05-6396

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSE PADILLA,
Petitioner-Appellee,

v.

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

APPEAL FROM A FINAL JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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(name of party/amicus) (appellant/appellee/amicus)

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6/6/05
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES, AND REGULATIONS

OTHER LEGISLATIVE AND REGULATORY AUTHORITIES

MISCELLANEOUS

STATEMENT OF THE ISSUE

Whether the Executive has the power to imprison in military jails, indefinitely and without criminal charge, American citizens seized from civilian settings in the United States.

STATEMENT OF THE CASE

In May 2002, Jose Padilla was arrested at Chicago O'Hare Airport on a material witness warrant and jailed in New York. When he was seized from his civilian jail cell in June 2002 by military agents acting on orders from the President, Donna R. Newman, the attorney appointed to represent Padilla in the material witness proceeding, filed a writ of habeas corpus seeking his immediate release from military custody. The District Court for the Southern District of New York ruled that the President had authority to detain persons seized in the U.S. as "enemy combatants," but held that Padilla was entitled to access to counsel and a meaningful hearing. Claiming that a meaningful hearing would pose a threat to national security, the government appealed.

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

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

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

Padilla's attorneys immediately re-filed in the District of South Carolina and moved for summary judgment. The district court agreed with the Second Circuit and the only Supreme Court justices to have reached the merits, holding that "the President has no power, neither express nor implied, neither constitutional nor statutory, to hold Petitioner" without criminal charge. JA181. "To do otherwise," the court found, "would not only offend the rule of law and violate this country's constitutional tradition, but it would also be a betrayal of this Nation's commitment to the separation of powers that safeguards our democratic values and individual liberties." JA180. The court thus declined the Executive's invitation to grant it historically unprecedented powers, concluding that doing so would be a simple act of "judicial activism." *Id.*

The Executive sought and received a stay and appealed.

STATEMENT OF MATERIAL FACTS

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

hold Padilla under these conditions until the unforeseeable end of the "war on terrorism."

Padilla was not captured in combat. He was not captured on an overseas battlefield. To the contrary, his initial seizure occurred in an ordinary civilian context: civilian law enforcement agents arrested Padilla pursuant to a court-issued material witness warrant following his arrival via a regularly scheduled commercial airliner at Chicago O'Hare Airport on May 8, 2002. Padilla had already passed the immigration checkpoint and been admitted to the United States as a returning citizen before he was pulled aside in the customs inspection area. JA93 (Stipulations of Fact). At the time of his arrest, Padilla was wearing civilian clothing and carrying a valid United States passport. *Id.* He had no weapons or explosives. *Id.*

After his arrest, the government brought Padilla to New York, where the grand jury that had issued the material witness warrant was convened. The district court appointed counsel, and Padilla was allowed communications with his lawyer. Two days before the scheduled district court hearing on the motion to quash the warrant, ordinary procedures were swept aside. The President signed an order declaring Padilla an "enemy combatant" whom the government believed to be "associated" with al Qaeda. JA16. Military agents seized Padilla from the maximum security civilian detention facility where he was held and transported

him to a military brig. The government held him completely incommunicado for nearly two years.

In the three years since he was seized from his jail cell by the military, the government has never charged Padilla with a crime. Nor has Congress authorized a new regime of domestic detention without charge by suspending the writ of habeas corpus or other legislative action.

These are the only facts relevant to this appeal. To be sure, the government has alleged other facts about Padilla's conduct. But while those allegations would matter in a factual dispute over whether Padilla is what the government claims he is, they are irrelevant in the legal dispute over whether the President has the power to detain, indefinitely and without charge, unarmed citizens seized in civilian settings in the United States.

SUMMARY OF ARGUMENT

The President has never been granted the authority to imprison indefinitely and without charge an American citizen seized in a civilian setting in the United States. The Constitution allows him no such power. History shows that the power to imprison citizens suspected of being enemies of the state is a power that is particularly subject to governmental abuse. To guard against the risk of that abuse, the Framers established numerous constitutional safeguards, safeguards repeatedly recognized by the Supreme Court and independently fortified by Congress.

