No. 03-1027

In The Supreme Court of the United States

DONALD H. 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 *AMICI CURIAE* PRACTITIONERS AND SPECIALISTS IN THE INTERNATIONAL LAW OF WAR IN SUPPORT OF RESPONDENTS

ALLISON MARSTON DANNER
Assistant Professor of Law
VANDERBILT UNIVERSITY LAW SCHOOL
131 21st Avenue South
Nashville, Tennessee 37203-1181
(615) 322-6762
Counsel of Record for Amici Curiae

GEORGE C. HARRIS
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
(415) 268-7000

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are practitioners and specialists in the international law of war, also called international humanitarian law.[1]

Payam Akhavan served as a Legal Advisor to the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia.

Brigadier General David Brahms served as principal legal advisor for POW matters at Headquarters Marine Corps during the Vietnam War, senior legal advisor to the United States Marine Corps, and is now Executive Director of the Judge Advocates Association.

Mary Cheh is Elyse Zenoff Research Professor of Law at George Washington Law School and is a member of the National Institute of Military Justice's Board of Directors. She is also a member of the Rules Advisory Committee of the U.S. Court of Appeals for the Armed Forces and served as a member of the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice.

Cara Robertson served as a Legal Advisor to the Appeals Chamber at the International Criminal Tribunal for the Former Yugoslavia.

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[1] Letters of consent to the filing of this brief accompany this brief. Pursuant to S.Ct. Rule 37.3, *Amici* certify that no counsel for a party authored this brief in whole or in part and that no person, other than *Amici,* their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Stephen Saltzburg is the General Counsel for the National Institute of Military Justice and a professor of law at George Washington Law School.

Marco Sassòli served as the deputy head of the legal division of the International Committee of the Red Cross, the international body charged with implementing the Geneva Conventions, and is a professor of international law at the University of Québec.

Michael P. Scharf is a professor of law and Director of the Frederick K. Cox International Law Center and War Crimes Research Office at Case Western Reserve University School of Law.

Minna Schrag is a former senior trial attorney in the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia.

They file this brief to correct certain misconceptions regarding the scope and applicability of the law of war that arise from the Government's assertions in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Government relies on precedents and standards allegedly provided by the "law of war" to justify its treatment of the Respondent, Jose Padilla. (Br. for Pet'r at 6, 28) (asserting that the President's determination of Padilla's enemy combatant status and Padilla's capture and detention done pursuant to the "law of war"). By this phrase, the Government is referring to the international law of armed conflict, a body of law that comprises the international treaties governing armed conflict (principally the Geneva and Hague Conventions) and the customary

rules regarding such conflicts followed by nations out of a sense of legal obligation. *See Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals").

Although the Government relies upon the international law of armed conflict as the ultimate source of the President's authority to detain Padilla, it provides no analysis of that body of law or its application to this case. In fact, the law of war furnishes no basis for treating Padilla as a combatant in an armed conflict governed by the rules of this body of law. Indeed, although this Court need not reach that question to decide this case, categorizing the "war on terror" or the pursuit of al Qaeda suspects as an armed conflict is itself unprecedented and without support in international humanitarian law.

Under the law of war, "combatants" are defined principally as "members of the armed forces of a Party to a conflict." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter Additional Protocol I];[2] *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(2) [hereinafter Third Geneva Convention] (further defining those combatants entitled to prisoner of war status to include certain members of militias). Persons who are not

[2] International treaties are referred to herein in an abbreviated form. Complete citations are provided in the Table of Authorities.

members of the armed forces of a Party to a conflict and who are not on the actual field of battle wielding weapons have not traditionally been treated as combatants, lawful or unlawful. Instead, to the extent they have conspired to engage in violent acts, they have been treated as criminals under the domestic law of the captor.

Indeed, in U.S. law, this point was firmly established by *Quirin*, the very case on which the Government places primary reliance for its detention of Padilla as an enemy combatant. In *Quirin*, members of the armed forces of Nazi Germany, who had landed in uniform in the United States and then shed their uniforms in a plot to commit acts of sabotage, were treated as "enemy combatants" and tried before a military commission. *Quirin*, 317 U.S. at 21-22. However, those persons who aided the plot in the United States but who were not themselves members of the German army were not held as "unlawful combatants." They were instead tried in ordinary civilian courts for crimes such as treason. *Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943); Louis Fisher, *Nazi Saboteurs on Trial* 80-84 (2003).

In this case, the Government does not allege that Padilla ever participated directly in combat and claims only that Padilla is "associated" with al Qaeda, much as Haupt and Cramer were associated with the German saboteurs. The Government's own allegations dictate that Padilla be tried under civilian criminal jurisdiction like the detainees in *Haupt* and *Cramer*, not like the combatants in *Quirin*. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003), (Wilkinson, C.J., concurring in the denial of rehearing en banc) ("To compare this battlefield capture

to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges.").

