming that such proceedings would pose a threat to national security, the Government sought a stay and took an immediate interlocutory appeal.

The U. S. Court of Appeals for the Second Circuit held that the President had no constitutional or statutory authority to detain Padilla as an "enemy combatant." *Padilla v. Rumsfeld*, 352 F.3d 695 (2003). The court held that the Constitution – via the Habeas Suspension Clause and other provisions – vests Congress rather than the President with the power to authorize domestic detentions in times of war as well as peace. *Id.* at 715. The court stated that "express congressional authorization" is required before the military may imprison an

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he did in his Reply, that the sole support for the factual averments in the Government's Answer is an affidavit that appears to be based entirely on hearsay "evidence" that was obtained in an illegal, possibly criminal, manner. *See, e.g.,* David Johnston & James Risen, "Aides Say Memo Backed Coercion for Qaeda Cases," *N.Y. Times* (June 27, 2004) (reporting that government officials had acknowledged possible torture during interrogation of Khalid Shaikh Mohammed and others). Petitioner believes this "evidence" is both unreliable and inadmissible in federal court. Finally, Petitioner again points out the constantly shifting nature of the Government's allegations against him and notes that at some point equitable principles of estoppel must prevent the Government from changing its story about the alleged grounds for his detention. *See* Reply at 3 n.2.

American citizen seized on American soil outside a zone of combat. *Id.*; *see also id.* at 352 F.3d at 699 (stating that "clear" Congressional authorization required). Finally, the court concluded that Congress had not provided the necessary clear and express authority for domestic detentions in the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), or any other statute. *Id.* at 722-24. The court thus ruled that Padilla must be charged with a crime, held as a material witness, or released. *Id.* at 724.

The U.S. Supreme Court granted the Government's petition for a writ of certiorari. The Court reversed the Second Circuit on other grounds, holding that the suit should have proceeded in South Carolina rather than New York; neither the majority opinion nor a separate concurrence on the jurisdictional issue addressed the merits. *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2715 (2004); *id.* at 2727 (Kennedy, J., concurring). Four dissenting justices believed that jurisdiction was proper in New York. *Id.* at 2729, 2730 (Stevens, J., dissenting). On the merits, the dissent observed that "[a]t stake in this case is nothing less than the essence of a free society," *id.* at 2735, and expressed the view that "[c]onsistent with the judgment of the Court of Appeals . . . the Non-Detention Act, 18 U.S.C. § 4001(a), prohibits – and the Authorization for Use of Military Force Joint Resolution . . . does not authorize – the protracted, incommunicado detention of American citizens arrested in the United States." *Id.*[2]

Summary of Argument

The Executive in this case seeks to validate an unprecedented system of military imprisonment of U.S. citizens in the U.S. based on suspicion that they are enemies of the state. It seeks to do so contrary to two centuries of American constitutional tradition and absent any

[2] Justices Souter, Ginsburg and Breyer joined Justice Stevens' dissent in its entirety, without any reservation as to this footnote or any other aspect of the dissent.

authorization by Congress defining the permissible scope and duration of such extraordinary imprisonments. When the Supreme Court opinions in *Padilla* and *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), are read together, it is clear that at least five members of the Supreme Court believe the President has *no authority* to order the indefinite military detention without criminal charge of citizens arrested in the United States. This court should grant the writ of habeas corpus and hold – as the Second Circuit did and as it appears that five members of the Supreme Court would have held had they reached the merits of the case – that Padilla must be immediately released from military custody, leaving the government to decide whether to press criminal charges or not.

Contrary to the government's assertion, there is no statutory authorization for the indefinite detention of U.S. citizens seized on U.S. soil. Neither the AUMF nor any other act of Congress provides the President with such extraordinary power. Throughout the Nation's history, the Supreme Court has always required clear and specific Congressional authorization for detention of citizens. *See, e.g., Ex parte Endo*, 323 U.S. 283, 300 (1944). This fact alone renders inapposite the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), which rested on clear and explicit Congressional authorization of trials by military commissions – authorization that was separate and distinct from the general authorization to use force in the declaration of war against Germany. Moreover, Congress has underscored its intent to exercise the full scope of its constitutional power over detention by enacting a statute specifying that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *See* 18 U.S.C. § 4001(a). The legislative history demonstrates that § 4001(a) was designed to prevent the President from invoking vague powers to justify precisely the sort of national security detention at issue in this case.

The AUMF does not provide the clear and specific authorization for detention of citizens like Padilla that the Constitution and § 4001(a) demand. The AUMF is a straightforward authorization for the President to deploy American armed forces in combat, as he did in Afghanistan. In *Hamdi v. Rumsfeld*, the Supreme Court plurality read the AUMF to "clearly and unmistakably" authorize the detention of individuals captured on an overseas battlefield in Afghanistan because the detention of such traditional prisoners of war is a "fundamental incident of waging war." 124 S.Ct. 2633, 2641 (2004) (plurality op.).[3] But the *Hamdi* plurality was careful to limit its decision to the "narrow circumstances" presented in that case and not extend its finding of authorization beyond the context of conventional armed conflict. *Id.* There is no indication that the *Hamdi* plurality would have been willing to extend the President's military detention authority to citizens arrested in the United States – and indeed there is every indication that at least one of the members of the plurality most definitely would not. Justice Breyer, who joined the plurality opinion in *Hamdi*, also joined without reservation Justice Stevens' dissent in *Padilla*, which would have found that the AUMF does not authorize "the protracted, incommunicado detention of American citizens arrested in the United States." *Id.* at 2735 n.8 (Stevens, J., dissenting). Given that four justices in *Hamdi* – Scalia, Stevens, Souter and Ginsburg – believed the AUMF was insufficient even to support the detention of a U.S. citizen captured on a conventional battlefield overseas, it seems clear that at least five members of the

[3] The plurality opinion in *Hamdi* was authored by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Kennedy and Breyer. 124 S.Ct. at 2635. Justices Souter and Ginsburg dissented in part because they viewed the AUMF insufficient to authorize Hamdi's non-criminal detention, but concurred in the plurality's judgment that the Due Process Clause entitled Hamdi to a hearing. *Id.* at 2652. Justices Scalia, joined by Justice Stevens, dissented on the grounds that the Constitution forbids detention of citizens without charge absent a congressional suspension of habeas corpus. *Id.* at 2660. Justice Thomas dissented because he disagreed with the plurality's due process analysis. *Id.* at 2674.

Court – Stevens, Scalia, Souter, Ginsburg and Breyer – would have held Padilla's detention unlawful had the Court reached the merits in his case.

