No. 03-1027

IN THE
Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
Petitioner,

v.

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

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

BRIEF OF *AMICI CURIAE* THE RUTHERFORD INSTITUTE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND HUMAN RIGHTS FIRST (FORMERLY THE LAWYERS COMMITTEE FOR HUMAN RIGHTS) IN SUPPORT OF RESPONDENTS

ELIOT M. MINCBERG
DEBORAH LIU
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M STREET, N.W.
SUITE 400
Washington, D.C. 20036
(202) 467-4999

CARTER G. PHILLIPS*
MARK E. HADDAD
JOSEPH R. GUERRA
ROBERT N. HOCHMAN
CHAD W. PEKRON
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether the district court has jurisdiction over the proper respondent to the amended habeas petition.

2. Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), to seize and detain a United States citizen in the United States based on a determination by the President that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts, or whether 18 U.S.C. § 4001(a) precludes that exercise of Presidential authority.

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INTEREST OF *AMICI CURIAE*[1]

Amici are three organizations with a range of viewpoints that have joined to address the profoundly important constitutional issues raised by this case.

Since 1978, the Human Rights First, formerly the Lawyers Committee for Human Rights, has worked 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. Human Rights First supports human rights activists who fight for basic freedoms and peaceful change at the local level; promote fair economic practices by creating safeguards for workers' rights; protect refugees in flight from persecution and repression; work to ensure that domestic legal systems incorporate international human rights protections; and help build a strong international system of justice and accountability for the worst human rights crimes. Human Rights First believes that this case presents compelling issues of justice and the rule of law and is keenly interested in its outcome.

People For the American Way Foundation ("People For") is a non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, including Norman Lear, Father Theodore Hesburgh, and Barbara Jordan, People For now has over 600,000 members and supporters nationwide. One of People For's primary missions is to educate the public on the vital importance of our tradition of liberty and freedom, and to defend that tradition, through litigation and other means, against efforts to

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief.

limit fundamental rights and freedoms, including the fundamental rights of American citizens at issue in this case.

The Rutherford Institute ("Institute") is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have appeared as counsel before this Court and federal appeals courts in many significant civil liberties cases and have filed briefs as *amicus curiae* in numerous criminal procedure cases. Institute attorneys currently handle several hundred civil rights cases nationally at all levels of federal and state courts. The Institute has also published articles and educational materials in this area. The present case raises important criminal justice and civil liberties concerns, and so is of significance to the Institute.

SUMMARY OF ARGUMENT

Our nation has repeatedly faced perilous threats to its security and even its survival. These threats have come not only from aliens, but from citizens who, through espionage, treason, bombings, and other overt and covert acts of violence, have taken the lives of fellow citizens and threatened to destroy the nation. We therefore have a substantial historical record—from the founding of the nation, the War of 1812 and the Civil War, the Palmer raids of the 1920s, and the internment of Japanese-Americans during the Second World War—that reveals the consistent understanding that the framing generation, this Court, Congress and prior administrations have had of the President's power to detain civilians during national emergencies. The historical record demonstrates that the threat we face today, though undeniably grave, is not unprecedented. What is unprecedented is the executive branch's claim of a unilateral power to detain citizens it deems to be "enemy combatants."

In this case, the executive branch claims that the President can unilaterally determine: (1) when the nation is engaged in armed conflict, (2) what countries or organizations are the enemy, (3) whether particular United States citizens located within the United States are "enemy combatants," (4) whether those citizens should be detained and (5) for how long. According to the executive branch, the President may make these decisions without any guidance from Congress and no one—not even the detained citizen—is permitted to challenge any of his conclusions, in court or anywhere else. The President's decision to detain a United States citizen in this manner is subject to no temporal, procedural or substantive constraints. His decision is final and unreviewable.[2]

The President's assertion of unchecked power to deprive United States citizens of liberty is squarely at odds with the nation's legal history. That history demonstrates conclusively that, even in times of gravest national peril, United States citizens enjoy their liberty secure that the government cannot restrain it except according to duly enacted law. That principle was embedded in the Constitution at the nation's founding, and all three branches of government—including the executive—have enforced or respected it during crises perceived to be every bit as threatening as today's.

In structuring the Constitution, the Framers denied the executive unchecked power over matters of war and military authority. Decisions of this Court from the early days of the Republic to the Civil War and through armed conflicts in the last century have repeatedly and jealously protected the bedrock principle that, even when the survival of the nation itself is at stake, United States citizens may not be detained except according to duly enacted law. And prior administrations essentially have conceded that the President's

[2] The administration details the internal administrative procedures that were used to determine whether a citizen is an "enemy combatant." (Pet. Br. 6-7.) That procedure, however, is not required by law, and apparently could be changed at the whim of the President.

Commander-in-Chief power does not include the power to detain United States citizens without statutory authorization.

In providing such authorization, moreover, Congress must be clear. Because the most fundamental of freedoms are at stake, this Court has refused to read Congressional authorizations to use military force expansively to include the authority to detain United States citizens when civil courts remain open. This Court has consistently required the executive branch to point to legislation that specifically expresses Congress's considered view that the detention of United States citizens is warranted. And Congress has in the past spoken with such clarity. The Authorization for Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), fails this clear statement test.

The executive branch asks this Court to defer to the President on a matter of military judgment and thus permit him to continue to keep Jose Padilla in military custody. But this Court has never slavishly deferred to the executive branch, even during the Civil War, regarding whether the President has unilateral authority to restrain the liberty of citizens. To the contrary, this Court has always drawn and enforced the very line that *amici* propose: when the courts are open and functioning, a citizen in the United States cannot be detained outside the judicial process unless Congress has clearly authorized such an extraordinary act. And, when Congress has authorized such detentions in the past, it has not afforded the President the blanket power he claims here, and instead has provided various procedural rights and safeguards.

