

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

JOSE PADILLA,

Petitioner-Appellee,

v.

COMMANDER C.T. HANFT,
USN COMMANDER, CONSOLIDATED NAVAL BRIG,

Respondent-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

**BRIEF OF *AMICI CURIAE* THE CENTER FOR NATIONAL
SECURITY STUDIES AND THE CONSTITUTION PROJECT
IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE**

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BRIEF OF *AMICI CURIAE* THE CENTER FOR NATIONAL SECURITY STUDIES AND THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE

INTEREST OF AMICI CURIAE

The Center for National Security Studies is a nonprofit, nongovernmental civil liberties organization in Washington, D.C., founded in 1974 to ensure that civil liberties are not eroded in the name of national security. The Center has worked for more than 25 years to find solutions to national security problems that protect both the civil liberties of individuals and the legitimate national security interests of the government.

The Constitution Project is a nonprofit, bipartisan organization based at Georgetown University's Public Policy Institute that seeks to build consensus on, and develop solutions to, contemporary legal and constitutional issues through scholarship and public education. After September 11, 2001, the Project created its Liberty and Security Initiative, consisting of a bipartisan committee of prominent Americans, to develop recommendations on such issues as military tribunals and the detention of suspected terrorists.

The parties have consented to the filing of this amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises issues fundamental to this Nation's conception of itself as a republic governed by the rule of law. From our heritage in the English

parliamentary and common law systems, as supplemented by our experience in overthrowing monarchical rule, this Nation has derived four irreducible principles of liberty. *First*, no person may be subject to governmental restraint without clear warrant in positive law. *Second*, the legislative, executive, and judicial powers—the powers to make, to enforce, and to construe the law—belong in three separate branches of government, and certainly may not be combined in one person or entity. *Third*, with a few limited exceptions, the government must justify any significant and extended deprivation of liberty through the common law procedures attendant in a criminal prosecution. *Fourth*, military power, although obviously necessary to the protection of the Nation, must be narrowly confined so as not to supplant civil institutions, including the civil courts.

The position taken by the government in this case imperils all four of these core principles. A cornerstone requirement of due process is that no person may be deprived of liberty without justification in law. To justify the detention of Padilla, the Executive must be able to point to some source of law—statutory or constitutional—empowering the President to deprive Padilla of his liberty. This the Executive has not done, for no statute authorizes Padilla’s detention without being charged with a crime, and the President’s independent military authority under the Constitution does not extend to exercising control over an individual in the United States who neither was apprehended in a zone of active combat

operations nor is an undisputed or self-acknowledged member of the armed forces of a hostile state.

A narrow construction of the President’s military authority over individuals within the United States, so as not to displace civil institutions and core constitutional protections, is fundamental to the rule of law. Basic precepts of the rule of law as observed in this country are that the legislature has principal responsibility for authorizing deprivations of liberty, such deprivations must be accompanied by fair procedures before neutral tribunals, and civil authority is supreme in carrying out the coercive power of the government. That paradigm, which predated and undergirded the creation of this country two centuries ago, has served us well over time and has been a beacon to the rest of the world. *Cf. United States v. Robel*, 389 U.S. 258, 264 (1967) (“It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”). It should not be abandoned now.

ARGUMENT

I. WITH ONLY VERY NARROW EXCEPTIONS, DETENTION OF INDIVIDUALS WITHIN THE UNITED STATES MUST BE PURSUANT TO CIVIL AUTHORITY AND CONSISTENT WITH THE GUARANTEES OF THE BILL OF RIGHTS

Under our constitutional system, with only very narrow exceptions, an individual may be deprived of liberty only pursuant to civil authority and only after

having had the accusations against him tested at a criminal trial with the procedural protections attendant thereto. As the Supreme Court has stated:

Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States. And to protect persons brought before these courts, Article III and the Fifth, Sixth, and Eighth Amendments establish the right to trial by jury, to indictment by a grand jury and a number of other specific safeguards.

Reid v. Covert, 354 U.S. 1, 21 (1957) (opinion of Black, J.). Or, as Justice Scalia wrote in his dissent in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the “Due Process Clause ‘in effect affirms the right of trial according to the process and proceedings of the common law.’” *Id.* at 2661 (Scalia, J., dissenting) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* § 1783, at 661 (1833)).

