No. _____

In The
Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

COMMANDER C.T. HANFT,
U.S.N., COMMANDER,
CONSOLIDATED NAVAL BRIG,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF PETITIONER FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the President have the power to seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge or trial?

2. Did the Fourth Circuit err in concluding that Petitioner's continued detention as an "enemy combatant" was a "necessary and appropriate" use of force under the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001)?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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BRIEF OF PETITIONER FOR WRIT OF CERTIORARI

Petitioner Jose Padilla respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1a to 25a) is reported at 423 F.3d 386 (4th Cir. 2005). The opinion of the district court (App. 26a to 54a) is reported at 2005 WL 465691.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL LAW PROVISIONS

The relevant constitutional, statutory, and international law provisions involved are set forth in Appendix 55a-57a, infra.

STATEMENT OF THE CASE

Jose Padilla, a United States citizen, has now been held in government custody without criminal charge for more than three years. In June 2002, Padilla was seized by the military from his cell in a civilian jail in New York City. In the intervening years, the President has consistently claimed the unprecedented authority to subject him to military detention without charge until the indefinite end of the "War Against Terror."

Following his arrest on a material witness warrant at Chicago O'Hare Airport on May 8, 2002, Padilla was

initially held in a maximum security civilian detention facility in New York and was allowed to meet with a court-appointed attorney. On June 9, 2002, however, the President declared him an "enemy combatant" and ordered his seizure by the military. Padilla's court-appointed New York attorney immediately filed a petition for writ of habeas corpus on his behalf in the U.S. District Court for the Southern District of New York.

The New York district court accepted the Executive Branch's claim that it had authority under the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), to detain U.S. citizens arrested in the U.S. as enemy combatants, but held that Padilla was entitled to access to a lawyer and to a factual hearing.[1] *Padilla ex rel. Newman v. Bush*, 233 F. Supp.2d 564 (2002).

The U.S. Court of Appeals for the Second Circuit reversed. It held that the President had no constitutional or statutory authority to detain indefinitely without criminal charge U.S. citizens arrested in the United States. *Padilla v. Rumsfeld*, 352 F.3d 695 (2003). In so holding, the Second Circuit relied on constitutional history and structure as well as the Non-Detention Act. 18 U.S.C. § 4001(a). The Non-Detention 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). The court found that Congress's authorization of "necessary and appropriate force" in the AUMF was insufficiently clear and specific to overcome the presumption against the domestic military detention of citizens flowing from § 4001(a) and the Constitution. *Id.* at 710-22.

[1] The AUMF provides in relevant part: "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224.

Accordingly, the court held that Padilla must be charged with a crime, detained in some other legally authorized status (e.g., as a material witness), or released.

This Court granted certiorari. *Rumsfeld v. Padilla*, 540 U.S. 1173 (2004). After full briefing and argument on the question of Presidential authority – the identical question presented by the current petition – a majority of the Court declined to reach the merits and held that the case should have been filed in South Carolina rather than New York. 124 S.Ct. at 2727 (2004).

In accordance with this Court's decision, Padilla immediately refiled his petition in South Carolina, the district of his present military incarceration. Padilla then moved for summary judgment.

On February 28, 2005, the U.S. District Court for the District of South Carolina granted Padilla's motion for summary judgment. The court reached the same conclusion that the U.S. Court of Appeals for the Second Circuit had reached more than a year before, finding that the President lacked the legal authority to detain indefinitely and without criminal charge a United States citizen who was seized in the United States. *Padilla v. Hanft*, No. Civ. A. 2:04-2221-26A, 2005 WL 465691 (D.S.C. Feb. 28, 2005). The district court carefully reviewed this Court's decision in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), and ultimately concluded that the differences between Hamdi's overseas battlefield capture and Padilla's civilian arrest in the United States were "striking." 2005 WL 465691, at *6. *Cf. Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring) (noting that "[t]o compare this battlefield capture [in Hamdi] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges"). The district court thus concluded that Padilla's nearly three-year-long military detention was neither a "necessary" nor an "appropriate" use of military force within the meaning of the AUMF. 2005 WL 465691, at *7.

Like the Second Circuit, the district court also rejected the government's argument that *Ex parte Quirin*,

317 U.S. 1 (1942), supported Padilla's detention. *Padilla v. Hanft*, 2005 WL 465691, at *7. The district court noted that in *Quirin*, Congress had "'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 in appropriate cases.'" *Id.* at *8 (quoting *Quirin*, 317 U.S. at 28). As this Court found in *Hamdi*, the AUMF clearly and necessarily authorizes the detention of combatants captured on overseas battlefields, something that the laws of war allow and that has been customary in past wars in which the United States has been involved. But the AUMF cannot be read to speak with comparable clarity to the detention without trial of U.S. citizens arrested in civilian settings here at home, something that has never been a traditional part of this nation's practice in times of war or peace.

Having found Padilla's detention not authorized by the AUMF, and prohibited by the Non-Detention Act, the district court also soundly rejected the government's argument that Padilla's detention was supported by inherent presidential power, concluding that such power would "offend the rule of law and violate this country's constitutional tradition." 2005 WL 465691, at *11 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring)). The district court therefore granted Padilla's motion for summary judgment and ordered that Padilla be released from military custody within 45 days, noting that "[o]f course, if appropriate, the Government can bring criminal charges against Petitioner or it can hold him as a material witness." *Id.* at *13 & n.14.

The Government appealed. In a decision written by Judge Luttig, the Fourth Circuit reversed. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) (App. at 1a). The Fourth Circuit interpreted this Court's decision in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), to permit the seizure and indefinite military detention without criminal charge of citizens within the United States. It reasoned that Yaser Esam Hamdi, who was allegedly captured armed in a zone

of active combat operations in Afghanistan, was no different than Padilla, who was arrested unarmed in a civilian setting in the United States. *Id.* at 391 (App. at 12a). In so doing, the Fourth Circuit ignored this Court's careful statement confining its decision in *Hamdi* to U.S. citizens "captured in a *foreign* combat zone." *Hamdi*, 124 S.Ct. at 2643 (emphasis in original). The court also rejected Padilla's argument that a clear statement of congressional authorization was required before citizens could be deprived of liberty, finding instead that principles of deference to the Executive in wartime required it to accept the President's determination that the indefinite military detention of citizens was "necessary and appropriate." 423 F.3d at 395-96 (App. at 19a-21a).

REASONS FOR GRANTING THE PETITION

A. The Case Still Involves a Question of Imperative Public Importance that Must Be Settled by this Court.

When this Court was first presented with a petition for certiorari in this case, it determined that the questions presented were of sufficient public importance to warrant review on an expedited schedule. *See Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2727 (2004) (acknowledging that authority question was "indisputably of profound importance"); *id.* at 2735 (Stevens, J., dissenting) ("At stake in this case is nothing less than the essence of a free society"). Even the government accepted the fundamental importance of the question. Gov't Pet. for Cert., *Rumsfeld v. Padilla*, at 11 (noting that the legitimacy of Padilla's detention is "of extraordinary national significance"). That was true when the case arose out of New York, and it remains true now that the case arises out of South Carolina.

In this case, the President claims authority to militarily detain without charge an American citizen arrested on American soil for the duration of a "War on Terror" that is indeterminate in scope and time. This assertion of authority is unprecedented, triggering weighty constitutional

questions regarding separation of powers and individual rights. As things stand – and as they will continue to stand until this Court resolves the matter – the President will continue to assert this extraordinary power. Only this Court possesses the national authority to conclusively resolve the issue. The continuing uncertainty about an issue of such imperative public importance serves neither liberty nor security interests.

B. The Fourth Circuit's Decision Conflicts with the Second Circuit Decision.

The Fourth Circuit's decision directly conflicts with the decision of the Second Circuit in this case. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *vacated on other grounds*, 540 U.S. 1173 (2004). In light of this Court's decision on the proper locus for suit in *Rumsfeld v. Padilla*, no further circuit split is likely to arise. That is because the government can control the location of suit by controlling the location of the prisoner; since the Fourth Circuit has now resolved the authority question in the government's favor, the government can avoid any conflicting rulings by holding all citizen detainees within the Fourth Circuit.

C. The Fourth Circuit's Decision Conflicts with Relevant Decisions of this Court.

The Court of Appeals held in essence that the President's authority to substitute military rule for the rule of law is the same here at home for the duration of the "War on Terror" as it is on an overseas battlefield. That is in conflict with numerous precedents of this Court, and of other lower courts. It strikes at the bedrock protections the Framers of the Constitution erected to shield citizens from Executive detention and to preserve the supremacy of civilian government over the military. There is no question more important in American constitutional law than the power of the Executive Branch to subject citizens to indefinite military detention without criminal trial. Only

this Court can lift the cloud that the Fourth Circuit's decision casts over our system of constitutional governance.

1. The Fourth Circuit's decision conflicts with this Court's precedents holding that Congress must speak clearly when it authorizes the infringement of individual liberties.

In reviewing both deprivations of individual liberty and actions of dubious constitutionality, this Court has consistently required, at a minimum, clear and specific authority from Congress. As the district court found, such authority is completely lacking here.

The Court of Appeals, however, disregarded this Court's precedents and found that no "clear statement" of congressional intent to deprive citizens of liberty was required. 423 F.3d at 395-96 (App. at 20a-21a). Indeed, the Fourth Circuit applied the opposite presumption, suggesting that in the face of ambiguity, the courts were required to defer to the President's Commander-in-Chief powers even at the cost of individual liberties. *Id.* (App. at 20a-21a). As this Court reiterated very recently, however, "a state of war is not a blank check for the President." *Hamdi*, 124 S.Ct. at 2650 (plurality op.).

The decision by the Court of Appeals in this case is in conflict with numerous decisions of this Court (and of numerous lower courts following this Court's precedents), which establish that the Constitution requires a "clear statement" by Congress when the government acts in constitutionally sensitive areas. *See, e.g.*, *Georgia v. Ashcroft*, 501 U.S. 452, 461 (1991). This requirement serves the important purpose of ensuring that "the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* (internal quotation omitted). As this Court stated in *Greene v. McElroy*, a Congressional decision to deprive citizens of their constitutional rights "cannot be assumed by acquiescence or nonaction." 360 U.S. 474, 507 (1959).

Rather, such decisions "must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Id*.

The clear statement requirement applies most forcefully when Congress acts to deprive citizens of individual liberty. *See Gutknecht v. United States*, 396 U.S. 295, 306-07 (1970) ("[W]here the liberties of the citizen are involved . . . we will construe narrowly all delegated powers that curtail or dilute them") (citation omitted). In addition, courts have enforced the clear statement requirement with particular vigilance in times of war and insecurity. In accordance with these principles, this Court has consistently refused to read congressional authorizations for the use of force as "blank check[s]" giving the President broad discretion to infringe individual liberties. *Hamdi*, 124 S.Ct. at 2650 (plurality op.); *id*. at 2655 (Souter, J., concurring) (noting that enactments limiting liberty in wartime are subject to the requirement of a "clear statement"); *see also Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

The constitutional "clear statement" rule is buttressed in this case by the Non-Detention Act, enacted by Congress 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) (emphasis added). As this Court has recognized, the language of the Act is unambiguous: "[T]he 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). Moreover, the legislative history of the Act confirms that it was intended to prohibit *exactly* the kind of preventative detention of citizens arrested in the United States for national security reasons at issue in this case. *See Rumsfeld v. Padilla*, 352 F.3d 695, 718-20

(2d Cir. 2003) (discussion of legislative history); *Hamdi*, 124 S.Ct. at 2653-54 (Souter, J., concurring) (same).

This Court's decision in *Hamdi* reaffirmed the applicability of the clear statement rule even in the context of an overseas battlefield capture, where both statutory and constitutional protections were more attenuated than here. *Hamdi*, 124 S.Ct. at 2641 (plurality op.); *id.* at 2655 (Souter, J., concurring). 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 – in that context. *Id.* at 2641. In short, the Fourth Circuit's rejection of the clear statement rule directly contravenes *Hamdi*, as well as a long line of this Court's precedents requiring that Congress speak clearly and unmistakably before citizens' liberties are infringed in wartime.

2. The Fourth Circuit's opinion dramatically extends this Court's decision in *Hamdi v. Rumsfeld*.

The Fourth Circuit's opinion departed from this Court's decision in *Hamdi v. Rumsfeld* in other important ways as well. The Court's decision in *Hamdi* upholding the detention of an overseas battlefield detainee was carefully limited to the "narrow circumstances" presented in that case. 124 S.Ct. at 2634. The *Hamdi* plurality took great pains to emphasize that the "context of [Hamdi's] case" was that of a "citizen captured in a *foreign* combat zone." 124 S.Ct. at 2643 (emphasis in original). The Fourth Circuit completely disregarded those careful limitations in finding "no difference in principle," 423 F.3d at 391 (App.

at 12a), between an individual captured bearing a weapon in a zone of active combat in a foreign country and a citizen arrested unarmed in a civilian setting in the United States on suspicion of being a participant in the "War on Terror." As another judge of the Fourth Circuit previously recognized, however, "[t]o compare [Hamdi's] battlefield capture to the domestic arrest in [this case] is to compare apples and oranges." *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (denying rehearing *en banc*) (Wilkinson, J., concurring). Contrary to the Court of Appeals' holding, there is a dramatic difference – both legally and practically – between an overseas battlefield capture and a domestic arrest, as this Court's reasoning in *Hamdi* makes clear.

a. The fact of overseas battlefield capture was critical to this Court's legal analysis in *Hamdi* in four respects.

