No. 03-1027

IN THE

Supreme Court of the United States

DONALD RUMSFELD, Secretary of Defense,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
As next friend of Jose Padilla,
Respondents.

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

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JOINED BY THE NEW YORK COUNCIL OF DEFENSE LAWYERS AND THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF THE RESPONDENT JOSE PADILLA

BENITO ROMANO
JOSEPH GERARD DAVIS *
MARY EATON
JOHN J. LOCURTO
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8000

* Counsel of Record

1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

Attorneys for Amicus Curiae Association of the Bar of the City of New York

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the President had authority as Commander in Chief to seize Respondent Jose Padilla, an American citizen, in the United States away from a zone of active combat and to detain him indefinitely without charge and without freedom to communicate outside his military prison, based on the President's unilateral determination that Padilla is an enemy combatant who is closely associated with al Qaeda and who has engaged in hostile and war-like acts.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

INTRODUCTION

The Association of the Bar of the City of New York ("ABCNY") respectfully submits this brief as *amicus curiae* pursuant to Rule 37.3 of the Rules of this Court in support of the Court of Appeals' decision. The parties have consented in writing to ABCNY's participation as *amicus curiae* and their written consents have been filed with the Clerk of the Court. The New York Council of Defense Lawyers ("NYCDL") and the American Jewish Committee ("AJC") adopt ABCNY's positions and join in this *amicus* brief.[1]

STATEMENT OF INTEREST

ABCNY is a professional association of nearly 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, ABCNY educates the bar and public about current issues arising in connection with the "war" on terrorism, the pursuit of suspected terrorists, and the treatment of detainees. While it fully understands the importance of preventing future acts of terrorism, ABCNY believes that the President's actions in this and similar cases are dangerously eroding civil liberties and the efficacy of the habeas remedy.

NYCDL, established in 1986, is a not-for-profit professional association whose membership comprises approximately 200 lawyers, many of them former federal prosecutors, who devote a substantial part of their practices to the defense of those investigated or prosecuted for criminal offenses. NYCDL's principal mission is to engage the Bench and the Bar, including government attorneys, in a continuing collegial dialogue concerning the legal, ethical and practical

[1] No counsel for a party authored this brief either in whole or in part, and no person made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

issues confronting attorneys and judges in the criminal justice system. NYCDL members routinely deal with issues of personal liberty in various contexts, including habeas corpus proceedings. NYCDL is uniquely situated to express an informed view concerning the importance of the habeas remedy and access to counsel. For this reason, NYCDL is particularly supportive of Point III of this brief.

AJC, a national human relations organization with over 125,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of the Jewish community. It is the conviction of AJC that those rights will be secure only when the civil and religious rights of all Americans are also secure. Since the tragic events of September 11, 2001, AJC has continued to advocate for the appropriate balance between enhancing our national security and defending our constitutionally guaranteed civil liberties and the principles of due process of law. AJC believes that striking the appropriate balance requires allowing a United States citizen access to counsel and the courts to challenge his designation, seizure and detention as an enemy combatant.

ABCNY and the joining parties, NYCDL and AJC (collectively, "Amici"), support the Court of Appeals' holding that the President has exceeded his authority in this case, but in part for reasons not advanced by that court. Amici respectfully submit that any decision concerning the scope of the President's authority to seize and detain Jose Padilla must be made in a way that gives appropriate weight to his competing constitutional rights to individual liberty and to petition for his freedom through the Writ of Habeas Corpus.

Amici do not address the tension between executive and legislative authority discussed in the Court of Appeals' decision, including the effect on the President's asserted power of the Authorization for Use of Military Force, Pub. L.

No. 107-40, 115 Stat. 224 (2001) ("Joint Resolution") and 18 U.S.C. § 4001(a). Accordingly, this brief does not conduct the comprehensive analysis that would be required to analyze all three sets of competing constitutional rights and powers—executive, legislative and individual. The purpose of this brief is to identify the individual interests involved and assert that the ultimate analysis must be broader than the government's formulation of the issue. This brief also does not address the jurisdictional issue raised in the first question presented by the Petitioner.

SUMMARY OF ARGUMENT

The Petition asks the court to decide "[w]hether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force . . . 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, or whether 18 U.S.C. 4001(a) precludes that exercise of Presidential authority." (Pet. at I.) Accordingly, the government asserts, "This case raises fundamental questions about the authority of the Commander in Chief in a time of war." (Pet. Br. at 13.) The government further characterizes the issues as "questions of exceptional national significance concerning the authority of the Commander in Chief to wage the ongoing conflict against al Qaeda." (*Id*. at 16.) Strikingly absent from these formulations is the name of the person who was seized nearly two years ago, who was held entirely cut-off from the outside world for some twenty months and who even today remains in military custody with very little outside contact—Jose Padilla.

The fundamental questions posed by the Petition are before the Court only because Padilla's habeas petition brought them here. The scope of presidential power to seize and detain

Jose Padilla must be decided not on the basis of generalized abstractions, but by specific reference to the ways in which that power was exercised in this case. When resolving a challenge such as this involving fundamental liberty interests, close attention must be paid to the rights at issue. *See Reno v. Flores*, 507 U.S. 292, 302 (1993). Careful scrutiny of the facts giving rise to the dispute is also warranted given that this case requires the Court to comment on the scope of the President's powers as Commander in Chief. *Dames & Moore v. Regan*, 453 U.S. 654, 660-62 (1981).