The government argues in this case that Padilla has no recourse to these core protections of the Bill of Rights. To establish the basis for this claim, the government must demonstrate that Padilla’s case falls within a settled exception to this presumption in favor of a criminal trial and all its incidents—indictment, a trial by jury, and a judgment in accordance with procedural rules sufficient to provide a fair opportunity to be heard. These limitations on governmental power date at least from the Magna Carta, and are enshrined in the Due Process Clause, which “was an attempt by those who wrote the Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary

conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases.” *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (Black, J., concurring) (citations omitted).

To be sure, narrow exceptions to these principles have been recognized. In *Hamdi*, for example, a plurality of the Supreme Court concluded that, where congressionally authorized, the Executive may detain individuals who are captured in a foreign combat zone and legitimately determined to be Taliban combatants, 124 S. Ct. at 2642-2643 (plurality opinion). But here, the government has not overcome the presumption that an individual captured and detained in the United States for allegedly criminal behavior—far from the zone of active combat operations and well within a territory in which civil institutions are available and functioning—is entitled to a criminal prosecution. As discussed below, the government has demonstrated neither that Congress has authorized the type of detention at issue in this case, nor that the Executive has inherent authority to order such detention.

The government has relied heavily on the hearsay Declaration of Jeffrey N. Rapp (Aug. 27, 2004) (J.A. 17-24), which recites allegations about, *inter alia*, Padilla’s associations with the Taliban and al Qaeda, including his plans to assist them in targeting civilian populations within the United States for terrorist attack.

The Declaration further recites allegations about Padilla's presence at al Qaeda safehouses in Afghanistan while armed with an assault rifle. But the government's allegations, although unquestionably serious, establish only that Padilla may be prosecuted and tried for a crime. As we explain, the government fails to establish that Padilla falls within a category of persons who, under the law of war, may be denied a criminal trial and instead be subject to military control.

II. PADILLA'S DETENTION IS NOT AUTHORIZED BY STATUTE

“The President's power, if any, to issue the order [detaining Padilla] must stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). When a power so extraordinary as that claimed in this case is at issue, it is all the more important to be certain whether the power is well grounded in a source of law. The first step, accordingly, is to determine whether any Act of Congress clearly vests the President with the authority to detain an individual, such as Padilla, who was not apprehended in a zone of active combat operations and is not a member of the armed forces of any hostile state. Such a clear statement by Congress is necessary because indefinite military detention of a civilian apprehended in the United States raises, at a minimum, grave constitutional concerns. Subjecting Padilla to military control constitutes a significant intrusion on the Fifth and Sixth Amendment rights to which he would be entitled if he were prosecuted in civil court. *See Reid*, 354

U.S. at 21 (opinion of Black, J.); *see also Hamdi*, 124 S. Ct. at 2655 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting that Court has consistently required a clear statement from Congress to justify deprivation of liberty in wartime); *id.* at 2671-2672 (Scalia, J., dissenting) (emphasizing necessity of clear statement by Congress in this context). As we show, not only is Padilla's detention not clearly authorized by statute, it is in fact prohibited by law.

A. Because Padilla Was Neither Captured on the Battlefield Nor Indisputably Identified as a Member of an Enemy Armed Force, the AUMF Does Not Authorize Padilla's Indefinite Detention Under Military Authority

In arguing that *Hamdi* and *Ex Parte Quirin*, 317 U.S. 1 (1942), are controlling, the government argues principally that Congress's Authorization For Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), provides the President with the authority to detain Padilla. The AUMF, however, does not expressly authorize detention of any kind. Thus the government's argument must be that its power to detain Padilla, indefinitely and without trial, is implied in the grant of authority to use military force. Such a power, however, cannot be implied from the language of that statute.

In some circumstances, congressional authorization to the President to use military force necessarily includes authorization to the military to detain some individuals. Congress's statutory authorization to use military force activates the

President's Commander-in-Chief powers and thus empowers the President to prosecute military operations to successful conclusion and to protect the security of U.S. armed forces in doing so. In deploying military force, the President is entitled to detain individuals where to do so is consistent with the well-settled law of war—centrally, enemy soldiers (*i.e.*, actual members of the armed forces of a hostile state), persons apprehended on the battlefield, and (in some cases) citizens of enemy states who have lent assistance to hostile forces by (for example) ferrying munitions or battlefield intelligence to the enemy. *See Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950); *Quirin*, 317 U.S. at 37-38.

