No. 03-1027

IN THE

Supreme Court of the United States

DONALD RUMSFELD,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT

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STATEMENT

For almost two years, Jose Padilla – an American citizen born in New York – has been held in solitary confinement in a military prison. He has not been charged with any crime or violation of the law of war. No court or neutral fact-finder has evaluated the evidence supporting his detention. Until recently, Padilla was denied any contact with a lawyer, his family, or non-military personnel.

The United States asks this Court to rule that the military may seize and incarcerate Padilla – and any other citizen the President designates as an "enemy combatant" – in this manner until the unforeseeable end of the "current conflict" with al Qaeda. US Br. 14, 28, 29. It is the Government's position there need only be "some evidence" that a citizen has "associated" with a terrorist organization "bent on hostile acts" for that citizen to be declared an "enemy combatant" and denied virtually all constitutional and civil rights.[1]

Padilla was not captured in combat, nor is he alleged to be a soldier or member of a military organization. On May 8, 2002, Padilla was arrested, pursuant to a warrant, by civilian law enforcement agents as he walked off a commercial flight at O'Hare Airport. Pet. App. 4a, 169a. Padilla was wearing civilian clothing and carrying a valid United States passport. JA69. He had no weapons or explosives. JA70.

Padilla was arrested on the basis of information provided by confidential sources. Pet. App. 168a. The Government admits that the information provided by its sources "may be part of an effort to mislead or confuse U.S. officials" and that one of the sources "recanted some of the information that he had provided." *Id*. at 168a n.1. The Government claims its sources indicate that Padilla conceived a "plan" to build and

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[1] *See* Opening Br. of United States, *Padilla v. Rumsfeld*, No. 03-2235, at 48 (2d Cir. filed July 22, 2003) (defining "some evidence" as "*any* evidence in the record that *could* support the conclusion" that Padilla is an "enemy combatant") (emphasis added); US Br. 6 (describing criteria used to determine "enemy combatant" status).

detonate a "dirty bomb" within the United States, but the Government admits that the supposed plot "was still in the initial planning stages" and "there was no specific time set for the operation to occur." *Id*. at 170a. Deputy Secretary of Defense Paul Wolfowitz stated publicly that "I don't think there was actually a plot beyond some fairly loose talk and his coming in here obviously to plan further deeds." *See* http://usinfo.state.gov/topical/pol/terror/02061103.htm.[2]

Although the Government refers repeatedly to "members" and "leaders" of al Qaeda, Pet. App. 169a-170a, the Government admits its confidential source "stated that he did not believe that Padilla was a 'member' of Al Qaeda." *Id*. at 170a. And an unsealed portion of the Government's grand jury affidavit states that "[Padilla] indicated he was unwilling to become a martyr." JA72.

Padilla's alleged activities, although very preliminary and rudimentary, could violate many federal criminal statutes. He has not been charged, however, with any crime. The Government chose to bring Padilla to New York pursuant to a grand jury warrant issued there, and he was held in maximum security at the Metropolitan Correctional Center (MCC). Pet. App. 4a. The District Court appointed Donna R. Newman to represent Padilla, and Newman filed motions challenging the warrant. *Id*. at 4a-5a. Two days before a hearing on the motions, the President signed an order "To the Secretary of Defense" declaring Padilla an "enemy combatant." *Id*. at 57a-58a. Secretary Rumsfeld then sent military personnel to New York to seize Padilla and move him to the military brig on a base in South Carolina. At the scheduled hearing two days later, Newman filed a habeas corpus petition on Padilla's behalf.

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[2] The sealed grand jury affidavit supporting Padilla's original arrest, which was shown to defense counsel, contains a fuller and apparently more candid description by the Government of the allegations made by its sources. Respondent is filing with this brief a letter under S. Ct. R. 32.3 for permission to lodge this affidavit with the Clerk.

JA46 (amended petition). Since June 9, 2002, the military has held Padilla in solitary confinement. Pet. App. 5a. He remains there today.[3]

The District Court ruled that Newman could serve as next friend for Padilla and that, given the unique facts of the case, Secretary Rumsfeld was a proper respondent and subject to suit in New York. *Id*. at 76a. The court held that the President had authority to detain Padilla, but that Padilla was entitled to present facts to rebut the claim he is an "enemy combatant." *Id*. at 166a. The court also ruled that Padilla's need to consult with counsel was "obvious" given that "[h]e is held incommunicado at a military facility" and his right to contest his "combatant" status "will be destroyed utterly if he is not allowed to consult with counsel." *Id*. at 147a-148a, 153a.

The Court of Appeals unanimously affirmed on the threshold issues concerning location of suit. *Id*. at 14a-26a & n.22, 61a n.32. On the merits, the court found no need to address the claim that an undeclared war exists between al Qaeda and the United States, *id*. at 30a, or – given that Padilla was seized by the military from a high security jail – the President's authority to prevent an imminent attack. *Id*. at 42a n.27. The court viewed the case as primarily about the division of power between the Executive and Congress. Emphasizing that it sat only a short distance from where the World Trade Center once stood, the court was "as keenly aware as anyone of the threat al Qaeda poses to our country." *Id*. at 2a.

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[3] The military has held Padilla in total isolation as an acknowledged interrogation tactic: "Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla. . . . Providing him access to counsel now . . . would break – probably irreparably – the sense of dependency and trust that the interrogators are attempting to create." JA86 (Jacoby Decl.). While the case was pending in this Court, the Government announced that counsel finally could meet with Padilla in the presence of military officials, but even that grant of access was wholly discretionary and may end at any time. *See* US Cert. Reply Br. 7 n.6.

Nevertheless the court held that the Constitution vests *Congress* with the primary power to authorize domestic detentions, including in times of war; that "clear congressional authorization" is required before the military may imprison an American citizen seized on American soil outside a zone of combat; and that Congress has not provided that authority. *Id*. The court thus ruled that Padilla either must be charged with a crime, held as a material witness, or released. *Id*. at 3a.

Judge Wesley dissented in part, but agreed that jurisdiction was proper in New York and noted that "the real weakness of the government's appeal" was its contention that the President had the authority to make a unilateral determination to detain and continue to hold Padilla, without affording Padilla a "serious opportunity to put the government to its proof by an appropriate standard," assisted by counsel. *Id*. at 74a, 75a.

SUMMARY OF ARGUMENT

The Executive today seeks to validate an unprecedented new system of extrajudicial military imprisonment of citizens. It seeks to do so absent any authorization by Congress defining the permissible scope and duration of such imprisonments, absent any meaningful review by the courts, and absent any charge or trial or procedural protections of any kind. The Government argues that the President and his advisers have considered the situation carefully and the courts should defer, completely, to their determination that Padilla's detention is necessary for national security. But in our constitutional system, it is not enough to trust that our leaders act in good faith, for ours is "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). As this Court wrote in rejecting claims that the rule of law should give way to military necessity during the crisis of the Civil War:

> 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.

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866). Terrorism presents a grave threat. But even – indeed especially – in times of peril, efforts to eviscerate our most basic constitutional safeguards must be rejected.

The Framers of our Constitution carefully divided power among the three branches of government to better preserve liberty. They placed stringent limits on the Executive's powers of detention and took care that the Nation's military power should be limited in scope and subordinated to the will of Congress. This Court has carefully policed the boundaries of military jurisdiction throughout our history, and has made clear that even citizens suspected of plotting to engage in hostile acts in wartime generally cannot constitutionally be subject to military jurisdiction where "the courts are open and their process unobstructed." *Milligan*, 71 U.S. at 121.

A system of domestic military detention for citizens suspected of plotting violent acts would violate the constitutional boundary recognized in *Milligan*. But in any event, it would represent such a dramatic departure from our Nation's constitutional traditions that, at a minimum, it must be authorized by a clear and unequivocal statement by Congress, explicitly delineating the scope of such detentions and the procedures to accompany them. The courts then could review that system to determine if its scope and procedures were consistent with the Constitution. In the absence of a clear statement from Congress authorizing such detentions, it is premature for this Court to pass on their constitutionality.

Indeed, throughout the Nation's history, this Court has required clear congressional authorization for detention of citizens. *See, e.g., Ex parte Endo*, 323 U.S. 283, 300 (1944); *Duncan v. Kahanamoku*, 327 U.S. 304, 315 (1946). This fact

alone renders inapposite this Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), which rested on clear and explicit congressional authorization of trials of enemy soldiers by military commissions – authorization that was separate and distinct from the general authorization to use military force contained in the Declaration of War against Germany. Moreover, Congress has underscored its intent to exercise the full scope of its power over detention by enacting a statute specifying that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). Neither of the statutes relied on by the Government here – the Authorization for Use of Military Force ("AUMF") and 10 U.S.C. § 956(5) – provides the necessary clear authorization for detention.

Because the AUMF does not authorize Padilla's military detention, and § 4001(a) expressly prohibits it, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Neither *Quirin* nor the law and customs of war on which that decision rests give the President the inherent power under the Commander-in-Chief Clause to detain citizens like Padilla as "enemy combatants."

In *Quirin*, the prisoners were given a trial and the opportunity to defend themselves with the assistance of counsel. Contrary to the Government's argument, the power to detain without trial is not *lesser* than the power to put on trial, for detention without trial carries a greater risk of error and abuse. These risks, moreover, are exacerbated in the "war on terror," where the persons the Government alleges to be combatants are indistinguishable from the civilian population.

Moreover, the petitioners in *Quirin* were, upon the conceded facts, soldiers in the German Army. Membership in the "armed forces" of an "enemy government" is a significant

limiting principle for military jurisdiction, and it was critical to *Quirin*'s distinction of *Milligan* – in which military jurisdiction had been held unconstitutional notwithstanding the fact that the petitioner was likewise alleged to have plotted to engage in violent acts in wartime, but in conjunction with a secret paramilitary organization rather than as a soldier in a government army. In light of this Court's reiteration even after *Quirin* that *Milligan* remains "one of the great landmarks in this Court's history," *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality), and in light of the Court's caution in *Quirin* that it had "no occasion now to define with meticulous care the ultimate boundaries" of military jurisdiction in the absence of congressional legislation or for individuals differently situated, 317 U.S. at 45-46, the Court should decline the Government's invitation to extend *Quirin* far beyond its facts.

