No. 03-1027

In the Supreme Court of the United States

DONALD RUMSFELD, PETITIONER

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. 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, 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.

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

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page

Constitution and statutes:

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Donald Rumsfeld, Secretary of Defense, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-75a) is not yet reported, but is available at 2003 WL 22965085.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 11, 2001, the al Qaeda terrorist network launched a massive, coordinated attack on the United States, killing approximately 3000 persons. The President, acting pursuant to his constitutional authority as Commander in

Chief, took immediate steps to prevent future attacks. Congress promptly enacted a resolution expressing its support of the President's use of "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." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (App., *infra*, 59a-60a). Congress emphasized that those forces "continue to pose an unusual and extraordinary threat to the national security," and that it is necessary "to protect United States citizens both at home and abroad." Congress further recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." App., *infra*, 59a-60a.

The President ordered the armed forces of the United States to Afghanistan to subdue the al Qaeda terrorist network and the Taliban regime that supported it. In the course of that military campaign, which remains ongoing, the United States—consistent with its settled historical practice in times of war—has captured and detained numerous individuals fighting for and associated with the enemy. The detention of enemy combatants serves the vital wartime objectives of preventing captured combatants from continuing to aid the enemy and of yielding critical intelligence in advancement of the war effort. The al Qaeda network remains a serious threat to the national security in the course of the continuing conflict. That threat, regrettably, is not limited to the United States' interests abroad. Rather, there is a continuing risk of future terrorist attacks against United States citizens and interests carried out—as were the attacks of September 11—by enemy combatants who infiltrate the United States.

2. On May 8, 2002, Jose Padilla flew from Pakistan to Chicago, with an intermediate stop in Switzerland. Upon his arrival in Chicago, he was arrested pursuant to a material

witness warrant issued by the United States District Court for the Southern District of New York in connection with grand jury proceedings investigating the September 11 attacks. On May 15, 2002, following Padilla's transfer to New York City, the district court appointed respondent Donna R. Newman, Esq., as Padilla's counsel. App., *infra*, 4a-5a.

On June 9, 2002, the President, invoking both his constitutional authority as Commander in Chief and Congress's Authorization for Use of Military Force, determined that Padilla "is, and at the time he entered the United States in May 2002 was, an enemy combatant." App., *infra*, 57a. The President found, in particular: that Padilla is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war"; that Padilla has "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"; that he "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda"; that he "represents a continuing, present and grave danger to the national security of the United States"; and that his detention as an enemy combatant "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." *Id.* at 57a-58a.

The President's determination was based on information from sources directly connected with al Qaeda that Padilla is closely associated with al Qaeda and came to the United States to advance the conduct of terrorist operations on al Qaeda's behalf. See Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy (Aug. 27, 2002) (Mobbs Declaration) (App., *infra*, 167a-

172a).[1] The information considered by the President evidenced that Padilla moved to Egypt in 1998 after his release from prison in the United States, and he subsequently became known as Abdullah Al Muhajir. Over the next three years, Padilla traveled to Pakistan, Saudi Arabia, and Afghanistan. During his time in the Middle East, Padilla was closely associated with the al Qaeda network and its leaders. *Id.* at 168a-169a.

While in Afghanistan and Pakistan in 2001 and 2002, Padilla had extended discussions with senior al Qaeda operatives concerning his conduct of terrorist operations within the United States. In Afghanistan in 2001, Padilla met with senior Usama Bin Laden lieutenant Abu Zubaydah to discuss his plans, including a plan to detonate a radiological dispersal device (or "dirty bomb") in the United States. Zubaydah directed Padilla to travel to Pakistan to receive training on the wiring of explosives, and Padilla researched explosive devices at an al Qaeda safehouse in Lahore. While in Pakistan in 2002, Padilla met on several occasions with senior al Qaeda operatives to discuss further his plans for conducting terrorist operations within the United States, including the dirty bomb plan as well as other operations involving the detonation of explosives in hotel rooms and gas stations. At the direction of al Qaeda operatives, Padilla returned to the United States in May 2002 to advance the conduct of additional al Qaeda attacks against the United States. App., *infra*, 169a-171a.

Acting on that information, the President directed the Department of Defense "to receive Mr. Padilla from the Department of Justice and to detain him as an enemy

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[1] A classified version of the Mobbs Declaration providing additional detail concerning the determination that Padilla is an enemy combatant was submitted to the district court under seal and *ex parte*. The government is making arrangements with the Clerk of this Court so that the classified declaration is available for this Court's review.

combatant." App., *infra*, 58a. On June 9, 2002, upon issuance of the President's determination, the Department of Justice immediately requested the district court to vacate the material witness warrant. The district court vacated the warrant that day, and Padilla was transferred to military control and transported to the Naval Consolidated Brig, Charleston, South Carolina, for detention as an enemy combatant. *Id.* at 83a.

3. a. On June 11, 2002, Padilla's counsel, respondent Newman, filed a habeas petition in the United States District Court for the Southern District of New York challenging the legality of Padilla's detention. C.A. App. 21-25. On June 19, 2002, Ms. Newman, styling herself as Padilla's next friend, filed an amended habeas petition on Padilla's behalf. *Id.* at 26-35. The amended petition names as respondents the President, the Secretary of Defense, the Attorney General, and Commander Melanie A. Marr, commanding officer of the Naval Consolidated Brig, Charleston, South Carolina, where Padilla is being held. *Id.* at 28. The amended petition alleges that Padilla's detention violates the Fourth, Fifth, and Sixth Amendments to the Constitution, as well as the Posse Comitatus Act, 18 U.S.C. 1385. C.A. App. 32-33. As relief, the amended petition seeks, *inter alia*, Padilla's release from military confinement. *Id.* at 34.

On June 26, 2002, the government filed a motion to dismiss the amended petition for lack of jurisdiction, arguing: (i) that attorney Newman lacks standing as a next friend to file the amended petition on Padilla's behalf; and (ii) that the district court for the Southern District of New York lacks territorial jurisdiction over the only proper respondent to the amended petition—Commander Marr, Padilla's immediate custodian at the Naval Consolidated Brig, Charleston—such that the petition should have been filed in the District of South Carolina. App., *infra*, 7a, 13a. On August 27, 2002, in response to the district court's direction to address the merits,

the government filed a response to and motion to dismiss the amended petition on the merits. In connection with that motion, the government submitted the Mobbs Declaration setting forth the factual underpinnings of the President's determination that Padilla is an enemy combatant. *Id.* at 167a-172a.

b. On December 4, 2002, the district court issued an opinion and order resolving the jurisdictional claims and several of the issues on the merits. App., *infra*, 76a-166a. On the jurisdictional issues, the court first ruled that attorney Newman had a sufficient relationship with Padilla to qualify as his next friend for standing purposes. *Id.* at 91a-97a. The court next addressed whether it has jurisdiction over the proper respondent to the amended petition. The court acknowledged that, "in the usual habeas corpus case * * * courts have held consistently that the proper respondent is the warden of the prison where the prisoner is held." *Id.* at 98a. The court nevertheless held that Secretary Rumsfeld rather than Commander Marr is the proper respondent in this case, and further held that Secretary Rumsfeld is subject to the court's habeas jurisdiction pursuant to the New York long-arm statute. *Id.* at 98a-108a, 116a-117a.

On the merits, the district court agreed with the government that the settled wartime authority of the Commander in Chief to capture and detain enemy combatants is fully applicable in the circumstances of this case. *Id.* at 119a-135a. The court relied principally on *Ex parte Quirin*, 317 U.S. 1 (1942) (*Quirin*), which upheld the exercise of military jurisdiction over German saboteurs (including one presumed to be an American citizen) who were captured within the United States's borders during World War II before they could carry out plans to destroy United States war facilities.

The district court rejected Padilla's reliance on 18 U.S.C. 4001(a), which states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to

an Act of Congress." The court explained that Padilla's detention is "pursuant to an Act of Congress," because Congress's Authorization for Use of Military Force broadly supports the application of military force to prevent future acts of terrorism by al Qaeda. App., *infra*, 140a-142a. Accordingly, the court ruled, the "President * * * has both constitutional and statutory authority to exercise the powers of Commander in Chief, including the power to detain unlawful combatants, and it matters not that Padilla is a United States citizen captured on United States soil." *Id.* at 158a.

While upholding the President's legal authority to detain Padilla, the court determined that Padilla was entitled to raise a factual challenge to the determination that he is an enemy combatant. App., *infra*, 142a-144a. The court granted Padilla access to counsel pursuant to the All Writs Act, 28 U.S.C. 1651(a), in order to facilitate such a factual challenge. *Id*. at 144a-155a.

c. On January 9, 2003, the government moved for reconsideration of that part of the district court's order directing that Padilla be afforded access to counsel. App., *infra*, 8a; C.A. App. 154. The government submitted a sworn declaration of Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency (Jan. 9, 2003), which explains the significant national security concerns raised by interposing counsel into the military's efforts to obtain vital intelligence from detained enemy combatants. C.A. App. 55-63. On March 11, 2003, the district court issued an opinion and order granting reconsideration but adhering to its previous disposition. App., *infra*, 9a; C.A. App. 153-164.

d. On March 31, 2003, the government moved the district court to certify its orders for interlocutory appeal pursuant to 28 U.S.C. 1292(b). On April 9, 2003, the district court granted the government's motion. App., *infra*, 9a-10a; C.A. App. 165-168. On June 10, 2003, the court of appeals granted

the parties' application for an interlocutory appeal. *Id.* at 10a.

4. A divided panel of the court of appeals affirmed in part and reversed in part. App., *infra*, 1a-75a.

a. The court first sustained the district court's assertion of habeas jurisdiction over the amended petition. App., *infra*, 13a-26a.[2] In the court's view, although the general rule in habeas cases calls for naming the "immediate physical custodian as respondent," that rule need not apply in the case of a person "detained for reasons other than federal criminal violations." *Id.* at 15a. The court found Secretary Rumsfeld to be a proper respondent in this case based on the "unique role [he] plays in this matter." *Id.* at 20a. The court reasoned that, while Commander Marr is Padilla's immediate physical custodian, "the legal reality of control is vested with Secretary Rumsfeld" because he "could inform the President that further restraint of Padilla as an enemy combatant is no longer necessary." *Id.* at 20a.

The court rejected the government's contention that a district court's habeas jurisdiction is confined to respondents located within the district's territorial boundaries. The court determined that a district court can exercise habeas jurisdiction over any respondent subject to suit under the long-arm statute of the state in which the court sits. App., *infra*, 21a-26a. Here, the court concluded, Secretary Rumsfeld was subject to service of process under the New York long-arm statute. *Id.* at 25a.

b. On the merits, the panel majority concluded that the President lacks legal authority to detain Padilla as an enemy combatant. App., *infra*, 26a-55a. The court first addressed the scope of the President's constitutional powers as Commander in Chief, concluding that "the President lacks

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[2] The court also found as a threshold matter that attorney Newman had established standing as a next friend to file the amended petition on Padilla's behalf.

inherent constitutional authority * * * to detain American citizens on American soil outside a zone of combat." *Id.* at 29a. The court rejected the district court's reliance on *Ex parte Quirin*, reasoning that *Quirin* involved congressional authorization absent in this case. *Id.* at 37a-38a. The court of appeals thus held that, "while Congress * * * may have the power to authorize the detention of United States citizens under the circumstances of Padilla's case, the President, acting alone, does not." *Id.* at 36a (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 631-632 (1952) (Douglas, J., concurring)).

The panel majority next concluded that Congress had prohibited Padilla's detention in 18 U.S.C. 4001(a). App., *infra*, 43a-55a. The court read Section 4001(a) to prohibit all detentions of United States citizens, including the wartime detention of enemy combatants, except if pursuant to specific statutory authorization. *Id.* at 43a-44a. The court rejected the conclusion of the district court that Congress's Authorization for Use of Military Force supplies a statutory basis for Padilla's detention. In the court of appeals' view, Congress's Authorization does not encompass the detention of "American citizens seized on American soil and not actively engaged in combat." *Id.* at 51a. The court likewise found that 10 U.S.C. 956(5), which authorizes the military to use appropriated funds to detain prisoners of war and persons "similar to prisoners of war," fails to support the detention of American citizens "seized off the battlefield." *Id.* at 54a.

The court therefore remanded the case to the district court with instructions to issue a writ of habeas corpus directing Padilla's release from military control within 30 days. App., *infra*, 55a. The court explained that its holding that the President lacks authority to detain Padilla "effectively moots arguments raised by both parties con-

cerning access to counsel, standard of review, and burden of proof." *Id.* at 4a n.1.[3]

c. Judge Wesley dissented from the majority's conclusion that the President lacks legal authority to detain Padilla as an enemy combatant. App., *infra*, 61a-75a. In Judge Wesley's view, "the President, as Commander in Chief, has inherent authority to thwart acts of belligerency on U.S. soil that would cause harm to U.S. citizens, and, in this case, Congress through the Joint Resolution specifically and directly authorized the President to take the actions herein contested." *Id.* at 62a.

Judge Wesley disagreed with the majority's assumptions that the Commander-in-Chief authority is confined to "zones of combat" and that the President is without power to define a "zone of combat." The majority's reasoning, Judge Wesley observed, entails the "startling conclusion" that the "President would be without any authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat *or* authorized the detention." App., *infra*, 66a. In addition, Judge Wesley explained, Congress's Authorization "was *not* limited in geographic scope" and "did not limit the President's authority to foreign theaters." *Id.* at 73a. In Judge Wesley's view, Congress "clearly recognized that the events of 9-11 signaled a war with al Qaeda that could be waged on U.S. soil." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has issued an unprecedented decision ordering the release of an individual whom the President—acting as Commander in Chief in a time of war—has determined poses a grave danger to the national security of the United States and should be detained as an enemy

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[3] The court observed, however, that "the government had ample cause to suspect Padilla of involvement in a terrorist plot." App., *infra*, 4a n.2.

combatant. The court of appeals' conclusion that the President categorically lacks the authority to detain Padilla as an enemy combatant is fundamentally at odds with this Court's decisions, *e.g.*, *Ex parte Quirin*, 317 U.S. 1 (1942), and it undermines the President's vital authority as Commander in Chief to protect the United States against additional enemy attacks launched within the Nation's borders. Those concerns are particularly acute in the current conflict, waged against an enemy that operates in secret, has executed its most horrific attacks in the United States, and plots further surreptitious and large-scale attacks on civilian targets. The court of appeals' opinion, moreover, is premised on an overly broad interpretation of 18 U.S.C. 4001(a), and on a cramped and insupportably narrow reading of Congress's Authorization for Use of Military Force. In the face of Presidential actions and a congressional authorization prompted by attacks in the United States and motivated by an intent to, *inter alia*, prevent further attacks here, the court below found unique limitations on the President's ability to protect against attacks in the United States. Because the court of appeals' decision erroneously restricts the President's authority to prevent further attacks within the Nation's borders and resolves issues of extraordinary national significance, the decision self-evidently warrants this Court's review.

In addition, the court of appeals issued its unprecedented ruling in a case that should have proceeded in a different district court in a different circuit. The settled rule under the habeas statutes holds that the proper respondent in a challenge to physical confinement is the individual with day-to-day physical control over the detainee, *i.e.*, the detainee's immediate custodian. The court of appeals nonetheless held that Secretary Rumsfeld is a proper respondent in this case, a holding irreconcilable with the decisions of a number of other courts of appeals adhering to the immediate custodian rule. The upshot of the court of appeals' opinion, moreover,

is to vest virtually *every* district court in the country with habeas jurisdiction over the amended petition. That result is directly at odds with Congress's intent in the habeas statutes to circumscribe the reach of the district courts' habeas jurisdiction. The court of appeals' erroneous jurisdictional holding thus also merits this Court's review.

A. The Court Of Appeals' Holding That The President Lacks Authority To Detain Padilla As An Enemy Combatant Incorrectly Resolves An Issue Of Extraordinary National Significance

The court of appeals' decision eliminating a core wartime judgment of the Commander in Chief is unprecedented and warrants review. The President, acting as Commander in Chief in a time of war, determined that Padilla is "closely associated with al Qaeda" and has "engaged in * * * hostile and war-like acts," that Padilla possesses intelligence that "would aid U.S. efforts to prevent attacks by al Qaeda," and that his detention as an enemy combatant "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." App., *infra*, 57a-58a. The court of appeals nonetheless ordered Padilla's release from military control, holding that the President lacks authority to order Padilla's detention as an enemy combatant. That ruling is flawed in a number of fundamental respects and self-evidently merits this Court's review.

1. The court of appeals' decision is inconsistent with this Court's opinion in *Ex parte Quirin*

In *Ex parte Quirin*, 317 U.S. at 1, this Court upheld the military detention and prosecution of a group of German saboteurs who were captured in the United States during World War II before they could carry out plans to destroy domestic war facilities. One of the captured combatants was presumed to be a United States citizen. *Id.* at 20. This Court explained that, "[f]rom the very beginning of its history," it "has recognized and applied the law of war as

including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of * * * enemy individuals." *Id.* at 27-28. Under basic principles of the laws of war, the Court held, both lawful and unlawful enemy combatants "are subject to capture and detention * * * by opposing military forces," and unlawful combatants in addition are "subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Id.* at 31.

The Court made clear that enemy combatants who are American citizens are fully subject to capture and detention by the military. As the Court explained, "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the * * * law of war." *Quirin*, 317 U.S. at 37-38; see *id.* at 31 (describing "enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property"); accord *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957); *In re Territo*, 156 F.2d 142 (9th Cir. 1946). For that reason, the *Quirin* Court found it unnecessary to resolve definitively one saboteur's claim to citizenship. 317 U.S. at 20.

The President's determination in this case makes clear that Padilla is an enemy combatant within the meaning of this Court's opinion in *Quirin*. The President found that Padilla is "closely associated with al Qaeda" and "engaged in * * * hostile and war-like acts * * * that had the aim to cause injury to or adverse effects on the United States," and that his detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." App., *infra*, 57a-58a.

In concluding that the President lacks authority to detain Padilla as an enemy combatant, the court of appeals reasoned that "the President's Commander-in-Chief powers

do not encompass the detention of a United States citizen * * * taken into custody on United States soil outside a zone of combat." App., *infra*, 36a n.24. *Quirin*, however, likewise involved a presumed American citizen captured within the United States's borders. Moreover, the Court expressly found it insignificant that the captured saboteurs had "not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." 317 U.S. at 38. The saboteurs were captured in Chicago and New York. Accordingly, the court of appeals' opinion cannot be squared with *Quirin*.

The court of appeals asserted that, notwithstanding the "factual parallels between the *Quirin* saboteurs and Padilla," this Court's decision "to uphold military jurisdiction" in *Quirin* "rested on express congressional authorization." App., *infra*, 37a, 38a n.26. The Articles of War discussed in *Quirin* and relied on by the court of appeals below provided for trial by military commission of offenses against the laws of war. See 317 U.S. at 26-27; *id.* at 36. The relevant provisions remain fully in effect today, and are codified in the Uniform Code of Military Justice. See 10 U.S.C. 821. And although *Quirin* addressed the pre-trial detention and trial of the saboteurs by military commission pursuant to those provisions, whereas no such charges have been brought against Padilla, the Court's opinion makes clear that the President's authority over enemy combatants encompasses not just the authority to prosecute them through military commissions, but also the more commonly practiced authority to detain enemy combatants in the course of an armed conflict without charging them with specific war crimes. 317 U.S. at 30-31. As the district court explained, consequently, this case "is *a fortiori* from *Quirin*." App., *infra*, 133a.[4]

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[4] Insofar as the court of appeals viewed its decision as supported by *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), the court was mistaken. Unlike the basic authority of the Commander in Chief to

2. The court of appeals' opinion rests on a fundamentally flawed interpretation of 18 U.S.C. 4001(a) and Congress's Authorization for Use of Military Force

The court of appeals found that Padilla's detention as an enemy combatant is barred by 18 U.S.C. 4001(a). That conclusion lacks merit.

a. Even if Section 4001(a) encompassed the military detention of enemy combatants in wartime (but see pages 17-18, *infra*), Padilla's detention, as the district court correctly found (App., *infra*, 139a-142a), is "pursuant to an Act of Congress" within the meaning of that provision. In ordering Padilla's detention as an enemy combatant, the President specifically invoked Congress's Authorization for Use of Military Force (App., *infra*, 57a), which broadly supports the President's use of "*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 * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." 115 Stat. 224 (emphasis added). As the Fourth Circuit explained in *Hamdi*, the " 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops." *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003), cert. granted, No. 03-6696 (Jan. 9, 2004).

The court of appeals below attempted to avoid creating an open conflict with the Fourth Circuit's reading in *Hamdi* of

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detain enemy combatants in wartime, *Youngstown Sheet* concerned the President's decision to seize steel mills to prevent labor disputes from slowing the production of steel. See App., *infra*, 64a (Wesley, J., dissenting) (observing that the "President's attempt to link the seizure to prosecuting the war in Korea was far too attenuated," whereas "[i]n this case the President's authority is directly tied to his responsibilities as Commander in Chief").

Congress's Authorization by concluding that the Authorization only contemplates "a power of detention * * * in the battlefield context." App., *infra*, 52a. That reading is legally and factually insupportable. Nothing in the terms of Congress's Authorization suggests a limitation to a foreign battlefield, and there is no legal basis for so narrowing Congress's broad authorization. In any event, the Authoriation was enacted in direct response to large-scale attacks against civilians that effectively turned parts of New York, Pennsylvania, and Virginia into battlefields.

Moreover, Congress specifically recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and Congress emphasized the need "to protect United States citizens *both at home and abroad*." 115 Stat. 224 (emphasis added). And Congress acted against the backdrop of this Court's decision in *Quirin*, which made clear that the President's Commander-in-Chief authority fully applies to American citizens captured within the United States's borders whether or not they enter a zone of military operations or combat zone. Accordingly, as Judge Wesley correctly concluded in his dissent, Congress's Authorization "was *not* limited in geographic scope"; it "did not limit the President's authority to foreign theaters"; and "Congress clearly recognized that the events of 9-11 signaled a war with al Qaeda that could be waged on U.S. soil." App., *infra*, 73a.[5]

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[5] In addition, 10 U.S.C. 956(5) authorizes the expenditure of funds for "the maintenance, pay, and allowance of prisoners of war" and "other persons in the custody of the [military] whose status is determined by the Secretary to be similar to prisoners of war." As the Fourth Circuit concluded in *Hamdi*, it "is difficult if not impossible to understand how Congress could make appropriations for the detention of persons 'similar to prisoners of war' without also authorizing their detention in the first instance." 316 F.3d at 467-468. The court of appeals below suggested that Section 956(5) has no application "to American citizens seized off the

b. In any event, 18 U.S.C. 4001(a), properly construed, does not pertain to the wartime detention of enemy combatants. It was settled by the time of *Quirin* that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." *Quirin*, 317 U.S. at 37. Consequently, as the Fourth Circuit explained in *Hamdi*, if Congress intended for Section 4001(a) to "override this well-established precedent * * * it surely would have made its intentions explicit." 316 F.3d at 468. Section 4001(a) instead pertains to—and was intended to address—the detention of civilians, not the detention of enemy combatants in wartime.[6]

The court of appeals' contrary interpretation of Section 4001(a) rejects the constitutional-avoidance approach of the Fourth Circuit and raises serious separation-of-powers concerns. The President's determination in a time of war that an individual is an enemy combatant represents a core exercise of the Commander-in-Chief power under Article II. See *Quirin*, 317 U.S. at 28-29; *Hamdi*, 316 F.3d at 467. The canon of constitutional avoidance thus forecloses any reading of Section 4001(a) that would interfere with the President's determination that Padilla should be detained as an enemy

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battlefield." App., *infra*, 54a. But nothing in the terms of Section 956(5) suggests a distinction between capture on a traditional battlefield and capture elsewhere, and *Quirin* makes clear that the President's Commander-in-Chief authority fully applies in either context.

[6] The legislative history relied on by the court of appeals (App., *infra*, 44a-47a) does not suggest otherwise. As the court explained, Section 4001(a) was intended to repeal the Emergency Detention Act, which had provided the Attorney General with statutory authority to detain citizens. Consistent with its placement in Title 18, Section 4001(a) was designed to repeal this unusual grant of authority to civilian officials to detain citizens. But there is no indication that Congress intended to negate the military's longstanding authority to capture and detain enemy combatants who are American citizens—indeed, there is no mention in the legislative history of this Court's decision in *Quirin*, which had specifically recognized the President's authority to detain such combatants.

combatant. See *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 466 (1989) (avoidance canon applies with special force when the "constitutional issues * * * concern the relative powers of the coordinate branches of government"). See also App., *infra*, 74a (Wesley, J., dissenting) ("[I]f, as the majority asserts, § 4001(a) is 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.").

