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 OF LOUIS HENKIN, HAROLD HONGJU KOH, AND MICHAEL H. POSNER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are experts in the protection of human rights under constitutional and international law.[1] They submit this brief to challenge the premise that with respect to this case, "*inter arma silent leges*" ("in wartime, the laws are silent"). The "war against terrorism" did not transform respondent Jose Padilla into an "extra-legal person," devoid of legal rights. As a U.S. citizen detained on U.S. soil, Padilla enjoys protections under United States law and international law that cannot be repealed by the President, acting alone.

Louis Henkin is University Professor Emeritus and Special Service Professor at Columbia University Law School, where he has held chairs in constitutional law and international law and diplomacy. He is currently the Chair of the Center for the Study of Human Rights and Director of the Human Rights Institute at Columbia University Law School. He has served as U.S. Member of the Human Rights Committee, Chief Reporter of the *Restatement (Third) of the Foreign Relations Law of the United States*, Co-Editor-in-Chief of the *American Journal of International Law*, and President of the American Society of International Law. His numerous publications on the subjects of constitutional law and international law include *Constitutionalism, Democracy and Foreign Affairs* (1989); *Foreign Affairs and the US Constitution* (1990); and *International Law: Politics and Values* (1995).

Harold Hongju Koh is the Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School, and Dean-Designate of Yale Law School. He

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[1] Written consent of all parties to the filing of this brief is on file with the Clerk of the Court. This brief has not been authored in whole or in part by any counsel for a party. No person, other than the *amici curiae* and their counsel, has made any monetary contribution to the preparation or submission of this brief.

served as Assistant Secretary of State for Democracy, Human Rights and Labor from 1998 to 2001. His numerous publications on the subjects of constitutional law and international law include *Deliberative Democracy and Human Rights*, with Ronald C. Slye (1999), and *The National Security Constitution* (1990).

Michael H. Posner is the Executive Director of Human Rights First (previously The Lawyers Committee for Human Rights). Since 1978, Human Rights First has been working in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law, particularly in the areas of political asylum law, international justice, refugee protection, and workers' rights. Mr. Posner has taught human rights at Yale and Columbia Law Schools and published widely on human rights.

SUMMARY OF ARGUMENT

The indefinite executive detention of U.S. citizen Jose Padilla on United States soil offends the rule of law and violates our constitutional traditions. Because we are said to be in a time of war, petitioner claims that the President has unilateral, unreviewable power to designate U.S. citizens as enemies of the state, to detain them indefinitely, and to determine their guilt without providing any of the guarantees of due process. At bottom, petitioner claims that a "war on terrorism" must necessarily be fought outside the constraints of the law. Even to invoke the rule of law, the Government suggests, is to belittle the magnitude of the threat facing our Nation.

The Government bases its actions on a radically broadened view of executive authority that is, in the

words of one judge below, "breathtaking in its sweep."[2] To accept the Government's position "would be effecting a sea change in the constitutional life of this country, and . . . would be making changes that have been unprecedented in civilized society."[3] In the Government's view, criminal charges, lawyers, and trials are neither "necessary or appropriate" when the Executive Branch decides to detain a U.S. citizen as an enemy combatant;[4] "different rules," which only the Executive may determine, "have to apply" when the threat of terrorism arises.[5]

The Government claims that those who would have this Court review its conduct toward U.S. citizens on U.S. soil "fundamentally misunderstand the nature of the threat this country is facing."[6] To ask federal judges to review the legality of a detention on a writ of habeas corpus, the Government says, is tantamount to the claim that "our judges—even though untrained in executing war plans—have a substantive role in the war decisions of the commander-in-chief."[7]

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[2] Transcript of Oral Argument in the Court of Appeals, Nov. 17, 2003, at 116:3 (Comment of Parker, J.), <http://news.findlaw.com/hdocs/docs/padilla/padrums111703trans.pdf>.

[3] *Id.* at 116:9-12.

[4] Alberto R. Gonzales, Counsel to the President, Remarks Before the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004), <http://www.abanet.org/natsecurity/judge_gonzales.pdf>.

[5] Donald Rumsfeld, Secretary of Defense, Remarks to Greater Miami Chamber of Commerce (Feb. 13, 2004), <http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html>.

[6] Gonzales, *supra*.

[7] *Id.* The Executive would strip away the most basic due process rights of notice and an opportunity to be heard. Admiral Jacoby's chilling declaration, included in the record, claims that denying Padilla due process is essential to the Government's goal of extracting his full

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"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Throughout the history of this Republic, the Judiciary has adjudicated cases under the law, and in doing so has ensured the Executive's compliance with constitutional and statutory protections. However untrained the federal judiciary may be "in executing war plans,"[8] it is fully capable of interpreting the Constitution, domestic and international law, and articulating the legal principles that restrain executive overreaching in times of security threat.

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court held that in time of undeclared war, the President lacks inherent authority to seize indefinitely the property of U.S. citizens in a manner contrary to a relevant federal statute. In this case, the court below held *a fortiori* that in time of undeclared war, the President may not invoke inherent constitutional authority to restrain indefinitely the *liberty* of U.S. citizens in a manner contrary to a relevant federal statute, the Nondetention Act of 1971, 18 U.S.C. § 4001(a).[9]

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intelligence value. Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, J.A. 80, 86 ("Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation .... Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship ... —even for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process.... Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla").

[8] Gonzales, *supra*.