First, the fact of overseas battlefield capture informed the plurality's interpretation of the AUMF. The plurality concluded that the AUMF authorized Hamdi's military detention because the detention of enemy combatants captured on a foreign battlefield is "a fundamental incident of waging war." *Hamdi*, 124 S.Ct. at 2641.[2] This conclusion is buttressed by long-standing historical practice. It would be virtually impossible for American troops to engage in overseas combat operations unless they could detain enemy soldiers found on the field of battle. If detention were not allowed, the only feasible alternative would be to kill captured enemy soldiers, itself a violation of the laws of war. Thus, the plurality found that Hamdi's detention was clearly and unmistakably authorized as "necessary and appropriate force" under the AUMF. *Id*.

[2] On a foreign battlefield, where the military may shoot enemy soldiers, it is logical that it may alternatively capture and detain them. However, unless it is seriously contended that the government had the right to shoot Padilla in his jail cell in Manhattan, no similar logic applies to this case.

By contrast, the indefinite military detention without trial of citizens seized in the United States because of suspected wrongdoing is far from "a fundamental incident of waging war," and indeed is unprecedented in this nation's history. There is no evidence in the text or legislative history of the AUMF suggesting that Congress even considered the possibility that it was authorizing the President to indefinitely detain a citizen arrested in the United States.[3]

Second, the plurality's primary response to Justice Scalia's dissenting argument that the Habeas Suspension Clause precludes the AUMF from authorizing a citizen's detention was that the dissent "largely ignores the context of this case: a United States citizen captured in a *foreign* combat zone." *Id*. at 2643 (emphasis in original). The distinction between an overseas battlefield capture and a domestic arrest is crucial in terms of the Suspension Clause. The Habeas Suspension Clause specifically speaks of times of "Rebellion" and "Invasion" – terms that plainly apply to times of *domestic* peril, when military conflict on our own soil may make ordinary civilian law impractical or dangerous. It was thus not implicated by a foreign battlefield capture, as the *Hamdi* plurality suggested when responding to Justice Scalia's dissent.

[3] The legislative history of the AUMF is devoid of any discussion or debate over granting the executive such a broad detention power. This is in sharp contrast to the vigorous debate only a month later over provisions in the USA Patriot Act that expanded the Executive's authority to detain *aliens* without charge. *See generally* Christopher Bryant and Carl Tobias, *Youngstown Revisited*, 29 Hastings Const. L.Q. 373, 386-91 (2002) (describing debates). In light of such vigorous debate over the detention of *aliens*, it seems very unlikely that Congress intended its silence on the question of detention power over U.S. *citizens* to be interpreted by the courts as affirmative authorization of such power. Rather, the more reasonable explanation is that Congress never contemplated, let alone authorized, such a sweeping expansion of the Executive's detention powers over citizens here at home.

The Habeas Suspension Clause establishes the exclusive constitutional mechanism for granting such military detention power in a time of invasion: *congressional* suspension of the writ. To uphold Padilla's detention on the facts of this case would fatally undermine the explicit delegation of power contained in the Habeas Suspension Clause and fundamentally alter the balance of power between the Legislative and Executive branches of government. Such a result is unnecessary and unacceptable when the "courts are open and their process unobstructed." *Ex Parte Milligan*, 71 U.S. 2, 121 (1866). Had the Fourth Circuit not elided the difference between overseas battlefield captures and domestic arrests, it would have understood that the detention without trial of prisoners of war captured on foreign battlefields does not require a suspension of habeas corpus; the detention without trial of citizens arrested in the United States in time of war does.

Third, the fact of battlefield capture was an important component of the *Hamdi* plurality's analysis of *Milligan*, the Civil War case in which this Court held that a citizen accused of plotting with a secret organization to engage in acts of war in aid of the Confederacy was constitutionally entitled to a civilian trial. Under the facts presented in *Milligan*, the Court held that military jurisdiction cannot extend to civilians in areas "where the courts are open and their process unobstructed." *Id.* at 121. The *Hamdi* plurality explicitly distinguished *Milligan* on the ground that Hamdi was captured on a foreign battlefield carrying arms while Milligan was arrested at home in Indiana. *Hamdi*, 124 S.Ct. at 2642. As the Court pointed out, the circumstances of capture were "central to [the *Milligan* Court's] conclusion." *Id*. In fact, as the *Hamdi* plurality explained, "[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Id*. Because – *like* Milligan and *unlike* Hamdi – Padilla was not captured bearing arms on a battlefield, but seized in a civilian setting in the United States where the courts were open

and operating and far from any zone of active combat operations, this Court's holding in *Milligan* controls.

Fourth, the context of Hamdi's foreign battlefield capture in the course of a traditional armed conflict led the plurality to conclude that the long-established laws of war provided clear guidance on the scope of "necessary and appropriate" action. 124 S.Ct. at 2640-42 (discussing duration and purpose of detentions allowed under the Geneva Conventions and Hague Conventions). The traditional law of war limits – which were critical in preventing the AUMF from becoming a "blank check" for the President in *Hamdi* – are notably absent in Padilla's case.

Hamdi was allegedly captured while fighting on a conventional battlefield with a unit of the Taliban, the armed force of the nation-state of Afghanistan. *Id.* at 2637. In traditional armed conflicts, the President's power to detain captured soldiers without trial is inherently defined and limited by the scope of the war. Persons subject to detention as "combatants" are easily defined: those captured on the battlefield and those asserting military status in the form of membership in the armed forces of a nation-state (like the men in *Quirin*). The President's detention power ends when hostilities cease.

The Fourth Circuit's extension of the President's authority to the circumstances of Padilla's capture would eviscerate these traditional law of war limits. Unlike Hamdi, Padilla was seized not as part of a traditional armed conflict, but rather pursuant to the broader "War on Terror." *See, e.g.*, 423 F.3d at 389, 397 (App. at 7a, 23a) (framing question in terms of detention of a citizen "who is closely associated with al Qaeda, an entity with which the United States is at war"). The law of war limits that confined the power recognized in *Hamdi* are noticeably absent in Padilla's case.

b. The *Hamdi* plurality recognized and accepted the traditional limits on the military detention power set by the law of war. The Fourth Circuit's extension of the President's military detention power to the "War on

Terror" fundamentally conflicts with those limits in several ways, creating an Executive detention power far broader than the Executive has wielded in any traditional armed conflict.

Because the "War on Terror" is potentially perpetual, the domestic military detention power created by the Fourth Circuit might never end. Unlike the case of traditional battlefield detention power, which ends with the peace treaty concluding the war, the executive detention power the President seeks could become a permanent fixture of American law. *Cf. Hamdi*, 124 S.Ct. at 2642 (noting that "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan" and concluding that the "United States may detain, for the duration of *these* hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States' ") (plurality op.) (emphasis added).

Moreover, the context of traditional battlefield captures limits in important ways the potential for error and for abuse of government power. When an individual is apprehended overseas in a zone of active combat operations, the chances that he has been detained in error are small. The facts and circumstances of his capture in a foreign combat zone can be readily established by military records kept in the ordinary course of operations. The minimal due process hearing envisioned by the *Hamdi* plurality is constitutionally sufficient to minimize the small risk of error in such situations. *See Hamdi*, 124 S.Ct. at 2646 (weighing, under *Mathews v. Eldridge*, " 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if any, of additional or substitute safeguards' ") (plurality op.) (citations omitted). Nor is there much chance that the government will be able to abuse the power of detention for illegitimate ends, since most citizens simply will not be found in the foreign theater of battle.

By contrast, military detention of citizens arrested unarmed in the United States based on suspected association with terrorist organizations poses far greater risks of both error and abuse. Importantly, this is true whether the suspected association with terrorist organizations includes only plots to engage in future terrorist acts, or whether it also encompasses allegations of having been present at some point in the past on a foreign battlefield. In the case of domestic arrest, seizure of a citizen will most likely be based on information from secret informants, as it was in this case. The risk of error when relying on evidence from secret witnesses is quite high, significantly altering the *Mathews v. Eldridge* balance. *See generally Crawford v. Washington*, 541 U.S. 36, 42-50 (2004) (cataloging the historic aversion to and evils stemming from the admission of *ex parte* testimony). The risk of abuse of government power is also heightened when the state can subject a citizen to indefinite imprisonment simply by presenting the court with anonymous hearsay allegations that the individual engaged in wrongdoing (including past wrongdoing abroad), leaving it up to the individual to disprove those allegations. Indeed, the risks of Executive detention based on precisely this sort of evidence were what led the Framers of the Constitution to erect the criminal procedure protections of the Bill of Rights, including the Confrontation Clause. *See id.* at 50 (describing "use of ex parte examinations as evidence against the accused" in treason cases as "the principal evil at which the Confrontation Clause was directed and which "the founding-era rhetoric decried"). Yet the Fourth Circuit's decision permits the government to avoid the Bill of Rights' criminal procedure protections precisely where the potential for error and abuse that motivated their framing is at its highest.

c. The Fourth Circuit also erred in concluding that Padilla, even on the government's facts, met the definition of a "combatant" under the laws of war. The mere fact of having been present in a combat zone at some point in the past does not render one a "combatant" for the duration of hostilities under the traditional laws of war. Rather, the laws of war define combatants only as "members of the

armed forces of a Party to a conflict" – that is, soldiers who have status in a recognizable national army. Geneva Convention Additional Protocol I, art. 43(2). Members of the armed forces of a party to a conflict are combatants wherever they go and may be targeted with lethal force whether or not in a zone of active combat (unless in a protected area such as a hospital).

Under the laws of war, persons who are *not* members of the armed forces of a party to the conflict – that is, civilians – are not allowed to participate in combat and are protected from attack "unless and for such time as they take a direct part in hostilities." *Id.*, art. 51(3). Civilians who illegally participate in combat lose their protection from attack "for such time as they take a direct part in hostilities." But they do not thereby become "combatants" subject at any subsequent time and place to lethal attack. They may be the subject of lethal attack, and the lesser force involved in capture and detention like a prisoner of war, only "for such time as they take a direct part in hostilities" – *i.e.*, while they are on the battlefield. After they leave the battlefield, they may later be arrested and criminally prosecuted for having engaged in combat (since they lack the combatant's privilege afforded to members of the armed forces) or for any other war crimes they may have committed, but they remain civilians.

Under these rules, Hamdi, who was plausibly a "member of the armed forces of a Party to the conflict" (*i.e.*, the Taliban) fell within the law of war definition of a "combatant." On the other hand, even on the most generous reading of the government's facts, Padilla is, at most, a civilian who at one point illegally participated in hostilities; he does not meet the law of war definition of "combatant." (If he did, the government had no obligation to arrest him, but was authorized under the laws of war to shoot him wherever they found him, at least so long as he was not injured or attempting to surrender).

These traditional rules and categories of the laws of war may seem ill-fitted to the "War on Terror." This, however, is an argument for why Congress may need to

develop new laws to deal with a new problem. It is *not* a legitimate argument for allowing the Executive Branch or the Article III courts to manufacture new rules out of whole cloth in the absence of Congressional legislation.

In short, by distorting the holding in *Hamdi* beyond the "narrow circumstances" of foreign battlefield capture, the Fourth Circuit granted the President a broad, indefinite military detention power – the kind of "blank check" that this Court has consistently refused to sanction. 124 S.Ct. at 2650. The difference between an overseas battlefield capture and a domestic arrest is not irrelevant, as the Fourth Circuit thought. It is the difference between a society based on the rule of law and a military regime.

3. The Fourth Circuit misapplied this Court's decision in *Ex parte Quirin*.

The Fourth Circuit also misinterpreted this Court's decision in *Ex parte Quirin*. In that case, the Court upheld the conviction of an American citizen captured in the United States and tried before a military tribunal. There are, however, at least four key distinctions between *Quirin* and the present case, as the district court properly recognized. *First*, each defendant in *Quirin* asserted military status. This status prevented their civilian trial and punishment, but allowed them to face a military trial instead. The *Quirin* Court found that the saboteurs could not first seek the protection of the law of war and then later evade the consequences of violating the very same law. 317 U.S. at 37-40. Here, petitioner denies military status, as did the petitioner in *Milligan*.[4] 71 U.S. at 131.

[4] It is not merely that Padilla denies the *facts* undergirding his alleged military status, as Hamdi did. *Cf.* 124 S.Ct. at 2643 (plurality op.). Rather, it is that he also argues that even on the facts alleged by the government, he lacks the military status that was the prerequisite to the military jurisdiction upheld in *Quirin*. As explained above, even on the government's facts, he is not a combatant and not subject to military jurisdiction. *See supra* at Pt. C.2.c.

Second, in *Quirin*, the Court found that Congress had "*explicitly* provided" by statute for trial before military tribunals (*i.e.*, not through the authorization to use force against Germany). 317 U.S. at 28 (emphasis added). Here, the AUMF provides no such "explicit" authority. *Third*, the *Quirin* petitioners were tried and convicted of crimes defined by statute. The only question confronted by the Court was whether petitioners might be tried by military commission rather than civilian jury. The issue was not raised, and the Court did not address, whether petitioners could constitutionally be detained in light of the Habeas Suspension Clause. In this case, petitioner explicitly challenges the constitutionality of his military detention without trial. *Fourth*, *Quirin* was decided before Congress enacted § 4001(a). Congress passed § 4001(a) in 1972 in order to prevent the President from detaining, *inter alia*, citizens suspected of sabotage or espionage unless expressly authorized to do so by Congress. As explained *supra*, the AUMF provides no such authorization. Thus, *Quirin* provides no support for Padilla's continued military detention.

