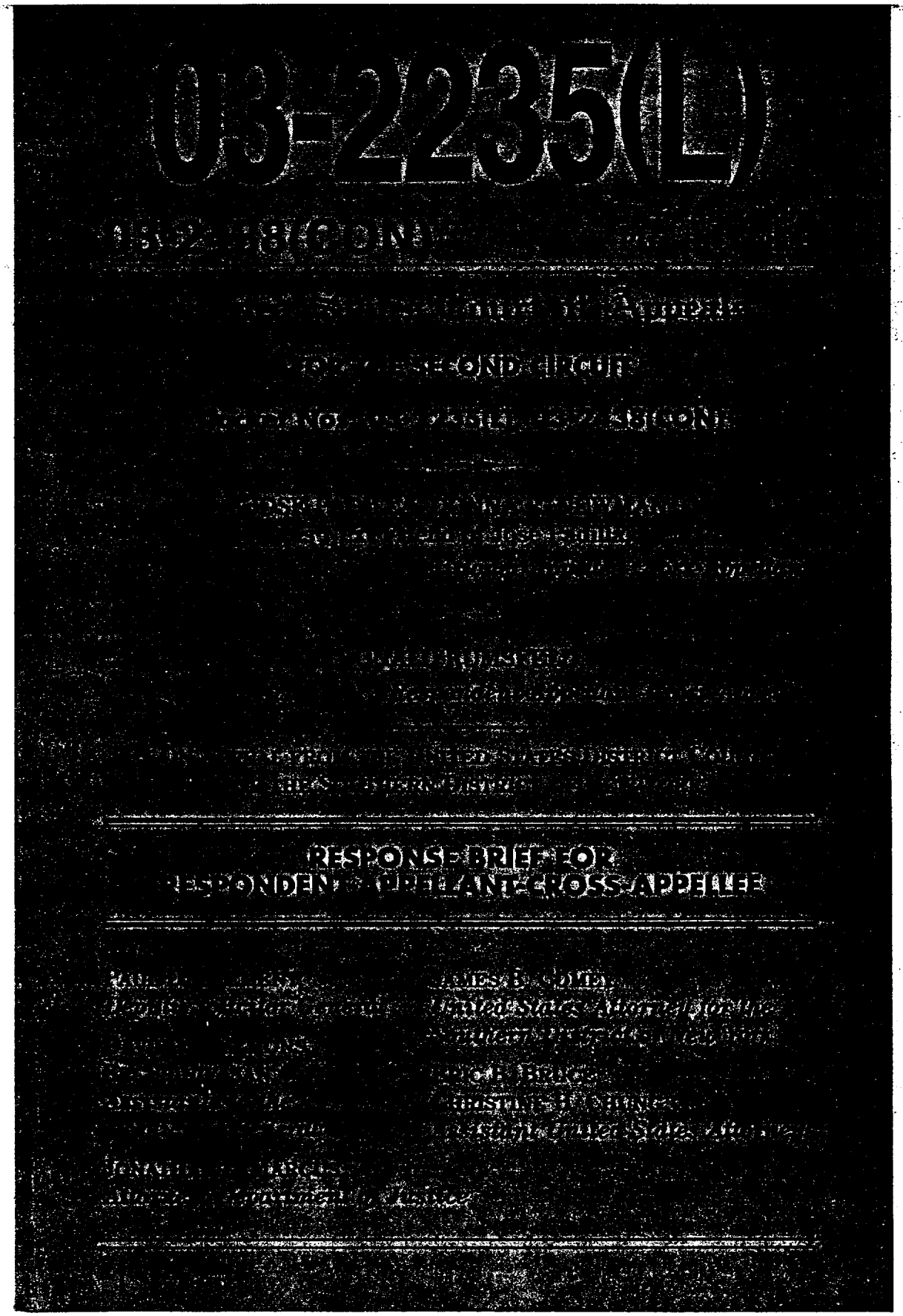

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 03-2235(L), 03-2438(CON)

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

Petitioner-Appellee-Cross-Appellant,

-v.-

DONALD RUMSFELD,

Respondent-Appellant-Cross-Appellee.

RESPONSE BRIEF OF RESPONDENT-APPELLANT-CROSS-APPELLEE

Questions Presented

1. Whether the President has authority under the Constitution and the laws of war to order Padilla's wartime detention as an enemy combatant.

2. Whether judicial review of the factual basis for the President's determination that Padilla is an enemy combatant can extend beyond confirming the existence of some evidence supporting that determination.

Statement*

1. In the immediate wake of al Qaida's massive attacks against the United States on September 11, 2001, the President, pursuant to his authority as Commander in Chief, undertook to prevent further al Qaida strikes against the United States and to launch a major military response. Congress, explicitly recognizing the President's constitutional authority, acted to support the President's actions. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

Congress found that the September 11 attacks "pose an unusual and extraordinary threat to the national security and foreign policy of the United States," and "render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." *Ibid.* Specifically acknowledging the "President['s] * * * authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," Congress supported the President's use of "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,

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* Our opening brief contains a complete review of the factual and procedural history of this case. See Resp. Opg. Br. 2-12. This response brief reviews the principal facts and procedural history bearing on the issues of the President's legal authority to determine that Padilla is an enemy combatant and the proper standard of review of the factual basis for that determination.

2001, * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." *Ibid.* Subsequently, the President made it express that the September 11 attacks "created a state of armed conflict" with al Qaida. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (§ 1(a)).

2. In prosecuting the ongoing armed conflict against al Qaida, the United States military—consistent with its settled practice in times of war—has captured and detained hundreds of enemy combatants. On June 9, 2002, the President, invoking his constitutional powers as Commander in Chief as well as Congress's joint resolution, determined that Padilla is an enemy combatant and should be detained as such by the military in the course of the current conflict. JA 51.

The President found, in particular: that Padilla "is closely associated with al Qaeda, an international terrorist organization with which the United States is at war"; that 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"; that 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"; that Padilla "represents a continuing, present and grave danger to the national security of the United States" and his detention "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"; and that Padilla's detention as an enemy combatant is "consistent with U.S. law and the laws of war." *Ibid.*

The President's determination, as the Mobbs Declaration elaborates (JA 44-49), was based on intelligence information, from sources directly connected with al Qaida, that Padilla is closely associated with al Qaida and came to the United States to advance the conduct of terrorist operations on al Qaida's behalf. The information considered by the President evidenced that Padilla, while in Afghanistan and Pakistan in 2001 and 2002, had extended discussions with senior al Qaida operatives about his conduct of terrorist operations within the United States. JA 46, 47 (¶¶ 6, 9-10). In Afghanistan in 2001, Padilla met with senior Usama Bin Laden lieutenant Abu Zubaydah to discuss his plans, including a plan to detonate a dirty bomb within the United States. JA 46 (¶¶ 6, 8). Zubaydah directed Padilla to travel to Pakistan to receive training on the wiring of explosives, and Padilla researched explosive devices at an al Qaida safehouse in Lahore. JA 46 (¶¶ 6-7, 10). While in Pakistan in 2002, Padilla met on several occasions with senior al Qaida operatives to discuss further his conduct of terrorist operations in the United States, including the dirty bomb plan and other operations involving detonation of explosives in hotel rooms and gas stations. JA 47 (¶ 9). At the direction of al Qaida operatives, Padilla returned to the United States in May 2002 to advance the conduct of additional al Qaida attacks. JA 47 (¶¶ 9-10).