[9] *Padilla v. Rumsfeld*, 352 F.3d 695, 722 (2d Cir. 2003) (citing 18 U.S.C. § 4001(a)).

The Constitution does not authorize the President to establish "different rules" to strip away the very freedoms that we espouse to the international community in the fight against terrorism. Petitioner seeks the unprecedented removal of a U.S. citizen on U.S. soil from *any* established legal regime, leaving him without the recognized rights of *either* a prisoner of war *or* a criminal defendant. This assertion of unfettered executive power lacks any support in the text and structure of the Constitution or in the precedents of this Court, and has no place in a society governed by the rule of law.

ARGUMENT

I.
THE EXECUTIVE IS CONSTRAINED BY LAW EVEN IN TIMES OF WAR.

A. The Constitution Does Not Confer Limitless Powers on the President Even in Times of War.

Ours is "a government of laws and not of men," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The Constitution establishes a Federal Government of limited, not plenary, powers. Accordingly, "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte Quirin*, 317 U.S. 1, 25 (1942). By also dividing power among the three branches, the Constitution authorizes each to act as a check on the others and ensures that the conduct of each will be constrained by law. As Madison explained, "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47, at 301 (1788) (James Madison) (Clinton Rossiter ed. 1961).

The existence of war or other armed conflict does not alter the fundamental structure of the Constitution or the constraints that it imposes on executive power. The U.S. Constitution contains no wartime or emergency exception to the scope of the President's powers.[10] Indeed, the word "war" appears nowhere in Article II of the Constitution. Instead, our constitutional text, structure, and history direct that the powers to conduct war and foreign affairs are not exclusive to the Executive, but rather are shared among all three branches of Government. *See* Louis Henkin, *Foreign Affairs and the US Constitution* 25-29 (2d ed. 2002); Harold Hongju Koh, *The National Security Constitution* 69-72 (1990).

The President is given the constitutional power to act as "Commander in Chief of the Army and Navy of the United States." U.S. Const. art. II, § 2. But Congress also has far-reaching authority over matters of war and national security. The Constitution provides that Congress has the power, among others, to "declare War . . . and make Rules concerning Captures on Land and Water," to "define and punish ... Offences against the Law of Nations," to "raise and support Armies," to "provide and maintain a Navy," and to "make rules for the Government and Regulation of the land and naval Forces"; and Congress has the power to suspend the writ of habeas corpus in times of "Rebellion or Invasion." U.S. Const. art. I, §§ 8, 9. In addition, the Constitution gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the fore-

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[10] *Compare, e.g.*, Turkey Const. art. 15 (providing for suspension of fundamental rights, except right to life, in cases of emergency, wartime, or martial law). *See generally* Oren Gross, *Providing for the Unexpected: Constitutional Emergency Provisions*, 32 Israel Y.B. Hum. Rts. (2004), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=475583>.

going Powers, *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof*." *Id.* art. I, § 8 (emphasis added).

The Judiciary also plays a critical role with respect to cases affecting national security and foreign affairs. Under Article III, "[t]he judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made ... under their Authority." U.S. Const. art. III, § 2. Even for crimes directly implicating war and national security, the Constitution makes explicit that the Judiciary has a role in protecting individual liberties. *See id.* § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court"). Ultimately, "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions," not political ones. *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

To be sure, the Commander-in-Chief Clause "puts the Nation's armed forces under Presidential command." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952); *see also The Federalist* No. 69, at 418 (Alexander Hamilton) (the President's designation as commander-in-chief "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy"). No less than the President's power as chief executive in civilian matters, however, the President's power as commander-in-chief of the armed forces is limited by law; it does not make him "Commander-in-Chief of the country," *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring).

The coordinate branches traditionally give due deference to the Executive in matters of national security and foreign affairs when the President acts within the scope of his proper discretion. Such deference, however, is largely based not on constitutional text, but on the perceived institutional competencies of the Executive: speed, military expertise, and the ability to provide a unified voice for the United States in foreign affairs. *See, e.g.*, *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 319 (1936); Henkin, *supra*, at 41-42, 45-46; *The Federalist* No. 75, at 418 (Alexander Hamilton). Where those particular competencies are not directly implicated, and where a matter directly implicates the express powers of the coequal branches, the justification for deference to the Executive is diminished.[11]

Further, due deference must not be confused with unrestrained power, particularly in view of the specific war-related powers vested in the other branches by the very text of the Constitution. As this Court has held,

> It does not follow from the fact that the Executive has this range of discretion . . . that every sort of action . . . , no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established.

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[11] Petitioner cannot plausibly claim that the circumstances of this case invoke the unique institutional competencies of the presidency—speed, efficiency and unity—as they would be implicated, for example, by the President's control over military operations in the field. Here, the Executive has detained on U.S. soil a U.S. citizen whom the Executive declares to be an "enemy combatant," a novel term not found in international law. At the time of Padilla's designation, he was already being held in criminal detention pursuant to a material witness warrant. *Padilla v. Rumsfeld*, 352 F.3d 695, 700 (2d Cir. 2003).

Sterling, 287 U.S. at 400-01.[12]

Even in the conduct of war, the President "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866). Indeed, the Constitution[13] and numerous federal statutes[14] contain several specific provisions designed expressly to address the balance between individual rights and public safety in times of "war," "rebellion or invasion," or "public danger."

