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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 THE CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore limited constitutional government and secure those constitutional rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with the courts. Because the instant case raises vital questions about the power of government to deprive citizens of their liberty, hold them incommunicado, and severely limit their access to the courts to seek redress, the case is of central concern to Cato and the Center.

STATEMENT OF THE CASE

The prisoner in this case, Jose Padilla, is an American citizen. He is presently confined in a military brig in the United States. A petition for a writ of habeas corpus has been filed on his behalf and that petition alleges that Mr. Padilla's imprisonment is contrary to law.

[1] The parties' consent to the filing of this *amicus* brief has been lodged with the Clerk of this Court. In accordance with Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation of this brief.

The Government claims that Mr. Padilla is an "enemy combatant" who is "closely associated" with the al Qaeda terrorist organization. Mr. Padilla was arrested by federal government agents upon his arrival at Chicago's O'Hare International Airport after a flight that originated in Pakistan. A few weeks later, President Bush issued an order to his Secretary of Defense "to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant." Pursuant to that presidential order, Mr. Padilla was taken to a military brig in Charleston, South Carolina.

For almost two years, the Government has denied Mr. Padilla any access to legal counsel. The Government claims that the Executive has plenary power to identify "enemy combatants" and to hold them incommunicado indefinitely. Because it is physically impossible for a prisoner in such circumstances to file a writ of habeas corpus, an attorney must file a "next friend" petition on the prisoner's behalf. The Government contends that such petitions must be "properly filed" even though the attorney has not been able to meet with the prisoner to discuss the Government's allegations. The Government also maintains that properly filed petitions should be summarily dismissed if the prisoner has been deemed by the Executive to be an "enemy combatant."

SUMMARY OF ARGUMENT

Since the September 11th terrorists attacks, the Federal Government has made several sweeping constitutional claims – that the Executive can seize American citizens, place them in solitary confinement, deny any and all visitation (including with legal counsel), and, in effect,

deny the prisoner access to Article III judges to seek the habeas "discharge" remedy. As long as the Executive has issued "enemy combatant" orders to his Secretary of Defense, the Government claims, the process comports with the Constitution – regardless of whether the prisoner is an American citizen or whether the arrest-seizure takes place overseas or on American territory. Repeatedly, the Government conflates three distinct issues: seizure of citizens, imprisonment of citizens, and trial of citizens.

The main problem in this case is that the Court of Appeals, Petitioner, and Respondent have all operated on the erroneous assumption that Jose Padilla was seized "on American soil." That mistake of law has opened the door to a host of other issues that may not be properly presented in this case. *Amicus Curiae* respectfully submits that both Petitioner and Respondent have overstated the strength of their respective legal positions. The prisoner, Jose Padilla, is correct insofar as he maintains that he must be able to meet with counsel in order to respond to the Government's allegations during habeas proceedings. On the other hand, the Government is correct insofar as it maintains that formal criminal charges are not necessary to confine Mr. Padilla in a prison facility. If the Government can persuade an Article III judge that Mr. Padilla is indeed an "enemy combatant," his confinement in a military brig would be lawful. 18 U.S.C. § 4001 does not apply to Mr. Padilla because he was taken into custody at an international airport, which is the functional equivalent of the border. Section 4001 only applies to citizens taken into custody within the border. This Court should reverse the

ruling below and remand this case for further proceedings.[2]

ARGUMENT

The power of the Executive to seize and imprison can vary – depending on where the citizen is seized. When the citizen is seized at the border, the government's power to detain is limited, but only by the requirements of meaningful habeas review (which has not yet been granted in this case). When the citizen is seized on U.S. territory, more demanding requirements must be met

Part I describes the power of the Executive to seize and detain citizens outside American borders. Part II describes the power of the Executive to seize and detain on U.S. territory. And Part III will argue that Mr. Padilla's seizure ought to be governed by the rules of extra-territorial seizures – because Mr. Padilla was seized on the border (as a matter of law), not on U.S. territory.[3]

[2] *Amicus Curiae* believes the Court of Appeals for the Second Circuit properly concluded that the district court has jurisdiction over the proper respondent. *Amicus Curiae* will not burden this Court by repeating the arguments on those issues here.

[3] The instant case does not involve a non-citizen and does not involve prosecution and trial matters. Thus, *Amicus Curiae* will not burden the Court with a discussion of those issues here.