Acting on that information, the President determined "for the United States of America" that Padilla "is, and at the time he entered the United States in May 2002 was, an enemy combatant." JA 51. Accordingly, the President directed the military to detain Padilla as an enemy combatant in the course of the ongoing armed conflict. *Ibid.*

3. On June 19, 2002, Padilla's appointed counsel, styling herself as his next friend, filed an amended habeas petition alleging that his detention violates the Fourth, Fifth, and Sixth Amendments to the Constitution, as well as the Posse Comitatus Act, 18 U.S.C. 1385. JA 32-33 (¶¶ 33-35, 38-40). On December 4, 2002, the district court issued an opinion and order that: (i) rejected the amended petition's legal challenges to the President's authority to order that Padilla be detained as an enemy combatant; and (ii) ruled that the factual basis for the President's determination that Padilla is an enemy combatant would be reviewed to assess whether there is some evidence supporting that determination. *Padilla* v. *Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

a. With respect to petitioner's legal challenge, the district court first rejected petitioner's contention that the military's settled wartime authority to detain enemy combatants is inapplicable in the current conflict. The court explained "that the President may exercise his powers as Commander in Chief without a declaration of war" by Congress, and that, "even if Congressional authorization were deemed necessary, the Joint Resolution, passed by both houses of Congress, * * * engages the President's full powers as Commander in Chief." *Id.* at 589-590. The court further reasoned that the "laws of war

themselves, which the President has invoked as to Padilla, apply regardless of whether or not a war has been declared." *Id.* at 590. The court dismissed the suggestion that the President's authority was diminished in the current conflict by reason of any uncertainty concerning "when the conflict with al Qaeda may end." *Ibid.* The court perceived "no basis for contradicting the President's repeated assertions that the conflict has not ended," *ibid.*, and explained that "the notion that a court must be able now to define conditions under which the current conflict will be declared to be over * * * defies the basic concept of Article III jurisdiction," *id.* at 591.

Next, the court held that the President's settled authority to detain enemy combatants in wartime encompasses the detention of American citizens seized on American soil. The court rejected petitioner's reliance on *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), concluding that the controlling precedent instead was *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld the trial by military commission of a group of German saboteurs—including one assumed to be an American citizen—who were captured within the United States during World War II before they could carry out plans to destroy United States war facilities. See 233 F. Supp. 2d at 593-594. The court reasoned that "Padilla, like the saboteurs" in *Quirin*—but unlike Milligan—"is alleged to be in active association with an enemy with whom the United States is at war." *Id.* at 594. The court further observed that *Quirin* expressly viewed an enemy combatant's detention during a conflict "as a lesser consequence" than his trial by military commission for war crimes, but the decision "approved even that greater consequence." *Id.* at 595 (citing *Quirin*, 317

U.S. at 30-31). As a result, the court found, this "case is *a fortiori* from *Quirin* as regards the lawfulness of [Padilla's] detention under the law of war." *Ibid.*

Finally, the court concluded that the President's authority to order Padilla's detention as an enemy combatant is unaffected by 18 U.S.C. 4001(a), which states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The court determined that Padilla's detention was "pursuant to an Act of Congress" within the meaning of that provision. 233 F. Supp. 2d at 598-599. The court explained that Congress's joint resolution broadly supports the application of military force to prevent future acts of terrorism by al Qaida, and that "Padilla is alleged in the [President's] June 9 Order to have been an unlawful combatant in behalf of al Qaeda." *Ibid.* Accordingly, the court ruled, the "President * * * has both constitutional and statutory authority to exercise the powers of Commander in Chief, including the power to detain unlawful combatants, and it matters not that Padilla is a United States citizen captured on United States soil." *Id.* at 606.

b. After sustaining the President's legal authority to order Padilla's detention as an enemy combatant, the court addressed the appropriate standard for judicial review of the factual underpinnings of the President's determination. The court denied petitioner's call for "a 'searching inquiry' into the factual basis for the President's determination that Padilla is an enemy combatant." 233 F. Supp. 2d at 606. The court explained that the "President is operating at maximum authority" in respect to his "decision to detain Padilla as an unlawful combatant," because that action was

undertaken pursuant "both [to] the Constitution and the Joint Resolution." *Id.* at 607 (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-637 (1952) (Jackson, J., concurring)). And "the 'political branches,' when they make judgments on the exercise of war powers under Articles I and II, as both branches have here, need not submit those judgments to review by Article III courts." *Ibid.*

The court therefore concluded that the "commission of a judge * * * does not run to deciding *de novo* whether Padilla is associated with al Qaeda and whether he should therefore be detained as an unlawful combatant." *Id.* at 608. Instead, "[i]t runs only to * * * examining whether there is some evidence to support [the President's] conclusion that Padilla was, like the German saboteurs in *Quirin*, engaged in a mission against the United States on behalf of an enemy with whom the United States is at war," and "whether that evidence has not been entirely mooted by subsequent events." *Ibid.*

SUMMARY OF ARGUMENT

I. The settled authority of the Commander in Chief to detain enemy combatants in the course of an armed conflict is fully applicable in the circumstances of this case. The Supreme Court has rejected any suggestion that the Constitution and laws of war give the President authority to capture and detain enemy combatants in connection with hostilities overseas, only to deny him any power to seize and detain enemy combatants who bring the fight within the Nation's borders.

In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court recognized the military's authority to detain enemy combatants in a time of war, and upheld the President's exercise of military jurisdiction over an American citizen captured on American soil while preparing to carry out acts of sabotage on behalf of Germany in World War II. Padilla likewise associated with enemy forces during wartime and then entered the United States seeking to advance the conduct of hostile acts on the enemy's behalf. *Quirin* rejects the suggestion that Padilla is immune from detention as an enemy combatant under the laws of war because he was not in a zone of day-to-day combat operations when he was captured. Indeed, al Qaida's insistence on extending the battle beyond the traditional battlefield to target civilian populations establishes a violation of the laws of war, not an immunity from application of those laws.

The President's authority to detain enemy combatants under the laws of war is not diminished in the present conflict simply because the enemy is not a sovereign state. The President's determination that a state of armed conflict exists to which the laws of war apply is conclusive upon the courts. In any event, it is well-settled under the laws and customs of war that non-state entities such as al Qaida can be subject to those laws. Indeed, both Congress and NATO have taken actions confirming that the al Qaida attacks of September 11, 2001, were an armed attack evidencing the existence of an armed conflict to which the laws of war apply.

Nor do the President's actions in this case encroach upon the authority of Congress. To the contrary, Congress

has broadly supported the President's use of all necessary and appropriate force against al Qaida in the current conflict, and that broad endorsement of the use of force necessarily encompasses the detention of enemy combatants associated with al Qaida. As both the district court and the Fourth Circuit correctly found, Congress's joint resolution makes clear that the President's authority to detain Padilla is unaffected by 18 U.S.C. 4001(a). Moreover, the enactment of various criminal prohibitions against terrorist acts in no way diminishes the President's discretion in exercising his Commander-in-Chief powers in prosecuting the current conflict.

II. The district court correctly declined to accept petitioner's invitation to engage in a searching judicial review of the factual basis for the President's determination that Padilla is an enemy combatant. Settled principles of judicial deference to the President's core military judgments as Commander in Chief dictate that review of the President's determination can extend no further than confirming the existence of some evidence supporting it. There is no merit to petitioner's appeal for a full-fledged evidentiary hearing with de novo review and a heightened standard of proof. That argument rests on the flawed premise that Padilla's wartime detention is tantamount to criminal punishment. In addition, the intensive factual inquiry sought by petitioner would entangle the Judiciary in highly sensitive national security assessments of the type reserved to the Executive.

ARGUMENT

POINT I

The President's Determination That Padilla Should Be Detained As An Enemy Combatant Is Fully Consistent With The Laws Of War And The Constitution

A. The Authority Of The Commander In Chief To Detain Enemy Combatants In Wartime Is Well Established

1. "[T]he authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2." *Hamdi* v. *Rumsfeld*, 296 F.3d 278, 281-282 (4th Cir. 2002) (*Hamdi II*). The capture and detention of enemy combatants presents a core exercise of the President's constitutional powers in wartime. Accordingly, the United States military has seized and detained enemy combatants in the course of virtually every significant armed conflict in the Nation's history, including the current conflict. See Lt. Col. George G. Lewis & Capt. John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, Dep't of the Army Pamphlet No. 20-213 (1955). That settled historical practice is deeply rooted in the laws and customs of war.

