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IN THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSE PADILLA,
DONNA R. NEWMAN, AS NEXT FRIEND, *Petitioner-Appellee/Cross Appellant*

v.

DONALD RUMSFELD, *Respondent-Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CONSENTED-TO BRIEF OF AMICI CURIAE HON. JOHN J. GIBBONS, HON. NATHANIEL R. JONES, HON. ABNER J. MIKVA, HON. WILLIAM A. NORRIS, HON. H. LEE SAROKIN, HON. HAROLD R. TYLER, JR., DONALD FRANCIS DONOVAN, SCOTT GREATHEAD, ROBERT E. JUCEAM, PHILIP ALLEN LACOVARA, ROBERT TODD LANG, ROBERT M. PENNOYER, BARBARA PAUL ROBINSON, AND WILLIAM D. ZABEL IN SUPPORT OF PETITIONER-APPELLEE/CROSS APPELLANT JOSE PADILLA AND ADVOCATING FOR AFFIRMANCE IN PART AND REVERSAL IN PART

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July 30, 2003

STATEMENT OF *AMICI CURIAE*

Both parties – Petitioner (via Donna Newman) and Respondent (via Eric Bruce) – have consented to the filing of this brief.

AMICI'S INTEREST

This case involves an unprecedented detention by the United States of an American citizen, seized on American soil away from any recognized or traditional field of battle, and held incommunicado for more than a year without any charge being filed against him, without any access to counsel, and without any right to challenge the basis for his detention before a United States judge or magistrate. Amici curiae are retired federal judges, former government officials and lawyers who are deeply concerned about the novel and important issues presented by this case. Amici believe the Executive's position in this case threatens the basic "rule of law" on which our country is founded, the role of the federal judiciary and the separation of powers in our national government, and fundamental individual liberties enshrined in our Constitution.

AMICI'S IDENTITY AND SOURCE OF THEIR AUTHORITY TO FILE

Judge John J. Gibbons served as a judge on the United States Court of Appeals for the Third Circuit from 1970 to 1990, and as Chief Judge from 1987 to 1990.

Judge Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002.

Judge Abner J. Mikva served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and as Chief Judge from 1991 to 1994. He also served as White House Counsel from 1994 to 1995. Prior to taking the

bench, he served five terms as a member of Congress, representing portions of Chicago and its suburbs.

Judge William A. Norris served as a judge on the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

Judge H. Lee Sarokin served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and on the United States Court of Appeals for the Third Circuit from 1994 to 1996.

Judge Harold R. Tyler, Jr. served as a judge on the United States District Court for the Southern District of New York from 1962 to 1975. He has also served as the Deputy Attorney General of the United States, an Assistant Attorney General of the United States Department of Justice Civil Rights Division, and an Assistant United States Attorney.

Donald Francis Donovan practices law in New York City, where he concentrates in international disputes. He currently serves as Chair of the Institute for Transnational Arbitration and as Vice President of the International Council for Commercial Arbitration, having previously held leadership positions in a range of other international law, human rights, and international arbitration organizations.

Scott Greathead is a member of the New York Bar and an international human rights advocate. He has traveled to more than a dozen countries to urge judges and government officials that detained persons are entitled to the fundamental due process rights articulated in this brief.

Robert E. Juceam is a lawyer in private practice in New York City and the director of the American Immigration Law Foundation.

Philip Allen Lacovara is an attorney in private practice in New York. He has served as the Special Counsel to the New York City Police Commissioner, a position which included anti-terrorism responsibilities; the Deputy Solicitor General of the United States, where he was in charge of the federal government's criminal and internal security cases in the United States Supreme Court; and Counsel to the Special Watergate Prosecutor.

Robert Todd Lang is an attorney in private practice in New York City. He has practiced law since 1948, and is the former managing partner of a large private law firm in New York.

Robert M. Pennoyer is an attorney in private practice in New York City. He has served as an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the Southern District of New York, the Assistant to the General Counsel of the Department of Defense, and the Special Assistant to the Assistant Secretary of Defense for International Security Affairs.

Barbara Paul Robinson is an attorney in private practice in New York City. She is a former President of the Association of the Bar of the City of New York.

William D. Zabel is the Chairman of the Lawyers Committee for Human Rights and a senior partner of Schulte, Roth & Zabel LLP in New York City.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

STATUTES AND RULES

MISCELLANEOUS

INTRODUCTION AND SUMMARY OF ARGUMENT

This unprecedented case concerns Jose Padilla, a United States citizen arrested in the United States, who has been held incommunicado for more than a year without being charged with any crime, without being given any notice of the government's case against him, and without being allowed any access to a lawyer or to court. The President asserts first, that he has the unilateral power to condemn a citizen to such indefinite imprisonment without trial simply by designating the citizen as an "enemy combatant"; and second, that the courts are forbidden from even asking to hear the prisoner's side of the story. In the judgment of amici, the precedent the Executive asks this Court to set, represents one of the gravest threats to the rule of law, and to the liberty our Constitution enshrines, that the nation has ever faced.

As the present case comes to this Court, the issues are both clear and momentous. The district court has ruled that the President does have the power to detain Padilla indefinitely without criminal trial, but that Padilla is entitled to some limited access to counsel and to some limited judicial review of his detention. Seeking to deny Padilla even that minimal due process, the Executive sought an interlocutory appeal. Padilla has cross-appealed, challenging the President's power to detain without charge or trial (and without Congressional authorization) a United States citizen arrested in the United States. Padilla also seeks review of the district court's determination that it should apply the exceedingly deferential "some evidence" standard of review to the President's designation of Padilla as an enemy combatant.

This brief focuses on Padilla's right to present, through counsel, evidence that he is not an "enemy combatant" of the United States, and on the authority of the court to

exercise meaningful independent review of the Executive's determination that he is. Because of this focus, the brief does not address the antecedent question of whether the President has authority to seize persons not on a battlefield and to detain them indefinitely as so-called "enemy combatants." Without in any way endorsing the existence of such an authority, the brief addresses the question of what process is constitutionally due to such prisoners should such an unprecedented power be found.