Where the President's Commander-in-Chief powers are most directly implicated, during the conduct of actual combat operations, the authority to detain individuals flows naturally from congressional authorization to use military force. Thus, when the President, acting pursuant to the AUMF, deployed military force in Afghanistan, he was authorized by Congress to detain combatants captured in actual hostilities. *See Hamdi*, 124 S. Ct. at 2639-2641 (plurality opinion) (noting that detention of individuals in Hamdi's limited category is "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use").

That situation, however, is far removed from the present case, which involves an individual who was apprehended in the United States, far from any

zone of actual combat operations, and who is not a member of the armed forces of a hostile state. Congress has not clearly extended the President's military powers so far into the domestic sphere. In this regard, it bears emphasis that the AUMF is not an open-ended grant of power to the President to do anything he thinks suitable. Rather, it authorizes the President to use "all necessary *and appropriate* force" against those organizations that aided the terrorist attacks of September 11, 2001. Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added). In carefully choosing the terms "necessary *and appropriate* force," Congress intended that the President not act in violation of the well-settled law of war, which places limits on the exercise of President's military authority over civilians, for to do so would not be "appropriate." *Cf. Printz v. United States*, 521 U.S. 898, 923-924 (1997) (noting that the Constitution's grant of power to Congress to enact "necessary and proper" laws does not authorize Congress to enact laws that violate constitutional principles of state sovereignty, as such laws are not "proper").

Despite the government's use of the label "combatant" to refer to Padilla, he does not meet the criteria under the well-settled law of war for a person against whom deadly military force may be deployed. Unlike the individuals tried before military tribunals in *Quirin, In re Territo*, 156 F.2d 142 (9th Cir. 1946), and *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), Padilla is not a member of the armed forces of a hostile state. Nor does Padilla fall within any other well-

settled category of other persons over whom military control may be exercised under the law of war. For example, Padilla was not engaged in battlefield operations when he was apprehended; if he had been so engaged, he would have been subject to military control even if he were not a member of the armed forces of a hostile state (such as, for example, al Qaeda combatants captured in battle in Afghanistan, or members of the Viet Cong captured during the Vietnam War). *Cf. Hamdi*, 124 S. Ct. at 2639 (plurality opinion) (indicating that that case was limited to the context of capture of an individual alleged to be part of or supporting forces hostile to the United States or its coalition partners in Afghanistan and who engaged in armed conflict against the United States); *id.* at 2640 (noting that the purpose of detention of enemy combatants is to prevent captured individuals from returning to the “field of battle”); *id.* at 2643 (emphasizing that Hamdi was captured in a “foreign combat zone”).

Finally, this is not a case where the facts underlying the government’s asserted right to exercise military control over Padilla is indisputable. Padilla is not one of the self-acknowledged or otherwise undisputed leaders of al Qaeda who would therefore be the legitimate target of military force; indeed, the government has never even made such a suggestion. *Cf. Hamdi*, 124 S. Ct. at 2670 n.4 (Scalia, J., dissenting) (stressing that *Quirin* was decided based on “the conceded facts” of that case that the saboteurs were members of enemy armed forces, and that the

purpose of “the procedural safeguards in the Bill of Rights is to limit the methods by which the Government can determine facts that the citizen disputes and on which the citizen’s liberty depends”) (emphasis in *Hamdi*).

The government has stressed that, in *Quirin*, this Court distinguished *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), where it disapproved use of a military commission to try a non-belligerent sympathizer with the Confederacy, on the ground that Milligan (unlike the Nazi saboteurs in *Quirin*) was not “a part of or associated with the armed forces of the enemy.” *Quirin*, 317 U.S. at 45. The government seizes on this language to argue that Padilla is “associated with” al Qaeda and therefore may be subject to military control. But in using the phrase “associated with the armed forces,” the Court in *Quirin* did not grant broad authorization to the President to use military power to indefinitely detain anyone in the United States based on a suspicion that that person might be planning acts of sabotage or otherwise supporting a foreign enemy—an argument that, if taken to its apparent conclusion, could embrace all manner of persons who might have lent support in some attenuated way to an organization accused of engaging in terrorism. Rather, the Court in *Quirin* was merely accurately reciting the fact that, under the well-settled law of war, certain persons who are not actually enrolled in

the armed forces of a hostile state may be seized by the military if they have inserted themselves into combat situations.¹