As the Supreme Court explained in *Ex parte Quirin*, the "universal agreement and practice" under "the law of war" holds that "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces"; and "[u]nlawful combatants are likewise subject to capture and detention" for the duration of the conflict, "but in addition they are subject to trial and punishment by

military tribunals for acts which render their belligeren unlawful." 317 U.S. at 30-31; see also *Johnson* v. *Eise trager*, 339 U.S. 763, 786 (1950) ("This Court has chara terized as 'well-established' the 'power of the military exercise jurisdiction over members of the armed force those directly connected with such forces, * * * enem belligerents, [and] prisoners of war.'") (quoting *Duncan* v *Kahanamoku*, 327 U.S. 304, 313-314 (1946)); *Hamdi* v *Rumsfeld*, 316 F.3d 450, 463 (4th Cir. 2003) (*Hamdi III*) *Hamdi II*, 296 F.3d at 281-283; *Colepaugh* v. *Looney*, 23 F.2d 429, 432 (10th Cir. 1956), cert. denied, 352 U.S 1014 (1957); *In re Territo*, 156 F.2d 142, 145 (9th Cir 1946); *Ex parte Toscano*, 208 F. 938, 940 (S.D. Cal 1913).

In addition, it is long settled that the military's authority to detain an enemy combatant in wartime is undiminished by the individual's American citizenship. *Quirin*, 317 U.S. at 37-38; *Hamdi II*, 296 F.3d at 283; *Colepaugh*, 235 F.2d at 432; *Territo*, 156 F.2d at 144-145. Moreover, the well-established authority to detain enemy combatants is part and parcel of the President's authority as Commander in Chief. See *Quirin*, 317 U.S. at 28-29 ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."); *Hamdi III*, 316 F.3d at 467 ("capturing and detaining enemy combatants is an inherent part of warfare").

2. The detention of enemy combatants serves two principal purposes directly related to the conduct of the

war. First, "detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies." *Hamdi III*, 316 F.3d at 465; see *In re Territo*, 156 F.2d at 145 ("The object of capture is to prevent the captured individual from serving the enemy."). Second, detention enables the military to gather vital intelligence from captured combatants concerning the capabilities and intentions of the enemy. As the district court explained (233 F. Supp. 2d at 588 n.9), Padilla thus "is being detained in order to interrogate him about the unlawful organization with which he is said to be affiliated and with which the military is in active combat, and [also] to prevent him from becoming reaffiliated with that organization."

It follows that the detention of enemy combatants in the course of a conflict "'is neither a punishment nor an act of vengeance,' but rather a 'simple war measure.'" *Hamdi III*, 316 F.3d at 465 (quoting W. Winthrop, *Military Law and Precedents* 788 (2d ed. 1920)); cf. *Moyer* v. *Peabody*, 212 U.S. 78, 84-85 (1909) (seizures of individuals "whom [the executive] considers to stand in the way of restoring peace" during an insurrection "are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power"). And as a non-punitive measure firmly grounded in both the laws of war and the Commander-in-Chief authority, the wartime detention of enemy combatants is fully consistent with the Constitution. See *Quirin*, 317 U.S. at 27-28 ("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."); see also *Hamdi II*, 296 F.3d at 283; *Territo*, 156 F.2d at 145.

B. This Case Squarely Implicates The President's Settled Authority To Detain Enemy Combatants In The Course Of An Armed Conflict

Petitioner does not contest the President's well-settled authority under the Constitution and the laws of war to capture and detain enemy combatants in wartime. Petitioner instead submits that, for various reasons, the settled authority to detain enemy combatants is inapplicable in the particular circumstances of this case. Each of the grounds put forward by petitioner fails to withstand scrutiny.

1. The President's Authority In This Case Is Confirmed By *Ex Parte Quirin*

Petitioner principally contends (Pet. Opg. Br. 15-20), on the basis of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that the President lacks authority to exercise military jurisdiction over Padilla because he is a citizen seized within the United States. Petitioner's reliance on *Milligan* is misplaced. As the district court correctly determined (233 F. Supp. 2d at 593-596), this case is controlled by *Quirin*, not *Milligan*.

a. *Milligan* involved a citizen who was seized by the military and was tried and convicted by a military commission on charges that he conspired against the United States in the Civil War. 71 U.S. at 6-7. He filed a habeas action challenging the military's authority to exercise jurisdiction over him, arguing that he "at no time had * * * been in the military service of the United States, or in any way

connected with the land or naval force, or the militia in actual service; nor within the limits of any State whose citizens were engaged in rebellion against the United States, at any time during the war." *Id.* at 7. A majority of the Supreme Court found that, in those circumstances, Milligan was not subject to trial and punishment by the military under the laws of war. *Id.* at 121-122. The Court emphasized that Milligan was "a citizen in civil life, in nowise connected with the military service." *Id.* at 122.*

Subsequently, in *Quirin*, the Court unanimously confined *Milligan* to its specific facts. See 317 U.S. at 45 ("We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it."). In *Quirin*, eight individuals (including one assumed to be an American citizen) landed in the United States from submarines during World War II intending to carry out plans to destroy United States war facilities on behalf of the

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* Four Justices, concurring in the judgment, concluded that Congress could have subjected Milligan to military jurisdiction consistent with the Constitution but had not exercised that authority. 71 U.S. at 132-142 (Chase, C.J., concurring). The concurring Justices were critical of the majority for reaching out to decide the case on constitutional grounds. *Id.* at 136-137; see William H. Rehnquist, *All the Laws But One* 135-136 (2001) (explaining that *Milligan* majority engaged in "unsound constitutional adjudication," with the result that its "unnecessary *obiter dicta*" came "back to haunt the Court" when "the case of *Quirin* arose during the Second World War").

(71 U.S. at 131), but he had no connection to the enemy's forces. 317 U.S. at 45; see 71 U.S. at 121-122. The saboteurs in *Quirin*, by contrast, directly affiliated with German forces during World War II—indeed, they received explosives training in Germany—and then entered the United States with plans to destroy certain of the United States's war facilities. The parallels to Padilla are striking. Padilla, like the belligerents in *Quirin* but unlike Milligan, was in Afghanistan and Pakistan after the attacks of September 11, 2001, he engaged there in extended discussions with senior al Qaida operatives about conducting operations in the United States, he received training from al Qaida about wiring explosives and researched explosive devices at an al Qaida safehouse, and he returned to the United States to advance the conduct of al Qaida attacks within the United States's borders. JA 46-47 (¶¶ 6-10).

Consequently, whereas Milligan was not "part of or associated with the armed forces of the enemy," 317 U.S. at 45, the President determined that Padilla is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war," JA 51. The President further determined that Padilla "engaged in 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." *Ibid.* Padilla thus fits squarely within the terms of the Court's decision in *Quirin*: "Citizens who associate themselves with the military arm of the foreign government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the * * * law of war." 317 U.S. at 37-38.

discretion, and they thus neither limit the discretion of subsequent Executives nor afford a basis for judicial review.

In addition, even if the line the Executive elected to draw between the *Quirin* saboteurs and their co-conspirators somehow limited the discretion of subsequent Executives (and it does not), Padilla plainly falls on the *Quirin* saboteur side of the line. The line the Executive drew in *Quirin* did not depend on citizenship or place of capture. Rather, the conduct of the co-conspirators Haupt and Cramer differs in kind from the actions of the *Quirin* saboteurs and Padilla.

Haupt was the father of one of the saboteurs. Although he became aware of his son's sabotage plans after his son returned to the United States, Haupt's conduct consisted solely of furnishing his son shelter for six days and helping him obtain employment and an automobile. 330 U.S. at 634-635. Cramer, meanwhile, was a friend of one of the saboteurs and met with him on two occasions after he returned to the United States. The evidence did not establish that Cramer knew of the saboteurs' plans or provided them assistance, 325 U.S. at 5-6, 36-45, and the Court overturned his conviction for treason, *id.* at 36-48.