Yet the Executive now asks to set aside those carefully constructed protections. It asks this Court to sanction a radical new path - a shadow system of preventive detention without criminal charge for citizens suspected of wrongdoing. Before this Court considers ratifying such an unprecedented departure, Congress must at a minimum enact a clear and unmistakable authorization – an authorization that specifies precisely who may be detained, for how long, and under what conditions.

The AUMF is not such an authorization. To try to make it one, the government relies on *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), and *Ex Parte Quirin*, 317 U.S. 1 (1942). Neither case compels – or even permits – such revolutionary transformation. Like the Framers of the Constitution, the Supreme Court in *Hamdi* and *Quirin* recognized the crucial roles played by Congress and the courts in guaranteeing that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 124 S.Ct. at 2650 (plurality op.) (*citing Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 587 (1952)). *Hamdi* and *Quirin* are narrow decisions, carefully limited by the Supreme Court to their facts. But the government would strip away these careful limitations, leaving the Executive with unbridled power to create a novel system of detention that is fundamentally incompatible with the Constitution.

Quirin rested on clear and explicit Congressional authorization of trials by military commissions – authorization that was separate and distinct from the

general authorization to use force in the declaration of war against Germany. Moreover, since *Quirin* was decided, Congress underscored its concerns about Executive detention by enacting a statute specifying that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *See* 18 U.S.C. § 4001(a). Section 4001(a) was designed to prevent the President from invoking vague military powers to justify precisely the sort of detention at issue in this case.

In *Hamdi*, the Supreme Court plurality read the AUMF to "clearly and unmistakably" authorize the detention of individuals captured on an overseas battlefield in Afghanistan because the detention of such traditional prisoners of war is a "fundamental incident of waging war." 124 S.Ct. 2633, 2641 (2004). But the *Hamdi* plurality was careful to limit its decision to the "narrow circumstances" presented in that case: a "battlefield capture" in a "*foreign* combat zone." *Id.* at 2643 (emphasis in original).

The indefinite military detention without charge of U.S. citizens arrested in civilian settings in the U.S. is very different from overseas battlefield detentions. Far from being a "fundamental incident of waging war," the indefinite military detention of citizens arrested in the United States based on suspected wrongdoing is entirely unprecedented in American history.

There is no indication that, without a single word of debate, Congress intended the AUMF to upset two centuries of constitutional tradition and create a system for the military detention of citizens in this country. Indeed, just a few weeks later, when it passed the PATRIOT Act, Congress vigorously debated a provision allowing the civilian detention without charge of suspected terrorist *aliens* for just *seven* days. It strains reason to believe that the same Congress that seriously deliberated over this far more limited provision in the PATRIOT Act had already implicitly authorized the detention of citizens for years at a time – without a single Member speaking one word of concern.

Because the AUMF does not authorize Padilla's military detention without trial, and § 4001(a) expressly prohibits it, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see Padilla v. Rumsfeld*, 352 F.3d at 711. That ebb is far too low a tide to cover the unprecedented actions that the government seeks here to justify.

ARGUMENT

I. The Executive Seeks Unprecedented Powers

Allowing the detention of citizens arrested in the United States based on suspected association with the enemy would dramatically upset our constitutional system in a way that overseas battlefield captures do not. The Executive's own recent statements make clear how dangerous it would be for courts to adopt, without legislative guidance, a definition of "enemy combatant" that reaches beyond the classic battlefield detainee scenario recognized in *Hamdi*. In oral argument in the U.S. District Court for the District of Columbia several months ago, Executive branch officials asserted that a "little old lady" who sent a check to "what she thinks is a charity that helps orphans in Afghanistan" could be detained in military custody indefinitely, without charge or trial, if unbeknownst to her the donation was passed on to terrorists. *Rasul v. Bush*, No. 02-0299, D.D.C., Tr. of 12/1/2004 hearing, at 25. As the Deputy Associate Attorney General starkly stated, "someone's intention . . . is not a factor that would disable the military from detaining the individual as an enemy combatant." *Id.* That was no slip of the tongue. Later in the argument, he stated that a teacher who taught English to the son of a terrorist could also be held because "Al Qaeda is seeking to train its operatives to learn English." *Id.* at 27. In the Executive's view – and these are its own words – teaching English to terrorists' children is tantamount to "shipping