Unsurprisingly, then, in the past, individuals who have been suspected of acting as spies and saboteurs in concert with enemy powers and who have been apprehended in the United States have traditionally been prosecuted in civil courts—as was the case with the civilians who conspired with the Nazi saboteurs in *Quirin*. See *Haupt v. United States*, 330 U.S. 631 (1947); *Cramer v. United States*, 325 U.S. 1 (1945); see also *Hamdi*, 124 S. Ct. at 2633-2664 (Scalia, J., dissenting) (describing instances in which citizens have been charged and tried in federal courts for engaging in belligerent acts against the United States). Indeed, even now, the government has shown itself able and willing to proceed against other alleged al Qaeda supporters in the criminal courts.²

¹ Cf., e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135 (providing that “[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces” may qualify as prisoners of war).

² See, e.g., Sealed Complaint at 1, *United States v. Shah*, No. 05 MAG 956 (S.D.N.Y. May 27, 2005) (alleging that defendants conspired to provide “material support and resources” to al Qaeda in violation of 18 U.S.C. § 2339B), available at <http://www.umaryland.edu/healthsecurity/docs/usshahsahir52705.pdf>.

In requiring a clear congressional statement to authorize military detention of individuals, even during declared wars, the Supreme Court has consistently expressed skepticism of the argument that congressional authorization to use military force should be implied to include a broad power to subject persons within the United States to military control and to remove them from the purview and protection of civilian institutions—and when it has found such authorization, the Court has concluded that it is narrowly confined and limited to situations where civilian institutions could not operate. In *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the Court rejected the government’s argument that a statute granting the Governor of Hawaii the power to place Hawaii under “martial law” necessarily included the power to subject civilians to trial before military tribunals. While accepting that the power to impose “martial law” granted in the act “authorize[d] the military to act vigorously for the maintenance of an orderly *civil government* and for the defense of the island against actual or threatened rebellion or invasion,” the Court declined to read the statute as authorizing “the supplanting of courts.” *Id.* at 34 (emphasis added); accord *Milligan*, 71 U.S. (4 Wall.) at 127 (“As necessity creates the rule, so it limits its duration, for if [military] government is continued *after* the courts are reinstated, it is a gross usurpation of power.”).

Most recently, in *Hamdi*, although the Court concluded that Congress had granted the President authority to detain persons apprehended in foreign combat

situations—where, of course, the civil courts of the United States are not found—the controlling opinion expressed doubt that the AUMF authorized detention of persons apprehended within the United States, where the civil courts of the country are located and do operate. *See* 124 S. Ct. at 2641-2642 (plurality opinion) (finding the AUMF applicable in the narrow facts of that case and indicating that the analysis might be different in another context); *see also id.* at 2653-2655 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (concluding that the AUMF did not authorize detention of Hamdi); *id.* at 2671-2672 (Scalia, J., dissenting) (concluding that the AUMF did not authorize detention with sufficient clarity to overcome canon that statutes should be construed to avoid grave constitutional concerns).

As the Court stated in *Ex parte Endo*, 323 U.S. 283, 300 (1944):

In interpreting a war-time measure we must assume that [Congress's] purpose was to allow for the greatest possible accommodation between [civil] liberties and the exigencies of war. 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.

So too, in the AUMF, Congress has not spoken with sufficient clarity to authorize the military detention of Padilla.

B. Padilla's Detention Is Prohibited by 18 U.S.C. § 4001(a)

Section 4001(a) of Title 18 provides: “No citizen of the United States shall be imprisoned or otherwise detained by the United States except pursuant to an Act

of Congress.” Accordingly, § 4001(a) precludes Padilla’s detention by the military unless (as the government argues) it contains an implicit exception authorizing such military detention or is itself unconstitutional.