Unlike Padilla and the *Quirin* saboteurs, therefore, neither Haupt nor Cramer himself associated directly with the enemy's forces (and certainly did not do so by traveling to enemy territory to receive training), and neither participated in planning or preparing for attacks on the enemy's behalf. Indeed, neither even had any knowledge of the saboteurs' intentions before they arrived in the United States to carry out their plans. The decision to

"a part of *or associated with* the armed forces of the enemy") (emphasis added); *Territo*, 156 F.2d at 145 ("[A]ll persons who are active in opposing an army in war may be captured."); see also *Quirin*, 317 U.S. at 36-37 ("entry upon our territory in time of war by enemy belligerents, *including* those acting under the direction of the armed forces of the enemy * * * is a hostile and warlike act") (emphasis added); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135, art. 4(A)(4) (including among prisoners of war subject to capture and detention all "persons who accompany the armed forces without actually being members thereof").

The Supreme Court in *Quirin* specifically rejected the suggestion, pressed by petitioner here, that such persons are "any the less belligerents if * * * they have not actually committed or attempted to commit any act of depredation *or entered the theatre or zone of active military operations*." 317 U.S. at 38 (emphasis added). Indeed, the *Quirin* saboteurs were arrested in Chicago and New York, far from any traditional battlefield. As the Court explained, any individuals "who associate themselves with the military arm of the enemy government" and "enter this country bent on hostile acts" are "enemy belligerents within the meaning of * * * the law of war." *Id.* at 37-38. Padilla, like the *Quirin* saboteurs, received training in explosives from the enemy and came to the United States intending to further the conduct of hostile operations on the enemy's behalf. Accordingly, the laws of war amply support the President's order directing Padilla's detention as an enemy combatant upon determining (JA 51) that he is "closely associated with al Qaida" and engaged in

bring charges of treason against them in the civil justice system thus has no bearing on the President's authority to detain Padilla as an enemy combatant.

2. The President's Authority Is Not Confined To Members Of The Enemy's Forces Captured In Battlefield Combat

Petitioner and his amici argue that the President's authority to detain enemy combatants has no application to "an individual not found in a zone of active combat operations and not an acknowledged member of a foreign army." Pet. Opg. Br. 21; see LOW Br. 2-3, 14. That is incorrect.

a. There is no merit to petitioner's contention (Pet. Opg. Br. 20-21) that only "members" of the enemy's armed forces are subject to capture and detention as enemy combatants. Any such argument would mean that the *Quirin* saboteurs would have been immune from treatment as enemy combatants if Germany simply had trained them for their missions but not formally inducted them into the armed forces. In the current conflict, al Qaida, unlike a regular army, does not issue insignia or identifications to its operatives; but Padilla's conduct is equivalent to that of a member of the enemy's armed forces. See *Quirin*, 317 U.S. at 37-38.

In addition, the President's authority to detain enemy combatants is not restricted to members of the enemy's forces captured in traditional battlefield combat. Instead, it extends to any individuals who associate with the enemy's forces in furtherance of their hostile actions. See *id.* at 45 (confirming that "an enemy belligerent" may be

"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."

b. Petitioner's emphasis (Pet. Opg. Br. 21) on whether an individual is an "acknowledged" enemy soldier and is engaged in conventional battlefield combat pertains to the distinction between "lawful" and "unlawful" enemy combatants, not to the antecedent question whether an individual is subject to detention as an enemy combatant at all. Lawful combatants comply with the requirements for lawful belligerency under the laws of war, including wearing insignia or uniforms openly acknowledging their association with enemy forces and distinguishing them from the civilian population. See, *e.g.*, 233 F. Supp. 2d at 592-593; A. Rosas, *The Legal Status of Prisoners of War* 305 (1976). They are entitled to treatment as prisoners of war when captured and detained, and are immune from prosecution for any hostile actions not amounting to war crimes. Combatants who fail to comply with the requirements for lawful belligerency are unlawful combatants. They are not entitled to treatment as prisoners of war and are subject to trial and punishment for acts in violation of the laws of war. See *Quirin*, 317 U.S. at 31 ("[A]n enemy combatant who without uniform comes secretly through the lines for the purpose of waging war" is a "familiar example[]" of a belligerent "generally deemed not to be entitled to the status of prisoners of war, but to be [an] offender[] against the law of war subject to trial and punishment by military tribunals.").

As *Quirin* makes plain, and as the district court explained (233 F. Supp. 2d at 592), *all* combatants— wheth-

er lawful or unlawful—are subject to capture and detention for the duration of an armed conflict. 317 U.S. at 30-31; see also *Colepaugh*, 235 F.2d at 432. Although unlawful combatants are *also* subject to trial and punishment for acts in violation of the laws of war, there is no requirement that the Executive take the additional step of seeking criminal punishment against them. See *Hamdi III*, 316 F.3d at 469; 233 F. Supp. 2d at 593. "Rather, their detention for the duration of hostilities is supportable * * * on the same ground that the detention of prisoners of war is supportable: to prevent them from rejoining the enemy." *Ibid.* In fact, the overwhelming share of combatants seized and detained in the course of a conflict are never charged with an offense. See *Hamdi III*, 316 F.3d at 465.

There is thus no merit to the suggestion (Pet. Opg. Br. 18 & n.11; Cato Br. 33) that *Quirin* is inapplicable here because the combatants in that case were charged with war crimes and subjected to trial by a military tribunal. *Quirin* itself confirms that the President also is entitled to take the lesser step of detaining enemy combatants in the course of the conflict. 317 U.S. at 31 ("Unlawful combatants are * * * subject to capture and detention, but *in addition* they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.") (emphasis added); accord, *Hamdi III*, 316 F.3d at 469; *Colepaugh*, 235 F.2d at 432.

c. Petitioner and his amici therefore have it precisely backwards in contending that Padilla is exempt from detention as an enemy combatant because he is not an acknowledged soldier in the enemy's force and was not captured in battlefield combat in a zone of active military

operations. See Pet. Opg. Br. 17, 21; CCR Br. 31; ACLU Br. 16; LOW Br. 2, 14. A principal objective of the laws and customs of war is to distinguish combatants from civilians in order protect civilians from harm. See *Quirin*, 317 U.S. at 30 ("By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations."). Actions that blur that essential distinction, such as fighting without being part of a lawful armed force, thus are particularly condemned under the laws of war due to the dangers such actions present. See, *e.g.*, U.S. Dep't of the Army, Field Manual 27-10, *The Law of Land Warfare* 34 ¶ 82 (1956) (persons who "commit hostile or belligerent acts" but fail to comply with conditions for recognition as lawful belligerents can be "subject to the extreme penalty of death because of the danger inherent in their conduct").

Petitioner's approach would stand the laws of war on their head, affording *more* protection—and exempting entirely from the laws of war—those who plot hostile acts in secret and aim their actions at civilians. That approach is baseless. That al Qaida and its operatives fail openly to distinguish themselves from the civilian population and extend the battle beyond the traditional battlefield to target innocent civilians demonstrates only that they are unlawful combatants under the laws of war, not that they are entitled to an exemption from the application of those laws. As the nature of the September 11 attacks makes manifestly clear, moreover, the suggestion that the Commander-in-Chief authority is confined to traditional enemy soldiers in conventional combat zones is particularly ill-founded in the context of the current conflict. See *Hamdi III*, 316 F.3d at 466 ("As the nature of threats to America evolves, along

with the means of carrying those threats out, the nature of enemy combatants may change also. In the face of such change, separation of powers doctrine does not deny the executive branch the essential tool of adaptability."); *Hamdi II*, 296 F.3d at 283 ("[T]he unconventional aspects of the present struggle do not make its stakes any less grave.").*

3. The President Has Authority To Apply The Laws Of War To Al Qaida

Petitioner's amici suggest more broadly (see CCR Br. 31-32; LOW Br. 10, 23; ACLU Br. 16) that, because al Qaida is not a state entity, the authority to detain enemy combatants in the current conflict extends to combatants for the Taliban but not al Qaida. That contention lacks merit.

a. As an initial matter, whether there exists a state of armed conflict against an enemy to which the laws of war