In the end, *amici* propose a resolution that is narrow, and properly so. Today is not the day to decide whether the Constitution permits the detention of citizens as "enemy combatants," or to decide what process an accused citizen "enemy combatant" is due under the Constitution. Determining whether the government can act outside the judicial process to detain its own citizens on United States soil when the courts are open and functioning is an issue this Court need

only address if both the executive and legislative branches clearly have agreed that the President must be vested with such power. Because Congress has passed no statute authorizing the detention at issue here,[3] the decision below should be affirmed.

ARGUMENT

I. THE COMMANDER-IN-CHIEF POWER DOES NOT CONFER UNCHECKED AUTHORITY TO DETAIN AMERICAN CITIZENS.

Throughout our nation's history the suggestion that the President's power as Commander in Chief includes unchecked authority, including the authority unilaterally to determine whether a citizen's liberty should be restrained, has been consistently rejected. The Founders purposefully divided the war powers between the President and Congress to ensure that the President would not have unchecked military authority. Prior administrations facing emergencies as grave as those we face today understood and respected the line the administration today proposes to cross: the executive branch may not detain citizens in the United States without Congressional authorization. Finally, this Court has consistently understood that the President's power, even in times of dire conflict, does not include the unchecked power to detain citizens, at least when the courts are available.

1. The Framers. Prior to the American Revolution, an omnipresent force in colonial life was the British Army under the sole control of the King of England. Indeed, among the list of grievances recited in the Declaration of Independence was that the King "has affected to render the Military independent of and superior to Civil power" and "has kept among us, in times of peace, Standing Armies without the Consent of our legislatures." The Declaration of Independence, paras. 13-14. As such, the Framers' fears of unchecked military

[3] *Amici* do not address whether such a statute would be constitutional.

power "are derived in a great measure from the principles and examples of our English ancestors." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1182 (1833). Having experienced first-hand the dangers of such an unchecked executive power, the Framers denied it to the executive they were creating. See James Madison, *Notes of Debates in the Federal Convention of 1787*, at 46 (Adrienne Koch ed., 1987) (the "Prerogatives of the British Monarch [were not] a proper guide in defining the Executive powers") (James Wilson).

To achieve this end, the Framers divided national military power between the executive and legislative branches. While the President was named Commander in Chief of the army and navy, Congress was also granted substantial powers over the military. In particular, Congress, among other things, was authorized to "declare War," "make Rules for the Government and Regulation of the land and naval Forces," "raise and support Armies," and "define and punish … Offences against the Law of Nations." U.S. Const. art. I, § 8.

These provisions reflect an intent to create a substantial and independent role for Congress in military affairs. During the Constitutional Convention, it was repeatedly recognized that the new Constitution would substantially limit the potential for tyranny inherent in an armed nation. See Madison, *supra*, at 475-77, 481-83 (John Langdon, for example, responded to Elbridge Gerry's complaint that the Constitution would lead to military government by pointing out that the military would be controlled by the "Representatives of the people."). The Framers were conscious that liberty would be threatened were the President, as Commander in Chief, left with unchecked authority to employ the military power of the new nation, especially domestically. See 3 Story, *supra* § 1177 (reciting objections raised to the unlimited power of the new government to "keep large armies constantly on foot" as being "most dangerous, and in its principles despotic"). Ensuring that Congress, the branch of government most

responsive to the people, had a substantial role in controlling the use of the nation's war and military powers was understood as a vital structural protection against threats to liberty. *Id.* § 1182 (explaining that the Constitution eliminated the "danger of an undue exercise of the [military] power" by ensuring that "[i]t can never be exerted, but by the representatives of the people").

The President's assertion of unchecked authority as Commander in Chief to determine when the nation is at war, with whom, which of the nation's citizens are "enemy combatants," and which of those combatants should be detained by the military is flatly at odds with the Framers' clear intent to *limit* the President's military power, especially on United States soil. Having taken such care to subject the President's military powers to Congressional control, the Framers did not intend the phrase "Commander in Chief" to provide the President with unchecked power to use the military to detain citizens in the United States when civilian authorities remain available to enforce the rule of law.

Indeed, the founding generation's distrust of standing armies and its narrow conception of the President's Commander-in-Chief power is reflected in its response to the "undeclared war" with France, the first major threat to the nation's security. France, then a world superpower, had large "numbers of enemy agents operating in th[is] country" and had for years enjoyed the ardent support of many United States citizens. David McCullough, *John Adams* 505 (2001). Operating in a climate of "rampant fear of the enemy within," *id.*, and amidst rumors that French agents were plotting to burn down Philadelphia (the nation's capital and largest city), *id.* at 501, Congress enacted a series of war measures. Notably, however, while the Alien Act gave the President broad authority to expel foreigners he deemed dangerous, the infamous Sedition Act authorized only criminal prosecutions against citizens who conspired to take actions against the United States. An Act respecting Alien Enemies, ch. 66, § 1,

1 Stat. 577, 577 (1798); An act for the punishment of certain crimes against the United States, ch. 74, 1 Stat. 596 (1798).

Even the threat of war with Napoleon did not shake the founding generation's distrust of standing armies. President Adams himself "deplored the idea of a standing army," and Congress raised only a "'provisional'" one to repel a possible invasion. McCullough, *supra*, at 499. When the threat of war receded, Adams and Congress competed in seeking credit for promptly disbanding that provisional force. *Id.* at 540.

Thus, the founding generation's attitudes and actions, even at a time of grave peril to a still weak nation, belie any suggestion that they understood the Commander-in-Chief Clause to confer a sweeping unilateral authority on the President to arrest and detain United States citizens.