If the Government's position were accepted, it would mean that for the foreseeable future, any citizen, anywhere, at any time, would be subject to indefinite military detention on the unilateral order of the President. That would upset our constitutional system in a way that the legislatively authorized trial by military commission of admitted German soldiers simply did not. Equally important, the expansion of the law of war far beyond its historical boundaries and internal limits would be a fundamentally legislative act, yet is one that our legislature has not undertaken. *See Youngstown*, 343 U.S. at 587 (Jackson, J., concurring) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker").

In addition, the power to detain asserted by the Government is so vast that it cannot, consistent with the Due Process Clause, be based solely on "a determination by the President," Questions Presented, US Br. (I), that the individual is an "enemy combatant." In light of the liberty interest at stake, the risk of error, and traditional principles of habeas corpus jurisdiction, the courts must have authority to determine *de*

novo the "jurisdictional facts" that subject an individual to military rather than civilian jurisdiction. Ordinarily, a deprivation of liberty of the sort at issue here could never be accomplished without at least clear and convincing evidence presented at an adversarial hearing before a neutral fact-finder where the accused is assisted by counsel. Again, however, this Court need not define in the first instance the process by which a citizen may be determined to be an enemy combatant and subject to military detention; that is a legislative act for Congress.

Nor should the Court compound the unchecked executive power asserted in this case by adopting new and technical personal jurisdiction rules for habeas corpus that would allow the Government to funnel cases to the judicial district it desires. The traditional standards applied by the Court of Appeals are flexible enough to take account of practical concerns related to the administration of justice under the unique facts of this case.

ARGUMENT

I. THE PRESIDENT LACKS AUTHORITY TO SUBJECT PADILLA TO MILITARY DETENTION.

A. The President's Claim of Power Must Be Evaluated in Light of Established Limitations on Executive Detention and Military Authority.

Throughout history, rulers have asserted the unilateral authority to imprison without trial those among their citizens deemed to be enemies of the state posing threats to national security. The Framers of our Constitution rejected such power as incompatible with a free and democratic society. Through numerous constitutional provisions, the Framers created structural and procedural protections that constrain the Government's power to deprive citizens of liberty. Similarly wary of the danger that military power could substitute for the rule of law, the Framers subordinated the military to civilian government, ensuring that the Constitution's checks and balances could not be evaded through the backdoor of military

necessity. Throughout the Nation's history, this Court has remained faithful to these constitutional bedrocks by carefully scrutinizing extra-judicial detentions and policing the limits of military jurisdiction. The President's claim of an extraordinary power to subject citizens to military detention must be evaluated in light of these long-standing constitutional boundaries.

1. Executive detention is a core concern of the Constitution, as demonstrated by basic constitutional history and the number of constitutional provisions aimed specifically at this problem. The Constitution's frontline protections against executive detention include the Due Process Clause, the criminal procedure protections of the Bill of Rights, and the structural separation of powers. Ordinarily, these provisions ensure that a citizen can only be deprived of liberty pursuant to a law duly enacted by the *legislature* that defines the precise conduct prohibited; upon a prosecution initiated by the *executive*; following a *judicial* trial by jury at which the defendant is entitled to be represented by counsel and to present evidence in his defense. The President's assertion of the right to define, implement, and review Padilla's detention is fundamentally at odds with the Framers' "central judgment" that "within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). It also violates due process and the procedural safeguards of the Fourth, Fifth, and Sixth Amendments.

The Government claims that this case is extraordinary and outside the normal constitutional framework because the Nation is at war. But the Constitution is no less concerned with executive detention in times of war, and if anything demonstrates the Framers' concern that assertions of national security not be used as justification for unchecked executive power.

The Constitution establishes the primacy of legislative and judicial control over the power of detention even in wartime through the Habeas Suspension Clause. As Justice Jackson

explained: "Aside from the suspension of the privilege of habeas corpus in time of rebellion or invasion," the Framers "made no express provision for exercise of extraordinary power because of a crisis," and "I do not think we rightfully may amend their work." *Youngstown*, 343 U.S. at 649-50 (Jackson, J., concurring); *accord Milligan*, 71 U.S. at 125-26. The Suspension Clause expressly contemplates a "Rebellion or Invasion" in which the "Public Safety may require" detention without trial, and it gives *Congress*, not the President, the power temporarily to suspend the writ, which is tantamount to authorizing extrajudicial executive detention. U.S. Const. art. I, § 9, cl. 2; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *cf. INS v. St. Cyr*, 533 U.S. 289, 298-303 (2001).[4] This allocation of power ensures that even in times of crisis, no one branch has the power to deprive citizens of liberty. *See Youngstown*, 343 U.S. at 652 (Jackson, J., concurring) ("emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them").

Historically, the Great Writ evolved as a tool to limit executive detention – a power that frequently had been abused by the Crown based on claims that such detention was necessary to protect the security of the realm in time of emergency. *See Darnel's Case*, III How. St. Tr. 2, 44-45 (1627); William F. Duker, *A Constitutional History of Habeas Corpus* 141 (1980) (describing how Parliament "refused to accept [the King's] claim to emergency power of arrest and detention," enacting first the Petition of Right and then the acts guaranteeing habeas corpus). The great struggles between the King and Parliament in the 17th Century eventually established that only Parliament could suspend habeas corpus. *See* 1 William Blackstone, Commentaries on the Laws of England

[4] Similarly, the Treason Clause, which contemplates citizens "levying War against" the United States and "adhering to their Enemies," U.S. Const. art. III, § 3, cl. 1, establishes *heightened* requirements for conviction of such crimes before an Article III court.

136 (photo reprint, Univ. of Chi. Press 1979) (1765). These struggles were well known to the Framers and continued into the colonial era. But limits on the King's power were sufficiently established by then that even King George did not claim an executive or military power to detain subjects suspected of treason during the American Revolution. Though the colonists had armed themselves and plotted to expel the Crown with violent acts, the King recognized he could not detain these combatants without charge absent an Act of Parliament suspending habeas corpus, which he sought and received. 17 Geo. 3 c. 9 (1777).

This history negates the notion that the President has broad inherent powers of detention absent legislative authorization. Even in wartime, detention must take place within a framework of positive law enacted by Congress. The Executive's unilateral detention of Padilla is directly contrary to this tradition.

2. The President's assertion of military power over Padilla also runs afoul of our Nation's established limits on military jurisdiction. The Framers had a "fear and mistrust of military power." *Reid*, 354 U.S. at 29 (plurality). This was born of the fact that "the King had endeavored to render the military superior to the civil power." *Duncan*, 327 U.S. at 320; Decl. of Ind. para. 14 (1776).[5] As a result, the Framers made the military "subordinate to civil authority." *Reid*, 354 U.S. at 30. By dividing war powers between Congress and the President, they also sought to ensure that military power would not become a tool of oppression.[6] As set forth by Justice

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[5] *See also Loving v. United States*, 517 U.S. 748, 762 (1996) ("The political disorders of the 17th century ushered in periods of harsh military justice, with soldiers and at times civilian rebels punished, even put to death, under the summary decrees of courts-martial") (quotation marks omitted).

[6] The Framers allocated to Congress power to "define and punish . . . Offences against the Law of Nations" (U.S. Const. art. I § 8, cl. 10); powers over war and the militia, including the power to "declare War . . . and make Rules concerning Captures on Land and Water" (*id.*, art. I § 8, cl. 11);

Jackson in his seminal concurrence in *Youngstown*, particularly in the domestic sphere, the extent of the President's authority depends on whether he is acting pursuant to, absent, or contrary to congressional authorization. 343 U.S. at 635-38; *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981).

Throughout the Nation's history, this Court has carefully policed the boundaries of military jurisdiction and has struck down incursions of martial law into civilian life. The most important of these cases grew out of the Civil War, when the very existence of our Republic was threatened and large swaths of the country became battlefields. In the context of that grave crisis, the Court nevertheless held that military jurisdiction could not extend to civilians in areas "where the courts are open and their process unobstructed." *Milligan*, 71 U.S. at 121; *see also id.* at 141-42 (Chase, C.J., concurring) (military jurisdiction could not extend to civilians except where martial law had been lawfully imposed); *Duncan*, 327 U.S. at 322. Padilla's case fits squarely within the framework of *Milligan*.

Milligan, like Padilla, was charged with conspiring with a secret society to commit hostile and warlike acts against the United States. Milligan was alleged to have joined and aided a secret paramilitary group for the purpose of overthrowing the government; to have violated the law of war; to have held communications with the enemy; and to have conspired to seize munitions, liberate prisoners of war, and commit other violent acts in an area under constant threat of invasion by the enemy. 71 U.S. at 6-7 (statement of case); *id.* at 140 (Chase, C.J., concurring). Milligan, like Padilla, was seized by the military. As in this case, the Government argued that the President's role as Commander-in-Chief placed all powers in his hand, making

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power to "make Rules for the Government and Regulation of the land and naval Forces" (*id.*, art. I § 8, cl. 14); power "to provide for calling forth the Militia to . . . suppress Insurrections, and repel Invasions" (*id.*, art. I § 8, cl. 15); and the obligation to prescribe by law the quartering of soldiers in any private home, even in time of war (*id.*, amend. III).

him simultaneously "supreme legislator, supreme judge, and supreme executive." *Id*. at 14 (argument of Attorney General).[7] Unlike Padilla, however, Milligan was charged with crimes and tried before a military commission, before which he was represented by counsel and allowed to present a defense.

Despite Milligan's direct participation in planning attacks on the Nation itself in a time of war, this Court firmly rejected the expansion of military jurisdiction over a civilian American citizen and held that Milligan was entitled to a civilian criminal trial and to release from military custody. The Court in *Milligan* recognized the extreme importance of the question presented – which, as here, "involves the very framework of the government and the fundamental principles of American liberty." *Id*. at 109. It observed that the Constitution itself – notably the Fifth and Sixth Amendments – specifies in plain terms how citizens must be tried. *Id*. at 119-20. And it reaffirmed that "it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law." *Id*. at 119.