The indefinite military detention without charge of U.S. citizens arrested in civilian settings in the U.S. is very different from the overseas battlefield detentions the *Hamdi* Court found the AUMF to have authorized. *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (*en banc*) (Wilkinson, J., concurring) ("To compare [Hamdi's] battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges."). Far from being a fundamental incident of waging war, the indefinite military detention of citizens arrested in the United States based on suspected wrongdoing is entirely unprecedented in American history. As Justice Scalia noted in *Hamdi*, even "[w]here the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime." 124 S.Ct. at 2660 (Scalia, J., dissenting). There simply is no indication that by enacting the AUMF, Congress, without a single word of debate, intended to upset two centuries of constitutional tradition and create a novel system for the military detention of citizens in this country. Indeed, just a few weeks later, when it passed the PATRIOT Act, Congress vigorously debated a provision allowing the civilian detention without charge of suspected terrorist *aliens* for just *seven* days. It strains reason to believe that the same Congress that seriously deliberated over this far more limited provision in the PATRIOT Act had already implicitly authorized the detention of citizens for years at a time – without a single Member speaking one word of concern. In sum, the AUMF cannot plausibly be read to authorize detention of citizens arrested in the United States with the clarity and specificity that the Constitution and § 4001(a) require.

Because the AUMF does not authorize Padilla's military detention without trial, and § 4001(a) expressly prohibits it, the President's "power 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 Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see Padilla v. Rumsfeld*, 352 F.3d at 711. Two principles negate the possibility of inherent executive power to subject U.S. citizens arrested in civilian settings in the United States to indefinite military detention without charge. First, executive detention without criminal trial is extraordinarily disfavored in Anglo-American legal history, as exemplified by the Habeas Suspension Clause. U.S. Const., art. I, § 9, cl. 2. Second, the Framers of the Constitution sought to ensure that the military would remain subordinate to civilian government in domestic life. Both of these bedrock principles are left intact by the Supreme Court's decisions in *Hamdi* and *Quirin*, but would be fatally undermined were the novel presidential power asserted in this case upheld.

If the Government's position on inherent Executive power to detain citizens in wartime were accepted, it would mean that for the foreseeable future – as long as the U.S. faced a threat of international terrorism – any citizen, anywhere, and at any time could be subject to indefinite military detention with little congressional or judicial oversight. That would radically alter our constitutional system in a way that the legislatively authorized detentions of individuals captured on an overseas battlefield, as in *Hamdi*, or the trial by military commission of admitted German soldiers, as in *Quirin*, simply did not. The relaxed standards of evidence and proof that might be constitutionally tolerable in the case of an individual captured on an overseas battlefield are constitutionally intolerable when applied to citizens arrested in this country, for whom the process due under the Constitution has traditionally been criminal process. Equally important, the expansion of the laws of war far beyond their historical boundaries and internal limits to apply broadly to the "war on terrorism" would be a fundamentally legislative act, and not one

that could constitutionally be accomplished by executive fiat or judicial extension of prior case law. *See Youngstown*, 343 U.S. at 587 (Jackson, J., concurring) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *cf. Hamdi*, 124 S. Ct. at 2674 (Scalia, J., dissenting) ("If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires [in the Habeas Suspension Clause], rather than by silent erosion through an opinion of this Court."). In short, constitutional text, history, Supreme Court precedent, and common sense suggest that the President lacks the extraordinary power to deprive citizens of liberty that he claims in this case. Unless the President charges him with a crime or Congress suspends the writ of habeas corpus, Padilla must be released.

ARGUMENT

I. Congress Has Not Authorized the Indefinite Detention Without Trial of Citizens Arrested in the United States

This case implicates the gravest constitutional perils against which the Constitution's Framers sought to guard: executive imprisonment of citizens without criminal trial, the assertion of military power over civilians, and the accumulation of unchecked and unbalanced power in a single Branch of government.[4] In reviewing both deprivations of individual liberty and actions of dubious constitutionality, the Supreme Court consistently has required, at a minimum, clear and specific authority from Congress. Such authority is completely lacking in this case. The AUMF provides neither a suspension of habeas corpus, nor any other clear and specific support for the detention without trial of U.S. citizens arrested on U.S. soil.

[4] For a discussion of these constitutional issues, *see infra* Part II.

A. The Constitution Requires that Congress Speak Clearly When It Authorizes the Infringement of Citizens' Liberties

"In traditionally sensitive areas . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Georgia v. Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation omitted); *Greene v. McElroy*, 360 U.S. 474, 507 (1959) ("[E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws."). This "clear statement" requirement applies most forcefully in the context of the liberty protected by the Fifth Amendment. "Where the liberties of the citizen are involved . . . we will construe narrowly all delegated powers that curtail or dilute them." *Gutknecht v. United States*, 396 U.S. 295, 306-07 (1970) (citation omitted).

The clear statement rule does not disappear in times of war or emergency; to the contrary, the Court has been especially vigilant in such times to employ it. *See Ex parte Endo*, 323 U.S. 283, 300 (1944); *Hamdi*, 124 S.Ct. at 2655 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (describing constitutional "interpretive regime that subject[s] enactments limiting liberty in wartime to the requirement of a clear statement"). In the Nation's early years, the Supreme Court held that a congressional declaration of war does not grant the President authority to confiscate enemy persons or property found domestically, without an additional clear authorization of those seizures by Congress. *Brown v. United States*, 12 U.S. 110 (1814). Chief Justice Marshall explained that even a "declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found, at the time, within the [domestic] territory." *Id.* at 126; *see also Little v. Barreme*, 6 U.S. 170, 177-78 (1804) (Marshall, C.J.) (striking down wartime seizure of ship traveling *from* a French port because Congressional statute authorized seizure of ships traveling *to* a French port). The Court reiterated this principle

after the Civil War, finding that "[t]he clearest language would be necessary to satisfy us that Congress intended" to give the military power over traditional judicial questions because "[i]t is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." *Raymond v. Thomas*, 91 U.S. 712, 715-16 (1875) (ruling that even statutes that gave "very large governmental power to the military commanders" presiding over former Confederate states were not sufficient to authorize military commander to void local court decree).

The Supreme Court has adhered to this clear statement requirement in more modern wartime cases. In *Ex parte Endo*, 323 U.S. 283 (1944), the Court construed a Congressional enactment and prior Executive Order concerning the Japanese-American internment camps of World War II. After reviewing the requirements of the Fifth and Sixth Amendments and the Habeas Suspension clause, the Court emphasized: "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.* at 300. Because the statute did not use "the language of detention," no authority to detain could be presumed. *Id.*

Two years later in *Duncan v. Kahanamoku*, the Court applied the same rule in holding that a congressional enactment allowing the Governor of Hawaii to "place the Territory . . . under martial law," 327 U.S. 304, 307 n.1 (1946), must be narrowly construed, because Congress "did not specifically state to what extent the army could be used or what power it could exercise. It certainly did not explicitly declare that the Governor in conjunction with the military could for days, months or years close all the courts and supplant them with military tribunals." *Id.* at 315.

The "clear statement" rule remains a central tenet of the Supreme Court's jurisprudence. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 298-300 (2001); *cf. Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) ("Based on our conclusion that indefinite detention of aliens . . . would raise serious constitutional concerns, we construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review."). Given the substantial constitutional questions presented in this case by the indefinite military imprisonment without charge of an American citizen, at a minimum a "clear statement" of congressional authority, is required.