2. The War of 1812. Two administrations later, the nation found itself at war with Britain, then the world's greatest naval power. It is easy to forget, nearly two centuries and a number of large-scale wars later, what peril the nation faced at the time. British forces invaded the United States, sacked Washington and, in much the same way as today's enemies, destroyed national symbols, burning and gutting the White House and the Capitol. Due to the deep political divisions of the day, moreover, many Federalists in New England obstructed war efforts, and President Madison feared extremists there were plotting to secede, a possibility the British promoted by blockading all but northern ports. Jack N. Rakove, *James Madison and the Creation of the American Republic* 196, 200-01 (2002).

Despite citizen-led obstructions of the war effort, Congress did not authorize military detentions of citizens. And, in several decisions that this Court later deemed notable "not only for the principles they determine, but on account of the distinguished jurists" involved, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 129 (1866), courts deemed several such detentions unlawful. In *Smith* v. *Shaw*, 12 Johns. 257 (N.Y. Sup. Ct.

1815), New York's highest court held that an American citizen believed to be a British spy was falsely imprisoned by a military commander who detained him for two weeks. Because no act of Congress authorized the plaintiff's trial, "the defendant could certainly have no legal right to detain him." *Id.* at 266. To the defendant's assertion that the plaintiff's detention was "essential to the public safety," *id.* at 260, the court responded that "[i]f the defendant was justifiable in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority." *Id.* at 266; see also *In re Stacy*, 10 Johns. 328, 333 (N.Y. Sup. Ct. 1813) (holding that detention of citizen by military official was without "any color of authority"); *McConnell* v. *Hampton*, 12 Johns. 234 (N.Y. Sup. Ct. 1815) (upholding false imprisonment verdict against military officer who detained citizen suspected of espionage, but ordering new trial on damages).

3. The Civil War. In the midst of the gravest threat to the survival of the Union our nation has ever faced, this Court flatly rejected the broad interpretation of the Commander-in-Chief power that the executive branch presses in this case.

During the Civil War, Lamdin P. Milligan was a member of "a secret society known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government; … [held] communication with the enemy; conspir[ed] to seize munitions of war stored in the arsenals; [and] to liberate prisoners of war." *Ex parte Milligan*, 71 U.S. (4 Wall.) at 6-7. In October 1864, Milligan was arrested by military personnel, tried by military commission, and sentenced to death. *Id.* He filed a petition for writ of habeas corpus, insisting upon his right to be released because the military lacked authority to detain a citizen arrested in Indiana, which had never been in rebellion. *Id.* at 108.

The arrest of Milligan had taken place after Congress had authorized the President to suspend the writ of habeas corpus in 1863, An Act relating to Habeas Corpus, ch. 81, 12 Stat.

755 (1863) (the "1863 Act"). But Milligan was still able to obtain judicial review, because the military had failed to observe the procedural dictates of the 1863 Act.[4] *Milligan*, 71 U.S. (4 Wall.) at 114-16. As a result, the government was forced to defend the lawfulness of Milligan's detention and trial, without the benefit of the 1863 Act.

The government asserted that military jurisdiction over Milligan was "complete under the 'laws and usages of war.'" *Id.* at 121. Specifically, the government argued that the nature of the Civil War, which placed Indiana (Milligan's state) under threat of invasion by the enemy, furnished the military with the authority to seize citizens who were aiding the enemy. *Id.* at 126. This Court flatly rejected the argument. In doing so, the Court drew a clear line: "Martial rule can never exist where the courts are open." *Id.* at 127; see also *id.* at 121 (rejecting application of laws of war "in states which have upheld the authority of the government, and where the courts are open and their process unobstructed"). This Court did not question the authority of the President or his military commander to impose rules "on states in rebellion to cripple their resources and quell [an] insurrection." *Id.* at 126. But this Court would not cede to the President, and his military officers, the type of unchecked authority over the liberty of citizens that the executive branch asserts here. The framers "knew … the nation they were founding … would be involved in war … and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen." *Id.* at 125.[5]

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[4] The significance of those procedural requirements is discussed in more detail *infra* at 23-28.

[5] *Milligan* affirmed the views of other state and federal courts that the President's power as Commander in Chief does not include the authority to suspend the writ of habeas corpus without Congressional authorization. *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (Taney, J.) (holding that Congress alone possesses the power to suspend the writ of habeas corpus); *In re Kemp*, 16 Wis. 359, 367-68 (1863)

The executive branch here seeks precisely the authority the Lincoln Administration was denied. It asserts that the nature of the war with al Qaeda requires military authority to detain United States citizens, despite the fact that civil courts remain open. Pet. Br. 35-38. During the Civil War itself, however, the very survival of the nation was at stake, and the organizations to which Milligan belonged had stockpiled weapons, conspired with rebel agents to plot insurrections against the government, and "coordinated an invasion of Missouri with guerrilla attacks." James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 783-84 (1988). Other saboteurs received $5 million from the Confederate government and used it to destroy or damage military installations in Missouri and Illinois and hotels in New York City. *Id.* at 764. Yet, despite these terrorist-like activities in aid of a full-scale military rebellion, the courts refused to acquiesce in the President's assertion of unchecked power over the liberty of citizens.

4. Twentieth Century Responses to National Crises. No doubt influenced by Civil War-era precedents, the executive branch responded to several national emergencies during the twentieth century by seeking statutory authority to detain American citizens. These actions reflect the recognition of prior administrations that they lacked such authority in the absence of Congressional authorization.