4. The Fourth Circuit's decision conflicts with decisions of this Court restricting the exercise of military power as an instrument of domestic policy.

The Framers had a "fear and mistrust of military power" and therefore made the military "subordinate to civil authority." *Reid v. Covert*, 354 U.S. 1, 29-30 (1957). For that reason, the Framers granted Congress many of the war powers to ensure that the military would not become a tool of governmental oppression.[5] The President's authority to use military power in domestic affairs is thus particularly circumscribed when he acts without Congressional authorization – or, even worse, against Congressional

[5] *See* U.S. CONST. ART. I § 8, cl. 10, cl. 11, cl. 14, cl. 15; U.S. CONST. AMEND. III.

will. *See Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring).

This is not the first time that a President has sought to expand his domestic powers through the Commander-in-Chief Clause. This Court, however, has carefully policed the boundaries of military jurisdiction throughout the Nation's history. The Court has repeatedly reaffirmed Alexander Hamilton's observation that the powers conferred on the President by the Commander-in-Chief Clause "amount to nothing more than the supreme command and direction of the military and naval forces," and grant no sweeping authority to seize people or property within American borders, even in times of war. *The Federalist* No. 69, at 418 (Clinton Rossiter, ed., 1961). For example, in *Youngstown* this Court dramatically rejected President Truman's attempt to rely on his Commander-in-Chief powers to seize steel mills for military purposes during the Korean War. *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring) ("No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role"). If the President lacks the authority under the Commander-in-Chief Clause to seize property, surely he lacks similar authority to deprive citizens of their liberty.

Even with the support of Congress, the Constitution limits the exercise of military jurisdiction over citizens, as illustrated by *Ex parte Milligan*, 71 U.S. at 121, 123, 127. The case arose during the Civil War, when large portions of the country had become battlefields. In the context of that crisis, this Court held that military jurisdiction could not extend to civilians in areas "where the courts are open and their process unobstructed." *Id*. at 121. Like Padilla, Milligan was charged with conspiring with a secret society to commit hostile and warlike acts against the United States. *Id*. at 6-7. Milligan, like Padilla, was detained by the military. As in this case, the government argued that the President's Commander-in-Chief powers gave him authority to subject Milligan to military jurisdiction. *Id*. at

14. Despite Milligan's direct participation in planning wartime attacks on the United States, this Court firmly rejected the expansion of military jurisdiction and held that Milligan must be released from military custody.

The *Milligan* Court reaffirmed "the birthright of every American citizen, when charged with crime, to be tried and punished according to law." *Id*. at 119. The Court emphasized that the Constitution's requirements and guarantees apply "equally in war and peace" and are not "suspended during any of the great exigencies of government," *id*. at 120-21, save in situations where the Habeas Suspension Clause has been employed. *Id*. at 125. The Court recognized that military detention or trial might be necessary where martial law prevailed – *i.e.*, where battlefield conditions force civilian courts to close. *Id*. at 126, 142 (Chase, C.J., concurring). It also recognized that the Constitution allows soldiers in the regular armed forces to be tried under military jurisdiction. *Id*. at 123, 142 (Chase, C.J., concurring); U.S. CONST. AMEND. V. But the Court refused to equate Milligan with a soldier. As the Court explained, "[i]f he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties[.]" *Id*. at 131. Given the great similarities between the two cases, Padilla is similarly entitled "to be tried and punished according to law." *Id*. at 119.

More recent cases have reaffirmed and further established that, even with congressional authorization, the Constitution limits the power of the Executive to subject citizens to military rather than civilian jurisdiction. *See Duncan*, 327 U.S. at 324 (rejecting military jurisdiction to try civilians even under martial law statute); *Reid*, 354 U.S. at 33-34 & n.60 (plurality) (notwithstanding statute, rejecting on constitutional grounds military jurisdiction outside "active hostilities" or "occupied enemy territory," and rejecting the argument that "concept 'in the field' should be broadened . . . under the conditions of world tension which exist at the present time"). Thus, even *with* explicit congressional authorization, Padilla's military

detention would violate the Constitution. However, given the complete absence of congressional authorization, and in the face of explicit congressional prohibition in § 4001(a), Padilla's detention simply cannot be upheld.

The Court of Appeals decision thus significantly upsets the Constitution's carefully crafted protection of the supremacy of civilian government by departing from this Court's long line of cases policing the limits of military jurisdiction.

D. There is No Reason to Further Delay Review of the Urgent Constitutional Questions Presented by this Case.

The errors in the Fourth Circuit's decision are manifest. Because of the magnitude of the constitutional questions, allowing these errors to remain uncorrected for even a short time is intolerable.

The government will no doubt argue that since the case currently comes to the Court in a summary judgment posture, certiorari review should be delayed to allow further fact-finding before the magistrate under the framework of the *Hamdi* plurality decision. But such a hearing is unlikely to obviate the need for this Court to review the fundamental question of presidential authority at issue here. Moreover, it is likely to spawn a host of other evidentiary and procedural questions that will wastefully consume judicial resources both at trial and on appeal. In addition, delay of review until after a fact hearing will seriously prejudice Padilla. Finally, it disserves the national interest to continue to leave unresolved a question of profound constitutional importance that this Court deemed worthy of review two Terms ago.

1. Immediate review will serve judicial economy.

This Court has on countless occasions reviewed cases on appeal from a trial court's grant of summary judgment.

In this case, as in those, judicial economy is served by granting review now, not by waiting.

As things stand now, the exact framework for a *Hamdi* hearing is unclear. *See Hamdi*, 124 S.Ct. at 2651-52 (directing the District Court to "ensure that the minimum requirements of due process are met" and "engag[e] in a factfinding process that is both prudent and incremental"). To conduct the hearing, the district court will need to craft guidelines for the admission of evidence, the scope of discovery, and the burdens of persuasion and proof – all unmoored from the long-established constitutional and statutory safeguards applicable in criminal trials.

An evidentiary hearing under the *Hamdi* plurality's framework might be straightforward enough if this case involved an individual captured on a foreign battlefield. The government could present evidence, in the form of an affidavit based on military records kept in the ordinary course of business, that the detainee had been seized in a foreign combat zone bearing a weapon and in the company of enemy soldiers. 124 S.Ct. at 2637 (describing contents of the Mobbs declaration in that case). Little discovery would be needed, unless the individual had a plausible basis for disputing his place of capture. The detainee would then have an opportunity to present evidence that he was not an enemy soldier but was, instead, an "errant tourist, embedded journalist, or local aid worker." 124 S.Ct. at 2649.

By contrast, because of the differences between battlefield detention and domestic arrest, the hearing that would need to be conducted on remand in *this* case will involve a host of difficult evidentiary and procedural questions of constitutional magnitude.[6]

[6] The complexity and difficulty of defining the procedures to be used in this case highlights the threshold need for a clear statement from Congress that specifies who can be detained, for how long, and under what procedures.

The "evidence" the government has offered against Padilla over the past three years consists of double and triple hearsay from secret witnesses, along with information allegedly obtained from Padilla himself during his two years of incommunicado interrogation.[7] In discovery, Padilla would seek the identity of the individuals who provided the information that is the basis of both the Mobbs and Rapp Declarations and the opportunity to examine them. Given the widespread reports of torture and cruel, inhuman and degrading treatment during interrogation of detainees in U.S. custody around the world, Padilla would also seek to determine the circumstances in which those individuals may have given evidence against him.[8] This would require the district court to resolve questions of whether national security interests can prevent the disclosure of such information, and if so whether the Due Process Clause would nevertheless allow the government to introduce a hearsay affidavit based on this evidence in court. This, in turn, might also require an inquiry into whether the interrogation tactics used on detainees may have violated United States or international law. The court would also need to resolve whether

[7] *See* Mobbs Decl. ¶ 3 (App. at 59a) ("This information is derived from multiple intelligence sources, including reports of interviews with several confidential sources, two of whom were detained at locations outside the United States.") (submitted in *Padilla v. Rumsfeld*); *id.* n.1 (admitting that "these confidential sources have not been completely candid," noting that "[o]ne of the sources, for example, in a subsequent interview . . . recanted" and acknowledging that one source was being treated with various types of drugs"); Rapp Decl. ¶ 3 (App. at 61a) (information "derived from the circumstances surrounding his arrest and Padilla's statements during post-capture interrogation").

[8] *See, e.g.,* James Risen, et al., *Harsh C.I.A. Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004 (citing instances where suspected al Qaeda operative was strapped to a board, forcibly immersed under water, and made to believe he might drown); David Johnston & James Risen, *Aides Say Memo Backed Coercion for Qaeda Cases*, N.Y. TIMES, June 27, 2004 (reporting that government officials acknowledged "extreme" and "harsh" – indeed, possibly criminal – interrogation methods of suspected al Qaeda operatives).

any information derived from Padilla's two years of incommunicado, uncounseled interrogation is constitutionally admissible. *Cf. Hamdi*, 124 S.Ct. at 2641 (plurality op.) ("Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized"); *Padilla*, 124 S.Ct. at 2734 (noting that "[w]hether the information . . . procured" through "[i]ncommunicado detention for months on end" is "more or less reliable than that acquired by more extreme forms of torture is of no consequence" in evaluating its illegality) (Stevens, J., dissenting). Finally, he would argue that, whatever might have been permissible in the battlefield capture context of *Hamdi*, hearsay cobbled together from the secret interrogation of detainees does not bear sufficient indicia of reliability to be admissible.[9]

[9] The Fourth Circuit also erred in suggesting that Petitioner somehow "stipulated to the facts as set forth by the government." Slip op. at 7 n.1. Petitioner has argued that he is entitled to judgment as a matter of law *even if* all the facts pleaded by the Executive Branch are assumed to be true, but he has also consistently argued that the summary judgment standard does not require acceptance of the factual allegations in the government's pleadings. Pet. D.Ct. Reply (Traverse) at 2-3 & n.2; Pet. Mot. For Sum. J. at 1 & 2 n.1; Pet D.Ct. Reply Br. at 15 & n.2; Pet. Fourth Circuit Br. at 53-55. Unlike on a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12, in responding to a motion for summary judgment under Federal Rule of Civil Procedure 56, a party "may not rest on the mere allegations" of his pleadings, but rather "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e); Pet. D.Ct. Reply Br. at 15 (citing same); Pet. Fourth Circuit Br. at 53. Affidavits opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters therein." Fed. R. Civ. Proc. 56(e). As Petitioner has consistently argued, the only affidavit submitted by the government was *not* "made on personal knowledge," *not* "admissible in evidence," and does *not* show "that the affiant is competent to testify to the matters stated therein." *See* Pet. Mot. For Sum. J. at 2 n.1 ("Petitioner also notes . . . that the sole support for the factual averments in the Government's Answer is an affidavit that appears to be based entirely on hearsay 'evidence' that was obtained in an illegal, possibly criminal manner. Petitioner believes this 'evidence' is both unreliable and inadmissible in federal court") (citation omitted);

(Continued on following page)

If the magistrate or the district court rules in favor of Padilla on any or all of these issues, the government will no doubt appeal. The case is then likely to come back to this Court presenting not only the question of authority presented by the instant petition, but also half a dozen other constitutional questions of great significance and difficulty.[10]

On the other hand, if the district court rules against Padilla on all or most of these issues and finds that the government has successfully shifted to him the burden of proving his innocence, Padilla will then be presented with a Hobson's choice. He can attempt to disprove the allegations of the government's secret witnesses through his own testimony. But, without clear guidance from this Court of what a citizen must have done to be deemed an "enemy combatant" subject to indefinite military detention, it may not even be apparent to Padilla which aspects of the government's case he needs to counter. He will also have to make the decision to testify without knowing for certain whether he possesses a privilege against self-incrimination in an enemy combatant hearing, and whether his decision to testify in such a hearing will waive the privilege in any later criminal prosecution. Certain defenses might negate the Government's assertions that he was an enemy combatant, but could subject

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Pet D.Ct. Reply Br. at 15 & n.2; Pet. Fourth Circuit Br. at 53-55. Petitioner was therefore also entitled to summary judgment because the government did not meet its burden of coming forward with sufficient admissible evidence to create a "genuine issue of material fact" for trial; as a matter of law, petitioner's continued detention as an "enemy combatant" cannot be a "necessary and appropriate" use of force when the government has produced *no* admissible evidence to support that detention.

[10] To give a sense of the likely delays, litigation over Zacarias Moussaoui's access to individuals with potentially exculpatory information in Government custody took more than three years, despite an established statutory and constitutional framework for discovery and production of witnesses in criminal cases. *See, e.g., United States v. Moussaoui*, 382 F.3d 453, 466-483 (4th Cir. 2004).

Padilla to criminal liability. If such a defense were mounted, the Government would be in an advantageous position to charge him using ordinary criminal processes should the courts later find his detention to be unconstitutional. Yet, forgoing that defense might waive Padilla's only opportunity to contest his ongoing detention if that detention is, as the Government claims, authorized.

In this scenario as well, the case would inevitably return to this Court after the hearing with even greater complexity and difficulty, presenting not only the authority question but also all the procedural questions. Significantly, if the district court has made factual findings following an erroneous ruling on any one of the half a dozen difficult procedural issues in the case, those findings will likely have to be set aside and therefore will be of *no use* to this Court in resolving the authority question. In short, delaying review in the hopes that further proceedings in the trial court will spare this Court the difficult task of deciding the fundamental question presented by this petition is a false economy.

