Nos. 03-1027 & 03-6696

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,

Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,

Respondents.

YASER ESAM HAMDI AND ESAM FOUAD HAMDI,

Petitioners,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second and Fourth Circuits

BRIEF FOR UNITED STATES SENATORS JOHN CORNYN AND LARRY E. CRAIG AS AMICUS CURIAE IN SUPPORT OF DONALD H. RUMSFELD

JOHN CORNYN
Counsel of Record
Chairman, U.S. Senate Subcommittee on the Constitution, Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510
(202) 224-7840

Counsel for Amicus Curiae

QUESTION PRESENTED

This brief will address the following question:

Whether the President, acting pursuant to Congressional authorization to use force in response to the terrorist attacks of September 11, 2001, has the authority to detain two American citizens whom he determined were enemy combatants, presenting ongoing threats to the safety of the United States.

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BRIEF FOR UNITED STATES SENATORS JOHN CORNYN AND LARRY E. CRAIG AS AMICUS CURIAE IN SUPPORT OF DONALD H. RUMSFELD

INTEREST OF THE AMICUS CURIAE[1]

John Cornyn and Larry E. Craig are members of the United States Senate currently serving in the One Hundred Eighth Congress. Senator Cornyn is Chairman of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights. Senator Craig is a member of the subcommittee. The Senators strongly support the Authorization for Use of Military Force joint resolution approved during the 107th Congress by a 98-0 vote in the Senate and a 420-1 vote in the House. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sep. 18, 2001) ("Joint Resolution"). The Senators firmly believe that the Joint Resolution provides ample authorization for the detention of Yaser Hamdi and Jose Padilla as enemy combatants, and that any decision to the contrary by this Court would contradict and undermine that act of Congress.

INTRODUCTION

a. On September 11, 2001, members of the al Qaeda terrorist network launched a treacherous, savage attack on the United States. Four planes were hijacked within one hour. Two struck the World Trade Center in New York City, a third struck the Pentagon in Washington D.C., and a fourth, likely intended for another target in Washington, D.C.,

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[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the amicus, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court.

crashed in a Pennsylvania field due to the heroic efforts of several passengers. Terrorists claimed the lives of approximately three thousand innocent Americans and foreign nationals that tragic morning.

In response to this act of war, President George W. Bush deployed the United States military against al Qaeda and the Taliban regime in Afghanistan, which harbored and supported the terrorists. The President acted pursuant to the Joint Resolution enacted within a week of the September 11 attacks, which authorized the President to use force against any person, organization, or nation responsible for the attacks, or any nation that harbored them. In conjunction with its allies and a coalition of local military groups known as the Northern Alliance, the United States succeeded in driving the Taliban dictatorship from power and restoring a legitimate government to Afghanistan. The broader war against al Qaeda continues to this day.

b. In November 2001, during the course of military operations in Afghanistan, Yaser Esam Hamdi was captured by Northern Alliance troops when his military unit surrendered on the battlefield. Armed with an AK-47 assault rifle at the time of his capture, Hamdi was detained in several military prisons in Afghanistan. Interrogations revealed that Hamdi came to Afghanistan in July or August of 2001, where he became affiliated with a Taliban military unit and received weapons training. Hamdi was eventually transferred from Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba. On April 5, 2002, upon discovering that Hamdi apparently was born in Louisiana and never renounced his U.S. citizenship, officials transferred him to a naval brig in Norfolk, Virginia. The government has provided Hamdi with access to the brig commander and the chaplain, and has recently allowed him to consult with a lawyer under appropriate supervision.

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia filed a writ of habeas corpus as

Hamdi's "next friend," challenging the legality of his detention. The District Court found that the suit was properly brought. *Hamdi* J.A. 113-116. It ordered that Hamdi receive counsel, and that the government provide more evidence that Hamdi's detention was justified. The Fourth Circuit reversed on the narrow ground that the Public Defender's petition was unnecessary because Hamdi's father "was ready, willing, and able to file, and in fact has filed, a petition as Hamdi's next friend." *Hamdi v. Rumsfeld*, 294 F.3d 598, 600 (4th Cir. 2002) (*Hamdi I*). Ruling on the writ of habeas corpus brought by Hamdi's father, the District Court ordered that the Public Defender should have unmonitored access to Hamdi. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002). On appeal, the Fourth Circuit again reversed. *Hamdi v. Rumsfeld*, (4th Cir. 2002) (*Hamdi II*) (*Hamdi* J.A. 332-44). The court reversed the District Court's unwarranted assumption "(1) that Hamdi is not an enemy combatant, or (2) even if he might be such a person, he is nevertheless entitled not only to counsel but to immediate and unmonitored access thereto." *Hamdi* J.A. 340. The Fourth Circuit remanded the petition to the district court so that it could "consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at 343.

On remand, the District Court remained dissatisfied with the government's basis for detaining Hamdi, *see Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002) (*Hamdi* J.A. 282-99), notwithstanding the Declaration submitted by the Special Advisor to the Under Secretary of Defense for Policy (*Hamdi* J.A. 148-150). The Declaration explained the circumstances of Hamdi's capture, and stated that he met the government's screening criteria for those classified as enemy combatants. Dissecting the Declaration line by line, the District Court demanded that the government produce substantial additional information to justify the detention. Once again, the Fourth Circuit reversed. *Hamdi v. Rumsfeld*,

316 F.3d 450 (4th Cir. 2002) (*Hamdi III*) (J.A. 415-55). It held that "the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the petition." J.A. 418. Over four dissenting votes, the Fourth Circuit denied rehearing *en banc*. *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (denial of rehearing *en banc*) (*Hamdi IV*) (J.A. 458-533).