Contrary to the Government's suggestion, its detention of Padilla as a so-called "unlawful combatant" is not a routine application of the customary law of war. Rather, the Government's detention dramatically expands the law of war (and correspondingly, the powers of the President as Commander in Chief) in unprecedented and illegal directions. The Government has every right to treat Padilla as an accused terrorist and criminal defendant, but it may not – by the force of its own rhetoric surrounding the "war on terror" – convert him into a combatant in an international armed conflict in order to justify his detention without charge or trial.

ARGUMENT

I. THE GOVERNMENT MISAPPLIES INTERNATIONAL HUMANITARIAN LAW TO THE WAR AGAINST TERRORISM.

International humanitarian law (IHL), sometimes referred to by its older label, the "law of war,"[3] is the body of international law that regulates the methods, targets, and means of waging armed conflict. *See* Dep't of the Army, *The Law of Land Warfare, Field Manual* 27-10,

[3] The terms "law of war," "law of armed conflict," "international humanitarian law," and "IHL" are used interchangeably throughout this brief.

paras. 2-3 (1956) [hereinafter *The Law of Land Warfare*].[4] International humanitarian law is a complex body of law. While this brief cannot provide a comprehensive overview of IHL, even a brief review – particularly of the Geneva Conventions – demonstrates the Government's misuse of the law of war.

International humanitarian law does not govern a state's initial decision to use military force. Once armed conflict has begun, however, IHL provides a set of rules that, in their broadest form, prohibit the deliberate targeting of those not directly participating in hostilities and limit the violence and destructiveness of the tactics employed to that level necessary to achieve the aim of the conflict. *See* Marco Sassòli & Antoine A. Bouvier, *How Does Law Protect in War* 67 (Int'l Comm. of the Red Cross, 1999); *The Law of Land Warfare* para. 3.

International humanitarian law derives from two sources: treaties and customary international law. *See The Law of Land Warfare* para. 4. Much of IHL is contained in treaties. For example, the four 1949 Geneva Conventions [hereinafter the Geneva Conventions] that govern the treatment of wounded and sick soldiers (First Geneva Convention), sailors (Second Geneva Convention), prisoners of war (Third Geneva Convention), and civilians

[4] *The Law of Land Warfare* "is an official publication of the United States Army." Originally published in 1956, it is still regarded as an authoritative treatment of the law of war, and, although it lacks binding legal force, its provisions are "of evidentiary value insofar as they bear upon questions of custom and practice." *Law of Land Warfare* para. 1.

(Fourth Geneva Convention)[5] in international armed conflicts are treaties that 191 nations have ratified, including Afghanistan, Iraq, and the United States.[6] Because treaties are essentially contracts between nations, the Geneva Conventions technically bind only the nations that have ratified them and, according to their explicit language, they principally apply only to armed conflicts between these nations. *See* Geneva Conventions, Common Article 2 ("[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties. . . . ").[7] For example, the Geneva Conventions clearly apply to the armed conflicts involving the United States, Afghanistan and Iraq, because these nations have ratified the Conventions.[8]

In addition to treaties, IHL is also found in customary international law. *See The Law of Land Warfare* para. 6. Customary international law consists of rules derived from the actual practice of nations developed gradually over time that are followed from a sense of legal obligation. *See*

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[5] Another important series of treaties, first adopted in 1907, addresses the means and methods of warfare. These are sometimes referred to collectively as the "Hague Conventions" or "Hague law."

[6] *See* Int'l Comm. of the Red Cross, States Party to the Geneva Conventions and their Additional Protocols (May 20, 2003) <*www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc*> (States Party to the Geneva Conventions).

[7] The first few articles of the four 1949 Geneva Conventions are identically worded, and are sometimes referred to as the Common Articles, e.g., Common Article 2 or Common Article 3.

[8] *See* States Party to the Geneva Conventions (May 20, 2003) <*www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc*>.

The Paquete Habana, 175 U.S. 677, 711 (1900). Once a rule of customary international law emerges, it binds all nations, except for those states that have specifically and repeatedly objected to the rule. Like the common law, customary international law is not consolidated in any authoritative source but instead is found in many sources, such as judicial decisions interpreting international law, statements by government officials, and scholarly books and articles on international law. *See The Law of Land Warfare* para. 6.