Amici have long experience with claims of national security and in no way minimize the threat brought home to all of us on September 11. But the Executive's position in this case poses a threat to the rule of law unnecessary and disproportionate to the external threat we now face. This brief demonstrates first, that the use of executive power to detain people without trial was a core concern of those who won our independence and drafted our Constitution. Indeed, the Constitution includes multiple safeguards designed to prevent unilateral executive detention. Under our Constitution, such executive action is reviewable by the independent judiciary to ensure its conformity to duly enacted laws. The brief then demonstrates that this core guarantee of our constitutional system necessarily dictates that all persons seized within the United States are entitled to access to counsel and to a hearing at which they may present evidence and be heard.

Equally fundamental is the need for meaningful and independent judicial review. At the outset, Padilla has a constitutional right in this proceeding to challenge, through counsel, the authority of the government to imprison persons seized in the United States indefinitely without criminal charge or trial. It is the courts that ultimately must decide whether, and under what circumstances, that authority exists. In addition, *assuming* (without conceding) that such authority is found, no standards yet have been established

defining what *is* an "enemy combatant," what rights an individual has to challenge that designation, and how long and under what conditions such an individual may be detained. Until that vacuum is filled by appropriate legislation or regulation found to be constitutionally sufficient, the federal courts must have meaningful authority to make an independent evaluation of whether a person is properly being held. It is not enough, as the Executive urges, for there to be "some" evidence that "could" support the conclusion that the citizen is an undefined "enemy combatant." Such a standard gives the Executive far too broad a power to imprison a citizen declared to be an "enemy" of the state; the power asserted would be alarmingly akin to that routinely exercised by totalitarian governments over dissidents.

Given the astonishing breadth of what the Executive here seeks – an unbridled right to detain a citizen indefinitely without formal charge, trial, or other proceedings of any kind – the Executive must, at a minimum, present clear and convincing evidence that a person seized on American soil is an "enemy combatant." No lesser standard of proof comports with the staggering loss of liberty at issue here. At least until such time as appropriate and constitutionally-permissible procedures are established for the detention of American citizens as so-called "enemy combatants," it is essential that the federal judiciary provide this independent check.

Procedural protection short of these requirements is not the rule of law; rather, it is rule at the whim of the Executive.

ARGUMENT

I. Padilla Is Entitled to Meaningful Judicial Review of His Detention, and He Must Have Access to Counsel in Order to Secure That Review.

Acceptance of the Executive's assertion that it may indefinitely imprison an American citizen without trial and without significant judicial review would dangerously upset the balance of separated powers set forth in the Constitution. The Executive has been wise enough not to assert here, as it did in the *Hamdi* case, that the courts are entirely without power to review Padilla's detention. *See Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002) ("The government thus submits that we may not review at all its designation of an American citizen as an enemy combatant – that its determinations on this score are the first and final word."), *rehearing en banc denied*, 2003 WL 21540768 (4th Cir. July 9, 2003). However, the type of judicial review the Executive suggests would be sham process. It is troubling enough that the Executive seeks to circumvent all the procedural protections that our criminal justice system normally affords to persons before they are deprived of liberty. But the Executive would also strip away the most basic due process rights of notice and an opportunity to be heard by forbidding Padilla from even learning about this case or communicating in any manner with his counsel – *or even with the court*. The Executive justifies this position by advancing the novel proposition that allowing Padilla to learn that a court is reviewing his case might give him hope of someday getting out, thereby upsetting the "sense of dependency and trust that the interrogators are attempting to create." Jacoby Declaration at 8-9 (A55-63).

Although there has never been *any* hearing in *any* forum in which Padilla has been allowed to defend himself or present evidence on his behalf, the Executive asks for extreme deference to its unilateral determination that it has "some evidence" to justify

Padilla's continued detention without trial. In the Executive's view, an Article III court's role is limited solely to ascertaining whether the government has submitted an *ex parte* affidavit that is not facially incredible; so long as the government complies with this pro forma requirement, the court cannot even ask to hear the prisoner's side of the case.

Although the Executive will not cite it, the only precedent in this nation's history for the prolonged detention of American citizens with so little due process is the discredited decision in *Korematsu v. United States*, 323 U.S. 214 (1944). Unless the courts are now to become rubber-stamps for executive overreaching, the government's position must be rejected.

A. Judicial Review of Executive Detention Is Critical to Maintaining the Constitutional System of Checks and Balances.

The conduct at issue in this case – the unilateral detention of a citizen by an unchecked executive – strikes at the core of the liberty our Constitution safeguards. The Framers' experience with the Crown gave them ample reason to fear the abuse of unchecked executive power.[1] As Madison elaborated in Federalist No. 47, "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The plan of divided and limited government set forth in our Constitution is, therefore, first and foremost a guarantee of liberty. *See Myers v. United States*, 272 U.S. 52, 293 (Brandeis, J., dissenting) ("The doctrine of separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power . . . and to save the people from

[1] The Declaration of Independence, paras. 20-21 (U.S. 1776). *See also* The Federalist, No. 84 (Alexander Hamilton) (habeas corpus provides "greater securities to liberty" than other provisions of the Constitution, for "the practice of arbitrary imprisonments, [has] been, in all ages, [one of] the favorite and most formidable instruments of tyranny.").

autocracy."). To guard against arbitrary executive detentions of the kind the Framers feared, the Constitution imposes multiple structural safeguards – including the right of habeas corpus (which subjects executive detention to review by an independent judiciary), the Fourth Amendment (which requires the executive to obtain judicial approval before – or immediately after – seizing a person), and the Due Process Clause of the Fifth Amendment (which forbids executive detentions not authorized by law and ensures fair procedures for evaluating the lawfulness of any detention).