I. THE POWER OF THE EXECUTIVE TO SEIZE AND IMPRISON CITIZENS OUTSIDE AMERICAN BORDERS

A. SEIZURE

There can be no doubt that the al Qaeda terrorist network is much more dangerous than a band of criminal outlaws. It is no overstatement to say that al Qaeda is an armed foreign force that is waging war on America. Al Qaeda terrorists not only engage in war-like acts, they are primarily interested in perpetrating *war crimes*. As the vicious attacks of September 11th demonstrated, innocent victims are not regarded as "collateral damage" – rather, al Qaeda's objective is to murder as many innocent civilians as it possibly can. The President's responsibility to defeat this enemy organization and to protect the citizenry is made more difficult by the fact that this foe cannot be located on a map; it is not a nation-state. Al Qaeda operatives impersonate civilians – they dress in civilian garb and pose as college students, tourists, and businesspeople – and they travel widely.

Given the unusual character of this war, it is appropriate for the judiciary to afford the President a measure of deference in the exercise of his executive authority and as Commander in Chief. When the U.S. military is sent abroad to vanquish terrorist training camps, soldiers have the authority to capture and detain both enemy personnel and their collaborators. This Court has never held that arrest warrants are required in the battlefield. Although the Government complains in general terms about attempts to "impair" Executive authority, it notably fails to identify any legal challenge to the *capture* of enemy forces outside of America's borders. The Government, in short, builds a convincing case against a classic straw man when

it argues that the military must have latitude to *seize* combatants, including combatants who turn out to have been born in America.[4]

B. IMPRISONMENT

When the Government seeks to *imprison* an American citizen, another set of legal issues comes to the fore. It is sensible to afford military authorities some deference with respect to the capture and brief detention of enemy personnel, but it is another matter when the Executive has made a determination to imprison an American citizen without formal criminal charges. As the Court of Appeals for the Second Circuit observed, once a person has been confined to a jail cell, any immediate threat that he may have posed has been effectively neutralized. *See Padilla v. Rumsfeld*, 352 F.3d 695, 700 (2d Cir. 2003). If the Government determines that an American citizen must be deprived of his liberty because he poses a threat to public safety, it must be prepared to defend that assessment in a court of law. *See In re Territo*, 156 F.2d 142 (9th Cir. 1946) (habeas petition considered and subsequently denied).

The Court of Appeals for the Fourth Circuit recently noted that American citizenship entitles a prisoner "to file

[4] If the purpose of the straw man is to confuse the general public, it may have succeeded. Many people are under the mistaken impression that the President's authority to take prisoners of war is under legal assault in the *Hamdi* litigation. However, counsel for Yaser Hamdi has made it clear that Hamdi's initial capture is *not* an issue. See Brief for Petitioners, *Hamdi v. Rumsfeld* (No. 03-6696) at 10 ("Hamdi's habeas petition challenges his indefinite detention – not his initial seizure by the Northern Alliance or transfer to U.S. custody.").

a petition for a writ of habeas corpus in a civilian court to challenge his detention." *Hamdi v. Rumsfeld*, 316 F.3d 450, 471 (4th Cir. 2002). The right to petition for a writ of habeas corpus is, in essence, a right to seek judicial protection against lawless incarceration by executive authorities. If the judiciary could not independently review and reject the Executive's decision to incarcerate a citizen, the writ would never have acquired its longstanding reputation in the law as the "Great Writ." As *Amicus Cato Institute* has more fully explained in *Hamdi v. Rumsfeld* (see 03-6696 Cato Br. 6-13), if the writ of habeas corpus has not been suspended, the writ retains its full legal force – no matter where the seizure of a citizen takes place. Although the Government contests this point, claiming that this "extraordinary context" necessitates a "limited scope of review" (see Brief for the Respondents, *Hamdi v. Rumsfeld* (03-6696) at 10), it would be premature to elaborate upon these issues here, as there are no habeas issues before the Court in this case.

II. THE POWER OF THE EXECUTIVE TO SEIZE AND IMPRISON CITIZENS WITHIN AMERICAN BORDERS

A. SEIZURE

Absent an invasion or rebellion on U.S. territory, the Fourth Amendment establishes the fundamental law regarding the parameters of the Government's power to arrest an individual. The Fourth Amendment of the Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized." U.S. Const. amend. IV.