Despite the serious separation-of-powers concerns raised by its unprecedented decision, the court below declined two obvious options for interpreting congressional acts so as to avoid those serious concerns. The court could have avoided those difficulties through *either* a straightforward interpretation of Section 4001(a) to govern only detentions by civilian authorities or through an equally straightforward interpretation of Congress's Authorization to encompass necessary steps to protect against additional attacks "at home" (115 Stat. 224). Instead, the court interpreted Section 4001(a) unduly broadly and the Authorization unduly narrowly and pronounced severe and unprecedented limits on the President's authority. That decision plainly merits this Court's review.

3. The court of appeals' ruling compromises the ability of the President to preserve the national security in a time of war

The court of appeals' decision sets aside the determination of the Commander in Chief that "it is in the interests of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant." App., *infra*, 58a. The court contemplated that Padilla would be released from military control and would be detained by civilian authorities pending the potential initiation of criminal charges against him. See *id.* at 55a-56a. The court's holding significantly undermines

the ability of the President to protect the Nation from further enemy attacks in wartime.

The detention of enemy combatants, as indicated (page 11, *supra*), not only prevents combatants from continuing to aid the enemy, but also enables the collection of vital intelligence in furtherance of the war effort. See App., *infra*, 57a-58a. The latter function is particularly critical in the context of the current conflict, waged against an enemy that eschews conventional rules of open warfare and aims to launch large-scale, surprise attacks against the civilian population.

In this case, the President not only found that Padilla's detention is "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces," but also determined that Padilla "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens." App., *infra*, 57a-58a. Consequently, as Judge Wesley explained in his dissenting opinion below, "Padilla was not only a threat with regard to a specific terrorist plot, but he allegedly possesses information that could assist the United States in thwarting other terrorist plots in the U.S. and abroad." *Id.* at 73a n.41 (citation omitted).

The President's decision to detain Padilla as an enemy combatant in lieu of detaining him in the criminal justice system reflects a sensitive determination at the core of the President's Article II powers concerning the best interests of the Nation in wartime. Cf. *CIA* v. *Sims*, 471 U.S. 159, 176 (1985) ("judges * * * have little or no background in the delicate business of intelligence gathering"). The court of appeals' invalidation of the President's determination should be reviewed by this Court.

4. The Court should grant the petition for a writ of certiorari in this case rather than hold the petition pending its disposition in *Hamdi*

Although both this case and *Hamdi* v. *Rumsfeld*, No. 03-6696 (cert. granted Jan. 9, 2004), broadly concern the President's authority to detain enemy combatants in the course of the current conflict, the Court should grant certiorari and schedule argument in this case as well as in *Hamdi*, rather than hold the petition pending its ultimate disposition of *Hamdi*. Both the court of appeals below and the Fourth Circuit in *Hamdi* expressed the view that the cases raise distinct questions. See, *e.g.*, App., *infra*, 27a ("our review is limited to the case of an American citizen arrested in the United States, not on a foreign battlefield"); *Hamdi*, 316 F.3d at 465 (distinguishing *Padilla*). Those asserted distinctions warrant this Court's consideration; and this case is fully ripe for the Court's review and raises distinct questions of exceptional significance concerning the President's wartime authority as Commander in Chief.[7]

Nonetheless, because the questions in the two cases overlap in certain respects, the Court may wish to schedule argument in the two cases on the same day if it grants certiorari in this case. Accordingly, the government has filed with the Court a motion for expedited consideration in this case that proposes a schedule for consideration of the petition and briefing and argument on the merits such that oral argument could be heard in the April session of this Court, when the *Hamdi* case presumably will be heard.

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[7] This case also presents important issues concerning habeas jurisdiction that independently merit this Court's review. See pp. 20-28, *infra*.

B. The Court Of Appeals Erred In Concluding That The District Court Has Jurisdiction Over The Proper Respondent To The Amended Habeas Petition

The Second Circuit issued its unprecedented decision in a case that should have never proceeded in the Southern District of New York or the Second Circuit. The habeas statutes specify that the writ "shall be directed to *the person* having custody of the person detained," 28 U.S.C. 2243 (emphasis added), and also require that, in appropriate circumstances, "the person to whom the writ is directed shall * * * produce at the hearing the body of the person detained," 28 U.S.C. 2243. See also 28 U.S.C. 2242 (requiring that the petition "allege * * * the name of the person who has custody"). This Court explained long ago that "these provisions contemplate a proceeding against some person who has the *immediate custody* of the party detained, with the power to produce the body of such party before the court or judge." *Wales* v. *Whitney*, 114 U.S. 564, 574 (1885) (emphasis added).[8] In addition, the habeas statutes confine district courts to issuing the writ only "within their respective jurisdictions," 28 U.S.C. 2241(a), a restriction intended to prevent district courts from asserting jurisdiction over habeas actions brought by individuals detained beyond the district's boundaries. See *Carbo* v. *United States*, 364 U.S. 611, 617 (1961).

Those principles establish that, in a traditional habeas action challenging physical detention, jurisdiction lies in the district court with territorial jurisdiction over the detainee's immediate custodian. *E.g.*, *Monk* v. *Secretary of the Navy*,

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[8] A separate aspect of the Court's decision in *Wales* concerned the circumstances in which a person is in "custody" within the meaning of the habeas laws. The Court has since expanded its understanding of the "custody" requirement. See *Hensley* v. *Municipal Court*, 411 U.S. 345, 350 n.8 (1973).

793 F.2d 364, 369 (D.C. Cir. 1986). Accordingly, the only court with jurisdiction in this case is the United States District Court for the District of South Carolina, where Padilla's immediate custodian, Commander Marr, is located. The court of appeals, however, held that Secretary Rumsfeld is a proper respondent to the amended petition, and that the district court's habeas jurisdiction extends beyond the Southern District of New York to reach Secretary Rumsfeld. The court of appeals' ruling is incorrect and cannot be reconciled with opinions of other courts of appeals.[9]

1. The court of appeals' conclusion that Secretary Rumsfeld is a proper respondent is inconsistent with decisions of other courts of appeals

a. A long line of decisions in the courts of appeals holds that the proper respondent in a habeas action is the detainee's immediate custodian—typically the warden or commanding officer of the detention facility, who has day-to-day physical control over the detainee. See, *e.g.*, *Robledo-Gonzalez* v. *Ashcroft*, 342 F.3d 667, 673 (7th Cir. 2003); *Vasquez* v. *Reno*, 233 F.3d 688, 690-691 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); *Guerra* v. *Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986); *Jones* v. *Biddle*, 131 F.2d 853, 854 (8th Cir. 1942). Of particular significance, a number of courts of appeals have rejected claims that the Attorney General can be a proper habeas respondent, holding that "the warden of the penitentiary not the Attorney General is the person who holds the prisoner in custody for habeas purposes." *Vasquez*, 233 F.3d at 693; see *Robledo-Gonzalez*, 342 F.3d at 673; *Roman* v. *Ashcroft*, 340 F.3d 314, 321-322 (6th Cir. 2003); *In*

[9] Although Secretary Rumsfeld was named as a respondent in *Hamdi*, the petition also named the commanding officer of the facility where Hamdi was detained, and the petition was properly filed in the district in which that officer is located. Consequently, in *Hamdi*, unlike this case, the fact that Secretary Rumsfeld is named as a respondent has no jurisdictional significance.

re Hanserd, 123 F.3d 922, 925 n.2 (6th Cir. 1997); *Yi* v. *Maugans*, 24 F.3d 500, 507 (3d Cir. 1994); *Sanders* v. *Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945); *Jones*, 131 F.2d at 854.

The rule that the proper respondent is the detainee's immediate custodian rather than a supervisory official has also been applied in the context of military detentions. In *Monk* v. *Secretary of the Navy*, 793 F.2d at 369, the D.C. Circuit held that the proper respondent in a habeas action brought by a military prisoner was the commanding officer of the detention facility rather than the Secretary of the Navy. The court explained that the "argument that the Secretary can be considered [the] custodian for purposes of habeas corpus is no different from the claim that the Attorney General is the custodian of all federal prisoners." *Ibid.*

b. The court of appeals in this case diverged from those decisions, ruling that Secretary Rumsfeld is a proper respondent to the amended petition. The court reasoned that the immediate custodian rule is inapplicable when the petitioner is "detained for reasons other than federal criminal violations." App., *infra*, 15a. The Ninth Circuit drew the same distinction in *Armentero* v. *INS*, 340 F.3d 1058 (9th Cir. 2003), holding that the Attorney General and Secretary of Homeland Security are proper habeas respondents when aliens seek relief from detention ordered under the immigration laws. See *id.* at 1061 (concluding that there are "exceptions to the general practice of naming an immediate physical custodian as respondent, especially with regard to habeas petitions brought by persons detained for reasons other than federal criminal violations"); App., *infra*, 18a n.13 (relying on *Armentero*).[10]

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[10] The Ninth Circuit, relying on *Armentero*, later upheld certification of a nationwide habeas class action on the basis that the Attorney General and Secretary of Homeland Security are custodians of all immigration

The distinction drawn by those courts between criminal and non-criminal detentions is unsound, and it has been rejected by other courts of appeals. The terms of the habeas statutes direct attention to the individual with day-to-day physical control over the detainee, without suggesting any pertinent distinction between criminal and non-criminal detentions. Accordingly, the First Circuit, in rejecting the argument that the Attorney General is a proper respondent in habeas challenges to detention under the immigration laws, explained that "there is no principled distinction between an alien held in a detention facility awaiting possible deportation and a prisoner held in a correctional facility awaiting trial or serving a sentence." *Vasquez*, 233 F.3d at 693. The Sixth Circuit likewise has applied the immediate custodian rule in the context of habeas claims challenging non-criminal detention under the immigration laws. *Roman*, 340 F.3d at 321 ("We see no reason to apply a different rule for identifying a petitioner's custodian depending on whether the petitioner is an alien or a prisoner.").

The court of appeals also grounded its departure from the immediate custodian rule in the "unique role Secretary Rumsfeld plays in this matter." App., *infra*, 20a. According to the court, "the legal reality of control is vested with Secretary Rumsfeld, since only he—not Commander Marr—could inform the President that further restraint of Padilla as an enemy combatant is no longer necessary." *Ibid.* *No* immediate custodian, however, has independent responsibility for determining the duration of a detainee's confinement. The court of appeals' focus on "legal reality of control" thus amounts to an outright rejection of the immediate custodian rule. As other courts have held, the immediate custodian is the proper respondent under the habeas laws not because of any "legal reality of control," but because of

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detainees nationwide. *Ali Ali* v. *Ashcroft*, 346 F.3d 873 (2003). The government has sought rehearing en banc in both of those cases.

his day-to-day physical control over the detainee. See, *e.g.*, *Robledo-Gonzalez*, 342 F.3d at 673 (detainee must name as respondent "the warden of the facility in which [he] was being held" rather than an official such as the Attorney General who has "power to control some aspect of the petitioner's legal process"). Accordingly, the fact that Commander Marr lacks authority unilaterally to determine the date of Padilla's release should afford no grounds for departing from the immediate custodian rule. See *Al-Marri* v. *Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) (applying immediate custodian rule in habeas challenge brought on behalf of detained enemy combatant).

c. The court of appeals interpreted language in certain of this Court's decisions to sanction departing from the immediate custodian rule. See App., *infra*, 15a-20a (discussing *Ex parte Endo*, 323 U.S. 283 (1944), *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), and *Strait* v. *Laird*, 406 U.S. 341 (1972)).[11] Those decisions address anomalous situations and afford no basis for avoiding the immediate custodian rule in a traditional habeas action challenging present physical confinement.[12]

Moreover, the court of appeals' reliance on those decisions underscores the disagreement among the courts of appeals. Other courts of appeals have examined precisely the same opinions and concluded that they do not support departing

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[11] In *Ahrens* v. *Clark*, 335 U.S. 188 (1948), overruled on other grounds by *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), the Court found it unnecessary to determine whether the Attorney General was the proper habeas respondent. See 335 U.S. at 193.

[12] *Strait* involved an unattached military reservist who was not physically detained and who thus had only a "nominal custodian." 406 U.S. at 344. The petitioner in *Braden* was in the custody of two jurisdictions: he was confined in one State but sought to challenge a detainer lodged against him by another State. See 410 U.S. at 499-500. In *Endo*, the petitioner properly filed in the location of her immediate custodian but was subsequently relocated to a different jurisdiction. 323 U.S. at 306-307.

from the immediate custodian rule. See *Vasquez*, 233 F.3d at 695 (concluding that *Endo* has no application where, as here, "the petitioner file[s] for habeas relief in a jurisdiction where neither he nor his immediate custodian [is] physically located"); *id.* at 494-496 (explaining that *Strait* and *Endo* involved "highly unusual facts" and "cannot plausibly be read to * * * consign to the scrap heap the substantial body of well-reasoned authority holding that a detainee must name his immediate custodian"); *Monk*, 793 F.2d at 369 (holding that "[n]othing in *Braden* supports" deviating from the immediate custodian rule). Accordingly, the court of appeals' jurisdictional analysis is deeply flawed, in conflict with numerous appellate decisions, and merits this Court's review.

2. The court of appeals' conclusion that habeas jurisdiction is coextensive with state long-arm statutes conflicts with the terms of the habeas laws and decisions of other courts of appeals

The habeas statutes confine district courts to issuing the writ "within their respective jurisdictions," 28 U.S.C. 2241(a), a constraint intended by Congress to prevent district courts in habeas cases from reaching beyond the district's territorial boundaries. See *Carbo* v. *United States*, 364 U.S. at 617. Consequently, as the D.C. Circuit has explained, habeas "jurisdiction is proper only in the district in which the immediate * * * custodian is located." *Monk*, 793 F.2d at 369. Even if Secretary Rumsfeld were a proper respondent to the amended petition, therefore, he is located in the Eastern District of Virginia (see *id.* at 369 n.1) and is not subject to habeas jurisdiction in the Southern District of New York.

The court of appeals in this case declined to follow the rule set forth in the habeas statutes and adopted in the D.C. Circuit, holding instead that a district court's habeas jurisdiction extends far beyond the district's territorial boun-

daries to reach any person subject to service under the forum state's long-arm statute. App., *infra*, 21a-26a. Under the court of appeals' view that habeas jurisdiction is defined by state long-arm statutes and that Secretary Rumsfeld is a proper respondent, jurisdiction could lie in this case in virtually *every* federal district court. And while the court asserted that its ruling was limited to the facts of this case (*id.* at 20a-21a), the court's rationale in fact would sanction a comparable result in any case in which a Cabinet-level official is involved in detention decisions. That result, of broadly overlapping habeas jurisdiction among the district courts in a particular case, is incompatible with the statutory restriction confining district courts to "their respective jurisdictions." 28 U.S.C. 2241(a).

In fact, the habeas statutes otherwise make clear that only one district court has jurisdiction in any given case, providing that the "Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application * * * to *the* district court having jurisdiction to entertain it." 28 U.S.C. 2241(b) (emphasis added); see 28 U.S.C. 2242 (application "addressed to the Supreme Court, a justice thereof or a circuit judge * * * shall state the reasons for not making application to the district court of the district in which the applicant is held"). When Congress intends to vest "concurrent jurisdiction to entertain [a habeas] application" in more than one district, Congress makes its intention explicit. 28 U.S.C. 2241(d). Accordingly, the terms of the habeas statutes foreclose the court of appeals' holding that district courts have overlapping habeas jurisdiction under state long-arm laws.[13]

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[13] The court of appeals believed (App., *infra*, 22a-23a) that this Court's decisions in *Braden* and *Strait* support a district court's assertion of long-arm jurisdiction in habeas cases. Other courts of appeals have found, by contrast, that those decisions do not support the exercise of habeas

3. The court of appeals' jurisdictional approach unduly complicates the administration of habeas proceedings

The rule that jurisdiction in a habeas challenge to present, physical confinement lies in the district court with territorial jurisdiction over the immediate custodian not only follows directly from the terms of the habeas statutes, but also is straightforward and easily administered. The court of appeals' approach in this case, by contrast, would give rise to duplicative and overlapping habeas jurisdiction among the district courts.

As the First Circuit has observed, "adopting a broad conception of who qualifies as a custodian will make the litigation of habeas claims more complex, forcing courts in many cases to undertake fact-intensive analyses of venue and forum non conveniens issues." *Vasquez*, 233 F.3d at 694. The Sixth Circuit likewise has explained that "adopting a broader definition of 'custodian' would complicate and extend the duration of habeas corpus proceedings." *Roman*, 340 F.3d at 322. For that reason, and because of the disagreement among the courts of appeals on the rules for determining habeas jurisdiction, this Court should review the court of appeals' holding that jurisdiction over the amended petition properly lies in the Southern District of New York.

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jurisdiction beyond the district's territorial boundaries. See *Vasquez*, 233 F.3d at 695 n.6 (explaining that relevant passage in *Strait* "is not intended to be a rule of general application, but rather, to explain the fact-specific holding in the case itself"); *Monk*, 793 F.2d at 369 (ruling that "[n]othing in *Braden* supports" the exercise of habeas jurisdiction outside "the district in which the immediate * * * custodian is located"); *Guerra*, 786 F.2d at 417 ("The *Braden* decision in no way stands for the proposition * * * that federal courts may entertain a habeas corpus petition when the custodian is outside their territorial jurisdiction.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-2235(L), 03-2438(CON.)

JOSE PADILLA, DONNA R. NEWMAN, AS NEXT FRIEND OF JOSE PADILLA, PETITIONER-APPELLEE-CROSS-APPELLANT

v.

DONALD RUMSFELD, RESPONDENT-APPELLANT-CROSS-APPELLEE

[Dec. 18, 2003]

OPINION

Before: POOLER, B.D. PARKER and WESLEY, Circuit Judges.

POOLER and B.D. PARKER, Circuit Judges.

INTRODUCTION

This habeas corpus appeal requires us to consider a series of questions raised by Secretary of Defense Donald Rumsfeld and by Donna R. Newman, Esq., on behalf of Jose Padilla, an American citizen held by military authorities as an enemy combatant. Padilla is suspected of being associated with al Qaeda and plan-

ning terrorist attacks in this country. The questions were certified by the United States District Court for the Southern District of New York (Michael B. Mukasey, C.J.) and involve, among others: whether the Secretary of Defense is Padilla's "custodian" for habeas purposes, whether the Southern District of New York had jurisdiction over the petition, and whether the President has the authority to detain Padilla as an enemy combatant. We conclude that the Secretary of Defense is a proper respondent and that the District Court had jurisdiction. We also conclude that Padilla's detention was not authorized by Congress, and absent such authorization, the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat.

As this Court sits only a short distance from where the World Trade Center once stood, we are as keenly aware as anyone of the threat al Qaeda poses to our country and of the responsibilities the President and law enforcement officials bear for protecting the nation. But presidential authority does not exist in a vacuum, and this case involves not whether those responsibilities should be aggressively pursued, but whether the President is obligated, in the circumstances presented here, to share them with Congress.

Where, as here, the President's power as Commander-in-Chief of the armed forces and the domestic rule of law intersect, we conclude that clear congressional authorization is required for detentions of American citizens on American soil because 18 U.S.C. § 4001(a) (2000) (the "Non-Detention Act") prohibits such detentions absent specific congressional authorization. Congress's Authorization for Use of Military

Force Joint Resolution, Pub.L. No. 107-40, 115 Stat. 224 (2001) ("Joint Resolution"), passed shortly after the attacks of September 11, 2001, is not such an authorization, and no exception to section 4001(a) otherwise exists. In light of this express prohibition, the government must undertake to show that Padilla's detention can nonetheless be grounded in the President's inherent constitutional powers. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-38, 72 S. Ct. 863, 96 L.Ed. 1153 (Jackson, J., concurring). We conclude that it has not made this showing. In reaching this conclusion, we do not address the detention of an American citizen seized within a zone of combat in Afghanistan, such as the court confronted in *Hamdi* v. *Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) *("Hamdi III")*. Nor do we express any opinion as to the hypothetical situation of a congressionally authorized detention of an American citizen.

Accordingly, we remand to the District Court with instructions to issue a writ of habeas corpus directing Secretary Rumsfeld to release Padilla from military custody within 30 days, at which point the government can act within its legislatively conferred authority to take further action. For example, Padilla can be transferred to the appropriate civilian authorities who can bring criminal charges against him. If appropriate, he can also be held as a material witness in connection with grand jury proceedings. *See United States* v. *Awadallah*, 349 F.3d 42 (2d Cir. 2003). Under any

scenario, Padilla will be entitled to the constitutional protections extended to other citizens.[1]

BACKGROUND

I. The Initial Detention

On May 8, 2002, Jose Padilla, an American citizen, flew on his American passport from Pakistan, via Switzerland, to Chicago's O'Hare International Airport. There he was arrested by FBI agents pursuant to a material witness warrant issued by the Chief Judge of the Southern District of New York in connection with a grand jury investigation of the terrorist attacks of September 11. Padilla carried no weapons or explosives.[2]

The agents brought Padilla to New York where he was held as a civilian material witness in the maximum security wing of the Metropolitan Correctional Center (MCC). At that point, Padilla was under the control of the Bureau of Prisons and the United States Marshal Service. Any immediate threat he posed to national security had effectively been neutralized. On May 15, 2002, he appeared before Chief Judge Mukasey, who appointed Donna R. Newman, Esq., to represent

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[1] Therefore, our holding effectively moots arguments raised by both parties concerning access to counsel, standard of review, and burden of proof.

[2] These details should not be read to suggest that Padilla is in fact innocent or that the government lacked substantial reasons to be suspicious of him. We include them because they are relevant to our analysis of the President's power to detain Padilla as an enemy combatant. As is evident from the government investigation, described below, the government had ample cause to suspect Padilla of involvement in a terrorist plot. We, of course, reach no conclusion as to Padilla's guilt or innocence.

Padilla. Newman "conferred with [Padilla] over a period of weeks in . . . an effort to end [his] confinement." *Padilla ex rel. Newman* v. *Bush*, 233 F. Supp. 2d 564, 576 (S.D.N.Y. 2002) ("*Padilla I*"). She also conferred with Padilla's relatives and with government representatives on Padilla's behalf.

On May 22, Newman moved to vacate the material witness warrant. By June 7, the motion had been submitted for decision. A conference on the motion was scheduled for June 11. However, on June 9, the government notified the court ex parte that (1) it wished to withdraw its subpoena and (2) the President had issued an Order (the "June 9 Order") designating Padilla as an enemy combatant and directing Secretary Rumsfeld to detain him. Chief Judge Mukasey vacated the warrant, and Padilla was taken into custody by Department of Defense (DOD) personnel and transported from New York to the high-security Consolidated Naval Brig in Charleston, South Carolina. At the scheduled June 11 conference, Newman, unable to secure Padilla's signature on a habeas corpus petition, nonetheless filed one on his behalf as "next friend."

For the past eighteen months, Padilla has been held in the Brig in Charleston. He has not been permitted any contact with his counsel, his family or any other non-military personnel. During this period he has been the subject of ongoing questioning regarding the al Qaeda network and its terrorist activities in an effort to obtain intelligence.

II. The Order Authorizing the Detention

In his June 9 Order, the President directed Secretary Rumsfeld to detain Padilla based on findings that Padilla was an enemy combatant who (1) was "closely

associated with al Qaeda, an international terrorist organization with which the United States is at war"; (2) had engaged in "war-like acts, including conduct in preparation for acts of international terrorism" against the United States; (3) had intelligence that could assist the United States to ward off future terrorist attacks; and (4) was a continuing threat to United States security. As authority for the detention, the President relied on "the Constitution and . . . the laws of the United States, including the [Joint Resolution]."[3]

In an unsealed declaration submitted to the District Court, Michael H. Mobbs, a special advisor to the Under Secretary of Defense for Policy (who claims no direct knowledge of Padilla's actions or of the interrogations that produced the information discussed in his declaration), set forth the information the President received before he designated Padilla as an enemy combatant. According to the declaration, Padilla was born in New York, was convicted of murder in 1983, and remained incarcerated until his eighteenth birthday. In 1991, he was convicted on a handgun charge and again sent to prison. He moved to Egypt in 1998 and traveled to several countries in the Middle East and Southwest Asia between 1999 and 2000. During this period, he was closely associated with known members and leaders of al Qaeda. While in Afghanistan in 2001, Padilla became involved with a plan to build and detonate a "dirty bomb" within the United States, and went to Pakistan to receive training on explosives from al Qaeda operatives. There he was instructed by senior al Qaeda officials to return to the United States to conduct reconnaissance and/or other attacks on

[3] The full text of the President's Order is set forth in Appendix A.

behalf of al Qaeda. He then traveled to Chicago, where he was arrested upon arrival into the United States on May 8, 2002. Notwithstanding Padilla's extensive contacts with al Qaeda members and his actions under their direction, the government does not allege that Padilla was a member of al Qaeda.