bullets to the front lines" and transforms the teacher into an "enemy combatant." *Id.*

Put simply, the Executive argues that it has the power to deprive anyone, anywhere and anytime, of the right to have accusations judged by a jury of his peers – merely by labeling him an "enemy combatant." The accumulation in a single branch of such unprecedented power over the nation's citizens would be constitutionally troubling even if wielded only for a brief time. *The Federalist* No. 47, at 301 (Clinton Rossiter, ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny."). But the Executive does not claim some "emergency" power with temporal limits. To the contrary, the President has acknowledged that the source of any military power over citizens – the war on terror – will most likely *never* end.[1] In the end, the Executive seeks a permanent enhancement of power that would dramatically upset our constitutional system.

II. Congress Has Not Authorized the Indefinite Detention Without Charge of Citizens Arrested in the United States

This case implicates the gravest constitutional perils against which the Constitution's Framers sought to guard: Executive imprisonment of citizens

[1] Mike Allen, *Bush Tones Down Talk of Winning Terror War*, WASH. POST, Aug. 31, 2004 at A06.

without criminal trial, the assertion of military power over civilians, and the accumulation of unchecked and unbalanced power in a single Branch of government.[2] In reviewing both deprivations of individual liberty and actions of dubious constitutionality, the Supreme Court consistently has required, at a minimum, clear and specific authority from Congress. Such authority is completely lacking here.

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

"In traditionally sensitive areas . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Georgia v. Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation omitted); *Greene v. McElroy*, 360 U.S. 474, 507 (1959) ("[E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws."). This "clear statement" requirement applies most forcefully in the context of government attempts to erode citizens' freedoms. As the Supreme Court noted during the Vietnam War, "[w]here the liberties of the citizen are involved . . . we will construe narrowly all delegated powers that curtail

[2] These constitutional issues are discussed *infra* at Part II.

or dilute them." *Gutknecht v. United States*, 396 U.S. 295, 306-07 (1970) (citation omitted).

The Supreme Court has vigilantly applied the clear statement rule in times of significant challenge to national security, always refusing to read Congressional authorizations for the use of force as a "blank check for the President." *Hamdi*, 124 S.Ct. at 2650 (plurality): *see also id.* 2655 (concurring op.) (describing constitutional rule "that subject[s] enactments limiting liberty in wartime to the requirement of a clear statement").[3]

That has been true since the Nation's very beginning. In the War of 1812, the U.S. Congress issued a full-blown declaration of war. Like today's terrorists, the enemy selected symbolic targets in the heart of America, burning the Capitol and White House. The young Nation felt itself to be at a moment of extraordinary peril. Yet even then, the Supreme Court recognized that an authorization to use force does not grant the President blanket authority to seize enemy persons or

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[3] The *Hamdi* Court issued a judgment only because Justices Souter and Ginsburg "join[ed] with the plurality to produce a judgment" to "give practical effect to the conclusions of eight members of the Court rejecting the Government's position." *Id.* at 2660 (concurring op.). Because no opinion commanded a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (internal quotation omitted), *reiterated with approval by Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). Despite the government's repeated reliance on it, Justice Thomas's lone dissenting voice is not "the narrowest grounds" of "those Members who *concurred* in the judgments," *Marks*, 430 U.S. at 193-94 (emphasis added).)

property in the United States; rather, clear Congressional approval was a prerequisite to the legality of any such seizure. Chief Justice Marshall explained that even a "declaration of war does not, of itself, authorize proceedings against the *persons* or property of the enemy found, at the time, within the [domestic] territory." *Brown v. United States*, 12 U.S. 110, 126 (1814) (emphasis added); *see also Little v. Barreme*, 6 U.S. 170, 177-78 (1804) (Marshall, C.J.) (striking down wartime seizure of ship traveling *from* French port as not clearly authorized because Congressional statute had authorized only seizure of ships traveling *to* French port).