A. The Palmer Raids. In April 1919, mail bombs were sent to nearly 20 government officials and business leaders. On May 1, 1919, riots broke out during May Day celebrations in Cleveland, Boston and New York. On June 2, 1919, bombs

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(holding that only the legislature may suspend the writ of habeas corpus and denying that the Commander-in-Chief power authorized the President to institute martial law in those jurisdictions where courts remained open); *Griffin* v. *Wilcox*, 21 Ind. 370, 386 (1863) (holding that the President "has the right to govern, through his military officers, by martial law, when and where the civil power of the United States is suspended by force[, but that i]n all other times and places, the civil excludes martial law—excludes government by the war power") (emphasis omitted).

exploded in eight different cities within the same hour, apparently targeting government officials including Attorney General A. Mitchell Palmer.[6] Because pamphlets from "The Anarchist Fighters" were found in the rubble of the bomb sites, the Justice Department concluded that the bombings were the work of Communists. Although the bombers were never captured, the Justice Department launched a series of raids that detained over 3000 radical aliens and deported many of them based on their membership, or suspected membership, in Communist organizations. See Espionage Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012 (repealed 1952) (authorizing deportation on such grounds).

The Attorney General believed that some citizens might also pose a serious threat to the peace and security of the nation. See *Sedition: Hearing Before the House Comm. on the Judiciary*, 66th Cong. 6 (1920) (statement of Attorney General Palmer) ("There is a condition of revolutionary intent in this country, on the part of both aliens and citizens … manifested chiefly by the threats, both written and spoken, on the part of such persons to injure, destroy or overthrow the Government by physical force of violence."). He recognized, however, that no law authorized him to detain citizens for the same offenses for which aliens were being deported. *Charges Against the Dep't of Justice: Hearings Before the House Comm. on Rules*, 66th Cong. 29, 33 (1920) ("1920 Hearings"). Notably, the Wilson Administration did not declare the threat from anarchists and communists to be akin to war, and order the military to detain citizens believed to be enemy combatants. Instead, President Wilson requested that Congress "arm the Federal Government with power to deal in its criminal courts with those persons who by violent methods would abrogate our time-tested institutions." Woodrow Wilson, Seventh Annual Message to Congress (Dec. 2, 1919),

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[6] A more complete description of these facts may be found in David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* 117-19 (2003).

available at http://www.presidency.ucsb.edu/site/docs/doc_sou.php?admin=28&doc=7 (last visited Apr. 8, 2004); see also 1920 Hearings at 33 (urging Congress to pass a statute that would authorize detention of citizens without proof of a conspiracy).

B. The Japanese Internment. Likewise, during the infamous World War II Japanese internment, the Roosevelt Administration recognized that it did not possess a unilateral detention power. On February 19, 1942, President Roosevelt issued Executive Order 9066, which authorized an appropriate military commander to create exclusion zones from which any individual could be excluded at the commander's discretion. 7 Fed. Reg. 1407. Pursuant to that order, the military issued orders excluding "all persons of Japanese ancestry, both alien and non-alien" from certain areas on the west coast. See, *e.g.*, Civilian Exclusion Order No. 57, 7 Fed. Reg. 3725, 3725 (May 10, 1942).

In the wake of the devastating attack on Pearl Harbor, the West Coast of the United States was widely perceived as under threat of imminent attack. See Public Proclamation No. 1, 7 Fed. Reg. 2320, 2321 (Mar. 2, 1942) (reciting that the entire Pacific Coast "by its geographical location is particularly subject to attack [and] invasion"). Executive Order 9066 itself plainly expressed the President's view that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities." 7 Fed. Reg. at 1407. Yet, despite dangers perceived to be just as dire as those the nation faces today, the military did not assert that anyone refusing to comply with orders issued to protect the homeland posed an unacceptable danger to national security warranting his or her detention by the military.

To the contrary, the War Department recognized that it could not exercise an inherent military arrest power to enforce compliance with its duly issued order. It explained to

Congress that, "'[a]s things now stand orders can be issued but there is no penalty provided for violation of orders and restrictions so issued.… [P]assage of this bill was necessary … to properly carry out the provision of the Executive order.'" 88 Cong. Rec. 2724 (1942). Rather than assert the unilateral authority to enforce its own orders, the military asked Congress to provide for criminal punishment of violators, see *id.* at 2722, which Congress quickly provided. See Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (repealed 1948).

C. The Steel Seizures. Although President Truman's seizure of the nation's steel mills during the Korean War did not involve the detention of citizens, it is also instructive here because of the core separation of powers principles that should inform the Court's judgment about how to proceed in this case. Both the courts (in the Civil War-era cases) and the executive branch (in the Palmer raids and internment situations) recognized that, if the national government can authorize the detention of citizens, that power resides in the political branches *as a whole*. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587 (1952), this Court expressly rejected the assertion that military exigencies enable the President, in his capacity as Commander in Chief, to arrogate to himself authority that resides in the legislative branch.

Believing that a threatened strike against most of the nation's steel mills would "immediately jeopardize and imperil our national defense … and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field," President Truman, acting "as President of the United States and *Commander in Chief of the armed forces of the United States*," ordered the mills seized and new labor agreements enacted. Exec. Order No. 10340, 17 Fed. Reg. 3139, 3141 (Apr. 10, 1952) (emphasis added). This Court held that a Commander-in-Chief power to seize private property could not be squared with our constitutional system, for such power "is a job for the Nation's lawmakers, not for its military authorities." *Youngstown*, 343 U.S. at

587.[7] "The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control," because "[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." *Id.* at 588-89. Because the continued production of steel could have been ensured through legislative means—by eminent domain, labor laws, or other legislative enactments—the Commander-in-Chief power did not authorize the President to obtain that same result by fiat. *Id.* at 588.

* * *

The lessons of this history are clear. The Constitution requires that Congress, and not merely the President alone, determine how to deal with American citizens accused of conspiring with an enemy to commit war-like acts on American soil. Congress has not authorized the military detention of such individuals, and has instead relied upon the comprehensive system of criminal laws to deal with such cases.[8] Because this is a decision that must reflect a

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[7] The administration seeks to distinguish *Youngstown* on the ground that President Truman used civilian rather than military forces to carry out his order. Pet. Br. 36. But nothing in this Court's decision suggests the outcome would have been different had the President ordered the military to take over the mills for the purpose, "quintessentially *military*," *id.*, of securing military supplies during time of war.