The government also offered for the District Court's review Mobbs' sealed declaration, which the District Court characterized as "identifying one or more of the sources referred to only in cryptic terms in the [unsealed] Mobbs Declaration" and "set[ting] forth objective circumstantial evidence that corroborates the factual allegations in the [unsealed] Mobbs Declaration." *Padilla I*, 233 F. Supp. 2d at 609.[4]

III. District Court Proceedings on the Habeas Petition

On June 26, 2002, the government moved to dismiss Padilla's habeas petition on the grounds that Newman lacked standing to act as Padilla's next friend, that Secretary Rumsfeld was not a proper respondent, and that, in any event, the District Court lacked personal jurisdiction over him. On the merits, the government contended that each Mobbs declaration contained sufficient evidence of Padilla's association with al Qaeda and his intention to engage in terrorist acts in this country on behalf of al Qaeda to establish the legality of holding Padilla in military custody as an enemy combatant.

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[4] Prior to oral argument, we reviewed the sealed Mobbs declaration as well as a sealed declaration of Vice Admiral Lowell E. Jacoby, the Director of the Defense Intelligence Agency, which was submitted to the District Court in connection with Secretary Rumsfeld's motion for reconsideration. Nothing in the ensuing discussion or holdings relies on either of these sealed documents.

Padilla contended that the President lacked authority to detain an American citizen taken into custody in the United States. At a minimum, he sought access to counsel.

In a comprehensive and thorough opinion, the District Court determined that (1) Newman could bring the habeas petition as Padilla's next friend; (2) Secretary Rumsfeld was a proper respondent and the District Court had jurisdiction over him; (3) the Constitution and statutory law give the President authority to detain American citizens as enemy combatants; (4) Padilla was entitled to consult with counsel to pursue his habeas petition "under conditions that will minimize the likelihood that he [could] use his lawyers as unwilling intermediaries for the transmission of information to others"; (5) Padilla could present facts and argument to the court to rebut the government's showing that he was an enemy combatant; and (6) the court would "examine only whether the President had some evidence to support his finding that Padilla was an enemy combatant, and whether that evidence has been mooted by events subsequent to his detention." *Padilla I*, 233 F. Supp. 2d at 569-70 (S.D.N.Y. 2002). The court did not rely on the sealed Mobbs declaration in making its rulings. *Id.* at 610.

The District Court's order directed the parties to set conditions under which Padilla could meet with his counsel, but Secretary Rumsfeld declined to do so. Instead, more than a month after the *Padilla I* decision, the government moved for reconsideration of the portion of *Padilla I* that allowed him access to counsel, on the ground that no conditions could be set that would protect the national security. *Padilla ex rel. Newman* v. *Rumsfeld*, 243 F. Supp. 2d 42, 43-46

(S.D.N.Y. 2003) ("*Padilla II*"). Although Chief Judge Mukasey expressed doubts as to the procedural regularity of the motion, he nonetheless entertained it on the merits and denied it. *Id.* at 48-49, 57.

The government then moved for certification of the issues which it had lost. Chief Judge Mukasey certified the following questions as "involv[ing] . . . controlling question[s] of law as to which there is substantial ground for difference of opinion" and the resolution of which "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (2000); *Padilla ex rel. Newman* v. *Rumsfeld*, 256 F. Supp. 2d 218, 222-23 (S.D.N.Y. 2003) ("*Padilla III*"):

> (1) Is the Secretary of Defense, Donald Rumsfeld, a proper respondent in this case?
>
> (2) Does this court have personal jurisdiction over Secretary Rumsfeld?
>
> (3) Does the President have the authority to designate as an enemy combatant an American citizen captured within the United States, and, through the Secretary of Defense, to detain him for the duration of armed conflict with al Qaeda?
>
> (4) What burden must the government meet to detain petitioner as an enemy combatant?
>
> (5) Does petitioner have the right to present facts in support of his habeas corpus petition?
>
> (6) Was it a proper exercise of this court's discretion and its authority under the All Writs Act to direct that petitioner be afforded access to

> counsel for the purpose of presenting facts in support of his petition?

Id. at 223.

On June 10, 2003, this Court granted the parties' application for an interlocutory appeal.[5]

DISCUSSION

I. Preliminary Issues

A. Next Friend Status [6]

The first of several issues in this appeal concerns attorney Newman's standing to proceed as "next friend" on Padilla's behalf. The government contends that Newman lacks standing because next friend status is restricted to counsel with a "longstanding" connection to a detainee, and that Newman's relationship with

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[5] Twelve amici submitted briefs in support of Petitioner and one in support of Respondent. Almost all of these briefs have been helpful to us. We particularly appreciate the amici's care in emphasizing different issues and thus eliminating much of the redundancy that would otherwise exist. At oral argument on November 17, 2003, we requested post-argument submissions concerning the legislative history of the congressional acts urged to be dispositive of this case. These submissions were received by the Clerk's office on November 28, 2003, and by chambers on December 2, 2003.

[6] The District Court characterized its finding that Newman could act as next friend as "a ruling that I cannot imagine will be open to serious question." *Padilla III*, 256 F. Supp. 2d at 221. While the Order certifying this matter for interlocutory appeal did not certify the next friend issue, this Court "may address any issue fairly included within the certified order" because "it is the order that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205, 116 S. Ct. 619, 133 L.Ed.2d 578 (1996) (internal quotation marks and citation omitted).

Padilla is not sufficient. Newman, on the other hand, contends that the established attorney-client relationship, under which she represented Padilla after his arrival in New York, is adequate for next friend standing because the nature of the relationship, not simply its duration, controls.

Next friend standing is authorized by 28 U.S.C. § 2242 (2000), which declares that a habeas petition may be brought "by the person for whose relief it is intended *or by someone acting in his behalf*." *Id.* (emphasis added). In *Whitmore* v. *Arkansas*, 495 U.S. 149, 110 S. Ct. 1717, 109 L.Ed.2d 135 (1990), the Supreme Court noted that next friend standing "has long been an accepted basis for jurisdiction in certain circumstances," and has most often been invoked "on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves." *Id.* at 162. "A 'next friend' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest." *Id.* at 163. A next friend "resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another." *Morgan* v. *Potter*, 157 U.S. 195, 198, 15 S. Ct. 590, 39 L.Ed. 670 (1895). The availability of next friend status is, however, subject to significant limitations:

> Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action.

> Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest. The burden is on the "next friend" clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.

Whitmore, 495 U.S. at 163-64 (internal citations omitted). These "limitations on the 'next friend' doctrine are driven by the recognition that '[i]t was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends.'" *Id.* at 164 (quoting *United States ex rel. Bryant* v. *Houston*, 273 F. 915, 916 (2d Cir. 1921)).[7]

There is no dispute that Padilla is unable to file a petition on his own behalf—he is being held incommunicado. Similarly, there is no issue as to Newman's professional relationship with Padilla. As a member of the bar, she is, of course, duty-bound to represent Padilla and to protect his interests zealously and within the bounds of the law. *See* N.Y. Code Prof. Resp. DR 7-101. Newman was assigned to represent Padilla when he was first brought into the Southern District and, before his transfer to military custody, she had begun

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[7] Whether a person seeking next friend status must have a "significant relationship" to the petitioner has not been resolved by this Court or by the Supreme Court. The Supreme Court merely said that "it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest." *Whitmore*, 495 U.S. at 163-64. In the ensuing discussion, we assume—without holding—that there is a significant relationship requirement for next friend status.

to advise Padilla about the legal implications of his apprehension and confinement. From May 15 to June 9, 2002, she met with him in an effort to vacate the material witness warrant and to secure his release. She filed motions on his behalf that attacked the legal basis of his confinement, met with his family and appeared in court with him. Moreover, she was perhaps the only person aware of his wishes when he was taken into custody by the DOD, and nothing in the record before us has called into question her suitability to pursue those wishes. Finally, she has continued ably to represent him and indeed she, with others, argued this appeal on his behalf. We find this relationship to be a significant one, notwithstanding its duration. We also find it one in which Newman is neither an "intruder" nor an "uninvited meddler," *Whitmore*, 495 U.S. at 164, and, consequently, we conclude that the District Court properly approved Newman as Padilla's next friend.[8]

B. Jurisdictional Issues

The government argues that because the proper respondent is Padilla's immediate custodian—Commander Melanie A. Marr, the commander of the brig in South Carolina, not Secretary Rumsfeld—the petition must be dismissed or transferred to the District of South Carolina because the Southern District of New York does not have jurisdiction. The government bases this contention on 28 U.S.C. §§ 2242 and 2243, which

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[8] The facts of this case distinguish it from *Hamdi* v. *Rumsfeld*, 294 F.3d 598 (2002) ("*Hamdi I*"), and *Coalition of Clergy, Lawyers, and Professors* v. *Bush*, 310 F.3d 1153 (9th Cir. 2002), cert. denied, —- U.S. ——, 123 S. Ct. 2073, 155 L.Ed.2d 1060 (2003), on which the government relies. In both of those cases, the putative next friends had *no* relationship with the petitioner. *Hamdi I*, 294 F.3d at 606-607; *Coalition of Clergy*, 310 F.3d at 1162.

require a petitioner to "allege . . . the name of the person who has custody over him," instruct that the writ "be directed to the person having custody of the person detained," and provide that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."[9] The government asserts this language "indicates . . . there is only one proper respondent to a habeas petition," Commander Marr, who is not within the jurisdiction of the Southern District of New York. *Vasquez* v. *Reno*, 233 F.3d 688, 693 (1st Cir. 2000). The government's jurisdictional argument thus raises two issues: who is the proper respondent and whether the Southern District of New York has jurisdiction over that individual.

i. Is Secretary Rumsfeld a Proper Respondent?

The government contends that in the usual habeas corpus case brought by a federal prisoner, courts have consistently held that the proper respondent is the warden of the facility, not the Attorney General. *See, e.g.*, *Sanders* v. *Bennett*, 148 F.2d 19, 20 (D.C. Cir.

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[9] Other courts have rejected this argument. In *Eisel* v. *Sec'y of the Army*, 477 F.2d 1251 (D.C. Cir. 1973), a case involving an inactive reservist, the court stated:

> [W]hile the statute does provide that the action shall be against the "person having custody of the person detained," it does not define "custody" or specify who the person having "custody" will be. Nowhere does the statute speak of an "immediate custodian" or intimate that an action must necessarily be instituted in the location of such an "immediate custodian," even if it were possible to grant substance to the vague concept of "immediate custodianship."

Id. at 1258 (footnotes omitted).

1945). Similarly, it argues the proper respondent to a petition brought by a military prisoner challenging his confinement is the warden of the facility holding the soldier, not the Secretary of Defense. *See, e.g.*, *Monk* v. *Sec'y of the Navy*, 793 F.2d 364, 369 (D.C. Cir. 1986).[10] This traditional rule has been described as "a practical one based on common sense administration of justice." *Sanders*, 148 F.2d at 20. Relying on these principles, the government argues that the petition must be brought against Commander Marr, not Secretary Rumsfeld.

But this is not the usual situation. "[W]hat makes the usual case usual is that the petitioner is serving a sentence, and the list of those other than the warden who are responsible for his confinement includes only people who have played particular and discrete roles in confining him, notably the prosecuting attorney and the sentencing judge, and who no longer have a substantial and ongoing role in his continued confinement." *Padilla I*, 233 F. Supp. 2d at 579. Thus, "[t]he warden becomes the respondent of choice almost by default." *Id.*

When habeas petitions are brought by persons detained for reasons other than federal criminal violations, the Supreme Court has recognized exceptions to the general practice of naming the immediate physical custodian as respondent. "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that mis-

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[10] The only exceptions involve limited circumstances where prisoners are held abroad with no domestic forum available or where the prisoner is being held at an undisclosed location. *See Demjanjuk* v. *Meese*, 784 F.2d 1114, 1115-16 (D.C. Cir. 1986).

carriages of justice within its reach are surfaced and corrected." *Harris* v. *Nelson*, 394 U.S. 286, 291, 89 S. Ct. 1082, 22 L.Ed.2d 281 (1969). Moreover, the courts "have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Lee* v. *United States*, 501 F.2d 494, 503 n.9 (8th Cir. 1974) (Webster, J., concurring) (quoting *Hensley* v. *Municipal Court*, 411 U.S. 345, 350, 93 S. Ct. 1571, 36 L.Ed.2d 294 (1973)).

Ex parte Endo, 323 U.S. 283, 65 S. Ct. 208, 89 L.Ed. 243 (1944), for example, involved a Japanese-American woman originally interned at Tulelake, California but later transferred to an internment camp in Utah. The Court held that her transfer did not destroy the California district court's jurisdiction over the habeas petition, because there were potential respondents—the Secretary of the Interior or national officials of the War Relocation Authority—still within the court's jurisdictional reach. *Id.* at 304-06. Rather than formalistically require that Endo's immediate physical custodian be designated as the respondent, the Court recognized the flexibility of the Writ and concluded that the petition could properly be directed against national-level officials who have power to "produce[]" the petitioner even though they were not the immediate custodians. *Id.* at 305. [11]

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[11] Four years later in *Ahrens* v. *Clark*, 335 U.S. 188, 68 S. Ct. 1443, 92 L.Ed. 1898 (1948), the Supreme Court was again confronted with the issue. *Ahrens* involved habeas petitions brought by German immigrants detained on Ellis Island under removal orders issued by the Attorney General. The petitions named the Attorney General as sole respondent. The *Ahrens* Court

Similarly, in *Strait* v. *Laird*, 406 U.S. 341, 92 S. Ct. 1693, 32 L.Ed.2d 141 (1972), the Court held that Strait, a California-domiciled inactive Army reservist under the command of an Indiana-based officer, could file a habeas action against that officer in California district court.[12] Although Strait's military records were kept with his commanding officer at Fort Benjamin Harrison, Indiana, Strait was at all times domiciled in California and was never in or assigned to Indiana. When ordered to report to active duty at Fort Gordon, Georgia, he filed an application for discharge as a

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determined the petitions had to be dismissed because the detainees had not filed petitions in the district court for the district in which they were confined. *Id.* at 193. In so holding, *Ahrens* left open the question of whether the Attorney General, under whose removal orders and "custody and control" the aliens were detained, could be a proper respondent to the petitions. *Id.* at 189, 193.

[12] In between *Endo* and *Strait*, the Court also decided *Schlanger* v. *Seamans*, 401 U.S. 487, 91 S. Ct. 995, 28 L.Ed.2d 251 (1971), which addressed a habeas petition filed by a United States soldier temporarily studying at Arizona State University but under the control of military officers at Moody Air Force Base ("Moody AFB") in Georgia. Schlanger filed a petition in Arizona district court alleging his enlistment contract had been breached and his freedom was being unlawfully restricted by the military. The petition named the Secretary of the Air Force, the Commander of Moody AFB, and the Commander of ROTC on Arizona State University's campus as respondents. In reaching its conclusion that the Commander of Moody AFB was Schlanger's custodian and outside the reach of the territorial jurisdiction of the Arizona district court, the Court did not discuss whether the Secretary of the Air Force might be both within the court's jurisdiction and a proper respondent. In our opinion, by this omission and the Court's emphasis on the Commander at Moody as an essential party, *Schlanger* suggested that the proper respondent is the person who exercises the power to limit petitioner's liberty.

conscientious objector. His application was processed at Fort Ord, California and his superiors in California recommended discharge, but on review, the application was denied. Thereafter, Strait filed a petition for a writ of habeas corpus in California naming his commander in Indiana as the respondent. The Supreme Court held that jurisdiction was proper in California. It concluded that "virtually every face-to-face contact between [Strait] and the military occurred in California" at the direction of the Indiana officer. *Id.* at 344. Accordingly, the Court held that because the Indiana commander had the responsibility to decide whether to release Strait, he was an appropriate respondent despite the intervening level of military personnel that dealt with Strait directly.

Under *Strait's* "broad concept" of custodian, the appropriate focus was whether the respondent, through his agent, was responsible for Strait's detention.[13] *Strait*, however, did not calibrate the distance in the chain of command sufficient for designation as a

[13] A number of courts have embraced this approach. For example, in *Armentero* v. *INS*, 340 F.3d 1058 (9th Cir. 2003), the Ninth Circuit held that the Attorney General was the proper respondent to an immigration habeas petition, citing the necessity to base the concept of "custodian" for the purpose of habeas relief "more on the legal reality of control than the technicalities of who administers [to petitioner] on a day-to-day basis." *Id.* at 1070. Although we acknowledge the circuit split regarding the propriety of designating the Attorney General as the habeas respondent to an immigrant's petition, *e.g.*, *Vasquez* v. *Reno*, 233 F.3d 688, 696 (1st Cir. 2000) (holding that the Attorney General was not a proper respondent), as well as our own Court's reluctance to reach the question, *see Henderson* v. *INS*, 157 F.3d 106, 128 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999), we are satisfied that the unique involvement of Secretary Rumsfeld distinguishes this case from the typical immigrant petition.

"custodian" for habeas purposes. Although Strait named the Secretary of Defense as a respondent in addition to Strait's Indiana commanding officer, the Court did not discuss whether the Secretary was a proper respondent. In any event, it was clear there, unlike here, that the Secretary had no direct responsibility for the denial of Strait's application for conscientious objector status.

Finally, in *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 93 S. Ct. 1123, 35 L.Ed.2d 443 (1973), Kentucky filed a detainer against Braden while he was imprisoned in Alabama on unrelated charges. The Court held that, notwithstanding his confinement in Alabama, he could file a habeas petition against Kentucky authorities in Kentucky federal district court to challenge Kentucky's alleged failure to grant him a speedy trial on that state's charges.[14] *Id.* at 500. The Court determined that 28 U.S.C. § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the *custodian* of the prisoner. The fact that "the prisoner himself [was] confined outside the court's territorial jurisdiction" was immaterial; what was dispositive was the court's jurisdiction over the "custodian." *Id.* at 495.[15] Importantly, the proper

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[14] *Braden* overruled, in part, the Court's earlier decision in *Ahrens* that a habeas petition could only be filed in a court sitting within the district in which the petitioner is confined. *See supra* note 11; *see also infra* Section I.B.ii.

[15] In addition to the cases we already have cited, prisoners in other Supreme Court cases have named someone other than their immediate custodian as the respondent. *See Garlotte* v. *Fordice*, 515 U.S. 39, 42, 115 S. Ct. 1948, 132 L.Ed.2d 36 (1995) (respondent named by an incarcerated prisoner was the governor of the state and not the prison warden); *Toth* v. *Quarles*, 350 U.S. 11, 76 S. Ct. 1, 100 L.Ed. 8 (1955) (Secretary of the Air Force named as

respondent was the entity with the power to limit the petitioner's freedom: the Kentucky authorities that filed the detainer. Simply put, Braden could not seek relief from the detainer without making the Kentucky court a party to the proceeding.[16]

The unique role Secretary Rumsfeld plays in this matter leads us to conclude that he is a proper respondent. Secretary Rumsfeld was charged by the President in the June 9 Order with detaining Padilla. In following that Order, the Secretary sent DOD personnel into the Southern District of New York to take custody of Padilla. Secretary Rumsfeld, or his designees, determined that Padilla would be sent to the brig in South Carolina. Although Commander Marr is the commander of the Brig, the legal reality of control is vested with Secretary Rumsfeld, since only he—not Commander Marr—could inform the President that further restraint of Padilla as an enemy combatant is no longer necessary. In this respect, "the extraordinary and pervasive role that [Secretary Rumsfeld] played in [this] matter[ ] is virtually unique." *Henderson* v. *INS*,

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respondent by ex-service member in military custody in Korea); *Burns* v. *Wilson*, 346 U.S. 137, 73 S. Ct. 1045, 97 L.Ed. 1508 (1953) (Secretary of Defense named as respondent by service member held in military custody in Guam). Although these cases do not analyze the propriety of naming a high level official rather than an immediate physical custodian as the respondent, they certainly suggest that there is no inflexible rule that the immediate custodian is the only proper respondent.

[16] While *Braden* is clearly about the jurisdiction of the court, its resolution rests in part on determining the proper custodian/respondent. Recognizing the overlap and interrelationship of these issues, it is important to note we must first determine if Secretary Rumsfeld is a proper respondent. The jurisdictional analysis logically follows thereafter.

157 F.3d 106, 126 (2d Cir. 1998).[17] In fact, this degree of Cabinet-level involvement is unprecedented as far as we have been able to determine. Accordingly, we do not undertake to articulate a rule defining the proper respondent in a habeas case other than one involving a petitioner designated as an enemy combatant under circumstances congruent with Padilla's designation and detention. We only hold that, here, Secretary Rumsfeld is the proper respondent.

ii. Whether the Court has Jurisdiction over Secretary Rumsfeld

The government argues that even if Secretary Rumsfeld were a proper respondent, he is located in the Eastern District of Virginia beyond the District Court's habeas jurisdiction, because 28 U.S.C. § 2241(a) limits district courts to issuing writs "within their respective jurisdictions," 28 U.S.C. § 2241(a), and this means that "habeas corpus jurisdiction does not extend to officials outside the court's territorial limits." *Malone* v. *Calderon*, 165 F.3d 1234, 1237 (9th Cir. 1999). Under this analysis, long-arm jurisdiction is not applicable to habeas petitions. Newman, on the other hand, maintains that a federal district court sitting in New York has habeas jurisdiction over a non-resident "custodian"

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[17] Moreover, circumstances we foresaw in *Billiteri* v. *United States Board of Parole*, 541 F.2d 938 (2d Cir. 1978), indicate Secretary Rumsfeld is an appropriate respondent in this case. *Billiteri* held that the Board of Parole is not an appropriate respondent in habeas petitions involving prisoners seeking early parole. *Id.* at 948. Nevertheless, *Billiteri* also noted the possibility that "when *the Board itself* has caused a parolee to be detained for violation of his parole," the parole board may qualify as a custodian for habeas purposes. *Id.* (emphasis added). Here, Secretary Rumsfeld by his own actions and decisions caused Padilla to be detained.

if he can be reached under the state's process—here, New York's long-arm statute. *See* N.Y. C.P.L.R. § 302 (McKinney 2003).

The Supreme Court in *Ahrens* v. *Clark*, 335 U.S. 188, 68 S. Ct. 1443, 92 L.Ed. 1898 (1948), had construed section 2241(a)'s language of "within their respective jurisdictions" to require a habeas petitioner to be physically present within the district. *See id.* at 190. But *Braden* overruled *Ahrens* and dispensed with this requirement:

> Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Braden, 410 U.S. at 495.

Moreover, Supreme Court law predating *Braden* supports the conclusion that habeas jurisdiction requires only that the district court have personal jurisdiction over the respondent—long-arm or otherwise. In *Strait*, the Court held that the reservist located in California could bring a habeas petition in that state against his Indiana-based commanding officer, rejecting the contention that long-arm jurisdiction does not apply in the habeas context:

> Strait's commanding officer is "present" in California through the officers in the hierarchy of the

> command who processed this serviceman's application for discharge. To require him to go to Indiana where he never has been or assigned to be would entail needless expense and inconvenience.

406 U.S. at 345 (footnote omitted). The Court added:

> That such "presence" may suffice for personal jurisdiction is well settled, *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L.Ed.2d 223; *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95, and the concept is also not a novel one as regards habeas corpus jurisdiction. In *Ex parte Endo*, 323 U.S. 283, 307, 65 S. Ct. 208, 89 L.Ed. 243, we said that habeas corpus may issue "if a respondent who has custody of the prisoner is within reach of the court's process."

Id. n.2. The issue, then, is whether Secretary Rumsfeld is subject to the personal jurisdiction of the Southern District of New York. *See*, *e.g.*, *United States ex rel. Sero* v. *Preiser,* 506 F.2d 1115, 1128-29 (2d Cir. 1974) (interpreting *Braden* to require only that the custodian be reachable by the state's long-arm statute).