The distinction between IHL that derives from treaties and IHL that forms part of customary law is not clear-cut. Some international treaties setting out the law of war largely represent codifications of pre-existing international customary rules, and sometimes treaty rules over time take on the status of customary international law. *See* Dep't of Army, *Law of War Workshop Deskbook* 26 (Brian J. Bill, ed., 2000); *The Law of Land Warfare* para. 6. For example, although the United States has not ratified the 1977 Additional Protocols I and II to the Geneva Conventions (which provide further rules for international and non-international armed conflicts, respectively), it recognizes that most of their provisions now constitute customary international law binding upon the United States. *Law of War Deskbook* 32; Dep't of Army, *Operational Law Handbook* 11 (T. Johnson ed., 2003).[9]

[9] To the extent that this brief relies on the Additional Protocols, it relies only on those portions which the United States has either explicitly recognized as part of customary international law or to which the United States has not objected.

The field of IHL is divided into an elaborate body of law regulating international armed conflicts and a less-developed legal doctrine governing non-international armed conflicts (typically civil wars). Once the rules of IHL apply to a situation, the law of war provides a comprehensive framework for the treatment of any individuals caught up in the conflict. As the Commentary to the Fourth Geneva Convention notes:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention. . . . *There is no* intermediate status; nobody in enemy hands can be outside the law.[10]

Under IHL, individuals caught up in a conflict must either be classified as combatants or non-combatants, with only combatants being lawful targets for military action. *See, e.g.,* Additional Protocol I art. 48. So long as they are not disarmed or surrendering, combatants may be attacked with lethal force wherever they are found.[11] Thus, if Padilla (and all other persons who have associated with al

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[10] *See* Int'l Comm. of the Red Cross, *Commentary to the IV Geneva Convention* 51 (Jean S. Pictet ed., 1958) [hereinafter *ICRC Commentary to the Fourth Geneva Convention*]; Fourth Geneva Convention arts. 4(1) & 4(3); Additional Protocol I art. 50; *Law of Land Warfare* para. 73.

[11] While it is forbidden "to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion," Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 23(c), IHL authorizes attacks on "individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or else-where." *The Law of Land Warfare* para. 31.

Qaeda) truly were "combatants," the law of war would not only allow them to be held until the end of active hostilities, but it would allow them to be shot upon discovery, at any point, anywhere in the world – whether on a road in a faraway place or in a U.S. airport.[12]

II. PADILLA IS NOT A COMBATANT UNDER THE LAW OF WAR.

The Government indiscriminately invokes IHL terminology without reference to its context or relationship to other parts of that law to justify its indefinite detention of Padilla. IHL, however, is a highly technical and complex body of law, following its own internal logic and shaped by history, politics, and military technology. IHL treaties are carefully negotiated, and their language is often abstruse. One cannot pluck a phrase from the law of war and apply it out of context. Correctly read, the rules of IHL compel the conclusion that Padilla is not a "combatant" in any "armed conflict" (international or non-international) as those terms are defined in IHL. This Court, therefore, must find the legal principles relevant to his detention in domestic constitutional or criminal law and in other bodies of international law (for example, treaties on terrorism or international human rights law).

IHL is divided into two broad sub-fields: that regulating "international armed conflicts" and that regulating "non-international armed conflicts." In order to understand which of these sub-fields applies to Padilla's case,

[12] The Government might also be allowed to inflict collateral damage on bystanders. *See* Additional Protocol I art. 51.

one must determine the nature of the conflict in which Padilla has allegedly served as a combatant. The Government fails to provide a legal analysis of either the conflict in which it believes Padilla has participated as a combatant or the basis for classifying Padilla as a combatant under the law of war. A systematic approach to both questions, however, reveals that Padilla cannot be considered a combatant – illegal or legal – in any cognizable armed conflict within the framework of the existing laws of war.

A. Padilla is not a Combatant in an International Armed Conflict.

By definition, "an international armed conflict" must involve the armed forces of two or more nation states. By their terms, the Geneva Conventions apply only to international armed conflicts between two or more of the states that have ratified those conventions (the "High Contracting Parties").[13] Because al Qaeda is not a nation state, it cannot, by definition, be a party to an international armed conflict under IHL.

By contrast, "Operation Enduring Freedom" in Afghanistan clearly met the definition of international armed conflict. It involved fighting between the organized military forces of Afghanistan and the United States (among other countries), both of which are High Contracting Parties to the Geneva Conventions. Although it has

[13] The Geneva Conventions also apply to territorial occupations of one of the High Contracting parties and to conflicts between High Contracting Parties and other nations if those nations agree to apply the provisions of the Conventions. Neither of these situations is relevant to this case.

not done so in its arguments before this Court, the Government might contend that Padilla should be deemed a combatant in the Afghanistan conflict based on his alleged association with al Qaeda. In both a factual and legal sense, however, Padilla cannot be deemed a "combatant" in the "international armed conflict" between the United States and Afghanistan.

