No. 03-1027

IN THE SUPREME COURT OF THE UNITED STATES

DONALD RUMSFELD,
Petitioner,

v.

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

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

---

BRIEF FOR *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF RESPONDENT

DANIEL KANSTROOM
Professor and Director
International Human Rights Law Program
Boston College Law School
885 Centre Street
Newton, Massachusetts 02459
617-552-0880
Attorney for *Amici Curiae* Law Professors

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. CASES

U.S. CONSTITUTION PROVISIONS

U.S. STATUTES, REGULATIONS

TREATIES

OTHER INTERNATIONAL LEGAL MATERIALS

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*

Amici Curiae are law professors who are concerned about the human rights questions involved in this matter. *Amici* support affirmance and write to situate the issues in this case within the broader context of international human rights law. *Amici* believe that this Court's analysis of the decision rendered by the Second Circuit should take into account the serious rights questions raised by the assertion of executive authority to designate, detain, and isolate people deemed "enemy combatants" or any equivalent category. These concerns weigh strongly against endorsement of such broad, unilateral executive power and in favor of a strict construction of the Joint Resolution.[*]

[*] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part. The brief was written by Daniel Kanstroom, counsel for *Amici Curiae*, with the assistance of Sara Leary, Hanh Nguyen, Tatum Pritchard, and Haimavathi Varadan, students at Boston College Law School. No one other than *Amici Curiae*, Boston College Law School, or counsel for *Amici Curiae* has made a monetary contribution to the preparation or submission of the brief. Both Petitioner and Respondent have consented to the filing of this brief. Letters of consent have been lodged with the clerk.

SUMMARY OF ARGUMENT

No challenges to human rights are more basic than those presented by the seizure, isolation, interrogation without counsel, and detention of a United States citizen in the United States by the executive branch of government. This Court's answers to those challenges should comply with and be informed by the standards of international human rights law.

Amici believe that this case is governed by principles of domestic constitutional and criminal law which relate to international human rights law in historical and evolving ways. The rules provided by this body of law could not be clearer: Mr. Padilla may not be designated by executive order as an "enemy combatant" and thereby held outside all of the accepted norms of human rights law.

The government's first major contention is that "the President's inherent powers as Commander in Chief are substantially more robust than recognized by the court of appeals." (Petitioner's Brief [hereinafter Pet. Br.] at 14) This proposition cannot mean that Mr. Padilla may be unilaterally designated as an "enemy combatant" and then deprived of all rights, including the basic rights to counsel and to meaningful judicial review of the legality of his detention. Such a ruling by this Court would contradict the most fundamental norms of human rights developed over hundreds of years and represented by documents as central to our legal system as *Magna Carta*, the Suspension Clause[1] and the Fifth Amendment.[2] Moreover, it would violate basic principles of international human rights law to which the United States is bound and which should inform this Court's analysis of the scope of *habeas corpus* review in this case.

Indeed, even if this Court were to accept the government's second major argument—that Congress has

[1] U.S. CONST. art. I, § 9.
[2] U.S. CONST. amend.V.

authorized the detention of Mr. Padilla through the Authorization for Use of Military Force Joint Resolution[3] [hereinafter "Joint Resolution"]—the required result would be no different. Congressional authorization of unreviewable executive detention of a U.S. citizen on U.S. soil, or indeed of any person, cannot overcome the requirements of the U.S. Constitution and of international human rights law. As James Madison once noted as to non-citizens, "[even if they] are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them..."[4]

The Court's interpretation of the Joint Resolution and the Non-Detention Act[5] should be informed by basic human rights principles. Absent the clearest possible statement by Congress, this Court should strive to avoid both a serious constitutional question and a serious conflict with well-accepted human rights norms.

Most importantly, *Amici* urge this Court to make clear that:

- Mr. Padilla has a fundamental human right against arbitrary detention;
- this right derives from his humanity, not only from his U.S. citizenship;
- this right includes a right to counsel and to meaningful *habeas corpus* judicial review.

[3] Pub. L. No. 107-40, 115 Stat. 224 (2001).

[4] James Madison, *Report on the Virginia Resolutions*, 4 Debates, Resolutions and Other Proceedings, in Convention on the Adoption of the Federal Constitution 556 (Jonathan Elliot ed., 2d ed. 1836).

[5] Non-Detention Act, 18 U.S.C. § 4001(a) (2000).

ARGUMENT

I. INTERNATIONAL HUMAN RIGHTS LAW PROHIBITS ARBITRARY DETENTION OF ANY PERSON AND MANDATES MEANINGFUL JUDICIAL REVIEW OF DETENTION

A. International Human Rights Law Prohibits Arbitrary Detention

The protections of international human rights law against arbitrary government detention are as fundamental as any legal principles one can imagine. Their lineage in our legal system may be traced at least as far as back as 1215 to the ringing guarantees of *Magna Carta* that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." As Alexander Hamilton once noted, "The practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument of tyranny."[6]

Regardless of the formal legal status or the location of a person, contemporary international human rights law, heir to this long tradition, clearly prohibits "arbitrary detention." It is a central part of the International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified.[7] Widespread acceptance of the prohibition

---

[6] *See* THE FEDERALIST No. 84, at 533 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

[7] The General Assembly of the United Nations adopted the Covenant in 1966, and it entered into force in 1976. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, art. 9, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter ICCPR]. As of November 2003 there were 151 parties to the Covenant. The United States ratified the ICCPR in 1992 with certain "reservations, understandings, and declarations." The first declaration asserts that articles 1 to 27 of the ICCPR will not be self-executing in the U.S. U.S. Senate Resolution of Advice and Consent

of arbitrary detention evidenced by multilateral instruments, declarations, and intergovernmental bodies shows that this prohibition is customary international law and indeed may be a *jus cogens* norm.[8] The Restatement (Third) of Foreign Relations Law of the United States lists prolonged arbitrary detention among the human rights violations that rise to the level of *jus cogens*.[9] As the Tenth Circuit Court of Appeals has noted, "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."[10]

This principle is not contradicted by the international law of armed conflict (also known as "international humanitarian law" or the "law of war".) *Amici* conclude that the government is mistaken in its reliance upon this body of

---

to Ratification of the International Covenant on Civil and Political Rights, 102d Cong., 2d Sess., 138 Cong. Rec. S4783 (daily ed. Apr. 2, 1992). S. Exec. Rep., No. 102-23, at 15 (1992). *See infra* Sec. II. B.