This Court granted certiorari, *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (U.S. Jan. 9, 2004) (No. 03-6696).

c. On May 8, 2002, Jose Padilla flew from Pakistan, via Switzerland, to Chicago O'Hare International Airport. Shortly after exiting the plane, FBI agents arrested him pursuant to a material witness warrant issued by the Chief Judge of the Southern District of New York. The warrant sought to enforce a subpoena requiring Padilla to testify before a grand jury on matters related to September 11. Within one week, Padilla, an American citizen, was transferred to the Metropolitan Correctional Center in New York City, where he was officially under the control of the Bureau of Prisons and the United States Marshall Service.

On May 15, Chief Judge Mukasey appointed Donna R. Newman as Padilla's counsel. On May 22, Newman filed a motion to vacate the material witness warrant. Before the court ruled on the motion, the United States withdrew its subpoena, because the President issued an Order on June 9, 2002, designating Padilla as an enemy combatant and directing Secretary Rumsfeld to detain him. Pursuant to this Order, Padilla was taken into custody by Department of Defense personnel and moved to a naval brig in Charleston, South Carolina.

The President found in his June 9 Order that Padilla "is, and at the time he entered the United States in May 2002

was, an enemy combatant," and that he "represents a continuing, present and grave danger to the national security of the United States." *Padilla* Pet. App. 57a-58a. The Order further stated that "Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war," that he "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism," and that he possesses intelligence that "would aid U.S. efforts to prevent attacks by al Qaeda." *Id.* at 57a.

This Order, in turn, was based on a Declaration of the Special Advisor to the Under Secretary of Defense for Policy. *Padilla* Pet. App. 167a-172a. The Declaration explained that Padilla was born in New York, convicted of murder as a minor, imprisoned on handgun charges after his 18th birthday, and left the United States for the Middle East and Southwest Asia in the late 1990s. At that time, Padilla became closely associated with known members of al Qaeda. While in Afghanistan in 2001, Padilla conspired with al Qaeda members to build and detonate a "dirty bomb" within the United States. He went to Pakistan to receive explosives training from al Qaeda operatives, and subsequently flew to Chicago, where he was arrested.

Four judicial opinions have addressed Padilla's status and legal claims. The first held that court-appointed counsel Donna Newman had standing as "next friend" to bring a habeas petition; that the court had jurisdiction over the matter; that Secretary Rumsfeld was properly named; and that the court would use a "some evidence" standard to determine whether Padilla was validly detained as an enemy combatant. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 569-70 (S.D.N.Y. 2002) (*Padilla I*) (*Padilla* Pet. App. 76a-166a). It also held that Padilla should be permitted to consult with counsel, and gave the parties four weeks to agree upon a mutually satisfactory way to comply with that holding. The government requested reconsideration of the

court's decision, arguing that access to counsel was not legally required and would compromise national security. The court adhered to its original holding. *Padilla ex rel. Newman v. Rumsfeld,* 243 F. Supp. 2d 42, 43-46 (S.D.N.Y. 2003) (*Padilla II*). The government then moved for certification of the ruling in order to pursue interlocutory review on the issues it lost. *See* 28 U.S.C. § 1292(b). The court certified six questions for appeal. *See Padilla ex rel. Newman v. Rumsfeld,* 256 F. Supp. 2d 218, 222-23 (S.D.N.Y. 2003) (*Padilla III*).

On appeal, a divided Second Circuit panel affirmed in part and reversed in part. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (*Padilla IV*) (*Padilla* Pet. App. 1a-75a). The majority first held that the district court properly asserted habeas jurisdiction over the matter. It then noted that "great deference is afforded the President's exercise of his authority as Commander-in-Chief," *Padilla* Pet. App. 30a, and even specifically acknowledged that "the government had ample cause to suspect Padilla of involvement in a terrorist plot," *id.* at 4a n.2. Nevertheless, the majority concluded that the President had no authority to detain Padilla as an enemy combatant. It reasoned that 18 U.S.C. § 4001(a), an obscure statute buried in the "Prisons and Prisoners" section of the United States Code, prohibits the detention of enemy combatants during wartime without express Congressional authorization. *Padilla* Pet. App. 43a-50a. Finding no Congressional authorization despite Congress's sweeping Joint Resolution, the Second Circuit remanded to the district court with instructions to release Padilla from military custody within 30 days. *Id.* at 50a-56a. Judge Wesley dissented from this holding, arguing that, if § 4001(a) is – as the majority claims – "an impenetrable barrier to the President detaining a U.S. citizen who is alleged to have ties to the belligerent and who is part of a plan for belligerency on U.S. soil, then § 4001(a), in my view, is unconstitutional." *Padilla* Pet. App. 74a (Wesley, J., dissenting in part and

concurring in part). He also criticized the majority's "strained reading" of Congress's "strong and direct" Joint Resolution, which, in his opinion, clearly authorized the President to detain enemy combatants. *Id.* The majority's interpretation of the Joint Resolution, he argued, was based on a "false distinction between the use of force and the ability to detain." *Id.* at 70a.

This Court granted certiorari, *Rumsfeld v. Padilla*, __ S. Ct. __, 2004 WL 95802 (U.S. Feb 20, 2004) (No. 03-1027).