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* Cf. *Matthes* v. *Diaz*, 426 U.S. 67, 81 (1976) ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution."); *United States* v. *McDonald*, 265 F. 754, 763-764 (S.D.N.Y. 1920), appeal dismissed, 256 U.S. 705 (1921) ("The term 'theater of war' * * * apparently was intended to mean the territory of activity of conflict. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations.").

apply is a political question for the President, not the courts. See *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) ("Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.") (emphasis in original); see also *Eisentrager*, 339 U.S. at 789 ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); *Ludecke* v. *Watkins*, 335 U.S. 160, 170 (1948) (whether "state of war" exists is a "matter[] of political judgment for which judges have neither technical competence nor official responsibility"); *The Three Friends*, 166 U.S. 1, 63 (1897) ("it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted"). The President's determination that "members of al Qaida * * * have carried out attacks * * * on a scale that has created a state of armed conflict" thus is conclusive in establishing the applicability of the laws of war to the conflict. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (§ 1(a)); see JA 51 ("Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war.").

b. In any event, the suggestion that the laws of war do not apply to conflicts against non-state entities is flatly incorrect. It is well established that the laws of war fully apply to armed conflicts involving groups or entities other than traditional nation-states: "it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states." *The Prize Cases*, 67 U.S. at 666; see also *United States* v. *Pacific R.R.*, 120 U.S. 227, 233 (1887); *Hamdi III*, 316 F.3d at 464 (observing that, although current conflict "is waged less against nation-states than against scattered and unpatriated forces," "neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches"); I. Detter, *The Law of War* 134 (2d ed. 2000) ("non-recognition of groups, fronts or entities has not affected their status as belligerents nor the ensuing status of their soldiers as combatants"). Any contrary conclusion would blink reality in view of the fact that al Qaida has repeatedly declared itself an enemy of the United States and has committed unspeakable acts against United States citizens—acts that, by any understanding, constitute acts of war under the laws and customs of war.

Congress recognized as much in supporting the President's exercise of his Commander-in-Chief authority against the "nations, *organizations*, or *persons* he determines" were responsible for the attacks of September 11, 2001. 115 Stat. 224 (emphasis added). Moreover, NATO, upon concluding that al Qaida was responsible for directing those attacks from abroad, took the unprecedented step of invoking article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the

parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; see Statement of NATO Secy. Gen. (Oct. 2, 2001) (available at http://usinfo.-state.gov/topical/pol/terror/01100205.htm). The President has paramount authority in coordinating the response of the Nation's diplomatic and military allies, *e.g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), and NATO's action eliminates any doubt concerning the applicability of the laws of war to the conflict against al Qaida.*

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* There is no merit to the suggestion of petitioner's amicus (CCR Br. 31) that non-state entities are subject to the laws of war only in the context of an intra-state insurrection. Although many armed conflicts with a non-state party have involved intra-state rebellions, that simply reflects the fact that such non-state actors, especially until recently, generally lack the resources and capability to launch large-scale, transnational offensives. There is no basis in law or logic for confining the exercise of the Commander-in-Chief power against non-state entities to the context of intra-state rebellions, wholly to the exclusion of coordinated, international attacks of the scale and gravity perpetrated on September 11, 2001. See *Hamdi III*, 316 F.3d at 466 ("As the nature of threats to America evolves, along with the means of carrying those threats out, the nature of enemy combatants may change also.").

C. Congress Has Specifically Supported, Not Prohibited, The Exercise Of The President's Commander-In-Chief Authority At Issue In This Case

Petitioner argues (Pet. Opg. Br. 22) that the President's determination to detain Padilla as an enemy combatant "trespass[es] on the prerogatives of Congress." That claim lacks merit. Petitioner's understanding of the separation of powers is seriously flawed. In addition, Congress has broadly supported the President's exercise of Commander-in-Chief authority in terms that encompass the President's actions in this case. Nothing in the various statutes relied on by petitioner addresses or limits the President's war-time authority to detain Padilla as an enemy combatant.

1. The President's exercise of his constitutional powers as Commander in Chief does not require the authorization of Congress. See *The Prize Cases*, 67 U.S. at 668 ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."). The President's actions in this case, moreover, come with full statutory support from Congress. See *Hamdi II*, 296 F.3d at 281; see also *Coalition of Clergy* v. *Bush*, 310 F.3d 1153, 1156 (9th Cir. 2002) (observing that "the President and Congress united in their commitment of the Armed Forces of the United States to take military action against the Al Qaeda terrorists and those who would harbor them"). As the district court correctly reasoned (233 F. Supp. 2d at 607), the President's constitutional authority therefore is at its apogee. See *Dames & Moore* v.

Regan, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).*

Congress recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." 115 Stat. 224. And Congress broadly supported the President's use of "*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 * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Ibid.* (emphasis added).

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* Petitioner's reliance on *Youngstown Sheet* (Pet. Opg. Br. 14-15) is misplaced for that reason. Unlike the basic authority to detain enemy combatants in wartime—a quintessential exercise of the Commander-in-Chief power in directing military operations against enemy forces—the President's action in *Youngstown Sheet* was "to take possession of private property to keep labor disputes from stopping production." 343 U.S. at 587. In that case, there was no act of Congress from which support for the President's action "can fairly be implied," *id.* at 585, and Congress in fact had specifically refused to adopt the President's chosen method for resolving the labor disputes, *id.* at 586. Here, by contrast, Congress has acted in full support of the President's actions as Commander in Chief in the current conflict, including in respect to the capture and detention of enemy combatants.

The authority to use "all necessary and appropriate force" against organizations determined by the President to be responsible for the September 11 attacks necessarily embraces the authority to seize and detain enemy combatants. As the Fourth Circuit has explained, because "capturing and detaining enemy combatants is an inherent part of warfare," the "'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops." *Hamdi III*, 316 F.3d at 467 (quoting 115 Stat. 224); see also *Quirin*, 317 U.S. at 28-29 ("An important incident to the conduct of war is the adoption of measures by the military command * * * to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."); *Moyer*, 212 U.S. at 34-35 (construing statute granting authority to "repel or suppress" an invasion or insurrection as necessarily encompassing "the milder measure of seizing the bodies of those * * * consider[ed] to stand in the way of restoring peace").

Petitioner and his amici suggest (Pet. Opg. Br. 24, 28; CCR Br. 16) that Congress intended to withhold support for capturing enemy combatants within the United States. Nothing in the broad terms of the joint resolution admits of such a geographic restriction, which is not surprising considering that Congress acted in direct response to attacks perpetrated within the United States's borders. In fact, in supporting the President's use of "necessary and appropriate force * * * to prevent *any* future acts of international terrorism against the United States," Congress specifically found that it is "necessary and appropriate that the United States exercise its rights to self-defense

and to protect United States citizens both *at home* and abroad." 115 Stat. 224 (emphasis added). Moreover, Congress acted against the backdrop of the Supreme Court's decision in *Quirin*, which made clear that the President's Commander-in-Chief authority applies fully to American citizens captured on United States soil. The "well-settled presumption [is] that Congress understands the state of existing law when it legislates." *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988).