The right to habeas corpus – that is, to have a *court* determine the legality of detention – was one of the few individual rights enshrined in the Constitution itself, even before the Bill of Rights. Although habeas today typically involves collateral review of state convictions, "[a]t 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." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *see also Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977); *id.* at 385-86 (Burger, C. J., concurring) ("the traditional Great Writ was largely a remedy against executive detention"); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."). As the Supreme Court has noted, at common law, "'[w]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise *all issues relating to the legality of the detention.*'" *St. Cyr*, 533 U.S. at 301 n.14 (emphasis added).[2]

[2] Executive detention has long been viewed skeptically in Anglo-American jurisprudence. *See, e.g., Shaughnessy 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

Of course, "the Constitution . . . is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Through the Suspension Clause, the Constitution provides a remedy for situations of "Rebellion or Invasion" when the nation temporarily cannot afford habeas. But the Suspension Clause resides in Article I. Only *Congress*, not the President, has the power to suspend judicial scrutiny of executive detention. U.S. Const. art. I, § 9 cl. 2; *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C. Md. 1861) (Taney, C.J.); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, C.J.). Vesting the power to suspend habeas corpus in the Legislature serves two important purposes. First, it ensures that no branch of government has the unilateral power to deprive persons of liberty. Second, it vests this important decision in the more representative and deliberative branch of government. Thus, the Constitution ensures that the power of habeas corpus to act as a restraint on executive detention is not an empty promise, as it would be if the Executive had the unilateral authority to exempt its own actions from judicial review.

The fear of arbitrary arrests by the Executive and the preference for judicial process is further reflected in the Fourth Amendment's requirement that seizures be accompanied by a *judicial* determination of probable cause. As the Supreme Court has explained, the Fourth Amendment's requirement of review by a neutral magistrate

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imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint."); 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 Herbert Morrison (Nov. 21, 1943)). *See also* III William Blackstone, Commentaries *133.

"accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." *United States v. United States Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 317 (1972); *see also McDonald v. United States*, 335 U.S. 451, 455-56 (1948) ("The presence of a . . . warrant serves a high function. . . . Power is a heady thing; and history shows that the police acting on their own cannot be trusted.").

Even when a warrantless arrest is justified by urgent circumstances, the Constitution requires that the arrestee be brought before a magistrate within 48 hours for a *judicial* determination. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). As the Court explained, the government's "strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity" must be balanced against the risk of "prolonged detention based on incorrect or unfounded suspicion." *Id.* at 52; *see also id.* at 61 (Scalia, J., dissenting) (advocating a 24-hour requirement and noting that historically "the only element bearing upon the reasonableness of delay was not such circumstances as the pressing need to conduct further investigation, but the arresting officer's ability, once the prisoner had been secured, to reach a magistrate who could issue the needed warrant for further detention").

The Fifth Amendment provides similar checks on the Executive's authority. That Clause's command that no person "be deprived of life, liberty, or property, without due process of law" brings the structural division of powers to bear on the protection of individual liberty by requiring that government action be taken not at the whim of some official, but only pursuant to duly enacted laws applied to the individual by fair procedures. U.S. Const. amend. V. The Clause requires that the "'legislature establish minimal guidelines to govern law enforcement,'" for when the "legislature fails to

provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citation omitted) (alteration in original). Due process also requires separation of the executive and judicial functions. *See, e.g., Touby v. United States*, 500 U.S. 160, 170-71 (1991) (Marshall, J., concurring) ("In particular, the Due Process Clause limits the extent to which prosecutorial and other functions may be combined in a single actor."); *cf. Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) ("[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process").

Nations around the world have come to share the view that judicial checks and balances are a vital aspect of the rule of law. Accordingly, numerous international human rights treaties guarantee the right to judicial review of detention.[3] Courts have held these provisions applicable even in cases involving terrorism or other threats to national security. For example, the Inter-American Commission on Human Rights has stated:

> The Commission nevertheless considers that, even in emergency situations, the writ of habeas corpus may not be suspended or rendered ineffective. . . . To hold the contrary view -- that is, that the executive branch is under no obligation to give reasons for a detention and may prolong such a detention indefinitely during states of emergency, without bringing the detainee before a judge . . . would, in the opinion of the Commission, be equivalent to attributing uniquely judicial functions to the executive branch, which would violate the principle of separation of powers, a basic characteristic of the rule of law and of democratic systems.

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[3] *See* International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, art. 9(4), 999 U.N.T.S. 171, 176 (entered into force Mar. 23, 1976) (Tab 1); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, opened for signature Nov. 4, 1950, art. 5(4), 213 U.N.T.S. 221, 226 (entered into force Sept. 3, 1953) (Tab 2); American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 7(6), 1144 U.N.T.S. 143, 147 (entered into force July 18, 1978) (Tab 3).

Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Inter-Am. Ct. H.R. (Ser. A) No. 8 ¶ 12 (Jan. 30, 1987) (Tab 4). Similarly, in invalidating Turkey's detention of suspected terrorists for more than fourteen days without bringing them before a court or allowing them to consult with a lawyer, the European Court of Human Rights stated:

> Although the Court is of the view . . . that the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention.

Askoy v. Turkey, 23 Eur. H.R. Rep. 553 ¶ 78 (1996) (Tab 5); *see also id.* ¶ 82 (contrasting British detention law for Northern Ireland, which the court had previously upheld, because under British law "the remedy of habeas corpus was available to test the lawfulness of the original arrest and detention" and "there was an absolute and legally enforceable right to consult a solicitor forty-eight hours after the time of arrest") (citing *Brannigan and McBride v. United Kingdom*, 17 Eur. H.R. Rep. 539 (1994)). These international bodies recognize that allowing one branch of government alone to make the law, to choose the persons it will target, and to judge its own application of the law to the individual, fatally undermines the rule of law.

The constitutional separation of powers must be safeguarded in times of crisis as well as in times of peace. As the Supreme Court wrote concerning a time when the nation's very survival was threatened by the Civil War:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence.

Ex parte Milligan, 71 U.S. 2, 120-21 (1866). Here, however, Congress has *not* suspended the writ of habeas corpus, nor can a suspension implicitly be found. *St. Cyr*, 533 U.S. at 299. It is thus beyond question that Padilla is entitled to review of his detention by an independent judiciary to ensure its conformity with law, and to challenge the authority of the Executive to detain him without trial.