SUMMARY OF ARGUMENT

The Fourth Circuit correctly upheld the President's detention of Mr. Hamdi as an enemy combatant. The Second Circuit was wrong to conclude that the President lacked the authority to detain Mr. Padilla as an enemy combatant.

a. The United States is at war. On September 11, 2001, the al Qaeda terrorist organization launched a series of coordinated acts of war against our country. Within days, two events marked Congress's official recognition of a state of war. On September 14, President Bush declared a national emergency in response to the September 11 attacks. This triggered the President's war powers as recognized in section 2(c) of the War Powers Resolution. 50 U.S.C. § 1541(c). And on September 18, Congress approved by overwhelming margins the Joint Resolution, which constitutes the "specific statutory authorization" contemplated by the War Powers Resolution to use "all necessary and appropriate force" against al Qaeda. The Constitution vests the war powers exclusively in the President and Congress. This Court has never contradicted the political branches' determination of a state of war. Nor has it ever questioned Congress's ability to authorize the President to conduct war. The separation of powers and principles of justiciability require that courts leave these questions to the political branches.

b. The President's power to detain enemy combatants falls within the Joint Resolution authorization to use "all necessary and appropriate force." As a matter of text, logic,

and the precedents of this Court, the greater and more deadly power to use lethal military force encompasses the lesser power to detain. A contrary holding would lead to absurd results and perverse incentives, and would upset this Court's tradition of deference to the political branches in times of war.

c. Neither citizenship nor location of capture affects the President's wartime authority to detain enemy combatants. Any other conclusion would offend tradition, *Ex parte Quirin*, 317 U.S. 1, 37 (1942), and logic. Both Hamdi and Padilla fall squarely within *Quirin*, and no other decision of this Court can fairly be read to suggest otherwise.

d. 18 U.S.C. § 4001(a) does not apply to the President's wartime power to detain enemy combatants. Neighboring sections and the entire U.S. Code reveal the provision's limited scope. Moreover, the well-established avoidance canon, which assumes special meaning in the context of foreign affairs, requires that section 4001(a) be given this narrow meaning. And nothing in the legislative history justifies a broader interpretation. Finally, in any event, the Joint Resolution constitutes an "Act of Congress" authorizing the detentions even under section 4001(a).

ARGUMENT

I. THE UNITED STATES IS AT WAR.

There can be little doubt that the savage attacks on the United States on September 11, 2001, were acts of war. Although launched from within the United States, they were carried out by a foreign terrorist organization whose aim is to mercilessly kill innocent American civilians in order to force the United States out of the Middle East region and to promote its virulent, extremist political philosophy. The attacks killed approximately three thousand Americans and foreign nationals, and targeted political, military, and financial centers of the United States. It is only because of the brave sacrifice of passengers on a fourth jet that crashed

in rural Pennsylvania that al Qaeda did not succeed in attacking either the White House or the Capitol Building in addition to the Pentagon and the World Trade towers. September 11 followed a series of other attacks by al Qaeda launched against Americans abroad, including the 2000 attack on the U.S.S. Cole in Yemen, the 1998 bombing of our embassies in Kenya and Tanzania, the 1996 bombing of a military housing complex in Saudi Arabia, and the 1993 bombing of the World Trade Center.

On September 18, 2001, by votes of 98-0 in the Senate and 420-1 in the House, Congress found that "these grave acts of violence" posed a direct threat to the national security and foreign policy of the United States and that they "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." 115 Stat. 224. It found that it is "both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." Accordingly, the Joint Resolution authorized the President

> 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.[2]

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[2] There is no constitutional requirement that Congress's power to declare war be exercised through a formal declaration. "Of course, a state of war may in fact exist without a formal declaration." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring). *See also Bas v. Tingy*, 4 U.S. 37, 40-41 (1800). In fact, no declaration was necessary, as a state of war was automatically triggered by the September 11 attacks by al

Further proof that Congress recognizes the existence of a state of war is found in the War Powers Resolution. The Resolution provides that the President can exercise his Commander-in-Chief powers "pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." 50 U.S.C. § 1541(c). Conditions two and three have been met: the nation suffered a direct attack on September 11, and the Joint Resolution provides the President with "specific statutory authorization" to use force against those responsible.[3] Both the Joint Resolution and the War Powers Resolution affirm that Congress has recognized the existence of a state of war.

The President has likewise concluded that the September 11 attacks initiated a war. Shortly after September 11, President Bush declared a national emergency. Declaration of National Emergency by Reason of Certain Terrorist Attacks, 66 Fed. Reg. 48,199 (Sep. 14, 2001). He declared "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces," triggering the President's war powers authority pursuant to the War Powers Resolution. 50 U.S.C. § 1541(c)(3). In his September 18 signing statement accompanying the Joint Resolution, President Bush declared: "Our whole Nation is unalterably committed to a direct, forceful, and comprehensive response

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Qaeda an international terrorist organization that declared war on the United States as early as 1996. *See, e.g.*, U.S. Dep't of State, *Fact Sheet: The Charges Against International Terrorist Usama bin Laden* (Dec. 15, 1999), *available at* http://usinfo.state.gov/topical/pol/terror/99129502.htm.

[3] Section 2(b)(1) of the Joint Resolution states: "Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.." 115 Stat. 224.

to these terrorist attacks and the scourge of terrorism directed against the United States and its interests." In a November 2001 order, the President found that the attacks "created a state of armed conflict." 66 Fed. Reg. 57,833 (Nov. 13, 2001).

The President and Congress are charged under the Constitution with all of the federal government's war power. This includes the sole power to decide whether war exists, the measures to be taken to successfully prevail, and the direction of the military forces of the United States to achieve the goals of the war.[4] Furthermore, the Constitution requires that the decision of the political branches charged with the war power binds the federal judiciary. The federal courts have no authority to contradict a determination by the President and Congress that a state of war exists. This Court recognized this proposition as long ago as the Civil War. In reviewing whether the outbreak of the Civil War constituted a war, this Court recognized that a presidential proclamation of an outbreak of hostilities and the imposition of a blockade of the Southern states was sufficient action by the political branches to determine that war existed.[5]

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[4] "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted." *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870).