The government argues that, notwithstanding its sweeping language, § 4001(a) should be read to preclude detention only by federal civilian authorities, and not by the military. Gov’t C.A. Br. at 59-61. But as the Supreme Court has stated, § 4001(a) proscribes “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); *see also Hamdi*, 124 S. Ct. at 2653 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (concluding that the Non-Detention Act applies to detention by the military). Padilla is surely “detained” by military force. Had Congress intended § 4001(a) to govern only civil incarceration, it might have limited the statute’s reach to citizens “imprisoned,” but it went further to preclude unauthorized detention of *any kind*. Moreover, Padilla’s detention is surely “by the United States.” The military is no less a part of “the United States” than the civil authorities.

Although the government presents its “military detention” exception to § 4001(a) as a saving construction of that law, to avoid a purported constitutional clash with the President’s Commander-in-Chief powers under Article II of the Constitution, it is not evident what statutory language the government believes

may be construed to provide such an exception. The doctrine favoring construction of statutes to avoid constitutional doubt has application only where there is statutory language susceptible of more than one construction. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998); *Salinas v. United States*, 522 U.S. 52, 59-60 (1997). The government points to no such language here. Moreover, the government's construction of § 4001(a) to permit military detention of citizens at the unilateral behest of the President would obviously *create* constitutional concerns, as discussed below. Thus, the statute should simply be construed according to its plain terms.

III. THE PRESIDENT'S INHERENT CONSTITUTIONAL POWERS DO NOT EXTEND TO INDEFINITE DETENTION OF PADILLA

A. The President's Claim to Unilateral Authority Lacks Precedent or Historical Support

Because Padilla's military detention is not authorized by statute, his detention could be consistent with due process only if it were rooted in some other source of law to detain individuals—presumably, the Constitution itself. The government has contended that the Commander-in-Chief Clause of Article II of the Constitution vests the President with the authority to designate an individual in the United States as an “enemy combatant” and thereby remove him from the reach of the civilian courts, based on its determination that that person intends to engage in conduct harmful to national security, such as sabotage. That claim is a dramatic

one, for, as this Court has noted in another context—in which it rejected the contention that the President’s Article II foreign affairs powers, however broad, included the power to deprive an individual of liberty without congressional authorization—“the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law.”

Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 9 (1936).³

The government seeks to reassure the Court that the designation of Padilla as an enemy combatant “was the culmination of an extensive deliberative process within the Executive Branch involving several layers of review.” Gov’t C.A. Br. at 12-13 n.2. But the nub of the matter is that, according to the government, the power to determine whether any particular individual meets the criteria for an “enemy combatant” belongs *alone* to the Executive Branch, as part of the

³ In some respects, the President’s claim is similar to a contention that the Executive may impose martial law on selected individuals of its choosing. See Frederick Bernays Wiener, *A Practical Manual of Martial Law* 10 (1940) (defining “martial law” as “the carrying on of government in domestic territory by military agencies, *in whole or in part*, with the consequent supersession of *some or all* civil agencies”). To be sure, the government has not in this case claimed that the President has the military authority to detain all individuals within a broad geographic area. On the other hand, the government’s argument that the President may act *selectively* to subject some individuals to military control demands even closer scrutiny than an argument that he may act broadly. As a practical matter, a broad geographic imposition of martial law would demand the utmost justification to gain acceptance from the public. By contrast, the President’s assertion of power over a few individuals here and there is unlikely to meet with such careful probing.

President's Commander-in-Chief powers. *Id.* Indeed, according to the government, once the President makes the decision that someone is an "enemy combatant," that individual falls outside the purview of our historical protection of due process rights. He is, essentially, entitled to something less than the guarantees afforded to an accused criminal whose conviction could result in one year of imprisonment. *See Baldwin v. New York*, 399 U.S. 66, 73-74 (1970).

The government cites *Johnson v. Eisentrager* and *Quirin* for the proposition that the President's military authority to seize and detain enemy combatants in wartime is well settled. Gov't C.A. Br. at 20-23. But the question here is not the broad issue of the President's authority to "detain enemy combatants"; rather, the issue is whether the President may, without legislative authorization, indefinitely detain an individual apprehended on U.S. soil who was not a member of the armed forces of any hostile state because the President suspects that individual of being an "enemy combatant." That claim to power lacks any historical roots.