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[12] In *Sterling*, the Court invoked established due process constraints on the power of the federal military to seize property in the course of waging war, as described in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851), and *United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1871).

[13] For example, Article I provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when *in Cases of Rebellion or Invasion* the public Safety may require it." U.S. Const. art. I, §9 (emphasis added). The Third Amendment provides that "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, *nor in time of war, but in a manner to be prescribed by law*." *Id.* amend. III (emphasis added). And the Fifth Amendment requires that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger*." *Id.* amend. V (emphasis added).

[14] *See, e.g.*, Alien Enemy Act, 50 U.S.C. §21 (declaring that "whenever there is a declared war between the United States and any foreign nation or government . . . ," citizens of "the hostile nation or government" who are not naturalized are subject to summary arrest, internment, and deportation, when the President so proclaims); Trading with the Enemy Act, 50 U.S.C. App. §§ 1-44 (enabling the President to regulate or prohibit commerce with any enemy state or its citizens after "Congress has declared . . . war or the existence of a state of war," *id.* § 2); Foreign Intelligence Surveillance Act of 1978, §§ 111, 309, 404, 50 U.S.C. §§ 1811, 1829, 1844 (permitting the President to authorize electronic surveillance, physical searches, or the use of pen registers for a period of fifteen days following a congressional declaration of war).

At a time when the Union had recently been torn apart by bloody civil war and much of the country remained under military occupation, this Court declared:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.* Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence.

Milligan, 71 U.S. (4 Wall.) at 120-21 (emphasis added). This Court should reject any attempt to read the Commander-in-Chief Clause as creating a blanket license to ignore individual rights in times of undeclared war.

B. This Court Has Recognized that the Law Applies in Times of War.

The Government misreads this Court's decisions as effectively freeing the President from any meaningful check during wartime. Time and again, in moments of national crisis, this Court has turned to law, not unfettered discretion, as the standard against which the President's action must be judged.

In *The Prize Cases*, 67 U.S. (2 Black) 635 (1863), decided at the height of the Civil War, the Court upheld the President's power to impose a naval blockade against the Confederate states. In reaching that conclusion, however, the Court nowhere suggested that the President's actions in times of war are unrestrained by law. Rather

than rely on the President's assertions that a war was in progress, the Court independently "enquire[d] whether, at the time this blockade was instituted, a state of war existed." *Id.* at 666.[15] The Court then examined whether the President was empowered to use military force, and found that power in *express congressional authorization* of a kind that is lacking here.[16] Significantly, the Court did *not* merely accept as true the Executive's representations as to the circumstances surrounding the capture of the vessels seized in the course of the blockade. Rather, the Court reviewed the executive seizure, looked to the testimony introduced below, and by applying to the facts the established international law of prize, decided to restore a portion of the seized property. *Id.* at 671-82.

While *The Prize Cases* dealt only with seized property, not with the executive detention of U.S. civilians in military custody, this Court addressed the latter issue three years later in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). The Government claimed that Milligan, like Padilla, was a U.S. citizen who had joined a subversive

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[15] Taking guidance from customary international law, the Court reached its own conclusion that on the facts, the insurrection in the Southern states met the criteria for a civil war. *The Prize Cases*, 67 U.S. (2 Black) at 667 (quoting 3 Emmerich de Vattel, *The Law of Nations* § 293 (1758) (Joseph Chitty ed. & trans. 1852)).

[16] The Court held that the President "has no power to initiate or declare a war either against a foreign nation or a domestic State. But *by the Acts of Congress* of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or the United States." *Id.* at 668 (emphasis added) (referencing ch. 36, 1 Stat. 424, and ch. 39, 2 Stat. 443). The Court further noted that Congress had ratified the President's actions in imposing the blockade, a well-accepted form of military force under international law. *Id.* at 669-71.

organization dedicated to attacking the United States.[17] There, as here, the President claimed that the existence of war and his role as commander-in-chief conferred upon him a reservoir of constitutional authority to detain citizens for trial by military commission.

In *Milligan*, unlike this case, Congress had authorized the suspension of the writ of habeas corpus, but only until the detained individual could be presented to the civilian courts for indictment and trial. The Government claimed that the President's commander-in-chief power gave him inherent authority to detain and try civilians, without regard to any limits that Congress may have placed upon that power. This Court rejected that claim, holding that the President "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws." *Id.* at 121.

Echoing its claim here, the Government also urged this Court to defer broadly to its designation of Milligan as a prisoner to be held outside the civilian criminal system. *Id.* at 131. Rejecting any such blind deference, the Court substantively reexamined the designation the Government had placed on Milligan, concluding that Milligan was a civilian criminal defendant, accused of conspiring to wage unlawful war against the United States in concert with the enemy. *See id.* at 131 (dismissing notion that Milligan could be treated as prisoner of war). Even though Milligan's alleged crimes took place at a time when the Nation's very existence was imperiled, this Court found

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[17] *See Milligan*, 71 U.S. (4 Wall.) at 6-7 (statement of the case) (reciting accusations that Milligan had joined a subversive organization "for the purpose of overthrowing the Government and duly constituted authorities of the United States; holding communication with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate prisoners of war, &c." between October 1863 and August 1864).

that the courts established by Congress were open and functioning, and that the President was thus required to turn Milligan over to the those courts for trial. *Id.* at 121-22.

