Summary of Argument

No President has ever claimed the power to imprison an American citizen seized far from any combat zone, without trial, charge, or access to counsel. No court has ever found such a power to exist. Yet the Government blithely contends that Padilla's detention is an ordinary discharge of military responsibilities. Nothing could be further from the truth.

Our military forces have detained without charge enemy soldiers captured on the battlefield in Avirtually every significant armed conflict in the Nation's history.@ (Gov=t Resp. Br. at 11.) But A[t]o compare th[ose] battlefield capture[s] to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges.@ *Hamdi v. Rumsfeld*, No. 02-7338, 2003 Lexis13719, at *11 (4th Cir. July 9, 2003) (en banc) (Wilkinson, J., concurring) [hereinafter *Hamdi IV*]. Though Padilla was not captured on a battlefield, the Government's brief is replete with citations to cases that deal with battlefield captures. *E.g., Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) [hereinafter *Hamdi II*]; *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) [hereinafter *Hamdi III*]; *In re Territo*, 156 F.2d 142 (9th Cir. 1946). The Asettled historical practice@ (Gov=t Resp. Br. at 11) of battlefield captures provides no warrant for the Government=s actions against Padilla.

Even in a traditional armed conflict, the law of war does not confer unlimited power on the Executive to seize civilian persons and property. *See Little v. Barreme,* 6 U.S. (2 Cranch) 170, 177 (1804). The category of combatants under the law of war includes only persons who are (a) members of the armed forces of a party to the conflict, or (b) civilians who spontaneously take up arms and participate directly in combat. Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 1351 [hereinafter Third Geneva Convention]. Civilians accused of Aassociating@ with the enemy or even of conspiring to commit sabotage have never been treated as Acombatants,@ and treating them as such would dramatically expand the law of war beyond its rationales and internal limits. The Government=s policy arguments about the dangers of terrorism change none of that. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (AIn the framework of our Constitution, the President=s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.@)

Congress has not authorized the detention of American citizens without charge. The Authorization for the Use of Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AAUF@) says nothing at all about detention of citizens without charge nor could it reasonably be read to have silently authorized such detention. The plain terms of AUF make clear that the President=s authority to use force against al-Qaeda does not somehow entail an authority to use force against those whose association with members of al Qaeda is unrelated to September 11. That AUF does not authorize Padilla=s detention is underscored by 18 U.S.C. ' 4001(a). In passing ' 4001(a), Congress explicitly withheld from the President the authority to detain without charge American

citizens suspected of sabotage or spying.

When the citations from inapposite battlefield cases like *Hamdi* are peeled away, it becomes apparent that the Government seeks to sustain the detention of Padilla on a single basis: a reading of *Ex parte Quirin*, 317 U.S. 1 (1942), that is far broader than its facts and holding permit. Indeed, the *Quirin* Court explicitly disavowed any effort to define even the Aboundaries of the jurisdiction of military tribunals to try persons according to the law of war,@ let alone the boundaries of the Government=s claimed authority to detain citizens without charge. *Id.* at 46. The Supreme Court has respected the narrowness of the *Quirin* opinion, upholding *Milligan*=s limitation on military jurisdiction. *See, e.g., Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

The Government, however, latches on to the *Quirin* Court=s description of Milligan as Anot being a part of or associated with the armed forces of the enemy@ as evidence that the law of war provides the Executive with authority to detain any person Aassociated with@ an enemy armed force. (Gov=t Resp. Br. at 20-23 (quoting *Quirin,* 317 U.S. at 45).) Thus the Government claims Padilla need not even be a member of al-Qaeda to be detained. (Gov=t Resp. Br. at 20-25.) The Government=s misreading ignores *Quirin*=s explicit refusal to define the law of war for those differently situated than Quirin, and confuses a factual description in *Milligan* with a doctrinal holding. Moreover, it ignores a long line of jurisprudence that both defines what it means to be Aassociated with@ the military and limits military jurisdiction to those within that clearly defined status.

Baseless as it is, the Government=s argument at least makes plain just how much power the President now seeks. The Government claims that military forces may seize a citizen and stow him away in a brig, without charge and without access to counsel, whenever the Commander-in-Chief concludes on Asome evidence@ (regardless of its dubious character) that a citizen has Aassociated@ with an enemy. That has never been our law. Such unprecedented power would violate the Framers= intent to prevent a AMilitary independent of and superior to the Civil Power.@ The Declaration of Independence, para. 14 (U.S. 1776). It would unbalance the separation of powers. That is why the Supreme Court=s interpretations of the Commander-in-Chief power B most of them post-*Quirin* B make clear that no such power exists.