Eisentrager involved German nationals "in the service of German armed forces" who were apprehended overseas for transmitting military intelligence to "the Japanese armed forces" still engaged in hostilities against the United States, in violation of the terms of Germany's surrender. 339 U.S. at 765-766. Those German nationals therefore fell within the "'well-established' . . . 'power of the military to exercise jurisdiction over members of the armed forces [and] those

directly connected with such forces,” *id.* at 786 (quoting *Duncan*, 327 U.S. at 313-314)—in essence, the same category as those persons described by the Court in passing in *Quirin* as being “associated with” the armed forces of a hostile state (317 U.S. at 45).

In *Quirin*, all the persons tried by military commission were undisputed members of the armed forces of a hostile state. *See* 317 U.S. at 38 (noting that the fact that the saboteurs had buried their uniforms was “essential” to the trial for a violation of the law of war). Moreover, in that case, the Court held that Congress had authorized the trial of such persons by military commission for violations of the law of war, and specifically stated that it was unnecessary to determine whether the President, acting unilaterally, would have had authority to subject such persons to trial by military commission. *Id.* at 29.

With the exception of the government’s attempt during the Civil War to remove Northern civilian sympathizers with the Confederacy from the control of civil authorities—an attempt that was, of course, repudiated by the Supreme Court in *Milligan*—the government points to no occasion in this country’s history during which the President has even attempted to exercise the power to exclude from the civil courts persons who were not either members of the armed forces of a hostile state, like the saboteurs in *Quirin*, or persons apprehended in a combat situation on the battlefield. Whether the President ever could do so consistent with our

constitutional traditions is a difficult question, but (as discussed below), at a minimum, two things are clear: he may not do so without legislative authorization, and he may not do so absent a pressing emergency such that normal civil institutions are precluded from operating; and even then, his authority to do so would be limited to ensuring that individuals were referred to civil authorities as quickly as possible. *See infra* pp. 24-28.

B. Absent Congressional Authorization, Military Detention, Without the Right to Due Process, of an Individual Apprehended in the United States Who Is Not Subject to Well-Settled Categories of Military Jurisdiction Is Impermissible

As discussed at pages 16-20, *supra*, Padilla’s military detention is prohibited by 18 U.S.C. § 4001(a). This, therefore, is a situation in which the President’s power “is at its lowest ebb,” and the Court could sustain the President’s claim to unilateral authority “only by disabling Congress from acting upon the subject.” *Youngstown*, 343 U.S. at 637-638 (Jackson, J., concurring). In other words, to sustain the President’s authority to detain Padilla, this Court would have to declare § 4001(a) unconstitutional as applied in this case. It is most unlikely, however, that Congress has acted unconstitutionally in protecting civil liberties in this manner. Although the President has substantial authority under the Commander-in-Chief Clause, his authority over the military is not exclusive; Congress has authority “to make all rules necessary and proper to govern and regulate” the armed forces. *See* U.S. Const. art. I, § 8, cl. 14; *see also id.* cl. 12 (vesting in

Congress, not the President, the power to raise and maintain military forces); *see also Hamdi*, 124 S. Ct. at 2659 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (recalling “Justice Jackson’s observation that the President is not Commander in Chief of the country, only of the military”) (citing *Youngstown*, 343 U.S. at 643-644 (Jackson, J., concurring)).

That authority surely empowers Congress to set boundaries to military control over persons not in the armed forces of this country or a hostile state. The Framers, who well understood the dangers and fears of a standing army but who accommodated the need for national self-defense, *see* The Federalist No. 41 (Madison), could hardly have intended that Congress be required merely to acquiesce in the President’s assertions of military control over individuals, no matter how expansive. *See* Decl. Indep. ¶ 14 (assailing George III for “affect[ing] to render the Military independent of and superior to the Civil Power”); The Federalist No. 69 (Hamilton) (observing that the President’s military authority “would be nominally the same with that of the king of Great Britain, but in substance much inferior to it” because it “would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and

armies, all which, by the Constitution under consideration, would appertain to the legislature.”) (footnote omitted).