Neither *Hamdi* nor *Quirin*, the cases on which the Government chiefly relies, in any way undermine this clear statement requirement. *Quirin* held that "Congress ha[d] *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." 317 U.S. at 28 (emphasis added); *cf. Madsen v. Kinsella*, 343 U.S. 341, 355 n.22 (1952) ("[T]he military commission's conviction of [the *Quirin*] saboteurs . . . was upheld on charges of violating the law of war *as defined by statute*") (emphasis added); *see also Padilla v. Rumsfeld*, 352 F.3d at 715-16 ("[T]he Quirin Court's decision . . . rested on express congressional authorization of the use of military tribunals to try combatants who violated the laws of war."). Thus, the Court in *Quirin* rested military jurisdiction to try offenses against the law of war on Congress's highly specific statutory authorization of such trials in the Articles of War[5] – not on the Declaration of War by the United

[5] The Articles of War relied on in *Quirin* are the precursors to the current Uniform Code of Military Justice, which is now codified at 10 U.S.C. §§ 801-941. But while the statutes may have provided a clear statement authorizing "the *trial* and punishment of offenses against the law of war," *Quirin*, 317 U.S. at 27 (emphasis added), they cannot plausibly be read to provide a clear statement authorizing the indefinite and potentially permanent detention of an American citizen *without trial*. *See, e.g.*, 10 U.S.C. § 821 (referring to "offenders or offenses that by statute or by the law of war may be *tried* by military commissions") (emphasis added). The power to

States against Germany.[6] In short, *Quirin* found that the clear statement rule was satisfied. The plurality opinion in *Hamdi* likewise found the clear statement rule satisfied. *See Hamdi*, 124 S.Ct. at 2641 (holding that Congress "clearly and unmistakably authorized detention in the narrow circumstances considered" in that case). Far from supporting the government's position, *Quirin* and *Hamdi* actually support the existence of a clear statement rule.[7]

B. The Non-Detention Act Requires a Clear Statement of Authority to Detain

The clear statement rule is buttressed here by the Non-Detention Act, enacted by Congress is 1972. The Act provides: "*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) (emphasis added). As the Second Circuit held, § 4001(a) plainly applies to Padilla's military imprisonment and prohibits that imprisonment absent specific authorization by Congress. *Padilla v. Rumsfeld*, 352 F.3d at 721 ("[T]he statute is unambiguous.").

The Government contends that § 4001(a) is irrelevant here because it applies only to *civilian*, not *military*, detentions of citizens. Answer at 21-22. The Government's argument cannot be squared with the plain text of the statute or with its history.

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detain without trial simply cannot be viewed as a lesser-included part of the power to put on trial; among other things, detention without trial carries a much graver risk of error and abuse. *The Federalist* 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("'[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.'") (quoting 1 William Blackstone, *Commentaries on the Laws of England* 132 (1765)).

[6] Moreover, the Executive's powers are larger when war is formally declared than in an undeclared or limited armed conflict like that authorized by the AUMF. *See Bas v. Tingy*, 4 U.S. 37, 43 (1800) ("If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, . . . but if a partial war is *waged*, its extent and operation depend on our municipal laws." (emphasis added)).

[7] Part C, *infra*, explains why the AUMF does not provide "clear[] and unmistakabl[e]" authority for Petitioner's detention.

As the Supreme Court has recognized, the language of the Act is unambiguous: "the plain language of § 4001(a) proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original); *see also Padilla v. Rumsfeld*, 352 F.3d at 721 ("[T]he statute is unambiguous."). The statute cannot be twisted to say that only detentions of citizens by civilian authorities are impermissible (absent authorization by Congress), but that this prohibition may be avoided if citizens are simply imprisoned by the military instead.

The plain text should be enough to resolve the issue, but the legislative history makes abundantly clear that the statute was designed to address *exactly* the sort of detention that is at issue in this case, notwithstanding the involvement of the military and the Executive's invocation of national security concerns. Section 4001(a) was enacted to repudiate the experience of the notorious Japanese-American internment camps of World War II and to repeal the Emergency Detention Act of 1950 ("EDA"). *See Hamdi*, 124 S.Ct. at 2639. Although administered by civilians, the internment camps were directly and heavily controlled by military commanders. It was a military order that placed the Japanese Americans in the camps, and it was military officials who had discretion to release them; it is simply inaccurate to describe the Japanese internment camps as a civilian enterprise.[8] And there is no indication that the Congress that passed § 4001(a) would have looked *more* favorably on the camps if their daily administration had been military.

Section 4001(a) also repealed the EDA, was likewise directed toward the detention of persons believed to be a threat to the security of the country in times of war or other national

[8] As recounted in *Ex parte Endo*, the petitioner in that case "was evacuated from Sacramento, California, in 1942, *pursuant to certain military orders which we will presently discuss*. . . ." 323 U.S. at 285 (emphasis added). Those military orders are discussed at length at pages 285 through 290 of the Supreme Court's opinion in *Endo*.

security crisis. It authorized the President, in time of invasion, declared state of war, or insurrection in aid of a foreign enemy, to proclaim an "Internal Security Emergency" and to apprehend and detain persons as to whom there was reasonable ground to believe that they "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." 50 U.S.C.A. §§ 812, 813, 64 Stat. 1021 (1950).[9] Section 4001(a) was passed expressly to *repeal* the Executive's right to detain such persons. Although those detentions were to have been administered by the Attorney General, there is no indication that Congress would have been satisfied had the same wartime spies and saboteurs covered by the EDA simply been detained instead by military authorities.

Indeed, Congress recognized that "the constitutional validity" of the EDA was "subject to grave challenge." House Report at 5, *reprinted in* 1971 U.S.C.C.A.N. 1435, 1438. As explained in the House Report, the criteria for detention in the statute "would seem to violate the Fifth Amendment by providing imprisonment not as a penalty for the commission of an offense, but on mere suspicion that an offense may occur in the future. The Act permits detention without bail even though no offense has been committed or is charged." *Id.* Moreover, Congress specifically rejected the initial proposal for a simple *repeal* of the EDA, without adding the explicit prohibition of § 4001(a): "Repeal alone might leave citizens subject to arbitrary executive action, *with no clear demarcation of the limits of executive authority*." *Id.* (emphasis added). Ironically, what the Government seeks to uphold with respect to Padilla – imprisonment without criminal charge of a citizen arrested in the United States while the nation is at war based

[9] The EDA originally was enacted in response to a legislative finding that a "world Communist movement" was engaged in covert operations within the United States, through operatives in the United States and whose mission was to engage in "treachery . . . espionage, sabotage, [and] terrorism." 81st Cong., 2d Sess. (Sept. 23, 1950) at §§ 2(1), 2(7), 101(1), 101(6).

upon suspicion that he may commit violent acts in the future – is precisely what Congress feared could occur and enacted § 4001(a) to prevent.[10]

C. The AUMF Does Not Provide Authority for Padilla's Detention

1. The Government contends that congressional authority for Padilla's detention is conferred by the Authorization for Use of Military Force enacted by Congress following the attacks of September 11. The AUMF does not authorize the indefinite military detention of citizens arrested in the U.S. Nothing in its text says that it does, and nothing in the Supreme Court's decision in *Hamdi* suggests that it does.