[5] *See The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (emphasis added):

> Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and *this Court must be governed by the*

Indeed, this Court has never exercised its power of judicial review to decide whether war existed contrary to the decision of the President and Congress. The political question doctrine bars any such judicial decision, because the issue is textually given to the Congress via the Declare War Clause and the President through the Commander-in-Chief power, and because it is one for which judicially-manageable standards do not exist. *Cf. Nixon v. United States*, 506 U.S. 224 (1993). The federal courts do not have the expertise or capability to determine whether the actions undertaken by the government are necessary or appropriate for fighting a war, and they risk interference with the nation's need for a single, unitary national security policy in regard to an international armed conflict. This is particularly the case in the war against al Qaeda, a war unlike any modern war this country has faced. The judicial branch has no constitutional standards to apply to determine whether a war can exist with an enemy which, though lacking the territory and population of a traditional enemy nation-state, has the capability and intention to attack the United States with the power of a nation-state. The separation of powers and principles of nonjusticiability require that this Court accept the decision of the political branches that the nation is at war.

To exercise judicial review over the decision on war would represent an unprecedented intrusion into the prerogatives of the President and Congress and their determined efforts at cooperation in this war. In the Joint Resolution, Congress found that the United States had suffered a direct attack and delegated to the President the full

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> *decisions and acts of the political department of the Government to which this power was entrusted.* "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

extent of powers necessary and appropriate to exercise self-defense and to prevail in the conflict with al Qaeda. And as explained earlier, this Court has never questioned a Congressional determination about a state of war.

Moreover, judicial second-guessing of the political branches is particularly inappropriate in this case. This Court has long rejected the notion that suits brought by private individuals, including habeas petitions, may be used to question the Legislative and Executive's determination that our nation is at war. "Certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region." *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950); *see also The Prize Cases,* 67 U.S. (2 Black) 635, 670 (1862).[6] After all:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

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[6] In fact, *The Prize Cases* suggest that we were at war the moment the terrorists attacked us, regardless of what Congress authorized. "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. at 668.

Eisentrager, 339 U.S. at 779. Accordingly, no lower federal court has questioned the joint decision of the President and Congress that this nation is indeed currently at war.[7]

II. AS A MATTER OF EXPRESS LANGUAGE, COMMON SENSE AND JUDICIAL DOCTRINE, "ALL NECESSARY AND APPROPRIATE FORCE" IN THE JOINT RESOLUTION INCLUDES THE POWER OF DETENTION.

"When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also Dames & Moore v. Reagan*, 453 U.S.

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[7] *See, e.g., Flynt v. Rumsfeld*, __ F.3d __, 2004 WL 190072 (D.C. Cir. 2004) ("Shortly after the September 11, 2001, terrorist attacks, the United States military began combat operations in Afghanistan in support of the global war on terrorism."); *In re Sealed Case*, 310 F.3d 717, 732-33 (For. Intel. Surv. Rev. 2002) (describing "law enforcement efforts in the war against terror"); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 202 (3d Cir. 2002) (Becker, C.J.) ("The era that dawned on September 11th, and the war against terrorism that has pervaded the sinews of our national life since that day, are reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches."). In addition to all branches of the United States government, foreign entities also acknowledge that the United States is engaged in a bona fide war. For example, "the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), and the remaining parties to the Security Treaty between the United States, Australia, and New Zealand (ANZUS), have all concluded that the September 11 attacks activated the mutual self-defense clauses of their treaties involving the United States." John C. Yoo and James C. Ho, *The Status of Terrorists*, 44 Va. J. Int'l L. 207, 212-13 (2003) (footnotes omitted).

654, 668, 661-62 (1981). Because President Bush's decisions to detain Hamdi and Padilla are expressly supported by the Joint Resolution, they are "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown,* 343 U.S. at 637.

The Joint Resolution specifically authorizes "the President ... to use all necessary and appropriate force" against those individuals, organizations and nations that he determines participated or helped to cause the September 11 attacks. The greater, and more lethal, power to use military force against the enemy necessarily includes the lesser power to detain them. Any other reading would offend logic, common sense, and judicial precedent.

As a logical matter, the power to use military force includes the power to detain. There is no conceivable reason why the greater power – in this case, one that involves the power to take the life of another – would not include the lesser. While a deprivation of liberty is undoubtedly serious, it cannot reasonably be considered worse than or even equivalent to the deprivation of one's life.[8] Further, detention itself centrally involves the use of force. When the U.S. military initially captured and detained Hamdi and Padilla, it *compelled them by physical means* to stop their efforts on behalf of the Taliban and al Qaeda, and moved them to prison facilities. Hamdi and Padilla remain in naval brigs because they are compelled both by physical means and by

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[8] The district court in *Padilla I* made exactly this point in its interpretation of *Quirin*. *See Padilla I*, 233 F. Supp. 2d at 595 ("If, as seems obvious, the Court in fact regarded detention alone as a lesser consequence than the one it was considering – trial by military tribunal[, which could lead to death or imprisonment] – and it approved even that greater consequence, then our case is *a fortiori* from *Quirin* as regards the lawfulness of detention under the law of war.").

legal requirement to remain there. The U.S. government literally uses guards and weapons to keep them in captivity as enemy combatants.