While the Executive pays lip service to the availability of such review, in fact it is attempting to do indirectly what it cannot do directly. The Executive would unilaterally define the term "enemy combatant," decide to whom this definition does and does not apply, and determine how much evidence is sufficient to hold a person indefinitely. However expedient this kind of concentration of government power may be, it is exactly what the Framers of the Constitution were trying to avoid. *Cf. Myers,* 272 U.S. at 292 (Brandeis, J., dissenting) ("Checks and balances were established in order that this should be 'a government of laws and not of men.'"). Just as the Executive cannot directly exempt itself from judicial review by suspending habeas, it cannot do so indirectly by defining the scope and conditions of review so narrowly that there is, in effect, nothing for the reviewing court to decide. In order to serve its vital role in our constitutional structure, the judiciary's habeas corpus review of executive detention must not be so narrowly circumscribed as to become a mere formality.

B. Padilla Must Have Access to Counsel to Secure Meaningful Judicial Review of His Detention.

1. Holding Padilla incommunicado, without access to court or counsel, is tantamount to an illegal suspension of habeas.

"[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Ex parte Hull*, 312 U.S. 546, 549 (1941). It is hard to imagine a more direct abridgement or impairment of Padilla's right to habeas

corpus than holding him incommunicado. A petitioner who cannot communicate cannot file. Amici know of no case in which any court in this country has upheld a complete and perpetual ban on a prisoner's access to counsel.

The right to habeas corpus entails more than a judicial rubber-stamp of the Executive's decision to detain. *See Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected"). A proceeding in which the detainee is not allowed to communicate with the court, either in person or via counsel, makes a mockery of the great writ, and amounts to an illegal suspension of habeas.

In its original sense, the writ of habeas corpus required that the body of the prisoner literally be brought in court. *See Price v. Johnston*, 334 U.S. 266, 283 (1948) ("The historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause."), *overruled on other grounds*, *McCleskey v. Zant*, 499 U.S. 467 (1991); An Act for the Regulating the Privy Council and for taking away the Court commonly called the Star Chamber (July 5, 1641), Statutes of the Realm, v. 110. 17 Car. I. cap. 10 (persons imprisoned by the King, Star Chamber, or King's Privy Council entitled to writ of habeas corpus, and custodian required to "bring or cause to be brought the body of the said party so committed or restrained unto and before the Judges or

Justices of the said Court from whence the same writ shall issue in open Court") (Tab 6); Black's Law Dictionary 709 (6th ed. 1990).

Although modern practice no longer requires the physical production of the petitioner's body, it is essential to remember the important purposes served by actually bringing the "body" into court: that the prisoner not be left solely at the mercy of his captors, but instead be given an opportunity to be heard and seen by a judge. *Cf.* Inter-American Commission on Human Rights Advisory Opinion OC-8/87, *supra*, ¶ 12 ("[T]he immediate aim of [habeas corpus] is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse.") (Tab 4). Allowing the prisoner a chance to communicate directly with the court is of particular importance in the realm of executive detention, where the prisoner has been afforded no other hearing.

In cases where the prisoner's "body" is not brought into court, the prisoner's right to communicate with the court may be satisfied either through his direct submission of a petition or through the presence of counsel. But when the prisoner may neither communicate directly nor even speak with his lawyer, that lawyer's presence in the courtroom is insufficient to vindicate the prisoner's right to habeas. As diligently as a lawyer may strive to represent the interests of the absent prisoner, that cannot erase the prisoner's essential interest in having some avenue for presenting his *own* views to the court.[4]

[4] This is no way suggests that Padilla's attorney cannot serve as his next friend. To the contrary, given that Padilla is being held incommunicado, it is only through the petition of a next friend that Padilla has any hope of eventually gaining access to court himself. The existence of a next friend, however, should not be an excuse for denying Padilla his *own* right of access to court.

To accept the Executive's position – to prevent Padilla from speaking to anyone besides his government interrogators for the foreseeable future – would render habeas corpus an empty shell. Gagging and hiding the defendant eviscerates the judicial check on executive power that habeas is meant to provide.

2. The Fifth Amendment procedural due process requirement of a meaningful hearing demands that Padilla have access to counsel.

The Executive's refusal to allow the courts to hear Padilla's side of the case also independently violates due process. Padilla, as a United States citizen detained in the United States, is unquestionably protected by the Fifth Amendment Due Process Clause. "Freedom from imprisonment – from government custody, detentions or other forms of physical restraint – lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). At a bare minimum, due process demands that an individual receive some kind of notice and some kind of opportunity to be heard when the state seeks to deprive him of his constitutionally protected liberty. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (due process requires, "[a]t the very minimum," that a person being deprived of liberty "be given some kind of notice and afforded some kind of hearing"); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (holding that "right to present the defendant's version of the facts as well as the prosecution's" is "a fundamental element of due process of law"); *In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence."). The Executive

has afforded Padilla neither notice nor an opportunity to be heard. This habeas proceeding is his first chance at obtaining either.

"[A] hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal." *Londoner v. City and County of Denver*, 210 U.S. 373, 386 (1908). Padilla quite literally has no ability to present his arguments and proof to the court himself. To vindicate his due process "right to be heard," Padilla must be allowed to participate in the hearing through counsel. But due process cannot be satisfied by the participation of Padilla's lawyer in the hearing, where Padilla himself has not been allowed to communicate any information or instructions to his lawyer. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for *himself* whether to appear or default, acquiesce or contest.") (emphasis added). Because of "our deep-rooted historic tradition that everyone should have his own day in court," due process generally requires that affected persons be allowed to participate in the proceedings directly. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (internal quotation marks and citations omitted). *Cf. Faretta v. California*, 422 U.S. 806, 819 (1975) ("It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him'. . . . The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.").[5]

[5] It is easy to imagine circumstances in which the prisoner may have information, otherwise unavailable to his counsel, that demonstrates a fatal flaw in the "some evidence" the government has against him. *See, e.g.*, Robert E. Pierre, *FBI Apology Fails to Dissipate Cloud: 8 Terrorism Suspects Confined on Bogus Tip*, Wash. Post, May 24,

Finally, the Supreme Court has recognized that due process very often requires the assistance of a lawyer. *Powell v. Alabama*, 287 U.S. 45, 65 (1932) ("where the defendant . . . is incapable adequately of making his own defense . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law"). Without the assistance of counsel, the guarantees of the Bill of Rights would be empty promises for all but the learned few. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.").

