No. 05-6396

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSE PADILLA,
Petitioner - Appellee,

- versus -

C. T. HANFT, Commander, U.S. Navy,
Commander, Naval Consolidated Brig, Charleston, S.C.,
Respondent - Appellant.

On Appeal from the United States District Court
for the District of South Carolina

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS In Support of *Petitioner - Appellee*

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

PARTIES and AMICI:

Except for *Amicus Curiae* herein, the National Association of Criminal Defense Lawyers [NACDL], all parties appearing before the District Court below are listed in Appellants' Brief.

RULE 26.1 DISCLOSURES:

1. The NACDL is a not-for-profit, professional Bar Association for the criminal defense bar, with over twelve thousand subscribed members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

2. The NACDL is ***not*** a publicly held company; does ***not*** have any parent corporation; does ***not*** issue or have any stock; and does ***not*** have any financial interest in the outcome of this litigation.

RULINGS UNDER REVIEW:

The Ruling of the District Court under review appears in the Parties *Joint Appendix*.

RELATED CASES:

None

June 13, 2005

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INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS[1]

The National Association of Criminal Defense Lawyers ["NACDL"] is a non-profit corporation with a subscribed membership of more than 12,200 national members, and an additional 28,000 state, local and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.[2]

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. The NACDL's *Military Law Committee* is co-chaired by three members with a combined total of more than 60 years of commissioned active duty and active reserve judge advocate experience in military law.

The NACDL's interest in this case is that the constitutional basis for depriving a *citizen* of his liberty by our Armed Forces absent a declaration of martial law is a

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[1]Counsel for the Parties have consented to *Amicus* filing this Brief.

[2]No counsel for a party authored this Brief in whole or in part. No person, entity or organization other than the *Amici Curiae* made a monetary contribution to the preparation and submission of this Brief or to counsel.

matter of grave constitutional concern - especially when the citizen has been held *without charges* for over three (3) years.

PREAMBLE

Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but thesee powers of the national government are limited by the Constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.[3]

STATEMENT OF FACTS

Jose Padilla is a U.S. citizen. He is a civilian - not a member of the armed forces of any sovereign country. On May 8, 2002, Padilla was arrested by F.B.I. agents in Chicago, Illinois upon a federal material witness warrant issued in New York City. Civilian personnel (not military) transported him to a civilian detention center in New York. He had civilian counsel appointed to represent him, appeared in court with her, and was contesting his incarceration - all without any damage to national security.

On June 9, 2002, per an *ex parte* Military Order of the President, Padilla was removed from the custody of the Justice Department and transferred to U.S. *military* custody and confined at the Consolidated Naval Brig, Charleston, South Carolina, where he remains, three (3) years later.

[3] *Schecter Poultry Corp. v. United States,* 295 U.S. 495, 528-29 (1935).

SUMMARY OF ARGUMENT

From the founding of our Country, military control over the civilian populace has been an anathema to our Constitutional system. The composite structure of the Constitution, to include the Bill of Rights, supports the basic concept of "civilian supremacy." Absent a declared war[4] or martial law, the military order of the President confining Padilla - a civilian - indefinitely in a military brig violates this basic principle.

Not only has Padilla been imprisoned for over three years as a *military* prisoner, he remains at all times *uncharged* with any crime, civilian or military. As a civilian, Padilla cannot *constitutionally* have military law applied to him absent a declared war.[5] The only exception - legally and historically - would be the application of *martial law* to him. Martial law however has not been declared, nor does any factual exigency or emergency exist such as to justify or necessitate it.

The *Authorization for the Use of Military Force* [AUMF] enacted by Congress

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[4]In spite of the rhetoric, *viz.,* the "war on terrorism," "time of war" is a term of art under *military* law. For ***civilian*** jurisdictional purposes it refers only to a "war formally declared by Congress." *United States v. Averette,* 41 CMR 363, 365 (CMA 1970). *See also,* 38 U.S.C. §§ 101(11) and 1501(4) defining "period of war."

[5]Nor is there any necessity to do so. The arsenal of offenses in 18 U.S. Code, suffices.

on September 18, 2001,[6] was a *limited* delegation of Congressional war power to the President. That delegation did not however, authorize him to either designate a U.S. citizen, *not* a member of the armed forces of any country, as an "unlawful combatant," nor did it authorize the indefinite military detention of a U.S. citizen arrested in Chicago without charges.

Rather, the scope of the AUMF must be evaluated within the parameters of the *enumerated* powers (and prohibitions) in the Constitution. Congressional enactments other than the AUMF, have not only preempted the field, but specifically preclude the actions of the President herein and prohibit the use of our military against our citizens ***domestically***. The *Posse Comitatus* Act, 18 U.S.C. § 1385, was not repealed nor excepted. 18 U.S.C. § 4001(a) [prohibiting "preventive detention" of citizens], was not modified, nor was 10 U.S.C. § 375 [prohibiting "direct participation" by military forces of "seizure, arrest or other similar activity" in law enforcement actions]. In the military context, Congress has spoken with unmistakably clear language in 10 U.S.C. § 809(d) ["No *person* may be ordered into arrest or confinement except for probable cause"].[7] Absent suspending the *writ of habeas corpus* or declaring martial law

[6]P.L. 107-40, 115 Stat. 224 (2001).