[8] Other relevant instruments include: Universal Declaration of Human Rights, G.A. Res. 217A(III), 3d. Sess., art. 9, U.N. Doc. A/810 (1948) [hereinafter UDHR]; American Convention on Human Rights, Nov. 22, 1969, art. 7, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention] (signed by the U.S. on June, 1, 1997); American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, art. XXV, OEA/Ser.L.V/II82 doc.6 rev.1, at 17 (1948) [hereinafter American Declaration]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5, 213 U.N.T.S. 221. [hereinafter European Convention]; African [Banjul] Charter on Human and People's Rights, June 27, 1981, art. 6, O.A.U. Doc. CAB/LEG/67/3 Rev.5 21 I.L.M. 58 [hereinafter Banjul Charter]; Arab Charter on Human Rights, Sept. 15, 1994, art. 8, *reprinted in* 18 HUM. RTS. L.J. 151 (1997) [hereinafter Arab Charter]. *See also* Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N.GAOR, Supp. No. 49, at 298, princs. 2, 4, U.N. Doc. A/43/49 (1988).

[9] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) [hereinafter "RESTATEMENT"].

[10] *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981); *see also Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) ("There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention.") (citations omitted).

law to justify its detention of Mr. Padilla, who is not a "combatant" in an "armed conflict."[11] To be sure, a civilian who takes *direct* part in hostilities may be treated as a combatant.[12] But this rule cannot be extended to a person accused of planning an attack, as is the case with Mr. Padilla. Such an extension would largely obliterate the dividing line between civilians and combatants and would implicitly render civilians legitimate targets of military attack. It would also render irrelevant the Constitution's provisions applicable to criminal proceedings, in which courts are given the central role of preserving individual liberties against legislative and executive overreaching.[13] This Court should not acquiesce in so radical an extension of the law of war.

Rather, this Court should apply the well-accepted principles of international human rights law that exist within our constitutional framework to Mr. Padilla. Such an application of principles comports with the Universal Declaration of Human Rights (UDHR), which is recognized as both the prototype for and the embodiment of many international human rights norms. The UDHR states simply and directly that, "[n]o one shall be subjected to arbitrary

---

[11] *See* Protocol Additional [I] to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Additional Protocol I]; Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *see also Ex parte Quirin*, 317 U.S. 1, 21-22 (designating as "enemy combatants" *members of the armed forces* of Germany who shed their uniforms and entered the U.S. as saboteurs); *cf. Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943) (upholding prosecution in criminal courts of those who aided such plots).

[12] Additional Protocol I, *supra* note 11, 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.")

[13] *See, e.g.*, U.S. CONST. art. III, § 3 (judiciary to try criminal cases involving treason), amend. IV (courts oversee issuance of search warrants), amend. V (grand juries issue criminal indictments), amend. VI (criminal defendants entitled to "a speedy and public trial").

arrest, detention or exile."[14] More specifically, Article 9 of the ICCPR sets out the specific prohibition against arbitrary detention. Article 9(1) provides that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such ground and in accordance with such procedure as are established by law.

Deprivation of liberty may only be carried out "in the cases and according to the procedures established in pre-existing law."[15] Therefore, at a bare minimum, arrest and detention must be initiated upon legitimate legal grounds and State authorities must follow accepted legal procedure.[16]

Of course, mere compliance with national law does not inevitably render detention permissible because the law and its enforcement also must not be arbitrary.[17] Thus, in addition to being formally authorized by law, detention must

---

[14] UDHR, *supra* note 8, art. 9 (1948); *see* HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAWS, POLITICS, MORALS 138-39 (2d ed. 2000); David A. Martin, *How Rhetoric Became Rights*, WASH. POST, Nov. 1, 1998. The U.S. voted for the UDHR's adoption and reaffirmed its commitment on its 50th anniversary in 1998.

[15] *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 171 (1993).

[16] *See id.*; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L. J. 503, 507 (2003).

[17] *See* NOWAK, *supra* note 15, at 172 (1993); *see also Wintwerp v. Netherlands*, 33 Eur. Ct. H.R. (Ser. A), para. 39 (1979) ("[i]n any democratic society subscribing to the rule of law … no detention that is arbitrary can ever be regarded as lawful"). Indeed, the *travaux preparatoires* (drafting history) of the UDHR indicate that the term "arbitrary" covers detentions that are unauthorized by law, as well as detentions undertaken pursuant to unjust laws. *See* 3 U.N. GAOR, Pt. I, Third Comm. 247, 248 (1948). *See generally* Parvez Hassan, *The Word "Arbitrary" As Used in the Universal Declaration of Human Rights*, 10 HARV. INT'L L. J. 225 (1969).

not be unjust, unreasonable, or infringe upon human dignity.[18]

B. International Human Rights Law Requires Meaningful Judicial Review of Detention

To ensure that detention is not arbitrary, international human rights law guarantees a concomitant right to meaningful judicial review. Any individual deprived of liberty by arrest or detention has the rights to appear before a court without delay, to ask the court to determine the legality of detention, and to be released if the detention is unlawful.[19] These guarantees are informed by the related rights to an effective remedy for rights violations and to "a fair and public hearing by an independent and impartial tribunal."[20]

For judicial review to protect against arbitrary detention, it clearly must be both available and meaningful. At the very least this means that the judiciary may not simply decline to hear the case as a matter of law.[21] As the Inter-

---

[18] *See* NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 376 (2002) (*citing* U.N. Docs. A/2929, ch. VI, secs. 29, 30, 31; A/4045, sec. 49) ("The discussions during the drafting of ICCPR 9 suggest that the word 'arbitrary' was understood to mean 'unjust', or incompatible with the principles of justice or with the dignity of the human person."); *see also Study of the Right of Everyone to Be Free From Arbitrary Arrest, Detention and Exile*, U.N. Doc. E/CN.4/826/Rev./1, at 7 (1964) ("An arrest is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.").

[19] *See, e.g.*, ICCPR, *supra* note 7, art. 9(4); American Declaration, *supra* note 8, art. XXV.

[20] ICCPR, *supra* note 7, arts. 2(3), 14(1); American Declaration, *supra* note 8, art. XXVIII; UDHR, *supra* note 8, art. 10.

[21] *See* the *Castillo Petruzzi Case* in which a local law denied suspected terrorists writs of *habeas corpus*. *Castillo Petruzzi Case, Merits, Judgment*, Inter-Am. Ct. H.R. (Ser. C) No. 52, para. 184-88 (May 30, 1999) (finding that the absence of an effective remedy is a violation of

American Court of Human Rights has noted in its construction of the American Convention,[22] the proper test is whether judicial review is "truly effective in establishing whether there has been a violation of human rights and in providing redress."[23]

The right to speedy review is an accepted requirement,[24] as is the right to counsel.[25] In *Öcalan v. Turkey* the European Court of Human Rights noted that counsel may be required to facilitate effective review.[26] The Restatement also makes clear that detention is arbitrary when "the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time."[27]

C. International Human Rights Law Does Not Support Analysis of This Case as a Derogation of the Right to Meaningful Judicial Review

---

Article 7 of the American Convention and of "the very rule of law in a democratic society").