It is indisputable that "[i]n dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts." *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (Murphy, J., dissenting). But respect and consideration are not synonyms for uncritical acquiescence, particularly where fundamental individual rights are at stake. In Justice Murphy's words:

> At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. 'What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.' *Sterling v. Constantin*, 287 U.S. 378, 401 [1932].

Korematsu, 323 U.S. at 234 (Murphy, J., dissenting).

For these reasons, although they support the Second Circuit's holding, Amici believe that the Court of Appeals' analysis was incomplete. Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952), which the Second Circuit adopted as the framework for its analysis, (Pet. App. A at 28a-55a.), provides a useful structure for consideration of the boundary between congressional and executive powers. But the temporary seizure of a business cannot be equated to the seizure and indefinite detention of a citizen. Padilla's habeas petition implicates fundamental due process concerns that were not at stake in *Youngstown*. The purpose of this brief is to address those concerns.

Specifically, the President's seizure and detention of Padilla implicate his Fifth Amendment right not to be deprived of liberty without due process of law and his right to invoke the Writ of Habeas Corpus to petition for freedom. This Court should not pass on the scope of the President's power to seize and detain Padilla without addressing the significant impact of the President's actions on these fundamental individual rights. (Point I.)

Government detention violates the Fifth Amendment's Due Process Clause "unless the detention is ordered in a *criminal* proceeding with adequate procedural protections . . . or, in certain special and 'narrow' nonpunitive circumstances . . . where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (internal citations omitted). This is not a criminal proceeding. Indeed, on June 9, 2002, the President issued an order declaring Padilla an enemy combatant and *removing* him from the jurisdiction of the criminal justice system. (Pet. App. A at 4a-5a.) Thus, the substantive due process issue is whether the President identified a "special justification" sufficient to support the detention.

The President asserts that Padilla's seizure and detention served two "vital purposes directly connected to prosecuting the war" against al Qaeda. (Pet. Br. at 28.) It prevented him from re-joining the war, and it enabled the military to collect intelligence from him. (*Id.* at 28-29.) Neither justification is particularly persuasive here. Padilla was already "neutralized" when the military seized him, (Pet. App. A at 4a.), and if the allegations against him are true, there are any number of criminal statutes under which he could be charged and detained pre-trial. The government's interrogation rationale at once proves too much and too little. It proves too much because it could be used to justify the detention of anyone the government believes may have knowledge of al Qaeda, whether that person is an "enemy combatant" or not. It proves too little because, even though the government has now admitted that continuing incommunicado detention of Padilla is unnecessary, *see* DoD, *Padilla Allowed Access to Lawyer*, Feb. 11, 2004, *available at* http://www.defenselink.mil/releases/2004/nr20040211-0341.html ("2/11/04 News Release"), it has neither released nor charged him. (Point II.)

The President's asserted power to detain Padilla indefinitely and hold him incommunicado also implicates Padilla's procedural due process rights. Lacking a statutory procedure to challenge his detention, Padilla, through a Next Friend, invoked the Writ of Habeas Corpus. Although the government did not directly challenge Padilla's right to petition for habeas relief, it asked the District Court to eviscerate that right by adjudicating his habeas petition while the government withheld access to the courts or counsel. (*See* Pet. App. B at 142a.) In this sense, the control that the Executive seeks to assert over Padilla is truly unprecedented. No court has ever held that a U.S. citizen detained on US. soil may not exercise the basic procedural due process right to present facts in support of his habeas petition. Even the saboteurs who landed on Long Island in the middle of World War II in

a German submarine wearing German uniforms had an opportunity to present facts in aid of their habeas petitions. *Ex parte Quirin*, 317 U.S. 1, 19-20 (1942). (Point III.)

The right to present evidence and the corresponding right to act through counsel are embodied in the Great Writ itself. The habeas statutes expressly grant a petitioner the right to "deny" and "allege" facts, and impose on the court the obligation to "hear and determine" those facts. 28 U.S.C. § 2243. Absent an ability to present facts and consult counsel, Padilla would have been denied "the necessary facilities and procedures for an adequate [habeas] inquiry." *Harris v. Nelson*, 394 U.S. 286, 300 (1969). The government's position to the contrary, which no court has accepted to date, amounts to a claim that the President may in its discretion suspend Padilla's right to invoke the Writ. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144, 148-49 (C.C.D. Md. 1861) (No. 9,847). (Point IV.)

The questions posed by this Petition are rarely adjudicated, but not entirely novel. Fifty years ago, Fred Toyosaburo Korematsu asked the Court to overturn his conviction for failing to comply with a series of Executive Orders and a statute designed "to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution." *Korematsu*, 323 U.S. at 229 (Roberts, J., dissenting). The majority conceded that "[n]o question was raised as to petitioner's loyalty to the United States." *Id.* at 216. Nevertheless, it rejected the notion that it was "dealing . . . with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States." *Id.* at 223. "[W]e are dealing specifically with nothing but an exclusion order," the majority stated as it upheld Korematsu's conviction. *Id.*

Fifty years later, albeit with the benefit of hindsight, it is clear that the *Korematsu* majority should have paid less attention to the theoretical scope of congressional and executive authority to fashion the exclusion order and greater attention to the effect of that order on Korematsu. To pass on the President's authority to seize and detain Padilla without considering if and to what extent Padilla's constitutional rights limit that authority would be to repeat the mistake of the *Korematsu* majority.

ARGUMENT

I. THE PRESIDENT'S ASSERTED POWER TO SEIZE AND DETAIN PADILLA MUST BE TEMPERED BY PADILLA'S COUNTERVAILING CONSTITUTIONAL RIGHTS.