The AUMF says *nothing* about military detentions of citizens arrested in civilian settings in the United States, and it simply cannot be viewed as authority – let alone a "clear statement" of authority – for such an unbounded and extensive curtailment of individual liberties. *See Padilla v. Rumsfeld*, 352 F.3d at 723. The AUMF does not mention detention of citizens arrested in the U.S. based on suspected association with terrorist organizations, much less define who is subject to such detentions, how the detention decisions shall be made or reviewed, how long such persons may be imprisoned, or what rights they shall have while confined. Yet the Government views the AUMF to have eliminated – by silent implication – two of this nation's most basic constitutional principles: trial by jury and the primacy of civilian over military rule. The President's scheme for detaining citizens arrested in civilian settings in the United States indefinitely without criminal charges in military prisons is unprecedented. While such a

[10] The predominant concern in the legislative history of § 4001(a) with *domestic* security detentions suggests that it should be read to apply less forcefully to the kind of traditional overseas battlefield detention at issue in *Hamdi*. The presumption against the extraterritorial application of statutes likewise suggests that § 4001(a) has less force overseas. Here, where § 4001(a) unmistakably applies and where Congress's core concern is plainly at issue, the requirement of clear and unmistakable authorization is much more stringent than it was in the context of the overseas battlefield at issue in *Hamdi*.

proposal would have provoked considerable debate in Congress, there is no debate *whatsoever* in the legislative history of the AUMF about the wisdom of such a radical change in the way our government can lock up its citizens. The obvious, and correct, explanation for this startling lack of debate is that Congress did not contemplate or intend to authorize such a scheme.

This lack of Congressional debate on detention of citizens takes on added significance when considered in light of the same Congress's extensive debates just a month later over the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).[11] Unlike the AUMF, the PATRIOT Act *expressly* gave the Executive authority to detain without criminal charge aliens suspected of terrorist activity, for short periods of time before the initiation of criminal or removal proceedings.[12] It is simply implausible that there should have been *no* discussion of the indefinite detention of American *citizens* suspected of terrorist activity, but *copious* discussion of the limited detention of *aliens* just a month later. Indeed, if, as the Government claims, the AUMF had already delegated to the Executive unfettered discretion to detain any suspected terrorist without trial, the PATRIOT Act's provisions would have been redundant. For it not to be redundant, one would have to conclude that Congress deliberately enacted § 1226a of the

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[11] *See* C. Bryant and C. Tobias, *Youngstown Revisited*, 29 Hastings Const. L.Q. 373 (2002). The PATRIOT Act also greatly expanded federal criminal prohibitions on terrorism, as requested by the President. *See* Pub. L. 107-56, §§ 802, 803, 805, 808, amending 18 U.S.C. §§ 2331, 2339, 2339A, 2339B. These provisions specifically encompass the unlawful acts attributed to Padilla. Essentially, the Government now contends that, instead of utilizing these provisions, the President simply may detain without trial anyone he suspects may have planned a terrorist act within the United States.

[12] The PATRIOT Act authorizes executive detention of terrorist aliens, but requires the Executive either to put the alien in removal proceedings, charge him with a criminal offense, or release him "not later than 7 days after the commencement of such detention." 8 U.S.C. § 1226a(5). The Attorney General may seek to renew the detention on an immigration violation charge, but that renewal request is subject to judicial oversight, and the detainee has a continuing ability to challenge the detention. 8 U.S.C. § 1226a(6) & § 1226a(b).

PATRIOT Act to provide aliens with *more* protections than citizens. This is simply implausible.[13]

To compensate for the lack of a clear statement, the Government relies on inapposite clauses of the AUMF. The Preamble, for instance, states that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." But while the Resolution properly recognizes that the President clearly has authority to deter and prevent acts of terrorism, it does not begin to identify what that authority *is*. Under the Government's view of the Preamble, Congress recognized the President's authority to do *anything* that could be said to "deter and prevent acts of international terrorism against the United States." The AUMF cannot reasonably be interpreted as conveying such unlimited power to the President, which would present grave constitutional questions. *Cf. Hamdi*, 124 S.Ct. at 2650 (plurality op.) ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.")

The Government also relies on § 2(a) of the AUMF, which provides that the President is authorized to use "all necessary and appropriate force" against those nations, organizations, or persons he determines were responsible for the September 11 attacks, "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." This authorization to use "necessary" and "appropriate" force allows the President to order soldiers into battle; indeed, the Resolution itself provides that "this section is intended to

[13] As a result, this case is markedly different from *Dames & Moore v. Regan*, 453 U.S. 654 (1981), on which the Government relies. In that case, although the Court found no specific statutory authorization for the President to suspend claims pending in American courts, it relied on other statutes that clearly indicated that Congress approved the settlement authority at issue, and on the absence of any contrary indication of legislative intent. *Id.* at 678-86. Here, the Government points to no other legislation indicating congressional approval of executive detentions, and both the PATRIOT Act and § 4001(a) strongly indicate that Congress did *not* intend to allow indefinite military imprisonments of citizens without trial.

constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." *See* 50 U.S.C. § 1541 *et seq.*[14] But it cannot plausibly be read to suggest that Congress intended to displace the criminal laws (and protections associated with those laws) with a wholly new, unbounded scheme of preventive military detention by executive fiat. The AUMF does not even come close to being a "clear statement" of congressional intent to curtail the fundamental rights of citizens in this country against military detentions without trial. *See Endo*, 323 U.S. at 300 (finding no authority where statute did not use "the language of detention.").

This lack of any clear statement in the Resolution authorizing the detention without charge of suspected citizen-saboteurs renders this case far different from *Quirin*. As noted above, *Quirin* found Congressional authorization not in Congress's Declaration of War against Germany (comparable to, but far more solemn and broad than, an "authorization to use military force"), but rather on specific provisions of the statutory "Articles of War" that clearly established the authority of "military commissions" to conduct trials of particular offenses. 317 U.S. at 26-27.

2. The Supreme Court's decision in *Hamdi* does not suggest that the AUMF provides authority for domestic detentions like the one in the instant case. *Hamdi* is a narrow decision, explicitly and repeatedly limited to its facts. *See, e.g.*, *Hamdi*, 124 S.Ct. at 2639 ("We therefore answer only the narrow question before us . . . .") (plurality op.) ; *id.* at 2641 (limiting holding to the "narrow circumstances considered here"). And as Judge Wilkinson recognized, "To compare

[14] The War Powers Resolution requires the President to cease military operations within 60 days unless Congress has declared war or specifically authorized the use of the armed forces. 50 U.S.C. § 1544(b). As the Second Circuit noted, Congress's clarity in specifying that the AUMF was meant to satisfy the War Powers Act makes it implausible that Congress would have left unstated a desire also to satisfy § 4001. *Padilla*, 352 F.3d at 723.