[22] *Amici* do not suggest that this Court is bound by opinions of the Inter-American Court of Human Rights. We do, however, believe that this Court should consider such opinions as well-respected, expert understandings of international human rights law.

[23] *Castillo Petruzzi Case, Merits, Judgment*, Inter-Am. Ct. H.R. (Ser. C) No. 52, para. 185 (May 30, 1999). The U.N. Human Rights Commission found judicial review ineffective in *Vuolanne v. Finland*, Views of the H.R. Comm. under Article 5, ¶4, of the Optional Protocol to the ICCPR, 35th Sess., Communication No. 265/1987, U.N. Doc. CCPR/C/35/D/265/1987 (1989) (review by a supervisory military officer did not offer a meaningful recourse as it did not have judicial character).

[24] *G.B. v. Switzerland*, App. No. 27426/95, Eur. Ct. H. R., para. 38 (2000) (finding that the Swiss court's two-tiered procedure prevented the detainee from a "speedy" result).

[25] *See e.g.*, *Report on Terrorism and Human Rights*, OEA/Ser.L./V/II.116 doc. 5 rev. 1 corr., paras. 19, 121, 127 (2002).

[26] *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H. R., para. 69 (2003).

[27] RESTATEMENT, *supra* note 9, § 702 cmt. h.

Extenuating circumstances may permit States to derogate temporarily from some international human rights obligations in accordance with certain safeguards.[28] Article 4 of the ICCPR states the permissible conditions for derogation:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties … may take measures derogating from their obligations … to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law …[29]

Amici do not in any way underestimate the gravity of the September 11th attacks or the threat they presented to the United States. However, the continuing, amorphous threat of terrorist activity without a foreseeable end cannot justify an indefinite derogation under Article 4.[30] Mr. Padilla's case should not be analyzed under this rubric.

ICCPR Article 4 and similar derogation provisions require an official proclamation of a state of emergency which "threatens the life of the nation."[31] Moreover, the

---

[28] U.N.H.R. Comm., General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, para. 1 (2001) [hereinafter General Comment No. 29].

[29] ICCPR, *supra* note 7, art. 4(1). For similar derogation provisions see European Convention, *supra* note 8, art. 15(1); American Convention, *supra* note 8, art. 27(1).

[30] *See* Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT'L L & POL'Y 58, 67 (2002).

[31] *See* ICCPR, *supra* note 7, art. 4(1); European Convention, *supra* note 8, art. 15(1); American Convention, *supra* note 8, art. 27(1). The United States has not submitted any such official statement to the U.N. or other State parties to the ICCPR. The official proclamation must specifically describe the nature of and justification for the derogation, among other things. *See Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. ESCOR, Annex, U.N. Doc E/CN.4/1985/4, para. 39(a)-(b) (1985) [hereinafter *Siracusa Principles*]. The Siracusa Principles were

requisite threat should affect the entire population and at least part of the territory of the State, challenging its physical integrity, the political independence of the State, or the basic function of institutions necessary to protect the human rights recognized in the ICCPR.[32] A derogation is strictly limited to what is necessary under the circumstances in terms of proportionality, material scope, duration, and geographical coverage.[33] The strict necessity of each individual measure should be examined objectively, not allowing derogation if ordinary measures are sufficient or "merely because of an apprehension of potential danger."[34]

Certain rights, such as those against torture and slavery, are explicitly exempt from derogation in any situation.[35] The fact that the right against arbitrary detention is not explicitly listed as non-derogable, however, does not mean that it is unprotected in states of emergency.[36] Indeed, the United Nations Human Rights Committee[37] has included the prohibition of arbitrary deprivation of liberty in a list of

---

promulgated in 1984 by a conference of experts and adopted by the U.N. to serve as a tool for interpreting the language of the ICCPR and clarifying the confines of acceptable derogation. *See* Raquel Aldana-Pindell, *Derogation is Not the Norm!: Regulating the September 11th Detentions* (unpublished manuscript, on file with author).

[32] *Siracusa Principles*, *supra* note 31, para. 39.

[33] *See* General Comment No. 29, *supra* note 28, para. 4.

[34] *Siracusa Principles*, *supra* note 31, paras. 51-54.

[35] Under ICCPR Article 4 these are: the right to life; the prohibition of torture or cruel, inhuman or degrading punishment; the prohibition of slavery, slave-trade and servitude; the prohibition of imprisonment because of inability to fulfill a contractual obligation; the principle of legality in the field of criminal law; the recognition of everyone as a person before the law, and freedom of thought, conscience and religion. *See* ICCPR, *supra* note 7, art. 4(2).

[36] General Comment No. 29, *supra* note 28, para. 6.

[37] The commentary and decisions of the Human Rights Committee have been recognized as an important aid to interpretation of the ICCPR. *See e.g.*, *Maria v. McElroy*, 68 F. Supp.2d 206, 232 (E.D.N.Y. 1999); *United States v. Bakeas*, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997); Report of the Committee, 1994 Report, vol. 1, 49 U.N. GAOR, Supp. No. 40, U.N. Doc. A/49/40, para. 5 ("General comments...are intended... [among other purposes] to clarify the requirements of the Covenant....").

humanitarian law and peremptory norms of international law from which States parties may not derogate under Article 4.[38] Thus, even in a state of emergency, rights to a fair trial and to an effective remedy for violations of rights do not disappear.[39] In order to protect non-derogable rights, the right to have a court decide without delay on the lawfulness of the detention must not be diminished by a decision to derogate.[40] Detention for an indefinite period of time is generally prohibited, as is being held incommunicado from family, friends, or lawyer for more than a few days.[41] Periodic evaluation by an independent review tribunal of the detention of persons detained without charge is required, as is the right to a fair trial by a competent, independent, and impartial court for those who are charged.[42]

A State party to the ICCPR simply may not derogate from the required entitlement to effective judicial review of detention.[43] The Inter-American Court of Human Rights has ruled that while liberty rights may be derogable, the right to judicial remedies, including *habeas corpus* and other forms of judicial review available to detainees, are not because they are essential for the protection of all other non-derogable rights.[44] As the European Court of Human Rights has stated, "[n]ational authorities cannot do away with effective control

---

[38] General Comment No. 29, *supra* note 28, para. 11 ("State parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or preemptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.")

[39] *See* General Comment No. 29, *supra* note 28.

[40] General Comment No. 29, *supra* note 28, para. 16.

[41] *Siracusa Principles*, *supra* note 31, para. 70(b)-(c).

[42] *Siracusa principles*, *supra* note 31, para. 70(e)-(d).