Petitioner nonetheless argues (Pet. Opg. Br. 18-19) that *Quirin* involved "congressional authorization" that is lacking here, and that the President thus had broader authority to detain enemy combatants in the circumstances of that case. Insofar as petitioner rests that assertion on the existence of a formal declaration of war in *Quirin* (Pet. Opg. Br. 17 n.9, 18; see CCR Br. 15), the argument is groundless. The United States military has routinely exercised its authority to capture and detain enemy combatants in a host of conflicts involving no formal congressional declaration—including more recent conflicts such as the Gulf, Vietnam, and Korean wars. See 233 F. Supp. 2d at 590 ("declarations of war are the exception rather than the rule"). That is because the President's prerogative to invoke the laws of war in a time of armed conflict, including in respect to the capture and detention of enemy combatants, in no way turns on a formal declaration. See, *e.g.*, *Bas* v. *Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800); A. Roberts & P. Guelff, *Documents on the Laws of War* 2 (3d ed. 2000) ("The application of the laws of war does not depend upon the recognition of the existence of a formal state of 'war,' but (with certain qualifications) comprehends situations of armed conflict whether or not formally

declared or otherwise recognized as 'war.'"). Congress understood as much when framing the terms of the joint resolution. See J. Ely, *War and Responsibility* 25 (1993) (the suggestion "that congressional combat authorizations must actually be labeled 'declarations of war'" is "manifestly out of accord with the specific intent of the founders").*

2. Petitioner (Pet. Opg. Br. 22-28) and his amici (CCR Br. 18-24; Cato Br. 3-17) contend that Padilla's detention as an enemy combatant is prohibited by 18 U.S.C. 4001(a). Section 4001(a), not raised in the amended petition, states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of

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* It is well established, as this Court has recognized, that "decisions regarding the form and substance of congressional enactments authorizing hostilities are determined by highly complex considerations of diplomacy, foreign policy and military strategy inappropriate to judicial inquiry." *Orlando* v. *Laird*, 443 F.2d 1039, 1043 (2d Cir.) (internal quotation marks omitted), cert. denied, 404 U.S. 869 (1971). "The choice, for example, between an explicit declaration on the one hand and a resolution and war-implementing legislation, on the other, as the medium for expression of congressional consent involves 'the exercise of a discretion demonstrably committed to the * * * legislature,' and therefore, invokes the political question doctrine." *Ibid.* (quoting *Baker* v. *Carr*, 369 U.S. 186, 211 (1962)). It follows that the presence or absence of a formal declaration can have no bearing in the context of this case.

Congress." The district court correctly rejected reliance on that provision (233 F. Supp. 2d at 598-599), as did the Fourth Circuit in *Hamdi III* (316 F.3d at 467-468).

a. Even assuming Section 4001(a) were intended to encompass the military's settled practice of detaining enemy combatants in wartime, the detention of Padilla and other combatants in the current conflict plainly is "pursuant to an Act of Congress," *i.e.*, Congress's joint resolution. See *Hamdi III*, 316 F.3d at 467 ("congressional resolution necessarily includes the capture and detention of any and all hostile forces"); 233 F. Supp. 2d at 598-599. In fact, the President specifically invoked the joint resolution in ordering Padilla's detention by the military (JA 51), and the resolution, as explained, broadly and necessarily supports the capture and detention of enemy combatants. That understanding is further confirmed by Congress's authorization for the expenditure of funds for "the maintenance, pay, and allowances of prisoners of war" and "other persons in the custody of the [military] whose status is determined by the Secretary to be similar to prisoners of war." 10 U.S.C. 956(5). As the Fourth Circuit concluded, "[i]t is difficult if not impossible to understand how Congress could make appropriations for the detention of persons 'similar to prisoners of war' without also authorizing their detention in the first instance." *Hamdi III*, 316 F.3d at 467-468.

Contrary to petitioner's argument (Pet. Opg. Br. 24-26), the canon of construction that the specific governs the general does not support the conclusion that Section 4001(a) bars Padilla's detention. Even assuming, in the face of the terms of the joint resolution, that it were

appropriate to resort to any interpretive canon, the joint resolution specifically supports the President's use of "all necessary and appropriate force" in the particular context of responding to the attacks of September 11, 2001. 115 Stat. 224. That focused grant of authority in the specific context of the current conflict would trump the more general prohibition in Section 4001(a). Petitioner evidently would require Congress to have acted to a level of detail explicitly supporting the use of force against enemy combatants who happen to be American citizens. But "Congress cannot anticipate and legislate with respect to every possible action the President may find it necessary to take or every possible situation in which he might act." *Dames & Moore*, 453 U.S. at 678.

b. In addition, Section 4001(a), properly construed, does not address the wartime detention of citizens as enemy combatants. As the Fourth Circuit observed, "[a]ny alternative construction of these enactments would be fraught with difficulty." *Hamdi III*, 316 F.3d at 468. It was settled by the time of *Quirin* that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." 317 U.S. at 37; see *Territo*, 156 F.2d at 144. And if Congress intended for Section 4001(a) to "override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit." *Hamdi III*, 316 F.3d at 468. Indeed, petitioner's reading of Section 4001(a) would preclude the detention even of an American citizen seized in the heat of conventional battle. But "there is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen

captured on the battlefield during wartime may be treated like the enemy combatant that he is." *Ibid.*

Any such reading of Section 4001(a) would infringe on the President's core exercise of his Commander-in-Chief authority. The language of Section 4001(a) should not be construed to impede the President's exercise of his Commander-in-Chief powers in the prosecution of the current conflict. See *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 467 (1989) (canon of constitutional avoidance applies with special force when the "constitutional issues * * * concern the relative powers of the coordinate branches of government"); see also *American Foreign Service Ass'n* v. *Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam) (same). Section 4001(a) pertains to—and was intended to address—civilian detentions, not the detention of enemy combatants: the immediately ensuing subsection, 18 U.S.C. 4001(b), speaks to the control of the Attorney General over "Federal penal and correctional institutions," and specifically exempts from its coverage "military or naval institutions." There is no warrant for inferring that a provision directed to civilian detentions is intended to interfere with the basic authority of the Commander in Chief to capture and detain enemy combatants in wartime.*

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* The legislative history supports the conclusion that Section 4001(a) was not intended to interfere with the President's Commander-in-Chief authority. Congressman Mikva, one of the sponsors of the legislation, explained that "nothing in the House Bill * * * interferes with the [Commander-in-Chief] power, because obviously no act of

3. Petitioner and his amici assert (Pet. Opg. Br. 21, 27; Cato Br. 7-8, 11-12) that the enactment of various criminal prohibitions addressing the conduct of terrorist activity, including the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), somehow constrains the President's authority to detain Padilla as an enemy combatant. That contention is without basis, and was correctly rejected by the district court. 233 F. Supp.2d at 596.* The President's power to enforce the criminal laws is categorically distinct from his authority to prosecute the war, and the purpose of detaining an enemy combatant in the course of an armed conflict is not to exact criminal punishment. See pp.12-13, *supra*. Consequently, the enactment of criminal prohibitions against terrorist activity does not—and could not—diminish the President's authority to exercise the full powers of the Commander in Chief in a time of war.

To be sure, an unlawful combatant is potentially subject to trial and punishment for acts that render his

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Congress can derogate the constitutional power of a President." 117 Cong. Rec. 31,555 (Sept. 13, 1971).

* The Patriot Act addresses the detention, pending immigration removal or exclusion proceedings, of immigrant aliens suspected of endangering national security. See 8 U.S.C. 1226a; cf. *DeMore* v. *Kim*, 123 S. Ct. 1708, 1718 (2003) (noting that "detention is necessarily a part of th[e] deportation procedure") (internal quotation marks omitted). Those provisions do not purport to address the wartime detention of alien enemy combatants. In fact, they speak to the authority of the Attorney General, rather than the military, to detain. See 8 U.S.C. 1226a(a)(1).

belligerency unlawful, and Padilla's conduct in association with al Qaida might well violate a host of criminal prohibitions. But "Padilla is not being detained by the military in order to execute a civilian law or for violating a civilian law, notwithstanding that his alleged conduct may in fact violate one or more such laws." 233 F. Supp. 2d at 588 n.9. Instead, like all enemy combatants, he is being detained to prevent him from assisting the enemy and to obtain vital intelligence needed for the war effort. *Ibid.* The Executive is no more required to prosecute him under the criminal laws for his conduct than was the Executive compelled to pursue civilian prosecutions against the *Quirin* saboteurs for their parallel conduct. Here, as in *Quirin*, the President's decision to treat Padilla as an enemy combatant under the laws of war is fully consistent with the Constitution and with federal law.*

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* Although the amended petition seeks relief (JA 33) under the Posse Comitatus Act, 18 U.S.C. 1385, petitioner does not invoke that statute in this Court. Any reliance on the Posse Comitatus Act would be in error for the reasons explained by the district court. 233 F. Supp. 2d at 588 n.9.