[Hamdi's] battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges." *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (denying rehearing *en banc*) (Wilkinson, J., concurring).

The *Hamdi* plurality took pains to emphasize that the "context of [Hamdi's] case" was that of a "battlefield capture" in a "*foreign* combat zone." *Id.* at 2643 (emphasis in original); *see also 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."); *id.* at 2642 (suggesting that *Ex parte Milligan* – the landmark Civil War case holding unconstitutional the trial by military commission of a civilian accused of plotting to engage in acts of violent sabotage against the Union – might have come out differently "[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield.").

As the *Hamdi* plurality concluded, it would be an odd thing indeed for Congress to have authorized the President to send our troops to war in Afghanistan but not to have authorized them to hold onto the prisoners of war they captured *there*. Because battlefield captures are a "fundamental incident of waging war," the plurality reasonably found that "in permitting the use of 'necessary and appropriate force,'" Congress had clearly intended to authorize detention in the "narrow circumstances considered" in *Hamdi*. 124 S.Ct. at 2641. Where the military has authority to shoot enemy soldiers, such as on the battlefield in Afghanistan, the military has power to capture and detain those soldiers instead for some period of time. But unless the Government genuinely contends it had the right to shoot Padilla where he was seized by the military – in a maximum-security cell at the Metropolitan Correctional Center in Manhattan –

there is no necessarily-included power to detain him militarily instead, let alone a clearly stated power to do so.

Allowing the military arrest and detention of citizens within the United States based on their suspected association with terrorist organizations would pose threats to freedom and constitutional government that are simply not present in the case of traditional battlefield captures.[15] The "practical circumstances" of such arrests are "entirely unlike" the circumstances of the battlefield captures and seizures of enemy soldiers that "informed the development of the law of war." *Hamdi*, 124 S.Ct. at 2641 (plurality op.). In traditional armed conflicts, the President's power to detain prisoners of war without trial was inherently limited by the scope of the war. The persons subject to detention were easy to identify, since they were captured on the battlefield or, like the men in *Quirin*, were soldiers in the armed forces of the opposing government.[16] The end of the war would be marked by a peace treaty with the opposing government, at which time prisoners would be returned home to resume their peacetime occupations. The "war on terror" knows no such limits, and the power the President seeks is thus unlimited and susceptible to error and abuse in two fundamental ways that are impossible to square with our constitutional system of limited government and legal protection for individual liberty. First, the power of detention asserted in this case would apply far more broadly than in a traditional war, since it could be used to detain any American, anywhere, and at any time. Second, the power might never end. Traditional wars like the conflict in Afghanistan end, but

[15] The fact that Padilla is alleged to have traveled outside the United States does not render his detention following his return to the U.S. lawful. It is undisputed that Padilla was seized by the military, while imprisoned in a New York City jail cell, more than a month after his return to this country.

[16] The Government's citation of recent historical commentary suggesting that some of the *Quirin* saboteurs were actually not soldiers is beside the point, since the Supreme Court plainly assumed that they were soldiers. *Quirin*, 317 U.S. 1, 22 (1942); See also *Padilla v. Rumsfeld*, 352 F.3d 695, 716 (2d Cir. 2003).

the "war on terror" may never end, meaning that there would be no clear point at which prisoners suspected of posing a threat would have to be released. Indeed, because of the potentially perpetual duration of the "war on terror," the extraordinary powers the President seeks today could become a permanent fixture of American law. It distorts the AUMF beyond recognition to say that Congress clearly intended it to give the President the power to infringe on individual liberties by expanding the laws of war far beyond their internal limits and historical context.

Finally, even were there emergency situations in which it might be "necessary and appropriate" for the President temporarily to seize a citizen on U.S. soil to prevent imminent catastrophic violence, that is not the situation presented by this case. *See Padilla*, 124 S.Ct. at 2735 n.8 (suggesting that AUMF does not authorize the "protracted" detention of "American citizens arrested in the United States") (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.); *Hamdi*, 124 S.Ct. at 2659 (Souter, J., concurring) ("[I]n a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation" but such emergency power is not relevant once the prisoner "has been locked up for over two years."). Padilla has now been in detention for more than two years without charge. If the military detention without charge of a man already locked up in a civilian prison were ever "necessary and appropriate," it is no longer so today. Padilla must be released or charged.

II. The President's Inherent Constitutional Powers Do Not Allow Him to Subject U.S. Citizens Arrested in the United States to Indefinite Military Detention

Because the AUMF does not authorize Padilla's military detention without trial, and § 4001(a) expressly prohibits it, the President's "power 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; *see Padilla v. Rumsfeld*, 352 F.3d at 711. Two principles of long-standing constitutional tradition make clear that the President's inherent power, particularly when at its "lowest ebb," does not include the authority to subject U.S. citizens arrested within the United States to indefinite military detention. First, executive detention without criminal trial is extraordinarily disfavored in Anglo-American legal history, and the Habeas Suspension Clause specifically guards against it. U.S. Const., art. I, § 9, cl. 2. Second, the Framers of the Constitution sought to ensure that the military would remain subordinate to civilian government in domestic life, and thus sharply limited the military's sphere of authority in domestic affairs. Both of these bedrock principles are left intact by the Supreme Court's decisions in *Hamdi* and *Quirin*, but would be fatally undermined were the novel presidential power asserted in this case upheld.

A. The Constitution Precludes Executive Detention without Congressional Authorization

The Habeas Suspension Clause establishes that the President has no inherent power to subject citizens arrested in the U.S. to detention without trial;[17] to the extent the President attempts to carry out detentions without congressional authorization, he acts unconstitutionally.[18]

Constitutional text and history demonstrate that executive detention of precisely the sort at issue in this case was a core concern of the Constitution's Framers. *See, e.g., INS v. St. Cyr*,

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[17] The Due Process Clause and the criminal procedure protections of the Fourth, Fifth and Sixth Amendments also safeguard against unilateral Executive detention, and render unconstitutional Padilla's current detention without criminal trial.

[18] Because the *Hamdi* plurality found the President's actions in that case to be authorized by the AUMF, it did not reach the issue of the President's inherent power in the absence of congressional authorization. 124 S.Ct. at 2639. This section addresses the question of inherent power left open in *Hamdi*, and argues that the Suspension Clause makes clear that the President has no inherent power to subject citizens arrested in the U.S. to detention without trial absent congressional authorization.