The Court held that constitutional requirements could not be circumvented by invoking military necessity or by using the army in place of civil process to detain or punish citizens. It recognized that history had shown "the extent of the struggle to preserve liberty and relieve those in civil life from military trials." *Id.* And it 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. Only one constitutional safeguard could be suspended in wartime: "the one concerning the writ of habeas corpus." *Id*. at 125.[8]

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[7] The Government further argued: "As necessity makes [the President's] will the law, he only can define and declare it; and whether or not it is infringed, and of the extent of the infraction, he alone can judge; and his sole order punishes or acquits the alleged offender." *Id*.

[8] "It is essential to the safety of every government that, in a great cri-

The Court recognized that the Constitution allows soldiers and sailors in the armed forces to be tried under military jurisdiction. *Id.* at 123; *accord id.* at 142 (Chase, C.J., concurring); U.S. Const. amend. V; *Solorio v. United States*, 483 U.S. 435, 439 (1987) ("the Constitution [conditions] the proper exercise of court-martial jurisdiction . . . on one factor: the military status of the accused"). But it refused to equate Milligan with a soldier, noting that "he was not engaged in legal acts of hostility against the government, and only such persons, when captured are prisoners of war." 71 U.S. at 131. 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*. The analysis applies equally here.

The Court acknowledged that necessity also permits the military to exercise jurisdiction over civilians in conquered territories that are ruled by military government, as well as when martial law is lawfully imposed in the United States itself during war or invasion "within districts or localities where ordinary law no longer adequately secures public safety or private rights." *Id*. at 142 (Chase, C.J., concurring); *see id.* at 126 (opinion of Court). But outside those narrow circumstances, it made clear that "no usage of war could sanction a military trial . . . for any offence whatever of a citizen in civil life, in no wise connected with the military service." *Id.* at 121-22; *accord Smith v. Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815) (court-martial lacked jurisdiction to try citizen civilian).[9]

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sis, . . . there should be a power somewhere of suspending the writ of habeas corpus." *Id*. But, "[k]nowing this, [the Framers] limited the suspension to one great right, and left the rest to remain forever inviolable." *Id*. at 126.

[9] The majority in *Milligan* believed that not even Congress could have authorized trials by military commissions in areas where the courts were open and operating. Chief Justice Chase agreed that Milligan should be released, but thought that Congress had the power (though unexercised in that case) to authorize military commissions by imposing martial law. Even the concurring Justices agreed, however, that the power to impose martial

Throughout its brief, the Government paints the limited military jurisdiction over trials of German soldiers upheld in *Ex parte Quirin* (discussed in detail *infra* at 18-20, 27-36) as the general rule, to which *Milligan* forms a narrow exception. But that framework is exactly backwards. *Quirin* was a narrow decision, explicitly confined to the precise facts before the Court. 317 U.S. at 19-20. Since *Quirin*, this Court has continued to refer to *Milligan* as "one of the great landmarks in this Court's history." *Reid*, 354 U.S. at 30 (plurality). It has reaffirmed the principles of *Milligan* numerous times when the government has claimed that a threat to national security justifies the arrest, detention, or trial of an American citizen by the military. *See Duncan*, 327 U.S. at 324 (rejecting military jurisdiction to try civilians even under statute authorizing martial law); *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 argument that "concept 'in the field' should be broadened . . . under the conditions of world tension which exist at the present time"); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) (rejecting military authority to arrest and try discharged former soldier); *Endo*, 323 U.S. at 299 (rejecting power to detain loyal American citizen of Japanese descent during World War II). As *Reid* noted:

> Throughout history many transgressions by the military have been called "slight" and have been justified as "reasonable" in light of the "uniqueness" of the times. We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military.

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law is narrow. *Compare id.* at 121, 123, 127 (opinion of Court), *with id.* at 139-42 (Chase, C.J., concurring). The disagreement in *Milligan* is not relevant here, however, because the military does not purport to be detaining Padilla pursuant to any lawful imposition of general martial law – nor could it. And neither the Court nor Chief Justice Chase intimated that military jurisdiction could be exercised over a civilian citizen in the United States absent martial law.

354 U.S. at 40 (plurality). But "[w]e should not break faith with this nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution." *Id*. In contrast, the two-year, ongoing military detention of Jose Padilla is fundamentally at odds with that tradition.

B. Congress Has Not Authorized Padilla's Military Detention.

A statute that authorized the military detention of an American citizen based on untested allegations of his "association" with a terrorist group and "loose talk" of future acts of violence would present grave constitutional questions. The Court need not resolve those questions today, however, for there is no such statute. In reviewing deprivations of individual liberty, this Court consistently has required, at a minimum, the clearest authority from Congress. The Court of Appeals correctly found that such authority is lacking in this case.

1. "In traditionally sensitive areas . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (quotation marks omitted); *Greene v. McElroy*, 360 U.S. 474, 507 (1959) ("explicit action [by lawmakers], especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws"). This "clear statement" requirement applies most forcefully in the context of restraints on personal liberty – particularly physical incarceration like that here. "Where the liberties of the citizen are involved . . . we will construe narrowly all delegated powers that curtail or dilute them." *Gutknecht v. United States*, 396 U.S. 295, 306-07 (1970) (citation and quotation marks omitted).

The clear statement rule does not disappear in times of war or emergency; to the contrary, in such times the Court has been especially vigilant. In our early years, the Court held that a

congressional declaration of war does not grant the President authority to confiscate enemy persons or property found domestically, without an additional clear authorization of those seizures by Congress. *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814). Chief Justice Marshall explained that even a "declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found, at the time, within the [domestic] territory." *Id*. at 126; *see also Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804) (Marshall, C.J.) (striking down wartime seizure of ship traveling *from* a French port because congressional statute authorized seizure of ships traveling *to* a French port). The Court reiterated this principle after the Civil War, finding that "[t]he clearest language would be necessary to satisfy us that Congress intended" to grant the military power to determine judicial questions, because "[i]t is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." *Raymond v. Thomas*, 91 U.S. 712, 715-16 (1875) (ruling that statutes that gave "very large governmental power to the military commanders" during Reconstruction were not sufficient to authorize military to void local court decree).

The Court has adhered to this clear statement requirement in modern wartime cases. In *Endo*, the Court construed a Congressional enactment and prior Executive Order concerning the Japanese-American internment camps of World War II. After reviewing the requirements of the Fifth and Sixth Amendments and the Habeas Suspension Clause and citing *Milligan*, the Court emphasized: "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." 323 U.S. at 300. Because the statute did not use "the language of detention," no authority to detain existed. *Id*.

Two years later, in *Duncan*, the Court applied the same rule in holding that a congressional enactment allowing the Governor of Hawaii to "place the Territory . . . under martial law," 327 U.S. at 307 n.1, must be narrowly construed, because Congress "did not specifically state to what extent the army could be used or what power it could exercise. It certainly did not explicitly declare that the Governor in conjunction with the military could for days, months or years close all the courts and supplant them with military tribunals." *Id*. at 315.

The clear statement rule remains a central tenet of this Court's jurisprudence. *See*, *e.g.*, *St. Cyr*, 533 U.S. at 298-300; *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) ("Based on our conclusion that indefinite detention of aliens . . . would raise serious constitutional concerns, we construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review"). Given the substantial constitutional questions presented in this case by the indefinite military imprisonment of an American citizen, without trial or adversarial process of any kind, based solely on untested allegations of "association" with a terrorist group and "loose talk" suggesting potential future criminal acts, a clear statement of congressional authority is, at a minimum, required.

2. *Quirin*, the case on which the Government chiefly relies, held that "Congress ha[d] *explicitly provided*, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war." 317 U.S. at 28 (emphasis added); *cf. Madsen v. Kinsella*, 343 U.S. 341, 355 n.22 (1952) ("[T]he military commission's conviction of [the *Quirin*] saboteurs . . . was upheld on charges of violating the law of war *as defined by statute*") (emphasis added); *In re Yamashita*, 327 U.S. 1, 7 (1946) (*Quirin* military commission upheld on basis of Congress's power under Offenses Clause of Article I). Thus, the Court in *Quirin* rested military jurisdiction to try offenses against the law of war on Congress's highly specific statutory authorization of such trials

in the Articles of War – not on the Declaration of War by the United States against Germany.[10] In short, the clear statement rule was satisfied in *Quirin*.

The Government correctly notes that the Articles of War relied on in *Quirin* remain in force today. *See* 10 U.S.C. §§ 801-941 (Uniform Code of Military Justice). But while those statutes may provide a clear statement authorizing "the *trial* and punishment of offenses against the law of war," *Quirin*, 317 U.S. at 27 (emphasis added), they cannot plausibly be read to provide a clear statement authorizing the indefinite and potentially permanent military detention of an American citizen *without trial*. *See*, *e.g.*, 10 U.S.C. § 821 (referring to "offenders or offenses that by statute or by the law of war may be *tried* by military commissions") (emphasis added); *see also* Louis Fisher, Congressional Research Service, *Military Tribunals: The Quirin Precedent* 6 (2002) ("CRS Report") (describing role of *Quirin* counsel); *Yamashita*, 327 U.S. at 5 (six officer-lawyers appointed as defense counsel in military trial of Japanese general "demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged").

Detention without charge poses far greater risks of error and abuse than trials do. And those risks become even sharper in the "war on terror," where suspected saboteurs cannot readily be distinguished from the general civilian population. *Infra* at 33-36. Indefinite detention – especially in solitary confinement, incommunicado, and subject to coercive interrogation – plainly raises unique constitutional problems not presented by the adversarial trial of defendants represented by counsel. *Infra*

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[10] That is especially striking, because the Executive's powers are larger when war is formally declared than in an undeclared or limited armed conflict. *See Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) ("If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, . . . but if a partial war is *waged*, its extent and operation depend on our municipal laws") (emphasis added).

at 39-44. The unchecked power to detain claimed and exercised by the Executive here is simply without precedent in our Nation's history, and it has never been sanctioned by this or any other Court. It certainly is not authorized by the Court's passing reference in *Quirin* to the capture and detention of combatants as the necessary prerequisites to the saboteurs' trials that promptly ensued. *See* 317 U.S. at 31.[11]

3. The clear statement rule is buttressed here by the Non-Detention Act, enacted by Congress is 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). Both courts below correctly held that § 4001(a) plainly applies to Padilla's military imprisonment, and that the statute therefore clearly *prohibits* Padilla's detention absent specific authorization from Congress for that detention. Pet. App. 135a-139a, 43a-50a.