Argument

I. The Executive Has No ADiscretion@ to Ignore Well Settled Law

Courts have regularly upheld the detention of combatants captured on the battlefield. *See, e.g., Hamdi II; Hamdi III; In re Territo*. Similarly, courts have upheld

the detentions of enemy soldiers captured in the United States. *See, e.g., Quirin*, 317 U.S. 1; *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). These cases, anchored in the historical law of war, do not justify the detention without charge of a non-soldier citizen seized in America, far from any battlefield. Civilian collaborators have always been charged under civil criminal statutes. *See, e.g., United States v. Haupt, [Sr.]*, 136 F.2d 661 (7th Cir. 1943), *aff=d* 330 U.S. 631 (1947); *Cramer v. United States*, 325 U.S. 1 (1945);[1] *United States v. Fricke*, 259 F. 673 (S.D.N.Y. 1919); *United States v. Robinson*, 259 F. 685 (S.D.N.Y. 1919); *Smith v. Shaw*, 12 Johns. 257 (Mil. Trib. 1815); *Elijah Clark=s Case*, Military Monitor Vol. 1, No. 23, Feb. 1, 1813, pp.121-22.

The Government argues that the Executive has sole and unreveiwable discretion to

[1] The Government is wrong to say these defendants were not Aassociated directly with the enemy forces.@ (Gov=t Resp. Br. at 19.) For example, Haupt Sr.=s son *was* the enemy B a Nazi soldier B and he Aassociated directly@ with his Nazi soldier-son. The Government suspects Padilla of the same kind of connection to an enemy: knowing association. Haupt Sr. (like Cramer, Fricke, Robinson, Smith and Clark) was charged with a crime because he was not a soldier in an enemy armed force and not captured on the battlefield B not because his acts were less odious than his son=s.

chose military detention over criminal prosecution. (Gov=t Resp. Br. at 18-19.) No support is given for that proposition; no support exists. The choice to execute the criminal laws that Congress has passed or to create new law is emphatically *not* a choice given to the Executive. *Youngstown*, 343 U.S. at 587 (Athe Constitution is neither silent nor equivocal about who shall make laws which the President is to execute@); *id*. at 343 U.S. at 655. That is why no previous executive has detained without charge suspected American saboteurs and spies, with the sole exception of Lincoln who sought and received specific Congressional authority in the form of the suspension of habeas corpus.

To be sure, the decisions involving the criminal prosecutions of Haupt, Cramer, Fricke and Robinson *et al*., do not address whether those men could have been detained without charge as combatants. But that is only because no President has ever B until now B grasped for the power to detain without charge absent a suspension of habeas corpus. The federal government has *always tried or released* civilians suspected of conspiracy to commit sabotage. This unbroken line from the ratification of the Constitution through the present does not, as this President would have, reflect the happenstance of similarly exercised discretion. Rather, it reveals an unwavering recognition of the checks and balances of our constitutional system.

II. The Law of War Does Not Treat Persons Like Padilla as Combatants

The customary law of war does not alter the settled domestic practice of treating persons like Padilla as criminal defendants, and provide no authority for

detaining Padilla as an enemy combatant. The Government hinges much of its case on vague references to the Alaw of war.@ *See, e.g.*, Gov=t Resp. Br. at 9. But closer examination of that law reveals that the Government=s treatment of Padilla is entirely without support.[2] Padilla does not meet the definition of combatant under the law of war because he is a civilian, not a soldier, and he was not captured bearing arms in a zone of combat, nor is there any allegation that he has participated directly in combat.

Combatant is a term of art and cannot be read in isolation. In order to understand the meaning of the term Acombatant@ in the law of war, it is important to understand the rationale behind that categorization. The law of war makes a fundamental distinction between civilians and combatants. *See* Dieter Fleck, *The Handbook of Humanitarian Law Protocol 65* (1995); Additional Protocol [I] to the Geneva Conventions of Aug. 12, 1949, and Relating to the Victims of International Conflicts, June 8, 1977, arts. 43, 48, 1125 U.N.T.S. 3, 16

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[2] Amici Washington Legal Foundation, et al., in support of the Government argue that Padilla=s references to international law are misplaced. BRIEF OF AMICI CURIAE WASHINGTON LEGAL FOUNDATION at 19. It is the Government, not Padilla, that introduced international law in to the case by relying on the Alaws and customs of war@ to justify its detention of Padilla in violation of otherwise applicable domestic constitutional protections. In fact, the Government has selectively parsed out portions of the law of war, ignoring pertinent parts which more fully explain sections they rely upon and sections which are contrary to their position. If the Government wishes to rely on the law of war, it must take the bitter with the sweet.

I.L.M. 1391 [hereinafter Additional Protocol I]; *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131(1866).