[43] Concluding Observation of the Human Rights Commission: Israel, 63rd Sess., U.N. Doc. CCPR/C/79/Add.93, para. 21 (1998).

[44] *Judicial Guarantees in States of Emergency,* Advisory Opinion No. OC-9/87, Inter-Am, C.H.R. (Ser. A) No.9, paras. 24, 41 (Oct. 6, 1987); *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No. 8, paras. 42, 44 (January 30, 1987).

of lawfulness of detention by the domestic courts whenever they chose to assert that national security and terrorism are involved."[45]

In sum, there can be no doubt that the unilateral designation of Mr. Padilla as an "enemy combatant" by the executive branch, his subsequent indefinite detention, and his isolation implicate the most fundamental protections of international human rights law.[46]

II. INTERNATIONAL HUMAN RIGHTS LAW IS PART OF UNITED STATES LAW AND IT SHOULD INFORM THIS COURT'S ANALYSIS

---

[45] *Al-Nashif v. Bulgaria*, App. No. 50963/94, Eur. Ct. H.R. (2002) (Mr. Al-Nashif, a local Muslim religious teacher, was detained after Bulgaria withdrew his residence permit and issued a deportation order because he allegedly posed a threat to national security. During his detention, he was denied contact with others, including counsel, rendering him unable to challenge the allegations against him. The Court found the procedure incompatible with protections against arbitrary arrest and detention). *See also Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1997) ("Although the Court is of the view … that the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention. This period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture ... Moreover, the Government have not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable.").

[46] *See Civil and Political Rights, Including the Question of Torture and Detention*, Report of the Working Group on Arbitrary Detention; Category I (persons detained on United States territory). Opinion No. 21/2002 (E/CN.4/2003/8/Add.1): "The Working Group considers that Mr. X and Mr. Y have been detained for more than 14 months, apparently in solitary confinement, without having been officially informed of any charge, without being able to communicate with their families and without a court being asked to rule on the lawfulness of their detention. This situation is such as to confer an arbitrary character on their detention, with regard to articles 9 and 14 of the [ICCPR]..." *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/TestFrame/c58095e9f8267e6cc1256cc60034de72?Open document.

A. International Law Is Part of the Law of the United States

There is no question that international law, pursuant both to treaties and customary law, is now—and always has been—part of United States law.[47] As to treaties, the rule is clear: international treaties are "the supreme law of the land"[48] and judicial power of the United States "shall extend to all…treaties made" under the authority of the United States.[49]

Our domestic legal system has also long incorporated customary international law.[50] In the late eighteenth century, the law of nations was seen as part of natural law and, as such, obligatory.[51] Thus, as this Court noted in 1796, "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of

---

[47] Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-62 (1984). *See also*, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2385-86 (1991) ("[A]s federal courts have done over the centuries, [judges] determine whether a clear international consensus has crystallized around a legal norm that protects or bestows rights…").

[48] U.S. CONST. art. VI, cl. 2. ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every state shall be bound thereby…").

[49] U.S. CONST. art. III, §2, cl. 1. *See also United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) (where a treaty is the law of the land and affects the rights of litigating parties, the treaty binds those rights and should be regarded by courts as an act of Congress).

[50] *See generally*, Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 464 (1997) ("As new members in the community of nations, the Founders felt bound, both ethically and pragmatically, to inherit and abide by the law of nations").

[51] *See generally*, Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280, 282-5(1932) (noting that both Blackstone and Lord Mansfield held that the law of nations was incorporated into the common law of England); *see also*, Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 238, 253 (1932).

purity and refinement."[52] The nineteenth century ascendance of positivist jurisprudence in international law did not change the basic principle that customary international law is part of U.S. law. Justice Gray's famous statement discussing the applicability of customary international law to the seizure of fishing boats in Cuban waters by the U.S. navy arose from this jurisprudential milieu: "International law, is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as the question of right depending upon it are duly presented for their determination."[53]

The Restatement notes that, "international law and international agreements are the law of the United States."[54] Cases arising under international law or international agreements to which the United States has acquiesced are within the jurisdiction of U.S. courts and these courts "are bound to give effect to international law."[55] Similarly, "cases arising under customary international law" are "within the Judicial Power of the United States under Article III, section 2 of the Constitution."[56] As noted above, *Amici* conclude that

---

[52] *See Ware v. Hylton*, 3 U.S. 199, 281 (1796); *Talbot v. Janson*, 3 U.S. 133, 161 (1795) (stating "this is so palpable a violation of our own law ... of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since"); *Chisholm v. Georgia*, 2 U.S. 419, 474 (1793) (holding "the United States had . . . become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed"); 1 Opp. Att'y Gen. 26, 27 (1792) (concluding "the law of nations, although not specifically adopted . . . is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation."); Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999) (collecting authorities).

[53] *See The Paquete Habana*, 175 U.S. 677, 700 (1900).

[54] RESTATEMENT, *supra* note 9, § 111(1).

[55] *See id*. at § 111(2), (3). Moreover, the President of the United States has the obligation and authority to make sure that international law is faithfully executed within the boundaries of this nation. *See id*. at § 111 cmt. c.

[56] *See* RESTATEMENT, *supra* note 9, § 111 cmt. e. Moreover, as this Court recognized in *Ex parte Quirin*, the "law of war" is part of the law of

the detention and isolation of Mr. Padilla violate the requirements of the ICCPR and customary international law. The question, then, is whether that treaty and customary international human rights law are U.S. law. *Amici* believe that they are.

B. The Senate Declaration That the ICCPR Is Not Self-Executing Does Not Render It Meaningless To Mr. Padilla

The Senate subjected its advice and consent to a declaration that the ICCPR is not "self-executing."[57] This, however, does not render it irrelevant to Mr. Padilla. First, the ICCPR is unquestionably binding on the United States as a ratified treaty.[58] Although it may not provide a direct "rule for the Court," ratification of the ICCPR clearly obliges the President and Congress faithfully to implement it.[59] Moreover, this Court should endeavor to construe any ambiguity in the non-self-executing doctrine in favor of applicability. This Court should not turn a blind eye to the fact that the executive has proceeded against Mr. Padilla in a manner that is contradictory to both the letter and the spirit

---

nations and, as such, prescribes the rights and duties of nations in dealing with "enemy individuals." *See* 317 U.S. at 27-28.

[57] 138 Cong. Rec. S4781-01 (1992).

[58] *See e.g., United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000) (recognizing ICCPR as "supreme law of the land" notwithstanding no-self-executing declaration). *See also*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 198-203 (2d ed. 1996) (describing such declarations as "'anti-Constitutional' in spirit and highly problematic as a matter of law") [hereinafter HENKIN, FOREIGN AFFAIRS].