533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."); *see also Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977); *id.* at 385-86 (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention . . ."); *see also Rumsfeld v. Padilla*, 124 S.Ct. 2771, 2721 (2004) ("While Padilla's detention is undeniably unique in many respects, it is at bottom a simple challenge to physical custody imposed by the Executive – the traditional core of the Great Writ."); *Hamdi*, 124 S.Ct. at 2659 (Souter, J., concurring in judgment) ("[W]e are heirs to a tradition given voice 800 years ago by [the] Magna Carta, which, on the barons' insistence, confined executive power by the 'law of the land.'"); *id.* at 2661 (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.").[19]

The Government claims that this case is extraordinary and outside the normal constitutional framework because the Nation is at war. But the Constitution is no less concerned with executive detention in war, and if anything demonstrates the Framers' concern that assertions of national security might be particularly tempting justifications for detention. The Habeas Suspension Clause establishes the primacy of legislative and judicial control over the power of detention *even in cases of war or other emergency*. Indeed, as Justice Jackson

[19] *See also Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting) ("Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned . . . save by the judgment of his peers or by the law of the land."); A.W.B. Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* 391 (1992) ("The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers is in the highest degree odious, and is the foundation of all totalitarian government whether Nazi or Communist.") (quoting Cable from Winston Churchill to British Home Secretary Hebert Morrison (Nov. 21, 1943)).

explained, "[a]side from the suspension of the privilege of habeas corpus in time of rebellion or invasion," the Framers "made no express provision for exercise of extraordinary power because of a crisis" and "I do not think we rightfully may amend their work." *Youngstown*, 343 U.S. at 649-50 (Jackson, J., concurring); *accord Milligan*, 71 U.S. at 125-26.

The Suspension Clause expressly contemplates a "Rebellion or Invasion" in which the "Public Safety may require" detention without trial, and gives Congress the power temporarily to suspend the writ. U.S. Const. art. I, § 9, cl.2. Suspending the writ is of course tantamount to authorizing extrajudicial executive detention, since a person imprisoned when the writ is suspended has no means of complaining of the error or illegality of his detention. *Cf. Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."). Unlike Congress, the President has no power to suspend the writ. *Ex parte Bollman*, 8 U.S. 75 (1807). The situations of "Rebellion or Invasion" contemplated by the Suspension Clause are exactly the situations in which the "inherent" power claimed by the Executive to detain "enemy combatants" pursuant to the Commander-in-Chief Clause would be most relevant; and yet the Constitution allows executive detention in those situations of domestic peril only when *Congress* has suspended habeas corpus. This allocation of power ensures that even in times of crisis, no one branch can unilaterally deprive citizens of liberty. *See Youngstown*, 343 U.S. at 652 (Jackson, J., concurring) ("[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.").

The law's concern with Executive abuse of the power to detain "enemies" in times of crisis predates the Constitution. Historically, the Great Writ evolved as a tool to limit executive detention – a power that had frequently been exercised by the Crown based on claims that it was

necessary to protect the security of the realm in time of emergency. *See Darnel's Case*, III How. St. Tr. 2, 44-45 (1627); William F. Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 44-45, 141 (1980) (describing how Parliament refused to accept the King's claim to emergency power of arrest and detention, enacting first the Petition of Right and then the acts guaranteeing habeas corpus). The great struggles between the King and Parliament in the 17th century eventually established that only Parliament could suspend habeas.[20] *See* 1 Blackstone's Commentaries 136. These struggles were well known to the Framers and continued into the colonial era. But limits on the King's power were sufficiently established by then that even King George did not claim an executive military power to detain those persons suspected of treason during the American Revolution. Though the colonists had armed themselves and plotted to expel the Crown with violent acts, the King recognized he could not detain these combatants without charge absent an Act of Parliament suspending habeas corpus, which he sought and received. 17 Geo. III c. 9 (1777). This history was well-known to the Framers of our Constitution.

The Executive's claim in this case of inherent, unilateral power to detain without charge U.S. citizens arrested on U.S. soil is directly contrary to centuries of Anglo-American legal tradition and to the express guarantee of the Habeas Suspension Clause. The President has no inherent power to detain Padilla without charge. The label "enemy combatant" cannot do the work that the Constitution reserves to Congress in the Habeas Suspension Clause.

The Supreme Court's decision in *Hamdi* simply cannot be read to support a broad

[20] Moreover, history demonstrates that the remedy provided by habeas corpus for executive detention was "*not* a bobtailed judicial inquiry into whether there were reasonable grounds to believe the prisoner had taken up arms against the King." Rather, the "only constitutional alternatives" available for the detention of citizens suspected of aiding the enemy or committing other treasonous acts were "to charge the crime or suspend the writ." *Hamdi*, 124 S. Ct. at 2666 (Scalia, J., dissenting) (emphasis in original).

inherent power of detention in the Executive absent a congressional suspension of habeas corpus. The plurality in *Hamdi* found congressional authorization for the detention without charge of a citizen seized in a *"foreign* combat zone," 124 S. Ct. at 2643 (emphasis in original). But the plurality did not address the situation of a citizen seized in a civilian setting in the United States, and therefore did not pass on the applicability of the Habeas Suspension Clause to such situations.[21] Again, the distinction between seizures on an overseas battlefield and domestic arrests is crucial. Congress is constitutionally empowered to suspend the writ of habeas corpus in times of "Rebellion" and "Invasion" – terms that plainly apply to times of dire *domestic* peril, when military conflict on our own soil may make ordinary civilian law impractical or dangerous. The Suspension Clause thus defines the situations when domestic detentions without charge may be required, and provides the exclusive mechanism for effectuating such detentions – Congressional suspension of habeas. Because Congress has not suspended the writ of habeas corpus, Padilla cannot be detained without charge and must be charged with a crime or released.[22]

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[21] As *Hamdi* implicitly recognized, the Clause does not bar detentions without charge following a battlefield seizure "in a *foreign* combat zone." *Id.* This must be so, for not all foreign wars will be accompanied by a "Rebellion" or "Invasion" triggering Congress's power to suspend habeas, and yet most foreign wars are accompanied by the detention without charge of battlefield detainees.

[22] Moreover, to the extent that the Constitution contemplates that citizens may levy war against the United States, it contemplates that those citizens will be charged with the crime of treason – a charge which carries with it heightened, not reduced, requirements of proof. *See* U.S. Const. art. III, § 3, cl. 1 (stating that "[t]reason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and comfort" and establishing a heightened proof requirement of two witnesses in order to convict); *see also Hamdi*, 124 S.Ct. at 2663 (Scalia, J., dissenting). Padilla's current detention thus violates the Treason Clause as well.

B. The Constitution Strictly Limits the Use of Military Powers in Domestic Affairs

1. The President's Commander-in-Chief Power Cannot Be Used to Render the Military Superior to the Civil Power in the Homeland

The President's assertion of the unilateral power to subject U.S. citizens arrested on U.S. soil to military detention also runs afoul of the Constitution's limits on military jurisdiction. The Framers had a "fear and mistrust of military power." *Reid v. Covert*, 354 U.S. 1, 29 (1957). This was borne of the fact that "the King had endeavored to render the military superior to the civil power." *Duncan*, 327 U.S. at 320. As a result, the Framers made the military "subordinate to civil authority." *Reid*, 354 U.S. at 30.