Nearly a century after *Milligan*, *Youngstown* again recognized that the President cannot exercise military powers to curtail liberty or seize property without express and specific authorization by Congress. President Truman had ordered the seizure of the steel mills to prevent a work stoppage that he believed could impair the conduct of the undeclared war in Korea. The Court rejected the notion—offered again by the Government today—that the changing nature of modern warfare frees the President unilaterally to extend the powers of the military into the civilian life of the Nation. Finding irrelevant the cases cited by the Government "upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war," the Court held that

> *[e]ven though 'theater of war' be an expanding concept*, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. *This is a job for the Nation's lawmakers, not for its military authorities.*

Youngstown, 343 U.S. at 587 (emphasis added).

Even this Court's discredited ruling in *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld the wholesale detention and relocation of persons of Japanese ancestry from the western United States during World War II, did not authorize the President to detain U.S. citizens indefinitely on U.S. soil without congressional authorization. In *Korematsu*, the Court upheld a criminal conviction of an American citizen of Japanese origin, who was charged with remaining in California in violation of

an Act of Congress providing that no person "shall enter, remain in, leave, or commit any act in any military area or military zone . . . contrary to the restrictions applicable to any such area or zone. . . ." *Id.* at 216. But in *Ex parte Endo*, 323 U.S. 283 (1944), decided the same day as *Korematsu*, the Court construed the same legislation as *not* authorizing the continued internment of the relocated individuals, to avoid the constitutional issue of whether such detention could ever satisfy the Due Process Clause. *Endo*, 323 U.S. at 303-04. On that basis, the Court ordered the petitioner in that case unconditionally released. *Id.*

Korematsu committed the grievous error of upholding a policy that "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting). But even there, this Court recognized limits on the President's power to curtail citizens' liberty in time of declared war. Such authority, the Court held, extended only so far as Congress had expressly authorized, and was subject to enforcement by ordinary judicial processes, not raw executive power.

Because *Milligan* and *Youngstown* cut so squarely against it, the Government rests its case almost entirely on *Ex parte Quirin*, 317 U.S. 1 (1942), which authorized the trial by military commission of German soldiers who had been captured within the United States as alleged saboteurs. Like *Korematsu*, *Quirin* is an aberrant case that was driven more by wartime haste and fear than by considered application of established constitutional principle.[18] But even accepting *Quirin* as precedent, for three

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[18] Subsequent revelations indicate that Attorney General Francis Biddle urged the President to set up and conduct the secret military trials in *Quirin* less to prevent disclosure of sensitive intelligence information than to avoid the embarrassment of public scrutiny of the

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reasons it offers no support for the President's current claim of unchecked wartime detention authority.

First, in *Quirin*, the Court upheld the Government's detention authority explicitly because *Congress* had authorized the establishment of military commissions by statute. *Quirin*, 317 U.S. at 29.[19] In upholding the military trials, the Court relied on *Congress's* war powers under the Constitution, *id.* at 26-28, looked to *Congress's* intent to incorporate international law in defining the scope of the war powers, *id.* at 28, and expressly declined to decide whether the President would have the power to order such trials "without the support of Congressional legislation." *Id.* at 29.

Second, in *Quirin*, members of the armed forces of Nazi Germany (according to the conceded facts), who had landed in uniform in the United States and shed their uniforms allegedly to commit sabotage, were treated as "enemy combatants" and tried before a military commission. *Id.* at 21-22. But U.S. citizens in circumstances analogous to those of respondent Padilla—who had allegedly aided the sabotage plot in the U.S. but were not themselves members of the German army—were never held as "enemy combatants." Instead, they were treated as criminal defendants under U.S. domestic law and tried in ordinary civilian courts for crimes such as treason. *See,*

FBI's bungling of the case. *See* David J. Danelski, *The Saboteurs' Case*, 1 J. Sup. Ct. Hist. 61, 66-67 (1996).

[19] Indeed, in two other sections of the statute not quoted by the Court, Congress had specifically authorized military commissions to try the crimes with which the commission defendants were charged. *See* Act of Aug. 29, 1916, ch. 418, §3, art. 82, 39 Stat. 619, 663 (authorizing "tri[al] by general court-martial or by a military commission"); *id.* art. 83 (authorizing "such . . . punishment as a court-martial or military commission may direct"). *See generally* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1282-83, 1285-86 (2002).

e.g., *Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943); Louis Fisher, *Nazi Saboteurs on Trial* 80-83 (2003).

Third, *Quirin* offers no support for the President's claim in this case that the Judiciary is incompetent to examine the allegations underlying the detention of an alleged enemy. The *Quirin* Court made no finding that it lacked jurisdiction to consider the lawfulness of the saboteurs' trial, that the legality of the detention was unreviewable, or that the accused saboteurs—whose status as enemy soldiers was conceded—could be detained or punished without due process. Instead, the *Quirin* Court accepted the concession that defendants were enemy soldiers, a status that Padilla contests in his case. The Court then reviewed the matter on the merits, and determined that the trial by military commission was lawful.