The due process right to counsel has not been limited to criminal cases. In other situations involving comparable, non-criminal deprivations of liberty, courts have recognized a right to counsel. *See Project Release v. Prevost*, 722 F.2d 960, 976 (2d Cir. 1983) ("A right to counsel in civil commitment proceedings may be gleaned from the Supreme Court's recognition that commitment involves a substantial curtailment of liberty and thus requires due process protection.") (citing *Addington v. Texas*, 441 U.S. 418 (1979)); *see also Vitek v. Jones*, 445 U.S. 480, 496-97 (1980) (plurality op.) (due process requires appointment of counsel to indigent prisoners who are facing transfer hearings from the main prison facility to mental health hospital because of the "adverse social consequences" and "stigma" that can result from a finding of mental illness).

The Executive's invocation of the words "enemy combatant" in no way erases the traditional requirements of due process. Before September 11, 2001, the phrase "enemy combatant" appeared in only a handful of court decisions, none of which support the Executive's refusal to grant Padilla access to counsel or to provide him with a meaningful

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2003, at A3 (describing how terrorist suspects held as material witnesses without criminal charge learned that "a lover's quarrel had done them in" insofar as "the wife of [a] fellow detainee, apparently in anger" gave the FBI a false tip).

adversarial hearing on his status. In each of the three World War II-era cases involving persons who might be termed "enemy combatants," the individual detained, unlike Padilla, was in fact afforded access to counsel and a real hearing. The case on which the government relies most heavily, *In re Quirin*, involved soldiers in the German army who were tried for war crimes before a military commission. The *Quirin* defendants were given lawyers, informed of the charges and evidence against them, and allowed to present evidence on their behalf at a formal hearing. By the time the case reached the Supreme Court on habeas, the facts were no longer in dispute. *See In re Quirin*, 317 U.S. 1, 23-24 (1942).

Similarly, *In re Territo* involved an American citizen captured while fighting with the Italian Army on a European battlefield and held as a prisoner of war. Unlike Padilla, Territo had access to counsel and was allowed to present evidence at his two-day habeas hearing in federal district court. *See In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946). Finally, the case of "enemy combatant" Japanese General Tomoyuki Yamashita reached the Supreme Court after a lengthy trial before an overseas military commission in which Yamashita was represented by no less than six defense counsel. *In re Application of Yamashita*, 327 U.S. 1, 6 (1946). None of these cases remotely support the government's position that Padilla may be detained indefinitely without access to counsel and without any sort of adversarial trial with the accoutrements of due process.

Other democratic nations give suspected terrorists access to counsel and meaningful judicial review. For example, British law guarantees citizens in Padilla's position access to a lawyer as soon as practicable, and within 48 hours in all cases. Terrorism Act 2000, c. 11, sched. 8, ¶¶ 7-9 (Eng.) (Tab 7). Likewise, the 2002 Israeli law allowing the detention of so-called "unlawful combatants" guarantees access to counsel

and requires that the detainee be brought before a court within fourteen days. Incarceration of Unlawful Combatants Law, 5762-2002, § 6, § 5(a) (Tab 8). Similarly, India's 2002 counter-terrorism law requires that a suspected terrorist be informed of the right to counsel upon reaching the police station; have access to counsel during the interrogation process; and be detained no longer than ninety days, unless a special court approves an extended detention. Prevention of Terrorism Act, Act No. 15 of 2002, § 52 ¶¶ 2, 4, § 49 ¶ 4 (Tab 9). While amici do not endorse these laws, which have been criticized as insufficiently protective of individual rights, it is worth noting that in situations of comparable national threat, other nations have provided significantly more procedural safeguards, including access to counsel, than has the current U.S. administration.

3. Substantive due process also requires that Padilla be given access to counsel.

Perhaps most troubling is the Executive's effort to end-run all of the guarantees of due process by simply refusing to charge Padilla with any crime. While in a narrow doctrinal sense the Fifth and Sixth Amendment rights to counsel have traditionally focused on ongoing criminal cases, *cf. Chavez v. Martinez*, 123 S. Ct. 1994 (2003), it is inconceivable that the Framers intended to allow the Executive to evade the Bill of Rights by never bringing criminal charges. The Fifth Amendment Self-Incrimination Clause and Sixth Amendment guarantees of counsel, confrontation, and speedy public trial are not mere technicalities, but represent a broad commitment to the rule of law. These protections are implicit in the concept of ordered liberty and protected by the substantive component of the Fifth Amendment's Due Process Clause.

The Fifth Amendment's Self-Incrimination Clause expresses the Framers' rejection of the inquisitorial system and the "practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end." *United States v. Mandujano*, 425 U.S. 564, 587 n.5 (1976). As the Court held in *Miranda*, "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The right to counsel, moreover, is "indispensable to the protection of the Fifth Amendment privilege." *Id.* at 469.

Interrogation tactics may violate substantive due process even if they do not violate the Fifth Amendment's Self-Incrimination Clause. *Chavez*, 123 S. Ct. at 2012 (Stevens, J., concurring in part) ("[T]he Bill of Rights . . . protects all citizens from the kind of custodial interrogation that was once employed by the Star Chamber, by the Germans in the 1930's and early 1940's, and by some of our own police departments only a few decades ago. Whenever it occurs, as it did here, official interrogation of that character is a classic example of a violation of a constitutional right implicit in the concept of ordered liberty."); *id.* at 2008 (majority op.); *id.* at 2016 (Kennedy, J., concurring in part).