The breadth of a federal court's personal jurisdiction is determined by the law of the state in which the district court is located. *See* Fed.R.Civ.P. 4(k)(1)(A); *United States* v. *First Nat'l Bank*, 379 U.S. 378, 381, 85 S. Ct. 528, 13 L.Ed.2d 365 (1965); *Henderson*, 157 F.3d at 123. New York's long-arm statute provides that personal jurisdiction may be asserted over any non-domiciliary if, "in person or through an agent," he "transacts any business within the state" or "commits a tortious act within the state," as long as the particular cause of action asserted is one "arising from" any of those acts.

N.Y. C.P.L.R. § 302(a)(1), (2) (McKinney 2003).[18] Its purpose was to extend the jurisdiction of New York courts over nonresidents who have "engaged in some purposeful activity [here] in connection with the matter in suit." *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 457, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965). Section 302 is a single-act statute; jurisdiction attaches if the defendant engages in a single purposeful activity that has a substantial relationship or articulable nexus to the claim asserted. *See Parke-Bernet Galleries, Inc.* v. *Franklyn*, 26 N.Y.2d 13, 16-17, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1969); *see also Henderson*, 157 F.3d at 123. Moreover, the statute's jurisprudential gloss and its legislative history suggest that its "transacts business" clause is not restricted to commercial activity.[19] In fact, the

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[18] Secretary Rumsfeld argues only that long-arm jurisdiction is inapplicable in the habeas context. He does not argue that section 302(a)(1) does not reach his activities in this state. We choose to address this issue because neither the courts of this circuit nor the New York courts have had an opportunity to examine the application of section 302(a)(1) in this unusual context.

[19] The term "transacts any business" has been held to include: engaging in active bidding on an open phone line from California, *Parke-Bernet*, 26 N.Y.2d at 19, 308 N.Y.S.2d 337, 256 N.E.2d 506; the conducting of proceedings and disciplinary hearings on membership by a private organization, *Garofano* v. *U.S. Trotting Assoc.*, 335 N.Y.S.2d 702, 705-06 (N.Y. Sup. Ct. 1974); the execution of a separation agreement, *Kochenthal* v. *Kochenthal*, 28 A.D.2d 117, 282 N.Y.S.2d 36, 38 (N.Y. App. Div. 1967); the making of a retainer for legal services, *Elman* v. *Benson*, 32 A.D.2d 422, 302 N.Y.S.2d 961, 964-65 (N.Y. App. Div. 1969); the entry into New York by non-domiciliary defendants to attend a meeting, *Parker* v. *Rogerson*, 33 A.D.2d 284, 307 N.Y.S.2d 986, 994-95 (N.Y. App. Div. 1970), appeal dismissed, 26 N.Y.2d 964, 311 N.Y.S.2d 7, 259 N.E.2d 479 (1970); and the conducting of audits, *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 367 F. Supp. 107, 121 (S.D.N.Y. 1973).

advisory committee which drafted the section decided to follow the broad, inclusive language of the Illinois long-arm statute then in effect, adopting as the criterion the "[transaction of] *any* business within the state." N.Y. C.P.L.R. § 302(a)(1); Ill. Stat. Ann., ch. 110 § 17 (Smith-Hurd 1956). Its legislative history indicates that it was designed to take advantage of the "new [jurisdictional] enclave" opened up by *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945), where the nonresident defendant has engaged in some purposeful activity in this State in connection with the suit. *See* N.Y. Advisory Comm. Rep. (N.Y. Legis. Doc., 1958, No. 13), at 39-40.[20]

We have little difficulty concluding that Secretary Rumsfeld is amenable to process under New York's long-arm statute. Although the Department of Justice ("DOJ") was responsible for bringing Padilla into the Southern District as a material witness and for detaining him at the MCC—a DOJ facility—all of the activities salient to Padilla's claim were completed or initiated by Secretary Rumsfeld or his agents in the Southern District of New York. Secretary Rumsfeld was charged by the President in the June 9 Order with

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[20] Although not relevant to the resolution of this case, it is important to note that in setting forth certain bases of permitted activity for long-arm jurisdiction, section 302 does not reach the outposts of constitutionally permitted activity. *See Banco Ambrosiano, S.p.A.* v. *Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 67, 476 N.Y.S.2d 64, 464 N.E.2d 432 (1984). Thus, a situation could occur in which the necessary contacts to satisfy due process are present, but *in personam* jurisdiction is not obtained in New York because the statute does not authorize it. *See* Seigel, N.Y. Prac., § 85, at 137 (3d ed. 1999).

detaining Padilla.[21] Pursuant to that Order, the material witness warrant was withdrawn and Secretary Rumsfeld was instructed to take custody of Padilla. Secretary Rumsfeld then sent DOD personnel into the Southern District of New York to (1) remove Padilla from the MCC, (2) detain Padilla, and (3) transfer him to South Carolina. Most importantly, Padilla's status was transformed in the Southern District—he arrived in New York a material witness in a grand jury investigation related to the September 11 attacks and departed an enemy combatant. In our opinion, these purposeful contacts of Secretary Rumsfeld with the Southern District of New York, whether personal or through agents, were substantially related to the claims asserted by Padilla and are therefore sufficient to confer personal jurisdiction over the Secretary by the District Court. *See* N.Y. C.P.L.R. § 302 (McKinney 2003); *see also Longines*, 15 N.Y.2d at 457, 261 N.Y.S.2d 8, 209 N.E.2d 68.[22]

II. Power to Detain

A. Introduction

The District Court concluded, and the government maintains here, that the indefinite detention of Padilla

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[21] Although the complained of action in this case is not the signing of the June 9 Order, it is nonetheless relevant given its charge to Secretary Rumsfeld.

[22] Similarly, we believe personal jurisdiction of Secretary Rumsfeld comports with due process. *See Asahi Metal Indus. Co., Ltd.* v. *Superior Court of California*, 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987). We believe that requiring Secretary Rumsfeld to litigate this matter in the Southern District of New York imposes no significant burden upon him—and, indeed, is most convenient for the parties—especially given the fact that this case has, for the last 18 months, been actively litigated in this district.

was a proper exercise of the President's power as Commander-in-Chief. The power to detain Padilla is said to derive from the President's authority, settled by *Ex parte Quirin*, 317 U.S. 1 (1942), to detain enemy combatants in wartime—authority that is argued to encompass the detention of United States citizens seized on United States soil. This power, the court below reasoned, may be exercised without a formal declaration of war by Congress and "even if Congressional authorization were deemed necessary, the Joint Resolution, passed by both houses of Congress, . . . engages the President's full powers as Commander in Chief." *Padilla I*, 233 F. Supp. 2d at 590. Specifically, the District Court found that the Joint Resolution acted as express congressional authorization under 18 U.S.C. § 4001(a), which prohibits the detention of American citizens absent such authorization. *Id.* at 598-99. In addition, the government claims that 10 U.S.C. § 956(5), a statute that allows the military to use authorized funds for certain detentions, grants authority to detain American citizens.

These alternative arguments require us to examine the scope of the President's inherent power and, if this is found insufficient to support Padilla's detention, whether Congress has authorized such detentions of American citizens. We reemphasize, however, that our review is limited to the case of an American citizen arrested in the United States, not on a foreign battlefield or while actively engaged in armed conflict against the United States. As the Fourth Circuit recently—and accurately—noted in *Hamdi* v. *Rumsfeld*, "[t]o compare this battlefield capture [of Hamdi] to the domestic arrest in *Padilla* v. *Rumsfeld* is to compare

apples and oranges." 337 F.3d 335, 344 (4th Cir. 2003) ("*Hamdi IV*") (Wilkinson, J., concurring).

B. The *Youngstown* Analysis

Our review of the exercise by the President of war powers in the domestic sphere starts with the template the Supreme Court constructed in *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring). *Youngstown* involved the validity of President Truman's efforts during the Korean War to seize the country's steel mills on the eve of a nationwide strike by steelworkers. *Id.* at 582-85. Writing for the majority, Justice Black explained that the President's power "must stem either from an act of Congress or from the Constitution itself." *Id.* at 585. The Court held that the seizure could not be justified as a function of the President's Commander-in-Chief powers and that it had not been authorized by Congress. *Id.* at 587-88. Justice Jackson's concurrence, which provides the framework for reviewing the validity of executive action, posits three categories for evaluating the exercise of emergency powers by the President. *See*, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 668-69, 101 S. Ct. 2972, 69 L.Ed.2d 918 (1981); *Hamdi* v. *Rumsfeld*, 296 F.3d 278, 281 (4th Cir. 2002) ("*Hamdi II*").

First, when the President acts pursuant to an express or implied authorization from 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*, 343 U.S. at 635 (Jackson, J., concurring). This category is exemplified by the power exercised by the President in *Quirin* and in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S. Ct. 216, 81 L.Ed. 255 (1936). Second, when the

President acts in the absence of either a congressional grant or denial of authority, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Youngstown*, 343 U.S. at 637. Finally, the third category includes those situations where the President takes measures incompatible with the express or implied will of Congress. In such cases, "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* The "[c]ourts can sustain exclusive presidential control [in this situation] only by disabling the Congress from acting upon the subject." *Id.* at 637-38.

Here, we find that the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat. We also conclude that the Non-Detention Act serves as an explicit congressional "denial of authority" within the meaning of *Youngstown*, thus placing us in *Youngstown's* third category. Finally, we conclude that because the Joint Resolution does not authorize the President to detain American citizens seized on American soil, we remain within *Youngstown's* third category.

i. Inherent Power

The government contends that the President has the inherent authority to detain those who take up arms against this country pursuant to Article II, Section 2, of the Constitution, which makes him the Commander-in-Chief, and that the exercise of these powers domestically does not require congressional authorization.

Moreover, the argument goes, it was settled by *Quirin* that the military's authority to detain enemy combatants in wartime applies to American citizens as well as to foreign combatants. There the Supreme Court explained that "universal agreement and practice" under "the law of war" holds that "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces" and "[u]nlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 30-31. Finally, since the designation of an enemy combatant bears the closest imaginable connection to the President's constitutional responsibilities, principles of judicial deference are said by the government to assume heightened significance.

We agree that great deference is afforded the President's exercise of his authority as Commander-in-Chief. *See Dep't of the Navy* v. *Egan*, 484 U.S. 518, 530, 108 S. Ct. 818, 98 L.Ed.2d 918 (1988). We also agree that whether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts. *See Johnson* v. *Eisentrager*, 339 U.S. 763, 789, 70 S. Ct. 936, 94 L.Ed. 1255 (1950) ("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."); *The Prize Cases*, 67 U.S. (2 Black) 635, 670, 17 L.Ed. 459 (1862). Because we have no authority to do so, we do not address the government's underlying assumption that an undeclared war exists between al Qaeda and the United States. We have no quarrel with the

former chief of the Justice Department's Criminal Division, who said:

> For [al Qaeda] chose not to violate the law but to attack the law and its institutions directly. Their proclaimed goal, however unrealistic, was to destroy the United States. They used powerful weapons of destructive force and openly declared their willingness to employ even more powerful weapons of mass destruction if they could lay hold of them. They were as serious a threat to the national security of the United States as one could envision.

Michael Chertoff, *Law, Loyalty, and Terror: Our Legal Response to the Post-9-11 World*, Wkly. Standard, Dec. 1, 2003, at 15.

However, it is a different proposition entirely to argue that the President even in times of grave national security threats or war, whether declared or undeclared, can lay claim to any of the powers, express or implied, allocated to Congress. The deference due to the Executive in its exercise of its war powers therefore only starts the inquiry; it does not end it. Where the exercise of Commander-in-Chief powers, no matter how well intentioned, is challenged on the ground that it collides with the powers assigned by the Constitution to Congress, a fundamental role exists for the courts. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). To be sure, when Congress and the President act together in the conduct of war, "it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs." *Hirabayashi* v. *United States*, 320 U.S. 81, 93, 63 S. Ct. 1375, 87 L.Ed. 1774 (1943). But when the Executive acts, even in the conduct of war, in the face of apparent

congressional disapproval, challenges to his authority must be examined and resolved by the Article III courts. *See Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

These separation of powers concerns are heightened when the Commander-in-Chief's powers are exercised in the domestic sphere. The Supreme Court has long counseled that while the Executive should be "indulge[d] the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society," he enjoys "no such indulgence" when "it is turned inward." *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring). This is because "the federal power over external affairs [is] in origin and essential character different from that over internal affairs," and "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Curtiss-Wright*, 299 U.S. at 319, 320. But, "Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy." *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). Thus, we do not concern ourselves with the Executive's inherent wartime power, generally, to detain enemy combatants on the battlefield. Rather, we are called on to decide whether the Constitution gives the President the power to detain an American citizen seized in this country until the war with al Qaeda ends.

The government contends that the Constitution authorizes the President to detain Padilla as an enemy

combatant as an exercise of inherent executive authority. Padilla contends that, in the absence of express congressional authorization, the President, by his June 9 Order denominating Padilla an enemy combatant, has engaged in the "lawmaking" function entrusted by the Constitution to Congress in violation of the separation of powers. In response, no argument is made that the Constitution expressly grants the President the power to name United States citizens as enemy combatants and order their detention. Rather, the government contends that the Commander-in-Chief Clause implicitly grants the President the power to detain enemy combatants domestically during times of national security crises such as the current conflict with al Qaeda. U.S. Const. art. II, § 2.

As an initial matter, we note that in its explicit vesting of powers in Articles I and II, the Constitution circumscribes and defines the respective functions of the political branches. *INS* v. *Chadha*, 462 U.S. 919, 946, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983) ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . ."). The Constitution gives Congress the full legislative powers of government and at the same time, gives the President full executive authority and responsibility to "take care" that the laws enacted are faithfully executed. U.S. Const. art I, § 1, art. II, §§ 1, 3; *Loving* v. *United States*, 517 U.S. 748, 758, 116 S. Ct. 1737, 135 L.Ed.2d 36 (1996) ("[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity"); *Field* v. *Clark*, 143 U.S. 649, 692, 12 S. Ct. 495, 36 L.Ed. 294 (1892). Thus, while the President has the obligation

to enforce laws passed by Congress, he does not have the power to legislate.

The propriety of a given branch's conduct does not turn on the labeling of activity as "legislative" or "executive." *See Mistretta* v. *United States*, 488 U.S. 361, 393, 109 S. Ct. 647, 102 L.Ed.2d 714 (1989). Legislative action depends "not on form but upon whether [it] contain[s] matter which is properly to be regarded as legislative in its character and effect." *Chadha*, 462 U.S. at 952 (internal quotation marks omitted). Thus, we must look to whether the exercise of power in question has been "subject to the carefully crafted restraints spelled out in the Constitution," *id.* at 959, to ensure that authority is exercised only by the branch to which it has been allocated. *See Youngstown*, 343 U.S. at 587-88.

The Constitution entrusts the ability to define and punish offenses against the law of nations to the Congress, not the Executive. U.S. Const. art. II, § 8, cl. 10; *United States* v. *Arjona*, 120 U.S. 479, 483, 7 S. Ct. 628, 30 L.Ed. 728 (1887). Padilla contends that the June 9 Order mandating his detention as an "enemy combatant" was not the result of congressional action defining the category of "enemy combatant." He also argues that there has been no other legislative articulation of what constitutes an "enemy combatant," what circumstances trigger the designation, or when it ends. As in *Youngstown*, Padilla maintains that "[t]he President's order does not direct that a congressional policy be executed in a manner prescribed by Congress —it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown*, 343 U.S. at 588.

The Constitution envisions grave national emergencies and contemplates significant domestic abridgements of individual liberties during such times. *See Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159-60, 83 S. Ct. 554, 9 L.Ed.2d 644 (1963). Here, the Executive lays claim to the inherent emergency powers necessary to effect such abridgements, but we agree with Padilla that the Constitution lodges these powers with Congress, not the President. *See Youngstown*, 343 U.S. at 649-50 (Jackson, J., concurring).

First, the Constitution explicitly provides for the suspension of the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. This power, however, lies only with Congress. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101, 2 L.Ed. 554 (1807). Further, determinations about the scope of the writ are for Congress. *Lonchar* v. *Thomas*, 517 U.S. 314, 323, 116 S. Ct. 1293, 134 L.Ed.2d 440 (1996).

Moreover, the Third Amendment's prohibition on the quartering of troops during times of peace reflected the Framers' deep-seated beliefs about the sanctity of the home and the need to prevent military intrusion into civilian life.[23] *See, e.g.*, *Laird* v. *Tatum*, 408 U.S. 1, 15, 92 S. Ct. 2318, 33 L.Ed.2d 154 (1972); *Katz* v. *United States*, 389 U.S. 347, 350 n.5, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967). At the same time they understood that in times of war—of serious national crisis—military concerns prevailed and such intrusions could occur. But

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[23] The full text of the Third Amendment states: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. Const. amend. III.

significantly, decisions as to the nature and scope of these intrusions were to be made "in a manner to be prescribed by law." U.S. Const. amend. III. The only valid process for making "law" under the Constitution is, of course, via bicameral passage and presentment to the President, whose possible veto is subject to congressional override, provided in Article I, Section 7. *See Chadha*, 462 U.S. at 946-51.

The Constitution's explicit grant of the powers authorized in the Offenses Clause, the Suspension Clause, and the Third Amendment, to Congress is a powerful indication that, absent express congressional authorization, the President's Commander-in-Chief powers do not support Padilla's confinement. *See id.* at 946. The level of specificity with which the Framers allocated these domestic powers to Congress and the lack of any even near-equivalent grant of authority in Article II's catalogue of executive powers compels us to decline to read any such power into the Commander-in-Chief Clause. In sum, while Congress—otherwise acting consistently with the Constitution—may have the power to authorize the detention of United States citizens under the circumstances of Padilla's case, the President, acting alone, does not.[24] *See Youngstown*, 343 U.S. at 631-32 (Douglas, J., concurring).

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[24] The dissent misreads us to suggest that the President has no power to deal with imminent acts of belligerency on U.S. soil outside a zone of combat and absent express authorization from Congress. *See infra* at [65a-66a]. We make no such claim. As we have discussed, criminal mechanisms exist for dealing with such situations. We only hold that the President's Commander-in-Chief powers do not encompass the detention of a United States citizen as an enemy combatant taken into custody on United States soil outside a zone of combat.

The government argues that *Quirin* established the President's inherent authority to detain Padilla. In *Quirin*, the Supreme Court reviewed the habeas petitions of German soldiers captured on United States soil during World War II. All of the petitioners had lived in the United States at some point in their lives and had been trained in the German Army in the use of explosives. *See* 317 U.S. at 20-21. These soldiers, one of whom would later claim American citizenship, landed in the United States and shed their uniforms intending to engage in acts of military sabotage. They were arrested in New York and Chicago, tried by a military commission as "unlawful combatants," and sentenced to death. The Court denied the soldiers' petitions for habeas corpus, holding that the alleged American citizenship of one of the saboteurs was immaterial to its judgment: "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." *Id.* at 37. The government contends that *Quirin* conclusively establishes the President's authority to exercise military jurisdiction over American citizens.

We do not agree that *Quirin* controls. First, and most importantly, the *Quirin* Court's decision to uphold military jurisdiction rested on express congressional authorization of the use of military tribunals to try combatants who violated the laws of war. *Id.* at 26-28. Specifically, the Court found it "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of

Congressional legislation." *Id.* at 29.[25] Accordingly, *Quirin* does not speak to whether, or to what degree, the President may impose military authority upon United States citizens domestically without clear congressional authorization. We are reluctant to read into *Quirin* a principle that the *Quirin* Court itself specifically declined to promulgate.[26]

Moreover, there are other important distinctions between *Quirin* and this case. First, when *Quirin* was decided in 1942, section 4001(a) had not yet been enacted. The *Quirin* Court consequently had no

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[25] The dissent argues that *Quirin* located the President's authority to try the saboteurs before a military tribunal, in part, on his powers as Commander-in-Chief. 317 U.S. at 28. However, the Court clearly viewed the statutory basis as the primary ground for the imposition of military jurisdiction, and regarded any inherent executive authority, if indeed it existed, as secondary: "By his Order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress, and also *such* authority as the Constitution itself gives the Commander in Chief . . . ." *Id.* The Court certainly did not find the President's Commander-in-Chief powers independently sufficient to authorize such military commissions. In fact, as noted above, the Court explicitly declined to reach this question.

[26] The government relies heavily on the factual parallels between the *Quirin* saboteurs and Padilla. Similar to the *Quirin* saboteurs, Padilla allegedly traveled overseas to Afghanistan and Pakistan, where he engaged in extended discussions with senior al Qaeda operatives about conducting hostile operations within the United States. Padilla is also alleged to have received explosives training and to have returned to the United States to advance prospective al Qaeda attacks against this country. We are not persuaded by these factual parallels that the President can act to place citizens in military detention absent congressional authorization because the *Quirin* Court relied on such authorization to justify the detention and military trial of the *Quirin* saboteurs, an authorization that we believe is lacking here.

occasion to consider the effects of legislation prohibiting the detention of American citizens absent statutory authorization. As a result, *Quirin* was premised on the conclusion—indisputable at the time—that the Executive's domestic projection of military authority had been authorized by Congress. Because the *Quirin* Court did not have to contend with section 4001(a), its usefulness is now sharply attenuated.

Second, the petitioners in *Quirin* admitted that they were soldiers in the armed forces of a nation against whom the United States had formally declared war. The *Quirin* Court deemed it unnecessary to consider the dispositive issue here—the boundaries of the Executive's military jurisdiction—because the *Quirin* petitioners "upon the conceded facts, were plainly within those boundaries." *Id.* at 46. Padilla makes no such concession. To the contrary, he, from all indications, intends to dispute his designation as an enemy combatant, and points to the fact that the civilian accomplices of the *Quirin* saboteurs—citizens who advanced the sabotage plots but who were not members of the German armed forces—were charged and tried as civilians in civilian courts, not as enemy combatants subject to military authority. *Haupt* v. *United States*, 330 U.S. 631, 67 S. Ct. 874, 91 L.Ed. 1145 (1947); *Cramer* v. *United States*, 325 U.S. 1, 65 S. Ct. 918, 89 L.Ed. 1441 (1945).

In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866), the government unsuccessfully attempted to prosecute before a military tribunal a citizen who, never having belonged to or received training from the Confederate Army, "conspired with bad men" to engage in acts of war and sabotage against the United States. 71 U.S. at 131. Although *Quirin* distinguished

Milligan on the ground that "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, [and] not subject to the law of war," 317 U.S. at 45, a more germane distinction rests on the different statutes involved in *Milligan* and *Quirin*. During the Civil War, Congress authorized the President to suspend the writ of habeas corpus. *Milligan*, 71 U.S. at 4. However, it also limited his power to detain indefinitely "citizens of States in which the administration of the laws had continued unimpaired in the Federal courts, who were then held, or might thereafter be held, as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war." *Id.* at 5.

This limitation was embodied in a requirement that the Executive furnish a list of such prisoners to the district and circuit courts and, upon request by a prisoner, release him if the grand jury failed to return an indictment. *Id.* The grand jury sitting when Milligan was detained failed to indict him. *Id.* at 7. The Court concluded that because "Congress could grant no . . . power" to authorize the military trial of a civilian in a state where the courts remained open and functioning, Milligan could not be tried by a military tribunal. *Id.* at 121-22. Thus, both *Quirin* and *Milligan* are consistent with the principle that primary authority for imposing military jurisdiction upon American citizens lies with Congress. Even though *Quirin* limits to a certain extent the broader holding in *Milligan* that citizens cannot be subjected to military jurisdiction while the courts continue to function, *Quirin* and *Milligan* both teach that—at a minimum—an Act of Congress is required to expand military jurisdiction.

The government's argument for the legality of Padilla's detention also relies heavily on the Fourth Circuit's decisions in *Hamdi II* and *Hamdi III*. These decisions are inapposite. The Fourth Circuit directly predicated its holdings on the undisputed fact that Hamdi was captured in a zone of active combat in Afghanistan. *Hamdi III*, 316 F.3d at 459 ("Because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that . . . [n]o further factual inquiry is necessary or proper."). The court said:

> We have no occasion . . . to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding. We shall, in fact, go no further in this case than the specific context before us—that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country.

Hamdi III, at 465 (internal citation omitted).

The dissent also relies on *The Prize Cases*, which, like *Milligan*, arose out of the Civil War, to conclude that the President has the inherent constitutional authority to protect the nation when met with belligerency and to determine what degree of responsive force is necessary. We believe that neither the facts of *The Prize Cases* nor their holding support such a broad construction.

First, *The Prize Cases* dealt with the capture of enemy property—not the detention of persons. The Court had no occasion to address the strong constitutional arguments against deprivations of personal liberty, or the question of whether the President could infringe upon individual liberty rights through the

exercise of his wartime powers outside a zone of combat.