Similarly, in *In re Yamashita*, 327 U.S. 1 (1946), this Court upheld the war-crimes trial of a Japanese general before a U.S. military commission. As in *Quirin*, this Court found specific Congressional authorization of such a trial. *Id.* at 16. The Court analyzed the relevant international treaties to determine that the prisoner's alleged crimes fell within the jurisdiction of the military tribunal as defined by Act of Congress. *Id.* at 14-16. The majority and dissent fully agreed that, far from being unreviewable, the Court could review the legality of the trial. *See id.* at 8-9 (opinion of the Court); *id.* at 30 (Murphy, J., dissenting).[20]

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[20] *Johnson v. Eisentrager*, 339 U.S. 763 (1950), is not to the contrary. The Court in that case barred nonresident enemy aliens who were imprisoned overseas and who had been tried and convicted by military commissions overseas from access to U.S. courts for habeas purposes. *Id.* at 765-66. The status of the prisoners as enemy aliens—defined as "the subject of a foreign state at war with the United

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In short, this Court has never accepted a claim as extreme as the Government makes here. The Executive has no *carte blanche*, in the name of undeclared war, to remove U.S. citizens on U.S. soil from the criminal justice system and to move them, based on untested allegation, into indefinite executive detention, without counsel, unreviewed by judicial authority, and unauthorized by law.

In *amici*'s experience, the Executive's rhetoric and practice evoke not so much our own Government's historical practices as those of dictatorial foreign governments that the U.S. State Department has traditionally condemned. Historically, in Latin American countries such as Chile in the 1970s and Peru and Colombia in the 1990s, in apartheid-era South Africa, and in China, Egypt, Iraq, and Malaysia, executive officials have claimed that a war against terrorism is too important to leave to the court system. They have declared states of siege or emergency, and suspended the legal order with grievous effect on the individual rights of their own citizens.[21]

States"—was not in question. *Id.* at 769 n.2. Nothing in *Eisentrager* addressed the circumstances of Padilla, a U.S. citizen being detained on U.S. soil, not a "subject of a foreign state at war with the United States." *See id.*

[21] *See, e.g.*, U.S. Dep't of State, *Human Rights Report on Malaysia, 2003*, <http://www.state.gov/g/drl/rls/hrrpt/2003/27778.htm> (criticizing detention without charge or trial and interrogation without access to counsel); U.S. Dep't of State, *Human Rights Report on Egypt, 2003*, <http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm> (criticizing prolonged detention and use of military tribunals to try terror suspects); *U.S. Dep't of State, Human Rights Report on the Philippines, 2003*, <http://www.state.gov/g/drl/rls/hrrpt/2003/27786.htm> (criticizing arbitrary arrests); U.S. Dep't of State, *Human Rights Report on China, 2000*, at 743 (criticizing detention without charge); U.S. Dep't of State, *Human Rights Report on South Africa, 1985*, at 295-96 (criticizing prolonged detention of terror suspects without charge, trial, or access to courts, for preventive or interrogation purposes).

In this case, our own government is invoking an undeclared state of war to assert unreviewable discretionary power to detain, even over U.S. citizens on U.S. soil. Such sweeping assertions cannot be reconciled with our Nation's fundamental commitment to the rule of law.

C. The Law of War, As Defined by Applicable Statutes, Treaties, and Customary Law, Imposes Limits on Detention in Times of Armed Conflict.

Petitioner invokes the phrase "law of war" as a talisman for authority to detain those it labels "enemy combatants," while ignoring the obligations imposed by the law of war. The Government's attempt to hide unfettered Presidential discretion behind the "law of war" disregards the rule of law, misrepresents this Court's holdings, ignores history, and displaces the constitutional role of Congress and the courts.

The law of war comprises international treaties relating to armed conflict—principally the Geneva Conventions[22]—and the customary rules regarding such conflicts followed by nations out of a sense of legal obligation. Whenever the law of war has previously been invoked before this Court, the Court—after considering the applicable Acts of Congress—has looked to the established body of international treaties and customary international law governing the conduct of belligerents. *See, e.g., Quirin*, 317 U.S. at 11 ("From the very beginning

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[22] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

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 also Yamashita*, 327 U.S. at 14-16; *The Prize Cases*, 67 U.S. (2 Black) at 666-68.

The Geneva Conventions apply only in "international armed conflict," *i.e.*, a difference between state parties to the applicable treaties leading to the use of military force.[23] Under the law of war, anyone belonging to the armed forces of the enemy state or an organized allied militia of those forces, or a civilian taking a *direct* part in the hostilities, may be held by the military. However, persons so detained must be afforded substantial protections and may be held only for the duration of that conflict. *See* Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. These rights include the right to be granted, in the event that their status is contested, all the protections afforded prisoners of war "until such time as their status has been determined by a competent tribunal." *Id.* art. 5. Until the present situation, the United States has officially observed these Convention protections in every conflict in which it has engaged since World War II, including the Vietnam War and the first Gulf War

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[23] The instruments regulating "non-international armed conflict" (*i.e.*, conflicts that take place in the territory of a "High Contracting Party between its armed forces and dissident armed forces or other organized armed groups") do not recognize any authority to detain until the cessation of hostilities. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1), 1125 U.N.T.S. 609. Instead, governments fighting insurgents must rely on domestic law authorizing and regulating detention. *See* Brief of *Amici Curiae* Practitioners and Specialists of the Law of War in Support of Respondent, at 16-17.

in 1991.[24] Petitioner asserts that the law of war applies to those it has labeled "enemy combatants," yet has refused to afford them the protections mandated by that body of law.[25]