The President's power to use military power as a tool of domestic policy is particularly circumscribed when he acts without Congressional authorization – or even worse against Congressional will – for the Framers of the Constitution also sought to ensure that military power would not become a tool of oppression by giving Congress many of the constitutional powers related to war.[23]

The Supreme Court has thus been careful to police the boundaries of military jurisdiction throughout the Nation's history. Time and again, the Supreme Court has reaffirmed Alexander Hamilton's oft-cited observation that the powers conferred on the President by the Commander-in-Chief Clause "amount to nothing more than the supreme command and direction of the military and naval forces," and grant no sweeping authority to seize people or property within

[23] The Framers allocated to Congress power to "define and punish . . . Offences against the Law of Nations" (U.S. Const. Art. I § 8, cl. 10); powers over war and the militia, including the power to "declare War . . . and make Rules concerning Captures on Land and Water" (U.S. Const. Art. I § 8, cl. 11); power to "make Rules for the Government and Regulation of the land and naval Forces" (U.S. Const. Art. I § 8, cl. 14); power "to provide for calling forth the Militia to . . . suppress Insurrections, and repel Invasions" (U.S. Const. Art. I § 8, cl. 15); and the obligation to prescribe by law the quartering of soldiers in any private home, even in time of war (U.S. Const. Amend. III).

American borders even in times of war. *The Federalist* No. 69, at 418 (Clinton Rossiter, ed., 1961); *see also Brown*, 12 U.S. at 128-29 (Wartime seizure of enemy property, even where consistent with international law, "is proper for the consideration of the legislature, not of the executive."); *Milligan*, 71 U.S. at 120 (President may not unilaterally establish military commissions to try civilians in wartime "because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws."); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955) ("assertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law.").

The President's attempt to rely on his Commander-in-Chief powers to avoid the normal domestic law-making process was dramatically rejected by the Supreme Court in *Youngstown*, which invalidated President Truman's seizure of steel mills for military purposes during the Korean war. *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring) ("No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."). If the President cannot use his Commander-in-Chief power to deprive property owners of their steel mills in war time without congressional authorization, surely he cannot deprive citizens of their liberty pursuant to such power.

2. The Constitution Limits the Power of Both the President and Congress to Exercise Military Jurisdiction over Citizens

Even when the President acts with the support of Congress, the Constitution limits the exercise of military jurisdiction over citizens, as demonstrated by the Supreme Court's decision in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121, 123, 127 (1866).

Milligan arose during the Civil War, when the very existence of our Republic was threatened, and large swaths of the country had become battlefields. In the context of that crisis, the Supreme

Court held that military jurisdiction could not extend to civilians in areas "where the courts are open and their process unobstructed." *Milligan*, 71 U.S. at 121. Padilla's case fits squarely within the framework of *Milligan*, and *Milligan* strongly suggests that, with or without Congressional authorization, a U.S. citizen like Padilla cannot be subject to military jurisdiction.

Milligan, like Padilla, was charged with conspiring with a secret society to commit hostile and warlike acts against the United States. Milligan was alleged to have joined and aided a secret paramilitary group for the purpose of overthrowing the government; to have violated the laws of war; to have communicated with the enemy; and to have conspired to seize munitions, liberate prisoners of war, and commit other violent acts in an area under constant threat of invasion by the enemy. *Id.* at 6-7 (statement of case); *id.* at 140 (Chase, C.J., concurring). Milligan, like Padilla, was detained by the military. As in this case, the government argued that the President's role as Commander-in-Chief gave him the authority to subject Milligan to military jurisdiction. *Id.* at 14.[24]

Despite Milligan's direct participation in planning attacks on the Nation itself in a time of war, the Supreme Court firmly rejected the expansion of military jurisdiction over a civilian American citizen and held that Milligan must be released from military custody. The *Milligan* Court reaffirmed that "it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law." *Id.* at 119. The Supreme Court emphasized that the Constitution's requirements and guarantees – including the protections of the Fourth, Fifth, and Sixth Amendments – apply "equally in war and peace" and are not "suspended during any of the great exigencies of government," *id.* at 120-21, save in situations where the Habeas Suspension Clause has been employed. *Id.* at 125.

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[24] Unlike Padilla, however, Milligan was charged with crimes and tried before a military commission, at which he was represented by counsel and allowed to present a defense.

The *Milligan* Court recognized that the Constitution allows soldiers and sailors in the regular armed forces to be tried under military jurisdiction. *Id.* at 123; *id.* at 142 (Chase, C.J., concurring); U.S. Const. amend. V; *see also Solorio v. United States*, 483 U.S. 435, 439 (1987) ("The Constitution [conditions] the proper exercise of court-martial jurisdiction . . . on one factor: the military status of the accused."). But it refused to equate Milligan with a soldier, noting that when captured "he was not engaged in legal acts of hostility against the government, and only such persons, when captured are prisoners of war." 71 U.S. at 131. As the Court explained, "[i]f he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties." This analysis applies equally to Padilla. Under *Milligan*, Padilla is entitled "to be tried and punished according to law." *Id.* at 119.

More recent cases like *Reid* and *Toth* likewise establish that, even with congressional authorization, the Constitution limits the ability of the government to subject citizens to military rather than civilian jurisdiction. *See Duncan*, 327 U.S. at 324 (rejecting military jurisdiction to try civilians even under statute authorizing martial law); *Reid*, 354 U.S. at 33-34 & n.60 (plurality) (notwithstanding statute, rejecting on constitutional grounds military jurisdiction outside "active hostilities" or "occupied enemy territory," and rejecting argument that "concept 'in the field' should be broadened. . . under the conditions of world tension which exist at the present time"); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) (rejecting military authority to arrest and try discharged former soldier); *Ex parte Endo*, 323 U.S. at 299 (rejecting power to detain loyal American citizen of Japanese descent during World War II). Even *with* congressional authorization, Padilla's military detention would likely violate the Constitution. It certainly cannot be upheld *without* such authorization (and in the face of explicit congressional prohibition of detentions in § 4001(a)), on the basis of Presidential power alone.

C. Neither *Quirin* nor *Hamdi* Alters These Basic Constitutional Principles

The Government paints the overseas battlefield detentions upheld in *Hamdi* and the military jurisdiction over German soldiers upheld in *Ex parte Quirin* as the general rules, to which *Milligan* forms a narrow exception, but the Government's framework is exactly backwards. Even in wartime, the general rule in the U.S. has always been that the government can ordinarily deprive citizens of their liberty only through civilian criminal process. Like *Hamdi*, *Quirin* was a narrow decision, explicitly confined to the precise facts before the Court. 317 U.S. at 19-20 ("[w]e have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war," given that "petitioners here, upon the conceded facts, were plainly within those boundaries."); *id.* ("We hold *only* that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.") (emphasis added); *Padilla*, 352 F.3d at 715-17 (describing narrowness of *Quirin* and applicability of *Milligan*).