Second, the dissent would have us read *The Prize Cases* as resolving any question as to whether the President may detain Padilla as an enemy combatant without congressional authorization. The Court did not, however, rest its decision upholding the exercise of the President's military authority solely on his constitutional powers without regard to congressional authorization. Rather, it noted that the President's authority to "call[ ] out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government" stemmed from "the Acts of Congress of February 28th, 1795, and 3d of March, 1807." *Id.* at 668. In any event, Congress's subsequent ratification of the President's wartime orders mooted any questions of presidential authority. *Id.* at 670. Finally, the Court in *The Prize Cases* was not faced with the Non-Detention Act specifically limiting the President's authority to detain American citizens absent express congressional authorization.

Based on the text of the Constitution and the cases interpreting it, we reject the government's contention that the President has inherent constitutional power to detain Padilla under the circumstances presented here.[27] Therefore, under *Youngstown*, we must now

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[27] The dissent expresses deep concerns that our holding means that the President lacks inherent authority to detain a terrorist in the face of imminent attack. The President's authority to detain such a person is not an issue raised by this case. The dissent's concerns overlook the fact that Padilla was detained by the military while a maximum security inmate at the MCC. Thus, issues concerning imminent danger simply do not arise in this case.

consider whether Congress has authorized such detentions.

ii. Congressional Acts

a. The Non-Detention Act

As we have seen, the Non-Detention Act provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). The District Court held that this language "encompasses all detentions of United States citizens." *Padilla I*, 233 F. Supp. 2d at 597.

We review this interpretation de novo. *United States* v. *Lucien*, 347 F.3d 45, 50 (2d Cir. 2003). In conducting our review, we must first examine the language of the statute and assume that its "ordinary meaning . . . accurately expresses the legislative purpose." *Id.* at 51 (internal quotation marks omitted). If the plain language is unambiguous, "judicial inquiry ends, except in 'rare and exceptional circumstances,' and legislative history is instructive only upon 'the most extraordinary showing of contrary intentions.'" *Id.* (quoting *Garcia* v. *United States*, 469 U.S. 70, 75, 105 S. Ct. 479, 83 L.Ed.2d 472 (1984)).

We read the plain language of section 4001(a) to prohibit all detentions of citizens—a conclusion first reached by the Supreme Court. *Howe* v. *Smith*, 452 U.S. 473, 479 n.3, 101 S. Ct. 2468, 69 L.Ed.2d 171 (1981) (characterizing the Non-Detention Act as "proscribing detention *of any kind* by the United States" (emphasis in original)). Not only has the government not made an extraordinary showing of contrary intentions, but the legislative history of the Non-Detention Act is fully

consistent with our reading of it. Both the sponsor of the Act and its primary opponent repeatedly confirmed that the Act applies to detentions by the President during war and other times of national crisis. The legislative history is replete with references to the detentions of American citizens of Japanese descent during World War II, detentions that were authorized both by congressional acts and by orders issued pursuant to the President's war power. This context convinces us that military detentions were intended to be covered. Finally, the legislative history indicates that Congress understood that exceptions to the Non-Detention Act must specifically authorize *detentions*.

Section 4001(a) was enacted in 1971 and originated as an amendment to legislation repealing the Emergency Detention Act of 1950, former 50 U.S.C §§ 811-26 (1970), which authorized the detention by the Attorney General during an invasion, a declared war, or "an insurrection within the United States in aid of a foreign enemy" of "each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." 50 U.S.C. §§ 812(a), 813(a) (1970). Congress referred to section 4001(a) as the Railsback amendment for its drafter, Representative Railsback. The Railsback amendment emerged from the House Judiciary Committee and was opposed by the House Internal Security Committee, which offered other alternatives.

Congressman Ichord, the chair of the House Internal Security Committee and the primary opponent of the Railsback amendment, argued that it would tie the President's hands in times of national emergency or war. He characterized the amendment as "this most

dangerous committee amendment" and as "depriv[ing] the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises." 117 Cong. Rec. H31542 (daily ed. Sept. 13, 1971). Representative Ichord's alarm stemmed from his belief that *Youngstown* "teaches that where the Congress has acted on a subject within its jurisdiction, sets forth its policy, and asserts its authority, the President might not thereafter act in a contrary manner." *Id.* at H31544; *see id.* at H31549 ("I do feel that the language of the amendment drafted by [Representative Railsback] under the Youngstown Steel case would prohibit even the picking up, at the time of a declared war, at a time of an invasion of the United States, a man whom we would have reasonable cause to believe would commit espionage or sabotage.").

No proponent of the Railsback amendment challenged Representative Ichord's interpretation. In fact, in a striking exchange between Representatives Ichord and Railsback, he ratified Representative Ichord's interpretation. Representative Ichord asked: "Does [Representative Railsback] believe that in this country today there are people who are skilled in espionage and sabotage that might pose a possible threat to this Nation in the event of a war with nations of which those people are nationals or citizens?" *Id.* at H31551. Representative Railsback responded, "Yes." *Id.* Representative Ichord then asked: "Does the gentleman believe then that if we were to become engaged in a war with the country of those nationals, that we would permit those people to run at large without apprehending them, and wait until after the sabotage is committed?" *Id.* Railsback answered:

> I think what would happen is what J. Edgar Hoover thought could have happened when he opposed the actions that were taken in 1942. He suggested the FBI would have under surveillance those people in question and those persons they had probable cause to think would commit such actions. Does the gentleman know that J. Edgar Hoover was opposed to detention camps, because be thought he had sufficient personnel to keep all these potential saboteurs under surveillance, and that they could prosecute the guilty in accordance with due process?

Id. at H31551-52. Railsback also suggested to Congress that the President could seize citizens only pursuant to an Act of Congress or during a time of martial law when the courts are not open. *Id.* at 31755.[28]

Congress's passage of the Railsback amendment by a vote of 257 to 49 after ample warning that both the sponsor of the amendment and its primary opponent believed it would limit detentions in times of war and peace alike is strong evidence that the amendment means what it says, that is that no American citizen can be detained without a congressional act authorizing the detention.

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[28] Railsback and Ichord's shared view of the scope of the Non-Detention Act was echoed by another opponent of the bill. *See, e.g.*, *id.* at 31554 (Representative Williams stating that "I do not want to see the President's hands tied by the language of the [Railsback] proposal which would require an Act of Congress before any likely subversive or would-be saboteur could be detained"). However, another opponent of the bill and member of the Internal Security Committee argued that even with the Railsback amendment, the President could declare a national emergency and act to detain citizens using his inherent powers. *See id.* at 31547 (remarks of Representative Ashbrook). We address the President's inherent powers *supra* at Section II.B.ii.

In addition, almost every representative who spoke in favor of repeal of the Emergency Detention Act or adoption of the Railsback amendment or in opposition to other amendments, described the detention of Japanese-American citizens during World War II as the primary motivation for their positions. *See*, *e.g.*, *id.* at H31537 (Rep. Railsback); *id.* at H31541 (Rep. Poff); *id.* at H31549 (Rep. Giaimo); *id.* at H31555 (Rep. Eckhardt); *id.* at H31556 (Rep. Mikva); *id.* at H31560 (Rep. Lloyd); *id.* at H31565 (Rep. Edwards); *id.* at H31568 (Rep. Wyatt); *id.* at H31571-72 (Rep. Matsunaga); *id.* at H31573 (Rep. Johnson); *id.* at H31757 (Rep. Wright); *id.* at H31760 (Rep. Holifield); *id.* at H31770-71(Rep. Hansen); *id.* at H31772-73 (Rep. Anderson); *id.* at H31779 (Reps. Drinan and Pepper). Because the World War II detentions were authorized pursuant to the President's war making powers as well as by a congressional declaration of war and by additional congressional acts, *see Endo*, 323 U.S. at 285-90, the manifest congressional concern about these detentions also suggests that section 4001(a) limits military as well as civilian detentions.

Finally, a statement by Representative Eckhardt demonstrates that Congress intended to require its express authorization before the President could detain citizens. He said: "You have got to have an act of Congress to detain, and the act of Congress *must authorize detention*." *Id.* at H31555 (emphasis added). Based primarily on the plain language of the Non-Detention Act but also on its legislative history and the Supreme Court's interpretation, we conclude that the Act applies to all detentions and that precise and specific language authorizing the detention of American citizens is required to override its prohibition.

Despite its plain language, the government argues that section 4001(a) is intended to preclude only detentions by the Attorney General, not by the military. Its first argument is a constitutional one: to construe section 4001(a) to include military detentions would, in the government's view, risk construing it as an unconstitutional abridgement of the President's war powers. Its second argument is a statutory "placement" argument, which the government claims is supported in two ways. First, it contends that because section 4001(a) appears in a section governing the management of prisons, it does not constrain the President's war power. Second, it maintains that because section 4001(a) immediately precedes section 4001(b)(1), which vests authority to manage prisons in the Attorney General but specifically excludes military prisons from his purview, section 4001(a) must be read to exclude military detentions.

The District Court correctly declined to construe section 4001(a) to apply only to civilian detentions in order to avoid a construction of the statute that would unconstitutionally limit the President's war power. It held that the "doctrine of constitutional avoidance 'has no application in the absence of statutory ambiguity.'" *Padilla I*, 233 F. Supp. 2d at 597 (quoting *HUD* v. *Rucker*, 535 U.S. 125, 134, 122 S. Ct. 1230, 152 L.Ed.2d 258 (2002)). We agree. For the reasons discussed above, we have found that the statute is unambiguous. Moreover, this interpretation poses no risk of unconstitutionally abridging the President's war powers because, as we have also discussed above, the President, acting alone, possesses no inherent constitutional authority to detain American citizens seized within the

United States, away from a zone of combat, as enemy combatants.[29]

Nor are we persuaded by the government's statutory placement argument. No accepted canon of statutory interpretation permits "placement" to trump text, especially where, as here, the text is clear and our reading of it is fully supported by the legislative history. While we, of course, as the government argues, read statutes as a whole to determine the most likely meaning of particular provisions or terms, this principle has no application here. *Greater New York Metro. Food Council, Inc.* v. *Giuliani*, 195 F.3d 100, 105 (2d Cir. 1999). Section 4001(b)(1) was enacted many decades

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[29] If the President's Commander-in-Chief powers were plenary in the context of a domestic seizure of an American citizen, the government's argument that the legislature could not constitutionally prohibit the President from detaining citizens would have some force. *Cf. Hamdi III*, 316 F.3d at 468 (stating that "§ 4001(a) functioned principally to repeal the Emergency Detention Act [which] had provided for the preventive 'apprehension and detention' of individuals *inside* the United States 'deemed likely to engage in espionage or sabotage' during 'internal security emergencies'" and that "[t]here is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen *captured on the battlefield* during wartime may be treated like the enemy combatant that he is" (quoting H. R. Rep. No. 92-116, at 2 (1971)) (emphases added)). In view of the plain language of the Act, it might have been preferable to hold that Congress could not intrude on the President's Commander-in-Chief power on the battlefield rather than to interpret the Act as the Fourth Circuit did. We do not have to reach that issue, however. As we have previously noted, Judge Wilkinson, one of the authors of *Hamdi III*, remarked in his later concurrence to the decision not to rehear *Hamdi III* en banc that "[t]o compare this battlefield capture to the domestic arrest in *Padilla* v. *Rumsfeld* is to compare apples and oranges." *Hamdi IV*, 337 F.3d at 344.

prior to the Emergency Detention Act as part of entirely different legislation. The government points to nothing suggesting the two subsections share a common origin or meaning, rather than simply a common code designation. In any event, reliance on subsection (b)(1) suggests a conclusion opposite to the one the government proposes. Subsection (b)(1) provides:

> The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended and the applicable regulations.

18 U.S.C. § 4001(b)(1). In subsection (b)(1), Congress explicitly distinguished between military and civilian jurisdiction by authorizing the Attorney General to control all prisons except military institutions. The lack of any such distinction in subsection (a) suggests that none exists and that the Non-Detention Act applies to both civilian and military detentions.

b. Specific Statutory Authorization

Since we conclude that the Non-Detention Act applies to military detentions such as Padilla's, we would need to find specific statutory authorization in order to uphold the detention. The government claims that both the Joint Resolution, which authorized the use of force against the perpetrators of the September 11 terrorist attacks, and 10 U.S.C. § 956(5), passed in 1984, which provides funding for military detentions, authorize the detention of enemy combatants. It is with respect to the Joint Resolution that we disagree with

the District Court, which held that it must be read to confer authority for Padilla's detention. It found that the "language [of the Joint Resolution] authorizes action against not only those connected to the subject organizations who are directly responsible for the September 11 attacks, but also against those who would engage in 'future acts of international Terrorism' as part of 'such . . . organizations.'" *Padilla I*, 233 F. Supp. 2d at 598-99.

We disagree with the assumption that the authority to use military force against these organizations includes the authority to detain American citizens seized on American soil and not actively engaged in combat. First, we note that the Joint Resolution contains no language authorizing detention. It provides:[30]

> That the 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.

Joint Resolution § 2(a).

Because the government seeks to read into the Joint Resolution authority to detain American citizens on American soil, we interpret its language in light of the principles enunciated in *Ex parte Endo*, 323 U.S. at 298-300. The *Endo* Court first recognized that "the Constitution when it committed to the Executive and to

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[30] The full text of the resolution is set forth in Appendix B.

Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully." *Id.* at 298-99. It then said: "At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government. Thus it has prescribed procedural safeguards surrounding the arrest, detention and conviction of individuals." *Id.* at 299. Therefore, the Court held: "[i]n interpreting a war-time measure we must assume that [the purpose of Congress and the Executive] was to allow for the greatest possible accommodation between those liberties and the exigencies of war." *Id.* at 300. The Court added: "We 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." *Id.* (emphasis added).

The plain language of the Joint Resolution contains nothing authorizing the detention of American citizens captured on United States soil, much less the express authorization required by section 4001(a) and the "clear," "unmistakable" language required by *Endo*. While it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the Joint Resolution that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not

"arrayed against our troops" in the field of battle. *Hamdi III*, 316 F.3d at 467.[31]

Further, the Joint Resolution expressly provides that it is "intended to constitute specific statutory authorization within the meaning of . . . the War Powers Resolution." Joint Resolution § 2(b); 50 U.S.C. § 1541 *et seq*. The War Powers Resolution requires the President to cease military operations within 60 days unless Congress has declared war or specifically authorized the use of the armed forces. 50 U.S.C. § 1544(b). It is unlikely—indeed, inconceivable—that Congress would expressly provide in the Joint Resolution an authorization required by the War Powers Resolution but, at the same time, leave unstated and to inference something so significant and unprecedented

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[31] The debates on the Joint Resolution are at best equivocal as to the President's powers and never mention the issue of detention. Therefore, even assuming they could overcome the lack of a specific grant to the President, they do not suggest that Congress authorized the detention of United States citizens captured on United States soil. Some legislators believed the President's authority was strictly limited. *See*, *e.g.*, 147 Cong. Rec. H5639 (Rep. Lantos: "to bring to bear the full force of American power abroad"). Supporters of the President's power argued that it was too limited. *See*, *e.g.*, *id.* at H5653 (Rep. Barr arguing that in addition to the joint resolution, Congress should declare war to "[g]ive the President the tools, the absolute flexibility he needs under international law and The Hague Convention to ferret these people out wherever they are, however he finds them, and get it done as quickly as possible"); *id.* at H5654 (Rep. Smith: "This resolution should have authorized the President to attack, apprehend, and punish terrorists whenever it is in the best interests of America to do so. Instead, the resolution limits the President to using force only against those responsible for the terrorist attacks last Tuesday. This is a significant restraint on the President's ability to root out terrorism wherever it may be found.")

as authorization to detain American citizens under the Non-Detention Act.

Next, the Secretary argues that Padilla's detention is authorized by 10 U.S.C. § 956(5), which allows the use of appropriated funds for "expenses incident to the maintenance, pay, and allowances of prisoners of war, 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 Armed Services] pursuant to Presidential proclamation." 10 U.S.C. § 956(5). The Fourth Circuit found that section 956(5) along with the Joint Resolution sufficed to authorize Hamdi's detention. *Hamdi III*, 316 F.3d at 467-68. With respect to Section 956(5), the court said: "It is difficult if not impossible to understand how Congress could make appropriations for the detention of persons 'similar to prisoners of war' without also authorizing their detention in the first instance." *Id.*

At least with respect to American citizens seized off the battlefield, we disagree. Section 965(5) authorizes nothing beyond the expenditure of money. *Endo* unquestionably teaches that an authorization of funds devoid of language "clearly" and "unmistakably" authorizing the detention of American citizens seized here is insufficient. *See* 323 U.S. at 303 n.24 (acknowledging that Congress may ratify past actions of the Executive through appropriations acts but refusing to find in the appropriations acts at issue an intent to allow the Executive to detain a citizen indefinitely because the appropriation did not allocate funds "earmarked" for that type of detention). In light of *Endo*, the Non-Detention Act's requirement that Congress specifically authorize detentions of American citizens,

and the guarantees of the Fourth and Fifth Amendments to the Constitution, we decline to impose on section 956(5) loads it cannot bear.

CONCLUSION

In sum, we hold that (1) Donna Newman, Esq., may pursue habeas relief on behalf of Jose Padilla; (2) Secretary of Defense Rumsfeld is a proper respondent to the habeas petition and the District Court had personal jurisdiction over him; (3) in the domestic context, the President's inherent constitutional powers do not extend to the detention as an enemy combatant of an American citizen seized within the country away from a zone of combat; (4) the Non-Detention Act prohibits the detention of American citizens without express congressional authorization; and (5) neither the Joint Resolution nor 10 U.S.C. § 956(5) constitutes such authorization under section 4001(a). These conclusions are compelled by the constitutional and statutory provisions we have discussed above. The offenses Padilla is alleged to have committed are heinous crimes severely punishable under the criminal laws. Further, under those laws the Executive has the power to protect national security and the classified information upon which it depends. *See, e.g.*, 18 U.S.C. app. § 3. And if the President believes this authority to be insufficient, he can ask Congress—which has shown its responsiveness—to authorize additional powers. To reiterate, we remand to the District Court with instructions to issue a writ of habeas corpus directing the Secretary of Defense to release Padilla from military custody within 30 days. The government can transfer Padilla to appropriate civilian authorities who can bring criminal charges against him. Also, if appropriate, Padilla can be held as a material witness in connection

with grand jury proceedings. In any case, Padilla will be entitled to the constitutional protections extended to other citizens.

APPENDIX A

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources,

REDACTED

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;

(2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;

(3) 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;

(4) Mr. Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on

the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and

(7) it is REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.

APPENDIX B

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it 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; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force."

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the 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.

(b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—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.

(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

WESLEY, Circuit Judge, concurring in part, dissenting in part.

I respectfully dissent from that aspect of the majority's opinion that concludes the President is without authority from Congress or the Constitution to order the detention and interrogation of Mr. Padilla.[32] In my view, the President as Commander in Chief has the inherent authority to thwart acts of belligerency at home or abroad that would do harm to United States citizens. But even if Mr. Padilla's status as a United States citizen on United States soil somehow changes the constitutional calculus, I cannot see how the Non-Detention Act precludes an affirmance.

Because I would affirm the thoughtful and thorough decision of Chief Judge Mukasey, a brief examination of his opinion is appropriate. After examining the President's inherent powers under the Constitution, as explained in *Amy Warwick*, 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1862) ("*The Prize Cases*"), and subsequent case law, the district court held Padilla's detention is not unlawful, as the President is authorized under the Constitution to repel belligerent acts that threaten the safety of United States citizens. The court also held that the detention is authorized by Congress' Authorization for Use of Military Force, Pub.L.No.107-40, 115 Stat. 224 (2001) ("Joint Resolution"). Chief Judge Mukasey noted that 18 U.S.C. § 4001(a) did not preclude this result in that the Joint Resolution identified a specific group of belligerents.

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[32] I concur in the majority's analysis that Newman can serve as Padilla's next friend, that Secretary Rumsfeld is an appropriate respondent and that the district court had personal jurisdiction over the Secretary.

Relying on the Third Geneva Convention, the district court examined the distinction between lawful and unlawful combatants and ultimately concluded that either could be detained. *See Padilla ex rel. Newman* v. *Bush*, 233 F. Supp. 2d 564, 594-95 (S.D.N.Y. 2002). The court concluded that the President's ability to detain Padilla as an unlawful enemy combatant was not altered by Padilla's citizenship. *See id.* at 594 (citing *Ex Parte Quirin*, 317 U.S. 1, 63 S. Ct. 1, 87 L.Ed. 3 (1942)). The court distinguished *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866), by noting that the citizens in *Milligan* were neither part of, nor associated with, the armed forces of the Confederacy. *See id.* Thus, they were not enemy combatants subject to the laws of war.

Much of Chief Judge Mukasey's work is not the focus of the majority's analytical resolution of this case. I offer that not as a criticism but merely as a note of limitation. Our task here is confined to the interplay between the President's Article II responsibilities as Commander in Chief and the authority of Congress to regulate domestic activity, even in a time of war, pursuant to Article I of the Constitution.

My disagreement with the majority is two-fold. In my view, the President, as Commander in Chief, has inherent authority to thwart acts of belligerency on U.S. soil that would cause harm to U.S. citizens, and, in this case, Congress through the Joint Resolution specifically and directly authorized the President to take the actions herein contested. The majority concludes the President is without inherent authority to detain Padilla. They agree that "great deference is afforded the President's exercise of his authority as Commander-in-Chief," Maj. at [30a] (citing *Dep't of the*

Navy v. *Egan*, 484 U.S. 518, 530, 108 S. Ct. 818, 98 L.Ed.2d 918 (1988)), and concede the judiciary has no authority to determine the political question of whether the nation is at war. *Id.* They recognize that the President and Congress often work cooperatively during times of armed conflict. However, the majority contends that separation of powers concerns are heightened when the President's powers are exercised in the "domestic sphere" and that Congress, not the Executive, controls utilization of war powers when invoked as an instrument of domestic policy. Maj. at [32a].

It is true that Congress plays the primary role in domestic policy even in a time of war. Congress does have the power to define and punish offenses committed on U.S. soil, *see* U.S. CONST. art. I, § 8, cl. 10, to suspend the Writ of Habeas Corpus, *see* U.S. CONST. art. I, § 9, cl. 2, and to determine when and if soldiers are to be quartered in private homes during a time of war, *see* U.S. CONST. amend. III. But none of those powers are in question here nor does the majority cite a specific constitutional provision in which Congress is given exclusive constitutional authority to determine how our military forces will deal with the acts of a belligerent on American soil. There is no well traveled road delineating the respective constitutional powers and limitations in this regard.

The majority relies on *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L.Ed. 1153 (1952), as its analytical guide in determining the President's constitutional authority in this matter. However, this is a different case. In *Youngstown*, the Supreme Court was confronted with two opposing claims of constitutional authority. The President

argued he had the authority to seize the steel mills in question by virtue of his constitutional responsibilities as Commander in Chief and as Chief Executive. *Id.* at 582, 72 S. Ct. 863. The President contended that a steady supply of steel was necessary to sustain the war effort in Korea. *See id.* at 582-83, 72 S. Ct. 863. The steel mills argued that at its core the dispute was a labor matter—an area clearly reserved for congressional regulation. *See id.* at 582, 72 S. Ct. 863. The Court sided with the steel mills, *id.* at 589, 72 S. Ct. 863, and with good reason—the President's attempt to link the seizure to prosecuting the war in Korea was far too attenuated. In this case the President's authority is directly tied to his responsibilities as Commander in Chief.

In *The Prize Cases* the Supreme Court rejected a challenge to the President's authority to impose a blockade on the secessionist states absent a declaration of war. *See* 67 U.S. at 668, 67 U.S. 635. As I read *The Prize Cases*, it is clear that common sense and the Constitution allow the Commander in Chief to protect the nation when met with belligerency and to determine what degree of responsive force is necessary. *See id.* at 669-70, 67 U.S. 635. The President has "no power to initiate or declare a war" but "[i]f a war be made by invasion . . . , the President is not only authorized but bound to resist force by force. He . . . is bound to accept the challenge without waiting for any special legislative authority." *Id.* at 668, 67 U.S. 635. Regardless the title given the force, the President, in fulfilling his duties as Commander in Chief to suppress insurrection and to deal with belligerents aligned against the nation, is entitled to determine the appropriate response. *See id.* at 669-70, 67 U.S. 635.