The label "enemy combatant," which the Government has affixed to numerous detainees, merely describes a member of the armed forces of a country with which the United States is at war. *See Quirin*, 317 U.S. at 31. The Government's indiscriminate and novel use of that term to justify indefinite detention obfuscates the legal distinction between *privileged combatants*, such as soldiers in an army, who are entitled to protection under Article 4 of the Third Geneva Convention if captured, and *nonprivileged combatants*, who are subject to criminal punishment for their belligerent acts, such as the Nazi saboteurs in *Quirin*. *See* Third Geneva Convention, art. 4, 6 U.S.T. at 3316; *Quirin*, 317 U.S. at 31. The Government's loose usage of the "enemy combatant" label also overlooks the crucial distinction between actual *combatants* taking a *direct* part in hostilities, such as the members of the German army in *Quirin* or the Japanese general in *Yamashita*, and *civilians* who may be subject to criminal

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[24] *See generally* Brief of *Amici Curiae* Experts on the Law of War, *Hamdi v. Rumsfeld*, No. 03-6696, at 9-13; U.S. Military Assistance Command, Vietnam, Directive No. 381-45, *Military Intelligence: Combined Screening of Detainees*, Annex A (Dec. 27, 1967), *reprinted in* Marco Sassoli & Antoine Bouvier, *How Does Law Protect in War?* 780-781 (1999); U.S. Army Judge Advocate General Corps, *Operational Law Handbook*, ch. 2 (T. Johnson & W. O'Brien eds. 2003), <http://www.jagcnet.army.mil/jagcnetinternet/homepages/ac/tjagsaweb.nsf/>.

[25] Nothing in the law permits the Executive to subject detainees to the burdens of the law of war without also granting them its benefits. As the Court remarked in *Milligan*, if a prisoner "cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?" 71 U.S. (4 Wall.) at 131.

trial in civilian courts for acts of espionage or treason in aid of an enemy power, such as Padilla, the *Quirin* saboteurs' co-conspirators, or the accused conspirator in *Milligan*. *Compare Yamashita*, 327 U.S. at 5, *and Quirin*, 317 U.S. at 21, *with, e.g., Cramer v. United States*, 325 U.S. 1, 3 (1945), *and Milligan*, 71 U.S. (4 Wall.) at 123.

Critically, the law of war gives the President no extra-constitutional authority to suspend—and effectively nullify—all of the constitutional limits on Executive actions against the liberty of citizens. Whenever the Government seeks to deprive a citizen of liberty, that citizen has a constitutional right to due process of law, including notice of the reasons why one is being held and an opportunity for a hearing on that issue under the criteria established by law. These constitutional protections cannot be avoided by claiming that authority to detain stems from the law of war. If, as petitioner alleges, Padilla is subject to the law of war, he must benefit from the protections that it provides as well as his constitutional rights as a U.S. citizen. *See, e.g.*, Third Geneva Convention, art. 5, 6 U.S.T. at 3316 (entitling detained alleged combatant to a hearing on his or her status before a "competent tribunal"); *see also Ex parte Endo*, 323 U.S. 283, 294-97 (1944) (ordering release of civilian held in executive detention during time of declared war).

By invoking the rhetoric of "law of war" and "enemy combatant," and resisting judicial scrutiny of the meaning and applicability of those terms, petitioner seeks to remove his prisoners from the protections of *any* recognized legal category—whether that of prisoner of war or of criminal pretrial detainee (civilian or military).[26]

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[26] Precisely the same principle is at stake in the related case, *Yaser Esam Hamdi, et al. v. Donald Rumsfeld, et al.*, No. 03-6696. Two primary bodies of law afford Hamdi rights in the circumstances of his case: the U.S. Constitution and federal laws of the United States; and *(continued)*

Petitioner argues that absolute executive discretion—not law—permits the indefinite incarceration of U.S. citizens on U.S. soil, without any meaningful judicial review. Such unchecked executive power over the liberty of individual citizens finds no support in our Constitution or legal tradition.

II.
THE EXECUTIVE'S DETENTION OF PADILLA IS UNLAWFUL.

Twenty-two months ago, the President abruptly declared Padilla an "enemy combatant"—a novel legal concept—and removed him from the criminal justice system. The President's action was tantamount to the summary issuance of an executive order stating:

> Notwithstanding any other provision of law, executive officials may indefinitely detain incommunicado, without charges, access to counsel, or due process of law, any American citizen stopped on U.S. soil whom they deem to be an "enemy combatant."

Apart from squarely violating the Nondetention Act of 1971, 18 U.S.C. § 4001(a), such an executive order would be at least triply unconstitutional: it would violate the constitutionally mandated separation of powers; it would unconstitutionally suspend the writ of habeas corpus without congressional action; and the total absence of

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the law of war as codified in the four Geneva Conventions, specifically the Third Geneva Convention, which relates to the treatment of prisoners of war. Yet in Hamdi's case, as in Padilla's, the Executive invokes the authority granted by both bodies of law, while accepting none of the constraints that limit the exercise of that authority. *See* Brief of *Amici Curiae* Experts on the Law of War, *Hamdi v. Rumsfeld*, No. 03-6696; Brief of *Amici Curiae* Retired Federal Judges in Support of Petitioner, et al., *Hamdi v. Rumsfeld*, No. 03-6696.

procedural protections would offend the Due Process Clause of the Fifth Amendment.