This case is rife with important constitutional questions. Yet neither the government's brief nor the Court of Appeals' decision convey the full range of constitutional values, rights and powers at stake. Both focus almost exclusively on the boundary between the President's Article II war powers and Congress's legislative prerogatives under Article I of the Constitution. Neither the government nor the Court of Appeals consider whether other constitutional provisions—such as the Fifth Amendment or the Suspension Clause—limit the President's authority. These omissions are striking because Jose Padilla's fundamental rights to individual liberty and freedom from physical restraint hang in the balance.[2]

[2] Amici recognize that important questions bearing on the constitutional rights of detainees are also before the Court in *Hamdi v. Rumsfeld*, No. 03-6696, but the critical distinctions between Hamdi—who was apparently seized on a battlefield in Afghanistan—and Padilla may provide a complete and distinct basis for evaluating the authority of the President asserted in *Hamdi* without addressing the impact of that authority on the rights of a United States citizen seized under dramatically different circumstances, away from a zone of active combat.

To proceed as if the fundamental rights of the individual seized and detained have no place in the framework for analyzing the scope of executive authority is tantamount to suggesting either that executive authority is absent altogether, as the Second Circuit held, or that executive authority in this area is boundless. Neither of these extremes is an appropriate outcome. The Court should analyze the limits of executive authority in light of the particular circumstances of Padilla's seizure and detention. This approach is consistent with the Court's constitutional role and the separation-of-powers structure that girds our Constitution.

A. The President's Asserted Power To Seize Padilla And Hold Him Indefinitely Should Be Analyzed In Light Of Its Impact On Padilla.

The theoretical scope of the President's power to seize and detain a United States citizen as an enemy combatant is not at issue. Nor could it be. "[B]y the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.'" *Muskrat v. United States*, 219 U.S. 346, 356 (1911); *cf. Flast v. Cohen*, 392 U.S. 83, 96-97 (1968). This limitation mandates a focus on the rights and claims of the parties before the court. *Muskrat*, 219 U.S. at 357. Jose Padilla's habeas petition gave rise to this case and, thus, the facts and circumstances of his seizure must provide the framework for evaluating the Executive's conduct. *See Dames & Moore*, 453 U.S. at 660.

This Court should not overlook Jose Padilla. Attempts to determine the conceptual bounds of the President's powers are "both futile and perhaps dangerous." *Id.* In light of the "never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he much deal and the Constitution under which we all live," *id.* at 662, categorical pronouncements on the theoretical reach of executive power are neither

possible nor desirable. In fact, they are inconsistent with Article III of the Constitution, which "confine[s] [the Court] to a resolution of the dispute before [it]." *Id.* at 660.

This case patently implicates Padilla's most fundamental liberty interest: "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690; *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Where, as here, a fundamental liberty interest is at issue, careful attention must be paid to the "description of the asserted right." *See Reno*, 507 U.S. at 302. Once articulated, it is the Court's role to balance those rights against the asserted presidential powers. *See, e.g., United States v. United States Dist. Court for E. Dist. of Mich.*, 407 U.S. 297 (1972) (balancing the President's national security powers against the individual's Fourth Amendment rights); *Zadvydas*, 533 U.S. at 695 (rejecting the government's contention that absolute deference was due to the executive and legislative branches in the immigration law context, and balancing the executive's power to detain a removable alien against the alien's due process rights); *cf. National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 207 (D.C. Cir. 2001) (Executive is "constrained by" the Fifth Amendment).

Careful attention to individual rights is no less appropriate in cases involving the President's war powers. Generally speaking, "great deference is afforded the President's exercise of his authority as Commander-in-Chief." (Pet. App. A at 30a.); *see also Korematsu*, 323 U.S. at 233-34 (Murphy, J., dissenting). However, deference to difficult military judgments is not absolute. As the Court of Appeals pointed out, "[t]he deference due to the Executive in its exercise of its war powers . . . only starts the inquiry; it does not end it." (Pet. App. A at 31a.) This is true even during periods of

significant peril. While the Executive may have substantial authority during times of conflict to safeguard the public:

> [i]t does not follow . . . that the broad guaranties of the Bill of Rights and other provisions of the Constitution . . . are suspended by the mere existence of a state of war. It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution . . . We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold.

Hirabayashi v. United States, 320 U.S. 81, 110 (1943) (Murphy, J., concurring). Thus, this Court should define the President's powers as Commander-in-Chief in light of Padilla's competing constitutional rights to determine the appropriate boundaries of presidential authority and whether those boundaries have been exceeded in this instance.[3]

B. The Court Of Appeals' Analysis Was Incomplete Because It Did Not Take Into Account Padilla's Constitutional Rights.

The Court of Appeals held that "in the domestic context, the President's inherent constitutional powers do not extend to the detention as an enemy combatant of an American citizen seized within the country away from a zone of combat." (Pet. App. A at 55a). To support this conclusion, the Court of Appeals relied on Justice Jackson's concurring opinion in *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring) (Pet. App. A at 28a.), in which he conceived a

[3] Of course, the presence or absence of a statute authorizing or proscribing the seizure and detention of suspected enemy combatants would also be relevant to this analysis, but that issue is beyond the scope of this brief.

structure for resolving separation-of-powers questions and demarcating the fluid boundary between executive and legislative authority in particular cases. *Id.* at 635-38. Adopting that approach, the Court of Appeals confined its analysis to the tension between executive and legislative power. The court's analysis did not take in account the critical differences between this case and *Youngstown*. Those differences necessitate a broader constitutional inquiry.