[7]The Government's Brief ["Gov't.Br."] at 54-57 attempts to distinguish and limit § 4001(a) to "civilian detentions," a position that *Amicus* disuputes based upon the unambiguous language of the statute, *viz.,* "no citizen" and "by the United States."
(continued...)

(neither of which publically has occurred),[8] there is no hybrid system of laws in the United States - there is the "civilian" side, as primarily encompassed by Titles 18 and 28, U.S. Code, and the "military" side, as set forth in the *Uniform Code of Military Justice.*[9] Furthermore, when Congress created the modern-day ***military*** prison system, it *expressly* limited them to confining "offenders against chapter 47 of this title." 10 U.S.C. § 951(a) [Chapter 47, is the UCMJ]. Since Padilla has not been charged with an offense - either under the UCMJ or the law of war - he *cannot* be imprisoned in a military confinement facility [10 U.S.C. § 951(a)], and 10 U.S.C. § 810 now mandates that he be released.[10] Whether one looks at Padilla's continued detention from the eyes of the Non-Detention Act or U.S. military law, ***Congress*** has

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[7](...continued)
Mr. Padilla is a citizen who is imprisoned "by the United States." But, assuming *arguendo* that the Government's position is correct, their Brief totally ignores the numerous and specific *statutory* prohibitions concerning ***military*** detentions, such as § 809(d), which are not limited to "military" offenders.

[8]*Amicus* notes that the *effect* of the President's "preventive detention" of Padilla is the *ad hoc* imposition of martial law defined as: "A government temporarily governing the ***civil population*** within its territory or a portion of its territory through its ***military forces as necessity may require***." *Manual for Courts-Martial United States* (2002 ed), paragraph 2(a)(2), page I-1[emphasis added; hereinafter "MCM (2002)"] [promulgated as Executive Orders, *see* Exec.Ord. 13262 (April 11, 2002)].

[9]10 U.S.C. §§ 801-946. 64 Stat. 107 (1950) [hereinafter "UCMJ"].

[10]If the UCMJ does *not* apply, Padilla cannot be imprisoned by the military per § 951(a). If it does, § 810 mandates his release.

clearly and unequivocally precluded his "preventive detention," under the circumstances herein. Removing Padilla from a civilian jail in New York is *not* a foreign combat-zone capture.[11]

Both the Constitution and statutory authority - authority with specific lineage to Article I, § 8, U.S. Constitution - forbid the indefinite *military* detention of a civilian citizen without charges for over three years. There is no authority, express or implied, in Article II of the Constitution, that sustains Appellant's arguments. Finally, to adopt the interpretation that the Government urges for the AUMF as somehow authorizing the arrest and indefinite preventive detention of Padilla, is to turn the AUMF into an *unconstitutional* Bill of Attainder.[12]

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[11] *Compare, Hamdi v. Rumsfeld,* __U.S.__, 124 S.Ct. 2633 (2004).

[12] Art. I, § 9, cl. 3, U.S. Const.

ARGUMENT

I. THERE IS NO LEGAL AUTHORITY FOR THE PRESIDENT TO IMPRISON A CIVILIAN CITIZEN IN A MILITARY PRISON, ABSENT MARTIAL LAW.

A. Overview.

Our Republic and the democracy that we enjoy, *i.e.,* a government "of the People, by the People, and *for* the People," did not come easily. As history shows, the United States was conceived in terroristic acts that evolved into a full-scale, military revolution. The "wars" with Native Americans, the Boston Massacre, Lexington and Concord and the ensuing siege of Boston all contributed to our Revolutionary War. Indeed, one of the chief complaints of the "Colonists," against the British Throne was, according to our *Declaration of Independence,* ". . . He has affected to render the Military independent of and superior to the Civil power. . . ."[13]

Amicus emphasize this history because of its contextual relevance - the Framers of our Constitution were acutely aware of the dangers of surprise attacks. The military presence and oppression of King George III's armies were precipitating factors leading to war. Indeed, "terrorism" was a specific concern:

> "He has excited ***domestic insurrections*** amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless

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[13]http://www.archives.gov/national_archives_experience/charters/declaration_transcript.html [June 9, 2005].

Indian Savages, ***whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions***."[14]

It was with this background that our Constitution was born and from which it must be interpreted.

Those events were fresh in the minds of the citizenry when our Constitution was drafted, debated and ratified. The "civilian supremacy" influence permeates the document itself, *viz.*: Article I, § 8: Congress regulates the military, declares war, etc.; Article II, § 2: The President is the Commander in Chief of the military; The Third Amendment: Citizens cannot be forced to "quarter" the military during peacetime, and only in a manner prescribed by law during war; The Fifth Amendment: The right to indictment by Grand Jury applies to all citizens "except in cases arising in the land or naval forces. . . ." *i.e.,* the military.