By the Government's own account, Padilla is a native-born citizen of the United States. He is alleged to have conspired abroad with al-Qaeda, a terrorist organization, to commit terrorist acts in the United States at some undisclosed time in the future. Civilian law enforcement agents arrested Padilla, on process issued by the U.S. District Court for the Southern District of New York, as he arrived in Chicago unarmed on a commercial airline flight. The Government transferred Padilla from civilian to military custody, and moved him from the district, just days before the district court was to consider his continued detention. *Padilla v. Rumsfeld*, 352 F.3d 695, 700 (2d Cir. 2003).

Nothing in these facts suggests that Padilla is a "combatant" captured in an "armed conflict," as those terms are used in the law of war. He is not alleged to be a member of the military force of a foreign country, nor was he captured in the company of foreign armed forces or while directly engaged in combat. The allegations against him are classically criminal in nature and would support a prosecution under a host of federal statutes.[27] The

[27] *See, e.g.*, 18 U.S.C. § 831(a)(1), (8) (prohibiting conspiracy to disperse nuclear material or nuclear byproduct material in order to cause death, bodily injury, property damage, or environmental damage); *id.* § 2332a(a)(2), (b), (c)(2)(D) (prohibiting conspiracy to use weapons of mass destruction, defined to include "any weapon that is designed to release radiation or radioactivity at a level dangerous to human life"); *id.* § 2332(a)(1)-(2), (g)(1) (prohibiting conspiracy to commit "acts of terrorism transcending national boundaries," defined to include assault with a dangerous weapon where conduct occurs both inside and outside the United States); *id.* § 2332f(a)(1)-(2) (prohibiting conspiracy to bomb places of public use, government facilities, public transportation systems and infrastructure facilities); *id.* § 2339B (prohibiting conspiracy to provide material support and resources to terrorist organizations such as al-Qaeda).

Government is fully entitled to treat Padilla as an accused terrorist and criminal defendant. What it may not do is label Padilla as a "combatant" in a "war" simply to justify his sustained incommunicado detention without trial. If this were permitted, nothing would prevent the Government from doing the same to an American citizen such as Timothy McVeigh, who could be removed without explanation from the criminal justice system and honored with the label of "soldier," when in truth he was a common criminal. Far from resting on the law of war, the Government's detention of Padilla dramatically distorts that law in an effort to expand and insulate from judicial review the asserted powers of the President.[28]

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[28] In contrast, Yaser Hamdi's circumstances place him within *both* the protections of the U.S. Constitution and the Geneva Convention protections for prisoners of war. The Government alleges that Hamdi was a soldier captured on the battlefield by the Northern Alliance while fighting on behalf of the Afghan military, and then later transferred to U.S. custody. Hamdi, like any U.S. citizen who finds himself in U.S. military custody abroad, is shielded from arbitrary executive action by the U.S. Constitution. *Reid v. Covert*, 354 U.S. 1, 6 (1957) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

Even if Hamdi is being held under the law of war, his detention is patently illegal. The law of war, as expressed by the Third Geneva Convention, requires all detained combatants to be treated as prisoners of war "from the time they fall into the power of the enemy and until their final release and repatriation." Third Geneva Convention, art. 5, 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 140. Such status can be revoked only if a competent tribunal holds otherwise: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [requiring POW status], *such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal*." *Id.*, 6 U.S.T. 3316, 3324, 75 U.N.T.S. 135, 142 (emphasis added). The Government's indefinite detention of Hamdi without the protections mandated by the

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Unlike the German soldiers in *Quirin* or the Japanese general in *Yamashita*, Padilla is not being tried for any crime. He is being detained without trial, formal charge, or even a status hearing. His recent meeting with counsel, which took place only after he had been detained for many months, was monitored and recorded. *See* Stevenson Swanson, *Padilla Gets to Talk with His Lawyers*, Chi. Trib., Mar. 4, 2004, at C1. In both *Quirin* and *Yamashita*, the accused were afforded more than a minimal degree of due process: they were allowed to confer with and be represented by counsel, to answer the charges against them, and to present evidence on their own behalf. *See Yamashita*, 327 U.S. at 5; *id.* at 32-33 (Murphy, J., dissenting); *Quirin*, 317 U.S. at 23. Padilla, however, has been held nearly incommunicado for almost two years without any fundamental protections. Until now, such protections have been routinely provided even to those accused of the most heinous crimes—including the enemy belligerents accused of war crimes in *Quirin* and *Yamashita* and citizens accused of acts of domestic terrorism, such as Timothy McVeigh. *See Yamashita*, 327 U.S. at 5, *Quirin*, 317 U.S. at 21; *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998). The Government makes no pretense that Padilla is being held for trial; he is simply being detained without any stated time limit for the duration of a global "war on terrorism" that has no foreseeable end.[29]

Third Geneva Convention flies in the face of this unambiguous and settled process. *See generally* Brief of *Amici Curiae* Experts on the Law of War, *Hamdi v. Rumsfeld*, No. 03-6696.

[29] *See* Brief for the Petitioner 28 ("all enemy combatants are subject to capture and detention for the duration of an armed conflict"); *id.* at 33 (invoking "the option to detain until the cessation of hostilities"); *see also, e.g.*, U.S. Dep't of Defense, Fact Sheet, *Guantanamo Detainees*, Feb. 2004, <http://www.defenselink.mil/news/Feb2004/d20040220det.pdf> ("The law of armed conflict governs this war between the U.S. and al Qaida and ... permit[s] the U.S. to detain

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Padilla's case most closely resembles that of Milligan, the pro-Confederate conspirator accused of having plotted with a secret organization to conduct attacks against the United States. Like the federal courts in Indiana at the time of *Milligan*, the U.S. District Court for the Southern District of New York continues to "m[e]et [and] peacefully transact its business. It need[s] no bayonets to protect it, and require[s] no military aid to execute its judgments." *Milligan*, 71 U.S. (4 Wall.) at 122. This Court in *Milligan* correctly rejected the claim that military necessity supported the Executive's attempt to withdraw Milligan from the civilian justice system. That controlling precedent should foreclose the Government's current effort to create an alternative justice track for Padilla.