Youngstown arose out of President Truman's wartime seizure of the nation's steel mills. This case, in contrast, involves the seizure and detention of Jose Padilla. The temporary wartime interference with property rights that occurred in *Youngstown* does not raise the fundamental issues of individual liberty caused by the seizure and indefinite detention of a United States citizen on U.S. soil. The constitutional values at stake here are of a different magnitude and call for a more comprehensive analysis. Specifically, the President's actions implicate Padilla's Fifth Amendment right not to be deprived of his physical liberty without due process of law as well as his right to challenge his captivity through the Writ of Habeas Corpus.

Because the Court of Appeals' analysis was incomplete, the court wrongly concluded that these issues are moot. (Pet. App. A at 4a n.1.) They are not. Rather, they are at the heart of the matter. If the seizure and detention of Padilla had been accomplished under a *statute* that permitted the Executive (1) to seize Padilla without setting forth the criteria pursuant to which the seizure could take place; (2) to hold him indefinitely; and (3) to prevent him, at the government's discretion, from presenting facts and consulting with counsel, that *statute* would be subject to constitutional challenge. That the asserted power is executive, not legislative, does not alter the salient characteristics of the seizure and detention at issue. One cannot answer the question whether the President had the authority to seize and detain Padilla without understanding

how and under what conditions he was seized and detained. Indeed, were the Court to answer the government's question without reference to those facts, the implication of its ruling might be that the President's authority to designate, seize and detain an enemy combatant is not limited by the underlying circumstances.

II. THE PRESIDENT'S ASSERTED POWER TO SEIZE PADILLA AND DETAIN HIM INDEFINITELY CONFLICTS WITH PADILLA'S SUBSTANTIVE DUE PROCESS RIGHTS.

The power that the President asserts in this case—virtually unfettered discretion to designate Padilla as an enemy combatant, seize him, and detain him indefinitely without charge—raises fundamental substantive due process concerns. *Cf. Zadvydas*, 533 U.S. at 690 ("[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem"). The Due Process Clause constrains the President's power to prevent its abuse, *Daniels v. Williams*, 474 U.S. 327, 331 (1986), even in wartime, *Hirabayashi*, 320 U.S. at 110 (Murphy, J., concurring). In particular, the Clause prohibits government seizure and detention unless they occur either "in a *criminal* proceeding with adequate procedural protections," *Zadvydas*, 533 U.S. at 690 (emphasis in original), or under "narrow" and "nonpunitive" circumstances where a "special justification" outweighs the individual's fundamental rights to liberty and freedom from physical restraint, *id.*

The Executive did not arrest Padilla for committing a crime and is not holding Padilla in anticipation of criminal trial. This appeal arose precisely because the Executive does not want to transfer Padilla to the criminal justice system, replete with its tested procedural safeguards, for prosecution. (Pet. App. A at 55a-56a.)

Civilian authorities initially detained Padilla in connection with a grand jury investigation pending in New York. (Pet. Br. at 4.) On May 8, 2002, acting pursuant to a material witness warrant, federal law enforcement officials arrested Padilla in Chicago. (*Id.*) They quickly transferred him to the custody of the Federal Bureau of Prisons in New York City. (Pet. App. B at 82a.) Approximately one month later, the President designated Padilla an enemy combatant and directed the military to seize him. (Pet. Br. at 4-6.) Padilla has remained under military jurisdiction since then, at the Naval Consolidated Brig in Charleston, South Carolina. (*Id.* at 6.)

The government concedes that Padilla was not seized for committing a crime and that his detention is not punitive. (*Id.* at 29.) Even so, the government justifies its treatment of Padilla as a "simple war measure" that serves two war-related objectives: incapacitation and interrogation. (*Id.*) As to the former, the government states that "detention prevents captured combatants from rejoining the enemy and continuing the fight." (*Id.* at 28.) With respect to the latter, the government contends that "detention enables the military to gather critical intelligence from captured combatants concerning the capabilities and intentions of the enemy." (*Id.* at 29.)

A. Padilla Was Incapacitated In The Custody Of The Bureau Of Prisons Before He Was Seized By The Military And Transferred To The Naval Brig.

Under limited circumstances, the government may seize and incapacitate a dangerous individual outside the criminal context to prevent harm to others. *See Zadvydas*, 533 U.S. at 690; *United States v. Salerno*, 481 U.S. 739, 748 (1987). Preventive detentions are constitutional only when the individual seized is "specially dangerous" and is afforded "strong procedural protections." *Zadvydas*, 533 U.S. at 691.

If the detention is potentially indefinite, then due process requires even closer scrutiny and demands more than a simple demonstration of dangerousness. *Id.*[4]

The government's incapacitation justification rings hollow, given that Padilla was seized from prison. (Pet. Br. at 4.) Putting aside whether Padilla may have been a threat to domestic security while at large, he was in custody at the time he was designated an enemy combatant and transferred to military control. The Court of Appeals found that, at the point he was seized by the military, "Padilla was under the control of the Bureau of Prisons and the United States Marshal Service. Any immediate threat he posed to national security had effectively been neutralized." (Pet. App. A at 4a.) Thus, there was no exigency that required military seizure to prevent Padilla from "rejoining the enemy and continuing the fight." (Pet. Br. at 28.)[5]

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[4] Although this Court has not considered preventive detention of suspected terrorists, *see Zadvydas*, 533 U.S. at 696, neither has it held that the Executive may seize a suspected terrorist and hold him indefinitely, without charge or the ability to challenge the detention in a meaningful way.