[8] *See, e.g.*, 18 U.S.C. § 2339b (criminalizing conspiracy to provide material support and resources to terrorist organizations such as al-Qaeda); *id.* § 2384 (criminalizing seditious conspiracy, including conspiracy to levy war against the United States); *id.* § 2381 (criminalizing treason); *id.* § 2332b (criminalizing acts of terrorism transcending national boundaries); 50 U.S.C. § 1705(b) (criminalizing conspiracy to contribute services to terrorist organizations such as al-Qaeda); 18 U.S.C. § 924(c) (criminalizing use of destructive device during and in relation to crime of violence); *id.* § 924(c)(1)(A)(iii) (criminalizing possession of firearms in furtherance of crimes of violence); *id.* § 2332a(a)(1) (criminalizing attempted use of a weapon of mass destruction); *id.* § 844 (criminalizing certain manufacture and handling of explosive materials); *id.* § 371 (criminalizing conspiracy to commit offense against United States).

legislative and not merely an executive judgment, the President, even acting as Commander in Chief, cannot proceed unilaterally.

II. CONGRESS MUST CLEARLY AUTHORIZE ANY DETENTION OF AMERICAN CITIZENS WITHIN THE UNITED STATES.

The administration asserts that Congress has authorized the President to detain, indefinitely, any citizens in the United States whom he deems "closely associated with al Qaeda" and whom he believes has "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism." Pet. Br. App. 5a. The President asserts that Congress took this dramatic step and provided him with extraordinary discretion to detain citizens in the United States with the following words:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

AUMF, § 2, 115 Stat. at 224.

This language cannot bear the heavy weight the President places upon it. This Court has, since the early days of the Republic, consistently refused to read broadly worded, non-specific grants of authorization to use military force as including a general detention power like that asserted here. Indeed, the non-specific authorization to use force reflected in the AUMF has often been read narrowly. This Court has refused to allow "traditional forms of fair procedure [to be restricted] by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." *Greene* v.

McElroy, 360 U.S. 474, 508 (1959); *Ex Parte Endo*, 323 U.S. 283, 300 (1944) (stating "[w]e must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used").

Congress has, on occasion, purported to authorize preventive detentions in terms far more "unmistakable" than that used in the AUMF. And, as explained more fully below, those examples are instructive because they show that a clear statement rule encourages Congress to express its considered view regarding precisely what procedural protections are due under the circumstances. *Greene*, 360 U.S. at 507 ("[E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws."). Whether Congress might one day choose to present the President the kind of authority he claims here cannot be known. But what is clear is that Congress has never done so when it has squarely considered the question.

1. The Limited Reading of Prior Authorizations to Use Force. In declaring war against Great Britain on June 18, 1812, Congress provided that "the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper … against the vessels, goods, and effects of [Great Britain] and the subjects thereof." Ch. 102, 2 Stat. 755, 755 (1812). In *Brown* v. *United States*, 12 U.S. (8 Cranch) 110 (1814), the United States Attorney for the District of Massachusetts had argued that the authorization to use force in the declaration of war also authorized the seizure of 550 tons of timber transported by a ship chartered to a British company. This Court rejected that argument. *Id.* at 125-26.

This Court's opinion highlighted the fact that after declaring war against Britain, Congress subsequently enacted separate legislation empowering the President to deal with alien enemies and to keep prisoners of war. *Id.*; see also An Act for the safekeeping and accomodation of prisioners of war, ch. 128, 2 Stat. 777, 777 (1812) (granting the President power to "make such regulations and arrangements for the safe keeping, support, and exchange of prisoners of war as he may deem expedient"). This meant that the declaration of war, standing alone, had not authorized the President to detain enemy citizens. Since "[w]ar gives an equal right over persons and property," it follows that the declaration of war, standing alone, did not authorize the President detain enemy property either. *Brown*, 12 U.S. (8 Cranch) at 126.

If, as *Brown* holds, a general declaration of war, and the accompanying general authorization to use force, failed to authorize the detention of either enemy citizens or property, *a fortiori*, it failed to authorize the military detention of United States citizens believed to have aligned themselves with the enemy. Indeed, that is precisely the holding of the notable decisions, discussed above, in which state courts upheld damages awards against military officers who detained citizens during the War of 1812. See *supra* at 8-9.

The same principle was applied during World War II. The declaration of war against Japan provided that "the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States." Declaration of War with Japan, Dec. 8, 1941, ch. 561, 55 Stat. 795, 795. During the war, the government asserted the power to detain United States citizens in two distinct contexts: martial law in Hawaii, and the internment of Japanese Americans in the western United States. Yet despite the

authorization to use *all* available resources to defeat Japan, the government never suggested that the broad authorization to use force supported either of these assertions of a detention power.

When instituting martial law in Hawaii, the government relied upon Section 67 of the Organic Act, passed by Congress in 1900 to create a territorial government for Hawaii. It provided as follows:

> That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, … and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, *suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under marital law* until communication can be had with the President and his decision thereon made known.

Act of Apr. 30, 1900, ch. 339, § 67, 31 Stat. 141, 153 (eliminated 1959) (emphasis added).