As respondents and other *amici* have fully argued, the facts of this case fit squarely within the third category of Justice Jackson's famous concurrence in *Youngstown*. The Government has not established that either the statutory Authorization for Use of Military Force (AUMF), Pub. L. No. 107-10, 115 Stat. 224, or various appropriations provisions specifically approved executive detentions, which

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enemy combatants without charges or trial for the duration of hostilities"); U.S. Dep't of Defense, Press Release No. 908-03, *DOD Announces Detainee Allowed Access To Lawyer* (Dec. 2, 2003), <http://www.defenselink.mil/releases/2003/nr20031202-0717.html> ("Under the law of war, enemy combatants may be detained until the end of hostilities"); U.S. Dep't of State, *Wolfowitz Says Jose Padilla Is "Where He Belongs,"* Wash. File, June 11, 2002, <http://usinfo.state.gov/topical/pol/terror/02061103.htm> (Padilla "is an enemy combatant who can be held for the duration of the conflict, according to Deputy Secretary of Defense Paul Wolfowitz"); Sgt. 1st Class Kathleen T. Rhem, *Intelligence, Not Prosecution, Is U.S. First Priority With Padilla* (June 2003), <http://www.defenselink.mil/news/Jun2002/n06112002_200206116.html> (quoting Secretary of Defense Rumsfeld) ("The United States is more interested in extracting intelligence information than in prosecuting Jose Padilla" and "[o]ur interest, really, in this case, is not law enforcement").

would place this matter in *Youngstown*'s first category, where the President's "authority is at its maximum." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Nor has Congress been silent, placing this matter in the "twilight zone" of *Youngstown*'s second category, where the President "and Congress may have concurrent authority or in which its distribution is uncertain." *Id.* at 637. Instead, as in *Youngstown* itself, an unambiguous statutory directive—here, the Nondetention Act's mandate that "[n]o citizen shall be . . . detained by the United States except pursuant to an act of Congress"[30]—places this case in Justice Jackson's third category, where "the President takes measures incompatible with the express . . . will of Congress, [and] his power is at its lowest ebb." *Id.* If the commander-in-chief power does not authorize the President to seize indefinitely American steel mills on American soil in times of undeclared war, how can it authorize him to seize indefinitely American *citizens* on American soil in times of undeclared war?

In *Kent v. Dulles*, 357 U.S. 116 (1958), this Court held that, even when foreign affairs are at issue, judges must find a clear statutory statement that Congress authorized the executive act in question before condoning an executive infringement on a citizen's liberty. Absent such a clear legislative statement, the Executive has no powers to withdraw rights from the individual. *See id.* at 128-30; *Ex parte Endo*, 323 U.S. 283, 299-301 (1944). Petitioner points to nothing close to a clear statement of legislative intent to authorize the military to detain United States citizens outside the law.

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[30] As *amici* Congressional Sponsors of Section 4001(a) in this case point out, that statute not only reflects constitutional limits on unauthorized executive detention of American citizens, but also rebuts any claim that congressional silence could be construed as acquiescence in that practice.

The AUMF does not even mention detention authority of the kind the Executive now asserts. Indeed, in the USA PATRIOT Act, enacted less than one month after the AUMF, Congress mandated that a suspected *alien* terrorist may not be detained for more than seven days without charging the alien with a criminal offense or commencing deportation proceedings. *See* 8 U.S.C. § 1226a(a)(5) (as added by USA PATRIOT Act, Pub. L. No. 107-56, § 412, 115 Stat. 272, 351). The Act also expressly preserves the right of a detained suspected alien terrorist to seek judicial review of the merits of his or her detention by petition for a writ of habeas corpus. *Id.* § 1226a(b). The Government now asks this Court to believe that the same Congress that would not approve the detention of a suspected alien terrorist beyond a week without triggering statutory protections simultaneously and silently endorsed the indefinite detention on United States soil of United States *citizens* suspected of terrorism, based on claims of inherent presidential authority that this Court had squarely rejected in *Milligan* and *Youngstown*.

CONCLUSION

The horrific attacks of September 11, 2001 have tested this Nation's resolve. But September 11 did not suspend the Constitution, abrogate solemn treaty commitments, or repeal existing statutes. Nor did it give the President a reservoir of unreviewable power to evade domestic courts and indefinitely detain American citizens on American soil in the name of conducting undeclared wars abroad.

Even in times of war or armed conflict, ours is "a government of laws and not of men." The Constitution and the laws of the United States limit executive power and protect citizens such as Padilla from arbitrary deprivation of their liberty. If the Constitution and laws of the United States do not protect Padilla, they do not protect any of us. When the Executive exceeds the lawful boundaries of

even its wartime powers, it is the province and duty of this Court to reassert the rule of law and reaffirm the supremacy of the Constitution.

For the foregoing reasons, *amici* urge this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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