POINT II

Judicial Review Of The Factual Basis For The President's Determination That Padilla Is An Enemy Combatant Does Not Extend Beyond Confirming The Existence Of Some Evidence Supporting That Determination

Acting on the basis of "the information available to [him] from all sources," the President determined that Padilla is an enemy combatant "closely associated with al Qaeda." JA 51. That factual determination, as our opening brief explains (Resp. Opg. Br. 44-49), is entitled to great deference in this proceeding. The district court thus correctly held that the "commission of a judge * * * does not run to deciding *de novo* whether Padilla is associated with al Qaeda," and instead "runs only to * * * examining whether there is some evidence to support [the President's] conclusion that Padilla was * * * engaged in a mission against the United States on behalf of an enemy with whom the United States is at war." 233 F. Supp. 2d at 608.

A. Settled Principles Of Judicial Deference To The Commander In Chief's Core Military Judgments Compel Adherence To The Some Evidence Standard In This Case

1. "[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs," *Dep't of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988), and "[d]eference by the courts to military-related judgments * * * is deeply recurrent in Supreme Court caselaw and repeatedly has been the basis for rejections to a variety of challenges to * * * decisions

in the military domain," *Able* v. *United States*, 155 F.3d 628, 633 (2d Cir. 1998). Deference to military judgments is especially warranted in respect to the conduct of the current conflict. See *Center for Nat'l Sec. Studies* v. *U.S. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003) (observing that "several federal courts * * * have wisely respected the executive's judgment in prosecuting the national response to terrorism" because "courts must defer to the executive on decisions of national security").

The President's determination that Padilla is an enemy combatant closely associated with al Qaida represents a core exercise of the Commander-in-Chief authority. See *Hamdi III*, 316 F.3d at 466 ("designation of * * * an enemy combatant * * * bears the closest imaginable connection to the President's constitutional responsibilities"). That determination rests on sensitive judgments of the sort uniquely within the competence of the Executive, because it "is within the role of the executive to acquire and exercise the expertise of protecting national security." *Center for Nat'l Sec. Studies*, 331 F.3d at 932; see *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"). Accordingly, basic principles of deference to the President's wartime judgments assume heightened significance in this case.

There is "all the more reason for deference" to the President's determination that Padilla is an enemy combatant because it rests on the full statutory support of Congress. *Hamdi II*, 296 F.3d at 281. The joint resolution supports the President's exercise of Commander-in-Chief authority against the "nations, organizations, or persons *he*

determines" were associated with the September 11 attacks "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224 (emphasis added). In accordance with that statutory direction, the President determined that Padilla "is closely associated with al Qaeda" and that his military detention "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." JA 51.

2. As explained in our opening brief (at 44-49), the deference owed the President's determination that Padilla is an enemy combatant dictates that judicial review of that determination can extent no further than confirming the existence of "some evidence" supporting it. That "some evidence" standard has been applied in a variety of contexts by courts when reviewing an executive determination, with the courts declining to reexamine or reweigh the factual basis for the determination but instead only verifying the existence of some evidence supporting it. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 306 (2001); *Superintendent* v. *Hill*, 472 U.S. 445, 455-457 (1985); *Eagles* v. *United States*, 329 U.S. 304, 312 (1946); *United States* v. *Commissioner*, 273 U.S. 103, 106 (1927); *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925).

To be sure, courts have applied the some evidence standard in those contexts when reviewing an executive determination that rests on an administrative record. In the circumstances of this case, however, the same level of deference is compelled by the serious separation of powers concerns that would accompany any more searching

inquiry into the factual basis for the core judgments of the Commander in Chief. See *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say"); cf. *El-Shifa Pharm. Indus. Co.* v. *United States*, 55 Fed. Cl. 751, 774 (2003) (court "may not look behind the President's discharge of his Constitutional duties as Commander in Chief, including his declaration of what constitutes an enemy target").

The Supreme Court's decision in *Moyer* v. *Peabody*, 212 U.S. 78 (1909), is instructive in this regard. *Moyer* concerned the decision of a governor acting in his capacity as "commander in chief of the state forces" to detain an individual in the course of a local "state of insurrection." *Id.* at 82. The Court upheld the governor's action against a due process challenge, ruling that, "[s]o long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief." *Id.* at 85. The Court explained that, as with Padilla's detention in this case, "[s]uch arrests are not necessarily for punishment," but are "to prevent the exercise of hostile power." *Id.* at 84-85. The "substitution of executive process for judicial process" is "admitted with regard to killing men in the actual clash of arms," the Court reasoned, and "we think it

obvious * * * that the same is true of temporary detention to prevent apprehended harm." *Id.* at 85.*

B. Petitioner's Call For Searching Judicial Review Of The President's Enemy Combatant Determination Rests On Authority With No Application Here

Petitioner argues that the President's enemy combatant determination should be reviewed de novo (Pet. Opg. Br. 47-49), and that the Constitution requires a full-blown evidentiary proceeding at which Padilla's ties to al Qaida must be proved beyond a reasonable doubt (*id.* at 54-59). Petitioner's argument for the functional equivalent of a criminal trial is decidedly out of place in the context of this proceeding.

1. Petitioner contends that the Due Process Clause of the Fifth Amendment requires de novo review of the President's enemy combatant determination. Pet. Opg. Br. 47-49. That is incorrect. There is no basis in historical tradition or practice for providing individuals who are

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* Petitioner seeks to distinguish *Moyer* (Pet. Opg. Br. 31) on the basis that the detention in that case "occurred pursuant to a specific state statute." That statute afforded no different or greater support for the governor's action than the joint resolution in this case for the President's Article II authority. The governor acted pursuant to a law authorizing him to "repel or suppress" any "invasion or insurrection," which the Court considered inherently to encompass the detention of "those whom he considers to stand in the way of restoring peace." 212 U.S. at 84.

detained as enemy combatants in the course of an armed conflict with a de novo judicial proceeding to test the factual basis for their detention. Nor is there any suggestion of such a requirement under the laws and customs of war. Cf. *Quirin*, 317 U.S. at 45 (concluding "that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission").*

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* There is no merit to the suggestion of petitioner's amici (CCR Br. 34; LOW Br. 27-28 n.35) that Padilla is entitled to an evidentiary hearing under Article 5 of the Third Geneva Convention, Geneva Convention Relative to the Treatment of Prisoners of War (GPW), Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135. See *Hamdi III*, 316 F.3d at 468-469 (rejecting reliance on Article 5). That provision states that, "[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining belligerents entitled to treatment as prisoners of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." The President has determined categorically that al Qaida operatives are not entitled to the protections of the GPW. See Resp. Opg. Br. 38. There can thus be no "doubts" as to the status of an al Qaida operative under the GPW. In any event, Article 5 only pertains to the existence of "doubts" concerning whether a detained enemy combatant qualifies for treatment as a prisoner of war, not to whether an individual is an enemy combatant subject to detention in the first place.