The arrest of a person is the quintessential "seizure" under the Fourth Amendment. *Payton v. New York*, 445 U.S. 573 (1980). The amendment shields the citizenry from overzealous government agents by placing limits on the powers of the police. The primary "check" is the warrant application process. That process requires the police to apply for arrest warrants, allowing impartial judges to exercise independent judgment regarding whether sufficient evidence has been gathered to meet the "probable cause" standard of the Fourth Amendment. *McDonald v. United States*, 335 U.S. 451 (1948). When government agents seize a citizen without an arrest warrant, the prisoner must be brought before a judicial magistrate within 48 hours so that an impartial judicial officer can examine the government's conduct and discharge anyone illegally seized. *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991).

Although there is no Fourth Amendment issue before the Court in the instant case, it would be useful for this Court to craft its ruling in such a way as to clarify precisely which legal matters have and have not been settled. This is important because the Government has been selectively quoting caselaw from this Court in an attempt to turn dicta into holdings. For example, the Government cites *Ex Parte Quirin,* 317 U.S. 1 (1942), which is a case involving *trial procedures* for enemy combatants, to make sweeping claims about the Executive's power to *seize* citizens on American soil:

> The settled authority of the military to capture and detain fully applies to a combatant who is an American citizen and is seized *within the borders*

> *of the United States*. In *Quirin*, *supra*, this Court upheld the President's exercise of military jurisdiction over a group of German combatants who were seized in the United States before carrying out plans to sabotage domestic war facilities during World War II.

Brief for the Petitioner, *Rumsfeld v. Padilla* (No. 03-1027), at 30 (emphasis added). It is misleading for the Government to suggest that this Court has considered and approved an Executive power to conduct arrests on U.S. territory outside of the Fourth Amendment's framework in those instances where a suspect is perceived to be an "enemy combatant." The saboteurs involved in the *Quirin* case were arrested by civilian police officers in Chicago and New York. The prisoners were subsequently transferred to the military for detention, trial, and execution. The *Quirin* holding pertains to trial procedures for prisoners *who do not contest "enemy combatant" allegations*. *See Quirin* at 47. The key point here is that the prisoners in *Quirin* were urging this Court to move their trial to the civilian court system, arguing that the military did not have jurisdiction to try them. *The circumstances of the initial arrests were never before this Court*.[5] It is thus misleading to suggest that *Quirin* authorizes the Executive to seize

[5] Interestingly, the circumstances of the capture of the saboteurs in 1942 seem to have been distorted by government officials at that time. According to one legal historian, the public was led to believe that the FBI caught the German agents through brilliant detective work, but the plot was actually uncovered when one of the German agents "turned himself in and fingered the others." Louis Fisher, *Nazi Saboteurs on Trial*, 46 (2003).

American citizens on American soil outside of the Fourth Amendment framework.[6]

B. IMPRISONMENT

The Constitution places several limitations on the power of the Government to deprive an American citizen of his liberty on American soil. As noted, the Fourth Amendment prohibits unreasonable seizures. The Fifth Amendment guarantees due process. The Sixth Amendment guarantees a speedy and public trial. And the "Great Writ" of habeas corpus guarantees judicial review of an incarceration when no formal criminal charges have been lodged.

In addition to these constitutional provisions, Congress has passed federal laws which pertain to the imprisonment or detention of American citizens on American soil. Since one of these laws, 18 U.S.C. § 4001, is the central issue presently under review, *Amicus Curiae* will focus on that statute.

Before delving into some of the details, however, it would be useful to begin with a constitutional principle that has thus far been obscured in this litigation. The

[6] To be sure, this Court has never suggested that Fourth Amendment principles and procedures apply to the battlefield, but it is equally clear that this Court has never sanctioned "executive arrest warrants" for citizens on U.S. soil. The prospect of government agents arresting American citizens on American soil outside of the Fourth Amendment framework may seem far-fetched, but this Court will likely confront such arguments in the very near future. *See e.g.* Testimony of John Yoo before the U.S. House Permanent Select Committee on Intelligence (October 30, 2003) ("[T]he federal government and the executive branch have broader sources of constitutional authority to protect the national security that do not require a warrant."), *available at* http://intelligence.house.gov/PDF/JohnYootestimony.pdf.

Government's brief is so replete with references to the President's Article II responsibilities as Commander in Chief that its presentation of the matter tends to obscure one of his other constitutional duties, namely, that he "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. That constitutional duty was set down on paper to remind the President (and others) that he should not enter office with a view toward enforcing the laws that tend to aggrandize his power while simultaneously ignoring the laws that tend to constrain his power.