Indeed, one great peril of that war was the presence of citizen "enemy combatants" within the Nation: unreformed Loyalists and their sympathizers spying on and sabotaging American encampments. These enemies were legion. Yet President James Madison – the man whom the Framers themselves called the Father of the Constitution – understood that he had no power to detain without charge citizens seized in the United States. President Madison never invoked the Commander-in-Chief Clause he had helped draft to justify a power to detain without charge citizen-combatants. In fact, Madison rejected any such power. In *Elijah Clark's Case*, an American citizen surreptitiously entering the country from abroad was seized near the border and charged with spying on American encampments. Brought before a military tribunal, Clark was convicted and

sentenced to death. 1 Military Monitor 121, 121-22 (Feb. 1, 1813). Clark appealed, and his case ultimately reached President Madison, who conducted final reviews of appeals from convictions by military tribunals. *Id.* at 122. President Madison reviewed the federal espionage statute and found that it criminalized espionage by non-citizens – but not by citizens.[4] *Id.* As such, he found no statutory basis to hold Clark. Rather than claiming inherent power to detain citizens without charge, or implicit power to detain citizens without charge by virtue of Congress's declaration of war, President Madison ordered Clark released. *Id.* If the Constitution had allowed him to detain, as enemy combatants, citizens seized in the United States on suspicion of aiding the enemy, President Madison surely would have invoked that power. He did not. Absent clear Congressional authorization, Madison knew that neither the declaration of war nor some inherent power allowed him to detain without charge suspected citizen-combatants seized in the United States. He refused to transcend the limitations on Executive power that he had helped create.

Later Courts held true to the Framer's vision. In the military occupation of the former Confederacy that followed the Civil War, the Supreme Court reiterated that "[t]he clearest language would be necessary to satisfy us that Congress

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[4] Congress later amended the federal espionage statute to cover citizens. *See* 12 Stat. 339, 340, 34 U.S.C. §1200, art. 5; see also 12 Stat. 731, 737, 34 U.S.C. §1200, art. 5.

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

Like its forbearers, the *Quirin* Court adhered to this clear statement requirement in wartime. Though the government ignores the plain language of the opinion, *Quirin* unequivocally held that "Congress ha[d] *explicitly* provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war." 317 U.S. at 28 (emphasis added); *cf. Madsen v. Kinsella*, 343 U.S. 341, 355 n.22 (1952) ("[T]he military commission's conviction of [the *Quirin*] saboteurs . . . was upheld on charges of violating the law of war *as defined by statute*") (emphasis added); *see also Padilla v. Rumsfeld*, 352 F.3d at 715-16 ("[T]he Quirin Court's decision . . . rested on *express congressional authorization* of the use of military tribunals to try combatants who violated the laws of war.") (emphasis added). Thus, the *Quirin* Court rested military jurisdiction to conduct a "trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy" on

Congress's highly specific statutory authorization of such trials in the Articles of War,[5] *not* on the Declaration of War by the United States against Germany. 317 U.S. at 27-28. Far from supporting the government's position, *Quirin* thus supports the long-standing clear statement rule.