The core constitutional concept is thus: "The established principle of every free people is, that the law shall alone govern; and to it the military must always yield." *Dow v. Johnson,* 100 U.S. 158, 169 (1879).

We submit that the *military* "order" here indefinitely confining Padilla by the military as a ***civilian*** citizen in a military prison without charges, is simply unlawful. His *continued* military imprisonment is therefore, unconstitutional. *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991). While we recognize the constitutional

[14] *Ibid.* [emphasis added].

tensions implicit in claiming illegality of the President's order under separation of powers concepts, it is indeed both the constitutional role and function of the judiciary under Article III, of the Constitution, to interpret the Constitution. *Marbury v. Madison,* 5 U.S. 137 (1803), both addresses and resolves this issue. The seizure and *continued* imprisonment of Mr. Padilla violates the basic premise of civilian supremacy prohibiting military control over civilian citizens. This is especially so where Congress has repeatedly and *expressly* exercised its Article I, § 8 powers, *viz.,* in the UCMJ, the *Posse Comitatus Act,* 18 U.S.C. § 1385, the Non-Detention Act and other statutes discussed hereinafter, laws that the President is constitutionally bound to follow and "execute."

This Court *could* avoid the constitutional conundrum of whether or not the Congressional AUMF authorizes the President's military *detention* of Padilla in a constitutional manner, by focusing on the constitutionality of Padilla's *continued* military incarceration for over three years absent any "charges" or other Due Process protections.[15] During the Civil War President Lincoln unilaterally suspended the *privilege* of the Writ of *Habeas Corpus* and ordered a blockade of Southern ports because Congress was not in session. Lincoln thereafter sought Congressional

[15] We do not concede this issue, but merely posit it to the Court in our capacity as *amicus curiae*.

"ratification" for his actions, something that was *not* done here.[16] Thus, whether or not Congress has authorized (or constitutionally *could* authorize without suspending the Writ of *Habeas Corpus*) a military detention of a citizen need not be reached by this Court *if* Padilla's *continued* military detention is unconstitutional as violative of Due Process. *See Duncan v. Kahanamoku*, 327 U.S. 304 (1946) [no factual necessity for continued martial law] and *Zadvydas v. Davis,* 533 U.S. 678 (2001) [no clear Congressional intention for indefinite detention of alien].

B. "Military" Law Does Not Apply.

Mr. Padilla, a citizen who is not a member of anyone's military, cannot Constitutionally have *military law* applied to him under the present circumstances. Furthermore, since "martial law" has not been declared (nor could it be at this juncture),[17] no ***military*** authority constitutionally exists to confine Padilla.

The actions of the President must be viewed through the constitutional limitations placed on that office,[18] because the basis of the illegal confinement is a *military* order of the Commander in Chief.[19] The Government's position, *viz.,* that the

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[16]*See* 12 Stat. 326 (1861)[blockade], and 12 Stat. 755 (1863) [*Habeas Corpus* suspension].

[17]*Duncan*, *supra*.

[18]*Cf. The War Powers Resolution,* 50 U.S.C. § 1541 *et seq.*

[19]Indeed, by *fiat* the President has created a classic *Bill of Attainder* against (continued...)

President has unfettered detention authority by virtue of issuing a *military* order, is simply wrong. It is also unconstitutional as *Little v. Barreme,* 6 U.S. 170 (1804), makes clear. *Little's* basic premise is respectfully controlling herein. There Congress delegated certain limited "war powers" to the Executive [compare the AUMF]. However, in implementing that delegation the President issued a *military* order exceeding the scope of the delegation [*compare* the military order indefinitely confining Padilla]. The Court in *Little* held that the order was *ultra vires* and respectfully, this Court should also do so herein.

C. There is No Historical Precedent for the President's Action.

Absent a formal, Congressional declaration of war,[20] or the lawful imposition of martial law, the President's military authority is limited by the Constitution's terms. The *Federalist Papers* demonstrate that the drafters of our Constitution, firmly rejected the concepts claimed by the President herein.[21]

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[19](...continued)
Padilla. *See* Article I, § 9, cl. 3, U.S. Const. *Compare, United States v. Brown,* 381 U.S. 437 (1965).

[20]The Joint Congressional "Authorization for Use of Military Force," *supra,* is *not* a Declaration of War, nor does it suspend *habeas corpus*, nor authorize the indefinite military detention of a civilian citizen. It offers no authority for the Appellant herein.

[21]In *Federalist, No. 48,* Madison observed:
[T]he executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty
(continued...)