If a law is controversial and is considered unwise, but constitutional, the President must still "take Care" and see that it be "executed." Should the President discover a counterproductive or pernicious law on the books, his duty is to "give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3. If the President is unable to persuade the Congress to repeal a law that the President considers unwise, Article II requires the President to put his own views aside, to humble himself, and to faithfully execute the law of the land.

18 U.S.C. § 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The Government readily admits that this law was designed to prevent a future President from issuing an executive order that would set up prison camps (or "detention centers") for citizens who are perceived to be a threat to national

security.[7] On the Government's view, however, this law means that if such a prison system is contemplated, the President need only be careful when delegating the assignment. On the Government's reading of the law, it is illegal for the Attorney General to set up prison facilities for people who are accused of being "enemy combatants," but it is legal for the Secretary of Defense to administer such facilities:

> Section 4001(a) pertains solely to the detention of American citizens by *civilian* authorities. It has no bearing on the settled authority of the *military* to detain enemy combatants in a time of war.

Brief for the Petitioner at 45 (emphasis in original). That is a fanciful interpretation of Section 4001(a). Had the statutory language covered all of the President's subordinates, someone might also come forward to say that Congress did not specifically prohibit the President from entering into an "executive agreement" with a foreign head of state, whereby American citizens could be transported to, say, Tijuana, Mexico or perhaps to the island of Jamaica, for confinement and interrogation.

18 U.S.C. § 4001 does not create a Maginot Line for the citizenry. It prohibits unilateral executive incarceration in

[7] After the outbreak of war with Japan in 1941, President Roosevelt issued Executive Order 9066, which was designed to protect "against espionage and against sabotage" and authorized military commanders to designate "military areas" in the United States "from which any and all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions" the "Military Commander may impose in discretion." *See generally Korematsu v. United States*, 323 U.S. 214 (1944).

circumstances where the President might be tempted to seize citizens without formal criminal charges. If the President believes that 18 U.S.C. § 4001 is impractical and ought to be repealed or modified, he should make his case to the Congress. The civilian-military distinction that has been advanced by the Government in this litigation is specious.[8]

III. THE SEIZURE AND IMPRISONMENT OF JOSE PADILLA

Jose Padilla flew on his American passport from Pakistan, via Switzerland, to Chicago's O'Hare International Airport. Upon his arrival at the airport, Mr. Padilla was arrested by federal law enforcement agents. These factual circumstances are highly significant to the proper resolution of this case.

First, this Court has often noted that the United States, as sovereign, has a special interest in managing international border crossings. Just this term, the Court noted that the federal government "has inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *United States v. Flores-Montano* (No. 02-1794), slip op. at 8 (March 30, 2004). On international borders, the interplay between the power of government and the constitutional rights of citizens is not the same as

[8] The Government also advances the argument that the Authorization of Force that was passed by the Congress shortly after the September 11th terrorist attacks qualifies as an "Act of Congress" that would permit the imprisonment of American citizens on American soil under the terms of Section 4001. The Court of Appeals properly rejected that argument and *Amicus Curiae* will not burden this Court by repeating those arguments here.

that which takes place within the borders. That point was expressed in *Carroll v. United States*, 267 U.S. 132 (1925):

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country . . . have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Id. at 153-54. Thus, under the border search doctrine, neither probable cause nor a search warrant is required to search a person, even an American citizen, at the border.

Second, this Court has also noted that international airports are the functional equivalent of the border. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973). Although Chicago's O'Hare airport is not located on an international border geographically, that airport has been held to be the "functional equivalent of an international border." *See United States v. Teng Yang*, 286 F.3d 940, 944 (7th Cir. 2002).

Given the factual circumstances of Mr. Padilla's arrest and this Court's jurisprudence with regard to the Government's special interest at the border, *Amicus Curiae* submits that statements concerning the seizure of "American citizens

on American soil" (*Padilla v. Rumsfeld*, 352 F.3d 695, 722 (2d Cir. 2003)) are inapposite for this particular case.[9] *Shaughnessy v. Mezei*, 345 U.S. 206 (1953) is also instructive on this point. Ignatz Mezei immigrated to America in 1923 and resided here as a lawful alien for twenty-five years. In 1948, he traveled to Hungary and remained there for 19 months. When Mezei attempted to return to the United States, the Attorney General ordered his exclusion citing national security. Mezei was confined on Ellis Island, in the harbor of New York City, for months because no other country would accept him. After 21 months had passed, Mezei petitioned for a writ of habeas corpus, arguing that his continued confinement on Ellis Island amounted to an indefinite, unlawful detention.