The Geneva Conventions, and especially Additional Protocol I, prescribe with considerable detail the rights and duties of people caught up in an armed conflict. Additional Protocol I states that "combatants," who are "members of the armed forces of a Party to a conflict," art. 43(2), are lawful military targets, while non-combatants are not.[14] This definition deliberately limits the class of people who lawfully may be targeted by opposing military forces. People who are actually in the armed forces are deemed combatants and are generally lawful targets;

[14] It further defines combatants to include:

> "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."

Additional Protocol I art. 43(1). Members of disorganized militia groups who are not under a command responsible to a State Party to the conflict are not combatants under this definition. Conversely, civilians are defined as persons who do not fall into one of the categories of persons entitled to prisoner of war status pursuant to article 4 of the Third Geneva Convention and article 43 of Additional Protocol I. *See* Additional Protocol I art. 50.

people who are not in the armed forces are generally not combatants and are generally not lawful targets.

When a civilian, however, is actually found wielding arms in the zone of combat, he may be treated as a lawful target of attack – but only insofar and as long as he takes a "*direct* part in hostilities."[15] A civilian does not become a combatant because the opposing commander suspects he might, at some point in the future, plot to engage in violent acts.[16] If the rule were otherwise, large parts of the civilian population of a country at war would become lawful targets for attack.

Shooting a gun on a battlefield constitutes taking a "direct part in hostilities." Carrying a gun towards the battlefield with the imminent intent to engage in combat might also amount to taking a direct part in hostilities. By contrast, supporting the enemy cause off the battlefield, conspiring with the enemy, contemplating taking part in battle in the future, and sympathizing with the enemy do not constitute taking a direct part in hostilities under the

[15] Additional Protocol I art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a *direct* part in hostilities.") (emphasis added).

[16] *See* Int'l Comm. of the Red Cross, *Commentary on the Additional Protocols* 619 (C. Pilloud et al. eds., 1987) (noting that there is "a clear distinction between *direct* participation in hostilities and participation in the war effort," for large portions of the civilian population may indirectly support the war effort and should not by virtue of that become targets) (emphasis added) [hereinafter *ICRC Commentary on the Additional Protocols*].

law of war, although those acts may be punishable under domestic criminal law.[17]

A person with civilian status who participates *directly* in hostilities would be violating the laws of war, and in the Government's nomenclature would be labeled an "illegal combatant."[18] "Illegal combatant" or "unlawful combatant" is not a term that appears in any treaty on the law of war. Commentators have occasionally used these phrases to describe someone who does not receive the privileges accorded to combatants, the most important of which are prisoner of war status and immunity from prosecution for engaging in combat. The phrase "unlawful combatant"

[17] *See* Robert K. Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM U. J. INT'L. L. & POL'Y 49, 70 (1993) ("[A] civilian can be considered to participate directly in hostilities when he actually takes part in fighting, whether singly or as a member of a group. Such participation . . . would also include acting as a member of a weapons crew or providing target information for weapons systems 'intended for *immediate use against the enemy*, such as artillery spotters or members of ground observer teams.'") (citation omitted) (emphasis in source); *ICRC Commentary on the Additional Protocols*, at 516 ("Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place."); L.C. Green, *The Contemporary Law of Armed Conflict* 107 (2d ed. 2000).

[18] A civilian who directly participated in hostilities could only be treated as a combatant in the sense that he would become a lawful target of attack for the duration of his participation in combat; in all other senses he would remain a civilian protected by the Fourth Geneva Convention. Fourth Geneva Convention art. 4; *The Law of Land Warfare* para. 73. The Fourth Geneva Convention would not prohibit the detention or criminal prosecution of such a person based on his unlawful participation in hostilities, provided that procedural safeguards were observed. *See* Fourth Geneva Convention arts. 42, 43, 78; Additional Protocol I art. 75(4).

actually encompasses two sets of people: members of the regular armed forces who do not wear uniforms and do not bear arms openly (and thereby lose their privileged combatant status), and civilians who unlawfully participate directly in battle (who never had privileged combatant status to begin with).

As persons in the latter category retain their civilian status, it is arguably improper to refer to them as combatants at all: they are more accurately described as "unprivileged belligerents." *See* George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int'l L. 891, 893 (2002). The *Quirin* Court's use of the phrase "unlawful combatants," *Quirin,* 317 U.S. at 31, rather than the categories and terminology of the Geneva Conventions, reflects the fact that *Quirin* predates the 1949 Conventions. Its analysis of IHL must therefore be read in conjunction with the subsequent, authoritative Geneva Conventions.