[59] *See* RESTATEMENT, *supra* note 9, § 111, rep. n.5 (noting "if a treaty is not self executing for a state party, that state is obligated to implement it promptly, and failure to do so would render it in default under its treaty obligations"); *see also* RESTATEMENT, *supra* note 9, § 115(1)(b) (stating "a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation").

of the ICCPR. Given the ambiguity of Presidential authority in this matter, as evidenced by the decision of the Second Circuit below, this Court should not easily acquiesce in executive action that so clearly disregards international law.[60] The underlying principle is one of separation of powers informed by human rights norms.

The provisions of non-self-executing treaties may have domestic effect,[61] particularly where, as here, they also embody binding principles of customary international law.[62] In light of the widespread acceptance of the principle against arbitrary detention, such a construction is particularly applicable to Article 9 of the ICCPR.[63]

---

[60] *See* HENKIN, FOREIGN AFFAIRS, *supra* note 58, at 244-45 (noting "there was no suggestion [in *Garcia-Mir*] that the president ordered the detention in the valid exercise of some independent constitutional authority as 'sole organ' or as Commander in Chief that might have effect as law of the United States…").

[61] *See e.g*., *Duarte-Acero*, 132 F. Supp.2d at 1040 n.8 (S.D. Fla. 2001) (declaration does not apply to defensive claims); *Bakeas*, 987 F. Supp. at 46 n.4 (D. Mass. 1997) (noting that policies of the Federal Bureau of Prisons may violate the ICCPR).

[62] *See e.g., Filartiga v. Pena*, 630 F.2d 876, 882 n.9 (2d Cir. 1980) (noting that although a treaty may be non-self-executing, "this observation alone does not end our inquiry"); *United States v. Toscanino*, 500 F.2d 267, 276-77 (2d Cir. 1974) (considering the applicability of the non-self-executing United Nations Charter and the Organization of American States charter "as evidence of binding principles of international law"). *But see Beazley v. Johnson*, 242 F.3d 248, 263-68 (5th Cir. 2001) (finding that ICCPR provisions barring imposition of the death penalty for crimes committed before the age of eighteen did not apply since the ICCPR was non-self-executing); *Igartua de la Rosa v. United States* , 32 F.3d 8, 10 n.1 (1st Cir. 2000) (*per curiam*) (rejecting a voting rights claim that was based in part on ICCPR).

[63] As the U.N. Human Rights Committee has noted, provisions in the Covenant that represent peremptory norms of customary international law may not be the subject of reservations. U.N.H.R. Comm., General Comment 24 (52), General Comment on Issues Relating To Reservations Made Upon Ratification Or Accession To The Covenant Or The Optional Protocols Thereto, Or In Relation To Declarations Under Article 41 Of The Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, paras. 11-12 (Nov. 2, 1994). [hereinafter General Comment 24] *See also Rodriguez-Fernandez v. Wilkinson*, 505 F.Supp. 787, 795 *aff'd on other grounds*,

C. Customary International Law Should Also Inform This Court's Analysis

Even if this Court were to conclude that the ICCPR does not directly govern this case, the inquiry into international law does not end there. Few legal principles are more well-entrenched than the venerable proposition that United States law should be construed in a manner that does not conflict with international law.[64] More broadly, this Court has recently recognized the importance of respecting the "values we share with a wider civilization."[65] Thus, in deciding the present case, customary international human rights law is applicable and the Court should strive to

---

654 F.2d 1382 (10th Cir. 1981) ("… review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law."); Louis Henkin, *Evolving Concepts of International Human Rights and the Current Consensus*, 170 F.R.D. 275, 281-84 (1997) (paper presented at the International Human Rights Session, Judicial Conference-Second Circuit, June 15, 1996 concluding that non-formally-binding treaties may be an important tool in statutory construction).

[64] *See Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Talbot v. Seeman*, 5 U.S. 1, 43 (1801) (stating "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law"); RESTATEMENT, *supra* note 9, § 114 (noting that U.S. statutes should be construed to avoid conflict with international law); *see also Weinberger v. Rossi*, 456 U.S. 25 (1982) (interpreting a statute prohibiting discrimination against United States citizens on military bases overseas); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), (interpreting the National Labor Relations Act in the maritime context so as not to run afoul of a "well-established rule of international law"); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (applying the *Charming Betsy* rule and international law in a maritime tort case to interpret the Jones Act).

[65] *See Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (citing decisions of the European Court of Human Rights); *see also Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (discussing the consensus of "the world community").

construe domestic laws in a manner consistent with its principles.[66]

It is true that a valid presidential act may supersede the applicability of a particular rule of customary international law.[67] The "*Charming Betsy*" rule, however, counsels in favor of a "clear statement" interpretive approach: laws and executive actions are to be read in conformity with international law where possible. In order to overrule customary international law, domestic legal action must post-date the development of a customary international law norm, and must clearly repeal that norm.[68] Where government action appears to contradict international law—as does the executive's interpretation of its inherent authority and that authorized by the Joint Resolution—the judiciary should construe the action so as to resolve the contradiction, if possible.[69] Moreover, where, as here, the rule against

---

[66] *See e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (noting courts must reevaluate past precedents where the "intervening development of the law" has "weakened the conceptual underpinnings from the prior decision").

[67] *See The Paquete Habana*, 175 U.S. at 694; RESTATEMENT, *supra* note 9, § 111 cmt. c; RESTATEMENT, *supra* note 9, § 115 rep. n.5; Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 920 (1986).

[68] *See e.g*., *Maria v. McElroy*, 68 F. Supp. 2d at 231 ("Congress can be assumed, in the absence of a statement to the contrary, to be legislating in conformity with international law and to be cognizant of this country's global leadership position and the need for it to set an example with respect to human rights obligations"). *Cf. Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (stating where Congress has made its intent in the statute clear, we must give effect to that intent); *I.N.S. v. St. Cyr*, 533 U.S. 289, 315-201 (2001) (holding Congress may enact *ex post facto* law removing an alien's right only with a clear statement).

[69] *See generally* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction,* 43 VAND. L. REV. 1103, 1143, n.177 (1990) (listing cases in which courts have construed smuggling and drug statutes to bring them into conformity with international jurisdictional and admiralty law); *Beharry v. Reno*, 183 F. Supp. 2d 584, 598-600 (E.D.N.Y. 2002) *overruled on other grounds.* The failure of Congress to enunciate international human rights

arbitrary detention is so deeply entrenched and so fundamental to all other basic human rights, this Court should not simply ratify any presidential act as a valid "over-ride."[70] The ambiguity as to the President's inherent authority to designate and detain Mr. Padilla should be read in light of the powerful requirements of human rights law. *Amici* agree with the Second Circuit Court of Appeals that the President does not have such unilateral inherent authority as a matter of U.S. law. However, even if this Court were inclined agree with the government's position that the Joint Resolution constitutes legislative authorization, so imprecise a legislative act likewise should not be read to over-ride the powerful requirements of human rights law.[71]

The Declaration of Independence noted that the American people must pay "decent respect to the opinions of mankind."[72] This Court has taken this principle seriously and should continue to do so. As Justice Blackmun has noted, this venerable idea requires that evolving standards of decency be measured against international norms.[73] The framers recognized that the United States would be part of a world community, "answerable to foreign powers for the conduct of its members."[74] As Chief Justice John Jay stated in 1793,[75] "the United States had, by taking a place among

---

principles in the Joint Resolution itself does not in any way prevent this Court from construing ambiguity to conform to international law. Steinhardt, *supra* note 69, at 1165.