Hamdi and Padilla's proposed construction would lead to an absurd result. *See, e.g., Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). "It would be curious if the resolution authorized the interdiction and shooting of an al Qaeda operative but not the detention of that person." *Padilla* Pet. App. 70a-71a (Wesley, J., dissenting in part and concurring in part). Indeed, Hamdi and Padilla's construction would create a perverse incentive to use *more* force than is "necessary and appropriate" in some situations. If handcuffed by a judicial decision that U.S. forces have no power of detention, U.S. soldiers may be faced with the choice between inflicting violence and letting a potentially deadly terrorist go free. Without the reasonable and time-honored option of detention, troops will be forced to kill or maim enemy combatants because they dare not let them go free.

This Court has agreed with this logic before. In *Moyer v. Peabody*, 212 U.S. 78 (1909), Justice Holmes concluded for the Court that an executive's authority to use force includes the lesser power to detain. During an uprising in Colorado, the governor exercised his Commander in Chief powers under the state constitution to "suppress insurrection, and repel invasion." *Id.* at 82. Pursuant to this power, he detained one citizen for over two months. This Court found that the detention of the citizen was legal under the state constitution's authorization to the governor to use force. Justice Holmes's opinion is instructive on this score. The state constitutional provision, he observed, "means that [the governor] shall make the ordinary use of soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace." *Id.* at 84. "Such arrests are not necessarily for punishment,

but are by way of precaution, to prevent the exercise of hostile power." *Id.* at 84-85. When the executive is authorized "with regard to killing men in the actual clash of arms . . . the same is true of temporary detention to prevent apprehended harm." *Id.* at 85. "As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection . . . we are of opinion that the same is true of a law authorizing by implication what was done in this case." *Id.* This Court has thus recognized that the greater power to use force implies the lesser power to detain.

This conclusion is reinforced by a long tradition of judicial deference to the political branches during times of war. "[T]he Framers 'did not make the judiciary the overseer of our government.'" *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring)). The President in particular is afforded great latitude in the execution of his core Commander-in-Chief powers during wartime. "[U]nless Congress *specifically* has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (emphasis added).[9]

Hamdi and Padilla ask this Court to violate its own standards of deference, demanded by the separation of

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[9] *See also Quirin*, 317 U.S. at 25 (courts cannot interfere with Executive Branch decisions to detain enemy combatants "without the *clear* conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted") (emphasis added); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (when Congress and the President are acting in concert during wartime, "it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs"). This case presents no conflict of opinion between the political branches. And even in cases involving such interbranch disagreement, courts would decide only which of the two political branches controls.

powers, by asking it to find that the Joint Resolution did not authorize their detention, despite its sweeping language to the contrary. They would have this Court ignore clear Congressional intent to authorize the President to exercise all military powers needed to successfully prosecute war. That would invade Congress's prerogative to decide whether and how to delegate authority to the Executive Branch in wartime. Further, Hamdi and Padilla would impose an unwarranted burden on Congress to enumerate all possible powers when delegating authority to the President. Their position, for example, would require that Congress not only authorize the President to use force, but also separately authorize him to arrest the enemy, to detain the enemy, to accept the surrender of the enemy, to interrogate the enemy, to release detainees, and so on. This argument fails to respect the Constitution's vesting of all of the war power in the political branches, and does not give due deference to Congress's role in deciding how to delegate authority to the President. Such judicial intervention in such matters is also unnecessary: if Congress believes that the President has overstepped his authority, it has numerous tools available to it to respond, including statutory amendment or withholding appropriations. It is difficult to imagine a greater judicial intrusion into the separation of powers than one that would dictate to the President and Congress how to conduct a war.

III. THE PRESIDENT'S WARTIME AUTHORITY IS UNAFFECTED BY AN ENEMY COMBATANT'S CITIZENSHIP OR THE LOCATION OF HIS CAPTURE.

The President's authority, both inherent and delegated, to detain enemy combatants in the course of a war has never been affected by the citizenship of the combatant.[10]

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[10] *See, e.g.*, *Quirin*, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency."); *In re Territo*, 156 F.2d 142,

Moreover, a rule that American citizens are constitutionally exempt from the federal government's war powers would offend both history and logic. During the Civil War, almost every Confederate soldier was an American citizen. A constitutional rule forbidding detention of American citizens as enemy combatants would have disastrously undermined the Union's ability to fight the Civil War. The impact on war of such an illogical rule would only be magnified during the current conflict. It would encourage America's enemies to recruit American citizens to carry out attacks such as September 11 in the hopes that they would be immune from the war power of the government.

The President's authority to detain enemy combatants is also unaffected by the location or manner of their capture. As this Court has unanimously held, all individuals, regardless of citizenship, who "associate" themselves with the "military arm of the enemy" and "with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war." *Quirin*, 317 U.S. at 37-38. Nothing further need be demonstrated to justify their detention as enemy combatants. The individuals need not be caught while engaged in the act of war or captured within the theater of war.[11] They need not

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144 (9th Cir. 1946) ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."); *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied* 352 U.S. 1014 (1957) ("[T]he petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war.").

[11] *See id.* at 38 ("Nor are petitioners any the less belligerents if . . . they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.").

be found carrying weapons.[12] Nor must their acts be targeted at our military.[13] Accordingly, all "those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants." *Id.* at 35.[14]

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[12] *See id.* at 37 ("It is without significance that petitioners were not alleged to have borne conventional weapons . . . .").

[13] *See id.* ("It is without significance that . . . their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. [The rules of land warfare] plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States.").