The Supreme Court again underscored the importance of the plain statement rule in *Duncan v. Kahanamoku*, a case involving both a declared war and statutory authorization of martial law – the very apex of the Executive's possible military power. Yet in *Duncan*, the Court held that the statute allowing the Governor of Hawaii to "place the Territory . . . under martial law," 327 U.S. 304, 307 n.1 (1946), must be narrowly construed, because Congress "did not specifically state to what extent the army could be used or what power it could exercise. It certainly did not explicitly declare that the Governor in conjunction with the military could

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[5] The Articles of War relied on in *Quirin* are the precursors to the current Uniform Code of Military Justice, 10 U.S.C. §§ 801-941. The statutes provided a clear statement authorizing "the *trial* and punishment of offenses against the law of war," *Quirin*, 317 U.S. at 27 (emphasis added), but cannot be read to provide a clear statement authorizing the indefinite and potentially permanent detention of an American citizen *without trial*. *See, e.g.*, 10 U.S.C. § 821 (referring to "offenders or offenses that by statute or by the law of war may be *tried* by military commissions") (emphasis added). The power to detain without trial cannot be viewed as a lesser-included part of the power to put on trial; among other things, detention without trial carries a much graver risk of error and abuse. *The Federalist* 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("'[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.'") (quoting 1 William Blackstone, *Commentaries on the Laws of England* 132 (1765)).

for days, months or years close all the courts and supplant them with military tribunals." *Id.* at 315.

The "clear statement" rule remains a central tenet of the Supreme Court's jurisprudence. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 298-300 (2001); *cf. Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) ("Based on our conclusion that indefinite detention of aliens . . . would raise serious constitutional concerns, we construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review."). The Executive's claim that *Hamdi* rejected the clear statement rule, Gov't Br. at 44, is utterly without support. In fact, the *Hamdi* plurality *reiterates* the clear statement rule. Though the plurality thought the "specific language of detention" was not a prerequisite to a clear statement, it understood the continued detention of someone captured on a foreign battlefield to be "a *fundamental* incident of waging war" and therefore concluded that "in permitting the use of 'necessary and appropriate force,' Congress has *clearly and unmistakably* authorized detention *in the narrow circumstances considered here.*" 124 S.Ct. at 2641 (emphasis added). The plurality's finding that Congress had "clearly and unmistakably" authorized

foreign battlefield captures was a finding that the clear statement rule had been satisfied – not abandoned. *Id.* at 2641.[6]

Ever since President Madison and Chief Justice Marshall acknowledged it, the requirement that Congress clearly and unmistakably authorize any governmental curtailment of citizens' liberties has guaranteed that Washington bureaucrats are not left with the final word on our freedoms. Before liberties are eroded for the sake of security, our own Congressional representatives – accountable to the Nation in ways that military officers and Executive branch officials are not – must first say so clearly.

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

The clear statement rule is buttressed by the Non-Detention Act, enacted in 1972. The Act provides: "*No citizen* shall be imprisoned or otherwise detained by the United States *except pursuant to an Act of Congress*." 18 U.S.C. § 4001(a)

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[6] Just as the *Hamdi* plurality found the AUMF to have clearly and unmistakably authorized captures on foreign battlefields without using the language of detention, so too *Ex parte Endo* suggested that detention of a citizen spy or saboteur "might" in specific circumstances be "clearly and unmistakably" authorized by a statute lacking "the language of detention," 323 U.S. 283, 300-02 (1944). Yet *Endo* viewed clear and unmistakable authorization of detention in a statute not using "the language of detention" as a rarity: "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.* (relying on Fifth and Sixth Amendments and Habeas Suspension clause to reject Executive claim of authority to detain).

(emphasis added). As the Second Circuit held, § 4001(a) plainly applies to Padilla's military imprisonment and prohibits that imprisonment absent specific authorization by Congress. *Padilla v. Rumsfeld*, 352 F.3d at 721 ("[T]he statute is unambiguous.").

The government contends that § 4001(a) is irrelevant here because it applies only to civilian, not military, detentions of citizens. Gov't Br. at 54. The government's argument cannot be squared with the plain text of the statute or with its history.

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

The plain text should be enough to resolve the issue, but the legislative history makes abundantly clear that the statute was designed to address *exactly* the sort of detention that is at issue in this case. Section 4001(a) was enacted in part to