Because Padilla is neither alleged to be a member of a regular armed force nor to have participated directly in any battle, he cannot be categorized as a combatant – lawful or unlawful. The Government does not claim that Padilla participated directly in hostilities in Afghanistan. Indeed, there is no allegation that Padilla played *any* role, direct or indirect, in the conflict between the United States and the armed forces of Afghanistan's Taliban Government. Neither the President's designation of Padilla as an enemy combatant nor the Mobbs Declaration even mentions the conflict in Afghanistan. Presidential Order Transferring Jose Padilla to Enemy Combatant Status para 4 (June 9, 2002) (Pet. App. 57a-58a); Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense of Policy (Aug. 27, 2002) (Mobbs Declaration)

(Pet. App. 167a-172a). Nor is there any allegation that Padilla is a member of any "organized armed forces, groups and units which are under a command responsible to [the Taliban Government] for the conduct of its subordinates."[19]

Members of the Taliban armed forces would properly be considered combatants in the conflict in Afghanistan. Similarly, members of groups associated with the Taliban, such as al Qaeda, who fought on the battlefield in Afghanistan and who served under a command responsible to Taliban officials could also be classified as combatants in that conflict. In addition, any other individuals who fought on the battlefield could be treated as combatants during their actual participation in the fighting. Padilla does not fall into any of these categories and therefore cannot be considered a combatant in the conflict in Afghanistan.

If this Court were to find that Padilla should be considered a combatant in an international armed conflict, it would be implicitly ratifying the position that *any* person ever "associated" with al Qaeda, at any place in the world, and presumably at any time, is also automatically a combatant in the armed conflict *in Afghanistan*. This position would constitute a dramatic extension of the law of war to persons never connected to that armed conflict.

[19] *See* Additional Protocol I art. 43(1). The relevant "Party" in the conflict in Afghanistan is the Taliban Government, which at the time of the hostilities was the *de facto* government of Afghanistan.

B. International and Domestic Law Also Provide no Support for the Characterization of Padilla as a Combatant in a Non-International Armed Conflict.

International and domestic law also provide no support for characterizing Padilla as a "combatant" in any other armed conflict. The Government appears to contend that Padilla's alleged activities, although not specifically part of the conflict in Afghanistan, are linked to the global U.S. campaign against the al Qaeda network. (Br. for Pet'r at 16) (describing this case as concerning "the ongoing conflict against al Qaeda"). As discussed above, such a conflict could not be described as an international armed conflict, because international armed conflicts must involve at least two nation states. *See* Geneva Conventions Common art. 2; *see also* Hilaire McCoubrey & Nigel D. White, *International Law and Armed Conflict* 194 (1992) (defining international armed conflict as "resort *by states* to active and hostile military measures . . . ") (emphasis added). Accordingly, to the extent the interaction between the United States and al Qaeda is an armed conflict within the purview of international humanitarian law, it must be described as a non-international armed conflict, subject to the much less elaborate legal regime regulating such conflicts. Even in the framework of non-international armed conflicts, there is no precedent for treating an individual who is not a member of an organized military force and who has not directly engaged in combat as a "combatant."

In terms of treaty law, non-international armed conflicts are governed by Common Article 3 of the Geneva Conventions and Protocol II Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts

[hereinafter Additional Protocol II], which set out certain minimum standards for humane treatment of opposing parties.[20] Unlike the treaty provisions governing international armed conflict, the treaty provisions governing non-international armed conflict do not explicitly define "combatant." To the extent the law of non-international armed conflict implicitly recognizes a class of persons that may be described as combatants, it includes only members of organized military forces or persons taking a *direct* part in hostilities. As in international armed conflict, civilians in non-international armed conflicts may not be targets of armed attack "unless and for such time as they take a direct part in hostilities." Additional Protocol II art. 13(3). Padilla is not alleged to be a member of al Qaeda, to have engaged in combat, or otherwise to have directly participated in hostilities. As noted previously, contemplating committing acts of violence at some undetermined point in the future does not, under IHL, constitute direct participation in hostilities.

Moreover, while the law of *international* armed conflict specifically allows the detention of prisoners of war until the end of hostilities[21] and the internment of alien civilians for imperative reasons of security during the conflict,[22] IHL provides no independent authority for detaining anyone in *non-international* armed conflicts, even prisoners of war. Instead, it leaves it up to individual states to provide the authority for detention as a matter of

[20] Such standards include the right to fair trial. *See* Geneva Conventions, Common Article 3.

[21] Third Geneva Convention arts. 21, 118.

[22] Fourth Geneva Convention art. 42.

domestic law. Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants*," 85 Int'l Rev. Red Cross 45, 47 (2003); *ICRC Commentary to Fourth Geneva Convention*, at 44.