Since *Quirin*, the Supreme Court has continued to refer to *Milligan* as "one of the great landmarks in this Court's history," *Reid*, 354 U.S. at 30. It has reaffirmed the principles of *Milligan* numerous times where the government has claimed that a threat to national security justifies the arrest, detention, or trial of an American citizen by the military.[25] Most recently, in *Hamdi*, the Court acknowledged the continuing precedential vitality of both *Milligan* and *Quirin*, reconciling them with the outcome in *Hamdi* by reference to the particular facts of each case:

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[25] *See Duncan*, 327 U.S. at 322 (rejecting military jurisdiction to try civilians); *Reid*, 354 U.S. at 33 & n.60 (plurality op.) (rejecting military jurisdiction outside "active hostilities" or "occupied enemy territory," and rejecting argument that the "concept 'in the field' should be broadened . . . under the conditions of world tension which exist at the present time"); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (rejecting military authority to arrest and try discharged former soldier); *see also Ex parte Endo*, 323 U.S. 283, 299 (1944) (citing *Milligan* and rejecting power to detain loyal American citizen of Japanese descent during World War II).

"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 plurality opined. *Id.* at 2642. But like Milligan (and *unlike* Hamdi), Padilla was not captured bearing arms on a battlefield. Like Milligan, Padilla was arrested far from any zone of active combat operations.

Although *Quirin* involved individuals who were not captured on a battlefield, it differed from this case in three important ways. *First*, as noted previously, the petitioners in *Quirin* had been charged with crimes and tried – not detained without charge or trial based on a claim of inherent executive authority. *See supra* n.4. *Second*, unlike Padilla, each defendant in *Quirin* conceded being a soldier in the military of a nation against which the United States had formally declared war and each wore a military uniform when landing, armed with explosives, in the United States. 317 U.S. at 21.[26] *Third*, and perhaps most importantly, *Quirin* was decided before Congress passed § 4001(a). *See Padilla v. Rumsfeld*, 352 F.3d at 716. The military trials ordered by the President occurred pursuant to clear Congressional authorization and in the face of no Congressional opposition, making them an example of Presidential power at its

[26] Here, in contrast, the Government merely alleges that Padilla is "associated" with al Qaeda, a non-state terrorist organization of uncertain structure. Answer at para. 2(b). This is precisely the sort of "practical circumstance" that is "entirely unlike" the traditional armed conflicts that informed the development of the laws of war that were relied upon by the *Quirin* Court – just the sort of critical difference which the *Hamdi* plurality warned could cause legal understandings based on those traditional armed conflicts to unravel. 124 S.Ct. at 2641 (plurality op.). The historical instances of military jurisdiction cited by *Quirin* concerned members of enemy armed forces in the ordinary meaning of that term: officers and soldiers in recognized, conventional armies affiliated with government entities. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 43(2) ("Members of the armed forces of a Party to a conflict . . . are combatants. . . "); Jennifer K. Elsea, *Presidential Authority to Detain "Enemy Combatants,"* 33 Presidential Studies Q. 568, 570 (Sept. 2003). Padilla, by contrast, does not meet the definition of a combatant under the traditional laws of war, since he is neither a member of a foreign nation's army, nor was he apprehended while directly participating in combat.

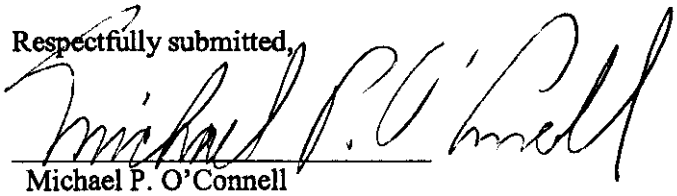
"maximum." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Here, clear Congressional authorization is lacking and § 4001(a) makes clear that Congress opposes any detention of a citizen absent such clear statutory authorization. Unlike in *Quirin*, then, Executive power is here at its "lowest ebb." *Youngstown*, 343 U.S. at 637. As the Second Circuit correctly found, *Quirin* provides no support for the detention without charge of citizens arrested in the United States. *Padilla v. Rumsfeld*, 352 F.3d at 715-16.

In short, the President's inherent power cannot overcome the Constitutional barricades erected by the Framers to prevent both executive detention without criminal trial and military incursions into domestic civilian life. Constitutional text and history would not permit this Court to validate executive power to imprison citizens without criminal charge even if the detention power had not been specifically limited by Congress. But here, where § 4001(a) expressly limits such executive authority, the President's power has waned to its "lowest ebb." That ebb is far too low a tide to cover the unprecedented actions that the government seeks here to justify.

CONCLUSION

The Constitution grants the President no power to detain a citizen seized in a civilian setting in the United States and to imprison him, indefinitely and without charge, in a military brig. No statute authorizes such detention. For the reasons set forth above, this Court should grant summary judgment on Counts One and Two of the Petition and order Petitioner released from custody.

Respectfully submitted,



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ATTACHED APPENDIX

TABLE OF CONTENTS FOR
APPENDIX TO MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. PLEADINGS FROM RECORD BELOW

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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02 Civ. 4445 (MBM)

JOSE PADILLA, DONNA R. NEWMAN, AS NEXT FRIEND OF JOSE PADILLA, PETITIONERS

v.

GEORGE W. BUSH, DONALD RUMSFELD, JOHN ASHCROFT, COMMANDER M. A. MARR, RESPONDENTS

AFFIDAVIT OF DONNA R. NEWMAN

DONNA R. NEWMAN being duly sworn, deposes and days:

1. I am the attorney of record for Jose Padilla having been assigned to represent him pursuant to the Criminal Justice Act of May 15, 2002. The information contained in this affidavit is based on information and belief, obtained through my review of my file, conversations with the government, law enforcement, and my clients family and friends and where indicated on personal knowledge.
2. Mr. Padilla traveled to Chicago to visit his son.
3. After visiting his son, he planned to travel to Florida to visit other members of his family.
4. When Mr. Padilla arrived at the airport he was carrying a valid United States Passport. Mr.

Padilla was not carrying weapons, explosives or bomb making instructions.

5. At the Chicago airport, he spoke with law enforcement agents for several hours. He politely answered their questions.

6. When Mr. Padilla was told that he was being arrested, he requested an attorney.

7. Mr. Padilla has never been to Washington, D.C. and he has no special knowledge of the Washington, D.C. area.

8. After Mr. Padilla was transferred to the Consolidated Naval Brig in Charleston, South Carolina, I spoke with a legal representative from the Department of Defense. I was informed that I could not visit Mr. Padilla, that his family could not visit him, and that he would not be able to call me or his family. I asked if I could write to Mr. Padilla and I was told that I would be permitted to write to Mr. Padilla. I asked the representative if what I sent to Mr. Padilla would actually be delivered to him. The representative of the Department of Defense to me that he could not give me assurance that anything that I sent to Mr. Padilla would actually be received by him.

Dated: New York, New York
September 24, 2002

Respectfully submitted,

/s/ DONNA R. NEWMAN
DONNA R. NEWMAN

Sworn to before me this
24th day of September, 2002

/s/
NOTARY PUBLIC

Andrew Patel
Notary Public, State of New York
No. 4829-468
Qualified in Westchester County
Commission Expires August 31, 2005

EXHIBIT B

THE WHITE HOUSE

WASHINGTON

FOR OFFICIAL USE ONLY

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources,

REDACTED

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;

(2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;

(3) Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;

(4) Mr. Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and

(7) it is REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.

DATE: June 9, 2002