Indeed, the Executive's desire to create a "sense of dependency" and hopelessness in Padilla by depriving him of all procedural protections is nothing more than a modern version of the Star Chamber. Jacoby Declaration at 8-9 (A55-63). The Executive's tactics are precisely what the Supreme Court understood the Fifth Amendment to prohibit, and for which it found access to legal counsel necessary to prevent. *Miranda*,

384 U.S. at 455-57 (describing the "third degree," which included interrogation that would "continue for days" and other techniques designed "to prevent distraction and to deprive [the suspect] of any outside support"); *Watts v. Indiana*, 338 U.S. 49, 52-53 (1949) (criticizing practice of holding a suspect for days on end, subjecting him to around-the-clock interrogation and denying him access to counsel).

The Executive contends that its intelligence-gathering needs justify departure from these time-tested principles. Invoking the term "enemy combatant," the Executive asks this Court to place its imprimatur on practices that brazenly disregard the protections guaranteed by the Bill of Rights. But prisoners brought before the Star Chamber and accused of plotting against the King also had valuable intelligence information. Throughout history, totalitarian regimes have attempted to justify their acts by designating individuals as "enemies of the state" who were unworthy of any legal rights or protections. These tactics are no less despicable, and perhaps even more so, when they occur in a country that purports to be governed by the rule of law.

The Sixth Amendment's guarantees likewise represent fundamental principles of due process, not mere technicalities that can be cleverly evaded by failing to bring charges. Although black letter Sixth Amendment case law states that a defendant has no speedy trial right until he has been arrested and charged with a crime, none of these Sixth Amendment cases contemplated the outrageous possibility that the government might arrest and hold an individual in custody without ever prosecuting criminal charges. When an individual's liberty has not been restricted in any way, the Constitution does not require the government to act with haste in initiating criminal proceedings. But when the government deprives an individual of their liberty or when charges are pending, "[t]he speedy trial guarantee is designed to minimize the possibility of lengthy incarceration

prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. Loud Hawk*, 474 U.S. 302, 311 (1986).

The Supreme Court has firmly instructed that persons cannot be held indefinitely even when there are legitimate reasons why a criminal prosecution cannot proceed. For example, when a defendant is incompetent he may not be held for significantly longer than he would face if convicted. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Instead, the government must initiate civil commitment proceedings – at which the prisoner is entitled to counsel – and demonstrate by clear and convincing evidence that the person is a threat either to himself or others. *Addington,* 441 U.S. at 426-27.

The importance of the individual's right to counsel is directly related to the potential consequences of the government's action against him. For example, when a criminal defendant is facing a felony charge that could *possibly* result in incarceration for more than six months, he is entitled to a lawyer at the state's expense. *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997). Furthermore, a court may not impose an actual sentence of incarceration of *even one day* unless the defendant was represented by counsel. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972). For these same reasons, persons are entitled to the assistance of counsel when the government seeks to deprive them of their liberty through the mechanism of civil commitment proceedings. *See supra* at 16. It would eviscerate the Sixth Amendment if the government could permanently deny a person in custody access to counsel merely by delaying indefinitely the onset of criminal proceedings.

Finally, "[t]he constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights." *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *rev'd on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989). "This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Id.*

For all of these reasons, Padilla has a constitutional right to challenge in court, through counsel with whom he has had a meaningful opportunity to consult, the lawfulness and constitutionality of his continued detention.

II. Padilla Is Entitled to Challenge the Authority of the Executive to Detain Him Without Trial, and to Meaningful Independent Review of the Assertion That He Is an "Enemy Combatant."

Apart from Padilla's right to participate in this proceeding through counsel, a fundamental issue in this appeal is what the habeas court must decide and under what standard of review. Fundamentally, Padilla challenges the legal authority of the Executive to detain without criminal trial persons (including American citizens) seized far from any conventional battlefield. Although amici do not address in this brief whether the Executive has such authority, this Court first must resolve that unprecedented and threshold legal question, for which the district court obviously was entitled to appoint counsel on Padilla's behalf. Second, assuming *arguendo* that the power to imprison "enemy combatants" is found, the habeas court must exercise meaningful independent review of the claim that Padilla is such an "enemy combatant." The "some evidence"

standard urged by the government is insufficient to check the Executive's ability to imprison an individual indefinitely.

A. The Executive's "Some Evidence" Standard Is Inappropriate and Insufficient.

The constitutional guarantee of habeas corpus was meant to ensure that the courts would have plenary authority to review the validity of executive detention. In this case, however, the Executive contends that the only issue for the habeas court is "'whether there is any evidence in the record that could support the conclusion'" that Padilla is an enemy combatant, "so as to ensure that the 'record is not so devoid of evidence that the findings' are 'without support or otherwise arbitrary.'" Brief for the United States, at 48 (quoting *Superintendent v. Hill*, 472 U.S. 445, 455-57 (1985)). To the Executive, "some evidence" – in the form of an affidavit from an Executive Branch official asserting that evidence exists – is sufficient to condemn a citizen to a military brig indefinitely. This Court should vindicate the importance of the separation of powers and of an independent judiciary by rejecting the Executive's efforts to immunize from any real scrutiny such an indefinite and severe deprivation of liberty.

The "some evidence" test proposed by the government is an inappropriate standard of *review* that presupposes there has been some underlying adversarial hearing at which a record was created. *See* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence"*, 25 San Diego L. Rev. 631, 663-64 (1988). Significantly, the "some evidence" standard has only been applied in cases – for example, those involving review of prison disciplinary hearings and immigration decisions – where an original evidentiary record was created at a proceeding in which due process was respected. *Hill*, 472 U.S. at 454 (holding that "some evidence" standard applicable to prison disciplinary

proceedings, but noting that inmates subject to prison disciplinary proceedings "must receive (1) advance written notice of the disciplinary charges; (2) an opportunity . . . to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action"); *Estep v. United States*, 327 U.S. 114, 122 (1946) (noting that the decisions of the local draft board are by statute final and virtually immune from judicial review, but only when "made in conformity with the regulations"); *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) (administrative officers in immigration proceedings must respect due process).