[5] Although it did not argue that Padilla represented an imminent threat at the time he was seized, the Executive asserted that Padilla's incommunicado detention was necessary to prevent him from transmitting messages to al Qaeda through counsel. (JA 83.) Vice Admiral Lowell E. Jacoby suggested that "counsel or others given access to detainees could unwittingly provide information and assistance to the detainee, or be used by the detainee as a communication tool." *(Id.)* The District Court rejected this argument as "gossamer speculation," concluding that there was no reason that Padilla could not be effectively neutralized while under BOP control. (Pet. App. B at 152a.) In any event, this rationale appears to have significantly less force today. On February 11, 2004, the Executive announced its intent to grant Padilla access to counsel. *See* 2/11/04 News Release. This decision was ostensibly based on a prior determination that "such access will not compromise the national security of the United States." *Id.* Where, as here, the initial basis for a preventive

Equally as important, the government had other means of incapacitating Padilla at its disposal short of military seizure. The government could have continued his detention as a material witness under 18 U.S.C. § 3144, (Pet. App. A at 55a-56a.), subject to Padilla's right to challenge that detention. The Declaration of Michael H. Mobbs asserts, among other things, that Padilla met with senior al Qaeda leadership, received training to construct and detonate a radiological dispersal device and returned to the U.S. to conduct reconnaissance and carry out attacks. (Pet. App. C at 169a-170a.) The government would be capable of making a strong argument regarding Padilla's detention as a material witness. (*See also* Pet. App. B at 82a.) (recounting that Padilla's initial arrest as a material witness was based on facts set forth in an FBI affidavit).

The Mobbs Declaration also suggests that Padilla could have been charged with various criminal offenses. (*See also* Pet. App. A at 4a at n.2.) (observing that "the government had ample cause to suspect Padilla of involvement in a terrorist plot."); (JA at 84.) ("Padilla has been implicated in several plots to carry out attacks against the United States, including the possible use of a 'dirty' radiological bomb in Washington, DC or elsewhere, and the possible detonation of explosives in hotel rooms, gas stations, and train stations."). Mobbs adverts to evidence that Padilla "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation of acts of international terrorism that had the aim to cause injury to or adverse effects to the United States." (Pet. App. C at 171a.) Mobbs also refers to evidence that Padilla received explosives training and was instructed to

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detention changes or disappears, the Due Process Clause requires that the detention be reevaluated in light of current circumstances. *Cf. O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

conduct reconnaissance and carry out attacks on behalf of al Qaeda. (*Id.* at 170a.) These averments at least suggest that Padilla could have been charged criminally. *See, e.g.*, 18 U.S.C. § 371 (conspiracy to commit an offense against the United States); 18 U.S.C. § 844 (transportation of explosive materials); *United States v. Berberian*, 851 F.2d 236, 237 (9th Cir. 1988) (affirming convictions of Armenian terrorist under Sections 371 and 844). The Executive does not argue that these criminal statutes, or other traditional mechanisms for depriving citizens of their liberty, were insufficient or that emergent circumstances rendered them effectively unavailable in this instance.

The government cites *Quirin* in support of its authority to detain a U.S. citizen on U.S. soil as an enemy combatant. (Pet. Br. at 28-34.) However, *Quirin* does not stand for the broad proposition that incapacitation, standing alone, is a constitutionally permissible basis for seizing and indefinitely detaining a suspected enemy combatant. 317 U.S. at 23-24. In that case, the FBI initially seized the petitioners, German soldiers who had covertly landed in this country during World War II intent on committing sabotage. *Id.* at 20-22. Thereafter, the President issued a proclamation establishing a military commission to try the petitioners. *Id.* at 22-23. In accordance with the proclamation, the FBI surrendered the petitioners to military custody "for trial before the Commission." *Id.* at 23. Unlike in *Quirin*, the President has not seized Padilla to prosecute him in any forum, (Pet. Br. at 29.), but instead posits a broader power to incapacitate him indefinitely, (*id.* at 28.) Because this asserted power to incapacitate by indefinite detention, without trial or even access to counsel, was not before this Court in *Quirin*, that decision does not support the government's position here.

B. The President's Interrogation Rationale Is Unprecedented And Difficult To Reconcile With The Due Process Clause.

The government argues that its need to gather intelligence "concerning the capabilities and intentions of the enemy," (*id.* at 29.), justifies its seizure and indefinite detention of Padilla. This justification is unprecedented, and the government's briefing is bereft of constitutional or judicial support for this power. Moreover, the asserted need to gather intelligence to prevent future acts of terrorism cannot be limited to enemy combatants. This need would justify the seizure of anyone who, in the government's view, possesses "intelligence that could assist the United States to ward off future terrorist attacks." (Pet. App. A at 6a.) The due process problems associated with an unbounded power to seize for interrogation purposes are particularly acute here because the interrogation process "can take a significant amount of time." (JA at 80.) (explaining that it may take months, even years, for interrogation to yield valuable intelligence).

In any event, the government's interrogation rationale appears to have less force in light of the recent announcement that the Department of Defense ("DoD") has authorized Padilla to have access to counsel. *See* 2/11/04 News Release. DoD policy permits enemy combatants to have access to counsel if DoD has either completed its intelligence-gathering efforts, or determines that such access will not impair the military's ability to extract information from the detainee. *Id.* Regardless of which basis applies in this case, DoD's decision to allow Padilla access to counsel reflects an important change in circumstances. As a result of that change, the Due Process Clause requires a reevaluation of the nature and duration of Padilla's detention. *See Zadvydas*, 533 U.S. at 690; *O'Connor*, 422 U.S. at 574-76.