2. Further delaying review will irreparably harm Petitioner.

Petitioner has now been held in solitary confinement in a military brig for three and one-half years without being charged with a crime. If his detention outside the criminal justice system was ever "necessary and appropriate," that time has long since passed. Further delay by this Court in reviewing the fundamental constitutional question presented by this petition will irreparably harm Padilla. The essence of Petitioner's claim is that he is not subject to military jurisdiction and is entitled to be *immediately* released from military custody. *Cf. Mitchell v. Forsyth*, 472 U.S. 511 (1985). Only a judgment from this Court can vindicate that claim.

As noted above, Padilla will suffer irreparable harm from being forced to present a defense at a hearing in which he is denied criminal procedural safeguards to

which he is entitled under the Constitution. *See, e.g.*, *Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989) (finding that alien had established a significant and irreparable injury if he "presents his defense in [a summary immigration] proceeding, and a court later finds that section inapplicable to him" because "the INS will nevertheless know his defense in advance of any subsequent [removal] proceeding"); *id*. ("[I]f, however, he does not present his factual defense now, he risks forsaking his only opportunity to present a factual defense"). These injuries are further exacerbated because the rules of this *Hamdi*-type hearing are themselves unclear and thus susceptible to significant change on appeal.

Moreover, should this Court later invalidate his detention after completion of a *Hamdi* hearing, Padilla will face enormous practical difficulties in defending against any criminal charges. Many years will have passed between the operative facts, occurring between June 2001 and May 2002, and the eventual indictment. Such a long delay will prejudice Padilla's ability to secure witnesses and collect evidence for an effective defense.

In addition, the unavoidable delay needed to develop and conduct a *Hamdi* hearing risks serious and permanent damage to Padilla's mental faculties. Padilla has been held in incommunicado detention or near-incommunicado detention for approximately three and one-half years. Other than occasional visits from his lawyers, he has had no regular interaction with individuals other than his jailers. Scientific evidence has long suggested that such conditions trigger or contribute to the development of serious mental illnesses.[11] In earlier stages

[11] *See Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988) ("[T]he record shows . . . that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage. . . ."); *Perri v. Coughlin*, No. 90-CV-1160, 1999 U.S. Dist. LEXIS 20320, at *7 (N.D.N.Y. June 11, 1999) (reviewing expert medical testimony that "[e]xtended segregation from social and environmental stimulation escalates the onslaught of mental

(Continued on following page)

of the litigation, the Government has even admitted the use of coercive techniques to affirmatively alter Padilla's mental state. *See* Decl. in Joint Appendix at 75, 86, *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004) (No. 03-1027) (describing the "sense of dependency and trust" interrogators were attempting to create by keeping Padilla isolated from the outside world and denying him access to counsel). Padilla would suffer a cruel irony if his continued isolation during the pendency of a *Hamdi* hearing inflicted further psychological damage, only to have this Court later invalidate his detention on the claims he now raises.

3. Immediate review is in the public interest.

Finally, our democratic institutions are built on the presumption that citizens understand and respect the extent of their government's power over them. *See Padilla*, 124 S.Ct. at 2735 (Stevens, J., dissenting) ("Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law"); *see also Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he greatest menace to freedom is an inert people"); Statement of Patrick Henry, 3 Elliot's Debates 169-70 (J. Elliot ed. 1881) ("The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them").

As evidenced by the several opinions of this Court's members, the President's authority to indefinitely detain Petitioner appears inconsistent with the long-standing values of a free and democratic society. *See, e.g.*, *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2661 (2004) (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon

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illness); *see also* Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 J. CRIME & DELINQUENCY 124, 132 (2003) (summarizing the negative effects of long-term solitary, including hypertension, uncontrollable anger, hallucinations, emotional breakdowns, chronic depression, and suicidal thoughts).

system of separated powers has been freedom from indefinite imprisonment at the will of the Executive"); *see also Padilla*, 124 S.Ct. at 2735 (Stevens, J., dissenting). To this day, however, the harmonization of these traditions with Petitioner's detention has not occurred. Further delay breeds unnecessary doubt, suspicion, and fear among the citizenry regarding one of the nation's most fundamental freedoms – the right to be free from physical detention by one's own government. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action").

Executive branch officials have further fueled this insecurity with vague and unconstrained statements regarding the breadth of this power. *See* Tr. of Hr'g at 25, *Rasul v. Bush* (D.D.C. Dec. 1, 2004) (noting that a "little old lady" who sent a check to "what she thinks is a charity that helps orphans in Afghanistan" could be detained as an enemy combatant); *Hearings on Military Justice & Detention Policy Before the Subcomm. On Pers. of the Senate Comm. on Armed Serv.*, 108th Cong. 3 (2004) (Statement of Principal Deputy General Counsel Daniel J. Dell'Orto) (asserting need "to maintain flexibility in the terminology" with respect to the definition and classification of enemy combatants).

Threats of detention under an "enemy combatant" label also, implicitly or explicitly, seep into federal criminal prosecutions. *See* Eric Lichtblau, *Wide Impact from Combatant Decision Is Seen*, N.Y. TIMES, June 25, 2003, at A14; Adam Liptak, *Threats and Responses: The Legal Context; Tribunals Move From Theory to Reality*, N.Y. TIMES, July 4, 2003, at A12; *see also* Philip Shenon & Eric Schmitt, *White House Weighs Letting Military Tribunal Try Moussaoui, Officials Say*, N.Y. TIMES, Nov. 10, 2002, at § 1, p. 17. Defendants charged with certain crimes face immense pressure to avoid an "enemy combatant" designation, and the prospect of perpetual detention, by pleading guilty.

In the face of genuine threats to the safety of the nation, the security of the Republic has always rested in the sustainability of its freedoms and liberties. An authoritative pronouncement from this Court on whether the President has the power to seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge or trial would reaffirm these basic tenets of our constitutional system.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-6396

JOSE PADILLA,

Petitioner-Appellee,

versus

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

Respondent-Appellant.

WASHINGTON LEGAL FOUNDATION; THE ALLIED EDUCATIONAL FOUNDATION,

Amici Supporting Appellant,

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; COMPARATIVE LAW SCHOLARS AND EXPERTS ON THE LAWS OF THE UNITED KINGDOM AND ISRAEL; PEOPLE FOR THE AMERICAN WAY FOUNDATION AND THE RUTHERFORD INSTITUTE; THE BRENNAN CENTER FOR JUSTICE AT THE NEW YORK UNIVERSITY SCHOOL OF LAW; AMERICAN CIVIL LIBERTIES UNION; NEW YORK CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA; AMERICAN

CIVIL LIBERTIES UNION OF VIRGINIA; ORIGINAL CONGRESSIONAL SPONSORS OF 18 U.S.C. SECTION 4001(A); JANET RENO; PHILIP B. HEYMANN; ERIC H. HOLDER, JR.; JEFFREY H. SMITH; CENTER FOR NATIONAL SECURITY STUDIES; CONSTITUTION PROJECT,

Amici Supporting Appellee.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Henry F. Floyd, District Judge. (CA-04-2221-26AJ)

Argued: July 19, 2005 Decided: September 9, 2005

Before LUTTIG, MICHAEL, and TRAXLER, Circuit Judges.

Reversed by published opinion. Judge Luttig wrote the opinion for the Court, in which Judge Michael and Judge Traxler joined.

ARGUED: Paul Clement, UNITED STATES DEPARTMENT OF JUSTICE, Department of the Solicitor, Washington, D.C., for Appellant. Andrew G. Patel, New York, New York, for Appellee. **ON BRIEF:** Jonathan S. Gasser, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina; Miller W.

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LUTTIG, Circuit Judge:

Appellee Jose Padilla, a United States citizen, associated with forces hostile to the United States in Afghanistan and took up arms against United States forces in that country in our war against al Qaeda. Upon his escape to Pakistan from the battlefield in Afghanistan, Padilla was recruited, trained, funded, and equipped by al Qaeda leaders to continue prosecution of the war in the United States by blowing up apartment buildings in this country. Padilla flew to the United States on May 8, 2002, to begin carrying out his assignment, but was arrested by civilian law enforcement authorities upon his arrival at O'Hare International Airport in Chicago.

Thereafter, in a letter to the Secretary of Defense, the President of the United States personally designated Padilla an "enemy combatant" against this country, stating that the United States is "at war" with al Qaeda, that "Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States," and that "Mr. Padilla represents a continuing, present and grave danger to the national security of the United States." Having determined that "detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens," the President directed the Secretary of Defense to take Padilla into military custody, in which custody Padilla has remained ever since. The full text of the President's memorandum to the Secretary of Defense reads as follows:

THE WHITE HOUSE

WASHINGTON

FOR OFFICIAL USE ONLY

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources,

REDACTED

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;

(2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;

(3) Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;

(4) Mr. Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and

(7) it is REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.

DATE: June 9, 2002 Signature
/George Bush/

The exceedingly important question before us is whether the President of the United States possesses the authority to detain militarily a citizen of this country who is closely associated with al Qaeda, an entity with which the United States is at war; who took up arms on behalf of that enemy and against our country in a foreign combat zone of that war; *and* who thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets.

We conclude that the President does possess such authority pursuant to the Authorization for Use of Military Force Joint Resolution enacted by Congress in the wake of the attacks on the United States of September 11,

2001. Accordingly, the judgment of the district court is reversed.

I.

Al Qaeda operatives recruited Jose Padilla, a United States citizen, to train for jihad in Afghanistan in February 2000, while Padilla was on a religious pilgrimage to Saudi Arabia.[1] J.A. 18-19. Subsequently, Padilla met with al Qaeda operatives in Afghanistan, received explosives training in an al Qaeda-affiliated camp, and served as an armed guard at what he understood to be a Taliban outpost. *Id.* at 19-20. When United States military operations began in Afghanistan, Padilla and other al Qaeda operatives moved from safehouse to safehouse to evade bombing or capture. *Id.* at 20. Padilla was, on the facts with which we are presented, "armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States." *Id.* at 21.

Padilla eventually escaped to Pakistan, armed with an assault rifle. *Id.* at 20-21. Once in Pakistan, Padilla met with Khalid Sheikh Mohammad, a senior al Qaeda operations planner, who directed Padilla to travel to the United States for the purpose of blowing up apartment buildings, in continued prosecution of al Qaeda's war of terror against the United States. *See id.* at 22. After receiving further training, as well as cash, travel documents, and

[1] For purposes of Padilla's summary judgment motion, the parties have stipulated to the facts as set forth by the government. J.A. 30-31. It is only on these facts that we consider whether the President has the authority to detain Padilla.

communication devices, Padilla flew to the United States in order to carry out his accepted assignment. *Id.* at 22-23.

Upon arrival at Chicago's O'Hare International Airport on May 8, 2002, Padilla was detained by FBI agents, who interviewed and eventually arrested him pursuant to a material witness warrant issued by the district court for the Southern District of New York in conjunction with a grand jury investigation of the September 11 attacks. *Id.* at 93. Padilla was transported to New York, where he was held at a civilian correctional facility until, on June 9, 2002, the President designated him an "enemy combatant" against the United States and directed the Secretary of Defense to take him into military custody. *Id.* at 16, 94. Since his delivery into the custody of military authorities, Padilla has been detained at a naval brig in South Carolina. *Id.* at 162-63.

On June 11, 2002, Padilla filed a petition for a writ of habeas corpus in the Southern District of New York, claiming that his detention violated the Constitution. *Id.* at 164. The Supreme Court of the United States ultimately ordered Padilla's petition dismissed without prejudice, holding that his petition was improperly filed in the Southern District of New York. *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2727 (2004). And on July 2, 2004, Padilla filed the present petition for a writ of habeas corpus in the District of South Carolina. J.A. 166.

The district court subsequently held that the President lacks the authority to detain Padilla, *id.* at 180-81, that Padilla's detention is in violation of the Constitution and laws of the United States, *id.*, and that Padilla therefore must either be criminally charged or released, *id.* at 183. This appeal followed. We expedited consideration of

this appeal at the request of the parties, hearing argument in the case on July 19, 2005.

II.

A.

The Authorization for Use of Military Force Joint Resolution (AUMF), upon which the President explicitly relied in his order that Padilla be detained by the military and upon which the government chiefly relies in support of the President's authority to detain Padilla, was enacted by Congress in the immediate aftermath of the September 11, 2001, terrorist attacks on the United States. It provides as follows:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (September 18, 2001). The Supreme Court has already once interpreted this Joint Resolution in the context of a military detention by the President. In *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the Supreme Court held, on the facts alleged by the government, that the AUMF authorized the military detention of Yaser Esam Hamdi, an American citizen who fought alongside Taliban forces in Afghanistan, was captured by United States allies on a battlefield there, and

was detained in the United States by the military.[2] *Id.* at 2635-37, 2641. The "narrow question," *id.* at 2639, addressed by the Court in *Hamdi* was "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants,'" *id.*, defined for purposes of that case as "individual[s] who . . . [were] '"part of or supporting forces hostile to the United States or coalition partners"' in Afghanistan and who '"engaged in an armed conflict against the United States"' there," *id.* The controlling plurality of the Court answered that narrow question in the affirmative, concluding, based upon "longstanding law-of-war principles," *id.* at 2641, that Hamdi's detention was "necessary and appropriate" within the meaning of the AUMF because "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war,'" *id.* at 2640 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). The rationale for this law-of-war principle, Justice O'Connor explained for the plurality, is that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war." *Id.* at 2641.