[70] *See* General Comment 24, *supra* note 63 (noting "[w]hen there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed").

[71] *See* Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 936 (1986).

[72] *See* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[73] Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45-46 (1994).

[74] *See* THE FEDERALIST No. 80, at 536 (Alexander Hamilton) (J. Cooke ed., 1961).

[75] Other justices have expressed similar sentiments more recently. Justice O'Connor has noted that, for U.S. lawyers, "understanding international

the nations of the earth, become amenable to the laws of nations, and it was their interest as well as their duty to provide, that those laws should be respected and obeyed."[76]

D. Mr. Padilla's Right Against Arbitrary Detention Is Not Only Due To His Citizenship

The prohibition against arbitrary detention under international human rights law is consonant with and complementary to well-established norms of United States law. Indeed, this Court's recognition of the importance of international human rights law to Mr. Padilla personally and to the questions of power implicated in this case better fit with our best traditions than any alternative approach.

The most basic proposition is that, "[i]n our society, liberty is the norm, and detention prior to trial is the carefully limited exception."[77] This Court has repeatedly confirmed the "general rule" of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial.[78] Preventive detention based on dangerousness has been upheld only when subject to strong procedural protections including, "proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards."[79]

The universality of human rights law supports recognition by this Court that it is not Mr. Padilla's

---

law is no longer just a specialty. It is becoming a duty." Sandra Day O'Connor, *Keynote Address before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y INT'L L. PROC. 348, 353 (2002). *See also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999) (noting "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights").

[76] *See Chisholm*, 2 U.S. at 474.

[77] *See United States v. Salerno*, 481 U.S. 739, 755 (1987).

[78] *See id.* at 749.

[79] *See Zadvydas*, 533 U.S. at 691 (*citing Salerno*, 481 U.S. at 747, 750-52).

citizenship that matters most. It is his humanity.[80] The fundamental protections of the Fifth Amendment "are universal in their application, to all persons within the territorial jurisdiction" of the United States.[81] As this Court has recently noted, "…the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[82]

Amici agree with the Second Circuit that the President's power is clearly "at its lowest ebb" in Mr. Padilla's case due to the Non-Detention Act,[83] which protects U.S. citizens.[84] We do not, however, believe that Presidential power to designate, detain, and isolate non-citizens in the United States and outside a zone of combat would be at a relevantly higher "ebb." The reasons for this derive both from the extensive statutory structure of U.S. immigration law and the constitutional rights of all persons within the United States.

Among the many cogent reasons advanced historically to support such a protective rule is a basic concern with the dangerous precedent that would be set by the allowance of government power to incarcerate *anyone*

---

[80] *See generally* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000); Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413 (2002).

[81] *See, e.g., Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments"); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 272-74 (1973) (Fourth Amendment protects noncitizens as to searches and seizures within the United States).

[82] *See Zadvydas*, 533 U.S. at 693; *see also Yick Wo*, 118 U.S. at 369.

[83] Non-Detention Act, 18 U.S.C. § 4001(a) (2000).

[84] *See Padilla v. Rumsfeld*, 352 F.3d 695, 711 (2d Cir. 2003) (*citing Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in result)).

without a bail hearing, based solely on accusation. As Thomas Jefferson—writing particularly to oppose the Federalists' Alien Friends Act, Alien Enemies Act, and Sedition Act[85]—warned, in 1798: "The friendless alien has indeed been selected as the safest subject of a first experiment, but the citizen will soon follow. . . ."[86] Ironically, Jefferson's concern now may be at least as applicable to the dangers posed by executive designation of a citizen as an "enemy combatant" as it was to aliens more than two centuries ago.

E. International Human Rights Law Should Inform This Court's Analysis of the Scope of *Habeas Corpus* Review

Amici believe that the Second Circuit's construction of the propriety of attorney Newman's "next friend" status and the jurisdictional issues for purposes of Mr. Padilla's *habeas corpus* petition were correct as a matter of U.S. law and consonant with the broad mandates of international human rights law described above. However, we also urge this Court to adopt an expansive view of the scope of *habeas corpus* review in all such cases.

Nearly 200 years ago, Chief Justice Marshall noted that our judicial tribunals "are established . . . to decide on human rights."[87] That responsibility looms especially large today.[88] Much of the substance of international law,

---

[85] Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798) (expired June 25, 1800) (permitting the President to order any alien whom he judges "dangerous to the peace and safety of the United States" to leave the country without a hearing); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. §§ 21–23 (1999)) (permitting the President during war to apprehend, restrain, secure, and remove all enemy aliens without a hearing); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801).

[86] *See The Kentucky Resolution*, Documents of American History 181 (Henry Steele Commager ed., 6th ed. 1958).

[87] *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810).

[88] This Court has long considered the requirements of international law in cases such as this. In *Ex parte Quirin* the Court noted that "from the very

especially the *corpus* of human rights law, has changed dramatically since *Quirin* and *Eisentrager* were decided by this Court. Moreover, the scope of *habeas* review itself has evolved substantially since that time.[89] The *Quirin* Court, for example, rendered its decision against a background rule of *habeas corpus* review that was formally limited to determining whether court which had issued a judgment below lacked "jurisdiction."[90] This limitation has since been definitively jettisoned in favor of a much more expansive approach.[91]

The "Great Writ" has served as an important limitation on Executive power to detain since the beginning of the modern Anglo-American legal system.[92] Following

---

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." *See* 317 U.S. at 27-28. Although the *Quirin* Court concluded that an American citizen who had violated the laws of war could be treated as an "enemy combatant" and held without the full array of Constitutional rights, it is important to note that in that case the citizen, after consultation with legal counsel, had stipulated to the facts supporting the enemy combatant designation. In *Johnson v. Eisentrager*, as part of its determination whether a German national convicted by a United States military commission could pursue *habeas* relief, this Court comprehensively surveyed the relevant rules of international law. 339 U.S. 763, 785-788 (1950) (considering "the practice of every modern government," citing treaty law and Hague Regulations and secondary sources). *Eisentrager* concerned what amounted to post-conviction *habeas* relief. A tribunal had considered the legality of detention.