Thus, if the Government claims that it has the authority to detain Padilla as a combatant in a non-international armed conflict, it must do so on the basis of positive domestic law. It cannot rely on international law or on domestic cases like *Quirin,* which are based on international law. The President's authority to detain Padilla must, therefore, be found in some domestic source that does not flow from the inherent powers of the Commander in Chief derived from the laws of war.

To the extent there is domestic U.S. law on the status of persons in non-international armed conflict, it is not in the Government's favor. In the most significant non-international armed conflict in which the United States has participated, the Civil War, the Government granted belligerent status to the regular Confederate Army and treated its soldiers as prisoners of war.[23] As discussed further below, this Court determined in the context of that conflict that, under the U.S. Constitution, persons like Padilla were to be prosecuted in civilian criminal courts, and not to be held as prisoners of war or prosecuted in front of courts-martial. *See Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866).

[23] *See* Instructions for the Government of Armies of the United States in the Field (Lieber Code), April 24, 1863 art. 57.

C. Consistent U.S. Practice in Past Armed Conflicts Does Not Support the Treatment of Padilla as a Combatant.

The Government's treatment of Padilla also runs afoul of the consistent past practice of the United States, which in turn is indicative of the customary law of war. A careful examination of U.S. practice dating from the time of the Civil War reveals that only those individuals who were members of conventionally organized armed forces or who were found actively engaging in combat on the battlefield have been considered combatants who need not be tried in civilian courts. *See* Jennifer K. Elsea, *Presidential Authority to Detain "Enemy Combatants*," 33 Presidential Stud. Q. 568 (Sept. 2003).

During the Civil War, the Supreme Court held that an individual accused of conspiring with a secret society to overthrow the U.S. Government, seize U.S. weapons, liberate enemy prisoners of war, and kidnap elected officials, could not constitutionally be held as a prisoner of war or tried by a military commission. *See Milligan,* 71 U.S. 2. Specifically, the Court found that Milligan could not be tried by military commission because "he was not engaged in legal acts of hostility against the government. . . . " *Id.* at 131. Nor did the Court accept the Government's argument that Milligan, who had never been on the battlefield, could be "held as a prisoner of war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates." *Id.* at 21. The Court, instead, found that Milligan should be tried and punished by the courts of Indiana. *Id.* at 131.

During World War I, the Government tried in courts-martial several spies who were members of the German

army and who had entered the territory of the United States. *See, e.g., United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920) (upholding military jurisdiction and thus the authority to detain). *Id.*, at 760-61. Significantly, two American citizens who were alleged to have conspired to commit espionage with Wessels were tried, and ultimately acquitted, of treason – not in courts-martial – but 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).

During World War II, in the *Quirin* case, the defendants had been paid by the German Government, had received instructions from a member of the German High Command, and had been wearing their German army uniforms when they landed in the United States. *Quirin,* 317 U.S. at 20. Although the defendants in *Quirin* were not entitled to treatment as prisoners of war because they had abandoned their uniforms upon entering the country,[24] *id*. at 35 n.12, they clearly remained members of the German armed forces.[25] Indeed, this Court described the defendants' shedding of their German uniforms upon entry in the United States as "essential" to their offense. *Id.* at 38.

Of the many people associated with the saboteurs' plot in *Quirin*, the only ones who were treated as enemy

[24] It was for this reason that the Court described them as "unlawful combatants." *Id.* at 31.

[25] In *Quirin,* the Court specifically distinguished *Milligan* on the ground that Milligan was not a "part of or associated with the armed forces of the enemy," 317 U.S. at 45, even though Milligan had been accused of being a member of a paramilitary organization associated with the Confederate Army. Elsea, *supra*, at 574.

combatants were members of the German military. Collaborators with the saboteurs and others who conspired with them were tried in federal court. Fisher, at 80-84.[26] The Government nowhere alleges that Padilla is a member of al Qaeda. It merely states that he is "associated" with the al Qaeda network – much as the collaborators in *Quirin* who were tried in federal court were associated with the defendants in that case.

The Government points to no precedent in U.S. history for treating an individual who is not a member of a conventionally organized army or who was not captured on an active battlefield as a combatant. *See* Elsea at 568-69 (describing the Government's definition of "enemy combatant" as "much broader than that which has historically applied during armed conflict and, as applied [to Padilla] appears to be without precedent").

Four years after *Quirin*, a federal court upheld the detention of a U.S. citizen as a prisoner of war (and hence, recognized his status as a combatant). However, the detainee in that case had been inducted into the Italian army, had been captured on the field of battle, and was wearing an Italian uniform. *In re Territo*, 156 F.2d 142, 143 (9th Cir. 1946). Neither *Quirin,* nor *Territo,* nor any case decided by this Court or any of the lower courts, supports detention of Padilla as an enemy combatant. Under controlling domestic law, then, Padilla – who has not participated directly in combat and who is not a member of a regularly organized army – is entitled to a criminal trial.