As the AUMF authorized Hamdi's detention by the President, so also does it authorize Padilla's detention. Under the facts as presented here, Padilla unquestionably qualifies as an "enemy combatant" as that term was defined for purposes of the controlling opinion in *Hamdi*.

[2] Having concluded that detention was authorized on the facts alleged by the government, the Court in *Hamdi* remanded the case for a hearing to determine, pursuant to the due process requirements set forth in its opinion, whether those alleged facts were true. *Hamdi*, 124 S. Ct. at 2635, 2648-52.

Indeed, under the definition of "enemy combatant" employed in *Hamdi*, we can discern no difference in principle between Hamdi and Padilla. Like Hamdi, Padilla associated with forces hostile to the United States in Afghanistan. *Compare* J.A. 19-23 (detailing Padilla's association with al Qaeda in Afghanistan and Pakistan), *with Hamdi*, 124 S. Ct. at 2637 (describing Hamdi's affiliation with the Taliban in Afghanistan). And, like Hamdi, Padilla took up arms against United States forces in that country in the same way and to the same extent as did Hamdi. *Compare* J.A. 21 (averring that Padilla was "armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States"), *and id.* at 20-21 (alleging that Padilla was "armed with an assault rifle" as he escaped to Pakistan), *with Hamdi*, 124 S. Ct. at 2642 n.1 (noting that the asserted basis for detaining Hamdi was that he "carr[ied] a weapon against American troops on a foreign battlefield"), *and id.* at 2637 (quoting Mobbs Affidavit that Hamdi had "'surrender[ed] his Kalishnikov assault rifle'" to Northern Alliance forces (alteration in original)). Because, like Hamdi, Padilla is an enemy combatant, and because his detention is no less necessary than was Hamdi's in order to prevent his return to the battlefield, the President is authorized by the AUMF to detain Padilla as a fundamental incident to the conduct of war.

Our conclusion that the AUMF as interpreted by the Supreme Court in *Hamdi* authorizes the President's detention of Padilla as an enemy combatant is reinforced by the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), on which the plurality in *Hamdi* itself heavily relied. In *Quirin*, the Court held that Congress had authorized the military trial of Haupt, a United States

citizen who entered the country with orders from the Nazis to blow up domestic war facilities but was captured before he could execute those orders. *Id.* at 20-21, 28, 46. The Court reasoned that Haupt's citizenship was no bar to his military trial as an unlawful enemy belligerent, concluding that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war." *Id.* at 37-38.

Like Haupt, Padilla associated with the military arm of the enemy, and with its aid, guidance, and direction entered this country bent on committing hostile acts on American soil. J.A. 22-23. Padilla thus falls within *Quirin*'s definition of enemy belligerent, as well as within the definition of the equivalent term accepted by the plurality in *Hamdi*. *Compare Quirin*, 317 U.S. at 37-38 (holding that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war"), *with Hamdi*, 124 S. Ct. at 2639 (accepting for purposes of the case the government's definition of "enemy combatants" as those who were "'"part of or supporting forces hostile to the United States or coalition partners"' in Afghanistan and who '"engaged in an armed conflict against the United States"' there").

We understand the plurality's *reasoning* in *Hamdi* to be that the AUMF authorizes the President to detain all those who qualify as "enemy combatants" within the meaning of the laws of war, such power being universally accepted under the laws of war as necessary in order to prevent the return of combatants to the battlefield during

conflict. *Id.* at 2640-41. Given that Padilla qualifies as an enemy combatant under both the definition adopted by the Court in *Quirin* and the definition accepted by the controlling opinion in *Hamdi*, his military detention as an enemy combatant by the President is unquestionably authorized by the AUMF as a fundamental incident to the President's prosecution of the war against al Qaeda in Afghanistan.[3]

B.

Padilla marshals essentially four arguments for the conclusion that his detention is unlawful. None of them ultimately is persuasive.

1.

Recognizing the hurdle to his position represented by the Supreme Court's decision in *Hamdi*, Padilla principally argues that his case does not fall within the "narrow circumstances" considered by the Court in that case because, although he too stood alongside Taliban forces in Afghanistan, he was seized on American soil, whereas Hamdi was captured on a foreign battlefield. In other words, Padilla maintains that capture on a foreign battlefield was one of the "narrow circumstances" to which the plurality in *Hamdi* confined its opinion. We disagree. When the plurality articulated the "narrow question"

[3] Under *Hamdi*, the power to detain that is authorized under the AUMF is not a power to detain indefinitely. Detention is limited to the duration of the hostilities as to which the detention is authorized. 124 S. Ct. at 2641-42. Because the United States remains engaged in the conflict with al Qaeda in Afghanistan, Padilla's detention has not exceeded in duration that authorized by the AUMF.

before it, it referred simply to the permissibility of detaining "an individual who . . . was '"part of or supporting forces hostile to the United States or coalition partners"' in Afghanistan and who '"engaged in an armed conflict against the United States"' there." *Id.* at 2639. Nowhere in its framing of the "narrow question" presented did the plurality even mention the locus of capture.

The actual reasoning that the plurality thereafter employed is consistent with the question having been framed so as to render locus of capture irrelevant. That reasoning was that Hamdi's detention was an exercise of "necessary and appropriate force" within the meaning of the AUMF because "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war." *Id.* at 2641. This reasoning simply does not admit of a distinction between an enemy combatant captured abroad and detained in the United States, such as Hamdi, and an enemy combatant who escaped capture abroad but was ultimately captured domestically and detained in the United States, such as Padilla. As we previously explained, Padilla poses the same threat of returning to the battlefield as Hamdi posed at the time of the Supreme Court's adjudication of Hamdi's petition. Padilla's detention is thus "necessary and appropriate" to the same extent as was Hamdi's.

Padilla directs us to a passage from the plurality's opinion in *Hamdi* in which, when responding to the dissent, the plurality charged that the dissent "ignore[d] the context of th[e] case: a United States citizen captured in a *foreign* combat zone." *Id.* at 2643. Padilla argues that this passage proves that *capture on a foreign battlefield* was one of the factual circumstances by which the Court's opinion was limited. If this language stood alone, Padilla's

argument as to the limitation of *Hamdi* at least would have more force, though to acknowledge that foreign battlefield capture was part of the *context* of the case still is not to say (at least not necessarily) that the locus of capture was essential to the Court's *reasoning*. However, this language simply cannot bear the weight that Padilla would have it bear when it is considered against the backdrop of both the quite different limitations that were expressly imposed by the Court through its framing of the question presented, and the actual reasoning that was employed by the Court in reaching its conclusion, which reasoning was consistent with the question having been framed so as to render an enemy combatant's point of capture irrelevant to the President's power to detain. In short, the plurality carefully limited its opinion, but not in a way that leaves room for argument that the President's power to detain one who has associated with the enemy and taken up arms against the United States in a foreign combat zone varies depending upon the geographic location where that enemy combatant happens to be captured.

Our conclusion that the reasoning in *Hamdi* does not support a distinction based on the locus of capture is buttressed by the plurality's analysis of *Quirin*. Although at issue in *Quirin* was the authority of the President to subject a United States citizen who was also an enemy combatant to military trial, the plurality in *Hamdi* went to lengths to observe that Haupt, *who had been captured domestically*, could instead have been permissibly *detained* for the duration of hostilities. *See id.* at 2640. That analysis strongly suggests, if it does not confirm, that the plurality did not regard the locus of capture (within or without the United States) as relevant to the President's authority to detain an enemy combatant who is also a

citizen, and that it believed that the detention of such a combatant is not more or less a necessary incident of the President's power to wage war depending upon the locus of eventual capture.

Given the lack of any reference to locus of capture in the plurality's articulation of the "narrow question" before it, the absence of any basis in *Hamdi*'s reasoning for a distinction between foreign and domestic capture of one who has both associated with the enemy and taken up arms against the United States on behalf of that enemy in a foreign combat zone, and the plurality's understanding of and reliance upon *Quirin* as a precedent that would permit the detention of an enemy combatant who had been captured domestically, we simply cannot ascribe to the rejoinder to Justice Scalia the significance, much less the dispositive significance, that Padilla urges.[4]

2.

Padilla also argues, and the district court held, that Padilla's military detention is "neither necessary nor appropriate" because he is amenable to criminal prosecution. J.A. 172. Related to this argument, Padilla attempts to distinguish *Quirin* from his case on the grounds that he has simply been detained, unlike Haupt who was charged

[4] Padilla also argues that the locus of capture should be legally relevant to the scope of the AUMF's authorization because there is a higher probability of an erroneous determination that one is an enemy combatant when the seizure occurs on American soil. It is far from clear that this is actually the case. In any event, Padilla's argument confuses the scope of the President's *power* to detain enemy combatants under the AUMF with the *process* for establishing that a detainee is in fact an enemy combatant. *Hamdi* itself provides process to guard against the erroneous detention of non-enemy combatants. 124 S. Ct. at 2648-52.

and tried in *Quirin*. Neither the argument nor the attempted distinction is convincing.

As to the fact that Padilla can be prosecuted, the availability of criminal process does not distinguish him from Hamdi. If the mere availability of criminal prosecution rendered detention unnecessary within the meaning of the AUMF, then Hamdi's detention would have been unnecessary and therefore unauthorized, since he too was detained in the United States and amenable to criminal prosecution. We are convinced, in any event, that the availability of criminal process cannot be determinative of the power to detain, if for no other reason than that criminal prosecution may well not achieve the very purpose for which detention is authorized in the first place – the prevention of return to the field of battle. Equally important, in many instances criminal prosecution would impede the Executive in its efforts to gather intelligence from the detainee and to restrict the detainee's communication with confederates so as to ensure that the detainee does not pose a continuing threat to national security even as he is confined – impediments that would render military detention not only an appropriate, but also the necessary, course of action to be taken in the interest of national security.

The district court acknowledged the need to defer to the President's determination that Padilla's detention is necessary and appropriate in the interest of national security. *See id.* at 179. However, we believe that the district court ultimately accorded insufficient deference to that determination, effectively imposing upon the President the equivalent of a least-restrictive-means test. To subject to such exacting scrutiny the President's determination that criminal prosecution would not adequately

protect the Nation's security at a very minimum fails to accord the President the deference that is his when he acts pursuant to a broad delegation of authority from Congress, such as the AUMF.

As for Padilla's attempted distinction of *Quirin* on the grounds that, unlike Haupt, he has never been charged and tried by the military, the plurality in *Hamdi* rejected as immaterial the distinction between detention and trial (apparently regarding the former as a lesser imposition than the latter), noting that "nothing in *Quirin* suggests that [Haupt's United States] citizenship would have precluded his *mere detention* for the duration of the relevant hostilities." *Hamdi,* 124 S. Ct. at 2640 (emphasis added).

3.

Padilla, citing *Ex parte Endo,* 323 U.S. 283 (1944), and relying upon *Quirin,* next argues that only a clear statement from Congress can authorize his detention, and that the AUMF is not itself, and does not contain, such a clear statement.

In *Endo,* the Court did state that, when asked to find implied powers in a wartime statute, it must assume that "the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language [the law makers] used." *Id.* at 300. The Court almost immediately thereafter observed, however, that the "fact that the Act" at issue was "silent on detention [did] not of course mean that any power to detain [was] lacking," *id.* at 301, an observation that proves that

the Court did not adopt or even apply in that case a "clear statement" rule of the kind for which Padilla argues.[5]

Padilla contends that *Quirin* also supports the existence of a clear statement rule. However, in no place in *Quirin* did the Court even purport to establish a clear statement rule. In its opinion, the Court did note that Congress had "explicitly" authorized Haupt's military trial. *See* 317 U.S. at 28. But to conclude from this passing note that the Court required a clear statement as a matter of law would be unwarranted. In fact, to the extent that *Quirin* can be understood to have addressed the need for a clear statement of authority from Congress at all, the rule would appear the opposite:

> [T]he detention and trial of petitioners – ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger – are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

Id. at 25.

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[5] At issue in *Endo* was the detention of a "concededly loyal" citizen, not an enemy combatant. 323 U.S. at 302. In the face of the statute's silence on detention, the Court looked to the statute's purpose – the prevention of espionage and sabotage – to determine whether Endo's detention was authorized. *See id*. at 300-02. The Court concluded that it was not, because detention of a concededly loyal citizen bore no relation to the prevention of espionage and sabotage. *Id*. at 302. Padilla's detention, by contrast, emphatically does further the purpose of the AUMF – "to prevent any future acts of international terrorism against the United States," Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

Of course, even were a clear statement by Congress required, the AUMF constitutes such a clear statement according to the Supreme Court. In *Hamdi*, stating that "it [was] of no moment that the AUMF does not use specific language of detention," 124 S. Ct. at 2641, the plurality held that the AUMF "clearly and unmistakably authorized" Hamdi's detention, *id*. Nothing in the AUMF permits us to conclude that the Joint Resolution clearly and unmistakably authorized Hamdi's detention but not Padilla's. To the contrary, read in light of its purpose clause ("in order to prevent any future acts of international terrorism against the United States") and its preamble (stating that the acts of 9/11 "render it both necessary and appropriate . . . to protect United States citizens both at home and abroad"), the AUMF applies even more clearly and unmistakably to Padilla than to Hamdi. Padilla, after all, in addition to supporting hostile forces in Afghanistan and taking up arms against our troops on a battlefield in that country like Hamdi, *also* came to the United States in order to commit future acts of terrorism against American citizens and targets.