In response, the Government contends that § 4001(a) applies only to *civilian*, not *military*, detentions of citizens. US Br. 45-48. But as this Court has recognized, "the plain language of § 4001(a) proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original). The statute cannot be twisted to say that only detentions of citizens by civilian authorities are impermissible (absent authority from Congress), but this prohibition may be avoided if citizens are imprisoned by the military instead. The Government's attempt to rewrite the

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[11] Indeed, the only decision we are aware of upholding military detention of an American citizen without trial, *In re Territo*, 156 F.2d 142 (9th Cir. 1946), is distinguishable in multiple ways, including the critical fact that Territo was held to be an *enemy alien* notwithstanding his American citizenship, *id*. at 145, and he was captured on the battlefield in Italy wearing part of an Italian army uniform, *id*. at 143. In addition, Territo was afforded a full habeas corpus hearing in which witnesses were heard and he was assisted by counsel.

statute must be directed to Congress, not this Court.

In light of the statute's plain language, no recourse to extra-textual materials is needed or proper. Nonetheless, the history and purpose of the Act confirm its plain meaning. *See generally* Pet. App. 43a-50a. Section 4001(a) was enacted to repudiate the experience of the notorious Japanese-American internment camps of World War II and to repeal the Emergency Detention Act of 1950 ("EDA"). *See* H.R. Rep. No. 92-116 at 1 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435-36 ("H. Rep."). Contrary to the Government's astounding claims, those internment camps were not wholly civilian. Although they were *administered* by a civilian agency, they were directly and heavily controlled by military commanders.[12]

Section 4001(a) also repealed the EDA, which likewise was directed toward the detention of persons believed to be a threat to the security of the country, including in times of war. The EDA authorized the President, in time of invasion, declared state of war, or insurrection in aid of a foreign enemy, to proclaim an "Internal Security Emergency" and to apprehend

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[12] Ms. Endo "was evacuated from Sacramento, California, in 1942, pursuant to certain *military orders* which we will presently discuss. . . ." 323 U.S. at 284-85 (emphasis added). Those military orders are discussed at length at pages 285 through 290 of the opinion. Among other things, it was a Proclamation of the *Secretary of War* that "provided that all persons of Japanese ancestry in [designated military] areas were required to remain there unless written authorization to leave was obtained from the Secretary of War or the Director of the War Relocation Authority. It recited that the United States was subject to 'espionage and acts of sabotage, *thereby requiring the adoption of military measures* necessary to establish safeguards against such enemy operations emanating from within as well as from without the national boundaries.'" *Id.* at 289 n.3 (emphasis added, citation omitted). Every citizen of Japanese ancestry who was permitted to leave a camp "was said to remain in the 'constructive custody' of the *military* commander in whose jurisdiction the Relocation Center was located." *Id.* at 291 n.9 (emphasis added). The internment detentions can hardly be described as "civilian" merely because the military ordered citizens into camps that were administered by civilian agents.

and detain persons as to whom there was reasonable ground to believe that they "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." Pub. L. No. 81-831, codified at 50 U.S.C. §§ 812, 813, 64 Stat. 1021 (1950).[13] Section 4001(a) *repealed* the Executive's right to detain such persons. Although those detentions were to have been administered by the Attorney General, there is no indication that Congress would have been satisfied had the same wartime spies and saboteurs covered by the EDA simply been detained instead by military authorities.

Indeed, Congress recognized that "the constitutional validity" of the EDA was "subject to grave challenge." H. Rep. at 5, *reprinted in* 1971 U.S.C.C.A.N. 1435, 1438. As explained in the House Report, the criteria for detention in the statute "would seem to violate the Fifth Amendment by providing imprisonment not as a penalty for the commission of an offense, but on mere suspicion that an offense may occur in the future. The Act permits detention without bail even though no offense has been committed or is charged." *Id*. Moreover, Congress specifically rejected the initial proposal for a simple *repeal* of the EDA, without adding the explicit prohibition of § 4001(a): "Repeal alone might leave citizens subject to arbitrary executive action, *with no clear demarcation of the limits of executive authority*." *Id*. (emphasis added). Ironically, what the Government seeks to uphold with respect to Padilla – imprisonment without charge during an alleged war based upon suspicion that an offense may occur in the future – is precisely what Congress feared could occur under the EDA and enacted § 4001(a) to prevent. Yet the Government claims § 4001(a)

[13] The EDA originally was enacted in response to a legislative finding that a "world Communist movement" was engaged in covert operations within the United States, through operatives in the United States whose mission was to engage in "treachery . . . espionage, sabotage, [and] terrorism." Act of Sept. 23, 1950, Pub. L. No. 81-831, §§ 2(1), 2(7), 101(1), 101(6), 64 Stat. 987-88, 1019-20.

and the repeal of the EDA are wholly irrelevant.

4. The Government contends that authority for Padilla's detention is conferred by the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF") (Pet. App. 59a-60a), enacted by Congress following the attacks of September 11, and by an appropriations statute for the Department of Defense, 10 U.S.C. § 956(5). Neither law authorizes the military detention of citizens like Padilla.

a. The AUMF says *nothing* about military detentions of citizens, and it simply cannot be viewed as authority – let alone a "clear statement" of authority – for such an unbounded and extensive curtailment of individual liberties. The AUMF does not mention detention, much less define who is subject to being detained, how the detention decisions shall be made or reviewed, how long such persons may be imprisoned, or what rights they shall have while confined. Basic constitutional rights of trial by jury, civilian over military rule, and judicial review of executive detention cannot simply be eliminated by implication. The President's scheme for detaining citizens indefinitely in military prisons is unprecedented, yet there is no discussion whatsoever in the legislative history of the AUMF of the lawfulness or wisdom of such a system. The obvious explanation for this lack of debate is that Congress did not contemplate or intend to authorize such a scheme.

The Government principally relies on the Preamble of the AUMF, *see* US Br. 2, 15, 38, 40, 41, 43, which states that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Pet. App. 59a. But while the Preamble recognizes that the President *has* authority to deter and prevent acts of terrorism, it does not begin to identify what that authority *is*, much less state that it includes detentions like that here. Under the Government's view, the general language of the Preamble recognized or created executive authority to do *anything* that could be said to "deter and prevent acts of

international terrorism against the United States." The Preamble cannot reasonably be interpreted as conveying such unlimited power to the President, which would present grave constitutional questions.

The Government also relies on § 2(a) of the AUMF, which provides that the President is authorized to use "all necessary and appropriate force" against those nations, organizations, or persons he determines were responsible for the September 11 attacks, "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Id*. at 60a. This authorization to use "necessary" and "appropriate" force does authorize the President to use military power; indeed, the AUMF itself provides that "this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." Pet. App. 60a; *see* 50 U.S.C. § 1541 *et seq*.[14] But there is nothing in the AUMF to suggest that Congress intended to displace the criminal laws (and protections associated with those laws) with a wholly new, unbounded scheme of preventive military detention by executive fiat. The AUMF simply is not a "clear statement" of congressional intent to curtail the fundamental rights of citizens against military detentions without trial. *See Endo*, 323 U.S. at 300 (finding no authority where statute did not use "the language of detention").[15]

Ultimately, the Government suggests that Congress

[14] The War Powers Resolution requires the President to cease military operations within 60 days unless Congress has declared war or specifically authorized the use of the armed forces. 50 U.S.C. § 1544(b).

[15] By its own admissions, the Government also cannot show that Padilla even falls within its own broad view of the AUMF, because the Government does not claim that Padilla is a "member" of al Qaeda (and certainly has no personal connection to the September 11 attacks). *See* US Br. 44 n.18; Pet. App. 170a. Unless the AUMF authorizes the indefinite military detention of any person who even has "associated" with a "member" or "leader" of al Qaeda, Padilla falls outside the statute.

necessarily authorized detention as a lesser-included power of the power to shoot and kill. US Br. 42 n.17. In certain circumstances, that might be true. Where the military has authority to shoot enemy soldiers, such as on the battlefield in Afghanistan, the military has power to capture and detain those soldiers instead for some period of time. But unless the Government contends it had the right to shoot Padilla where he was seized by the military – in this case, a maximum-security cell at the MCC – there is no subsidiary power to detain him militarily instead, let alone a clearly stated power to do so.

This lack of any clear statement in the AUMF authorizing the detention without charge of suspected citizen-saboteurs renders this case far different from *Quirin*. As noted above, *Quirin* found congressional authorization not in Congress's Declaration of War against Germany (comparable to, but far more solemn than, an "authorization to use military force"), but rather on specific provisions of the statutory Articles of War that clearly established the authority of "military commissions" to conduct "trials" of particular "offenses." 317 U.S. at 26-27.

Congress's subsequent enactments also confirm that the AUMF did not authorize Padilla's detention. Just one month after passing the AUMF, the same Congress passed the Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). Unlike the AUMF, the Patriot Act expressly gave the Executive authority to detain without criminal charge *aliens* suspected of terrorist activity, for short periods of time before the initiation of criminal or removal proceedings.[16] Although there were

[16] The Patriot Act authorizes executive detention of terrorist aliens, but requires the Executive either to put an alien in removal proceedings, charge him with a criminal offense, or release him "not later than 7 days after the commencement of such detention." 8 U.S.C. § 1226a(5). The Attorney General may seek to renew the detention on an immigration violation charge, but that renewal request is subject to judicial oversight, and the detainee has a continuing ability to challenge the detention. *Id*. §§ 1226a(6) & §1226a(b).

extensive debates on this topic, there was no discussion of the parallel detention of *American citizens* suspected of terrorist activity.[17] If, as the Government claims, the AUMF had already delegated to the Executive unfettered discretion to detain any suspected terrorist without trial, whether or not a citizen, the Patriot Act's provisions would have been redundant. For it not to be so, one would have to conclude that Congress deliberately enacted § 1226a of the Patriot Act to provide aliens with *more* protections than citizens. This is simply implausible.[18]

b. Similarly, 10 U.S.C. § 965(5) does not authorize the military detention of Padilla. The provision simply authorizes funds to be used for the maintenance of prisoners of war and "similar" persons, but does not authorize detention of any such person, much less expressly and clearly authorize the indefinite detention of an American citizen arrested unarmed in the

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[17] *See* Christopher Bryant and Carl Tobias, *Youngstown Revisited*, 29 Hastings Const. L.Q. 373, 386-91 (2002). The Patriot Act also greatly expanded federal criminal prohibitions on terrorism, as requested by the President. *See* Pub. L. No. 107-56, §§ 802, 803, 805, 808, amending 18 U.S.C. §§ 2331, 2339, 2339A, 2339B. These provisions appear specifically to encompass the unlawful acts attributed to Padilla. The Government contends that, instead of utilizing these provisions, the President simply may detain without trial anyone he suspects may have planned or committed a terrorist act within the United States.