Combatants can shoot and be shot at; civilians are not supposed to shoot or be shot at. This distinction appears on the rules of engagement cards that American soldiers carry into battle, which say: AFight only Combatants.@ *See* U.S. Dep=t of Army, *Operational Law Handbook* 95 (T. Johnson, ed., 2003). AMembers of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities.@ Additional Protocol I, art. 43(2).[3] Noncombatants, which include civilians, are defined residually as everybody else B individuals who are not members of the

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[3] *See also* Jennifer Elsea, *Presidential Authority to Detain Enemy Combatants*, 33 Presidential Stud. Q. (forthcoming Sept. 2003) [hereinafter Elsea] (for a complete discussion of the distinction between the two categories and how historically we have treated the different categories) *available at* http://www.nimj.org. *See also*, BRIEF OF AMICI CURIAE EXPERTS ON THE LAW OF WAR at 10-12.

participants= military force and who are not authorized to take up arms. *See, e.g.*, U.S. Dep=t of the Army, *The Law of Land Warfare*, Field Manual 27-10, para. 60 (1956) [hereinafter Law of Land Warfare]; Additional Protocol I, art. 50(1).[4]

The Government argues that whether an individual is an acknowledged enemy soldier or is found engaging in conventional battlefield combat pertains to the distinction between Alawful@ and Aunlawful@ enemy combatants, not the antecedent question of whether an individual is a combatant at all. But whether an individual is in the armed forces of a party to a conflict and whether he or she has directly participated in combat *is* relevant to that antecedent question, and examination of the second purpose behind the category of Acombatant@ B the who can be shot at prong B explains why.

Combatants, who are members of the armed forces of a party to a conflict, are lawful targets for military attack wherever they are found. *See, e.g., Law of Land Warfare,* para. 31; Additional Protocol I, art. 48. But the law of war

[4] *See* Turner & Norton, *Civilians at the Tip of the Spear,* 51 A.F.L. Rev. 1, 24 fn. 135 (2001) (AThe current definition of a combatant is any member of the armed forces of a party to the conflict except medical personnel and chaplains. All other parties are considered to be civilians.@) (quoting, A.P.V. Rogers, *Law on the Battlefield,* 8 (1996)).

deliberately and sharply limits the situations in which civilians can become lawful targets of military action. Civilians cannot be targets for military attack Aunless and for such time as they take a direct part in hostilities.@ Additional Protocol I, art. 51(3). In other words, a civilian B a person who is not a member of the armed forces of a party to a conflict B cannot be treated as a combatant except during the actual time he or she is taking a direct part in hostilities because those are the only persons who may lawfully be shot. Air Force Pamphlet 110-31, *International Law - The Conduct of Armed Conflict and Air Operations* (1976), para. 3-3.a. The reason for such a stringent requirement of *direct* participation in combat is that any other rule would allow the use of military force against large parts of the civilian population on the theory that they were associated with and aiding the enemy forces, thereby fatally undermining the protection of the civilian population that the law of war is designed to offer.

Contrary to the Government=s position Ainfiltrating the domestic territory of a belligerent to commit acts of sabotage or terror in furtherance of the enemy=s war efforts@[5] does not subject that individual to military arrest and detention, unless the saboteur is also a member of the enemy army.@ Elsea, at 3-4. Conduct

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[5] Padilla hardly Ainfiltrated@ anything. He arrived in his own country, on a commercial airliner at a public airport, unarmed in civilian clothing, using his U.S. passport.

of the sort Padilla is alleged to have engaged in B loosely associating with members of a criminal organization and plotting to engage in future hostile acts B does not constitute direct participation in combat, and does not transform a civilian into a combatant and lawful military target.[6] Simply put, conspiracy to engage in future violence does not a combatant make.

Ignoring these fundamental principles of the laws of war, which compel a conclusion that Padilla is not a combatant, the Government leaps over these essential distinctions as though they do not exist. (Gov=t Resp. Br. at 22, 24.)

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[6] *See, e.g,* International Committee of the Red Cross [ICRC] *Commentary on the Additional Protocols* 619 (C. Pilloud, et al., eds., 1987) (distinguishing between direct participation of a combatant as exemplified by battlefield activity and that of civilian assistance which provides support for the war effort); *id.* At 516 (ADirect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place.@); Ingrid Detter, *The Law of War,* 285-88 (Cambridge University Press, 2d. Ed. 2000); William Winthrop, Military Law and Precedents (2d ed. 1920); *see also* BRIEF OF AMICI CURIAE EXPERTS ON THE LAW OF WAR at 13 and references cited therein.

Their analysis fails to understand the importance of one=s being designated as an enemy combatant is a determination of one=s military status. *See, e.g., Milligan,* 71 U.S. 2.

III. Neither AUF Nor the Appropriations Act Authorizes Padilla=s Detention.

The AUF does not provide the President with the authority he claims. The Government argues that A[t]he 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.@ (Gov=t Resp. Br. at 31.) That is a misleading half truth.