C. The Joint Resolution Does Not Mitigate Substantive Due Process Concerns.

The Executive contends that Congress sanctioned Padilla's seizure and detention through the Joint Resolution. Even assuming this to be true, the Joint Resolution does not mitigate the serious substantive due process concerns in this case because it does not impose any constraints on the President's authority or provide a principled basis for evaluating the President's conduct.

Congress passed the Joint Resolution to authorize the use of force, Pub. L. 107-40, § 2, but did not expressly confer detention authority on the President. The Joint Resolution permits the use of force against individuals and organizations that were in some way connected to the 9/11 attacks. *Id.* Congress did not bestow a broader mandate to pursue all suspected enemy combatants associated with al Qaeda. Indeed, the Joint Resolution does not even mention "enemy combatants," much less define those terms. Thus, assuming the Joint Resolution conveys the power to seize and detain, it does not supply a discernible basis for determining who may be seized. Nor does it identify the bases for seizure or specify how long a detention may last. All of these critical decisions are left to the Executive's unchecked discretion, which is inconsistent with our historical tradition and the very notion of ordered liberty. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

III. THE PRESIDENT'S ASSERTED POWER TO HOLD PADILLA INCOMMUNICADO CONFLICTS WITH PADILLA'S PROCEDURAL DUE PROCESS RIGHT TO BE HEARD.

The government recently announced that it would permit Padilla to have limited access to counsel. This development

does not moot the procedural due process concerns presented here—Padilla's Fifth Amendment rights to be heard and to present his case with the assistance of counsel—which must be considered in the course of evaluating the power the President (asserted and continues to assert) to seize and detain him.

First, the Executive has made clear that it granted access to counsel "as a matter of discretion and military authority," clarifying that such access "is not required by domestic or international law and should not be treated as a precedent." 2/11/04 News Release. Padilla's access to counsel presumably could be revoked or further curtailed at any time in the future.[6]

Second, the issue presented by the Petition is not Padilla's prospective due process rights, but the scope of the asserted Presidential authority. In this case, that means at a minimum an asserted authority to detain Padilla incommunicado for twenty months, even while his habeas petition was being adjudicated, and, after granting some limited right to consult with his lawyer, to reserve the discretion to deprive him of that access at any time.

No court has ever endorsed the government's expansive interpretation of the President's Article II powers, nor otherwise authorized executive power to detain of the sort claimed here. On the contrary, this Court has long upheld and safeguarded the procedural due process rights of habeas petitioners to challenge their status as enemy combatants or military detainees.

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[6] The government has permitted Padilla to communicate with counsel only if a DoD official is present. (Resp. Supp. Br. Opp. Cert. at 2.) All conversations between Padilla and counsel are videotaped and monitored by intelligence officials. (*Id.*)

A. Padilla Has A Constitutional Right To Present His Case.

"The fundamental requisite of due process of law is the opportunity to be heard." *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). Access to the courts is therefore a "fundamental constitutional right." *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *see also Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989). "Rudimentary due process" requires the right to present arguments and evidence and confront adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

This Court has never accepted the contention that it could adjudicate a habeas petition without giving the petitioner the ability to present facts in support of his case, even in a time of war. German saboteurs who landed on Long Island in a submarine wearing German uniforms during World War II, for example, were given the right to present facts—undisputed though most of them were—in aid of their habeas petition, through counsel no less. *Quirin*, 317 U.S. at 19-20. A Japanese General accused of supervising war crimes in the Philippines was likewise given the right to present facts through counsel. *Yamashita v. Styer*, 327 U.S. 1, 5 (1946); *see also id.* at 47 (Rutledge, J., dissenting). Other detainees were afforded the same ability to present a case. *See, e.g.*, *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (affirming *United States ex rel. Ludecke v. Watkins*, 163 F.2d 143, 144 (2d Cir. 1947) ("Ludecke, the relator-appellant, made an oral argument and submitted a brief, both of which have been interesting and moving.")); *In re Territo*, 156 F.2d 142, 143 (9th Cir. 1946) (petitioner's case was "tried at the hearing on the order to show cause"); *Ex parte Milligan*, 71 U.S. 2, 5-6, 107 (1866); *Colepaugh v. Looney*, 235 F.2d 429, 431 (10th Cir. 1956) (refusing to "preclude access to the courts for determining the applicability of the law of war").

In the government's view, the courts could determine the fate of Padilla's habeas petition without his participation under a standard of review that requires only evidence presented by the government. This position conflicts with the only two decisions of this Court directly to address executive power to detain (and try by military commission) as unlawful combatants individuals arrested on U.S. soil in a time of war, but not on a battlefield, *Milligan* and *Quirin*. Although the outcome of each case was very different, both decisions recognized that the courts have the power to make a *de novo* factual determination in a contested proceeding about the critical jurisdictional fact: Whether the detainee is an unlawful combatant.

In *Quirin*, the Executive Proclamation pursuant to which the petitioners were detained, tried and convicted by military tribunal expressly "denied access to the courts," and the government contended that the petitioners should have no resort to the courts. 317 U.S. at 23-25. Nevertheless, the Court held that the Proclamation could not "preclude access to the courts *for determining its applicability to the particular case*." *Id.* at 25 (emphasis added). The "applicability" of the Proclamation, that is, whether the *Quirin* petitioners were unlawful combatants, was resolved in the initial per curiam opinion, apparently upon stipulated facts. *Id.* at 20, 25, 46. Accordingly, the Court stated it had "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." *Id.* at 45-46. Nowhere in the opinion did the Court suggest that it would not have had the power to draw those boundaries, or that its Congressional authority would have been limited to a review of whether "some evidence" supported the Executive's determination that the petitioners were unlawful combatants. On the contrary, the *Quirin* court recognized that it was precisely those jurisdictional boun-

daries, drawn by the *Milligan* court, that distinguished its holding from *Milligan*:

> We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.