A suspicion of Executive encroachment - both as to power and as to liberty - was of prime concern to the Drafters. While providing a system of government with a "separation of powers," they also wisely provided a Constitutional system of "checks and balances." It is thus clear constitutionally, that the President cannot *sua sponte* assume military powers neither textually enumerated within the Constitution, nor expressly delegated by Congressional "War Power."

Alexander Hamilton, the author of *Federalist, Number 69, The Real Character of the Executive,* stated:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, ***but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy;*** while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, ***all which, by the Constitution under consideration, would appertain to the legislature.*** [Emphasis added].[22]

It is abundantly clear that the Framer's view of the President's *authority* was limited; the War Power clearly resided and remained with the Congress - absent a true

[21](...continued)
ought to inspire. [Emphasis added].
http://thomas.loc.gov/home/histdox/fed_48.html [June 9, 2005].

[22]http://thomas.loc.gov/home/histdox/fed_69.html [June 9, 2005].

and sudden "emergency,"[23]

D. The Historical, Subservient Role of the Military.

In 1792, Congress passed the *Militia Act*[24], authorizing the President to federalize the State Militias for certain domestic contingencies. In 1794, the *"Whiskey Rebellion"* in Western Pennsylvania, required action. Pursuant to the *statutory* authority, President Washington ordered the mobilization of the Militia to suppress the insurrection. Yet, in his "Military Order" he commanded the troops:

> You are to . . .preserve . . . a scrupulous regard to the rights of persons and property, and a respect for the civil magistrates . . . .[25]

Washington clearly understood that his power as Commander in Chief was limited and depended upon Congressional authority. While the military made numerous arrests, detentions and prosecutions were handled by the civilian court system.

In *Ex Parte Bollman,* 8 U.S. 75 (1807), Bollman and others were arrested by the Army and charged with treason. The military, on orders from President Jefferson, turned the prisoners over to the jurisdiction of the federal court in the District of

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[23]The facts belie any claim of "emergency" such as experienced by Lincoln. Padilla was arrested in Chicago, taken to New York City, arraigned, had counsel assigned and was engaged in litigating his "material witness" status, when one *month* later, the decision to *militarily* imprison him indefinitely was made.

[24]1 Stat. 271; *and* 1 Stat. 424 (1795).

[25]As quoted in Wiener, *A Practical Manual of Martial Law,* 103 (1940). Washington also took along a federal judge and the U.S. Attorney, *id.,* 55.

Columbia, which detained them. The prisoners sought *habeas corpus* relief. The Supreme Court granted the *writs* and noted that only Congress could order the suspension of the writ of *habeas corpus*. Absent that, it was up to the Court to decide the merits of the petition for *habeas* relief - the very issue herein.

One of the earliest American commentators on "military law," in 1846, rejected the Government's arguments advanced herein and he was a military officer.

> ***The substitution of this power [martial law] for the civil courts, subjects all persons to the arbitrary will of an individual, and to imprisonment for an indefinite period . . . .***
>
> Now, to guard against such abuse, the constitution guarantees the privilege of the writ of *habeas corpus* . . . ***and the intervention of congress is necessary before such suspension can be made lawful***. . . . [Emphasis added][26]

The Supreme Court decided the *Prize Cases,* 67 U.S. 635 (1862), involving a naval blockade of Confederate ports and the seizure of foreign vessels. At the time of Lincoln's order, Congress was not in session, but thereafter, Lincoln sought and received Congressional ratification for his emergency blockade order. 67 U.S. at 670-71. Thus, the "war power" of the Commander in Chief ultimately flowed from Article I, and the Congress. Lincoln acted "extra-constitutionally" in a time of

[26]DeHart, (Acting Judge Advocate of the Army), *Observations on Military Law* (1859 ed.) [reprinted in 18 *Classics in Legal History*, (1973)], at 17-18.

imminent crisis *and* on-going domestic military engagements.[27]

Ex Parte Milligan, 71 U.S. 2 (1866), resolves the matter *sub judice.* Without express *Congressional* action, a United States citizen cannot be detained or imprisoned by the U.S. military, absent the *bona fide* existence of martial law or the suspension of *habeas corpus.* Milligan, a civilian was granted *habeas corpus*, after arguing that the military (in a non-battle zone) had no jurisdiction to detain or try him.

> ***Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power. . . ."*** [28] [emphasis added]

Milligan was not an aberration of military jurisprudence, as is implicit from the writings of that century's greatest military law scholar, Colonel William Winthrop. In his seminal work, *Military Law and Precedents,* 2nd ed. (1920 reprint) at 891; he notes the following:

> Where . . . an officer of the army is served with a writ of *habeas corpus* issuing from a court of the *United States,* he will make full return of the same . . . and on the return day will appear with the body of the petitioner before the court ***to abide by its order thereupon.*** [emphasis added in bold].

See also, Tillotson, Col., JAG, U.S. Army (ret.), *The Articles of War Annotated,*

[27]For an analysis of the "ratification" process in the *Prize Cases*, *see*, Randall, *Constitutional Problems Under Lincoln,* rev. ed. (1951), pp. 52-58. *See also* Farber, *Lincoln's Constitution* (2003), at 127-138.