In enacting the AUF Congress authorized a limited use of force.[7] *Cf. Little*, 6 U.S. 170. AUF permits the use of force against *Asuch nations, organizations or persons*@ who committed, planned, authorized or aided the September 11 terrorist acts and those who Aharbored@ such nations, organizations or persons. AUF ' 2(a). The President

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[7] As is evident from the legislative history Congress did not intend to authorize the broad power claimed by the President or the authority to infringe on civil liberties. *See* Statement of Rep. Conyers, 147 Cong. Rec. J5648, H5680 (daily ed. September 14, 2001); Statement of Sen. Feingold, *id.* at S9417; Statement of Sen. Levin, *id.* at S9416.

claimed that Padilla associated and conspired with members of al Qaeda, but he has never claimed that Padilla is a member of al Qaeda or that he harbored members of al Qaeda. (JA 51).

Congress could have authorized the use of force against any person who associated with the perpetrators of September 11. It did not. The only sort of association that AUF targets is harboring the perpetrators of September 11.

Nothing in the language, legislative history give any support to the Government=s assertion that the President may unilaterally expand the categories of persons against whom Congress authorized the use of force in order authorize the military detention without charge of whomever the President might deem a fitting target.

The President=s detention without charge of a person not within the categories targeted by the congressional authorization is made more contemptible where, as here, the individual seized by the military is an American citizen. Congress made clear many years ago that the detention without charge of citizens is an especially grave matter. 18 U.S.C. ' 4001(a). A[T]he plain language of section 4001(a) proscribe[s] detention of any kind by the United States absent a congressional grant of authority.@ *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981). Indeed, Congress withheld from the President the power to detain without charges even those citizens suspected of being spies or saboteurs for a foreign

enemy power.[8] *See* Pet. Opg. Br. at 22-23; Cato Brief at 3-7, 10-11. Section 4001(a)=s text and history thus underscore what AUF plainly establishes: Congress did not authorize the detention without charge of those like Padilla.

[8] Representative Mikva did not, as the Government contends, concede that the President could detain citizens without charge. (Gov=t Resp Br. at 35,n.). *See* BRIEF OF AMICI CURIAE THE CATO INSTITUTE ET AL. at n. 3 [hereinafter Cato Brief].

The Government also claims that ASection 4001(a) pertains to B and was intended to address B 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.@ (Gov=t Resp. Br. at 36.) This argument is wrong for at least four reasons. First, it Acannot overcome the plain language of the statute as read by the Supreme Court in *Howe v. Smith*.@ *Padilla ex rel Newman v. Bush*, 233 F.Supp. 2d 564, 598 (S.D.N.Y. 2002). Second, 18 U.S.C. ' 4001(b) was enacted eighty years earlier, i.e. in completely different legislation than ' 4001(a).[9] The two share only a code designation, not an origin or a meaning. Third, ' 4001(b) contains an exception for Amilitary penal or military reformatory institutions or persons confined therein,@ but ' 4001(a) does not. This difference reflects the fact that ' 4001(b) explicitly applies only to the Attorney General, whereas ' 4001(a) applies to the entirety of the federal government. There is simply no reason to import ' 4001(b)=s exception into ' 4001(a). Finally, Congress enacted ' 4001(a) to repudiate the internment camps of World War II -- the executive detention under the aegis of the Department of War, and not the Attorney General --which further underscores that the statute applies to the entire

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[9] *See* Act of Mar. 3, 1891, ' 4, 51st Cong., ch. 529, 26 Stat 839, 839, as amended by Act of May 14, 1930, ' 2, 71st Cong., ch. 274, 46 Stat. 325, 325.

federal government.

Contrary to the Government=s claim, AUF does not come close to satisfying ' 4001(a)=s requirement of congressional approval of detention without charge. AUF says nothing about detention without charge of American citizens. It is a general statute. The specificity or generality of a statute is measured by its subject matter, not, as the Government implies, by the events to which a statute responds. *See* Gov=t Resp. Br. at 35 (citing Aspecific context of the current conflict@). While the Government correctly notes that ACongress cannot anticipate and legislate with respect to every possible action the President may find it necessary to take,@ *id.*, it is also true that Congress can and must legislate with respect to existing laws, as the Government acknowledges elsewhere in its brief. *Id.* at 32. That Aexisting law@ included ' 4001(a).[10] Furthermore, ' 4001 followed *Quirin* and therefore, even if *Quirin* had read the law of war to permit

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[10] It also included longstanding congressional acts that authorize the detention of certain enemy individuals but exclude citizens, *see, e.g.*, Alien Enemy Act, 50 U.S.C. ' 21 *et seq.*; Trading with the Enemy Act, 50 U.S.C. App. ' 1 *et seq.* The Government also conveniently fails to point out that the Aarticles of war@ relied upon in *Quirin*, were not only repealed, but military jurisprudence was substantially altered by both the 1950 enactment of the *Uniform Code of Military Justice*, 10 U.S.C. ' 801, *et seq.*, and the significant *constitutional* jurisprudence of *Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert;* 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234 (1960); and *Solorio v. United States*, 483 U.S. 435 (1987). *Quirin*, a 1942 case, also predates much of the modern codification of the law of war, *i.e.*, the 1949 Geneva Conventions.

detention without charge of those who were not soldiers in enemy armed forces (and it did not), ' 4001 subsequently provided more protection to American citizens.