[89] *See generally*, A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV.309 (2003).

[90] *Id.* at 349.

[91] *See Brown v. Allen*, 344 U.S. 443, 533 (1955) (federal *habeas* relief extended to state court errors of federal constitutional law); *Fay v. Noia*, 372 U.S. 391 (1963), *overruled in part by Wainwright v. Sykes*, 433 U.S. 72 (1977).

[92] The writ of *habeas corpus* emerged in England as a means to limit the King's power to detain and to ensure that all detentions are legally authorized. The *Habeas Corpus* Act of 1679 supplemented the writ under common law and "afforded a powerful guarantee that individuals would not be detained on executive fiat instead of legally recognized grounds…" Subsequently, the *Habeas Corpus* Act of 1816 granted the

English precedent, *habeas* review has long extended to various types of executive detention.[93] Indeed, even enemy aliens convicted of war crimes during periods of declared war have obtained review under the writ.[94] In *INS* v. *St. Cyr*, this Court noted that, "[a]t its historical core, the writ of *habeas corpus* has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."[95]

Because "[t]he historic purpose of the writ has been to relieve detention by executive authorities without judicial trial," it is clear that the writ protects fundamental human rights, namely the rights to fair judicial review and freedom from arbitrary detention. [96] The writ holds a critical place in our legal system, serving as, "the precious safeguard of personal liberty."[97] Historically, *habeas* review has played the most critical role in times of emergency. As this Court has explained, "It is no accident that *habeas corpus* has time and again played a central role in national crises, wherein the claims of order and liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today."[98]

To serve this crucial historical purpose, *habeas* review of executive detention cannot be formalistic or rigidly cabined. The international human rights standard of meaningful review is a reasonable guide for this Court to follow. *Amici* thus strongly disagree with the assertion that

---

court power to review the merits of the facts presented to justify detention. *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 563 (2002).

[93] *See* Brief *Amici Curiae* of Legal Historians in Support of Respondent at 16, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767).

[94] *See In re Yamashita*, 327 U.S. 1 (1948); *Ex parte Quirin*, 317 U.S. at 27-28.

[95] *See* 533 U.S. at 301.

[96] *See Brown v. Allen*, 344 U.S. 443, 533 (1955) (Jackson, J., concurring in result).

[97] *See Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

[98] *See Fay v. Noia*, 372 U.S. at 372 U.S. 391, 401.

"courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such."[99] The judiciary cannot simply rely on "the government's say-so."[100]

International legal bodies recognize the critical role *habeas corpus* review plays in ensuring compliance with human rights norms widely accepted throughout the world. As the Inter-American Court of Human Rights has noted:

> [*H]abeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.[101]

The human rights standard concerning judicial review demands contextual inquiry into whether detention is arbitrary. Judicial review must be fair and meaningful in cases alleging arbitrary detention.

The scope of *habeas* review has changed throughout history as understanding of the fundamental human rights on which it is based continues to evolve. "The great writ of *habeas corpus* has over the centuries been a flexible remedy adaptable to changing circumstances."[102] As this Court has noted, "[H]abeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes" and that "[t]he very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages

---

[99] *See Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (citing brief submitted by the government).

[100] *Id.*

[101] *See Habeas Corpus in Emergency Situations,* Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No. 8, para. 35 (January 30, 1987); *see also Castillo Petruzzi Case, Merits, Judgment*, Inter-Am. Ct. H.R. (Ser. C) No. 52 (May 30, 1999).

[102] *See Regina v. Secretary of State for the Home Dep't, ex parte Muboyayi*, [1992] Q.B. 244, 269 (C.A.).

of justice within its reach are surfaced and corrected."[103] The writ of *habeas corpus* "cuts through all forms and goes to the very tissue of the structure" and "[i]t comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have more than an empty shell."[104]

The evolution of international human rights norms must inform our understanding of *habeas corpus* review in the modern era.[105] Thus, *habeas* review should include procedural due process inquiry into factual determinations by the Executive.[106] A detainee must be permitted to offer evidence in order for the fact finder to assess the validity of the detention. Detainees must have the right to counsel, as well as some reasonable form of compulsory process and access to exculpatory evidence of which the government may be aware. An extremely deferential "some evidence" standard is insufficient.[107]

In sum, if this Court were to determine that the President has the power to designate, arrest, isolate, and detain Mr. Padilla it should make clear that Mr. Padilla has a right to counsel and a right to contest all factual and legal aspects of his unprecedented situation. *Amici* also agree with Judge Wesley's statement below that the undefined nature of Mr. Padilla's detention is one of its "more troubling

---

[103] *See Hensley v. Municipal Court, San Jose Milpitas Judicial Dist., Santa Clara County, Cal.*, 411 U.S. 345, 350 (1973) (*citing Harris v. Nelson*, 394 U.S. 286, 291 (1969).

[104] *See Frank v. Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

[105] *See Garza v. Lappin*, 253 F.3d 918, 923 (7th Cir. 2001); *Rodriguez-Fernandez*, 654 F.2d at 1388 ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."); *Beharry*, 183 F. Supp. 2d at 601.

[106] *See* Raquel Aldana-Pindell, *The 9/11 "National Security" Cases: Three Principles Guiding Judges' Decision-Making*, 81 OR. L. REV. 985, 1043 (2002).

[107] *See Padilla ex rel. Newman v. Bush*, 233 F.Supp. 2d 564, 608 (S.D.N.Y. 2002), *adhered to upon reconsideration*, 243 F.Supp.2d 42 (S.D.N.Y. 2002).

aspects"[108] and that therefore a *habeas* court could determine whether his continued, indefinite detention is warranted.

[108] *See Padilla*, 352 F.3d at 733 (Wesley, J. concurring in part).

III. CONCLUSION

This case presents the Court with issues of the deepest historical importance. Its resolution of them will mark the boundaries of liberty for generations to come. As Justice Jackson once noted:

> [A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself ... The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need ... A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution....[109]

Amici believe that the judgment below should be affirmed. This Court should also take this historical opportunity to affirm well-accepted international human rights norms against arbitrary detention and to clarify the incorporation of those norms—which are consonant with our best traditions as a constitutional democracy—into the rule of U.S. law.

Respectfully submitted,

Daniel Kanstroom,
Counsel of Record
Boston College Law School
885 Centre Street
Newton, MA 02459
(617)552-0880

[109] *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting) (citations omitted).