[28]71 U.S. at 124-25.

(1942), at 163, "HABEAS CORPUS."

The Court next visited this area of military jurisprudence in *Ex Parte Quirin,* 317 U.S. 1 (1942). Indeed, that is the judicial drum that the Government is beating loudest, for that is their stated basis for categorizing Padilla as an "unlawful combatant." However, even that claim is not historically accurate from a military perspective.

Winthrop recognized what he termed, "uncivilized combatants" - those who do not respect the laws of war. Thus,

> Not being within the protection of the laws of war, they were treated as criminals and outlaws, not entitled ***upon capture*** to be held as prisoners of war, liable to be shot, imprisoned or banished, either summarily where their guilt was clear or upon trial and conviction by military commission. Winthrop, *op cit.,* 784. [emphasis added]

Winthrop's observations however must be kept in the context of what he was describing - combatants who were captured ***on the battlefield***, *i.e.,* the "locus of capture" ***could be*** dealt with *summarily* - otherwise they were tried.[29]

Quirin is a judicial anomaly and of limited value.[30] It was undisputed that (a)

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[29]George Washington set the precedent for trying spies, rather than summarily executing them. When British Major André (Benedict Arnold's collaborator) was captured behind American lines in civilian clothes, Washington ordered a military trial. *Ex Parte Quirin,* 317 U.S. 1, 31, fn. 9 (1942).

[30]For the most comprehensive legal analysis of the case see, Fisher, *Nazi Saboteurs On Trial* (2003).

the United States was in a "declared" war with Germany; (b) all eight defendants were acting under the express command of the official *uniformed* German military; (c) they were on an official military mission (having traveled to the U.S. via German U-Boats); (d) they all wore German military uniforms at the time they came ashore; and (e) (unlike Padilla) all were facing criminal charges under military law.

Attorney General Biddle's claim that the President had "absolute" power over the "enemy," was ***not*** adopted by the Court. Appellant now cites *Quirin* for the proposition that U.S. citizens could be held as "unlawful enemy combatants," but a close reading of the Court's opinion shows that it is clearly *dicta.* The issue of citizenship was in reality a non-issue,[31] because it was clear that all of the saboteurs became unlawful belligerents under international law when they shed their military uniforms.[32] None of this has any relevance to the case herein and therefore, *Quirin* stands for nothing when there is no declared war, when there is no issue as to supporting an enemy sovereign, indeed, when there are no charges period pending against Padilla. The *Quirin* defendants were charged and tried - not placed into some

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[31]Procedurally, *Quirin* was an *interlocutory* attack on the jurisdiction of the military commission to try them. 317 U.S. at 19-20.

[32]What knocks *Quirin's* prop out from under the Government's claims is that the ***civilian*** co-defendants to the *Quirin* ***military*** case, were all indicted and tried in *federal* court. *See, Cramer v. United States*, 325 U.S. 1 (1945); and *Haupt v. United States*, 330 U.S. 631 (1947). *See,* Fisher, *op cit.,* 80-84.

indefinite military legal limbo.

Quirin, as modern precedent also suffers from additional problems - first, Congress in passing the UCMJ,[33] in 1950, engaged in a comprehensive overhaul of military law. Second, the 1949 Geneva Conventions were adopted post-*Quirin*, so that court never considered them or their impact on U.S. domestic law. Third, more recently ratified U.S. treaties, *e.g.,* the *International Covenant on Civil and Political Rights*,[34] ["ICCPR"] of which the United States is a signatory, supercedes any efficacy *Quirin* ever had regarding arbitrary and indefinite military detentions.[35] *See also Ex Parte Endo,* 323 U.S. 283, 300 (1944).[36]

Finally, the core reason that the Petitioner's arguments must fail stems from

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[33]10 U.S.C. § 801, *et seq.*

[34]999 U.N.T.S. 171, *entered into force* March 23, 1976; available at: http://www1.umn.edu/humanrts/instree/b3ccpr.htm [June 9, 2005]

[35]The ICCPR provides:
Article 9, Section 4: Anyone who is deprived of his liberty by arrest or ***detention*** shall be entitled to ***take proceedings before a court***, in order that court may decide without delay on ***the lawfulness of his detention*** and order his release if the detention is not lawful." [emphasis added].