In reaching this conclusion the Court noted the President's decision regarding the level of force necessary is a political not a judicial decision. *Id.* at 670, 67 U.S. 635. Thus, as courts have previously recognized, *The Prize Cases* stands "for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected." *Campbell* v. *Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring); *see also Padilla*, 233 F. Supp. 2d at 589. "[T]he authority to decide whether the exigency has arisen, belongs exclusively to the President, and . . . his decision is conclusive upon all other persons." *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30, 6 L.Ed. 537 (1827).[33] *The Prize Cases* demonstrates that congressional authorization is not necessary for the Executive to exercise his constitutional authority to prosecute armed conflicts when, as on September 11, 2001, the United States is attacked.

My colleagues appear to agree with this premise but conclude that somehow the President has *no* power to deal with acts of a belligerent on U.S. soil "away from a zone of combat" absent express authorization from Congress. Maj. at [2a], [29a], [49a]. That would seem to imply that the President does have some war power authority to detain a citizen on U.S. soil if the "zone of combat" was the United States. The majority does not tell us who has the authority to define a "zone of combat" or to designate a geopolitical area as such.

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[33] *Quirin* spoke to the issue of Presidential authority as well. In that case, the Court found the President's decision to try the saboteurs before a military tribunal rested in part on an exercise of his Presidential authority under Article II of the Constitution. *See Quirin*, 317 U.S. at 28, 63 S. Ct. 1.

Given the majority's view that "the Constitution lodges . . . [inherent national emergency powers] with Congress, not the President," Maj. at [35a], it would seem that the majority views this responsibility as also the singular province of Congress. That produces a startling conclusion. The President would be without any authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat *or* authorized the detention. Curiously, even Mr. Padilla's attorney conceded that the President could detain a terrorist without Congressional authorization if the attack were imminent. *See* Oral Argument Tr. at 51.

But the scope of the President's inherent war powers under Article II does not end the matter, for in my view Congress clearly and specifically authorized the President's actions here.[34] As Chief Judge Mukasey noted, the Joint Resolution, passed by both houses of Congress, "authorizes the President to use necessary and appropriate force in order, among other things, 'to prevent any future acts of international terrorism against the United States,' and thereby engages the President's full powers as Commander in Chief." *Padilla*, 233 F. Supp. 2d at 590 (quoting Pub.L. No. 107-40, 115 Stat. 224); *cf. Quirin*, 317 U.S. at 29, 63 S. Ct. 1 (finding it "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power . . . [f]or here Congress has authorized [his actions]"). *Youngstown*

[34] Of course, the majority must delineate the President's war powers as Commander in Chief; if the President acted within his inherent authority, the scope of the Joint Resolution and the proscription of § 4001(a) is irrelevant.

fully supports that view. "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." 343 U.S. at 635, 72 S. Ct. 863 (Jackson, J., concurring) (emphasis added). The Joint Resolution authorized the President to take the action herein challenged; his powers were at their apogee.

Following the attacks of 9-11, the President declared a national emergency. *See* 50 U.S.C. § 1541(c)(3) (2003). On September 18, 2001, Congress passed Public Law 107-40 as a joint resolution. Pub.L. No. 107-40, 115 Stat. 224. That resolution, entitled "Authorization for Use of Military Force," notes the "acts of treacherous violence committed against the United States and its citizens," and the danger those acts posed to national security. *Id.* Moreover, the resolution recognizes "the President has authority *under the Constitution* to take action to deter and prevent acts of international terrorism against the United States." *Id.* (emphasis added). It provides:

> That the 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.

Pub.L. No. 107-40, § 2(a), 115 Stat. 224, 224.[35] Some of the belligerents covered by the Joint Resolution are not nation states, they have no armies in the traditional sense—their "membership" consists of "soldiers" who rely on subterfuge and surprise. Congress recognized that these organizations are waging a war different from any our nation has faced. It authorized the President to employ the necessary and appropriate force to prevent future terrorist attacks.

It is quite clear from the President's Order of June 9, 2002 that Mr. Padilla falls within the Joint Resolution's intended sweep. Appendix A at 50-51. As relevant here, the Joint Resolution authorizes the President (1) to use appropriate and necessary force—detention would seem to be an appropriate level of force in Mr. Padilla's situation, (2) against those organizations that planned, authorized, or committed the terrorist attacks

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[35] The Joint Resolution also provides, in section 2(b)(1), that it is "intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." Pub.L. No. 107-40 § 2(b)(1), 115 Stat. 224, 224. As noted by Chief Judge Mukasey, 233 F. Supp. 2d at 571 n.3, the War Powers Resolution was enacted in 1973 over Presidential veto, and purported to limit the President's authority and discretion to commit American troops to actual or potential hostilities without specific congressional authorization. Pub.L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541 *et seq.*). Although President Bush signed the Joint Resolution the day it was passed, he did so noting "the longstanding position of the executive branch regarding the President's constitutional authority to use force, including the Armed Forces of the United States and regarding the Constitutionality of the War Powers Resolution." Press Release, Office of the Press Secretary, President Signs Authorization for Use of Military Force Bill (Sept. 18, 2001) (statement by the President), *available at* http://www.whitehouse.gov/news/releases/2001/09 20010918-10.html.

of 9-11—none of us disputes al Qaeda is responsible for the carnage of that day, (3) in order to prevent future attacks of terrorism against the United States—Padilla is alleged to be closely associated with an al Qaeda plan to carry out an attack in the United States[36] *and* to possess information that if obtained by the U.S. would prevent future terrorist attacks.

The Joint Resolution has limits; it applies only to those subsets of persons, organizations and nations "[the President] determines planned, authorized, committed, or aided the terrorist attacks." Pub.L. No. 107-40, 115 Stat. 224. The President is not free to detain U.S. citizens who are merely sympathetic to al Qaeda.[37] Nor is he broadly empowered to detain citizens based on their ethnic heritage. Rather, the Joint Resolution is a specific and direct mandate from Congress to stop al Qaeda from killing or harming Americans here or abroad.[38] The Joint Resolution is quite clear in its man-

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[36] The majority confirms that "the government had ample cause to suspect Padilla of involvement in a terrorist plot." Maj. at [4a] n.2.

[37] Compare the language of the Joint Resolution, *supra* at [59a-60a], with that of the Emergency Detention Act of 1950, former 50 U.S.C. §§ 811-26 (1970), which authorized the President to detain:

> persons who there is reasonable ground to believe probably will commit or conspire with others to commit espionage or sabotage . . ., in a time of internal security emergency, essential to the common defense and to the safety and security of the territory, the people and the Constitution of the United States.

Id. at § 811(14).

[38] In fact, some in Congress were concerned the "organization" prong of the Joint Resolution was too limited in its scope. They felt the Joint Resolution, as enacted, unnecessarily limited the President's ability to act against terrorist organizations such as

date. Congress noted that the 9-11 attacks made it "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." *Id.* It seems clear to me that Congress understood that in light of the 9-11 attacks the United States had become a zone of combat.

Organizations such as al Qaeda are comprised of people. Congress could not have intended to limit the President's authority to only those al Qaeda operatives who actually planned or took part in 9-11. That would do little to prevent future attacks. The fate of the participants is well known. And surely Congress did not intend to limit the President to pursue only those individuals who were al Qaeda operatives as of September 11, 2001. But even if it did, Mr. Padilla fits within the class for by September of 2001, he had already been under the tutelage and direction of senior al Qaeda officers for three years. Clearly, Congress recognized that al Qaeda and those who now do its bidding are a continuing threat to the United States. Thus, the Joint Resolution does have teeth and whether Padilla is a loaded weapon of al Qaeda would appear to be a fact question. A hearing, as ordered by the district court, would have settled the matter.

The majority suggests, however, that the President's actions are ultra vires because "the Joint Resolution does not specifically authorize detentions." Maj. at [43a-44a], [50a-55a]. To read the resolution as the majority suggests would create a false distinction between the use of force and the ability to detain. It

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Hamas, Hezbollah and Islamic Jihad. *See, e.g.*, 147 Cong. Rec. H5638, 5643 (2001) (statement of Representative Berman).

would be curious if the resolution authorized the interdiction and shooting of an al Qaeda operative but not the detention of that person.

The majority contends that 18 U.S.C. § 4001(a) prohibits detention of U.S. citizens on U.S. soil as enemy combatants absent a precise and specific statutory authorization from Congress. They offer a detailed history of the statute's enactment, which effectuated a repeal of the Emergency Detention Act of 1950, former 50 U.S.C. §§ 811-26 (1970). I share their view that the plain language of the statute appears to apply to military and civil detentions and that its placement in the U.S. Code does not rebut that conclusion. *See* Maj. at [48a-50a].[39] However, I find it somewhat puzzling that despite the statute's obvious and conceded clarity, the majority, based solely on the statement of one Member of Congress, *see* Maj. at [47a], sees fit to add a condition not found in the words of the section. The statute is quite clear: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). The section neither defines an "Act of Congress" nor contains a requirement that the authorizing enactment use the word "detention." The majority does not contest that the Joint Resolution is an Act of Congress. However, they chafe at its lack of specificity. As noted above, I think it would be quite difficult to conclude that Congress did not envision that detaining a terrorist was a possibility. It is apparent from the legislative record of § 4001(a) and the Joint Resolution that the efforts of Congress in each instance meant and

[39] I also concur with my colleagues' rejection of the Secretary's argument that 10 U.S.C. § 956(5) constitutes an Act of Congress authorizing detentions such as Padilla's.

implied many different things to individual Members. That is not unusual. It would be quite a surprise to see that Congress was of one mind on any issue; that is the nature of a representative democracy. But one thing is clear, both enactments have the force of law. It is the words used, not the individual motives of legislators, that should serve as the guide. Thus, I think it best to trace a course of legislative intent using the plain and powerful language employed.

The problem with the majority's view of the Joint Resolution of September 18, 2001 is that it reduces the legislative efforts contained therein to a general policy statement notwithstanding the resolution's declaration invoking the War Powers Resolution of 1973. Following the events of 9-11 the President declared a national emergency, 66 Fed.Reg. 48199 (2001), thus triggering the President's war powers authority under The War Powers Resolution. *See* 50 U.S.C. 1541(c)(3). Nothing in the War Powers Resolution of 1973 constrains the President's utilization of his war powers.[40] Congress passed the Joint Resolution and agreed that the President should utilize his war powers with regard to an identified threat. Of course, identifying the threat made sense. Only days earlier the nation had been attacked—American lives had been lost on American soil. Congress responded and invested the President with authority to pursue those responsible for the attacks in order to prevent future attacks.[41] Contrary

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[40] Although the President may view the War Powers Resolution as an unconstitutional infringement on his constitutional authority to deal with belligerents, that fight need not be won here.

[41] The majority concludes that Mr. Padilla's detention as a material witness "neutralized" the threat he presented. *See* Maj. at [4a], [42a] n.27. This of course overlooks a significant aspect of

to the implication of the majority, the Joint Resolution was *not* limited in geographic scope. It did not limit the President's authority to foreign theaters. Congress clearly recognized that the events of 9-11 signaled a war with al Qaeda that could be waged on U.S. soil.

The President's authority to detain an enemy combatant in wartime is undiminished by the individual's U.S. citizenship. *Quirin*, 317 U.S. at 37- 38, 63 S. Ct. 1; *see also Hamdi* v. *Rumsfeld*, 296 F.3d 278, 281-83 (4th Cir. 2002). Consequently, Padilla's citizenship here is irrelevant. Moreover, the fact that he was captured on U.S. soil is a distinction without a difference. While Mr. Padilla's conduct may have been criminal, it was well within the threat identified in the Joint Resolution. The resolution recognizes the painful reality of 9-11; it seeks to protect U.S. citizens from terrorist attacks at home and abroad. "[E]ntry upon our territory in time of war by enemy belligerents, including those acting under the direction of armed forces of the enemy . . . is a warlike act." *Quirin*, 317 U.S. at 36-37, 63 S. Ct. 1.[42]

Congress presumably was aware of § 4001(a) when it passed the Joint Resolution. *See Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184, 108 S. Ct. 1704, 100 L.Ed.2d 158 (1988). The resolution was congressional confirmation that the nation was in crisis. Congress

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the President's Order of June 9, 2002. Padilla was not only a threat with regard to a specific terrorist plot, *see* Maj. at [4a] n.2, he allegedly possesses information that could assist the United States in thwarting other terrorists plots in the U.S. and abroad.

[42] Under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(4), 6 U.S.T. 3317, 75 U.N.T.S. 135, prisoners of war subject to capture include all "persons who accompany the armed forces without actually being members thereof."

called upon the President to utilize his Article II war powers to deal with the emergency. By authorizing the President to use necessary and appropriate force against al Qaeda and its operatives, Congress had to know the President might detain someone who fell within the categories of identified belligerents in carrying out his charge. A different view 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. And if, as the majority asserts, § 4001(a) is 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.

Sadly, the majority's resolution of this matter fails to address the real weakness of the government's appeal. Padilla presses to have his day in court to rebut the government's factual assertions that he falls within the authority of the Joint Resolution. The government contends that Mr. Padilla can be held incommunicado for 18 months with no serious opportunity to put the government to its proof by an appropriate standard. The government fears that to do otherwise would compromise its ability both to gather important information from Mr. Padilla and to prevent him from communicating with other al Qaeda operatives in the United States.

While those concerns may be valid, they cannot withstand the force of another clause of the Constitution on which all three of us could surely agree. No one has suspended the Great Writ. *See* U.S. CONST. art. I,

§ 9, cl. 2. Padilla's right to pursue a remedy through the writ would be meaningless if he had to do so alone. I therefore would extend to him the right to counsel as Chief Judge Mukasey did. *See Padilla*, 233 F. Supp. 2d at 599-609. At the hearing, Padilla, assisted by counsel, would be able to contest whether he is actually an enemy combatant thereby falling within the President's constitutional and statutory authority.

One of the more troubling aspects of Mr. Padilla's detention is that it is undefined by statute or Presidential Order. *Compare Quirin*, 317 U.S. at 26-28, 35, 63 S. Ct. 1 (citing former 10 U.S.C. §§ 1553 and 1554 (1940)), *with* 66 Fed. Reg. 57833 (2001). Certainly, a court could inquire whether Padilla continues to possess information that was helpful to the President in prosecuting the war against al Qaeda. Presumably, if he does not, the President would be required to charge Padilla criminally or delineate the appropriate process by which Padilla would remain under the President's control. *See, e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L.Ed.2d 653 (2001).

Mr. Padilla's case reveals the unique dynamics of our constitutional government. Padilla is alleged to be a member of an organization that most Americans view with anger and distrust. Yet his legal claims receive careful and thoughtful attention and are examined not in the light of his cause—whatever it may be—but by the constitutional and statutory validity of the powers invoked against him. *See Youngstown*, 343 U.S. at 623, 72 S. Ct. 863 (Jackson, J., concurring).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 02 Civ. 4445(MBM)

JOSE PADILLA, BY DONNA R. NEWMAN,
AS NEXT FRIEND, PETITIONER

v.

DONALD RUMSFELD, RESPONDENT

Dec. 4, 2002

OPINION AND ORDER

TABLE OF CONTENTS

MUKASEY, District Judge.

Petitioner in this case, Jose Padilla, was arrested on May 8, 2002, in Chicago, on a material witness warrant issued by this court pursuant to 18 U.S.C. § 3144 to enforce a subpoena to secure Padilla's testimony before a grand jury in this District. His arrest and initial detention were carried out by the U.S. Department of Justice. As the result of events described below—including the President's designation of Padilla as an enemy combatant associated with a terrorist network called al Qaeda—Padilla is now detained, without formal charges against him or the prospect of release after the giving of testimony before a grand jury, in the custody of the U.S. Department of Defense at the Consolidated Naval Brig in Charleston, South Carolina.

Through his attorney, Donna R. Newman, acting as next friend, Padilla has petitioned pursuant to 28 U.S.C. § 2241, seeking relief in the nature of habeas corpus, challenging the lawfulness of his detention, and seeking an order directing that he be permitted to consult with counsel. He has named as respondents President George W. Bush, Secretary of Defense

Donald Rumsfeld, and Commander M.A. Marr, the officer in charge of the brig where he is detained.[1] The government has moved to dismiss the petition on several grounds, including that Newman lacks standing necessary to establish next friend status, and that this court lacks personal jurisdiction over any proper respondent, and over all of those named as respondents. Alternatively, the government moves to transfer the case to the District of South Carolina, where Padilla is held.

As to the merits, the government argues that the lawfulness of Padilla's custody is established by documents already before this court. Padilla argues that the President lacks the authority to detain him under the circumstances present here, including that he is a United States citizen arrested in the United States, and that in any event he must be permitted to consult with counsel.[2] The government has submitted a classified document *in camera* to be used, if necessary, in aid of deciding whether there exists evidence to justify the order directing that Padilla be detained.

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[1] Initially, Padilla also named Attorney General John Ashcroft as a respondent, but the parties have agreed that he should not be so named, and therefore the petition is dismissed as to him.

[2] In addition, two sets of *amici curiae* have filed briefs. In one brief, the New York State and the National Association of Criminal Defense Lawyers have argued principally that this court has jurisdiction to review Padilla's detention, and that that detention on its current terms is unlawful. In another brief, the American and New York Civil Liberties Union Foundations, and the Center for National Security Studies (collectively "ACLU"), also argue principally that Padilla's detention on its current terms is unlawful.

For the reasons set forth below, the parties' applications and motions are resolved as follows: (i) Newman may pursue this petition as next friend to Padilla, and the government's motion to dismiss for lack of standing therefore is denied; (ii) Secretary Rumsfeld is the proper respondent in this case, and this court has jurisdiction over him, as well as jurisdiction to hear this case, and the government's motion to dismiss for lack of jurisdiction, or to transfer to South Carolina, is denied; (iii) the President is authorized under the Constitution and by law to direct the military to detain enemy combatants in the circumstances present here, such that Padilla's detention is not *per se* unlawful; (iv) Padilla may consult with counsel in aid of pursuing this petition, under conditions that will minimize the likelihood that he can use his lawyers as unwilling intermediaries for the transmission of information to others and may, if he chooses, submit facts and argument to the court in aid of his petition; (v) to resolve the issue of whether Padilla was lawfully detained on the facts present here, the court will examine only whether the President had some evidence to support his finding that Padilla was an enemy combatant, and whether that evidence has been mooted by events subsequent to his detention; the court will not at this time use the document submitted *in camera* to determine whether the government has met that standard.

I. FACTUAL BACKGROUND

The immediate factual and legal predicate for this case lies in the September 11, 2001 attacks on this country, and the government's response. On that date, as is well known, 19 terrorists associated with an organization called al Qaeda hijacked four airplanes,

and succeeded in crashing three of them into public buildings they had targeted—one into each of the two towers of the World Trade Center in New York, and one into the Pentagon near Washington, D.C. The World Trade Center towers were destroyed and the Pentagon was seriously damaged. Passengers on the fourth airplane sought to overpower the hijackers, and in so doing prevented that airplane from being similarly used, although it too crashed, in a field in Pennsylvania, and all aboard were killed. In all, more than 3,000 people were killed in that day's coordinated attacks.

On September 14, 2001, by reason of those attacks, the President declared a state of national emergency. On September 18, 2001, Congress passed Public Law 107-40, in the form of a joint resolution that took note of "acts of treacherous violence committed against the United States and its citizens," of the danger such acts posed to the nation's security and foreign policy, and of the President's authority to deter and prevent "acts of international terrorism against the United States." The resolution, entitled "Authorization for Use of Military Force," (the "Joint Resolution") then provided as follows:

> That the 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.

Authorization for Use of Military Force, Pub. Law No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).[3] As the term "Public Law" connotes, the President signed the Joint Resolution.

On November 13, 2001, the President signed an order directing that persons whom he determines to be members of al Qaeda, or other persons who have helped or agreed to commit acts of terrorism aimed at this country, or harbored such persons, and who are not United States citizens, will be subject to trial before military tribunals, and will not have recourse to any other tribunal, including the federal and state courts of this country. He specifically cited the Joint Resolution in the preamble to that order. Mil. Order of Nov. 13, 2001, 66 Fed.Reg. 57,833, 57,833 (Nov. 16, 2001).

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[3] The Joint Resolution provides also, in section 2(b)(1), that it "is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." Authorization for Use of Military Force, Pub. Law No. 107-40, § 2(b)(1), 115 Stat. 224, 224 (2001). That resolution was enacted in 1973 over Presidential veto, and purported to limit the President's authority and discretion to commit American troops to actual or potential hostilities without specific Congressional authorization. War Powers Resolution, Pub. Law No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541 *et seq.*). Although President Bush signed the Joint Resolution the day it was passed, he did so while maintaining "the longstanding position of the executive branch regarding the President's constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War Powers Resolution." Press Release, Office of the Press Secretary, President Signs Authorization for Use of Military Force Bill (Sept. 18, 2001) (statement by the President), http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html. The constitutionality of the War Powers Resolution is a matter of debate, has never been tested in court—if indeed it could be—and need not be treated in this opinion.

As previously noted, on May 8, 2002, this court, acting on an application by the Justice Department pursuant to 18 U.S.C. § 3144,[4] based on facts set forth in the affidavit of Joseph Ennis, a special agent of the FBI, found that Padilla appeared to have knowledge of facts relevant to a grand jury investigation into the September 11 attacks. That investigation included an ongoing inquiry into the activities of al Qaeda, an organization believed to be responsible for the September 11 attacks, among others, and to be committed to and involved in planning further attacks. On May 15, 2002, following Padilla's removal from Chicago to New York, where he was detained in the custody of the Justice Department at the Metropolitan Correctional Center ("MCC"), he appeared before this court, and Donna R. Newman, Esq. was appointed to represent him. After Newman had conferred with Padilla at the MCC, and following another court appearance on May 22, 2002, Padilla, represented by Newman, moved to vacate the warrant. The motion to vacate the warrant included an affirmation from Padilla obviously drafted by Newman, albeit one that did not discuss any issue relating to the likelihood that he had information material to a grand jury investigation. (Padilla Affirmation) The motion was fully submitted for decision by June 7.

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[4] That section provides, in relevant part: "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title." 18 U.S.C. § 3144 (2000).

However, on June 9, 2002, the government notified the court *ex parte* that it was withdrawing the subpoena. Pursuant to the government's request, the court signed an order vacating the warrant. At that time, the government disclosed that the President had designated Padilla an enemy combatant, on grounds discussed more fully below, and directed the Secretary of Defense, respondent Donald Rumsfeld, to detain Padilla. The government disclosed to the court as well that the Department of Defense would take custody of Padilla forthwith, and transfer him to South Carolina, as in fact happened.

On June 11, 2002, Newman and the government appeared before this court at the time a conference had been scheduled in connection with Padilla's then-pending motion to vacate the material witness warrant. At that time, Newman filed a habeas corpus petition pursuant to 28 U.S.C. § 2241[5], later to be amended. In response to an inquiry from the court, the government conceded that after the June 9 Order was signed,

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[5] That section provides, in pertinent part:

> (a) Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions.
>
> . . . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States . . .; or
>
> . . . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

28 U.S.C. § 2241 (2000).

Department of Defense personnel took custody of Padilla in this district. (Tr. of 6/11/02 at 7; *see also* Tr. of 7/31/02 at 17) Newman's petition alleges the facts surrounding Padilla's initial capture and transfer to New York, Newman's activities in connection with representing him, proceedings relating to his motion to vacate the material witness warrant, and his subsequent transfer to South Carolina. (Am.Pet.¶¶ 15-22, 25) Newman has averred that she was told she would not be permitted to visit Padilla at the South Carolina facility, or to speak with him; she was told she could write to Padilla, but that he might not receive the correspondence. (Newman Aff. of 9/24/02 ¶ 8)

In addition to having submitted the above-mentioned affirmation from Padilla in connection with the motion to vacate the material witness warrant, according to the amended petition, it appears that Newman consulted not only with Padilla but also with his family. (Am.Pet.¶ 20) No criminal charges have been filed against Padilla.

The President's order, dated June 9, 2002 (the "June 9 Order"), is attached, in redacted form, to the government's dismissal motion, and sets forth in summary fashion the President's findings with respect to Padilla. Attached as well is a declaration of Michael H. Mobbs ("Mobbs Declaration"), who is employed by the Department of Defense. The Mobbs Declaration sets forth a redacted version of facts provided to the President as the basis for the conclusions set forth in the June 9 Order. In addition to the redacted summary contained in the Mobbs Declaration, the government has submitted, under seal, an unredacted version of information provided to the President ("Sealed Mobbs Declaration"). As set forth more fully below, the government

has argued that the Mobbs Declaration is sufficient to establish the correctness of the President's findings contained in the June 9 Order, although it has made the Sealed Mobbs Declaration available to the court to remedy any perceived insufficiency in the Mobbs Declaration. However, the government has maintained that the Sealed Mobbs Declaration must remain confidential. The government has taken the position that it would withdraw the Sealed Mobbs Declaration sooner than disclose its contents to defense counsel. (Respondents' Resp. to Petitioners' Supplemental Mem. at 11).