These facts unquestionably establish that Padilla poses the requisite threat of return to battle in the ongoing armed conflict between the United States and al Qaeda in Afghanistan, and that his detention is authorized as a "fundamental incident of waging war," *id*., in order "to prevent a combatant's return to the battlefield," *id*. Congress "clearly and unmistakably," *id*., authorized such detention when, in the AUMF, it "permitt[ed] the use of 'necessary and appropriate force,'" *id*., to prevent other attacks like those of September 11, 2001.

4.

Finally, Padilla argues that, even if his detention is authorized by the AUMF, it is unlawful under *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866). In *Milligan,* the Supreme Court held that a United States citizen associated with an anti-Union secret society but unaffiliated with the Confederate army could not be tried by a military tribunal while access to civilian courts was open and unobstructed. *Id.* at 6-7, 121. *Milligan* purported to restrict the power of Congress as well as the power of the President. *Id.* at 121-22 ("[N]o usage of war could sanction a military trial . . . for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power . . . "). *Quirin,* however, confirmed that *Milligan* does not extend to enemy combatants. As the Court in *Quirin* explained, the *Milligan* Court's reasoning had "particular reference to the facts before it," namely, that Milligan was not "a part of or associated with the armed forces of the enemy." *See* 317 U.S. at 45. The *Hamdi* plurality in turn reaffirmed this limitation on the reach of *Milligan,* emphasizing that *Quirin,* a unanimous opinion, "both postdates and clarifies *Milligan*." 124 S. Ct. at 2643. Thus confined, *Milligan* is inapposite here because Padilla, unlike Milligan, associated with, and has taken up arms against the forces of the United States on behalf of, an enemy of the United States.

III.

The Congress of the United States, in the Authorization for Use of Military Force Joint Resolution, provided the President all powers necessary and appropriate to protect American citizens from terrorist acts by those who attacked the United States on September 11, 2001. As

would be expected, and as the Supreme Court has held, those powers include the power to detain identified and committed enemies such as Padilla, who associated with al Qaeda and the Taliban regime, who took up arms against this Nation in its war against these enemies, *and* who entered the United States for the avowed purpose of further prosecuting that war by attacking American citizens and targets on our own soil – a power without which, Congress understood, the President could well be unable to protect American citizens from the very kind of savage attack that occurred four years ago almost to the day.

The detention of petitioner being fully authorized by Act of Congress, the judgment of the district court that the detention of petitioner by the President of the United States is without support in law is hereby reversed.

REVERSED.

JUDGMENT

FILED: September 9, 2005

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 05-6396
CA-04-2221-26AJ

JOSE PADILLA

Petitioner-Appellee

v.

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

Respondent-Appellant

WASHINGTON LEGAL FOUNDATION; THE ALLIED EDUCATIONAL FOUNDATION,

Amici Supporting Appellant

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; COMPARATIVE LAW SCHOLARS AND EXPERTS ON THE LAWS OF THE UNITED KINGDOM AND ISRAEL; PEOPLE FOR THE AMERICAN WAY FOUNDATION AND THE RUTHERFORD INSTITUTE; THE BRENNAN CENTER FOR JUSTICE AT THE NEW YORK UNIVERSITY SCHOOL OF LAW; AMERICAN CIVIL LIBERTIES UNION; NEW YORK CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA; AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA; ORIGINAL CONGRESSIONAL

SPONSORS OF 18 U.S.C. SECTION 4001(A); JANET RENO; PHILIP B. HEYMANN; ERIC H. HOLDER, JR.; JEFFREY H. SMITH; CENTER FOR NATIONAL SECURITY STUDIES; CONSTITUTION PROJECT

Amici Supporting Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Charleston

In accordance with the written opinion of this Court filed this day, the Court reverses the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JOSE PADILLA,	§	CIVIL ACTION NO.
Petitioner,	§	2:04-2221-26AJ
	§	
vs.	§	
	§	
COMMANDER C.T. HANFT, USN Commander, Consolidated Naval Brig,	§	
	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This is a 28 U.S.C. § 2241 *habeas corpus* action. The Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1331. Pending before the Court is Petitioner's Motion for Summary Judgment as to Counts One and Two.[1] The sole question before the Court today is whether the President of the United States (President) is authorized to detain an United States citizen as an enemy combatant under the unique circumstances presented here.

[1] In Count One of the petition, Petitioner claims that his detention without being criminally charged violates the United States Constitution, including the Fourth, Fifth and Sixth Amendments, as well as the *habeas* suspension clause found in Article Two and the treason clause found in Article III. In Count Two of the petition, Petitioner maintains that his detention violates the Non-Detention Act. 18 U.S.C. § 4001(a).

II. FACTUAL AND PROCEDURAL HISTORY

A. Factual history

The relevant facts as briefly recited by the Supreme Court in *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2715-16 (2004) are as follow:

> On May 8, 2002, Padilla flew from Pakistan to Chicago's O'Hare International Airport. As he stepped off the plane, Padilla was apprehended by federal agents executing a material witness warrant issued by the United States District Court for the Southern District of New York (Southern District) in connection with its grand jury investigation into the September 11th terrorist attacks. Padilla was then transported to New York, where he was held in federal criminal custody. On May 22, acting through appointed counsel, Padilla moved to vacate the material witness warrant.
>
> Padilla's motion was still pending when, on June 9, the President issued an order to Secretary of Defense Donald H. Rumsfeld designating Padilla an "enemy combatant" and directing the Secretary to detain him in military custody. App. D to Brief for Petitioner 5a (June 9 Order). In support of this action, the President invoked his authority as "Commander in Chief of the U.S. armed forces" and the Authorization for Use of Military Force Joint Resolution, Pub.L. 107-40, 115 Stat. 224 (AUMF),[2] enacted by Congress on September

[2] The AUMF provides in relevant part: "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any

(Continued on following page)

18, 2001. June 9 Order 5a. The President also made several factual findings explaining his decision to designate Padilla an enemy combatant.[3] Based on these findings, the President concluded that it is "consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant." *Id.*, at 6a.

That same day, Padilla was taken into custody by Department of Defense officials and transported to the Consolidated Naval Brig in Charleston, South Carolina.[4] He has been held there ever since.

Further, for the purposes of this proceeding, except where noted, the parties, in an October 20, 2004, filing with this Court titled "Stipulations of Fact," have agreed to the following facts:

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future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224.

[3] In short, the President "[d]etermine[d]" that Padilla (1) "is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;" (2) that he "engaged in . . . hostile and war-like acts, including . . . preparation for acts of international terrorism" against the United States; (3) that he "possesses intelligence" about al Qaeda that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States"; and finally, (4) that he "represents a continuing, present and grave danger to the national security of the United States," such that his military detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." June 9 Order 5a-6a.

[4] Also on June 9, the Government notified the District Court *ex parte* of the President's Order; informed the court that it was transferring Padilla into military custody in South Carolina and that it was consequently withdrawing its grand jury subpoena of Padilla; and asked the court to vacate the material witness warrant. *Padilla ex rel. Newman v. Rumsfeld*, 233 F.Supp.2d 564, 571 (S.D.N.Y. 2002). The court vacated the warrant. Ibid.

1. On May 8, 2002, petitioner Padilla boarded a flight in Zurich, Switzerland, bound for O'Hare International Airport, Chicago, Illinois. Agents of the Federal Bureau of Investigation (FBI) had become aware of which flight petitioner would be taking from Zurich to Chicago and monitored petitioner during the flight and upon his arrival at O'Hare International Airport.[5]

2. At approximately 12:55 P.M. (C.D.T.),[6] May 8, 2002, the United States District Court for the Southern District of New York issued a material witness warrant for petitioner's arrest in connection with grand jury proceedings.

3. Petitioner arrived at O'Hare International Airport on the flight from Zurich at approximately 1:00 P.M. (C.D.T.), May 8, 2002, wearing civilian clothing and carrying no weapons or explosives.

4. Passengers arriving on international flights at O'Hare International Airport must proceed to the Federal Inspection Service (FIS) area within the international arrivals terminal. The FIS area contains both an immigration inspection area and customs inspection area.

5. Passengers must first proceed to the immigration inspection area. Petitioner cleared the immigration inspection area where his United States passport was stamped "admitted" by an Immigration Inspector.

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[5] Petitioner does not stipulate to the content of paragraphs 1 and 2. Paragraphs 1 and 2 are factual averments of the respondent.

[6] Petitioner does not stipulate to the times indicated in any paragraph. The references to particular times are factual averments of the respondent.

6. Petitioner then proceeded to the customs inspection area. After an initial interview with a Customs Inspector, petitioner was questioned further by Customs Inspectors in an interview room within the customs inspection area.

7. Subsequently, while remaining in the same interview room, petitioner was interviewed by FBI agents. Petitioner's interview with the FBI agents began at approximately 3:15 P.M. (C.D.T.).

8. At approximately 7:05 P.M. (C.D.T.), petitioner declined to continue the interview without the representation of an attorney.

9. At approximately 7:35 P.M. (C.D.T.), while remaining in the same interview room, petitioner was presented with a grand jury subpoena in connection with grand jury proceedings in the Southern District of New York.

10. At approximately 8:10 P.M. (C.D.T.), while remaining in the same interview room, petitioner was arrested by the interviewing agents pursuant to the material witness warrant that had been issued by the United States District Court for the Southern District of New York.

11. After his arrest, petitioner was transferred to the custody of the United States Marshals Service for detention. The United States Marshals Service transported petitioner to New York City and incarcerated him in the Metropolitan Correctional Center, a civilian facility.

12. On June 9, 2002, the district court vacated the material witness warrant and petitioner was transferred to military control.

B. Procedural history

On June 11, Padilla's counsel, claiming to act as his next friend, filed in the Southern District a habeas corpus petition under 28 U.S.C. § 2241. The petition, as amended, alleged that Padilla's military detention violates the Fourth, Fifth, and Sixth Amendments and the Suspension Clause, Art. I, § 9, cl. 2, of the United States Constitution. The amended petition named as respondents President Bush, Secretary Rumsfeld, and Melanie A. Marr,[7] Commander of the Consolidated Naval Brig.

The Government moved to dismiss, arguing that Commander Marr, as Padilla's immediate custodian, is the only proper respondent to his habeas petition, and that the District Court lacks jurisdiction over Commander Marr because she is located outside the Southern District. On the merits, the Government contended that the President has authority to detain Padilla militarily pursuant to the Commander in Chief Clause of the Constitution, Art. II, § 2, cl. 1, the congressional AUMF, and this Court's decision in *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 (1942).

The District Court issued its decision in December 2002. *Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564. The court held that the Secretary's "personal involvement" in Padilla's military custody renders him a proper respondent to Padilla's habeas petition, and that it can assert jurisdiction over the Secretary under New York's

[7] Commander Marr has since been replaced by Commander C.T. Hanft.

long-arm statute, notwithstanding his absence from the Southern District. *Id.*, at 581-587. On the merits, however, the court accepted the Government's contention that the President has authority to detain as enemy combatants citizens captured on American soil during a time of war. *Id.*, at 587-599.

The Court of Appeals for the Second Circuit reversed. 352 F.3d 695 (2003). The court agreed with the District Court that Secretary Rumsfeld is a proper respondent, reasoning that in cases where the habeas petitioner is detained for "other than federal criminal violations, the Supreme Court has recognized exceptions to the general practice of naming the immediate physical custodian as respondent." *Id.*, at 704-708. The Court of Appeals concluded that on these "unique" facts Secretary Rumsfeld is Padilla's custodian because he exercises "the legal reality of control" over Padilla and because he was personally involved in Padilla's military detention. *Id.*, at 707-708. The Court of Appeals also affirmed the District Court's holding that it has jurisdiction over the Secretary under New York's long-arm statute. *Id.*, at 708-710.

Reaching the merits, the Court of Appeals held that the President lacks authority to detain Padilla militarily. *Id.*, at 710-724. The court concluded that neither the President's Commander-in-Chief power nor the AUMF authorizes military detentions of American citizens captured on American soil. *Id.*, at 712-718, 722-723. To the contrary, the Court of Appeals found in both our case law and in the Non-Detention Act, 18 U.S.C. § 4001(a), a strong presumption against domestic military detention of citizens absent explicit congressional authorization. 352 F.3d, at 710-722.

> Accordingly, the court granted the writ of habeas corpus and directed the Secretary to release Padilla from military custody within 30 days. *Id.*, at 724. [The United States Supreme Court] granted the Government's petition for certiorari to review the Court of Appeals' rulings with respect to the jurisdictional and the merits issues, both of which raise[d] important questions of federal law. 540 U.S. ___, 1173, 124 S.Ct. 1353, 157 L.Ed.2d 1226 (2004).

Padilla, 124 S.Ct. at 2716-17 (footnotes omitted).

On June 28, 2004, the Supreme Court ruled "[t]he District of South Carolina, not the Southern District of New York, was the district court in which Padilla should have brought his habeas petition. We therefore reverse the judgment of the Court of Appeals and remand the case for entry of an order of dismissal without prejudice." *Id.* at 2727.

This case was commenced on July 2, 2004, with the filing of the petition discussed herein. Respondent filed his Answer on August 30, 2004.

On October 20, 2004, Petitioner filed a Motion for Summary Judgment to Counts One and Two of his Petition, as well as his Memorandum of Law in Support of the Motion (Petitioner's Motion). The parties jointly submitted their Stipulations of Fact on the same day. Subsequently, on November 22, 2004, Respondent filed his Opposition to Petitioner's Motion (Respondent's Opposition). Petitioner filed a Reply to Respondent's Opposition on December 13, 2004. Oral arguments were held on January 5, 2005. The case is now ripe for adjudication.

III. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears this initial burden of informing the Court of the basis for its motions, and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Court reviews the record by drawing all inferences most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654 (1962)).

"Once the moving party carries its burden, the adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). The adverse party must show more than "some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. If an adverse party completely fails to make an offer of proof concerning an essential element of that party's case on which that party will bear the burden of proof, then all other facts are necessarily rendered immaterial and the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 322-23. Hence, the granting of summary judgment involves a three-tier analysis. First, the Court determines whether a genuine issue actually exists so as to necessitate a trial. FED. R. CIV. P. 56(e). An

issue is genuine "if the evidence is such that a reasonable [trier of fact] could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Second, the Court must ascertain whether that genuine issue pertains to material facts. FED. R. CIV. P. 56(e). The substantial law of the case identifies the material facts, that is, those facts that potentially affect the outcome of the suit. *Anderson*, 477 U.S. at 248. Third, assuming no genuine issue exists as to the material facts, the Court will decide whether the moving party shall prevail solely as a matter of law. FED. R. CIV. P. 56(e).

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327. The primary issue is whether the material facts present a sufficient disagreement as to require a trial, or whether the facts are sufficiently one-sided that one party should prevail as a matter of law. *Anderson*, 477 U.S. at 251-52. The substantive law of the case identifies which facts are material. *Id.* at 248. Only disputed facts potentially affecting the outcome of the suit under the substantive law preclude the entry of summary judgment.

IV. CONTENTIONS OF THE PARTIES

Petitioner maintains that Congress has not authorized the indefinite detention without trial of citizens arrested in the United States. He also argues that the President's inherent constitutional powers do not allow him to subject United States citizens who are arrested in the United States to indefinite military detention.

Conversely, respondent contends that the President has the constitutional authority to detain Petitioner as an enemy combatant without charging him criminally. Furthermore, according to Respondent, the Non-Detention Act, 18 U.S.C. § 4001(a), does not constrain the President's authority to detain Petitioner as an enemy combatant.

V. DISCUSSION

A. Three Supreme Court cases

Respondent maintains that the decisions of the Supreme Court in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004) and *Quirin*, 317 U.S. 1 "reaffirm the military's long-settled authority – independent of and distinct from the criminal process – to detain enemy combatants for the duration of a given armed conflict, including the current conflict against al Qaeda." Respondent's Opposition at 8. According to Respondent, "[t]hose decisions squarely apply to this case." *Id.* Petitioner, on the other hand, maintains that *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866) is controlling. The Court will consider each case in turn.

1. Hamdi

The petitioner in *Hamdi* was an American citizen captured while on the battlefield in Afghanistan. In that case, the Supreme Court had before it the threshold question of "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.'" *Hamdi*, 124 S.Ct. at 2639.

While the Court noted that there was some debate and no full exposition by the Government of the proper scope of the term "enemy combatant," it was clear in

Hamdi that, the "enemy combatant that [the Government was] seeking to detain [was] an individual who, it alleg[d], was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." *Hamdi*, 124 S.Ct. at 2639 (internal quotation marks and citations omitted). The Court also noted that, "the basis asserted for detention by the military is that Hamdi was *carrying a weapon against American troops on a foreign battlefield*; that is, that he was an enemy combatant." *Id.* at 2642 n.1 (emphasis added).

Against this backdrop, the Supreme Court found that authority existed to detain Mr. Hamdi. The Court reasoned,

> [t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant. . . . A citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," Brief for Respondents 3; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.
>
> In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention *in the narrow circumstances considered here.*

Hamdi, 124 S.Ct. at 2640-41 (emphasis added).

Thus, it is true that, under some circumstances, such as those present in *Hamdi*, the President can indeed hold an United States citizen as an enemy combatant. Just because something is sometimes true, however, does not mean that it is always true. The facts in this action bear out that truth.

In the instant case, Respondent would have this Court find more similarities between Petitioner here and the petitioner in *Hamdi* than actually exist. As two other courts have already found, however, the differences between the two are striking.

The first to distinguish the difference was Judge Wilkinson when he noted that "[t]o compare this battlefield capture [in *Hamdi*] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges." *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring). Not long thereafter, the Supreme Court, in responding to Justice Scalia's dissent, specifically noted "Justice Scalia largely ignores the context of [*Hamdi*]: a United States citizen captured in a *foreign* combat zone." *Hamdi*, 124 S.Ct at 2643 (emphasis in original).[8]

[8] In fact, in the plurality opinion, Justice O'Connor noted at least nine additional times that the Court's holding that Mr. Hamdi's detention as an enemy combatant was constitutionally permissible was limited to the facts of that case. *Id.* at 2635 ("Congress authorized the detention of combatants in the *narrow circumstances* alleged here.") (emphasis added); *Id.* at 2639 ("We therefore answer only the *narrow question* before us.") (emphasis added); *Id.* at 2639-40 ("[W]e conclude that the AUMF is explicit congressional authorization for the detention of individuals in the *narrow category* we describe.") (emphasis added); *Id.* at 2640 ("We conclude that the detention of individuals falling within the *limited category* we are considering . . . is an exercise of the 'necessary and appropriate force' Congress has authorized the President

(Continued on following page)

Nevertheless, Respondent would have the Court find that the place of capture is of no consequence in determining whether the President can properly hold Petitioner as an enemy combatant. According to that view, it would be illogical to find that Petitioner could evade his detention as an enemy combatant status just because he returned to the United States before he could be captured. The cogency of this argument eludes the Court.

In *Hamdi*, the petitioner was an American citizen who was captured on the battlefield. Petitioner is also an American citizen, but he was captured in an United States airport. He is, in some respects, being held for a crime that he is alleged to have planned to commit in this country.[9] No one could rightfully argue that "[t]he exigencies of military action on the battlefield present an entirely different set of circumstances than the arrest of a citizen arriving at O'Hare International Airport." Brief of *Amici*

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to use.") (emphasis added); *Id.* at 2641 ("Congress has clearly and unmistakably authorized detention in the *narrow circumstances* considered here.") (emphasis added); *Id.* at 2642 ("*Ex parte Milligan* . . . does not undermine our holding about the Government's authority to seize enemy combatants, *as we define that term today.*") (emphasis added); *Id.* at 2642 n.1 ("Here the basis asserted for detention by the military is that Hamdi was *carrying a weapon against American troops on a foreign battlefield;* that is, that he was an enemy combatant.") (emphasis added); *Id.* at 2643 (noting with disapproval that "Justice Scalia finds the *fact of battlefield capture* irrelevant. . . .") (emphasis added); *Id.* ("Justine Scalia can point to no case or other authority for the proposition that those *captured on a foreign battlefield* . . . cannot be detained outside the criminal process.") (emphasis added).

[9] The Court finds Respondent's argument concerning whether Petitioner had actually entered the country unavailing. Respondent has not provided, and this Court has not found, any case law that supports Respondent's position that an United States citizen, is not "in" the United States when he or she is "in" a United States airport. Such a failure is fatal to the claim.

Curiae Janet Reno et al. at 5, *Padilla*, 124 S.Ct. 2711 (No. 03-1027).

It cannot be disputed that the circumstances in *Hamdi* comport with the requirement of the AUMF, which provides that "the President is authorized to use all *necessary and appropriate force* against those . . . persons, in order to prevent attacks by al Qaeda on the United States." That is, the President's use of force to capture Mr. Hamdi was necessary and appropriate. Here, that same use of force was not.

Again, Petitioner in this action was captured in the United States. His alleged terrorist plans were thwarted at the time of his arrest. There were no impediments whatsoever to the Government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing. Also at the Government's disposal was the material witness warrant. In fact, the issuance of a material witness warrant was the tool that the law enforcement officers used to thwart Petitioner's alleged terrorist plans. Therefore, since Petitioner's alleged terrorist plans were thwarted when he was arrested on the material witness warrant, the Court finds that the President's subsequent decision to detain Petitioner as an enemy combatant was neither necessary nor appropriate. As accurately observed by counsel for Petitioner,

> [i]t's not necessary because the criminal justice system provides for the detention power. Nothing makes that clearer than the facts of this case. There was a warrant issued from a grand jury for Mr. Padilla's arrest. Mr. Padilla was arrested by law enforcement officials, civilian law enforcement officials. He was brought before a civilian

> judge. He was imprisoned in a civilian facility in New York. Everything occurred according to the civilian process in the way it is supposed to. And it's not only not necessary, but not appropriate. It's not appropriate because it directly conflicts with the limits on detention that [C]ongress has set by statute and the limits that the framers set on presidential power.

Transcript of January 5, 2005 hearing at 5:6-5:17.

2. Quirin

Quirin involves the *habeas* petitions of seven German soldiers, all of whom had lived in the United States at some point in their lives. The soldiers came to the United States bent on engaging in military sabotage. One of the seven, Haupt, claimed to be an American citizen.

In denying the soldiers' petitions, the Supreme Court held that "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." *Id.* at 37.

Respondent maintains that *Quirin* is wholly on point and, thus, for purposes of this motion, is controlling. The Court is unconvinced.

Although seemingly similar to the instant case, it is, in fact, like *Hamdi*, starkly different. As the Second Circuit has already noted, "the *Quirin* Court's decision to uphold military jurisdiction rested on the express congressional authorization of the use of military tribunals to try combatants who violated the law." *Hamdi*, 352 F.3d 695, 715-16.

> From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has 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 in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

Quirin, 317 U.S. at 27-28 (footnote omitted).

Respondent goes to great lengths to argue that the Court is *Quirin* did not rest its decision on a "clear statement from Congress." Respondent's Opposition at 22. The Court is unconvinced.

Contrary to Respondent's argument, it is clear from *Quirin* that the Court found that Congress had "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 in appropriate cases." *Id.* at 28. Therefore, since no such Congressional authorization is present here, Respondent's argument as to the application of *Quirin* must fail.[10]

3. Ex parte Milligan

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

[10] Other differences include, but are not limited to, the fact that:

1) In *Quirin*, Mr. Quirin was charged with a crime and tried by a military tribunal. In the instant case, Petitioner has not been charged and has not been tried.

2) *Quirin* involves a prisoner whose detention was punitive whereas Petitioner's detention is purportedly preventative.

3) *Quirin* is concerned more with whether the petitioner was going to be tried by a military tribunal or a civilian court. The case at bar is concerned with whether Petitioner is going to be charged and tried at all.

4) The decision in *Quirin* preceded the Non-Detention Act.

5) *Quirin* involved a war that had a definite ending date. The present war on terrorism does not.

> on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence.

Id. at 12-21.

Ex parte Milligan involves a United States citizen during the Civil War who was neither a resident of one of the Confederate states, nor a prisoner of war, but a citizen of Indiana for twenty years. He had never been in the military or naval service. Milligan was arrested while at home.

The Court held in *Milligan* that the military commission lacked any jurisdiction to try Milligan when the civilian "courts are open and their process unobstructed." *Id.* at 121. The President may not unilaterally establish military commissions in wartime "because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws." *Id.* at 121.[11]

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[11] The court in *Hamdi*, 124 S.Ct. at 2642, observed, however, that the *Milligan* court

> made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.

(citation and footnote omitted).

While not directly on point, and limited by *Quirin*, *Milligan's* greatest import to the case at bar is the same as that found in *Quirin:* the detention of a United States citizen by the military is disallowed without explicit Congressional authorization.

B. The Non-Detention Act, 18 U.S.C. § 4001(a)

The Non-Detention Act, also referred to as the "Rails-back Amendment," after its author Representative Rails-back, provides that "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).

Respondent asserts that the Non-Detention Act does not constrain the President's authority to detain Petitioner as an enemy combatant. He contends that 1) the Joint Resolution for Authorization for Use of Miliary Force (AUMF), passed by Congress on September 18, 2001, is an "Act of Congress" authorizing Petitioner's detention and 2) the Non-Detention Act does not apply to the military's detention of the military's wartime detention of enemy combatants to fulfill this statute. The Court finds these contentions to be without merit.

1. Authorization

The AUMF provides, in relevant part, that

> [t]he President is authorized to use all *necessary and appropriate* force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against

> the United States by such nations, organizations or persons.

Joint Resolution § 2(a) (emphasis added).

When interpreting a statute, this Court begins "where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In clear and unambiguous language, the Non-Detention Act forbids *any* kind of detention of an United States citizen, except that which is specifically allowed by Congress. *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) ("[T]he plain language of § 4001(a) proscrib[es] detention of *any kind* by the United States, absent a congressional grant of authority to detain.") (emphasis in original). Contrary to Respondent's contentions otherwise, the Court finds that 1) the AUMF does not authorize Petitioner's detention and 2) Petitioner's present confinement is in direct contradiction to the mandate of the Non-Detention Act.

As the Second Circuit stated,

> While it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the Joint Resolution that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not arrayed against our troops in the field of battle.

Padilla, 352 F.3d at 723 (internal quotation marks and citation omitted).

To be more specific, whereas it may be a necessary and appropriate use of force to detain a United States

citizen who is captured on the battlefield, this Court cannot find, in narrow circumstances presented in this case, that the same is true when a United States citizen in arrested in a civilian setting such as an United States airport.