Id. at 45.

In *Milligan* the Court was asked to answer three certified questions concerning the trial by military commission of a citizen of Indiana in the middle of the Civil War. 71 U.S. at 8-9. Although an Act of Congress gave the President the power to suspend the Writ of Habeas Corpus, the Act also provided that those held by the President "otherwise than as prisoners of war," would have to be indicted or presented to a judge for discharge or other disposition "according to law." *Id.* at 5. On October 5, 1864, Milligan, an alleged member of a 100,000-strong secessionist organization, was arrested, tried, convicted and sentenced to death by a military tribunal for plotting to overthrow the government, aiding the rebels and violating the laws of war, among other things. *Id.* at 6-7.

The *Milligan* Court rejected the Executive's contention that, even if the Act had been violated (Milligan was never indicted or presented to a judge), the trial of Milligan was justified by executive power to impose martial law.[7] The Court asserted "judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no

[7] The government argued that "jurisdiction is complete under the laws and usages of war." *Milligan*, 71 U.S. at 121.

usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service." *Id.* at 121-22. In short, although the Court recognized the power of the Executive to declare martial law under appropriate circumstances, *id.* at 126, it made a *de novo* factual determination that even in the dark hours of the Civil War martial law was not warranted and could not be used to justify Milligan's trial by the military rather than the courts.

Despite their divergent outcomes, *Quirin* and *Milligan* thus demonstrate that one who is seized on U.S. soil away from a theatre of war has the right to challenge directly and substantively the Executive's factual determination that he is an enemy combatant. The authority asserted by the President to detain Padilla indefinitely and without direct access to the courts, has deprived Padilla of the basic due process necessary to make that challenge.

B. Padilla's Right To Meaningful Access To The Courts Encompassed The Right To Present His Petition Through Counsel.

Beyond depriving Padilla of access to the courts, incommunicado detention also deprived him of access to counsel. To determine whether Padilla had a procedural due process right to access to counsel, the Court should examine (1) the private interest affected by official action; (2) the risk of error; and (3) the government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976).

1. *Padilla had a fundamental interest in the assistance of counsel.*

The Court has "frequently emphasized" the importance of *provision* of counsel in any case in which an individual may be deprived of liberty. *In re Gault*, 387 U.S. 1, 73 (1967) (Harlan, J., concurring and dissenting in part); *see also*

Gideon v. Wainright, 372 U.S. 335, 344 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). Indeed, it is well established that the "right to be heard" would be of "little avail if it did not comprehend the right to be heard *by counsel*." *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (emphasis added).

The right to counsel is not confined to cases arising under the Sixth Amendment in the criminal context. On the contrary, courts have frequently found a due process right to *provision* of counsel under the Fifth Amendment in cases in which the liberty interest in freedom from imprisonment has been implicated. *See, e.g., Gault*, 387 U.S. at 41 (commitment of juvenile delinquents); *United States v. Perez*, 330 F.3d 97 (2d Cir. 2003) (deportation of permanent resident); *Iavorski v. INS*, 232 F.3d 124, 128 (2d Cir. 2000) (deportation of aliens); *United States v. Budell*, 187 F.3d 1137, 1143 (9th Cir. 1999) (discharge of insanity acquitees); *Project Release v. Prevost*, 722 F.2d 960, 976 (2d Cir. 1983) (civil commitment). This Court has even recognized a due process right to counsel in proceedings where physical liberty is not in issue. *See Lassiter v. Department of Soc. Servs. of Durham County*, 452 U.S. 18, 31-32 (1981) (termination of parental rights) and *Goldberg, supra*, (termination of welfare benefits).

Though these cases acknowledge the critical importance of counsel in proceedings where significant rights are at stake, the issue here is even more fundamental, because the issue here is not provision of counsel, but mere access to counsel. The constitutional requirement of "meaningful access to the courts," *Bounds*, 430 U.S. at 823, means that reasonable access to appointed or retained counsel (or a surrogate for counsel) cannot be denied. *Procunier*, 416 U.S. at 419; *see also Shaw v. Murphy*, 532 U.S. 223, 231 n.3 (2001); *Johnson v. Avery*, 393 U.S. 483 (1969). As these cases demonstrate,

Padilla had a fundamental interest in being permitted to consult with and present his case through counsel.

2. *The risk of error in the absence of consultation with counsel is acute.*

The risk of error to someone like Padilla forced to contest his detention without access to counsel, particularly given the process insisted upon by the President here, is acute. The government justifies Padilla's indefinite detention based on information derived from unspecified "intelligence sources" and "reports of interviews" with unidentified "confidential informants." (JA at 44.) While these confidential sources supposedly are "believed" to have been involved with al Qaeda, the Mobbs Declaration nowhere states that they *in fact* are al Qaeda operatives or offers any facts that would indicate that the information they have provided is trustworthy. (*Id.*) Quite the contrary, by the government's own admission, these sources "have not been completely candid" and some information they have provided "remains uncorroborated" and may be "part of an effort to mislead or confuse U.S. officials." (*Id.*) It cannot be gainsaid that there is a risk that Padilla may have been wrongfully imprisoned, given that his detention is based on allegations of admittedly suspect informants providing admittedly suspect information, neither of which has been subjected to any kind of judicial review.