Such abbreviated review is inapplicable here, because there has been no prior adversarial proceeding in this case in which due process was respected and there are no established standards that confine the Executive's power. As Judge Mukasey explained:

> No court . . . has applied the 'some evidence' standard to a record that consists solely of the government's evidence, to which the government's adversary has not been permitted to respond. Rather, courts have applied that standard to review the decisions of tribunals where petitioners had a chance to contest the evidence against them.

Padilla v. Rumsfeld, 243 F. Supp. 2d 42, 54 (S.D.N.Y. 2003).

The government's "some evidence" standard masquerades as meaningful judicial review but would eviscerate the concept of independent judicial scrutiny. Constitutional guarantees of due process require far more than the Executive submitting a hearsay declaration of one of its own officials to say there is some reason for Padilla's ongoing and indefinite detention. *Cf. Withrow v. Larkin*, 421 U.S. 35, 58 (1975) ("Clearly, if an initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent

adversary hearing leading to an ultimate decision, a substantial due process question would be raised.").

Significantly, when underlying procedures concerning a claim are non-existent or inadequate, courts consistently require full *de novo* review of the matter. For example, in the context of reviewing decisions of courts-martial on petitions for habeas corpus, the Supreme Court has explained that *de novo* review is required for claims that the court-martial did not adequately consider:

> Had the military courts manifestly refused to consider those claims, the District Court was empowered to review them *de novo*. For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.

Burns v. Wilson, 346 U.S. 137, 142-43 (1953) (plurality op.). Even under the highly deferential scheme established by the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2241 *et seq.* (AEDPA), claims that were not considered by the initial decisionmaker are entitled to *de novo* review. *Norde v. Keane,* 294 F.3d 401, 409 (2d Cir. 2002) ("If a state court has failed to adjudicate a claim 'on the merits,' the AEDPA's more stringent standard does not apply, and we instead review both questions of law and mixed questions of law and fact *de novo*.").

Full and independent judicial review also is warranted because the basic question at issue – whether Padilla is an "enemy combatant" – is a "jurisdictional" fact that determines whether the asserted authority of the Executive may be exercised. *Frank v. Mangum*, 237 U.S. 309, 331 (1915) ("[I]t is open to the courts of the United States, upon an application for a writ of habeas corpus, to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived

of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not."). There is a fundamental problem of circularity with the government's position that Padilla may be deprived of all his normal constitutional rights because he is an enemy combatant, and that he has no right to review his designation as an enemy combatant because enemy combatants have no rights. Independent judicial review of jurisdictional facts is the only way to avoid this circularity.

In *Ng Fung Ho v. White*, 259 U.S. 276 (1922), the Supreme Court held that the Due Process Clause required Article III courts to conduct full *de novo* review of the jurisdictional fact of citizenship in immigration cases. As here, it was no answer to say that the individuals had no right to judicial review because they were not citizens – their citizenship was the very question at issue. Significantly, the Court noted that "[t]he situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service." The Court found it "well settled" that the courts could review the jurisdictional fact of the defendant's military status. *Id.* at 284; *United States v. Grimley*, 137 U.S. 147, 150 (1890); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950) (habeas court may examine whether the "court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers."). Moreover, in conducting such review, courts have allowed additional evidence to be introduced at the habeas hearing where the trial record was insufficient. *Givens v. Zerbst*, 255 U.S. 11, 20 (1921); *Ver Mehren v. Sirmyer*, 36 F.2d 876, 880 (8th Cir. 1929).

The breadth of this review reflects the fact that, by its nature, military jurisdiction is limited and exceptional. *See, e.g., Givens*, 255 U.S. at 19; *Ver Mehren*, 36 F.2d at 880.

Designating a detainee as an "enemy combatant" allows him to be removed from the normal criminal justice system and imprisoned in an alternative military system. Accordingly, the facts that justify that label are necessarily jurisdictional facts that courts are entitled to review *de novo* to ensure that the military does not exceed its jurisdiction.

For all these reasons, the habeas court must exercise independent review of the assertion that Padilla is an "enemy combatant" and therefore can be imprisoned and interrogated indefinitely in a military brig. The right to habeas corpus, principles of due process, and established limitations on military jurisdiction all require the court to do more than determine, as the Executive urges, whether there is "any" evidence in the record that "could support the conclusion" that Padilla is an enemy combatant.

B. A Person May Not Be Deprived of His Liberty Indefinitely Unless There Is At Least Clear and Convincing Evidence That He Is an "Enemy Combatant."

Amici submit that the Constitution requires at least clear and convincing evidence before a person may be held in custody for an extended or indefinite period of time, as the Executive already has imposed here.[6] This is the minimal standard of proof that has been required in analogous contexts. *See United States v. Salerno*, 481 U.S. 739 (1987) (pretrial detention without bail requires "clear and convincing" evidence); *Addington*, 441 U.S. at 427 ("the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence," and defining proper standard as "clear and convincing"). Moreover, to the extent that a detention is punitive in nature – as detention of "unlawful combatants" arguably may be –

[6] Because many months have now elapsed, amici express no view on whether some lower standard, such as probable cause, might be enough to support the original arrest or detention for a short period.

the Constitution requires proof beyond a reasonable doubt. Allowing people to be imprisoned for years at a time on proof as scanty as "some evidence" would flagrantly violate the presumption that a person is innocent until proven guilty, a presumption that is implicit in the concept of ordered liberty. *Cf. Estelle v. Williams,* 425 U.S. 501, 503 (1976); *Coffin v. United States*, 156 U.S. 432, 453 (1895).

C. Respecting Constitutional Protections Need Not Disrupt National Security.

The Constitution requires full and independent review in cases where there has been no underlying hearing in accordance with due process or where there are essential jurisdictional facts in dispute. Recognizing this safeguard need not damage national security, so long as the courts carefully tailor their proceedings to the needs of the situation, as they are fully capable of doing. The federal rules are flexible enough to accommodate special circumstances. *See, e.g.,* Fed. R. Evid. 102 (rules of evidence should be applied so that "the truth may be ascertained and proceedings justly determined"); Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. 3 (2000)).

Moreover, because Padilla was not captured on a battlefield, but at Chicago O'Hare airport,[7] this case will not require military commanders overseas to give testimony about the circumstances of his capture. Modern technology also could be used to alleviate any difficulty in securing any necessary evidence from overseas.