[18] As a result, this case is markedly different from *Dames & Moore v. Regan*, 453 U.S. 654 (1981), on which the Government relies. In that case, the Court reviewed the long history of executive settlement of claims against foreign sovereigns, *id*. at 679-84, which stands in marked contrast to the unprecedented detention here. Against that background, the Court found presidential authority to suspend claims based on other statutes that clearly indicated that Congress approved the settlement authority at issue, and on the absence of any contrary indication of legislative intent. *Id*. at 678-86. Here, the Government points to no other legislation indicating congressional approval of executive detentions, and both the Patriot Act and § 4001(a) strongly indicate that Congress did *not* intend to allow indefinite military imprisonments of citizens without trial.

United States.[19] In *Endo*, the Court rejected an argument virtually identical to that made by the Government here. 323 U.S. at 303 n.24 ("the appropriation must plainly show a purpose to bestow the precise authority which is claimed," which cannot be deduced from "a lump appropriation").

In sum, the statutes on which the Government relies in this case, unlike those in *Quirin*, provide no clear statement authorizing the Executive's action. To the contrary, Congress expressly prohibited this detention through § 4001(a).

C. The President Lacks Authority to Detain Padilla for the Additional Reason that He Is a Civilian Citizen Not Subject to Military Jurisdiction.

Even if the President possessed some authority to order the military to arrest and detain suspected "combatants," that authority would not permit the exercise of military jurisdiction over Padilla, because he does not fit into any traditional or recognized category of "combatant" subject to military instead of civilian authority. In arguing to the contrary, the Government again relies exclusively on *Quirin.* But *Quirin* involved clear congressional authorization of the precise executive action taken – the opposite of the clear *prohibition* here. In addition to that dispositive distinction, the ambit of the military jurisdiction permitted in *Quirin* – whether to try and punish through a military commission, or even to detain without trial – does not extend to this case.[20]

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[19] Nor does § 965 amend substantive law. *See*, *e.g.*, *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992).

[20] Significantly, the Government itself does not define consistently what it means by "enemy combatant." In this case, it defines the "legal standard" for "enemy combatant status" as follows: "'Citizens 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.'" US Br. 6 (quoting *Quirin*, 317 U.S. at 37-38 (ellipses inserted by Government)). In its Brief in *Hamdi v. Rumsfeld*, No. 03-6696 (U.S. filed Mar. 30, 2004), however, the Government defines "enemy combatant" quite differently: "When an

1. This Court has never sanctioned military jurisdiction over an individual who was not a soldier in a recognized army or found in an area of active combat or under military occupation or martial law. *Quirin* respected these traditional boundaries on military jurisdiction recognized in *Milligan* and adhered to in cases like *Duncan*, *Toth*, and *Reid* – boundaries the Government transgresses here. As described *supra* at 12-14, *Milligan* held unconstitutional the exercise of military jurisdiction over an individual accused of plotting to engage in hostile and warlike acts with a secret militia group, "holding communication with the enemy," and "affording aid and comfort to rebels against the authority of the United States." 71 U.S. at 6-7. Milligan was not an actual member of the Confederate army and therefore remained a civilian under civilian jurisdiction – not an "enemy combatant" subject to military jurisdiction.

Quirin, by contrast, involved admitted soldiers in a foreign army. Each of the defendants was conceded to be a member of the German Army and wore a German uniform when landing with explosives in the United States. 317 U.S. at 21. In short, "the petitioners in *Quirin* admitted that they were soldiers in the armed forces of a nation against whom the United States had formally declared war." Pet. App. 39a. In contrast, the Government merely alleges that Padilla is "associated" with, but is not believed to be a "member" of, al Qaeda. *Id*. at 169a, 170a.

That is a critical distinction (even assuming for the sake of argument that al Qaeda could be viewed as an enemy army, *but see infra*, at 33-36). The difference between a citizen who merely aids an enemy army and one who is a member of that

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individual is captured, commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant, *i.e.*, whether the individual 'was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States.' Individuals who are not enemy combatants are released." *Id*. at 3 (citation to DoD fact sheet omitted).

army distinguished *Milligan* from *Quirin* – a fundamental distinction that has long been recognized in the law of war. Outside of zones subject to actual martial law or military government, the law of war provides for military jurisdiction only over members of our own armed forces or over "[i]ndividuals of the *enemy's army*." William Winthrop, *Military Law & Precedents* 838 (2d ed. 1988) (emphasis added); *accord Quirin*, 317 U.S. at 30. That fundamental distinction between soldiers and civilians informs *Quirin*'s every reference to "combatants" or "belligerents" and its further distinction between "lawful and unlawful combatants," all of which refer to members of the armed forces.[21] Indeed, the historical instances of military jurisdiction cited by *Quirin* concerned members of enemy armed forces in the ordinary meaning of that term: officers and soldiers.[22]

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[21] *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) at art. 43(2) ("Protocol I Additional") ("Members of the armed forces of a Party to a conflict . . . are combatants"); Jennifer K. Elsea, *Presidential Authority to Detain "Enemy Combatants,"* 33 Presidential Studies Q. 568,570 (Sept. 2003). Combatant is a dual use term under the law of war, defining not only who may be detained as a POW but also who may be shot. Under the law of war, those who are not members of the armed forces of a Party (a sovereign nation) to a conflict cannot be treated as combatants, that is as targets for military attack, "unless and for such time as they take a direct part in hostilities." Protocol I Additional, art. 51(3). Thus a civilian – a person who is not a member of the armed forces of a party to a conflict – cannot be treated as a combatant except during the actual time he or she is taking a direct part in hostilities, because those are the only persons who may lawfully be shot. Air Force Pamphlet 110-31, *International Law - The Conduct of Armed Conflict and Air Operations*, para. 3-3.a (1976). Padilla is not alleged to have been captured while participating directly in combat.

[22] *E.g.*, 317 U.S. at 31 n.9 (military commission tried "Major John Andre, Adjutant-General to the British Army"); *id.* at 32 n.10 (military commissions tried "T.E. Hogg, . . . being commission, enrolled, enlisted or engaged by the Confederate Government," "John Y. Beall, . . . holding a commission in the Confederate Navy," "Robert C. Kennedy, a Captain of the Confederate

In the 20th Century the executive continued to respect the distinction between members of foreign armed forces who were subject to military jurisdiction, and civilians who were not. During World War I, several spies who were German citizens and members of the German army were tried by military commissions. *See United States ex rel. Wessels v. McDonald*, 265 F. 754, 760-61 (E.D.N.Y. 1920) (upholding military jurisdiction). But two American citizens who were alleged to have participated in the conspiracy, but who were not members of the German army, were tried in federal court. *United States v. Fricke*, 259 F. 673 (S.D.N.Y. 1919); *United States v. Robinson*, 259 F. 685 (S.D.N.Y. 1919). Although American civilians had participated in the saboteurs' plot in *Quirin*, the only ones who were tried by military commission were members of the German military. Non-soldiers who conspired with them were tried in federal court. *See Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943) (concerning Haupt's father); CRS Report at 15; *cf. Yamashita*, 327 U.S. at 9 (carefully noting that case did *not* concern "power of military commissions to try civilians").

Not surprisingly, then, the Government attempts to cast Padilla as the equivalent of a soldier in order to subject him to military jurisdiction. US Br. 31, 32. But even the Government's own declaration attempting to make that case is forced to admit that Padilla is at most "closely associated" with "known members and leaders of the Al Qaeda terrorist

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Army," and other "soldiers and officers 'now or late of the Confederate Army'") (citation omitted); *id.* at 42 n.14 (military commissions tried "a number of Confederate officers and soldiers"). Insofar as certain offenses against the law of war, such as spying, might be committed by civilians as well as soldiers, at the time the Constitution was framed military jurisdiction in such cases was limited to "alien spies," not American citizens. *Id.* at 41. Although this limitation was lifted in response to the unique situation of the Civil War, the only citizen spy cases relied on by the Court in *Quirin* concerned trials by military commissions of "Confederate officers and soldiers," not civilians. *Id.* at 42 n.14.

network," but is not himself believed to be "a 'member' of Al Qaeda." Pet. App. 169a, 170a. On that reasoning, however, the civilians who conspired with the members of the German military in the Wessels and Quirin plots would also have been subject to military jurisdiction, because those civilians were plainly "closely associated" with the enemy armed forces. So too would the Milligan plotters have been. *See* 71 U.S. at 6 (Milligan conspirators were charged and convicted of "holding communication with the enemy"); *Quirin*, 317 U.S. at 45 (nonetheless, Milligan was "non-belligerent"). But this country's unbroken practice has been to try citizen civilians – even those who, like Padilla, were accused of aiding the enemy – in Article III courts.

2. The Government's attempt to extend *Quirin* far beyond its facts should be rejected in light of the Court's repeated admonitions in *Quirin* about the narrowness of its holding. The Court emphasized that "[w]e have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war," given that "petitioners here, upon the conceded facts, were plainly within those boundaries." 317 U.S. at 45-46; *see also id*. at 46 ("We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission").