Finally, the Government claims that 10 U.S.C. ' 956(5), an appropriations bill, authorizes Padilla detention without charge. (Gov=t Br. at 34.) Appropriations bills do not authorize government actions; they fund them. Without clear statements absent here, appropriations bills do not and cannot amend substantive law. 10 U.S.C. ' 956 (5) merely reflects a need to fund the detention of non-soldiers captured alongside enemy soldiers, such as enemy medical personnel. *See* U.S. Army Reg. 190-8; *see also* Cato Brief at 14-17. This very argument was previously advanced by the Government and rejected by the Supreme Court. *Ex parte Endo*, 323 U.S. 283, 303 n. 24 (1944).

IV. *Quirin* Does Not Justify Padilla=s Detention Without Charge.

The Government=s brief essentially rests on a single foundation: *Quirin.* But *Quirin* cannot support the weight that the Government asks it to bear. The Supreme Court in *Quirin* did not announce a broad policy about the application of the law of war to American civilians. *Quirin* explicitly referred to the saboteurs before it as belligerents B agents of enemy armies, and limited its holding to those facts. *Quirin,* 317 U.S. at 36, 45. Those facts, which were stipulated (as they are not here), established that the saboteurs were members of the German Army at a time when the United States was at war with Germany. *Id*. at 20-21.

Recognizing that *Quirin*=s holding does not support Padilla=s detention without charge, the Government argues more boldly that Padilla need not even be a member of an enemy force (i.e., al-Qaeda) in order for the President to detain him without charge or access to counsel. (Gov=t Resp. Br. at 20-25.) This argument makes plain how broad a power the President seeks: he asks the Judiciary, not Congress, to give him the power to imprison in a brig, without charge or access to counsel, any citizen whom he declares has Aassociated@ with an enemy. There is no basis for the Government=s astonishing (and unconstitutional) argument.

The Government apparently believes that it does not make sense to treat non-soldier saboteurs differently from soldier saboteurs. (Gov=t Resp. Br. at 20 (Athe *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@).) This is a policy argument, not a legal argument, and it belongs in Congress, not before this Court.[11] In any event, it is wrong. As discussed above at, it is for the very protection of civilians that the law of war treats enlisted soldiers differently from civilians. Nor is a civilian saboteur immune from prosecution and punishment: our statutes

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[11] What makes the Government position even more suspect is the simple fact that the executive department quickly mustered congressional approval in enacting comprehensive and far-reaching legislation in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (AUSA PATRIOT Act@), Pub. L. No. 107-56 (2001), after the AUF was passed. Notably the PATRIOT Act did not give the President the powers he now

criminalize acts of terrorism and punish those who commit them with life imprisonment or death. *See, e.g.,* 18 U.S.C. ' 2332a(a)(1) (criminalizing attempted use of a weapon of mass destruction).

The Government=s main rejoinders to the state of the law, aside from its usual quotes from inapposite battlefield cases, are out-of-context phrases, from *Quirin* that in no way altered the law of war. (Gov=t Resp. Br. at 20-21.)[12] The first passage, provided more fully is:

> We construe the *[Milligan]* 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. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war Y

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seeks from the judiciary nor did he ask for such authority.

[12] The Government also half-heartedly cites the Third Geneva Convention, implying that all Apersons who accompany the armed forces@ of the enemy are subject to seizure and detention without charge. As the ICRC has made clear, this clause does no more than give a High Contracting Party to the Convention authority to seize and detain non-soldiers, such as militiamen, fighting in concert with an enemy army. *See also* Turner & Norton, *supra*.

> The Court=s opinion is inapplicable to the case presented by the present record. We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, *upon the conceded facts*, were plainly within those boundaries.

317 U.S. at 46. As is clear from a reading of this passage, the Court unequivocally declined to express any opinion on how the law of war would treat anyone else and held only that A*upon the conceded facts,*@ that the soldier-saboteurs before it were an enemy combatants. *Id.* at 38.