Moreover, even if one were to put § 4001(a) to one side—on the ground, suggested by the government, that it does not apply to military detention—the point remains that the Executive’s military detention of Padilla is not authorized by statute. *See supra* pp. 7-14. Due process requires a source of law for the detention of any individual. Thus, to sustain the military detention here, this Court would have to conclude that the President had independent power under Article II of the Constitution to order that detention. That is not an authority that the President has.

The authority claimed by the President to place an individual designated as an “enemy combatant” in indefinite military detention, without the right to a criminal trial, resembles a claim to authority to selectively suspend the writ of habeas corpus. But, of course, the President does not have the unilateral authority to suspend the writ. *See Hamdi*, 124 S. Ct. at 2644 (plurality opinion). Indeed, the clearest signal that congressional authorization is needed for detention of an individual without the guarantees of the Bill of Rights is the constitutional assignment to *Congress* of the authority to suspend the writ of habeas corpus. *See* U.S. Const. art. I, § 9, cl. 2. In fact, by recognizing the possibility that Congress might suspend habeas corpus in a case of “Rebellion” (*id.*), the Framers anticipated the possible presence on U.S. soil of individuals who might be “enemy

combatants,” and yet they made clear that the authority to keep such persons outside the civil courts rests with Congress, not the Executive.

Moreover, the issue in this case—whether the Executive Branch has power, without congressional authorization, to subject an individual who was not a member of the armed forces of a hostile state to military rather than civilian control—is not new. A similar scenario was presented to the Supreme Court in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). In *Milligan*, the Supreme Court ruled that the military commission that convicted Milligan of assisting the Confederacy was unlawful, and that Milligan was thus entitled to the writ of habeas corpus and release (unless, presumably, the government proceeded to bring charges against him in civil court). *Id.* at 130-131. The Court’s unanimous conclusion was that, at a minimum, legislative authorization would be required for such a military commission to be valid, and that, at least absent congressional authorization, “[a]ll . . . persons, citizens of states where the courts are open” other than persons “attached to the army, or navy, or militia in actual service . . . are guaranteed the inestimable privilege of trial by jury” rather than detention and trial by military tribunal. *Id.* at 123; *see also id.* at 137 (Chase, C.J., concurring) (stressing that Congress had made no such authorization).

C. Military Detention Without Criminal Trial Requires an Emergency in Which the Civil Courts Cannot Operate

The government’s claim fails for yet another reason: indefinite military detention of an individual apprehended in the United States, which has the effect of barring the detained individual from recourse to the procedural requirements of a criminal trial, could be justified—if at all—only to the extent that an actual and ongoing emergency is preventing legitimate civil authorities in the relevant geographic area from functioning. Even Congress may suspend habeas corpus only “when in Cases of Rebellion or Invasion the public safety may require it.” U.S. Const. art. I, § 9, cl. 2. And when federal military force has been deployed within the United States with legislative authorization, it has been so deployed for the purpose of restoring legitimate civil authority.

Most directly, in *Milligan*, the Supreme Court held that the power to cause the military to try (and, therefore, to detain) a U.S. citizen could be justified only in the case of a “necessity” that must be “actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.” 71 U.S. (4 Wall.) at 127. Moreover, the Court made clear, “[a]s necessity creates the rule, so it limits its duration” and scope, for “[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction” or outside “the locality of actual war.” *Id.*

Milligan had strong roots in Anglo-American law. The principle that military control of individuals who are not members of a hostile army can be justified, if at all, only by an actual and ongoing emergency dates back at least to the debates in Parliament in 1628 over the Petition of Right. There, a careful distinction was made between “an enemy com[ing] into any part where the common law cannot be executed,” in which case martial law was justifiable as a matter of necessity to maintain order, and the “tak[ing] of a subject in rebellion,” for which the subject “if he be not slain at the time of his rebellion” was to be “tried afterwards and by the common law.” *Ex parte McDonald*, 143 P. 947, 951 (Mont. 1914) (quoting the views of “such high authorities as Rolle and Coke” as stated by Rolle).