APPENDIX

List of *Amici*[*]

Susan Akram, Boston University School of Law
Lee A. Albert, SUNY/Buffalo Law School
Raquel Aldana-Pindell, University of Nevada, Las Vegas, William S. Boyd School of Law
Barbara Bader Aldave, University of Oregon Law School
Deborah Anker, Harvard Law School
Fran Ansley, University of Tennessee
George J. Annas, Boston University School of Law
Elvia Arriola, Northern Illinois University Law School
Sameer M. Ashar, CUNY School of Law
Michael Avery, Suffolk University Law School
Reuven Avi-Yonah, University of Michigan
Milner Ball, University of Georgia School of Law
Charles Baron, Boston College Law School
Robert M. Bastress, West Virginia University College of Law
Jon Bauer, University of Connecticut
Loftus E. Becker, Jr., University of Connecticut School of Law
Robert Benson, Loyola Law School, Los Angeles
Nathaniel Berman, Brooklyn Law School
Beryl Blaustone, CUNY School of Law
M. Gregg Bloche, Georgetown University, and Johns Hopkins University
Robert Bloom, Boston College Law School
Karen Blum, Suffolk University Law School
Amelia H. Boss, Temple University Beasley School of Law
Paul H. Brietzke, Valparaiso University Law School
Mark Brodin, Boston College Law School
Rosa Ehrenreich Brooks, University of Virginia School of Law
Mark Brown, Capital University Law School
David F. Chavkin, Washington College of Law, American University

[*] Institutional affiliations are listed for identification purposes only.

Frederick Tse-shyang Chen, Quinnipiac University
Gabriel Chin, University of Arizona James E. Rogers College of Law
Carol Chomsky, University of Minnesota Law School
Gerard J. Clark, Suffolk University Law School
Marjorie Cohn, Thomas Jefferson School of Law
Andrea A. Curcio, Georgia State University College of Law
Anthony D'Amato, Northwestern University
George Dargo, New England School of Law
Thomas J. Davis, Arizona State University Law School
Richard A. Daynard, Northeastern School of Law
Nora V. Demleitner, Hofstra University School of Law
Victoria Dodd, Suffolk University Law School
Nancy E. Dowd, University of Florida
George E. Edwards, Indiana University School of Law at Indianapolis
Jill Soffiyah Elijah, Harvard Law School
Russell Engler, New England School of Law
JoAnne Epps, Temple University Beasley School of Law
Peter Erlinder, William Mitchell College of Law
John Flym, Northeastern School of Law
Brian J. Foley, Touro College, Jacob D. Fuchsberg Law Center
Denise D. Fort, University of New Mexico Law School
Gregory H. Fox, Wayne State University Law School
Lawrence Friedman, Boston College Law School
Diane Geraghty, Loyola University Chicago School of Law
Gary S. Gildin, Dickinson School of Law, The Pennsylvania State University
Michel J. Godreau-Robles, University of Puerto Rico
Phyllis Goldfarb, Boston College Law School
Anne B. Goldstein, Western New England School of Law
Laura Gomez, UCLA School of Law
Kent Greenfield, Boston College Law School
Phoebe A. Haddon, Temple University Beasley School of Law
Louise Halper, Washington & Lee Law School
Roberta Harding, University of Kentucky Law School

Keith Harrison, Franklin Pierce Law Center
Emily Albrink Hartigan, St. Mary's Law School San Antonio
Virginia E. Hench, The University of Hawai`i School of Law
Dick Hesse, Franklin Pierce Law Center
Michael G. Heyman, The John Marshall Law School
Marsha Huie, The University of Tulsa College of Law
Ann L. Iijima, William Mitchell College of Law
Craig Jackson, Texas Southern University, Thurgood Marshall School of Law
Peter Jaszi, Washington College of Law
Kevin R. Johnson, University of California, Davis
David Kairys, Temple University Beasley School of Law
S. Blair Kauffman, Yale Law School
Linda Keller, Thomas Jefferson School of Law
Walter J. Kendall III, The John Marshall Law School
Kenneth F. Kirwin, William Mitchell College of Law
Karl Klare, Northeastern School of Law
Ilene Klein, New England School of Law
Daniel Kowalski, University of Colorado Law School
Stefan H. Krieger, Hofstra University School of Law
Renee Landers, Suffolk University Law School
Arthur S. Leonard, New York Law School
John M. Levy, William & Mary Law School
Hope Lewis, Northeastern School of Law
Antoinette Sedillo Lopez, University of New Mexico School of Law
Ann Lousin, The John Marshall Law School
Beth Lyon, Villanova University School of Law
Allan H. Macurdy, Boston University School of Law
Holly Maguigan, New York University School of Law
Karl Manheim, Loyola Law School
Peter Margulies, Roger Williams University School of Law
Wendy K. Mariner, Boston University School of Law
Martha T. McCluskey, SUNY at Buffalo School of Law
Judith A. McMorrow, Boston College Law School
Michael Meltsner, Harvard Law School

M. Isabel Medina, Loyola University New Orleans School of Law
Roy Mersky, The University of Texas, Austin
Theresa Miller, SUNY at Buffalo School of Law
Martha Minow, Harvard Law School
Jennifer Moore, University of New Mexico Law School
Daniel Murphy, University of Richmond
Winston P. Nagan, University of Florida
Eric W. Orts, The Wharton School, University of Pennsylvania
Nancy Ota, Albany Law School
Richard L. Ottinger, Dean Emeritus, Pace Law School
Dan Partan, Boston University School of Law
Zygmunt Plater, Boston College Law School
Catherine A. Rogers, Louisiana State University
Florence W. Roisman, Indiana University School of Law – Indianapolis
Howard I. Rosenberg, University of Denver College of Law
Lory Diana Rosenberg, American University, Washington College of Law
David Rossman, Boston University School of Law
James Rowan, Northeastern School of Law
Sherrie Russell-Brown, University of Florida
Natsu Saito, Georgia State University College of Law
Eileen A. Scallen, William Mitchell College of Law
Michael P. Scharf, Case Western Reserve University School of Law
Robert A. Sedler, Wayne State University School of Law
Elisabeth Semmel, University of California at Berkeley School of Law (Boalt Hall)
Michael P. Seng, The John Marshall Law School
Edward F. Sherman, Tulane Law School
Marjorie A. Silver, Touro College, Jacob D. Fuchsberg Law Center
Joseph Singer, Harvard Law School
Peter J. Spiro, Hofstra University Law School
Jon Stubbs, University of Richmond
Juliet Stumpf, New York University School of Law

Lee Teran, St. Mary's University School of Law
Gerald F. Uelman, Santa Clara University School of Law
Gloria Valencia-Weber, University of New Mexico School of Law
Johan D. Van der Vyver, Emory University School of Law
Rhonda Wasserman, University of Pittsburgh Law School
Deborah M. Weissman, University of North Carolina School of Law
Harry Wellington, New York Law School
Lucy A. Williams, Northeastern School of Law
David Wirth, Boston College Law School
Arthur D. Wolf, Western New England School of Law