In sum, "[i]n interpreting a war-time measure we must assume that [the purpose of Congress and the Executive] was to allow for the greatest possible accommodation between those liberties and the exigencies of war." *Ex parte Endo*, 323 U.S. 283, 300 (1944). "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*. In the case *sub judice*, there is no language in the AUMF that "clearly and unmistakably" grants the President the authority to hold Petitioner as an enemy combatant. Therefore, Respondent's argument must fail.[12]

Respondent next argues that,

> Even if there were any doubt about whether the AUMF encompasses combatants seized within the United States, such doubt would be resolved in favor of the President's determination that Congress did in fact authorize petitioner's detention. President's Order, Preamble (declaring that petitioner's detention is "consistent with the laws

[12] To the extent that Respondent maintains that the Non-Detention Act was impliedly repealed by the AUMF, the Court rejects the argument. It is black letter law that repeal of a statute by implication is strongly disfavored in the law.

> of the United States, including the Authorization for Use of Military Force").

Respondent's Opposition at 26.

Certainly Respondent does not intend to argue here that, just because the President states that Petitioner's detention is "consistent with the laws of the United States, including the Authorization for Use of Military Force" that makes it so. Not only is such a statement in directcontravention to the well settled separation of powers doctrine, it is simply not the law. Moreover, such a statement is deeply troubling. If such a position were ever adopted by the courts, it would totally eviscerate the limits placed on Presidential authority to protect the citizenry's individual liberties.

2. Application to wartime detention

In arguing that the Non-Detention Act has no application to Petitioner, Respondent first maintains that the placement the Act – in Title 18 ("Crimes and Criminal Procedure"), with directions regarding the Attorney General's control over federal prisons, and not in Title 10 ("Armed Forces") or Title 50 ("War and National Defense") – indicates that it speaks only to civilian detentions. Second, Respondent argues that the legislative history of the Non-Detention Act renders the same result. The Court is unpersuaded by either argument. Simply stated, the statute is clear, simple, direct and ambiguous. It forbids *any* kind of detention of an United States citizen, except that it be specifically allowed by Congress. Therefore, since Petitioner's detention has not been authorized by Congress, Respondent's argument must again fail.

C. Inherent authority

Having found that the Non-Detention Act expressly forbids the President from holding Petitioner as an enemy combatant, and that the AUMF does not authorize such detention, neither explicitly nor by implication, the Court turns to the question of whether the President has the inherent authority to hold Petitioner.

Respondent states that

> The Commander-in-Chief Clause grants the President the power to defend the Nation when it is attacked, and he "is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). An essential aspect of the President's authority in this regard is to "determine what degree of force the crisis demands." *Id.* at 670; see *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir.) (Silberman, J., concurring) ("[T]he President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."), cert. denied, 531 U.S. 815 (2000). The President's decision to detain petitioner as an enemy combatant represents a basic exercise of his authority as Commander in Chief to determine the level of force needed to prosecute the conflict against al Qaeda.

Respondent's Opposition at 10.

As a preliminary matter, the Court strongly agrees that "great deference is afforded the President's exercise of his authority as Commander-in-Chief." *Hamdi*, 352 F.3d at 712 (internal citation omitted). However, "[w]here the

exercise of Commander-in-Chief powers, no matter how well intentioned, is challenged on the ground that it collides with the powers assigned by the Constitution to Congress, a fundamental role exists for the courts." *Hamdi*, 352 F.3d at 713 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

Pursuant to the seminal case of *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), in a case such as this, where the President has taken steps that are inconsistent with the will of Congress – both express and implied – the President's authority 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*, 343 U.S. at 637.

Simply stated, Respondent has not provided, and this Court has not found, any law that supports the contention that the President enjoys the inherent authority pursuant to which he claims to hold Petitioner. The *Prize* cases are chiefly concerned with enemy property, not enemy combatants, and *Campbell* concerns air strikes in another country. Obviously, neither of those issues are present here. Thus, the Court finds the two cases of little guidance.

As Justice Jackson stated, "Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy." *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). "There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute [the President] also Commander-in-Chief of the country, its industries and its inhabitants. *Id.* at 643-44.

Accordingly, and limited to the facts of this case, the Court is of the firm opinion that it must reject the position posited by Respondent. To do otherwise 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.

For the Court to find for Respondent would also be to engage in judicial activism. This Court sits to interpret the law as it is and not as the Court might wish it to be. Pursuant to its interpretation, the Court finds that the President has no power, neither express nor implied, neither constitutional nor statutory, to hold Petitioner as an enemy combatant.

D. Other matters and concerns

1. A law enforcement matter

It is true that there may be times during which it is necessary to give the Executive Branch greater power than at other times. Such a granting of power, however, is in the province of the legislature and no one else – not the Court and not the President. "The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." *Youngstown*, 343 U.S. at 589. "[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 (internal citation omitted).

Simply stated, this is a law enforcement matter, not a military matter. The civilian authorities captured Petitioner just as they should have. At the time that Petitioner was arrested pursuant to the material arrest warrant, any alleged terrorist plans that he harbored were thwarted.

From then on, he was available to be questioned – and was indeed questioned – just like any other citizen accused of criminal conduct. This is as it should be.

There can be no debate that this country's laws amply provide for the investigation, detention and prosecution of citizen and non-citizen terrorists alike. For example, in his dissenting opinion in *Hamdi*, 124 S.Ct. at 2664, Justice Scalia lists the following criminal statutes that are available to the Government in fighting terrorism: 18 U.S.C. § 2381 (the modern treason statute which essentially tracks the language of the constitutional provision); 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities); 18 U.S.C. § 2332a (use of weapons of mass destruction); 18 U.S.C. § 2332b (acts of terrorism transcending national boundaries); 18 U.S.C. § 2339A (providing material support to terrorists); 18 U.S.C. § 2339B (providing material support to certain terrorist organizations); 18 U.S.C. § 2382 (misprision of treason); 18 U.S.C. § 2383 (rebellion or insurrection); § 2384 (seditious conspiracy); 18 U.S.C. § 2390 (enlistment to serve in armed hostility against the United States); 31 CFR § 595.204 (2003) (prohibiting the "making or receiving of any contribution of funds, goods, or services" to terrorists); and 50 U.S.C. § 1705(b) (criminalizing violations of 31 CFR § 595.204). In his concurrence, in addition to these statutes, Justice Souter lists 18 U.S.C. § 3142(e) (pretrial detention). *Id.* at 2657.[13]

[13] As for concerns about national security during the judicial process, it is axiomatic that the government has a legitimate interest in the protection of the classified information that may be necessarily be used in the prosecution of an alleged terrorist such as Petitioner. This Court is of the firm opinion, however, that federal law provides robust protection of any such information. *E.g.* The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III.

> [I]n declaring Padilla an enemy combatant, the President relied upon facts that would have supported charging Padilla with a variety of offenses. The government thus had the authority to arrest, detain, interrogate, and prosecute Padilla apart from the extraordinary authority it claims here. The difference between invocation of the criminal process and the power claimed by the President here, however, is one of accountability. The criminal justice system requires that defendants and witnesses be afforded access to counsel, imposes judicial supervision over government action, and places congressionally imposed limits on incarceration.

Amici Curiae at 3.

2. Suspension of the writ of habeas corpus

"The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Const. Art. 1, § 9, cl. 2. This power belongs solely to Congress. Since Congress has not acted to suspend the writ, and neither the President nor this Court have the ability to do so, in light of the findings above, Petitioner must be released.

3. Other measures

If the law in its current state is found by the President to be insufficient to protect this country from terrorist plots, such as the one alleged here, then the President should prevail upon Congress to remedy the problem. For instance, if the Government's purpose in detaining Petitioner as an enemy combatant is to prevent him from "returning to the field of battle and taking up arms once

again[,]" *Hamdi*, 124 S.Ct at 2640, but the President thinks that the laws do not provide the necessary and appropriate measures to provide for that goal, then the President should approach Congress and request that it make proper modifications to the law. As Congress has already demonstrated, it stands ready to carefully consider, and often accommodate, such significant requests.

VI. CONCLUSION

Accordingly, in light of the foregoing discussion and analysis, it is the judgment of this Court that Petitioner's Motion for Summary Judgment on Counts One and Two of the Petition, as well as his Petition for a writ of *habeas corpus* must be **GRANTED**. Accordingly, Respondent is hereby directed to release Petitioner from his custody within forty-five (45) days of the entry of this Order.[14]

IT IS SO ORDERED.

Signed this 28th day of February, 2005, in Spartanbug, South Carolina.

/s/ Henry F. Floyd
HENRY F. FLOYD
UNITED STATES
DISTRICT JUDGE

[14] Of course, if appropriate, the Government can bring criminal charges against Petitioner or it can hold him as a material witness.

The Constitutional Provisions, Treaties, Statutes, Ordinances, And Regulations Involved In The Case Include The Following:

18 U.S.C. § 4001(a) states:

> No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

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28 U.S.C. § 1254(1) states:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) states:

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force."

SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL – That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements –

(1) SPECIFIC STATUTORY AUTHORIZATION – Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS – Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Declaration of Michael H. Mobbs
Special Advisor to the Under Secretary
of Defense for Policy

Pursuant to 28 U.S.C. § 1746, I Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

1. I am a government employee (GS-15) of the U.S. Department of Defense and serve as a Special Advisor to the Under Secretary of Defense for Policy. The Under Secretary of Defense for Policy is appointed by the President and confirmed by the Senate. He is the principal staff assistant and advisor to the Secretary and Deputy Secretary of Defense for all matters concerning the formulation of national security and defense policy and the integration and oversight of DoD policy and plans to achieve national security objectives. The Under Secretary of Defense for Policy has directed me to head his Detainee Policy Group. Since mid-February 2002, I have been substantially involved with matters related to the detention of enemy combatants in the current war against the Al Qaeda terrorists and those who support and harbor them (including the Taliban).

2. As part of my official duties, I have reviewed government records and reports about Jose Padilla (also known as "Abdullah al Muhajir" and "Ibrahim Padilla") relevant to the President's June 9, 2002 determination that Padilla is an enemy combatant and the President's order that Padilla be detained by U.S. military forces as an enemy combatant.

3. The following information about Padilla's activities with the Al Qaeda terrorist network was provided to the President in connection with his June 9, 2002

determination. This information is derived from multiple intelligence sources, including reports of interviews with several confidential sources, two of whom were detained at locations outside of the United States.[1] The confidential sources have direct connections with the Al Qaeda terrorist network and claim to have knowledge of the events described. Certain aspects of these reports were also corroborated by other intelligence information when available.

4. Padilla was born in New York. He was convicted of murder in Chicago in approximately 1983 and incarcerated until his eighteenth birthday. In Florida in 1991, he was convicted of a handgun charge and sent to prison. After his release from prison, Padilla began referring to himself as Ibrahim Padilla.[2] In

* * *

[1] Based on the information developed by U.S. intelligence and law enforcement agencies, it is believed that the two detained confidential sources have been involved with the Al Qaeda terrorist network. One of the sources has been involved with Al Qaeda for several years and is believed to have been involved in the terrorist activities of Al Qaeda. The other source is also believed to have been involved in planning and preparing for terrorist activities of Al Qaeda. It is believed that these confidential sources have not been completely candid about their association with Al Qaeda and their terrorist activities. Much of the information from these sources has, however, been corroborated and proven accurate and reliable. Some information provided by the sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials. One of the sources, for example, in a subsequent interview with a U.S. law enforcement official recanted some of the information that he had provided, but most of this information has been independently corroborated by other sources. In addition, at the time of being interviewed by U.S. officials, one of the sources was being treated with various types of drugs to treat medical conditions.

[2] Padilla's use of the name "Ibrahim Padilla" was not included in the information provided to the President on June 9, 2002.

16. On June 9, 2002, acting on the President's direction, the Secretary of Defense ordered the U.S. armed forces to take control of Padilla as an enemy combatant and to hold him at the Naval Consolidated Brig. Charleston, South Carolina.

/s/ Michael H. Mobbs
MICHAEL H. MOBBS
Special Advisor to the
Under Secretary of
Defense for Policy

Dated: 27 August 2002

Declaration of Mr. Jeffrey N. Rapp
Director, Joint Intelligence Task Force
for Combating Terrorism

1. Pursuant to 28 U.S.C. § 1746, I, Jeffrey N. Rapp, hereby declare, to the best of my knowledge, information, and belief, and under penalty of perjury, that the following is true and correct:

Preamble

2. I submit this Declaration for the Court's consideration in the matter of Jose Padilla v. Commander C.T. Hanft, USN, Commander, Consolidated Naval Brig. Case Number 04-CV-2221-26AJ, pending in the United States District Court for the District of South Carolina.

3. Based on information that I have acquired in the course of my official duties, I am familiar with all the matters discussed in this Declaration. I am also familiar with the circumstances surrounding Jose Padilla's ("Padilla") arrest at Chicago's O'Hare International Airport and interrogations by agents of the Department of Defense ("DoD") after DoD took control of Padilla on 9 June 2002. The information in this declaration concerning Padilla and his activities with the Al-Qaeda terrorist organization is derived from the circumstances surrounding his arrest and Padilla's statements during post-capture interrogation.

Professional Experience as an Intelligence Officer

4. I am a career Defense Intelligence Agency Defense Intelligence Senior Executive Service member appointed

by the Director of the Defense Intelligence Agency. I report to the Director of the Defense Intelligence Agency. My current assignment is as the

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numbers of American civilians. He admits to meeting with numerous key al-Qaeda leadership figures and senior operational planners, and to planning plots against the United States with them. Padilla proposed using an atomic bomb in the United States and explosives and natural gas to blow up apartment buildings in the United States.

/s/ Jeffrey N. Rapp
Jeffrey N. Rapp
Director, Joint
Intelligence Task Force
for Combating Terrorism

Executed on 27 August 2004 at the Pentagon, Washington, D.C.