The Court's attempt in *Quirin* to narrowly define its holding is best understood in the context in which that decision was issued. *Quirin* was decided under extraordinary procedures during our Nation's darkest days in World War II. The Court hastily assembled during its summer recess, on one or two days' notice, for two days of oral argument without advanced briefing. CRS Report at 16. The Court did not even have certiorari jurisdiction when it began hearing the case. *Quirin*, 317 U.S. at 19-20.[23] Immediately after argument, the

[23] Although the petitioners moved to file original habeas corpus petitions,

Court issued a summary order upholding military jurisdiction without explaining why. *Id*. at 18, unnumbered note. Only later did the Court assemble the support for its action in an opinion that was issued after six of the seven petitioners – including Haupt, the petitioner who claimed American citizenship, and thus the only one whose circumstances are relevant here – had already been executed.[24] By then it was too late to revise the Court's judgment. As Justice Frankfurter noted later, *Quirin*'s deviation from standard procedures was "not a happy precedent." CRS Report at 39.[25]

It also appears that *Quirin* did not "rest [its] decision on the narrowest possible ground capable of deciding the case." *Dames & Moore*, 453 U.S. at 660. The Court addressed whether a military commission constitutionally could exercise jurisdiction over an American citizen based on the dubious *assumption* that Haupt was indeed a citizen. Haupt was born in Germany, but claimed to be a naturalized American citizen. 317 U.S. at 20. But the Government cited controlling authority that Haupt had forfeited any American citizenship through his allegiance to Germany. *Id*. And regardless of citizenship as such, Haupt's decision to abide in Germany after the United States' formal Declaration of War would have rendered him an *enemy alien* for purposes of the law of war. *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946); *see also Quirin*, 317 U.S. at 25 (recognizing that the petitioners were "enemy aliens"). The latter status distinguishes Haupt from American citizens

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that motion was denied by the Court, so that certiorari was the only basis for the Court's jurisdiction. 317 U.S. at 18, unnumbered note (per curiam order).

[24] The executions were carried out on August 8, 1942, eight days after the Court's *per curiam* order was issued. CRS Report, at 15.

[25] Justice Douglas likewise explained: "Our experience with [*Quirin*] indicated . . . to all of us that is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble." CRS Report at 39.

generally, including Padilla.[26]

Since *Quirin*, this Court has reaffirmed the jurisdiction of military commissions over *aliens* abroad, but it has never again upheld military jurisdiction, here or abroad, over an American citizen who is not a member of our own armed forces, much less extended such jurisdiction beyond the facts of *Quirin* itself. *See Yamashita*, 327 U.S. at 9 (describing *Quirin*'s holding as one concerning "trials of *enemy aliens* by military commission[s]") (emphasis added); *Johnson v. Eisentrager*, 339 U.S. 763, 768-77 (1950) (sharply distinguishing the rights of American citizens and the rights of enemy aliens abroad). Indeed, even the President's recent order creating military commissions extends their jurisdiction only to aliens, not to citizens. Notice, *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833, § 2(a) (Nov. 16, 2001). The Government's ahistorical reading of *Quirin* ignores this distinction.

3. Nor do changed circumstances permit the President to exercise legislative powers in order to expand the categories of persons subject to military jurisdiction under *Quirin* and the laws of war. As the Court of Appeals recognized, this case does not require the Court to determine whether the "war on terror" fits into the legal category of armed conflict. Pet. App. at 30a. But it does require the Court to recognize that Padilla's detention raises profoundly different constitutional questions from the historical capture and detention of enemy soldiers as prisoners of war, to which *Quirin* alludes. *See* 317 U.S. at 31. The *Quirin* Court reached its decision in the context of a traditional war between nation-states and simply had no occasion to address the questions that would be raised in the circumstances of a "war" with a secret, non-state terrorist

[26] Enemy alien status requires a formal declaration of war against (or a formal presidential proclamation upon invasion or predatory incursion by) a foreign *nation or government*. *See Johnson v. Eisentrager*, 339 U.S. 763, 775 (1950); *Ludecke v. Watkins*, 335 U.S. 160 (1948); 50 U.S.C. § 21.

organization.[27]

In past armed conflicts, the President's power to detain prisoners of war without trial was inherently limited by the scope of the war. The persons subject to detention were easy to identify, since they were captured on the battlefield or were soldiers in the armed forces of the opposing government. The end of the war would be marked by a peace treaty with the opposing government, at which time prisoners would be returned home to resume their peacetime occupations.

The war on terror knows no such limits, and the power the President seeks is thus unlimited in ways that are impossible to square with our constitutional system of limited government and legal protection for individual liberty. The Government asserts that the President's authority cannot be limited to "traditional combat zones," and that he must have "authority to seize and detain enemy combatants wherever found, including within the borders of the United States." US Br. 37-38. It asserts that this power to detain may be exercised on the basis of undisclosed intelligence information that a citizen, exhibiting no overt signs of belligerency, has "associated" with the enemy. US Br. 4; Pet. App. 5a-6a. And it contends that the President alone may define who the enemy is. US Br. 35

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[27] Indeed, the language from *Quirin* on which the Government relies (in *this* case) to define enemy combatants refers to "citizens who associate themselves with the military arm of the *enemy government*." *See* note 20, *supra*. Padilla simply does not meet that definition.

It is also ironic that the Government relies so heavily on the law of war – a body of customary international law, *see* U.S. Army Field Manual – when it has asserted in another case this Term that it is the role of Congress to "define and legislate offenses against the law of nations," and it condemns customary international law as "inherently indeterminate" and "ill-suited" to interpretation and enforcement by the courts in the absence of legislation specifically codifying it. US Br., *Sosa v. Alvarez-Machain*, No. 03-339, at 28-30, 35 (U.S. filed Jan. 23, 2004). Here, moreover, no *statute* even incorporates by *reference* the "law of war" or the "law of nations" as a basis for military *detention* – in sharp contrast to the jurisdictional statutes in both *Quirin* and *Sosa*.

(arguing that President's decision when and against whom to use his Commander-in-Chief powers in defense of the nation is "not conditioned on any action by Congress").

Moreover, unlike a traditional war, the "war on terror" may never end, and there is no clear point at which prisoners must be released. Thus, the extraordinary powers the President seeks today are not likely to be retired with the end of the "war," but are likely to become a permanent fixture of American law. The implication of the Government's position is that for the foreseeable future, any citizen, anywhere, at any time, is subject to indefinite military detention based on the President's determination that there is "some evidence" he has associated with a terrorist organization with violent intent. This would represent a dramatic shift in the constitutional balance of power in ways that the legislatively authorized trial by military commission of admitted German soldiers simply did not.

The extension of the laws of war beyond their internal limits and historical boundaries is a core legislative act, and not something that can constitutionally be accomplished by executive fiat. *See Youngstown*, 343 U.S. at 587 (Jackson, J., concurring) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker"). If this nation is to grant such new and awesome powers to its military commander, that decision must be made by our lawmakers – not by the very commander whose power is at issue.

Other democratic nations such as the United Kingdom and Israel have addressed the threat of organized terrorist networks through detailed legislation, carefully defining the circumstances under which suspected terrorists may be preventively detained and establishing procedural safeguards, including time limits and robust judicial review.[28] The model of a unilateral

[28] *See* Stephen J. Schulhofer, *Checks and Balances in Wartime*, 102 Mich. L. Rev. (forthcoming), *available in abridged form at* http://www.law.nyu.edu/faculty/workshop/spring2004/schulhofer.pdf.

and unlimited executive power to detain, as claimed by the Government here, not only is contrary to our own constitutional principles but would set a disturbing worldwide precedent. Certainly, Congress's decision in the days following September 11 to authorize the President to use military force simply does not reveal any intent by Congress to create a comprehensive scheme for preventive detention of suspected terrorists. And it does not reflect the kind of deliberation and democratic consensus that ought to be present before this Court passes on the constitutionality of such a dramatic departure from our traditions.

D. The President Does Not Have Authority Under the Commander-in-Chief Clause to Detain Padilla.

Because the AUMF does not authorize Padilla's military detention, and § 4001(a) expressly prohibits it, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Not even the most expansive reading of the President's authority can justify the extraordinary powers he asserts here.[29]

Time and again this Court has reaffirmed Alexander Hamilton's oft-cited 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," *The Federalist* No. 69, at 418 (Alexander Hamilton) (Clinton Rossiter, ed. 1961), and imply no sweeping authority to seize people or property within American borders, even in times of war. *See Brown*, 12 U.S. at 128-29 (wartime seizure of enemy property, even where

[29] The President argues that his power to take whatever measures he deems appropriate to defeat the enemy is "not conditioned on any action by Congress." US Br. 35. Indeed, the Government goes so far as to suggest that Congress is constitutionally forbidden from interfering with the President's power to detain "enemy combatants." US Br. 49.

consistent with international norms, "is proper for the consideration of the legislature, not of the executive"); *Milligan*, 71 U.S. at 120 (President may not unilaterally establish commission to try civilians in wartime "because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws"); *Toth*, 350 U.S. at 14 ("[the] assertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law").

The Court's most important pronouncement on the scope of the Commander-in-Chief Clause came in *Youngstown*. There, at the height of the Korean War, President Truman seized domestic steel mills in order to avert a strike, asserting his power as Commander-in-Chief and citing the "indispensability of steel as a component of substantially all weapons and other war materials." 343 U.S. at 590 (quoting Executive Order). The Court firmly rejected the argument. *Id*. at 587; *see also id*. at 644 (Jackson, J., concurring) (President "has no monopoly of 'war powers'").[30]

The Government cites to no authority remotely suggesting that the President, acting in contravention of legislation by Congress, and absent a compelling military exigency, may seize an American citizen in the United States and detain him in a military prison. The Government places principal reliance on

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[30] Similar to its response to § 4001(a), the Government argues that the seizure of domestic steel mills in *Youngstown* was improper only because President Truman addressed his order to the *civilian* sector, rather than the military. US Br. 36. Nothing in *Youngstown* suggests such a narrow basis for the Court's decision. Rather, Justice Black's opinion for the Court expressly noted that the taking of private property, even where necessary to supply soldiers in wartime, "is a job for the Nation's lawmakers, *not for its military authorities*." 343 U.S. at 687 (emphasis added). Indeed, the President's purported reliance on his military authority led Justice Jackson to admonish, "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." *Id*. at 646 (Jackson, J., concurring).