Nor is the Government aided by the *Quirin* Court=s finding that the *Quirin* saboteurs were no Aless belligerents if . . . they have not actually . . . entered the theatre or zone of active military operations.@ 317 U.S. at 38.[13] The *Quirin* saboteurs were admitted Nazi soldiers, *upon the conceded facts*, and so were legitimate targets for the use of force (or capture) wherever found. It was thus irrelevant whether *they* had entered a zone of active combat. However, those who like Padilla are *not* soldiers in a belligerent=s armed forces do not become Acombatants@ *unless and until* they enter a zone of active combat and engage in combat. Again, because the *Quirin* Court clearly chose not to

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[13] *See also Quirin*, 317 U.S. at 36-37 (Aentry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act@). The Court was here concerned with determining the Awarlike@ nature of an act, not with the status of those who commit the act; indeed, the phrase begins by presuming that those who commit the act are Aenemy belligerents.@

articulate general principles of the law of war beyond those applicable to Athe conceded facts@ of the soldier-saboteurs before it, *Quirin* does not lend support to the Government=s argument that principles applicable to saboteurs who are soldiers in the army of a nation with which the United States is at war are equally applicable to those suspected of Aassociating@ with international criminal terrorist organizations. The law of war draws a distinction between soldier-saboteurs and non-soldier-saboteurs, and *Quirin* did not alter that law. To determine whether the law of war authorizes the President=s detention without charge of Padilla, this Court must look to the law of war B not to inferences that the Supreme Court unambiguously instructed should not be drawn.

Moreover, the term Aassociated with@ the military is a technical term of art that was utilized correctly in *Quirin* but which the Government and the district court have misapplied. As the Court in *Quirin* explained, Congress provided military jurisdiction for offenses committed by members of the military and Aby specified classes of persons *associated or serving with* the Army.@ *Id*. at 27 (emphasis added). The *Quirin* Court=s understanding of the term=s technical meaning is evident from its reference to Articles 1 and 2 of the Articles of War, *Quirin*, 317 U.S. at 26-27. Article 2 classified all persons Asubject to military law.@ This classification included officers and soldiers belonging to the Regular Army and those defined in subsection (d) B A[a]ll retainers to the camp and all persons accompanying or serving with the armies of the United States without the

territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field.@ Act of June 4, 1920, art. 2(d), 66 Cong., ch. 227, 41 Stat. 759, 787. Accordingly, Congress provided for military jurisdiction over both members of the regular army and those individuals Aassociated or serving with@ the army on the battlefield, such as medical personnel, chaplains and civilian clerks. *See also In re Di Bartolo*, 50 F. Supp. 929, 931-32 (S.D.N.Y. 1943) (providing historical analysis of the term Aassociated with military@ under United States law and warning against surrender by civilian courts to military courts of jurisdiction over civilians). Padilla falls into none of these categories: B he was neither apprehended on the battlefield nor Aassociated with@ any military force, as the term is used in *Quirin* or by the law of war.

V. The Commander-in-Chief Power Provides No Authority for Padilla=s Detention Without Charge

Contrary to the Government=s claims, the Commander-in-Chief clause does not vest the President with wide powers off the battlefield. (Gov=t Resp. Br. at 8.) The Supreme Court has repeatedly given the Commander-in-Chief clause a narrow reading, respecting the line between Athe Military@ and Athe Civil Power@ that the Framers thought crucial. Declaration of Independence, para. 14 (U.S. 1776) (citing among the reasons for seeking liberty from Great Britain the fact that the King Ahas affected to render the Military independent of and superior to the Civil Power.@). The most emphatic of these cases were decided *after Quirin*, and make plain that *Quirin* cannot be read to

provide the military with the sort of jurisdiction over civilians that the Government claims.

In *Duncan*, 327 U.S. at 324, the Supreme Court held that even the declaration of martial law during wartime does not vest the Executive with military jurisdiction over civilians away from a battlefield. *See also id.* at 325 (Murphy, J., concurring) (A[I]n framing the Bill of Rights Y [our nation=s Founders] were careful to make sure that the power to punish would rest primarily with the civil authorities at all times. . . . This supremacy of the civil over the military is one of our great heritages.@). In *Toth*, 350 U.S. 11, the Court articulated the governing constitutional principle, holding plainly that an *Aassertion of military authority over civilians cannot rest on the President's power as commander-in-chief.@ Id.* at 14 (emphasis added). *Reid*, 354 U.S. at 35, followed suit, reasserting the military=s lack of jurisdiction over civilians and noting Athe business of soldiers is to fight . . . wars, not to try civilians for their alleged crimes.@ Indeed, the *Reid* Court described *Milligan* as Aone of the great landmarks in this Court=s history@B more than a dozen years after *Quirin. Id*. at 30; *see also id.* at 31 (A*Duncan* . . . reasserted the principles enunciated in *Ex parte Milligan* and reaffirmed the tradition of military subordination to civil authorities and institutions.@); *id*. at 33 (AThe *Milligan*, *Duncan* and *Toth* cases recognized and manifested the deeply rooted and ancient opposition in this country to the extension of military control over civilians.@).