In rejecting Mezei's constitutional claim, this Court emphasized that his presence on Ellis Island did not constitute an "entry" into the United States. For purposes of constitutional analysis, Mezei was treated "as if he stopped at the border." *Id.* at 215.[10] If the logic of the *Mezei*

[9] Both Petitioner and Respondent proceed from the premise that Mr. Padilla entered the United States – and therefore claim that this case is about an American who has been arrested "on American soil." See Brief for the Petitioner, at 38 ("The Commander in Chief . . . has authority to seize and detain enemy combatants wherever found, including *within the borders of the United States*.") (Emphasis added); Brief in Opposition of Respondent, at 16 (The Commander-in-Chief Clause does not give the President authority to seize "American citizens *on American soil* outside a zone of combat.") Both Petitioner and Respondent are mistaken on this crucial point.

[10] *Amicus Curiae* respectfully submits that this Court erred in holding that Mr. Mezei could be confined indefinitely *with no hearing whatsoever*. *See Shaughnessy v. Mezei*, 345 U.S. 206 (1953) (Black, J., dissenting). Since the Attorney General refused to present evidence to

(Continued on following page)

ruling is applied to Mr. Padilla, it is clear that as a matter of law his arrival at an American airport did not constitute an entry into the United States. In that legal posture, it is difficult to see how Mr. Padilla's legal rights at an O'Hare terminal can be any different than the rights he might have had had he been arrested by Pakistani and American authorities when he was boarding the airplane in Pakistan.

Although the Government is profoundly mistaken about the applicability of 18 U.S.C. § 4001 to American citizens within America's borders, *Amicus Curiae* submits that the statute does not apply to citizens who are seized on the border or abroad. "It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Smith v. United States*, 507 U.S. 197, 204 (1993) (citations and internal quotation marks omitted). Both the language and legislative purpose of 18 U.S.C. § 4001 support the applicability of that presumption. The explicit purpose of Section 4001 was to repeal the Emergency Detention Act of 1950, former 50 U.S.C. §§ 811-826 (1970). Under the Emergency Detention Act, if the President declared an "*Internal* Security Emergency," the Attorney General was authorized to detain persons who were perceived to be dangerous. As previously noted, Congress was also determined to legally forestall any attempt to revive the concentration camps that were set up during World War II for Japanese-American citizens. But there is no clear evidence in the language or legislative history of Section 4001 to support the idea that it applies to American

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an impartial judge, the writ of habeas corpus ought to have been issued and the prisoner should have been discharged.

citizens who have been seized beyond America's borders.[11] Thus, the Court of Appeals for the Second Circuit erred in its ruling that Mr. Padilla must be released or charged with a formal criminal offense by civilian authorities. Mr. Padilla is situated differently than the typical American citizen who resides in the City of Chicago.

Judge Wesley has correctly identified the "real weakness" in the Government's appeal, namely, its adamant refusal to acknowledge Mr. Padilla's right to have his day in court to rebut the "enemy combatant" allegations. *Padilla v. Rumsfeld*, 352 F.3d 695, 732-33 (2d Cir. 2003) (Wesley, J., concurring in part, dissenting in part). Every Article III judge in this litigation has properly rejected the Government's contention that Mr. Padilla can be denied access to counsel and that the habeas petition that has been filed on his behalf ought to be summarily dismissed. But the court below erred insofar as it concluded that the President did not have the inherent power to detain Mr. Padilla in the circumstances of this case. Thus, a proper disposition of this case would be to vacate the judgment of the court of appeals and to remand for further proceedings.

On remand, Mr. Padilla should be able to meet with his attorney in a private setting. An evidentiary hearing should then be held and the prisoner should have an

[11] Consider the so-called "American Taliban," John Walker Lindh, who was taken into custody in Afghanistan. *See generally United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002). The Government had the option of holding Mr. Lindh as a prisoner of war, or going further, and prosecuting him for criminal violations. It is far-fetched to say that Section 4001 would have applied to Mr. Lindh in the event the Government had chosen to hold him as a POW.

opportunity to address the Court, and his counsel must have an opportunity to rebut the Government's "enemy combatant" allegations at the hearing. If the Government can persuade an Article III judge that the "enemy combatant" allegation is true, Mr. Padilla can be remanded to the military brig.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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