[14] *Ex parte Milligan*, 71 U.S. (1 Wall.) 2 (1866), does not suggest otherwise. Milligan was arrested in Indiana and tried before a military tribunal for conspiring against the United States by planning to seize weapons, free Confederate prisoners, and kidnap the governor of Indiana. This Court found that the military could not apply the laws of war to citizens in a state that had never opposed the United States, and in which the civilian courts are open. *See id.* at 121-22. In reaching that conclusion, the *Milligan* court made clear that the laws of war did not apply to Milligan because "he lived in Indiana for the past twenty years, was arrested there, and had not been, during [the Civil War], a resident of any of the states in rebellion." *Id.* at 131. Moreover, this Court specifically concluded that Milligan "was not engaged in legal acts of hostility against the government." *Milligan*, 71 U.S. at 131.

The circumstances of Hamdi and Padilla are entirely different. Unlike Milligan, Hamdi and Padilla were closely "associate[d] with the "military arm of [an] enemy" at war with the United States. *Quirin*, 317 U.S. at 37-38. Hamdi was detained on the battlefield in Afghanistan, having taken up arms in direct conflict with the U.S. Armed Forces. As the district court noted in *Padilla I*, Padilla spent time in Afghanistan and elsewhere with known members of al Qaeda, including a senior Osama bin Laden lieutenant named Abu Zubaydah, just months before the

IV. 18 U.S.C. § 4001(a) DOES NOT APPLY TO THE PRESIDENT'S POWER DURING WARTIME TO DETAIN ENEMY COMBATANTS.

Hamdi and Padilla seek to escape the scope of the government's war power by arguing that 18 U.S.C. § 4001(a) trumps the Joint Resolution. Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." That provision, however, does not undermine or restrict the President's constitutional authority as Commander in Chief to detain enemy combatants. Examined in the context of section 4001 and of the United States Code as a whole, subsection (a) does not reach so broadly. Moreover, the canon of construction that statutes be construed to avoid constitutional defects requires that section 4001(a) be construed not to interfere with the President's constitutional powers as Commander in Chief.

To be sure, section 4001(a) uses broad language. It neither draws a distinction between differing types of detention nor mentions military detention for explicit

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September 11 attacks. *Padilla* Pet. App. 85-86a. Padilla researched possible terrorist plans "at an al Qaeda safehouse in Lahore, Pakistan," and "discussed that and other proposals for terrorist acts within the United States with al Qaeda officials he met in Karachi, Pakistan, on a trip he made at the behest of Abu Zubaydah." *Id.* at 86a. The President's June 9 Order specifically states that "Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States." *Id.* at 57a.

86 years after *Milligan*, the Court in *Quirin* specifically limited *Milligan*, noting that that Court's holding had "particular reference to the facts before it." It is *Quirin*, and not *Milligan*, that applies here.

inclusion or exclusion.[15] It is important, however, to examine the law in its entirety to understand its scope. *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). Nothing in section 4001 indicates that its provisions were meant to reach the President's authority, as Commander in Chief, to detain enemy combatants.

Read in context, section 4001(a) addresses the Attorney General's authority to govern the federal civilian prison system – and *not* the President's constitutional wartime power as Commander in Chief to detain enemy combatants. Congress specifically added subsection (a) to section 4001 in 1971. Act of Sep. 25, 1971, Pub. L. No. 92-128, § 1, 85 Stat. 347. Prior to 1971, section 4001 simply gave the Attorney General the power to "control and manage[]" the federal civilian prison system. Act of June 25, 1948, ch. 645, § 4001, 62 Stat 683, 847. That earlier language is identical to subsection (b) today. Then, as now, the plain terms of the provision specifically carve out "military or naval institutions" from the statute's coverage of "Federal penal and correctional institutions." Accordingly, construing the scope of subsection (a) broadly, to cover all types of detention, is difficult to reconcile with its coupling with subsection (b). The better reading is that subsections (a) and (b) have the same scope, applying exclusively to the federal civilian prison system.

As a structural matter, the placement of section 4001(a) in the United States Code signifies that it was not intended to govern the detention of enemy combatants by the U.S. Armed Forces. Title 18 of the United States Code covers "Crime and Criminal Procedure." Statutes concerning the military and national security, by contrast, are generally found in Title 10 ("Armed Forces") and in Title 50 ("War

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[15] Courts have found section 4001(a) to be judicially enforceable through the writ of habeas corpus. *See, e.g., Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978).

and National Defense"). Moreover, the particular part of Title 18 in which section 4001 is located contains chapters exclusively governing federal criminal confinement. Part III of Title 18, which contains section 4001, is entitled "Prisons and Prisoners" and contains chapters relating to the Bureau of Prisons, good time allowances, parole, and institutions for women, among other topics. Nothing in those provisions can plausibly be construed to apply to the detention of enemy combatants. Congress's decision to place section 4001(a) in this particular provision of the U.S. Code thus provides further support for the conclusion that subsection (a) does not apply to the President's constitutional power to detain enemy combatants.

Congress likewise has effectively construed section 4001(a) not to restrict the President's constitutional power as Commander in Chief to detain enemy combatants. In 1984, thirteen years after the enactment of section 4001(a), Congress added section 956 to Title 10 of the U.S. Code, which specifically governs the U.S. Armed Forces. That statute explicitly authorizes the U.S. Armed Forces to use any funds appropriated to the Department of Defense to pay for the detention of prisoners of war and other enemy combatants. Specifically, 10 U.S.C. § 956 (2000) authorizes the use of Defense Department funds for "expenses incident to the maintenance, pay, and allowances of prisoners of war" as well as of "other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of the Army, Navy, or Air Force pursuant to Presidential proclamation." This provision plainly contemplates that the President has the power to detain prisoners of war and other enemy combatants, presumably as an exercise of his constitutional authority as Commander in Chief, notwithstanding the prior enactment of section 4001(a). The language of 10 U.S.C. § 956 is thus difficult to reconcile with section 4001(a) – unless subsection

(a) is construed *not* to interfere with the President's constitutional power to detain enemy combatants. When it enacted 10 U.S.C. § 956, Congress must have understood that the President already had the authority to direct the U.S. Armed Forces to detain prisoners of war, and that the enactment of section 4001(a) had done nothing to undermine that authority.