The June 9 Order is addressed to the Secretary of Defense, and includes seven numbered paragraphs setting forth the President's conclusion that Padilla is an enemy combatant, and, in summary form, the basis for that conclusion, including that Padilla: is "closely associated with al Qaeda," engaged in "hostile and warlike acts" including "preparation for acts of international terrorism" directed at this country, possesses information that would be helpful in preventing al Qaeda attacks, and represents "a continuing, present and grave danger to the national security of the United States." (June 9 Order ¶¶ 2-5) In addition, the June 9 Order directs Secretary Rumsfeld to detain Padilla. (*Id.* ¶ 6)

The Mobbs Declaration states that Padilla was born in New York and convicted in Chicago, before he turned 18, of murder. Released from prison after he turned 18, Padilla was convicted in Florida in 1991 of a weapons charge. After his release from prison on that charge, Padilla moved to Egypt, took the name Abdullah al Muhajir, and is alleged to have traveled also to Saudi Arabia and Afghanistan. (Mobbs Decl. ¶ 4) In 2001, while in Afghanistan, Padilla is alleged to have

approached "senior Usama Bin Laden lieutenant Abu Zubaydeh" (*id.* ¶ 6) and proposed, among other things, stealing radioactive material within the United States so as to build, and detonate a "'radiological dispersal device' (also known as a 'dirty bomb') within the United States" (*id.* ¶ 8). Padilla is alleged to have done research on such a project at an al Qaeda safehouse in Lahore, Pakistan, and to have 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. (*See id.* ¶¶ 7-9) One of the unnamed confidential sources referred to in the Mobbs Declaration said he did not believe Padilla was actually a member of al Qaeda, but Mobbs emphasizes that Padilla had "extended contacts with senior Al Qaeda members and operatives" and that he "acted under the direction of [Abu] Zubaydah and other senior Al Qaeda operatives, received training from Al Qaeda operatives in furtherance of terrorist activities, and was sent to the United States to conduct reconnaissance and/or conduct other attacks on their behalf." (*Id.* ¶ 10)

As mentioned above, Padilla was taken into custody on the material witness warrant on May 8, in Chicago, where he landed after traveling, with one or more stops, from Pakistan. (*Id.* ¶ 11)

Dealing with the contents of the Sealed Mobbs Declaration is problematic. Padilla argues that I should not consider it at all, at least unless his lawyers have access to it and, he argues, he has an opportunity to respond to its contents. The government argues that I must not disclose it, but that I need not consider it because the redacted version of what the President was told, as set forth in the Mobbs Declaration, is enough to

justify the June 9 Order, unless for some reason I think otherwise, in which case I am invited to examine it *in camera.* Although neither the government nor Padilla mentions the point, the contents of the Sealed Mobbs Declaration could relate to another issue—whether, as the government claims, there is a reasonably cognizable risk to national security that could result from permitting Padilla to consult with counsel.

Although Padilla had been under arrest pursuant to the material witness warrant since May 8, his arrest was announced on June 10, after he was taken into Defense Department custody, by the President and by Attorney General John Ashcroft, who made his announcement during a trip to Moscow. *See* James Risen & Philip Shenon, *Traces of Terror: The Investigation; U.S. Says it Halted Qaeda Plot to Use Radioactive Bomb,* N.Y. Times, June 11, 2002, at A1.

Secretary Rumsfeld was questioned at a press briefing on Wednesday, June 12, during a trip to Doha, Qatar, about how close he thought Padilla and others were to being able to build a "dirty bomb," and whether he thought Padilla would be "court martialled."[6] News Briefing, Department of Defense (June 12, 2002), 2002 WL 22026773. In response, Secretary Rumsfeld described Padilla as "an individual who unquestionably was involved in terrorist activities against the United States." *Id.* He said that Padilla "will be held by the United States government through the Department of Defense and be questioned." *Id.* He then added that in order to protect the United States and its allies, "one

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[6] This was apparently an inartful reference to trial before a military tribunal, a procedure the President has already declared he will not apply to American citizens. *See supra* p. [81a].

has to gather as much [ ] intelligence information as is humanly possible." *Id.* Secretary Rumsfeld then summarized as follows how Padilla would be dealt with:

> Here is an individual who has intelligence information, and it is, in answer to the last part of your question—will be submitted to a military court, or something like that—our interest really in his case is not law enforcement, it is not punishment because he was a terrorist or working with the terrorists. Our interest at the moment is to try and find out everything he knows so that hopefully we can stop other terrorist acts.

Id.

Secretary Rumsfeld distinguished as follows the government's handling of Padilla from its handling of the usual case of one charged with breaking the law:

> It seems to me that the problem in the United States is that we have—we are in a certain mode. Our normal procedure is that if somebody does something unlawful, illegal against our system of government, that the first thing we want to do is apprehend them, then try them in a court and then punish them. In this case that is not our first interest.
>
> Our interest is to—we are not interested in trying him at the moment; we are not interested in punishing him at the moment. We are interested in finding out what he knows. Here is a person who unambiguously was interested in radiation weapons and terrorist activity, and was in league with al Qaeda. Now our job, as responsible government officials, is to do everything possible to find out what

> that person knows, and see if we can't help our country or other countries.

Id.

Secretary Rumsfeld offered anecdotal evidence to justify applying to Padilla procedures different from those applied to prisoners arrested in conventional cases:

> If you think about it, we found some material in Kandahar that within a week was used—information, intelligence information—that was used to prevent a[t] least three terrorist attacks in Singapore—against a U.S. ship, against a U.S. facility and against a Singaporean facility.
>
> Now if someone had said when we found that information or person, well now let's us arrest the person and let's start the process of punishing that person for having done what he had did, we never would have gotten that information. People would have died.
>
> So I think what our country and other countries have to think of is, what is your priority today? And given the power of weapons and given the number of terrorists that exist in the world, our approach has to [be] to try to protect the American people, and provide information to friendly countries and allies, and protect deployed forces from those kind of attacks.
>
> I think the American people understand that, and that notwithstanding the fact that some people are so locked into the other mode that they seem not

> able to understand it, I suspect that . . . the American people will.

Id. Secretary Rumsfeld's quoted statements appear to show both his familiarity with the circumstances of Padilla's detention, and his personal involvement in the handling of Padilla's case.

It is not disputed that Padilla is held incommunicado, and specifically that he has not been permitted to consult with Newman or any other counsel.

Although the immediate predicate for this case lies in the events of September 11 and their consequences, that date did not mark the first violent act by al Qaeda directed against the United States. An indictment styled *United States* v. *Bin Laden*, No. 98 Cr. 1023, charged defendants allegedly affiliated with that organization in connection with the August 1998 bombing of United States embassies in Nairobi, Kenya and Dar-Es-Salaam, Tanzania. According to that indictment, which was tried to a guilty verdict in the summer of 2001, al Qaeda emerged in 1989, under the leadership of Usama Bin Laden. *See United States* v. *Bin Laden*, 92 F. Supp. 2d 225, 228-29 (S.D.N.Y. 2000). As summarized by Judge Sand, who presided at that trial, the indictment portrayed al Qaeda as a "vast, international terrorist network" that functioned on its own and in cooperation with like-minded groups to oppose the United States through the use of "violent, terrorist tactics." *Id.* "From time to time, according to the Indictment, Bin Laden would issue rulings on Islamic law, called 'fatwahs,' which purported to justify al Qaeda's violent activities." *Id.* at 229. Bin Laden has declared a "jihad" or holy war against the United States. *Id.* at 230.

In addition to the September 11 attack and the 1998 bombings in Kenya and Tanzania, al Qaeda is believed, at a minimum, to be responsible for the October 2000 bombing of the U.S.S. Cole that killed 17 U.S. sailors, and to have participated in the October 1993 attack on U.S. military personnel serving in Somalia that killed 18 soldiers. (*Id.*)

On October 8, 1999, al Qaeda was designated by the Secretary of State as a foreign terrorist organization, pursuant to section 219 of the Immigration and Nationality Act. *See Designation of Foreign Terrorist Organizations*, 64 Fed.Reg. 55,112 (1999). It has also been similarly designated by the Secretary of State under the International Emergency Economic Powers Act. *See Additional Designations of Terrorism-Related Blocked Persons*, 66 Fed.Reg. 54,404 (2001).

II. NEWMAN'S STANDING AS NEXT FRIEND

The first of the several issues presented by this petition concerns Newman's Standing to assert a claim as next friend. The statute, 28 U.S.C. § 2242 (2000), provides that an application for relief thereunder "shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." The Supreme Court has explained that this provision was intended to permit a third party to sue as next friend when a prisoner is unable to seek relief himself. *See Whitmore* v. *Arkansas*, 495 U.S. 149, 162, 110 S. Ct. 1717, 109 L.Ed.2d 135 (1990) ("Most frequently, 'next friends' appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves."). In *Whitmore*, the Court described as follows the requirements for next friend standing:

> "[N]ext friend" standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another. Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest.

Id. at 163-64, 110 S. Ct. 1717 (citations omitted).

The Court placed the burden on the next friend "clearly to establish the propriety of his status and thereby justify the jurisdiction of the court." *Id.* at 164, 110 S. Ct. 1717. The Court explained that the limitations on next friend status "are driven by the recognition that '[i]t was not intended that the writ of habeas corpus should be availed of, as a matter of course, by intruders or uninvited meddlers, styling themselves next friends.'" *Id.* (quoting *United States ex rel. Bryant* v. *Houston*, 273 F. 915, 916 (2d Cir. 1921)). The Court added that "if there were no restriction on 'next friend' standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'" *Id.*

Of the factors listed in *Whitmore* to support a finding of next friend status—inaccessibility of the party in interest, the proposed next friend's dedication to the

welfare of that party, and a "significant relationship" between the proposed next friend and that party—the government disputes Newman only as to the last. It argues that Newman's relationship with Padilla is not sufficiently significant to warrant recognizing her as next friend in this case (Mot. to Dismiss Am. Pet. at 8-10), and suggests instead that a member of Padilla's immediate family, if so inclined, might serve in that capacity (*id.* at 10; Respondents' Reply in Supp. of Mot. to Dismiss Am. Pet. at 7- 8). Here, the government relies principally on *Hamdi* v. *Rumsfeld*, 294 F.3d 598 (4th Cir. 2002), a case involving a petitioner who is also detained as an enemy combatant, in whose behalf a federal public defender sought to file a habeas corpus petition as next friend. The federal defender in that case had no preexisting relationship with Hamdi, *id.* at 604, and there existed a person known to the federal defender—Hamdi's father—who did have such a relationship, *id.* at 606. Indeed, Hamdi's father petitioned for next friend status. *Id.* The Court said, "[w]e need not decide just how significant the relationship between the would-be next friend and the real party in interest must be in order to satisfy the requirements for next friend standing. It suffices here to conclude that no preexisting relationship whatever is insufficient." *Id.* at 604. The Court reasoned, "[A]bsent a requirement of some significant relationship with the detainee, there is no principled way to distinguish a Public Defender from someone who seeks simply to gain attention by injecting himself into a high-profile case, and who could substantiate alleged dedication to the best interests of the real party in interest by attempting to contact him and his family." *Id.* at 605. Notably, the Court in *Hamdi* explicitly declined to say "that an attorney can never possess next friend

standing, or that only the closest relative can serve as next friend." *Id.* at 607.

This case is easily distinguished from *Hamdi*. Here, Newman had a preexisting relationship with Padilla that involved directly his apprehension and confinement. She had conferred with him over a period of weeks in aid of an effort to end that confinement. She submitted at least one affidavit that he signed, and was engaged in attacking the legal basis of his confinement when he was taken into custody by the Defense Department. She is at once the person most aware of his wishes in this case and the person best suited to try to achieve them. It is of no significance whatever that when she and Padilla formed their relationship he was in the custody of the Justice Department and now he is in the custody of a different executive department. The legal issues may have changed, but the nature of the relationship between Newman and her client has not.

Not only does Newman have a significant and relevant relationship with Padilla, but she appears also to have conferred with Padilla's relatives. (*See* Am. Pet. ¶ 20 ("As an additional part of her representation of Mr. Padilla, Petitioner Donna R. Newman . . . consulted with both members of Mr. Padilla's family and representatives of the Government. She continues to consult with the Government and Mr. Padilla's family in her role as his attorney.")) She is certainly neither an "intruder" nor an "uninvited meddler." *Whitmore*, 495 U.S. at 164, 110 S. Ct. 1717.

Despite the government's casual suggestion that some other member of Padilla's family might serve as a next friend in this case (Mot. to Dismiss Am. Pet. at 10; Respondents' Reply in Supp. of Mot. to Dismiss Am. Pet. at 7-8), there is no indication here that any other

member of Padilla's family, unlike the detainee's father in *Hamdi*, wishes to assume that role in place of Newman. The government cites several cases in which family members have been granted next friend status, and argues, extravagantly, that those cases show that "'[n]ext friend' standing is typically reserved for those who have a close, *personal* relationship with a detainee —like a parent, spouse, or sibling." (Mot. to Dismiss Am. Pet. at 9) Those cases stand for no such principle. Rather, they involve for the most part capital defendants who have elected to forgo appeals and whose competence is in question. In such cases, courts have permitted family members to intervene as next friends to seek stays of execution. *See*, *e.g.*, *Vargas* v. *Lambert*, 159 F.3d 1161, 1168 (9th Cir. 1998) (mother had standing to seek stay of execution to allow for hearing on son's competency); *In re Heidnik*, 112 F.3d 105, 112 (3d Cir. 1997) (per curiam) (daughter could serve as next friend to stop father's execution upon showing he suffered from paranoid schizophrenia). However, when incompetence has not been shown, courts have denied next friend status even to close relatives. *See Brewer* v. *Lewis*, 989 F.2d 1021, 1026 (9th Cir. 1993) (mother did not have next friend standing because she failed to show defendant was incompetent).

The government quotes selectively from *T.W. by Enk* v. *Brophy*, 124 F.3d 893 (7th Cir. 1997), in an effort to show that a next friend ordinarily should be a relative. However, the Court was concerned in that case specifically with who should serve as a next friend when the real party in interest was a minor child. In such a case, it is obvious that:

> ordinarily the eligibles will be confined to the plaintiff's parents, older siblings (if there are no parents),

> or a conservator or other guardian, akin to a trustee; that persons having only an ideological stake in the child's case are never eligible; but that if a close relative is unavailable and the child has no conflict-free general representative the court may appoint a personal friend of the plaintiff or his family, a professional who has worked with the child, or, in desperate circumstances, a stranger whom the court finds to be especially suitable to represent the child's interests in the litigation.

Id. at 897. That case does not support the government's position here.

The government has informed me that the Ninth Circuit recently decided *Coalition of Clergy* v. *Bush*, 310 F.3d 1153 (9th Cir. 2002), but that case, involving a group of self-appointed "clergy, lawyers and law professors," *id.* at 1156, presents the classic "intruder" and "uninvited meddler" scenario that *Whitmore* found insufficient to confer standing. *See Whitmore*, 495 U.S. at 164, 110 S. Ct. 1717. *Coalition of Clergy* does not read on this case.

Both sides refer to *Lenhard* v. *Wolff*, 443 U.S. 1306, 100 S. Ct. 3, 61 L.Ed.2d 885 (1979) (Rehnquist, Circuit Justice, in chambers). There, Justice Rehnquist found it telling that a capital defendant's family declined to join in the effort to secure further judicial review of his sentence, and drew the inference that they felt the defendant was competent to waive further proceedings and therefore that the predicate showing of incompetence necessary to permit a next friend petition when the detainee is accessible and can act for himself had not been made. *Id.* at 1310. However, he also stated his view "that from a purely technical standpoint a public defender may appear as 'next friend' with as much

justification as the mother of [one or another capital defendant]." *Id.* As noted above, there is no issue of competence in this case; the reason for seeking next friend standing is inaccessibility, and the government has conceded that.

There being no "technical" impediment to appointing a lawyer to serve as next friend, it is not surprising that courts have done so in appropriate cases. *See, e.g.*, *Miller ex rel. Jones* v. *Stewart*, 231 F.3d 1248 (9th Cir. 2000) (granting next friend status to lawyer seeking to stay execution and remanding for hearing on defendant's competence); *Ford* v. *Haley*, 195 F.3d 603, 624 (11th Cir. 1999) (recognizing that lawyer who had represented petitioner for years was as fit as a relative to serve as next friend); *In re Cockrum*, 867 F. Supp. 494, 495 (E.D. Tex. 1994) (condemned prisoner was incompetent; lawyer who had represented him earlier could serve as next friend). Although Newman does not have the years-long relationship with Padilla that the lawyer in *Ford* had with her client, she has a sufficient relationship to overcome any suggestion that she is a mere intermeddler pursuing her own agenda.

Newman may act as next friend to Padilla here.

III. THIS COURT'S JURISDICTION

The government argues as well that this action must be dismissed, or transferred to the District of South Carolina because the only proper respondent in a case such as this is Padilla's custodian; Padilla's only custodian is Marr, the commander of the brig in South Carolina where Padilla is housed; and she is not within this court's jurisdiction. The government has moved to dismiss the petition against respondents other than Marr. For the reasons set forth below, that motion is

granted with respect to the President and, *mea sponte*, as to Commander Marr, but is denied as to Secretary Rumsfeld.

The government's jurisdictional argument raises subsidiary issues: who is the proper respondent in a case such as this, whether this court has jurisdiction over that respondent, and whether this case should be transferred to South Carolina.

A. *Who Is A Proper Respondent?*

As the government would have it, there is only one proper respondent to a habeas corpus petition, and that is the detainee's "immediate, not ultimate, custodian." (Mot. to Dismiss Am. Pet. at 11) The government points to language in 28 U.S.C. § 2242 directing that a petitioner "shall allege . . . the name of the person who has custody over him," as well as language in 28 U.S.C. § 2243, requiring that a writ or order to show cause "shall be directed to the person having custody of the person detained," and providing that, "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained," and argues, citing *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), that this language "indicates that there is only one proper respondent to a habeas petition," *id.* at 693.

It is certainly true that in the usual habeas corpus case brought by a federal prisoner, courts have held consistently that the proper respondent is the warden of the prison where the prisoner is held, not the Attorney General. *See*, *e.g.*, *Sanders* v. *Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945) ("But the Attorney General is not the person directly responsible for the operation of our federal penitentiaries. He is a supervising official rather than a jailer. For that reason, the proper person

to be served in the ordinary case is the warden of the penitentiary in which the prisoner is confined rather than an official in Washington, D.C., who supervises the warden."). The government cites numerous cases to the same effect. (*See* Mot. to Dismiss Am. Pet. at 15 n.6) Similarly, as a general rule, the proper respondent to a petition brought by a military prisoner who challenges a court martial conviction is the warden of the facility where he is held. The government cites, for example, *Monk* v. *Secretary of the Navy*, 793 F.2d 364 (D.C. Cir. 1986), where the Court held "that for purposes of the federal habeas corpus statute, jurisdiction is proper only in the district in which the immediate, not the ultimate, custodian is located," *id.* at 369.

However, what makes the usual case usual is that the petitioner is serving a sentence, and the list of those other than the warden who are responsible for his confinement includes only people who have played particular and discrete roles in confining him, notably the prosecuting attorney and the sentencing judge, and who no longer have a substantial and ongoing role in his continued confinement. The warden becomes the respondent of choice almost by default. As discussed below, this is not the usual case.

The hint of a more flexible approach in other than usual cases may be found even in authority cited by the government, involving prisoners who file § 2241 petitions challenging parole determinations. In *Billiteri* v. *United States Bd. of Parole*, 541 F.2d 938 (2d Cir. 1976), although the Court held that a prisoner denied parole should sue the prison warden, not the Board of Parole, it added that a different conclusion might follow if the

petitioner were challenging a detention that resulted from a parole violation:

> There are, to be sure, circumstances where a parole board may properly be considered a custodian for habeas corpus purposes, e.g., after a prisoner has been released into its custody on parole, or arguably, when the Board itself has caused a parolee to be detained for violation of his parole.

Id. at 948 (citations omitted); *see also Guerra* v. *Meese*, 786 F.2d 414, 417 (D.C. Cir. 1986) (warden held to be the proper respondent, but "[w]hen the appellees are paroled, if ever, the Parole Commission might then be considered their custodian, within the meaning of the habeas corpus statute").

Padilla argues that this case is analogous to the situation described in *Billiteri*, and cites *Bennett* v. *Soto*, 850 F.2d 161 (3d Cir. 1988), where the Court held that the chair of the board of parole was responsible for revocation of petitioner's parole, and that he, rather than the warden, was the proper respondent for a petition brought under the analogous Virgin Island habeas statute, *id.* at 163; *see also McCoy* v. *United States Bd. of Parole*, 537 F.2d 962, 964-65 (8th Cir. 1976) (Board of Parole, which issued warrant and lodged detainer, and not warden of detaining institution, is proper respondent). Other courts dealing with parole have gone even further, and held that a federal prisoner challenging the determination of his parole date may name the Parole Commission as a respondent. *See Dunn* v. *United States Parole Comm'n*, 818 F.2d 742, 744 (10th Cir. 1987) (per curiam) (Parole Commission, not warden, "may be considered petitioner's 'custodian' for purposes of a challenge to a parole decision under 28

U.S.C. § 2241"); *see also Misasi* v. *United States Parole Comm'n*, 835 F.2d 754, 755 n.1 (10th Cir. 1987) (citing *Dunn* for the propriety of naming the Parole Commission).

In *Ahrens* v. *Clark*, 335 U.S. 188, 68 S. Ct. 1443, 92 L.Ed. 1898 (1948), the Supreme Court left open the question of whether the Attorney General may be named as a respondent when an alien petitions under § 2241 to challenge his detention pending deportation. After *Ahrens*, our Court of Appeals has held out at least the possibility that the Attorney General might be a proper respondent in petitions brought by aliens detained in facilities of the Immigration and Naturalization Service ("INS"). In *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998), the Court considered, but did not decide, whether the Attorney General could be a proper respondent in such cases. Two of the petitioners in *Henderson* named both the INS district director in Louisiana and the Attorney General as respondents. *Id.* at 122. Although the petitioners were not lodged in Louisiana, they were seeking release from detainers lodged by the INS district director in Louisiana. *Id.* The Henderson Court certified to the New York Court of Appeals the question of whether the INS district director in Louisiana was subject to New York long-arm jurisdiction, *id.* at 124, and although it did not rule on the propriety of naming the Attorney General, did discuss that issue at some length. The Court said that "additional factors related to the unique role that the Attorney General plays in immigration matters may be taken to suggest that she may be a proper respondent in alien habeas cases." *Id.* at 125-26. The Court added that the Attorney General "has the power to produce the petitioners, remains the ultimate decisionmaker as

to matters concerning the INS, and is commonly designated a respondent in these cases, even when personal jurisdiction over the immediate custodian clearly lies." *Id.* at 126 (citations omitted). The *Henderson* Court took note of the dictum in *Billiteri*, discussed above, *see supra* [99a-100a], to the effect that a parole board might be the proper respondent if the board itself caused a parolee to be detained, and analogized the parolee to the alien in that the Attorney General by her own decision caused the alien to be detained. *Henderson*, 157 F.3d at 126 n.22 (discussing *Billiteri*, 541 F.2d at 948).