The Constitution stands as a bulwark against government actions, even those taken in the name of national security, that threaten to eviscerate the fundamental

[7] *See Hamdi v. Rumsfeld*, No. 02-7338, 2003 WL 21540768 (4th Cir. July 9, 2003) (Wilkinson, J., concurring in denial of rehearing en banc) ("To compare this battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges.").

American values of due process and the rule of law. Even during the tense years of the Cold War, Justice Frankfurter noted that "[t]he requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and times of trouble." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring in result). So too, during these uncertain times, must we stand fast in our defense of these important constitutional safeguards of liberty.

The importance of independent judicial review is heightened by the circumstances in which this case is presented to the Court. At present there is no constitutionally-approved definition of who is an "enemy combatant"; there are no constitutionally-approved procedures governing when and how persons seized in the United States may be imprisoned as "enemy combatants" or for how long. It may be that Congress can legislate procedures governing the threats posed by "enemy combatants" (including American citizens), procedures that first would be signed by the Executive and then subject to full judicial review. In the absence of such standards, however, the judiciary – and the historical "great writ" of habeas corpus – serves as the sole safeguard against what otherwise would be an unbridled power of the Executive to imprison a citizen based solely on the Executive's hearsay assertions that he or she has become an "enemy" of the state. If the Executive even has such a power to detain an American citizen as an "enemy combatant" indefinitely without trial, that power must be subject to meaningful and independent review by the federal judiciary.

III. The Executive's Evidence Fails Even Under the Extremely Deferential "Some Evidence" Standard.

Finally, even if this Court were to apply the highly deferential "some evidence" standard, the Executive's evidence fails that standard, because the Mobbs Declaration

consists of wholly uncorroborated, hearsay allegations from informants whose credibility cannot be assessed on this record. The case law makes clear that, to satisfy the "some evidence" test, the evidence must be based on personal knowledge, and there must be sufficient information to allow evaluation of the reliability of informants. *See, e.g.*, *Zavaro v. Coughlin,* 970 F.2d 1148, 1153 & n.1 (2d Cir. 1992) ("some evidence" standard not met where only evidence of defendant's individual participation in riot was information from confidential informants as to whom "there was no evidence whatsoever of their reliability"); *Broussard v. Johnson*, 253 F.3d 874, 876 (5th Cir. 2001) ("It is clear that a bald assertion by an unidentified person, without more, cannot constitute 'some evidence' of guilt."); *Goff v. Burton*, 91 F.3d 1188, 1192 (8th Cir. 1996); *Brown v. Smith*, 828 F.2d 1493, 1495-96 (10th Cir. 1987); *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987). The Mobbs Declaration refers to unnamed confidential sources who, by the government's own admission, "have not been completely candid about their association with Al Qaeda and their terrorist activities," who may be engaged in an "effort to mislead or confuse U.S. officials," and one of whom in a later interview "recanted some of the information that he had provided." Mobbs Declaration at 2, n.1 (A44-49). Surely the Due Process Clause requires evidence more reliable than this before an American citizen can be stripped of all his rights.

The cases establish that the "some evidence" standard cannot be satisfied by pointing to any shred of evidence, however insignificant or incredible, while ignoring countervailing evidence, however strong. Moreover, while a court applying the "some evidence" standard of review is not allowed to reweigh the evidence, where a party "produces exculpatory evidence that directly undermines the reliability of the evidence in the record pointing to his guilt, he is 'entitled to an explanation of why the [factfinder]

disregarded the exculpatory evidence and refused to find it persuasive.'" *Meeks v. McBride*, 81 F.3d 717, 720 (7th Cir. 1996).

In sum, "some evidence" does not mean "no evidence." Even under a highly deferential "some evidence" standard, Padilla is entitled to present evidence on his behalf and the court is required to consider whether that evidence fatally undermines the credibility of the government's case.

CONCLUSION

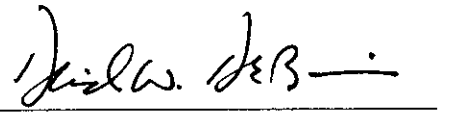
The Executive's position in this case sets on its head the framework of separated powers that the Constitution's drafters viewed as crucial to preserving liberty and the rule of law. While conceding that *some* judicial review may be had of its decision to detain indefinitely an American citizen, the Executive proposes a form of review that would completely eviscerate the independent role of Article III courts in our constitutional structure. The courts' role would be reduced to a rubber-stamp, with the sole criteria for review being whether the government had managed to draft and file an affidavit that was not, on its face, wholly implausible. So long as such affidavit were provided, the court would be barred from hearing the prisoner's side of the story.

As Justice Jackson wrote in *Mullane v. Central Hanover Bank & Trust Co.*, when process "is a person's due, process which is a mere gesture is not due process." 339 U.S. at 314. In his dissent in *Korematsu*, Justice Jackson noted that "[a] military order, however unconstitutional, is not apt to last longer than the military emergency," but that "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle." 323 U.S. at

246. That principle "then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Id.*

Whatever he may have done, or planned to do, Padilla is an American citizen deprived of liberty. Whether the Executive likes it or not, the Constitution still applies to him. He is entitled to due process of law in the form of a fair hearing in front of a neutral and independent judge. "It is inconceivable to me," Justice Jackson wrote fifty years ago, "that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 228 (1953) (Jackson, J., dissenting).

Respectfully submitted,



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1. *Amici* have filed a motion for leave to file an overlength brief. The brief contains 9,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally typeface using Word 2000 in Times New Roman 12-point font.

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CERTIFICATION

This is to certify that on this 30th day of July, 2003, a copy of the foregoing was sent postage pre-paid by First Class Mail to all counsel of record as follows:

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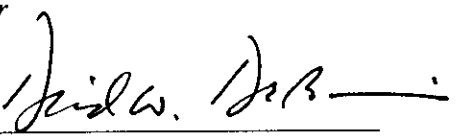

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ADDENDUM

INDEX