[36]Ms. Endo was freed in part because the Congressional ratification of the Executive Order in question did not "use the language of *detention.*" Neither did the AUMF herein. Furthermore, there has been no Congressional ratification herein of the "military order" detaining Padilla, unlike *Endo* and the *Prize Cases. Amicus* notes, consistent with *INS v. St. Cyr,* 533 U.S. 289 (2001), that if Congress had *any* desire to restrict *habeas* jurisdiction, as Appellant argues is implicit from the AUMF, *supra,* it would have done so when it enacted the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). This is the seminal case discussing the Constitutional *limitations* on the President's perceived "War Power." The Court itself held that even in times of a national emergency, the President lacked any independent legal basis to seize corporations for the "war effort" in the face of express Congressional prohibitions.[37] If the President cannot seize a corporation even as Commander in Chief, he cannot invest himself with the authority to seize and detain a U.S. citizen, contrary to the Fourth and Fifth Amendments.[38]

Justice Jackson's concurring opinion[39] bears repeating as he traces the history of the President's power - in war and peace:

> There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. ***He has no monopoly of "war powers," whatever they are.*** While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. 343 U.S. at 643.

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[37]Similar specific prohibitions exist herein.

[38]This interpretation is consistent with *Henkels v. Sutherland,* 271 U.S. 298, 301 (1926), "With enemy-owned property . . . the United States may deal as it sees fit [citation omitted]; ***but it has no such latitude in respect of the property of an American citizen.*"** [Emphasis added]. Again, if the enumerated "war power" of Congress cannot be used to seize ***property*** of a civilian citizen, surely it cannot be used to *seize* the Person himself herein. *Mitchell v. Harmony,* 54 U.S. 115, 134 (1852) [Army officer illegally seized property of U.S. citizen], and *United States v. Russell,* 80 U.S. 623, 628 (1871) [same].

[39]*Cf., Dames & Moore v. Regan,* 453 U.S. 654 (1981).

Justice Jackson next addressed the claimed "emergency" doctrine:[40]

> The appeal, however, that we ***declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted***. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of *habeas corpus* in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. . . . ***Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers.*** 343 U.S. at 650-51 [Emphasis added].

In a *habeas corpus* case involving a *former* member of the military, but a civilian at the time of his arrest, the Court in *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955), held that the military could *not* exercise any jurisdiction over civilians, even for crimes committed by that person while serving on active duty. In striking down a provision of the UCMJ, the Court also noted that, "this assertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law." 350 U.S. at 14 [citing *Milligan*].

Reid v. Covert, 354 U.S. 1 (1957), dealt with the court-martial of a *civilian* spouse who had killed her military husband while stationed overseas, as authorized

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[40]Unlike Lincoln's *bona fide* emergency - there was a war going on literally in his back yard - *Youngstown's* "emergency" was the President's perceived need to control steel production during the Korean War.

by a provision in the UCMJ. After her conviction and direct appeals, she sought *habeas* relief on the grounds that the military had no *criminal* jurisdiction over her as a *civilian*. The Court went on to look at its own precedents:

> The *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. ***In each instance an effort to expand the jurisdiction of military courts to civilians was repulsed.*** 354 U.S. at 33.

Amicus respectfully suggests that the situation herein is more egregious. The Government has detained and militarily imprisoned, *i.e.,* deprived Mr. Padilla of his liberty, without *any* charges simply by labeling him an "enemy combatant," and confining him virtually *incommunicado* in a military Brig for over three years.

II. THE GOVERNMENT'S INTERPRETATION OF THE *AUMF* RESULTS IN AN UNCONSTITUTIONAL "BILL OF ATTAINDER."

> *[W]e find nothing in this text that affirmatively authorizes detention, much less indefinite detention.*[41]

A. Background.

"Bills of attainder" are expressly prohibited by Article I, § 9, clause 3, U.S. Constitution. In *Cummings v. Missouri,* 71 U.S. 277, 323 (1867), the Court held:

> A bill of attainder is a legislative act which inflicts punishment without a judicial trial.
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> If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body . . . exercises the powers and office of judge; it assumes . . . judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own nations of the enormity of the offence.
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> > "Bills of this sort . . . have been most usually passed in England in times of rebellion . . . or of violent political excitements; periods, in which all nations are most liable . . . to forget their duties, and to trample upon the rights and liberties of others." [citing Story's *Commentaries on the Constitution,* at 1344].

Had Congress added language to the AUMF stating that "all 'enemy combatants' shall be imprisoned by the military until the 'war' against terrorism is over," such would be a *prima facie* bill of attainder. However, that *is* the

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[41] *Clark v. Martinez,* __U.S.__, 125 S.Ct. 716, 727 (2005).

interpretation of the AUMF that the Government urges this Court to adopt.

The Constitutional prohibition against bills of attainder must be interpreted broadly within the framework intended by its Drafters:

> [T]he Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply - trial by legislature.[42]

Certainly the President cannot do by implication what the Constitution expressly prohibits Congress from doing to a citizen. *See, e.g., United States v. Lovett,* 328 U.S. 303, 315 (1946) [Court held that Congressional refusal to pay salaries of federal employees deemed "subversive"[43] constituted a bill of attainder].