Quirin and *The Prize Cases*, but neither is on point. As discussed above, *Quirin* rested on express and specific statutory authorization of military trials. 317 U.S. at 26-27. In *The Prize Cases*, the Court simply made the unremarkable observation that the President could act to suppress an internal insurrection when there was no time for Congress to meet in advance. The President then sought, and received, express congressional approval at the earliest possible juncture. 67 U.S. (2 Black) 635, 670 (1862). In addition, the President already *had* express approval to repel insurgencies under prior acts of Congress. *See id*. at 668. Nothing in *Quirin* or *The Prize Cases* even hints at the remarkable proposition the Government asserts here: that the President may ignore the will of Congress and detain American citizens in a military prison simply because he is Commander-in-Chief.[31]

It is important to recognize the awesome nature of the unilateral authority the President claims: the inherent power under the Commander-in-Chief Clause to imprison citizens he decides are "associated" with organizations he deems to be "enemies" of the United States, indefinitely, without access to counsel, without meaningful judicial review, and without congressional authorization. And he claims the authority to exercise these extraordinary powers not simply overseas, or on the field of battle, or in situations where there is no time to go to Congress for authorization or to obtain review by the courts – but here, at home, when Congress and the courts are open and operating. These are powers fundamentally inconsistent with a democracy based on the rule of law.

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[31] The Civil War also involved conventional "organized armies," 67 U.S. at 670, under a secessionist government and thus was more similar to World War II than to the current "war on terror." Application of the law of war to the "current conflict" would raise constitutional questions that the Court in *Quirin* recognized but did not need to address on the conceded facts of that case. *See* 317 U.S. at 28-30, 45-46.

II. ANY MILITARY POWER TO DETAIN PADILLA CANNOT BE BASED SOLELY ON A DETERMINATION BY THE PRESIDENT.

The "Question Presented" by the Government is "Whether the President has authority as Commander in Chief and in light of [the AUMF] to seize and detain a United States citizen in the United States *based on a determination by the President* that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts. . . ." US Br. (I) (emphasis added). The military power to detain asserted by the Government is so vast that it cannot, consistent with the Due Process Clause, be based solely on a unilateral, unreviewable "determination by the President" that the individual is an "enemy combatant." The Government cites material outside the record concerning the supposed "process" it provided in connection with Padilla's detention as a combatant. *See* US Br. 6-7 (claiming that "[t]he President's determination to detain Padilla as an enemy combatant was the result of a careful, thorough, and deliberative process consisting of several layers of review") (citing Feb. 24, 2004 speech of White House Counsel, published on Mar. 11, 2004 in the Congressional Record). But no matter how many internal (and wholly discretionary, *see* 150 Cong. Rec. S2701, S2704 (daily ed. March 11, 2004)) layers the Government now may advance to defend its actions, the President and his advisors alone cannot exercise the power to detain Padilla in a military prison.

1. The essential guarantee of the Due Process Clause of the Fifth Amendment is that the Government may not imprison or otherwise physically restrain a person except in accordance with fair procedures, which extend beyond the good faith and honorable intentions of executive decision-makers. "It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws, not of men." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 177 (1951) (Douglas, J., concurring). The Framers

were most alarmed by the prospect of unrestrained executive agents, free to "imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure." *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) (quoting 4 W. Blackstone, Commentaries on the Law of England 349-50 (Cooley ed. 1899)).

The President's "assertion that [his] action . . . can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law has no support in the decisions of this Court." *Sterling v. Constantin*, 287 U.S. 378, 402 (1932). Moreover, the due process requirement applies with full force during times of war to military detentions of citizens seized outside the zone of combat. *See Duncan*, 327 U.S. at 322-24; *Milligan*, 71 U.S. at 118-21; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963) ("It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process").

Thus, this Court has long recognized the dangers to liberty inherent in military detention and trial, "dangers . . . which were sought to be avoided by the Bill of Rights and Article III of our Constitution." *Toth*, 350 U.S. at 22; *see also Duncan*, 327 U.S. at 322-24 (explaining constitutional preference for Article III courts over military tribunals). In light of these dangers, this Court has held that Article III courts, not the President, are to determine the lawful scope of military jurisdiction. *See Toth*, 350 U.S at 23 (upholding a district court order releasing an ex-serviceman from military custody for want of military jurisdiction). Thus, for example, Article III courts have the authority on habeas corpus review to determine whether a court martial or military commission has exceeded its jurisdiction, and if so, to order the petitioner's release from military custody. *See*, *e.g.*, *Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality). Without this important judicial safeguard, the boundary between civil society and the military would be

left in the military's hands, something the Framers sought to avoid.[32]

None of the cases cited by the Government supports the extraordinary claim that because of the conflict with al Qaeda, the President alone has authority to determine the jurisdictional fact that Padilla is an "enemy combatant." In *Quirin*, 317 U.S. at 21, *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), and *Territo*, 156 F.2d at 143, the factual findings giving rise to military jurisdiction were undisputed. In *Yamashita*, the petitioner was afforded counsel and the jurisdictional facts were established at trial after adversarial testing. 327 U.S. at 5. The facts in this case are neither "undisputed" nor "uncontrovertible." *See Walker v. Johnston*, 312 U.S. 275, 284 (1941). The "war on terror" cannot be used as an excuse to deprive courts of their core function of reviewing the legality of executive detention. *See St. Cyr*, 533 U.S. at 301.

2. A deprivation of liberty of the sort at issue here could never be accomplished based on a unilateral, unreviewable executive determination. "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation marks omitted);

[32] Moreover, judicial determination of jurisdictional facts such as these would have to be de novo, particularly because there have been no factual findings by an administrative tribunal to be reviewed under a more deferential standard. *See*, *e.g.*, *Burns*, 346 U.S. at 142-43 (plurality) (de novo determination of claims not yet considered). It is firmly established that jurisdictional facts are subject to de novo review, *see Crowell v. Benson*, 285 U.S. 22, 63-64 (1932); *Ng Fung Ho v. White*, 259 U.S. 276 (1922), particularly when the scope of military jurisdiction is at issue. *See Burns*, 346 U.S. at 142 (plurality); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *United States v. Grimley*, 137 U.S. 147, 150 (1890). The Government's "some evidence" standard, *see* n.1, *supra*, underscores that the Government effectively contends that *no* review is appropriate and that the determination of combatant status simply may be made, in fact, "by the President." US Br. (I).

accord Grannis v. Ordean, 234 U.S. 385, 394 (1914). "The Due Process Clause entitles a person to *an impartial and disinterested tribunal* in both civil and criminal cases," and "[t]he requirement of neutrality has been jealously guarded by this Court." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (emphasis added); *see Weiss v. United States*, 510 U.S. 163, 178 (1994) ("impartial judge" required in military court-martial proceedings). Thus, in a criminal case, it is fundamentally unfair for the accusing authority also to be the factfinder of guilt or innocence, *In re Murchison*, 349 U.S. 133, 136-39 (1955), and, in an administrative proceeding, a neutral adjudicator must conduct a de novo review of all factual and legal determinations made by parties with enforcement duties. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 618 (1993). The Government's alleged "process," consisting only of multiple, discretionary reviews of the same one-sided information by advisors serving the President, cannot meet this standard.

Any scheme for military imprisonment of the sort advocated by the Government here would require, at least, the presentation of clear and convincing evidence at an adversarial hearing before a neutral fact-finder where the accused is assisted by counsel. In analogous cases, when personal liberty – an interest "far more precious . . . than property rights," *Lassiter v. Dep't of Soc. Servs.,* 452 U.S. 18, 38 (1981) – was at stake, this Court has required a clear and convincing standard of proof. *See United States v. Salerno*, 481 U.S. 739 (1987) (pretrial detention without bail); *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Addington* v. *Texas*, 441 U.S. 418, 427 (1979) (civil commitment); *In re Winship*, 397 U.S. 358, 365-66 (1970) (juvenile delinquency); *Woodby v. INS*, 385 U.S. 276, 282 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization). Under the type of circumstances present here, the Court also has required access to counsel. *See In re Gault*, 387 U.S. 1, 36-

37 (1967) (juvenile delinquency); *cf. Salerno*, 481 U.S. at 755 (pretrial detention without bail); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (revocation of probation); *Lassiter*, 452 U.S. at 26-27 (recognizing "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty").

Moreover, it is "plain beyond the need for multiple citation" that a person's interest in freedom from indefinite physical detention is commanding. 452 U.S. at 27. That is particularly true where, as here, the "confinement . . . is not limited, but potentially permanent." *Zadvydas*, 533 U.S. at 691; *accord Demore v. Hyung Joon Kim*, 123 S. Ct. 1708, 1720-21 (2003). And the risk of an erroneous deprivation of liberty is particularly high in this case. Unlike a uniformed soldier taken into custody on the battlefield, a citizen like Padilla, arrested in a civilian setting on domestic soil, bears none of the indicia of combat. Any deference to executive judgment that might be appropriate in battlefield determinations is wholly absent here. In addition, the Government does not even argue that Padilla is a *member* of al Qaeda, claiming instead that he *associated* with that organization. US Br. 4-5. The scope and meaning of "associated with" are imprecise and invite government overreaching. Indeed, this Court often has emphasized that the definition of a class of detainable persons must be narrow and limited so that the Government's interests are sufficiently strong to justify detention. *See*, *e.g. Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (contrasting unconstitutional detention statute with one which "carefully limited the circumstances under which detention could be sought"); *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring) (suggesting that if a classification of harm "is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to

validate it").[33]

This Court need not define in the first instance, however, a constitutionally sufficient scheme for the military detention of citizens alleged to be "enemy combatants"– particularly in connection with the new, inherently amorphous "war on terror." Within our constitutional framework, it is for Congress to define, in the first instance, what an "enemy combatant" *is*; the *process* by a which a citizen may be subjected to military detention as such a combatant; and the *length of time* a citizen may be so imprisoned. Congress engaged in a similar exercise, carefully and after extensive debate, in the now-repealed EDA and with respect to the detention of certain aliens in the Patriot Act. Any such procedures enacted by Congress then would be subject to review by the courts. For purposes of the instant case, however, it is enough that the President certainly may not define these procedures on his own.