Against this background of hostility to military interference with or supersession of the civilian administration of justice, *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), considered and rejected an Executive attempt to claim a similar power to the one the government claims here. With the civil authorities operating, the Court refused to find “imprisonment by executive authority” justifiable. *Id.* at 150. In fact, that opinion confirmed that the purported authorization for Merryman’s military detention went “far beyond the mere suspension of the privilege of the writ of habeas corpus” and illegally “thrust aside the judicial authorities and officers to whom the constitution has confided the

power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers.” *Id.* at 152. With the civilian courts open and in the absence of “danger of any obstruction or resistance to the action of the civil authorities,” *Merryman* concluded that there was “no reason whatever for the interposition of the military.” *Id.*

Thus, by the time *Milligan* was decided, the proposition that “[a]ll . . . persons, citizens of states where the courts are open” other than persons “attached to the army, or navy, or militia in actual service . . . are guaranteed the inestimable privilege of trial by jury,” 71 U.S. (4 Wall.) at 123, rather than detention and possible trial by the military, was already well established. Although the Court recognized in *Quirin* that other persons subject to military jurisdiction under the well-settled law of war might be subjected to military control, including a U.S. citizen *if* he had joined the armed forces of a hostile state, it made no further inroads on the principle of *Milligan*.

Moyer v. Peabody, 212 U.S. 78 (1909), is illustrative. *Moyer* was in essence a decision about what would later be described as Executive officials’ qualified immunity from personal liability for their official actions. *See Scheuer v. Rhodes*, 416 U.S. 232, 247-248 (1974) (concluding that executive officers may be held personally liable under 42 U.S.C. § 1983 for constitutional torts, although only for

actions that were objectively unreasonable in light of the facts as they appeared at the time) (discussing *Moyer*). The issue was whether detention of the plaintiff during a state of insurrection had been a sufficiently obvious and serious enough violation to justify an award of civil damages. 212 U.S. at 85 (suggesting that a detention longer than reasonably necessary would make an award of damages possible). In affirming the dismissal of the civil action in *Moyer*, the Supreme Court was careful to note that the governor, having “declared a county to be in a state of insurrection” and “called out troops to put down the trouble,” “ordered that the plaintiff should be arrested as a leader of the outbreak, and should be detained until he could be discharged with safety, and that then he should be delivered *to the civil authorities, to be dealt with according to law.*” *Id.* at 82-83 (emphasis added). *Moyer* thus supports the uncontroversial proposition that the government may use force to suppress unlawful rebellions against legitimate civil authority and may, as part of that power, temporarily detain persons until civil authorities are able to function. But *Moyer* does not fairly suggest that the Executive power includes the power to detain citizens indefinitely or to cause them to be tried by military tribunals when the civilian courts are functioning.

Moreover, the detention of the plaintiff in *Moyer* was relatively brief, a fact that the Court appears to have accorded considerable significance. *Cf. Hamdi*, 124 S. Ct. at 2670 n.3 (Scalia, J., dissenting) (noting that the detention at issue in

Moyer was “roughly the length of time permissible under the 1679 Habeas Corpus Act”). The short duration of the detention provided little basis upon which to question the reasonableness of the governor’s judgment—for purposes of assessing his personal liability—that his actions were truly made necessary by the need to preserve order in the face of an ongoing collapse of legitimate civil government. The Court nevertheless noted the possibility of a future case “in which the length of the imprisonment would raise a different question.” *Moyer*, 212 U.S. at 85.

The instant case is the case that the Court hypothesized in *Moyer*. Padilla has been detained as an “enemy combatant” for nearly three years, and the government denies any obligation to deliver him to the civilian authorities for trial. Yet there is no question that the courts are open and functioning—indeed, Padilla himself was initially arrested and detained pursuant to a material witness warrant issued by a federal court. At least in the absence of explicit congressional authorization and a pressing emergency preventing the civil courts from operating, therefore, there is no lawful basis for military detention of one such as Padilla, who does not fall within one of the well-settled categories of persons subject to military jurisdiction.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**No. 05-6396 Caption: Jose Padilla, Petitioner-Appellee v. Commander
C.T. Hanft, USN Commander, Consolidated Naval Brig,
Respondent-Appellant**

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CERTIFICATE OF SERVICE

I hereby certify that the original and eight copies of the foregoing Brief of *Amici Curiae* the Center for National Security Studies and The Constitution Project in Support of Petitioner-Appellee and Affirmance were filed with the Court on the 15th day of June, 2005, by placing the same in Federal Express overnight mail, postage pre-paid, to:

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