Within hours of the Japanese attack on Pearl Harbor, the territorial governor of Hawaii issued a proclamation placing Hawaii under martial law and suspending the writ of habeas corpus. The proclamation authorized the Hawaiian Department of the United States Army to exercise all "the powers normally exercised by [the] Governor [and] judicial officers and employees," and such other powers as required "until the danger of invasion is removed." Garner Anthony, *Martial Law in Hawaii*, 30 Cal. L. Rev. 371, 393 (1942) (reprinting proclamation). President Roosevelt approved this decision. *Id.* at 372. Military courts supplanted civilian courts as the sole criminal authority in Hawaii for nearly three years. Nearly all basic constitutional guarantees were disregarded. See Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawaii, 1941-1946*, 19 U. Haw. L. Rev. 477, 512 (1997); see

also J. Garner Anthony, *Hawaii Under Army Rule* 38-39 (1955) (discussing procedures employed during military trials in Hawaii). Moreover, at least 1,500 individuals, including 617 American citizens, were detained indefinitely on suspicion of disloyalty. See Scheiber, *supra*, at 491; Memorandum from Office of Internal Security (Honolulu) to War Department No. R73740 (Nov. 30, 1945) (on file in the Hawaii Military Government Records, Record Group 338, National Archives).

Although none of the 1500 detainees filed habeas petitions,[9] in *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946), this Court was presented with petitions for habeas corpus from two individuals convicted by the military courts for embezzlement and assault. This Court concluded that even the Organic Act's specific authorization to impose "martial law" did not authorize the government to displace the civilian courts. This Court first recognized that the Organic Act "certainly did not explicitly declare that the Governor in conjunction with the military could for days, months or years close all the courts and supplant them with military tribunals." *Id.* at 315. The Court then reviewed the meaning of "martial law" in the history of American law and determined that its historic usage typically contemplated coexistence with civilian courts, where possible. *Id.* at 319-24. Therefore, this Court held, a Congressional authorization to place Hawaii under "martial law" did not also indirectly authorize trying civilians in military tribunals, for Congress "did not wish to exceed the boundaries between military and civilian power, in which our people have always believed." *Id.* at 324. If an express authority to impose "martial law" is not sufficient to displace civil courts, then the "clear statement" requirement is obviously a significant protection against unilateral executive branch efforts to detain citizens without judicial safeguards.

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[9] This failure reflected the detainees' fear that such an action could subject their fellow Japanese-Americans on Hawaii to the same mass detentions then occurring on the mainland. *See* Scheiber, *supra*, at 580.

The military internment orders applied against Japanese Americans in World War II provide yet another example of the high degree of clarity required before statutes will be understood to authorize military detention. As noted above, Congress, by the Act of March 21, 1942, ch. 191, 56 Stat. 173 (repealed 1948), provided legislative backing for Executive Order 9066. In *Endo* this Court held that that legislation did not clearly enough authorize the military detention of citizens.

Endo, a Japanese-American citizen who refused to accept the lawfulness of her detention, filed for a writ of habeas corpus. The Court examined the Act of March 21, 1942, in light of the Constitution's strong protections of liberty, and assumed that even a war-time measure is intended "to allow for the greatest possible accommodation between … libert[y] and the exigencies of war." 323 U.S. at 300. The Court then noted that neither the Act nor its legislative history "use[s] the language of detention." *Id.* In the absence of any express authority to detain, this Court refused to imply it. *Id.* at 300-04.

In both *Endo* and *Duncan*, therefore, this Court applied a strong presumption that military authorizations do not permit military detentions of citizens on United States soil, or the trial of such citizens in military courts, unless Congress clearly manifests an intent to confer such an extraordinary power. Although neither case involved persons alleged to be enemy belligerents, the applicability of the presumption this Court employed does not depend on this fact. If it did, a presumption *against* implied delegations of authority to detain citizens would be transormed into a presumption in *favor* of such authority by the expedient of an administration's unchallengeable allegation that a citizen is an enemy combatant. According to the administration, the President can detain a citizen without opportunity to prove his loyalty because the citizen has not proven his loyalty. Nothing in *Endo* or *Duncan* suggests that an interpretive presumption employed

to protect the most fundamental of rights can be so easily evaded.

Nor does it matter that Endo's custodian was a civilian agency, whereas Padilla is in military custody. Pet. Br. 46. The War Relocation Authority established by President Roosevelt was specifically empowered to carry out the orders of the Secretary of War or other military commanders. *Endo*, 323 U.S. at 287. While the War Relocation Authority was nominally civilian, its entire function was to assist the Commander in Chief in his military role and to enforce orders issued by military commanders. Executive Order 9066 made clear that the actions being taken were matters of national security. *Supra*, at 13. Were the President to create a civilian "Enemy Combatant Detention Authority" to detain Padilla, his power of detention could hardly expand as a result.

In the end, the AUMF is simply too vague to meet the standards of *Brown*, *Duncan* and *Endo*.[10] The authorization to use "all necessary and appropriate force" makes no statement one way or the other on whether it authorizes the detention of American citizens in places where courts are open to enforce the law. It is, if anything, less sweeping than the authorization "to use the whole land and naval force of the United States to carry the [war with Great Britain] into effect" during the War of 1812, ch. 102, 2 Stat. at 755, or "to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against [Japan and] Germany; and, to bring the conflict to a

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[10] The administration also half-heartedly argues that the Congressional statute that funds detention of prisoners of war, among others, authorizes the detention of Padilla. Pet Br. 39 (citing 10 U.S.C. § 956(5)). This argument was squarely rejected in *Endo*, where the government had argued that the detention power was ratified by Congressional funding for the Authority *after* the Authority promulgated its rules requiring relocated citizens to seek permission to leave. This Court recognized that Congress may fund a program without specifically ratifying every executive assertion of authority under the program. 323 U.S. at 303 n.24.

successful termination," Declaration of War with Germany, Dec. 11, 1941, ch. 564, 55 Stat. 796, 796, during World War II. These declarations of war were insufficient to authorize detention of American citizens. So is the AUMF.

2. Congress's Express Efforts To Authorize Detention of Citizens. The AUMF is not only substantially similar to statutes that have been held *not* to delegate a military detention power over citizens to the executive branch. It also stands in noticeable contrast to statutes that *have* clearly purported to delegate such a power to the President. Certain statutes stand out in American history for the clarity with which they appear to support an executive branch assertion of authority to detain citizens. And in those statutes, Congress not only expressly purported to authorize such detentions, it also expressly prescribed the procedural rights of the citizen to challenge that detention as erroneous or abusive.