III. ON THE UNIQUE FACTS HERE, SECRETARY RUMSFELD IS A PROPER RESPONDENT SUBJECT TO PERSONAL JURISDICTION IN NEW YORK.

In an attack on personal jurisdiction rejected by every judge below, the Government claims absolute control over the

[33] There are many examples of erroneous accusations of terrorist activity, which underscores the need for strong procedural safeguards. *See*, *e.g.*, *In re United States for Material Witness Warrant*, 214 F. Supp. 2d 356 (S.D.N.Y. 2002) (ordering government investigation into erroneous Sept. 11-related charges brought against individual based on deliberately false statements by security guard); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402 (D.N.J. 1999) (granting writ of habeas corpus in case where detention was based on secret and false accusations of terrorism connections by ex-wife and detainee was able to effectively rebut accusations). There are, unfortunately, also cases where the Government has misled the courts. *See Korematsu v. United States,* 584 F. Supp. 1406, 1417 (N.D. Cal. 1984) (writ of *coram nobis* granted and conviction vacated based upon, *inter alia*, finding that "the government knowingly withheld information from the courts when they were considering the critical question of military necessity in this case").

location where challenges to its actions may be heard. It contends that Padilla's habeas corpus petition was filed improperly in New York, even though the Government itself chose to bring Padilla there and then sent agents of the military to seize him there – after Padilla had been placed in custody by a federal judge on a grand jury warrant, and after the judge had scheduled a hearing on motions challenging that warrant. The Government contends that a habeas corpus action can only be brought where the soldiers chose to take Padilla. The issue here, however, is the legality of the seizure that occurred on Chief Judge Mukasey's doorstep.

Early in our history, Chief Justice Marshall warned that it would "be extremely dangerous to say, that because . . . prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the person so seized in any place which the general might select, and to which he might direct them to be carried." *Bollman*, 8 U.S. at 136. That admonition applies fully here. It is not Respondent who seeks to manufacture jurisdiction in a venue with no connection to the seizure he contends was unlawful. The Government could have taken Padilla anywhere; it chose South Carolina for its own reasons. As Chief Justice Marshall saw, it would be deeply disturbing if the Executive and the military could so control the jurisdiction of the courts. There is nothing in the law of habeas corpus that requires this Court to countenance that result. Indeed, "[t]he very nature of the writ demands that it be administered with the initiative and flexibility" necessary to "cut through barriers of form and procedural mazes" to reach "all manner of illegal detention." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

1. The Government first contends that suit is improper in New York because a "settled rule" requires that a "detainee must bring his challenge to his present, physical detention against his immediate, on-site custodian." US Br. 16. In fact, there is no such absolute requirement. The habeas corpus

statute, 28 U.S.C. § 2243, requires that the writ "shall be directed to the person having custody of the person detained," but it does not define *who* may be considered a proper custodian. *See, e.g., Eisel v. Secretary of the Army*, 477 F.2d 1251, 1258 (D.C. Cir. 1973) ("[n]owhere does the statute speak of an *immediate* custodian") (emphasis added).

This Court has not required that habeas petitioners always name their immediate custodian as respondent. To be sure, immediate custodians are frequently named, because that often is consistent with a "common sense administration of justice." *Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945). But this Court has recognized that the "concept[] of . . . custodian" is "sufficiently broad" to take account of the "reality" of the nature of a petitioner's confinement. *Strait v. Laird*, 406 U.S. 341, 344 (1971).

In numerous cases, the Court has considered habeas petitions involving "non-immediate" custodians who had legal control over the petitioner. *See, e.g., Endo*, 323 U.S. at 306 (high-ranking officials who had power to order petitioner's release from internment could be named when immediate custodian could not be reached by court); *Strait*, 406 U.S. at 345-46 (high-ranking officer could be named even though intervening officers would carry out relief sought); *Eisentrager*, 339 U.S. at 766-67 (Secretary of Defense and other senior officials could be named because "while prisoners are in immediate physical custody of an officer or officers not parties to the proceeding, respondents named in the petition have lawful authority to effect that release").[34] If the statute *required* that the "immediate" custodian be named, there would be no basis for these exceptions. These cases demonstrate that the

[34] *See also Garlotte v. Fordice*, 515 U.S. 39, 42 (1995) (naming Governor of Mississippi); *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995) (naming California Department of Corrections); *Toth*, 350 U.S. 11 (naming Secretary of the Air Force); *Burns*, 346 U.S. 127 (naming Secretary of Defense).

immediate custodian rule is not a talisman to be applied regardless of the circumstances of confinement. Instead, "[h]istorically, the question of who is 'the custodian' . . . depends primarily on who has the power over the petition and . . . on the convenience of the parties and the court." *Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998).

To justify its immediate custodian rule, the Government reaches back to *Wales v. Whitney*, 114 U.S. 564 (1885), a case this Court subsequently overruled as a "stifling formalism." *Hensley v. Municipal Court*, 411 U.S. 345, 350 & n.8 (1973). *Wales* held that habeas corpus relief was not available to a petitioner released on bail because the habeas provisions "contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body." 114 U.S. at 574. *Wales*'s reference to immediate custody was thus a corollary of a now-outmoded physical custody requirement. *Jones v. Cunningham*, 371 U.S. 236, 240 (1963); *Developments in the Law – Federal Habeas Corpus*, 83 Harv. L. Rev. 1072, 1073-75 (1970).

In finding that the Secretary was an appropriate respondent here, the courts below emphasized the narrow and unique circumstances of this case. Pet. App. 20a-21a, 104a-105a. This case involves an unprecedented *military* seizure in New York, pursuant to a presidential order directed to the Secretary of Defense, and involving a detention over which he, not Commander Marr, is directly responsible. As recognized below, it is the Secretary who (1) removed Padilla from the Southern District of New York, (2) determined that Padilla should be taken to the military brig in South Carolina, and (3) has the power to "decide[] when and whether all that can be learned from Padilla has been learned, and, at least in part, when and whether the danger he allegedly poses has passed." *Id*. at 105a. Secretary Rumsfeld, not Commander Marr, has the ultimate ability to "produce the body."

The Government fails to offer a single reason why this

habeas corpus challenge may not fairly proceed in New York where the military seizure occurred, other than pointing to a non-existent "settled rule." What is settled is that the writ "is not now and never has been a static, narrow, formalistic remedy." *Jones*, 371 U.S. at 243. Even courts that generally have required that the immediate custodian be named have suggested that the Government may not use the rule to "manipulate jurisdiction." *See Vasquez v. Reno*, 233 F.3d 688, 696 (1st Cir. 2000). Given the unique facts of this case, it would be a meaningless formalism, and a stark divergence from this Court's prior cases, to conclude that the Secretary is not an appropriate custodian for purposes of habeas corpus.

2. Personal jurisdiction over the Secretary can be exercised in New York on the specific facts here. The courts below correctly held, consistent with this Court's modern teaching, that jurisdiction over a respondent is determined by the limits of service of process and not antiquated notions of territoriality.

Section 2241 provides that "[w]rits of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions." 28 U.S.C. § 2241. Consistent with modern, contacts-based notions of personal jurisdiction, this Court has repeatedly interpreted "respective jurisdictions" to mean reachable by service of process, and has rejected the requirement that respondents be physically located within the territory of the court. While a divided Court had embraced the territorial view in *Ahrens v. Clark*, 335 U.S. 188 (1948), *but see id*. at 193 (Rutledge, J., dissenting), it broke from that approach over 30 years ago in *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973). Citing statutory and judicial developments that cut against an "inflexible territorial rule, dictating the choice of an inconvenient forum," *id*. at 500, *Braden* concluded in plain language that § 2241(a) "requires nothing more than that the court issuing the writ have jurisdiction over the custodian. *So long as the custodian can be reached by service*

of process, the court can issue a writ 'within its jurisdiction.'" *Id*. at 495 (emphasis added).

Braden reaffirmed the approach articulated earlier in *Strait* that a respondent can be fully "present" within a district court's jurisdiction by virtue of his contacts with the forum. 406 U.S at 345. Thus, the Court held that an Indiana respondent was "'present' in California through his contacts in that State [and was] therefore 'within reach' of the [California] federal court." *Id*. at 346 n.2. Embracing the foundational cases of modern personal jurisdiction, the Court explained "[t]hat such 'presence' may suffice for personal jurisdiction is well settled, and the concept is also not a novel one as regards habeas corpus jurisdiction." *Id*. (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)); *see also Endo*, 323 U.S. at 307 (exercising jurisdiction over War Authority officials as "respondents who ha[ve] custody of the prisoner . . . within reach of the court's process").

Upholding the jurisdictional determination below will not allow courts around the country to reach out and decide disputes with which they have no connection, as the Government contends. US Br. 25 n.11. It is not *Padilla* who has reached out for "one idiosyncratic district or appellate court anywhere in the nation" to force "the entire federal government [to] dance to its tune," *id*. (quotation marks omitted), and it is disingenuous for the Government even to suggest that here. Padilla, through his New York counsel as next friend, filed this action in New York because the Government had brought him there, because counsel was appointed to represent him there, and because the military unlawfully seized him there. It is the Government that has sought to force all litigation into "one idiosyncratic district or appellate court."

In this case, the lower courts based their finding of jurisdiction over the Secretary on specific acts he took within the district that brought him within New York's long arm

statute, and thus within Federal Rule 4(k)(1). The district court did not reach out to decide this case; rather, by his actions, the Secretary made it consistent with "notions of fair play and substantial justice" that he be sued there. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).[35]

Even if the question were close – which it is not – any uncertainty should be resolved to allow this Court to decide the issues of compelling national importance in this case now. *Subject matter* jurisdiction is not in doubt: the courts below had, and this Court has, *power* to decide this case. As Chief Justice Chase said, when the Government tried to erect similar procedural barriers to prompt judicial decision on this fundamental question in *Milligan*, "we are willing to resolve whatever doubt may exist in favor of the earliest possible answers to questions involving life and liberty." 71 U.S. at 132 (concurring opinion); *see also Quirin*, 317 U.S. at 19-20, 24-25.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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[35] The familiar requirements of venue are always available to ensure that litigation takes place in an appropriate forum. *See Braden*, 410 U.S. at 493-94 (setting out traditional venue considerations); *id.* § 1404(a) (transfer for convenience). Thus, contrary to recent suggestions by the Seventh Circuit, a contacts approach does not allow petitioners to litigate in every judicial district. *See al-Marri v. Rumsfeld*, 360 F.3d 707, 709 (7th Cir. 2004). In this case, however, the Government *abandoned* its venue challenge. *Compare* Pet. App. 117a *with id.* at 10a-26a.

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