B. The Government's Arguments.[44]

The Government argues:

1. [N]either the AUMF in general, nor it's "necessary and appropriate" language in particular, can plausibly be read to authorize detention abroad while simultaneously withholding support for the detention of combatants found within the United States . . . . [Gov't.Br. 32];

2. [I]f the AUMF left any doubt about whether Padilla's detention is "necessary and appropriate" . . . the district court should have

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[42]*United States v. Brown,* 381 U.S. 437, 442 (1965); *see also, Ex parte Garland,* 71 U.S. 333 (1867).

[43]*See* 328 U.S. at 311, fn. 3 for a definition of "subversive activity" that would encompass the allegations against Padilla.

[44]*See* Gov't.Br. at 30 *et seq.*

> . . . deferr[ed] to the President's determination that Padilla's detention was necessary, appropriate and therefore authorized. [*id.,* 35-6];

The Government's position in this Court urging reversal on this point is simply that the AUMF provided the President with statutory "authority to detain Padilla as an enemy combatant." *Id.,* 15.

C. Applying the AUMF as the President Requests is Unconstitutional.

The text of the AUMF says nothing about the detention - indefinite or otherwise - of "enemy combatants," unlawful belligerents or suspected terrorists, be they citizens or not. As this case and *Hamdi* illustrate, the proper interpretation of the AUMF is a matter of significant dispute.[45] While the Government urges this Court to "interpret" the AUMF to allow the *indefinite* detention of Padilla, to do so, as Justice Scalia writing for the Court in *Clark, supra,* observed, "would be to invent a statute rather than interpret one." *Id.,* 722-23.

It is a fundamental rule of statutory construction that in interpreting a statute susceptible of both a constitutional and unconstitutional application, a court *must* chose the constitutional one, namely "the canon of constitutional avoidance in

[45]We note that unlike Lincoln, the President has not sought specific Congressional "ratification" nor clarification. *See,* fn. 16, *supra*. As part of the USA PATRIOT Act [115 Stat. 350 (2001)], codified at 8 U.S.C. § 1226a(a)(6), Congress expressly provided for the "mandatory detention of suspected terrorists," but *limited* it to aliens. This is consistent with the Non-Detention Act.

statutory interpretation." *Clark, supra,* 724. *Padilla* argues that "The AUMF does not authorize detention of citizens arrested in the U.S.,"[46] while the Government contends, "The President has authority under . . . Congress's Authorization of Force to detain Padilla as an enemy combatant without charging him criminally."[47]

Hamdi, supra, does not resolve the matter *sub judice* as the "narrow circumstances" of his case showed that he was "captured" on an Afghani battlefield, not arrested in Chicago. 124 S.Ct. at 2641. Furthermore, the application of the AUMF to Hamdi's battlefield capture and subsequent military detention does not dictate the result herein, as argued by the Government, for:

> It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications . . . would not support the same limitation. *Clark, supra,* 724.

The issue of interpreting the AUMF *as applied* to Padilla is squarely before this Court and we respectfully submit that the "canon of constitutional avoidance" controls.

> [O]ne of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is the tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional questions. *Clark, supra,* 724.

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[46]*Appellee's* Brief, 10.

[47]Gov't.Br. 18.

There is a second basic principle of statutory construction applicable herein, *viz.,* the "rule of lenity." Where statutes have criminal applications, ambiguities are construed in favor of the individual. *Clark, supra*.[48] Being imprisoned as an "enemy combatant" without charges for over three years in a military prison with no end in sight is no different than the "indefinite detention" of the aliens in *Clark.*

If it is unconstitutional for *Congress* to enact a "bill of attainder," the construct of the AUMF urged by the Government herein seeking this Court's *imprimatur* on an *unconstitutional application* of the AUMF by the President is equally unconstitutional. It is a perverse application of basic constitutional doctrine to allow the President to do by fiat what the Constitution expressly forbids Congress from doing by legislation. To sanction this treatment of a citizen regardless of his suspected crimes, to include treason, cannot be anything but unconstitutional.

III. THE APPLICATION OF *CLARK v. MARTINEZ.*

Congress knows how to "detain" people and when it does, its language (unlike the AUMF) is quite specific. *Compare* 10 U.S.C. § 809, 18 U.S.C. § 3142(e) and 8 U.S.C. § 1226a(a)(6). But the concept of *indefinite* detention - the core issue herein - is an anathema to our basic liberties. Even the President has recognized the

[48]*See also Staples v. United States,* 511 U.S. 600, 619, fn. 17 (1994), and *Leocal v. Ashcroft,* __U.S.__, 125 S.Ct. 377, 384, fn. 8 (2004).

distinction between citizens and aliens. *See* Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain **Non-Citizens** in the War Against Terrorism,* 66 Fed.Reg. 57833 (November 16, 2001). Yet he persists in arguing that he can indefinitely detain citizen Padilla.

Clark is instructive by analogy - if *indefinite* detentions of "inadmissible aliens" with significant criminal records,[49] are unconstitutional *beyond* six months,[50] surely the non-criminal imprisonment of a citizen for over three ***years*** must logically meet the same fate. It is the President's unbridled claim of "inherent" and indefinite power to detain Padilla that respectfully must be rejected as unconstitutional.[51] Inadmissible aliens cannot have greater constitutional rights than Mr. Padilla.