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[26] *See, e.g., Cramer*, 325 U.S. 1; *Haupt*, 136 F.2d 661.

III. THE "WAR ON TERROR" DOES NOT CONSTITUTE AN ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW.

As the Government does not allege that Padilla is a member of al Qaeda, this Court need not determine whether all members of al Qaeda should be viewed as members of an "army" for purposes of IHL. This Court should realize, however, that the Government's assertion that the "war on terror" represents an armed conflict, as that phrase is understood within IHL, is unprecedented, unwarranted, and highly inimical to the careful limitations and underlying principles of this body of law.

Terrorist actions by private groups have not customarily been viewed as creating armed conflicts to which international humanitarian law applies.[27] For example, as the United Kingdom stated when it ratified Additional Protocol I: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation." Reservation by the United Kingdom to Art. 1, para. 4 & Art. 96, para. 3 of Additional Protocol I (Dec. 12, 1977) <*www.icrc.org/ihl.nsf*>. The British, Spanish, and Peruvian campaigns against the IRA, ETA, and the Shining Path guerrillas, respectively, have not been treated as armed conflicts under IHL.[28] Moreover, international and regional conventions that

[27] *See* Green, *supra,* at 56 ("[A]cts of violence committed by private individuals or groups which are regarded as acts of terrorism . . . are outside the scope of IHL").

[28] McCoubrey & White, *supra,* at 318.

address terrorism do not treat it as an act of war, but instead as grounds for criminal, civil, or administrative liability.[29]

Common sense explains why recognizing the "war on terror" as an armed conflict undermines the traditional protections and limitations of IHL. In a war against terrorism, all of the "combatants" of one side are persons who have taken no direct part in anything resembling traditional combat. In most armed conflicts, membership in the armed forces of a Party provides a straightforward criterion for detention; no dispute would ordinarily arise about whether a soldier taken prisoner is actually in the opposing army. By contrast, it may be factually quite difficult to determine whether an individual is a member of al Qaeda.[30]

To allow the President to condemn to indefinite detention without trial, any person, anywhere – even a U.S. citizen – whom he alleges to be a "member" of al Qaeda (or any other terrorist group), would represent a dramatic extension of the President's powers in derogation

[29] These conventions also require States Party to guarantee fair treatment to those detained on terrorism charges. *See, e.g.,* International Convention for the Suppression of the Financing of Terrorism art. 17; International Convention for the Suppression of Terrorist Bombings art. 14; International Convention Against the Taking of Hostages art. 8; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons art. 9.

[30] By all accounts, al Qaeda itself is a network of "cells" of terrorists operating in many countries, and the precise contours of its organization are unclear. Phil Hirshkorn et al., *Blowback,* Jane's Intelligence Rev., vol. 13, no. 8 (Aug. 1, 2001) <*www.mwarrior.com/alqaeda.htm*>.

of domestic constitutional rights, without any precedent in the laws of war. Moreover, this expansive new power would come without any time limits. IHL anticipates that armed conflict will, at some point, end, and it regulates the return from a state of war to normal life.[31] As defined by the Government, however, the "war on terror" will not end until all terrorists (and all those who are considering engaging in future terrorist acts) anywhere in the world are eradicated.

Finally, if detention of enemy combatants under IHL were extended to the "war on terror," there is little that would prevent its application to other violent, transnational non-state actors, such as narco-traffickers, organized crime, the illegal arms trade, and other such groups. These groups may be highly organized, capable of inflicting violence on governments or individual citizens, and operate with relative impunity in particular states. For example, as this Administration recently noted,

> the illegal drug trade has had a terrible impact on the United States, leading to 50,000 drug-related deaths yearly – 19,000 of these directly attributable to drugs. By way of comparison, drugs claim six times as many lives each year in the United States as did the terrorist attacks of September 11, 2001.[32]

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[31] *See, e.g.,* Third Geneva Convention art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

[32] U.S. Official Lauds Colombian Efforts to Combat Narco-Terrorism – Simons says measures are succeeding, urges continued support, State Department Press Releases and Documents (June 3, 2003), *available at* 2003 WL 2048364.

Nor is there any reason why governments of other nations may not point to U.S practice to justify the detention without trial of all those they deem "terrorists."

Amici fully acknowledge that al Qaeda's terrorist actions are dangerous and illegal, and subject to severe punishment under a host of international and domestic laws. The Executive Branch has every right to arrest alleged members and associates of al Qaeda, including Padilla, and charge them with the crimes the Government believes they have committed. Since federal law includes jurisdiction over inchoate crimes, the Government need not wait for a terrorist to achieve his dangerous goal before arresting and prosecuting him.