The authorities invoked by petitioner do not suggest otherwise. Petitioner places substantial reliance (Pet. Opg. Br. 33-36, 58-59) on *United States* v. *Salerno*, 481 U.S. 739 (1987), which upheld the pre-trial detention of criminal defendants under procedures afforded by the Bail Reform Act of 1984, 18 U.S.C. 3141 et. seq. But *Salerno* involved the rights of *criminal* suspects, as to whom the Constitution affords a panoply of familiar procedural protections. Padilla is not being detained as a criminal defendant under the domestic criminal laws, but as an enemy combatant under the laws and customs of war. Indeed, *Salerno* itself observes that, "in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom *the Government believes* to be dangerous." 481 U.S. at 748 (emphasis added); cf. *Ludecke*, 335 U.S. at 171-172 (holding that it does not "bespeak denial of due process to withhold * * * from the courts" any authority to review the decision of the President in a time of war to detain an enemy alien deemed to be dangerous).*

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* Petitioner fares no better in arguing (Pet. Opg. Br. 48) that de novo review is compelled by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). That case involved an action under the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., and thus is far afield from the issues in this case. In any event, the "President is not an 'agency' within the meaning of the APA," *Dalton* v. *Specter*, 511 U.S. 462, 469 (1994), and "so the APA does not allow courts to review the President's actions," *Lunney* v. *United States*, 319 F.3d 550, 554 (2d Cir. 2003). In fact, the APA specifically excepts

Petitioner ultimately grounds his due process claim for a searching evidentiary hearing in the balancing framework of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). See Pet. Opg. Br. 36-40. But the *Mathews* framework, which was conceived to address due process claims in administrative law, can afford no basis for relief where, as here, the challenged practice is firmly grounded in historical tradition—especially given the need to accord substantial deference to the President's judgments as Commander in Chief. Cf. *Medina* v. *California*, 505 U.S. 437, 445-446 (1992) (explaining that an approach "far less intrusive than that approved in *Mathews*" and focused on "historical treatment" is appropriate in challenges to State criminal procedures because of "centuries of common-law tradition" associated with "criminal process" and State's "expertise," and propriety of "exercis[ing] substantial deference to legislative judgments in this area"); *Burns* v. *Wilson*, 346 U.S. 137, 139 (1953) (plurality opinion) ("in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases"); *Able*, 155 F.3d at 633 (observing that

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from its scope "military authority exercised in the field in time of war." 5 U.S.C. 551(1)(G); see 5 U.S.C. 701(b)(1)(G). Moreover, any reliance on the APA to suggest that Congress intended de novo review in this case would be foreclosed by the joint resolution's support of the President's use of force against persons "he determines" are associated with al Qaida. 115 Stat. 224; cf. *Webster* v. *Doe*, 486 U.S. 592 (1988) (judicial review of agency action under APA is precluded when decision is committed to agency discretion).

"[h]abeas corpus relief is circumscribed" in the military context). The absence of any basis in history or practice for affording enemy combatants an evidentiary hearing to challenge their detentions thus should be dispositive. See *Quirin*, 317 U.S. at 27-28.

In any event, application of the *Mathews* balancing approach in the context of this case would be controlled by the recognition that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig*, 453 U.S. at 307. Accordingly, settled principles of deference to the President's determination that Padilla "represents a continuing, present and grave danger to the national security of the United States" (JA 51) would preclude a full, independent reevaluation of that determination. See *Moyer*, 212 U.S. at 84-85 (explaining that "what is due process of law * * * varies with the subject-matter and the necessities of the situation," and that in a state of insurrection, the executive may "seiz[e] the bodies of those whom he considers to stand in the way of restoring peace" as long as decisions are "made in good faith and in the honest belief that they are needed"). As this Court has explained, "constitutionally-mandated deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the military has advanced to justify its actions." *Able*, 155 F.3d at 534.

2. a. Petitioner argues (Pet. Opg. Br. 54) that "the only appropriate standard of proof here is proof beyond a reasonable doubt." That claim rests on the erroneous

assumption (*id.* at 56) that Padilla's detention "is punitive in nature."

As explained (pp. 12-13, *supra*), the wartime detention of an enemy combatant is not punishment. Contrary to petitioner's argument (Pet. Opg. Br. 56-58), the factors applied by the Supreme Court confirm that Padilla's detention is non-punitive. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). The detention of enemy combatants has not "historically been regarded as a punishment" and is not designed to "promote the traditional aims of punishment." *Id.* at 168; cf. *Smith* v. *Doe*, 123 S. Ct. 1140, 1152 (2003) (sex offender statute's "rational connection to [the] nonpunitive purpose" of "public safety" is a "most significant factor in our determination that the [law is] not punitive") (internal quotation marks omitted). Instead, enemy combatants are detained to prevent them from rejoining the enemy and to facilitate gathering intelligence about the enemy. See 233 F. Supp. 2d at 588 n.9. The kind of searching factual review envisioned by petitioner is fundamentally at odds with the purpose of obtaining intelligence (see Resp. Opg. Br. 50-53); and petitioner's proposed approach for assessing whether a military detention is justified would undermine the intelligence-gathering objective of the detention even when it is fully justified. Cf. *Hamdi*, 296 F.3d at 284 (noting that "least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary").

Petitioner thus errs in relying (Pet. Opg. Br. 58) on the Supreme Court's observation in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), that, except in "narrow non-punitive

circumstances," due process ordinarily requires a "*criminal* proceeding with adequate procedural protections" before detention may be imposed. *Id.* at 690 (internal quotation marks omitted) (emphasis in original). This case squarely presents the sort of "non-punitive circumstances" in which the procedural protections accorded criminal suspects are wholly inapplicable. Indeed, the Court in *Zadvydas* specifically observed that it was not considering "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." *Id.* at 696.

b. Moreover, the "heightened standard[s] of proof" and "full-blown evidentiary hearing" sought by petitioner (Pet. Opg. Br. 58-59) can have no application in the context of this case. As our opening brief explains (at 46-47), any intensive review of the evidentiary basis for the President's determination that Padilla is an enemy combatant would enmesh the judiciary in sensitive judgments lying at the core of the Commander-in-Chief power. Petitioner evidently contemplates an exhaustive evidentiary inquiry into the particulars of Padilla's conduct while overseas among the enemy, including analysis of the details and reliability of the foreign intelligence information weighed by the President in reaching his determination.

Those sorts of judgments are constitutionally committed to the Executive, and they lie outside the institutional expertise of the Judiciary. See, *e.g.*, *Ludecke*, 335 U.S. at 170 ("It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects

for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither technical competence nor official responsibility.") (footnote omitted); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (noting that the "President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are or ought to be published to the world," and "executive decisions as to foreign policy" based on such information "are delicate, complex, and involve large elements of prophecy" and are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility"); *Hamdi III*, 316 F.3d at 474-475 (explaining that "fine judgments about whether a particular activity is linked to the war efforts of a hostile power" are "judgments the executive branch is most competent to make," and that "[a]ny effort to ascertain the facts concerning the petitioner's conduct while amongst the nation's enemies would entail an unacceptable risk of obstructing war efforts authorized by Congress and undertaken by the executive branch").*

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* Petitioner argues (Pet. Opg. Br. 40-43) that Padilla's detention as an enemy combatant "shocks the conscience" and "crosses the line of decency" in violation of the substantive component of the Due Process Clause. Any substantive due process claim cannot be squared with the well-settled and consistent historical practice of the United States military to seize and detain enemy combat-

3. Finally, petitioner argues that Padilla has a right to counsel under the Constitution such that "there should be no restrictions on his meetings with counsel." Pet. Opg. Br. 60 n.30. Our opening brief explains (Resp. Opg. Br. 37-40) that Padilla has no entitlement to counsel under the Constitution or the laws of war, and (*id.* at 50-53) that the kind of unfettered access envisioned by petitioner would thoroughly frustrate the military's efforts to obtain vital intelligence from Padilla crucial to the war effort. That brief also explains (*id.* at 40-44) that, contrary to petitioner's assertion (Pet. Opg. Br. 67), the habeas statutes do not afford Padilla an "absolute right" to present facts challenging the President's determination or to access counsel for the purpose of asserting such a challenge. Because petitioner prevailed in the district court on the issue of access to counsel, the particular arguments on that issue raised by petitioner and his amici will be addressed in our reply brief.

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ants for the duration of an armed conflict. In fact, the President has made clear that enemy combatants detained by the military in the current conflict "will not be subjected to physical or mental abuse or cruel treatment," and "will be provided many POW privileges as a matter of policy" even though they are not lawful combatants under the laws of war. White House Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002), available at http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

CONCLUSION

For the reasons stated in our opening brief, this Court should vacate the district court's orders and remand the case with instructions to dismiss the amended petition for lack of jurisdiction. In the alternative, this Court should vacate that portion of the district court's orders requiring that Padilla be afforded access to counsel and remand the case with instructions to dismiss the amended petition on the merits.

Dated: New York, New York
August 12, 2003

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are 3,389 words in this brief.

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