First, in 1863 Congress passed a law authorizing the President to suspend the writ of habeas corpus. 1863 Act, § 1, 12 Stat. at 755. Suspension of the writ effectively authorizes detention outside the judicial process, because the courts would lack jurisdiction to hear any claim from the detained citizen. But the 1863 Act just as clearly provided specific procedural protections for citizens detained by the President, including protections that were tied to the judicial process.

The Secretaries of State and War were to provide a list of citizens imprisoned by presidential authority to courts in states where the administration of the laws remained unimpaired. *Id.* § 2, 12 Stat. at 755-56. Thereafter, any citizen so detained was to be released (and the officer in charge of the detention indicted for failure to do so) if the appropriate grand jury terminated its session without indicting the detainee. *Id.* That release, however, was to be conditioned upon an oath of loyalty to the United States and, if necessary, the posting of a bond to ensure good behavior. *Id.* § 3, 12 Stat. at 756. Moreover, even if the detainee were

indicted, he was entitled to be released upon posting any bail that was generally applicable to the charge. *Id.*

Although the 1863 Act allowed the President to detain a citizen without charge, it cabined that authority in time, thus preserving the fundamental rule-of-law values that form the basis of American freedom. As the *Milligan* Court noted, Congress had not "contemplated that such person should be detained in custody beyond a certain fixed period, *unless certain judicial proceedings, known to the common law, were commenced against him*." 71 U.S. (4 Wall.) at 115 (emphasis added). Because Congress was consulted regarding the proper treatment of citizens who were militarily detained, Congress was able to provide expressly what this Court has recognized Congress always seeks to provide when enacting war-related legislation: "the greatest possible accommodation between … liberties and the exigencies of war." *Endo*, 323 U.S. at 300.[11]

The second example of congressional authorization to detain American citizens likewise included certain procedural protections for those detained. In 1950, amid increasing fears of Communist subversion and infiltration, Congress passed the Emergency Detention Act ("EDA") over a presidential veto. Ch. 1024, tit. II, 64 Stat. 1019 (1950) (codified at 50

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[11] This Court expressed approval for Congress's balance over the administration's assertion of unchecked authority:

> If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, and afforded aid and comfort to rebels, and incited the people to insurrection,' the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law … enforced, and the securities for personal liberty preserved and defended.

Milligan, 71 U.S. (4 Wall.) at 122.

U.S.C. §§ 811-826 (1970)) (repealed 1971).[12] In passing the Act under the shadow of the Internment of Japanese Americans, Congress saw fit to "provide protection and safeguards to persons apprehended or detained under this title which are markedly greater than those accorded to persons whose relocation was ordered during World War II pursuant to legislation then in effect." H.R. Conf. Rep. No. 81-3112, at 65 (1950).

The powers of the Emergency Detention Act were to be triggered by presidential proclamation of an emergency during times of war, invasion, or insurrection, and those powers would last until terminated by either the President or Congress. 50 U.S.C. § 812(a)-(b) (1970) (repealed 1971). During a declared emergency, the Attorney General could "apprehend and by order detain … each person as to whom there is reasonable ground to believe … probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage." *Id.* § 813(a). Within 48 hours, a detainee was to appear before a preliminary hearing officer who was to inform him of various rights, including the grounds for the detention, the right to remain silent, the right to counsel, and the right to a preliminary hearing. *Id.* § 814(d). At the preliminary hearing, the detainee could introduce evidence and cross-examine witnesses; following that hearing the hearing officer could order continued detention or release. *Id.* Were continued detention ordered, the detainee could appeal to a review board required to hear the appeal within 45 days. *Id.* § 819(b). Judicial review of the detention was available either through appeal from

[12] The Emergency Detention Act was repealed by passage of 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The full implications of § 4001(a) for this case are addressed by other *amici*. For present purposes, this statute reflects Congress' recognition of its own constitutional obligation to shoulder responsibility—through clear statements and careful consideration of procedural safeguards—for any such extraordinary detentions.

decisions of the review board or through the writ of habeas corpus. *Id.* §§ 813(b)(4), 821.

Even when considering what kind of detention power to provide the President when investigating aliens suspected of terrorist activities, Congress has provided more procedural protections than the administration would provide an American citizen like Padilla. Though the administration initially asked Congress for the power to detain aliens suspected of terrorist ties indefinitely, 147 Cong. Rec. S11,004 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy), Congress refused. Instead, under section 412 of the Patriot Act, the Attorney General may detain aliens involved in terrorist activity or otherwise "engaged in any ... activity that endangers the national security of the United States," but must either begin removal proceedings or charge the alien criminally "not later than 7 days after the commencement of such detention." 8 U.S.C. § 1226a(a)(3)-(5). Congress provided that, even when detention is allowed, the Attorney General must review its necessity every six months, and the detainee is permitted to present evidence on his behalf. *Id.* § 1226a(a)(6)-(7). Judicial review of the detention remains available at all times. *Id.* § 1226a(b). If the administration is right, then Congress has provided greater procedural protections for aliens accused of working for al Qaeda than for United States citizens. There is no evidence for such a counter-intuitive proposition.[13]

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[13] Padilla was originally detained as a material witness in a terrorism investigation. The statute authorizing such detentions—another example of Congressional authorization to detain citizens without charge—provides substantial procedural protections. These protections, which are the same as those provided to defendants detained prior to trial, 18 U.S.C. § 3144, include a hearing in which the government must show by clear and convincing evidence that no procedures other than detention are sufficient to ensure future court appearances. *Id.* § 3142(f). The hearing must be held no later than five days after the detainee's first court appearance, and the detainee is entitled to be represented by counsel, to testify, and to present and cross-examine witnesses. *Id.*