3. *The President's interests are insufficient to deny access to counsel.*

Before it granted access to counsel, the government asserted that denial of access to counsel was required to preserve the President's interest in national security by preventing its interrogation process from being jeopardized. (*Id*. at 86-87.) Interposing counsel, the government contended, would have jeopardized the relationship between Padilla and his interrogators and threatened or delayed the

government's ability to secure potentially important intelligence information. (*Id.*)

Critically, the government's assertions about the sanctity of the interrogation process assume precisely the fact that Padilla had a right to challenge through habeas—that he is an enemy combatant. If Padilla is not an enemy combatant, any conceivable basis for the government's asserted right to detain and interrogate him as one evaporates.

Padilla's interests in access to counsel are fundamental and undeniable; the President's interests, while entitled to due consideration, are at least in part speculative and, therefore, ultimately less convincing. Moreover, Padilla's interests coincide with a broader interest of a lawful society in the legitimacy of executive actions. A principal function of the bar is to provide professional counseling and advocacy to both sides of a dispute. The presence of professional advocates inspires confidence that a court's ruling was made with the benefit of full presentations on each side. The government's plan to denude the process of "adversary argument . . . embracing conflicting and demanding interests," *Flast*, 392 U.S. at 97, would undermine the very confidence it should be seeking to engender—namely, that the war on terrorism is not incompatible with fundamental protection of individual liberty.

IV. THE PRESIDENT'S ASSERTED POWER TO HOLD PADILLA INCOMMUNICADO CONFLICTS WITH THE SUSPENSION CLAUSE.

Article I, Section 9 of the Constitution states in relevant part: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." This is one of the few individual rights found in the body of the Constitution itself. Because the Suspension Clause is situated in Article I, only Congress – not the President – can suspend the right to the

Great Writ. *Merryman*, 17 F. Cas. at 148. Indeed, the very purpose of the Writ of Habeas Corpus is to provide a mechanism for reviewing executive detention, *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring), and it is the fundamental safeguard against illegal Executive restraint, *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). Allowing the President to exert control over the primary safeguard against arbitrary executive restraint would conflict with the very structure of our Constitution, which is premised on a system of checks and balances. *See Dames & Moore*, 453 U.S. at 662.

While the government has not contested Padilla's right to petition for habeas review, the conditions of Padilla's confinement amounted to suspension. By holding Padilla incommunicado, with no ability to access the courts or assist those who could, the President deprived Padilla of his right to present his petition. The government, in part, has justified this assertion of power on the ground that the habeas statutes do not confer on Padilla a free-standing right to challenge the factual basis for his detention. That is incorrect.

Padilla petitioned for review pursuant to 28 U.S.C. §§ 2241, *et seq.*[8] The District Court concluded that Padilla had a statutory right to present facts *in this case*, relying principally on section 2243, which states that "[t]he applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts." 28 U.S.C. § 2243. Section 2243 further provides that the habeas court "shall summarily hear and determine the facts, and

[8] 28 U.S.C. § 2241 authorizes the federal courts to grant writs of habeas corpus to prisoners who, like Padilla, are "in custody under or by color of the authority of the United States," *id.* at (c)(1), as well as to those who are "in custody in violation of the Constitution or laws or treaties of the United States," *id.* at (c)(3). Other provisions of the habeas statute, particularly 28 U.S.C. § 2243, establish the procedures to be followed in section 2241 cases.

dispose of the case as law and justice require." These provisions grant Padilla the right to raise and support fact-based arguments and require resolution of factual disputes on habeas review. A court cannot discharge this duty if it only gets to hear the President's evidence. *See Walker v. Johnston*, 312 U.S. 275, 284-85 (1941) (habeas petition could not be adjudicated based on the government's *ex parte* affidavits without opportunity for rebuttal).

More fundamentally, as this Court stated over thirty years ago, the Writ mandates an opportunity to present evidence in cases where the facts are in controversy, as they are here:

> It is now established beyond the reach of reasonable dispute that the federal courts not only *may* grant evidentiary hearings to applicants, but *must* do so upon an appropriate showing.

Harris, 394 U.S. at 291 (emphasis added). While a full-blown hearing, replete with the traditional panoply of procedural safeguards, may not be required in every case, the opportunity to present facts cannot be denied. *Id.* at 298-99. This conclusion applies with extra force where, as here, the petitioner has been detained without pre-detention process, *see Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring), and the proof on which the detention is premised consists solely of a vague affidavit, *cf. Blackledge v. Allison*, 431 U.S. 63, 82 n.25 (1977).

Indeed, the Writ's protections are "strongest" in cases like this when executive detention is challenged, *id.*, because, without judicial scrutiny, such detention "lacks that assurance of legality which has come to be thought of as integral to government under law," Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 984 (1998). *See also Ex Parte Bollman*, 8 U.S. at 75-76 (demonstrating that a core function of the writ is to adjudicate, on the facts, the contention of one held prisoner

on the word of the President that the detention is wrongful—even, or especially, when the charge is levying war against the United States). Accordingly, where, as here, an American citizen is detained under executive authority as an enemy combatant, without judicial or any other process, habeas review is not only available, it is required. *See Hamdi*, 316 F.3d 450, 464-65 (4th Cir. 2003). The President denied Padilla this right.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Executive's asserted power to seize and detain Jose Padilla should be analyzed in light of the deprivation of Padilla's constitutional rights to due process and to petition for his freedom through habeas corpus. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

BENITO ROMANO
JOSEPH GERARD DAVIS *
MARY EATON
JOHN J. LOCURTO
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8000

1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

* Counsel of Record

Attorneys for Amicus Curiae Association of the Bar of the City of New York