IV. THE "LOCUS-OF-CAPTURE" CONCEPT IS PROPER UNDER MILITARY LAW.

The Government provides only rhetoric, not authority for its argument against the "locus of capture." That is because under military law and the law of war the

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[49]*Clark, supra,* 722.

[50]*Zadvydas v. Davis,* 533 U.S. 678 (2001).

[51]Gov't.Br. 52, ". . . The President Has Inherent Authority As Commander In Chief to Order Padilla's Detention . . . ." *But see, Little v. Barreme, supra.*

location of capture is very relevant. Major André[52] was liable as a spy *only* because he was caught behind our lines. Had he returned to the British and subsequently been captured, he could *not* have been prosecuted for spying. Winthrop, *op cit.,* 770. In *Bollman, supra,* at 136, the Army captured Bollman *et al.*, charged them with treason and took them to Washington, DC. The Court held that their capture in Louisiana required their trial to be held there.[53]

In *Beckwith v. Bean,* 98 U.S. 266 (1878), Bean sued Army officers for falsely imprisoning him allegedly for aiding Union deserters during the Civil War. The Court reversed the successful plaintiff's verdict on *evidentiary* grounds. However, Justice Field's dissent (urging affirmance) [*id.,* 285] is instructive. He first noted that the "arrest and imprisonment were in Vermont, far distant from the sphere of military operations. . . ." *Id.,* 292], and concluded:

> [I]t is a marvel that in this country, under a Constitution ordained by men who were conversant with the principles of Magna Charta . . . it could ever be contended that an order of the Executive, issued at his will for the arrest and imprisonment of a citizen, where the courts are open and in the full exercise of their jurisdiction, is due process of law, or could ever be made such by an act of Congress.
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> * * * * *
>
> The assertion that the power of the government to carry on the war and suppress the rebellion would have been crippled and its efficiency impaired if it could not have authorized the arrest of persons,

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[52]*See* fn. 29, *supra.*

[53]*Compare, United States v. Provoo,* 215 F.2d 531 (2nd Cir. 1954).

> and ***their detention without examination or trial***, ***on suspicion of their complicity with the enemy*** . . . rests upon no foundation whatever so far as Vermont is concerned. . . . A claim to exemption from the restraints of the law ***is always made in support of arbitrary power whenever unforeseen exigencies arise in the affairs of government.*** . . . A doctrine more dangerous than this to free institutions could not be suggested by the wit of man. *Id.,* 296-97 [emphasis added].

Two other cases are instructive. In *Quirin, supra,* the Court noted, "It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose." *Id.,* 38. Like Major André, the locus of their capture - behind our "military" lines - was dispositive. *Johnson v. Eisentrager,* 339 U.S. 763 (1950), is instructive for two reasons. First, the locus of capture was clearly in a foreign combat zone and second, the Court *expressly* recognized a distinction between citizens and aliens in a war zone. *Id.,* 769-70.

On May 8, 2002, Chicago was not a combat zone, it was not a military "theatre," and its courts like those in New York City, were open and functioning. The locus of Padilla's arrest - not military capture - is controlling.

CONCLUSION

Not far from where this Court sits, a little-known but significant "military" *habeas corpus* case was litigated in federal court. Jefferson Davis was captured on May 10, 1865, and militarily confined at Ft. Monroe, even though under federal

Indictment. One year later a superceding Indictment was filed in the Richmond court charging Davis with treason - but he was still confined by the military. His counsel filed a *writ of habeas corpus* against General Henry Burton, who had custody of Davis. On May 13, 1867 - two years after his capture - the Court issued the *writ*, Davis was brought before the Court and bail was set.[54]

Amicus Curiae respectfully submit that the time has come for the Judiciary once again to reject military power over a citizen far removed by time and distance from any perceived battlefield. Jose Padilla may be indicted or he may be granted the Great Writ, but he cannot *constitutionally* remain an uncharged, military prisoner.
[6985]

Dated: June 13, 2005.

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[54]Randall, *op cit.,* 104-115.

CERTIFICATE OF COMPLIANCE

1. This Brief of *Amicus Curiae* has been prepared using WordPerfect Suite 11, Times New Roman font, 14 point.

2. EXCLUSIVE of the Table of Contents, Table of Authorities, any Addendum containing statutes, rules or regulations, and the Certificate of Service, this Brief contains ***6985 words*** out of a maximum allowable ***7000 words.***

I understand that a material misrepresentation may result in the Courts striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief.

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Date: June____, 2005

CERTIFICATE OF SERVICE

This is to certify that two (2) true and accurate copies of the foregoing *Brief of Amicus Curiae,* National Association of Criminal Defense Lawyers, were sent to the following counsel as indicated on the 13th day of June, 2005.

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