With the lone exception of the *Padilla* case, *see, e.g., Padilla* Pet. App. 1a-75a, no court has ever construed section 4001(a) to apply to the detention of enemy belligerents in an armed conflict, or to restrict the President's constitutional authority to detain enemy combatants.[16] Moreover, the conclusion that section 4001(a) does not, and should not be construed to, interfere with the President's constitutional authority as Commander in Chief is supported by the well-established canon of construction that statutes are not to be construed in a manner that presents constitutional difficulties, so long as a reasonable alternative construction is available.[17]

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[16] To the contrary, prior to *Padilla*, every other judicial decision interpreting section 4001(a) applied that provision to the federal civilian prison system. *See Howe v. Smith*, 452 U.S. 473, 479 (1981); *Lono v. Fenton*, 581 F.2d 645, 648 (7th Cir. 1978); *Seller v. Ciccone*, 530 F.2d 199, 201 (8th Cir. 1976); *Marchesani v. McCune*, 531 F.2d 459, 461 (10th Cir. 1974); *Bono v. Saxbe*, 462 F. Supp. 146, 148 (E.D. Ill. 1978).

[17] *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This canon of construction applies where an act of Congress could be read to encroach upon powers constitutionally committed to a coordinate branch of government. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 800-1 (1992) (citation omitted); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-67 (1989). And in the area of foreign affairs, and war powers in particular, the avoidance canon has special force. *See, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 232-33 (1986). This Court should not lightly assume Congress has interfered with the

A review of the legislative history of 18 U.S.C. § 4001(a) underscores the conclusion that Congress never intended that provision to restrict the President's constitutional authority as Commander in Chief to detain enemy combatants. While some in Congress questioned the law's scope as potentially infringing on the President's war powers, others assured members that the statute could not extend so far. At best, the legislative history demonstrates that Congress had no fully shared understanding that section 4001 either regulated the President's Commander in Chief authority or did not. The inconclusive nature of the legislative history thus requires this Court to rely upon the scope of the President's war power, the structure of section 4001 and its placement in the U.S. Code, and the canon of avoidance.

First, the 1971 addition of section 4001(a) was accompanied by, and closely identified with, the repeal of the Emergency Detention Act of 1950, ch. 1024, 64 Stat. 1019, 1019-31, *codified at* 50 U.S.C. §§ 811-826, *repealed by* Pub. L. No. 92-128, 85 Stat. 347. That Act authorized the federal government to detain individuals suspected of violating certain *criminal* statutes. Specifically, it empowered the Attorney General "to apprehend and by order detain . . . each person as to whom there is [a] reasonable ground to believe that such person . . . will engage in, or probably will conspire with others to engage in, acts of espionage or . . . sabotage." 64 Stat. 1021. Espionage and sabotage were expressly defined in relation to particular sections of Title 18 of the

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President's constitutionally superior position as Chief Executive and Commander in Chief in the areas of foreign affairs and national security, and the Court's consistent view that "'foreign policy [is] the province and responsibility of the Executive.'" *Egan*, 484 U.S. at 529 (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)). *See also Agee*, 453 U.S. at 291. As this Court has repeatedly emphasized, the President's foreign affairs power necessarily exists independently of Congress. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936).

United States Code. *Id.* In other words, the Act authorized detention of individuals based on suspected criminal conduct. Thus, the repeal of the 1950 Act, and the accompanying enactment of section 4001(a), addresses similar forms of detention and *not* the detention of enemy combatants.

Second, an earlier version of the legislation enacting section 4001(a) suggests that the provision was not intended to reach the detention of enemy combatants. The original version of the House bill ultimately enacted, H.R. 234, did not include the language "except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). Instead, it more broadly prohibited the detention of any U.S. citizen "except in conformity with the procedures and the provisions of title 18." H.R. Rep. No. 92-116 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1437. A Department of Justice witness objected to the language on the ground that the drafters had incorrectly assumed that "all provisions for the detention of convicted persons are contained in title 18." *Id.* The witness went on to list the numerous other federal statutes, outside of title 18, authorizing the confinement of persons convicted of federal crimes.[18] The Committee accepted the witness's objection and recommended an amendment that changed the language to "except pursuant to an Act of Congress." *Id.* Notably, neither the witness nor any member of the Committee ever mentioned expanding the scope of the prohibition beyond detention related to criminal activity. Thus, the change in the legislation occurred in order to recognize other forms of detention of "convicted persons" under the federal criminal laws, and not the preventive detention of enemy combatants that occurs pursuant to the President's Commander in Chief authority.

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[18] *See id.* (citing, among others, provisions dealing with crimes involving narcotics in title 21, Internal Revenue violations in title 26, and crimes involving aircraft hijacking, carrying explosives aboard an aircraft and related crimes in title 49).