Youngstown reflects the same respect for the Framers= careful design. There, as here, the Executive claimed the power to effect a seizure deemed essential to a war. 343 U.S. at 583. The Court rebuffed the Executive=s claim of a power to seize under the Commander-in-Chief clause. *Id.* at 587. Indeed, the Court conspicuously rejected the applicability of battlefield cases Aupholding broad powers in military commanders engaged in day-to-day fighting in a theater of war.@ *Id.* The Court easily concluded that the Commander-in-Chief clause could not justify the seizure even of property. *Id.* If the Commander-in-Chief clause cannot justify the seizure away from a battlefield of compensable property, *a fortiori* it cannot justify the seizure away from a battlefield of personal liberty.

VI. The Executive=s Professed Goals of Information-Gathering and Prevention Do Not Justify Padilla=s Detention

The Government claims that its express purposes for Padilla=s detention without charge B Ato prevent him from assisting the enemy and to obtain vital intelligence@ B somehow authorize his detention. (Gov=t Br. at 13.) These goals provide no legal basis for Padilla=s detention. Indeed, they prove too much: these rationales would likewise justify the detention without charge of a great many suspected criminals.[14] The incommunicado detention without charge of suspected members of criminal organizations

[14] Moreover, obtaining intelligence information plays only a limited role in the ordinary detention of enemy combatants, since the Geneva Convention requires prisoners of war to provide only their name rank and serial number. Third Geneva

would allow federal officials to prevent considerable harm to our citizens and to obtain vital intelligence about those individuals. The Government may seek to avert harm, but it must act constitutionally as well. These ends do not justify illegal means.

VII. The Government=s Claim of Deference for the President=s Designation is an Assertion for Detention of Americans by Executive Fiat

The President=s designation is premised on his own purported Afindings of fact.@ (JA 51). As argued above, even if the facts are as the Government alleges, as a matter of law Padilla is not an enemy combatant. In addition, however, Padilla has a right to challenge these factual findings. Yet, the Government demands that the President=s findings be accepted as *a fait accompli*, as the facts, without *any* further inquiry. *See*, *e.g.*, Gov=t Resp. Br. at 44. That proposition has never been accepted and would be anathema to the values on which this nation was founded.

Padilla has a right to contest the Government=s facts and have them reviewed by this Court. As the *Quirin* Court recognized, war does not change the duties of the Judiciary.*Quirin*, 317 U.S. at 19. (A[T]he duty Y rests on the courts, *in time of war as well as in time of peace*, to preserve unimpaired the constitutional safeguards of civil liberty.@)(emphasis added).

A. Deference/Standard of Review

Convention, art. 17.

The Government argues that courts have traditionally shown great deference to military decisions and based on that deference urges this Court to adopt a historically unprecedented use of the Asome evidence@ test to review the President=s designation of Padilla as an unlawful combatant. (Gov=t Resp. Br. at 40-41.) The Government=s argument again compares apples with oranges and attempts to evade the central question of this habeas petition. None of the cases the Government cites involve deference to the type of decision concerning the liberty of a civilian that is at issue here. Courts have given deference to military decisions regarding the rules governing soldiers enlisted in our armed forces, *Able v. United States*, 155 F.3d 628 (2d Cir. 1998) (review of Adon=t ask-don=t tell@ policy on homosexuals in the military), and qualifications for service in sensitive positions within the military, *Dep=t of the Navy v. Egan*, 484 U.S. 518 (1988) (review of discharge of civilian employee for failure to qualify for security clearance resulting in loss of employment on nuclear submarine). Civilian courts have shown no deference in review of military claims of jurisdiction over civilians. *See Toth*, 350 U.S. at 14 (an Aassertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law.@); *id*. at 15 (Aany expansion of court-martial jurisdiction . . . necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution@); *Quirin*, 317 U.S. at 45 (AWe have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners

here, upon the conceded facts, were plainly within those boundaries@); *In re Grimley*, 137 U.S. 147, 150 (1890) (AIt cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence.@).

The Government misconstrues the basic difference between deference due to presidential judgments that clearly fall within military jurisdiction- i.e., a military decision to send troops and military strategy decisions- as opposed to a determination of whether something falls within military jurisdiction at all, i.e., the arrest and detention of a civilian citizen in the United States. *See* Gov=t Br. at 40. Simply, courts may have given deference to decisions that affect the operation of the military, courts have given no deference to military claims of jurisdiction over civilians.[15] *See Milligan; Duncan; Toth; Reid; Kinsella*. Historically, review of jurisdictional facts is exactly what courts have done.