Moreover, the fact that the United States' interactions with al Qaeda do not meet the definition of armed conflict under IHL does not mean that IHL prohibits the use of force against al Qaeda. IHL concerns *jus in bello* and regulates the conduct of the warring parties once a situation reaches the level of an armed conflict; it does not address *jus ad bellum*, or the legality of the decision to use armed force in the first place.

What the Government may not do, however, is claim that the customary law of war provides it with a legal justification, which it otherwise lacks under existing domestic law, to hold suspected terrorists indefinitely, incommunicado, without charge, without counsel, and without trial. The law of war provides no such authority.

Merely rehearsing the parallels between *Quirin* and Padilla's case does not substitute for legal analysis. Multi-level agency review, however elaborate, similarly cannot alter the key legal and factual distinctions between Padilla's case and that of the German saboteurs. The defendants in *Quirin* had worn German uniforms, had

been paid by the German government, and were under the command of the German army. In addition, they were participants in a prototypical armed conflict: a full-scale war between two nation states. These facts dictated both the applicable branch of the law of armed conflict (the rules regulating international armed conflict) and the correct classification of the *Quirin* defendants as combatants (because they had been uniformed members of the German army). These factors rendered this Court's determination that the *Quirin* defendants had violated the laws of war – by entering the United States surreptitiously, by submarine, at night and by shedding their uniforms at the water's edge – an easy case. By contrast, Padilla's situation does not fit neatly within the laws of war; on the contrary, the Government's frequent assertion that Padilla is a combatant in an armed conflict is deeply flawed and, ultimately, untenable.

CONCLUSION

The international law justification for Padilla's detention as a combatant is chimerical. If this Court recognizes Padilla as a combatant in an armed conflict – despite his lack of direct participation in combat and his lack of membership in any sort of military force – it will ratify the President's attempt to avoid longstanding and well-settled domestic restraints.

Furthermore, the Government's attempt to harness international law to justify its extraordinary actions runs afoul of the foundational principles of IHL. The rules of

IHL are designed to provide humanitarian limits on nations' behavior in the course of armed conflicts.[33] In this case, the Government twists IHL from a shield into a sword: using it to justify the indefinite detention of Padilla and to circumvent domestic legal requirements. Using IHL, not as a restraint on the use of force, but as a method to access extraordinary domestic powers violates the letter, aims and spirit of IHL.[34]

It may be that the events of September 11, 2001 have inaugurated an era marked by a new breed of conflict. It may be that the laws of war will, in the future, be revised in order to accommodate these changing threats. In the meantime, however, international humanitarian law does not provide parameters for the United States' campaign

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[33] *See The Law of Land Warfare* para. 2; *The Prize Cases*, 67 U.S. (2 Black) 635, 667 (1862) (stating "the laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war").

[34] While the Government grasps for the powers the law of war grants, it simultaneously disregards all of the protections that the law of war requires. For example, the law of war states that all captured combatants must be treated as prisoners of war until a "competent tribunal" determines that they are not entitled to such protection. *See, e.g.,* Third Geneva Convention art. 5; Additional Protocol I art. 45; *The Law of Land Warfare* para. 73; Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997). And yet the Government has given none of its captives in the "war on terror" hearings before "competent tribunals" and has given none of them the protections of prisoner of war status. Nor has the Government complied with numerous other provisions of IHL that provide protection to wartime detainees. *See, e.g.,* Additional Protocol I art. 75(3) (stating "*any* person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken") (emphasis added).

against al Qaeda. The Government cannot simultaneously emphasize both the novelty of the current conflict and claim that its treatment of alleged terrorists is "deeply rooted in the laws and customs of war." (Br. for Pet'r at 28). On the contrary, its treatment of Padilla is unrooted in treaty law, custom, or U.S. historical practice.

The President's designation and subsequent detention of Padilla as a combatant is an unprecedented and unwarranted distortion of the customary law of war. This centuries-old body of law does not support the Government's position, which, indeed, contravenes its underlying principles and careful limitations. If this Court endorses Padilla's indefinite detention without providing him with the constitutional safeguards to which he is entitled, it will not only weaken our domestic protections but will also do considerable violence to an important body of law that protects soldiers, civilians, and all those caught up in the scourge of war.

Respectfully submitted,

ALLISON MARSTON DANNER
Assistant Professor of Law
VANDERBILT UNIVERSITY LAW SCHOOL
131 21st Avenue South
Nashville, Tennessee 37203-1181
(615) 322-6762
Counsel of Record for Amici Curiae

GEORGE C. HARRIS
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
(415) 268-7000

Counsel for Amici Curiae