Even the administration's principal case fits within the legal framework advanced by *amici*. *Ex parte Quirin*, 317 U.S. 1 (1942), is not, as the administration would have it, a case in which a citizen in the United States was detained solely on the President's authority, without Congressional authorization. To the contrary, Congress had specifically authorized military detention and trial. As this Court pointed out, Congress, in Article 12 of the Articles of War, had provided the military with broad authority to try "'*any ... person* who by the law of war is subject to trial by military tribunal[].'" *Id.* at 27 (emphasis added). The emphasized language had been passed in 1916 to expand the authority of courts-martial to try civilian United States citizens. Maj. Jan E. Aldykiewicz & Maj. Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 Mil. L. Rev. 74, 92-96 (2001).[14] At the same time, Congress passed Article 15, Articles of War, ch. 418, sec. 3, § 1342, art. 15, 39 Stat. 650, 653 (1916), which made clear that the creation of courts-martial jurisdiction did not affect the jurisdiction of military commissions. S. Rep. No. 64-130, at 40 n.20 (1916).

Just as important, the Articles of War passed by Congress that authorized the military to detain citizens who were believed to be enemy combatants included procedural protections for the accused. Most prominently, suspected enemy combatants detained pursuant to the Articles of War were guaranteed the right to a trial at which they could mount a defense. *In re Yamashita*, 327 U.S. 1, 9 (1946).[15] And

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[14] Notably, neither the Court nor the government in *Quirin* appears to have relied upon the broad declaration of war with Germany as authority for the detention and trial of Haupt, the citizen enemy combatant. *See* Declaration of War with Germany, ch. 564, 55 Stat. at 796.

[15] It is perhaps because of the requirement that the detained be tried that the administration does not seriously assert that Padilla's detention is authorized by the surviving version of the Articles of War (now the

Congress made clear its preference that such a trial should be conducted, when "practicable," according to the "the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States." Articles of War, ch. 227, ch. II, art. 38, 41 Stat. 787, 794 (1920).[16]

At such a trial, the accused would have the opportunity, should he desire it, to dispute his status as an enemy combatant. Haupt, of course, did not dispute that he had joined the German army. *Quirin*, 317 U.S. at 20. This admission by Haupt narrows the ruling of *Quirin* even further, and significantly distinguishes the assertion of authority in that case from the authority claimed here. Haupt was detained by the military as an enemy combatant, promptly provided an opportunity to deny his status, refused to do so, and was punished according to law as a result. Padilla has been detained as an enemy combatant, denied any opportunity to challenge his status in any forum, and apparently will remain indefinitely restrained of his liberty. The administration contends that the power to detain Padilla indefinitely for alleged violations of the laws of war is included within the power to try him for that violation. Pet. Br. 33 (citing *Quirin*, 317 U.S. at 31).[17] The administration never explains why its asserted authority to detain Padilla and deny him an opportunity to dispute his status is *less* than the authority to detain Padilla on condition of providing him an opportunity to dispute his status. See 1 William Blackstone, *Commentaries* *132 (noting that "confinement of the person, by secretly

Uniform Code of Military Justice), 10 U.S.C. § 821. Pet. Br. 33. Today's provisions, like those in place when *Quirin* was decided, contemplate a military trial, something the administration has never indicated it intends to provide Padilla.

[16] The present version of Article 38 of the Laws of War, 10 U.S.C. § 836, expands the procedural protections Congress expects military commissions to provide to include not only the rules of evidence but also the "principles of law" generally recognized in criminal cases.

[17] Or, more ominously, of the power to shoot him on the spot. Pet. Br. 42 n.17

hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government" than even the power to deprive a citizen of his life). Indeed, in the criminal context, this Court has recognized that detention of an accused prior to trial is an extreme departure from our societal norms of liberty, see *United States* v. *Salerno*, 481 U.S. 739, 755 (1987), not a mere incident to the power of trial.

By insisting that the government cannot have the power to detain citizens unless Congress expressly so provides, this Court ensures that the political branches will first speak jointly to the fundamental question of what process is due in the delicate circumstances of war-related detention. On matters touching upon national security, it is entirely appropriate that the political branches should speak first. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981) ("[W]hen [Congress] acts in the area of military affairs.… the Constitution itself requires such deference to congressional choice."). The rule advocated by the administration would shut Congress out of the process. This Court should insist that it be invited in.

During the Civil War, World War II, and the communist scare of the 1950s, Congress believed that national security was sufficiently endangered to authorize the President, when he believed that circumstances were grave enough, to detain citizens in the United States outside the ordinary criminal judicial process. But even then, Congress saw fit to provide meaningful procedural protections to reduce the risk of error or abuse by the executive. Today, there is no comparable congressional authorization. Instead, it is the executive alone that has claimed that circumstances are grave enough to warrant the indefinite detention on United States soil of United States citizens that the executive believes are enemy combatants. In asserting this extraordinary power to infringe the liberty of United States citizens outside the law the President has not seen fit to await congressional

authorization—an authorization that, historically, Congress has never conferred without providing some procedural protections and safeguards. The fact that, when Congress has authorized a detention power, it has seen fit to place greater limits on that authority than the President freely places upon himself only proves that liberty is most secure when the power to make the law is placed in separate hands from the power to enforce it.

CONCLUSION

This Court should affirm the judgment of the Second Circuit below.

Respectfully submitted,

ELIOT M. MINCBERG
DEBORAH LIU
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M STREET, N.W.
SUITE 400
Washington, D.C. 20036
(202) 467-4999

CARTER G. PHILLIPS*
MARK E. HADDAD
JOSEPH R. GUERRA
ROBERT N. HOCHMAN
CHAD W. PEKRON
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

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