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[15] The invocation of Anational security@ neither precludes a court from examining the basis of military jurisdiction over a civilian citizen nor mandates limited judicial review. *See United States v. United States District Court*, 407 U.S. 297, 320 (1972) (AWe cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation.@).

The Government=s reliance on the *Prize Cases*, 67 U.S. (2 Black) 635 (1862), is equally misplaced, for in the *Prize Cases*, the Court reviewed the facts surrounding the impounding of alleged Aenemy property@ by military officers acting under the orders of the President. Where the *Prize* Court found the military lawfully seized ships and cargo as enemy property, it sustained the seizure, and where it did not, the cargo was returned to the shipowner. Indeed, in the *Prize Cases* themselves, the Supreme Court ordered thirty Atierces@ of tobacco strips returned to it owners as improperly seized. *Id.* at 682. The review of the legality of the seizure was a judicial review of actual combat decisions of military officers. This was accomplished without interfering with the President=s ability to fight a war.

Also, contrary to the Government=s claim that a hearing would create an unprecedented situation of demanding testimony from military personnel some of whom may be in the field of armed combat (Gov=t Resp. Br. at 49-50), this is the accepted practice that Congress envisioned and enacted in the Uniform Code of Military Justice. *See, e.g., United States v. Rivers*, 49 MJ 434 (1998) (Major General Testified on Motion Hearing); *United States v. Prater*, 43 C.M.R. 179 (C.M.A. 1971) (court-martial conducted in combat zone in Vietnam); *Duncan*, 327 U.S. at 330 (Murphy, J. concurring) (both Admiral Nimitz (Commander of the U.S. Pacific Fleet) and General Richardson (Army Commander of Hawaii), testified at the *habeas* trial in federal court); *see also* Larry Burton, *Witness Defends Pilots at Article 32 Hearing*, Shreveport Times, January

18, 2003 (Squadron CommanderSeptember 1, 2003 Major John Milton, testified at hearing concerning Afriendly fire@ deaths of Canadian soldiers killed in Afghanistan).

The Government=s invocation of separation of powers concerns is unfounded. (Gov=t Resp Br. at 29, 49-50.) Separation of powers supports Padilla=s position that liberty demands a robust involvement from all three branches of government before citizens can be deprived of liberty, not the Government=s claim of unreviewable executive power. All Padilla is seeking is court review of the legality of his detention by the military. The legality of military jurisdiction over civilians is an inquiry that courts in this nation have been making for years without any violation of separation of powers. If there is a separation of powers issue here, it is the executive encroachment into the historically judicial function of determining the limits of military jurisdiction.

B. Factual Findings Do Not Support Designation

Even under the Asome evidence@ standard, the Government=s evidence is insufficient because it is based on hearsay allegations and of dubious reliability. Thus, the call for Asummary judgment@ claimed by the Government as of right must be flatly rejected. *See* Gov=t Br. 52. The Michael H. Mobbs= Declaration admits that: the President=s determination was based on sources who had not been Acompletely candid,@ one of whom is known to have tried to Amislead or confuse U.S. officials;@ A[s]ome information remains uncorroborated;@ one source recanted a portion of what was stated (the content of the recantation is not known); and the information was derived from a

source who was being treated for an unnamed medical condition Awith various types of drugs at the time the information was Aprovided.@ (JA 45). In addition, information indicating that Padilla was unwilling to become a martyr was not given to the President. (JA 116). It is impossible to square Padilla=s unwillingness to die for a cause which values martyrdom with the President=s finding of Padilla to be a combatant. The Government=s insistence that it is not only a sufficient basis for a possible lifelong detention but that the basis is beyond debate, is frightening.

Even the Asome evidence@ standard does not require deference to such patently unreliable evidence. *See, e.g., Broussard v. Johnson,* 253 F.3d 874, 876 (5th Cir. 2001) (AIt 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 (8th Cir. 1996); *Brown v. Smith,* 828 F.2d 1493 (10th Cir. 1987); *Cato v. Rushen,* 824 F.2d 703 (9th Cir. 1987); *Zavaro v. Coughlin,* 970 F.2d 1148 (2nd Cir. 1992) (some evidence standard not met where guards testified only that inmate was one of a hundred prisoners in mess hall during riot and where only evidence of defendant=s individual participation was information from confidential informants as to whom Athere was no evidence whatsoever of their reliability.@). Thus, on its face, even under the some evidence standard, the evidence relied upon by the President, which was not fully and independently corroborated and was not reliable, was facially insufficient to support the designation of Padilla as an enemy combatant.

Conclusion

For the reasons stated in our opening brief, this Court should order the issuance of this writ or in the alternative, should remand this matter for fact finding after Padilla has met with counsel and submitted facts to be determined by the court below on an elevated standard of proof.

Dated: New York, New York
September 2, 2003

Respectfully submitted,

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