Finally, the relevant House floor debate fails to demonstrate a universal, shared understanding of section 4001(a) as an effort to regulate or interfere with the President's Commander in Chief authority to detain enemy combatants. Over a two-day period in September, 1971, the House debated two competing bills: H.R. 234, reported out of the Judiciary Committee, which repealed the Emergency Detention Act and added section 4001(a), and H.R. 820, reported out of the Internal Security Committee, which acted to amend the Emergency Detention Act to prohibit its use "solely on account of race, color, or ancestry." 117 Cong. Rec. at 31754 (1971). The House floor debate reflected the presence of three distinct views of the legislation.

In the first camp, there was wide support for eliminating the possibility of any future use or creation of *civilian* (as opposed to enemy combatant) detention camps. The internment of Japanese-Americans during World War II was frequently invoked by members of Congress to highlight the need for statutory action. Noting that the Emergency Detention Act was not in place during World War II, proponents of H.R. 234 argued that a simple repeal of the Emergency Detention Act would not necessarily eliminate the possibility of future creation or use of civilian detention camps.[19] That concern was the impetus for the addition of the language now found in 18 U.S.C. § 4001(a). Notably, this view does not conflict with our interpretation of section 4001(a), because unlike Hamdi and Padilla today, the Japanese-Americans detained during World War II were held not as enemy combatants, but as civilians.

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[19] *See* 117 Cong. Rec. at 31541 (statement of Rep. Kastenmeier) ("It has been suggested that repeal alone would leave us where we were prior to 1950. The committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an act of Congress, exists. This will assure that no detention camps can be established without at least the acquiescence of the Congress.").

Members of the second camp feared the legislation went too far and violated separation of powers because it infringed upon the President's constitutional powers and duties.[20] These critics suggested that the law's broad language could be read to interfere with the President's power to detain enemy combatants. Importantly, these members did not offer this reading as an authoritative interpretation of the statute's meaning, but rather as an effort to narrow its scope.

Finally, then-Congressman Abner Mikva, responding to both groups, noted that Congress lacked the authority to interfere with the President's constitutional powers, and that H.R. 234 should not be interpreted to do so. He argued:

> If there is any inherent power of the President of the United States, either as the Chief Executive or Commander in Chief, under the Constitution of the United States, to authorize the detention of any citizen of the United States, nothing in [H.R. 234] interferes with that power, because obviously no act of Congress can derogate the constitutional power of a President.

Id. at 31555.[21] Accordingly, there was no agreement in Congress that section 4001(a) covers enemy combatants.

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[20] *See, e.g.*, 117 Cong. Rec. at 31542 (statement of Rep. Ichord) ("[The amendment] would deprive the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises. Hence the amendment also has the consequence of doing patent violence to the constitutional principle of separation of powers. . . . Although many Members of this House are committed to the repeal of the Emergency Detention Act of 1950, they have no purpose, I am sure, to confound the President in his exercise of his constitutional duties to defend this Nation, nor would they wish to render this country helpless in the face of its enemies.").

[21] Moments later, Mikva elaborated on this point:

Congress has authorized the current detentions in any event. The Joint Resolution states: "[T]he President is authorized to use all necessary and appropriate force against those . . . persons he determines . . . aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such . . . persons." 115 Stat. 224.[22] As explained,

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> The next group of opinion would hold that the Federal Government does have certain emergency powers which can be exercised if necessary for self-preservation. Some in this group would give extensive latitude to the President to exercise such war powers, finding the justification in his [powers] as Commander in Chief of the Armed Forces, as well as in his sworn duty to uphold the Constitution and to preserve the Republic. Once again, it is difficult to see how proponents of this view could consistently oppose H.R. 234 on the grounds that it would undercut the President's ability to act in an emergency. After all, if the President's war powers are inherent, he must have the right to exercise them without regard to congressional action. Arguably, any statute which impeded his ability to preserve and protect the Republic from imminent harm could be suspended from operation. It is a contradiction in terms to talk of Congress limiting or undercutting an inherent power given by the Constitution or some higher authority. . . . The conclusion to be drawn from all of this is that, historical and philosophical questions aside, the repeal of the Emergency Detention Act which is proposed in H.R. 234 would have no measurable effect on the war powers of the President, whatever those powers are deemed to be at present.

Id. at 31557.

[22] *See Bowsher v. Snyar*, 478 U.S. 714, 756 (1986) (finding that a joint resolution satisfies "the full Article I requirements"); *Padilla I*, 233 F. Supp. 2d at 598 (collecting cases that describe a joint resolution as an "Act of Congress").

the power to use force plainly includes the power to detain. We agree with Judge Wesley that a contrary interpretation of the Joint Resolution "requires a strained reading of the plain language of the resolution and cabins the theater of the President's powers as Commander in Chief to foreign soil. If that was the intent of Congress it was masked by the strong and direct language of the Joint Resolution." *Padilla* Pet. App. 74a. This Court should respect the judgment of both political branches and effectuate the plain meaning of the Joint Resolution, and hold that the President has the wartime power to detain enemy combatants.[23]

CONCLUSION

The Court should affirm the judgment of the Fourth Circuit below, and reverse the judgment of the Second Circuit below.

Respectfully submitted.

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[23] International law, including the Geneva Conventions of 1949, likewise does not forbid the current detentions. *See, e.g.*, John C. Yoo and James C. Ho, *The Status of Terrorists*, 44 Va. J. Int'l L. 207 (2003). The protections of the Geneva Conventions are not self-executing in any event and thus have no legal effect in any federal court. *See Eisentrager*, 339 U.S. at 789 n.14.

JOHN CORNYN
Counsel of Record
Chairman, U.S. Senate
Subcommittee on the
Constitution, Civil Rights
and Property Rights
Dirksen Senate Office Building
Room 139
Washington, DC 20510
(202) 224-7840

Counsel for Amicus Curiae

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