The *Henderson* Court also acknowledged arguments against naming the Attorney General, including that the INS district director, rather than the Attorney General, exercised primary control over petitioners, and that "*Billiteri* appears to bar the designation of a higher authority (in that case, the parole board) as a custodian when a habeas petitioner is under the day-to-day control of another custodian (such as the prison warden)." *Id.* at 126-27. Although the *Henderson* Court acknowledged the government's concern that aliens could engage in forum shopping, it noted "that traditional venue doctrines are fully applicable in habeas suits" and these doctrines "if strictly applied, would do much to prevent forum shopping." *Id.* at 127. Although the Court's conclusion, in dictum, appears before this discussion, what the Court appears to have taken from these various considerations is the following: "Historically, the question of who is 'the custodian,' and therefore the appropriate respondent in a habeas suit, depends primarily on who has the power

over the petitioner and, as we will discuss below, on the convenience of the parties and the court." *Id.* at 122.[7]

Other cases, some that concededly do not involve incarcerated prisoners, but others that do, also suggest that the issue of who is the proper respondent is not always subject to a formulaic answer, and may turn on the facts before the court. Thus, in a case involving inactive reservists, the government contested the petitioners' attempt to name the Secretaries of the Army and Air Force, arguing that only the "immediate custodian" was the proper respondent. *Eisel* v. *Sec'y of the Army*, 477 F.2d 1251, 1254 (D.C. Cir. 1973). The Court declined to permit the Secretary of the Army or the Air Force to be named as a respondent, and emphasized the difference between the inactive reservist situation and the case of an incarcerated prisoner, *id.* at 1262, but dealt as follows with the government's "immediate custodian" argument:

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[7] Both before and after *Henderson*, district courts in our Circuit have divided on whether the Attorney General can be named a respondent in such actions. *Compare*, *e.g.*, *Lee* v. *Ashcroft*, 216 F. Supp. 2d 51, 54 (E.D.N.Y. 2002) (Attorney General is proper respondent), *with*, *e.g.*, *Carvajales-Cepeda* v. *Meissner*, 966 F. Supp. 207, 209 (S.D.N.Y. 1997) (district director, not Attorney General, is proper respondent). In *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), the Court held that the Attorney General is not the proper respondent, although it left open the opposite possibility in "extraordinary cases" such as a case where a petitioner was held at an undisclosed location or one "in which the INS spirited an alien from one site to another in an attempt to manipulate jurisdiction." *Id.* at 696. Without much discussion, the Third Circuit held in *Yi* v. *Maugans*, 24 F.3d 500 (3d Cir. 1994), that the warden and not the INS district director is the custodian for habeas purposes in INS cases. *Id.* at 507.

> [W]hile the statute does provide that the action shall be against the "person having custody of the person detained," it does not define "custody" or specify who the person having "custody" will be. Nowhere does the statute speak of an "immediate custodian" or intimate that an action must necessarily be instituted in the location of such an "immediate custodian," even if it were possible to grant substance to the vague concept of "immediate custodianship."

Id. at 1258 (footnotes omitted). Moreover, in other armed forces cases, courts have permitted the Secretaries of the Air Force and the Navy to be named as respondents. *See Lantz* v. *Seamans*, 504 F.2d 423 (2d Cir. 1974) (per curiam) (upholding jurisdiction of New York court over Secretary of the Air Force in case of petitioning reservist); *Carney* v. *Sec'y of Def.*, 462 F.2d 606 (1st Cir. 1972) (Secretary of the Navy was proper respondent to petition brought by Navy serviceman).

Finally, in *Demjanjuk* v. *Meese*, 784 F.2d 1114 (D.C. Cir. 1986) (Bork, J., in chambers), Judge Bork dealt with a petitioner seeking to avoid extradition who was being held at an undisclosed location. Judge Bork concluded that, "in these very limited and special circumstances" the Attorney General would be treated as the custodian and jurisdiction would lie in the D.C. Circuit alone. *Id.* at 1116.

Of the particular facts present here, the one that seems to me to bear most directly on the issue of who is a proper respondent is the personal involvement of the Cabinet-level official named as a respondent in the matter at hand. It was Secretary Rumsfeld who was charged by the President in the June 9 Order with detaining Padilla; it was plainly Secretary Rumsfeld who, in following that order, sent Defense Department

personnel into this District to take custody of Padilla; it could only have been Secretary Rumsfeld, or his designee, who determined that Padilla would be sent to the brig in South Carolina, as opposed to a brig or stockade elsewhere; and, based on his own statements quoted above, *see supra* pp. [87a-90a], it would appear to be Secretary Rumsfeld who decides when and whether all that can be learned from Padilla has been learned, and, at least in part, when and whether the danger he allegedly poses has passed. This level of personal involvement by a Cabinet-level officer in the matter at hand is, so far as I can tell, unprecedented. Certainly, neither side, and no amicus, has cited a case even remotely similar in this respect. How "limited," *Demjanjuk*, 784 F.2d at 1116, these circumstances may be—that is, in how many other cases, if any, the Secretary of Defense may have such personal involvement—I know not. However, when viewed in comparison to past cases, the circumstances present here seem at least "very special." *Id.* On these facts, the Secretary of Defense is the proper respondent.

As noted, Padilla has also sued the President. However, there are at least two reasons why the President should be dismissed as a party: first, Padilla does not seem to be seeking relief from the President; further, based on the authority cited below, the question of whether the President can be sued in this case raises issues this court should avoid if at all possible, and it is certainly possible to avoid them here.

Although it was the President who found that Padilla is an enemy combatant, and who signed the June 9 Order directing the Secretary of Defense to take custody of him, a common-sense assessment suggests that it is now the Secretary of Defense who decides

what happens to Padilla. Based on where Padilla is housed—in a naval brig in South Carolina—and Secretary Rumsfeld's own statements as to the need to find out what Padilla knows and to detain him because of the danger he presents to national security, it is obviously Defense Department personnel rather than White House personnel who are interrogating Padilla, evaluating the worth of any information he provides, and deciding what danger, if any, he may continue to pose. Thus, although the June 9 Order directs the Secretary of Defense to take custody of Padilla, I do not interpret it to mean that the Secretary must hold Padilla until the President directs otherwise. Nor would I conclude that if the Secretary were lawfully directed by a court to release Padilla, he would refuse to do so on the basis of the June 9 Order. It does not appear that the President has an ongoing involvement in Padilla's custody, and therefore Padilla does not appear to be seeking any relief from the President. Therefore, on these facts, even assuming that this court can direct the President to act, of which more in a moment, the President is not a proper party.

Moreover, the government has cited persuasive authority to the effect that this court has no power to direct the President to perform an official act. (Mot. to Dismiss Am. Pet. at 14) The relevant considerations are set forth in *Franklin* v. *Massachusetts*, 505 U.S. 788, 112 S. Ct. 2767, 120 L.Ed.2d 636 (1992), quoted below, where the plurality reversed a district court injunction directing the President to recalculate the number of representatives of the State of Massachusetts, and reasoned as follows:

> While injunctive relief against executive officials like the Secretary of Commerce is within the courts'

> power, *see Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows. We have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely "ministerial" duty, *Mississippi* v. *Johnson*, 4 Wall. 475, 498-499, 18 L.Ed. 437 (1866), and we have held that the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution, *United States* v. *Nixon*, 418 U.S. 683, 694, 94 S. Ct. 3090, 41 L.Ed.2d 1039 (1974), but in general "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi* v. *Johnson*, *supra*, 4 Wall. at 501. At the threshold, the District Court should have evaluated whether injunctive relief against the President was available, and, if not, whether appellees' injuries were nonetheless redressable.
>
> For purposes of establishing standing, however, we need not decide whether injunctive relief against the President was appropriate because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone.

Id. at 802-03, 112 S. Ct. 2767. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S. Ct. 1319, 99 L.Ed.2d 534 (1988). In this case, as in *Franklin*, the necessary relief, if any, may be secured by an order to the Secretary alone, and the

President can be dismissed as a party. There is no need to decide whether, were the facts otherwise, the President too could be named a respondent in a habeas corpus case such as this.

Although petitioner has named Commander Marr as a respondent, he and amici New York and National Criminal Defense Lawyers argue that she is not a necessary respondent in this case because she takes her orders from Secretary Rumsfeld and, indirectly, from President Bush, and cannot produce Padilla in violation of those orders without subjecting herself to a court martial. (Petitioners' Reply to Mot. to Dismiss Am. Pet. at 22-23) The government responds by pointing out that, "[n]o warden of any penal facility possesses independent power to release a prisoner, yet wardens are universally designated as the proper custodians in prisoner habeas cases." (Respondents' Reply in Supp. of Mot. to Dismiss Am. Pet. at 18) This debate now seems beside the point. I have already determined that Secretary Rumsfeld is a proper respondent, and there is nothing to indicate that he cannot or would not direct Commander Marr to obey any lawful order of this court, if necessary. Accordingly, the petition will be dismissed also as to Commander Marr.

B. *Territorial Jurisdiction*

The habeas corpus statute, 28 U.S.C. § 2241(a) (2000), permits the writ to be granted by district courts "within their respective jurisdictions." The government argues that this phrase operates to limit the jurisdiction of the court to grant the writ, beyond any limits otherwise imposed by the Federal Rules of Civil Procedure, and requires, at a minimum, that the respondent be physically present within this District in

order for the court to grant relief. (Mot. to Dismiss at 17; Respondents' Reply in Supp. of Mot. to Dismiss Am. Pet. at 22) However, for the reasons set forth below, the government's reading of the statute is inconsistent with governing authority, and this court may grant relief under the statute if relief is otherwise warranted.

The subject phrase—"within their respective jurisdictions"—was read initially by the Supreme Court in *Ahrens* v. *Clark*, 335 U.S. 188, 68 S. Ct. 1443, 92 L.Ed. 1898 (1948), to require that a petitioner be physically present within the geographic boundaries of the district before a petition could be heard. However, the Court did away with that requirement in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 93 S. Ct. 1123, 35 L.Ed.2d 443 (1973), where it held that a prisoner confined in an Alabama state prison following a felony conviction could seek habeas corpus relief in Kentucky to attack an indictment pending there, reasoning that in enforcing a Kentucky detainer, the Alabama warden was acting simply as the agent of the state of Kentucky, which was the real custodian. The Court said:

> Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Id. at 495, 93 S. Ct. 1123. In *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998), the Second Circuit relied on

Braden for the proposition that a New York district court would have jurisdiction to hear the § 2241 petitions of detained aliens so long as it had jurisdiction over the petitioners' custodian through New York's long-arm statute, N.Y. C.P.L.R. § 302(a)(1) (McKinney 1990): "A court has personal jurisdiction in a habeas case 'so long as the custodian can be reached by service of process.'" *Id.* at 122 (quoting *Braden*, 410 U.S. at 495, 93 S. Ct. 1123). The *Henderson* Court then certified to the New York Court of Appeals the question of whether New York's long-arm statute reached the INS district director in Louisiana, where the *Henderson* petitioners were detained. That Court declined to answer the question, and the parties then resolved the cases amicably. *See Yesil* v. *Reno*, 175 F.3d 287 (2d Cir. 1999) (per curiam). The Second Circuit has not considered the issue since.

However, before *Henderson*, in *U.S. ex rel. Sero* v. *Preiser*, 506 F.2d 1115 (2d Cir. 1974), the Second Circuit had occasion to consider the reach of a district court's jurisdiction under § 2241(a) when it construed § 2241(d), which directs that in a state having more than one district, a habeas petition from a prisoner in state custody pursuant to a state conviction be filed in either the district of conviction or the district of confinement, with the district courts involved then having discretion to transfer the case as they deem necessary. The Court noted that both the enactment of § 2241(d) in 1966, and the Supreme Court's decision in *Braden*, were intended to undo the damage caused by *Ahrens*, and said, based on both *Braden* and the statute itself, that it made sense to read § 2241(d) as a provision fixing venue rather than jurisdiction. The Court reasoned in part as follows: "If the original jurisdictional grant in § 2241(a)

was to be construed as coextensive with the scope of service of process, see Fed. R. Civ. P. 4(f), then a jurisdictional reading of § 2241(d) would render that subsection merely repetitious." *Id.* The Court's view that § 2241(a) was "coextensive with the scope of service of process" followed, at least in part, from its reading of *Braden*.

Both before and after *Henderson*, several district courts in this Circuit have held that if a respondent can be reached through the forum state's long-arm statute, the court has jurisdiction to hear the petition, *see*, *e.g.*, *Barton* v. *Ashcroft*, 152 F. Supp. 2d 235, 239 (D. Conn. 2001); *Perez* v. *Reno*, No. 97 Civ. 6712, 2000 WL 686369, at *3 (S.D.N.Y. May 25, 2000); as has a district court in the Sixth Circuit, *see Roman* v. *Ashcroft*, 162 F. Supp. 2d 755, 758 (N.D. Ohio 2001).

The government disagrees with those cases, and argues that habeas corpus jurisdiction is different. It notes that 28 U.S.C. § 1391(e), which provides for nationwide service of process on federal officials, does not apply in habeas corpus proceedings, and argues that *Braden* did nothing to change what the government perceives as the requirement that the custodian in habeas cases involving incarcerated prisoners be located within the district where the petition is filed. Padilla does not assert that § 1391(e) does so apply, but simply that a district court can exercise long-arm jurisdiction if the facts otherwise so warrant, even without resort to § 1391(e). *See Perez*, 2000 WL 686369, at *3 (acknowledging that 28 U.S.C. § 1391(e) does not apply, but exercising jurisdiction over out-of-state respondent through New York's long-arm statute).

It is not only *Henderson*, which I recognize assumed more than held that New York's long-arm statute can

provide the basis for personal jurisdiction over habeas corpus respondents, and the above-cited cases, which are not binding authority, that cut against the government's reading of *Braden* and therefore against its position here. The Supreme Court cases that antedated *Braden* provide a context for that case that undercuts the government's position.

One such case, relied on by the government, is *Schlanger* v. *Seamans*, 401 U.S. 487, 91 S. Ct. 995, 28 L.Ed.2d 251 (1971), where the petitioner, a serviceman on "permissive temporary duty" attending school in Arizona, sued in Arizona alleging that his enlistment contract had been breached. He named as respondents the Secretary of the Air Force, the commander of Moody Air Force Base, in Georgia, to which he had been assigned, and the commander of the ROTC program at the school he was attending. The Court framed the issue as follows: "The question in the instant case is whether any custodian, or one in the chain of command, as well as the person detained, must be in the territorial jurisdiction of the court." *Id.* at 489, 91 S. Ct. 995. The Court concluded that it was the commander of the Georgia base who was the proper custodian, and therefore, "the District Court in Arizona has no custodian against whom its writ can run . . . . [T]he absence of the custodian is fatal to the jurisdiction of the Arizona District Court." *Id.* at 491, 91 S. Ct. 995.

However, a year later, in *Strait* v. *Laird*, 406 U.S. 341, 92 S. Ct. 1693, 32 L.Ed.2d 141 (1972), the Court considered the petition of an inactive Army reservist whose contact with the Army had occurred in California but whose "nominal commanding officer" was at a record-keeping center in Indiana. *Id.* at 342, 92 S. Ct. 1693. The Court recognized its prior holding "in

Schlanger that the presence of the 'custodian' within the territorial jurisdiction of the District Court was a sine qua non," *id.* at 343, 92 S. Ct. 1693, but added: "The jurisdictional defect in *Schlanger*, however, was not merely the physical absence of the Commander of Moody AFB from the District of Arizona, but the total lack of formal contacts between Schlanger and the military in that district," *id.* at 344, 92 S. Ct. 1693. Referring to Strait's commanding officer in Indiana, the Court said:

> Strait's situation is far different. His nominal custodian, unlike Schlanger's, has enlisted the aid and directed the activities of armed forces personnel in California in his dealings with Strait. Indeed, in the course of Strait's enlistment, virtually every face-to-face contact between him and the military has taken place in California. In the face of this record, to say that Strait's custodian is amenable to process only in Indiana—or wherever the Army chooses to locate its recordkeeping center—would be to exalt fiction over reality.

Id. (citation omitted). The Court concluded that "Strait's commanding officer is 'present' in California through the officers in the hierarchy of command who processed this serviceman's application for discharge." *Id.* at 345, 92 S. Ct. 1693. Further, the Court cited and explicitly endorsed in *Strait*, *id.* at 344-45, 92 S. Ct. 1693, the Second Circuit's decision in *Arlen* v. *Laird*, 451 F.2d 684 (2d Cir. 1971), where that Court permitted a petition to be filed in New York by an inactive reservist residing there, even though his nominal commanding officer was located in Indiana. The Second Circuit rejected what it called the "limited interpretation of *Schlanger*," *id.* at 686, and concluded that

Schlanger did not preclude a district court "with jurisdiction over the territory in which an unattached reservist is in custody and in which he reside and works, from entertaining his petition for habeas corpus solely because his nominal 'commanding officer' is not physically present in the jurisdiction," *id.* Thus, in *Strait*, instead of focusing on whether the custodian was physically present within the district, the Court looked at the contacts the custodian had with the district.

Further, in *Strait*, the Court relegated to a footnote the issue of whether such "presence" could suffice for personal jurisdiction, calling that conclusion "well settled." *Id.* at 346 n.2, 92 S. Ct. 1693.

The government would read narrowly the Court's reference in *Braden* to service of process, when it said that, "[s]o long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction'," *Braden*, 410 U.S. at 495, 93 S. Ct. 1123 (quoting 28 U.S.C. § 2241(a)), by referring to the concluding lines of the case:

> Since the petitioner's absence from the Western District of Kentucky did not deprive the court of jurisdiction, and since the respondent was properly served in that district, see *Strait* v. *Laird*, 406 U.S. 341, 92 S. Ct. 1693, 32 L.Ed.2d 141 (1972); *Schlanger* v. *Seamans*, 401 U.S. 487, 91 S. Ct. 995, 28 L.Ed.2d 251 (1971), the court below erred in ordering the dismissal of the petition on jurisdictional grounds.

Id. at 500, 93 S. Ct. 1123. The government reads the phrase, "the respondent was properly served in that district" to mean that *Braden's* reference to reaching a custodian through service of process did not "contemplate service outside a district court's territorial

jurisdiction." (Respondents' Reply in Supp. of Mot. to Dismiss Am. Pet. at 22) However, the *Braden* Court cited both *Schlanger* and *Strait* as authority to support the statement that "respondent was properly served in that district." Obviously, that respondent in *Braden* was properly served within the district where that case was filed was *sufficient* to confer personal jurisdiction, but *Strait*, which the *Braden* Court itself also cites, shows that it was not also *necessary*.

The government cites language in several cases in the First, Sixth, Eighth, Ninth and District of Columbia Circuits, some of which have already been discussed above, to the effect that a respondent in a habeas corpus case must be physically present within the district where the petition is brought.[8] I have examined those cases, which involve either the usual prisoner habeas scenario treated above, or otherwise fit comfortably within the pattern of the other cases discussed above. I do not believe any of them read on the facts present here, and it would lengthen this already lengthy opinion unduly to distinguish each of them in detail. For the above reasons, as I read *Braden*, there is nothing in 28 U.S.C. § 2241(a) to prevent this court from exercising jurisdiction over Padilla's petition, particularly if New York's long-arm statute authorizes such exercise. For

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[8] Those cases are: *Malone* v. *Calderon*, 165 F.3d 1234, 1237 (9th Cir. 1999); *Yi* v. *Maugans*, 24 F.3d 500, 507 (3d Cir. 1994); *Dunne* v. *Henman*, 875 F.2d 244, 249 (9th Cir. 1989); *Monk*, 793 F.2d at 369; *Guerra*, 786 F.2d at 417; *Wright* v. *United States Bd. of Parole*, 557 F.2d 74, 77 (6th Cir. 1977); *Gravink* v. *United States*, 549 F.2d 1152, 1154 (8th Cir. 1977); *United States* v. *Clinkenbeard*, 542 F.2d 59, 60 (8th Cir. 1976); *United States* v. *DiRusso*, 535 F.2d 673, 676 (1st Cir. 1976); *Lee* v. *United States*, 501 F.2d 494, 501 (8th Cir. 1974); *Sholars* v. *Matter*, 491 F.2d 279, 281 (9th Cir. 1974); *United States* v. *Sparrow*, 463 F.2d 1215, 1216 (7th Cir. 1972).

the same reasons, I believe this reading is confirmed by *Henderson*. To the extent any of the out-of-circuit cases the government cites may bear on this case, such authority is to be treated as persuasive but not binding, *see*, *e.g.*, *Pireno* v. *N.Y. State Chiropractic Ass'n.*, 650 F.2d 387, 395 n.13 (2d Cir. 1981), and, for the above reasons, I respectfully differ from the reasoning in any such cases.

C. *Personal Jurisdiction*

The question of whether New York's long-arm statute, N.Y. C.P.L.R. § 302(a)(1) (McKinney 1990), reaches Secretary Rumsfeld is not complex. That section permits a court in New York to exercise personal jurisdiction, "[a]s to a cause of action arising from any of the acts enumerated" therein, "over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state." *Id.* The statute's "reference to 'business' is read broadly as 'purposeful activities,' without any limitation to commercial transactions." *Perez*, 2000 WL 686369, at *3 (citing *Madden* v. *International Ass'n of Heat and Frost Insulators and Asbestos Workers*, 889 F. Supp. 707, 710 (S.D.N.Y. 1995)). Section 302(a)(1) is a "single act statute": only one transaction is needed to confer jurisdiction, so long as the defendant's activities were purposeful and there is a substantial relationship between those activities and the claim in suit. *See Kreutter* v. *McFadden Oil Corp.*, 71 N.Y.2d 460, 467, 527 N.Y.S.2d 195, 198-99, 522 N.E.2d 40 (1988). Here, Secretary Rumsfeld was directed by the President on June 9 to take custody of Padilla, and, as noted, the government has acknowledged that agents of the Department of Defense came into this district that day and did so. (Tr. of 6/11/02 at 7; *see also* Tr. of 7/31/02 at

17) That conduct, through agents, is sufficient to confer jurisdiction over Secretary Rumsfeld. There is no denial of due process in finding personal jurisdiction under these circumstances.

D. *Transfer to South Carolina*

The government has moved in the alternative to transfer this case to the District of South Carolina. The principal arguments for transfer relate to issues already covered—principally, who is the proper respondent and whether this court has jurisdiction over that respondent and otherwise can hear this case. Those issues have been resolved in a way that favors keeping the case here.

Further, Padilla's lawyers are here, and Newman was here working to secure his release before he was taken to South Carolina. As a result of his having sent his agents into this district to take custody of Padilla, the Secretary can be reached through process issued by this court. Thus, he too is, in a legal if not quite a physical sense, here. Commander Marr is not here, but for reasons already explained there is no need that she be present in the jurisdiction where the action is pending. For current purposes, the Secretary will suffice. It may be, as set forth below, that it will be necessary for counsel to confer briefly with Padilla, which would entail a trip to South Carolina. However, as between taking a brief trip to South Carolina to confer with their client, and litigating the case in South Carolina, the convenience of counsel is served by keeping the case here. Insofar as the above cases suggest that considerations of convenience and practicality are relevant, *see Henderson*, 157 F.3d at 122, those considerations are served by keeping the case here.

The government's motion to transfer the case to South Carolina therefore is denied.

IV. THE LAWFULNESS OF PADILLA'S DETENTION

The basic question dividing the parties is whether Padilla is lawfully detained. Like the question of whether this court has jurisdiction, that basic question unfolds into subsidiary questions: Does the President have the authority to designate as an enemy combatant an American citizen captured on American soil, and, through the Secretary of Defense, to detain him for the duration of armed conflict with al Qaeda? If so, can the President exercise that authority without violating 18 U.S.C. § 4001(a),[9] which bars the detention of American citizens "except pursuant to an Act of Congress"? 18 U.S.C. § 4001(a) (2000). If so, by whatever standard

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[9] Padilla argues also that his detention by the military violates the Posse Comitatus Act, codified at 18 U.S.C. § 1385. That statute makes it unlawful to use the military "as a posse comitatus or otherwise to execute the laws." First, it is questionable whether that statute is enforceable in a habeas corpus proceeding to secure release from custody. *Cf. Robinson* v. *Overseas Military Sales Corp.*, 21 F.3d 502, 511 (2d Cir. 1994) (no private right of action to enforce Posse Comitatus Act). Moreover, the statute bars use of the military in civilian law enforcement. *See United States* v. *Mullin*, 178 F.3d 334, 342 (5th Cir. 1999) ("The [Posse Comitatus] Act is designed to restrict military involvement in civilian law enforcement."). Padilla is not being detained by the military in order to execute a civilian law or for violating a civilian law, notwithstanding that his alleged conduct may in fact violate one or more such laws. He is being detained in order to interrogate him about the unlawful organization with which he is said to be affiliated and with which the military is in active combat, and to prevent him from becoming reaffiliated with that organization. Therefore, his detention by the military does not violate the Posse Comitatus Act.

this court must apply—itself a separate issue—is the evidence adduced by the government sufficient to justify the detention of Padilla? As was true of the questions underlying the issue of jurisdiction, each of those questions subsumes its own set of questions.

For the reasons set forth below, the answer to the first two of those questions is yes; a definitive answer to the third of those questions must await a further submission from Padilla, should he choose to make one, although the court will examine only whether there was some evidence to support the President's finding, and whether that evidence has been mooted by events subsequent to Padilla's detention.

A. *The President's Authority To Order That Padilla Be Detained As An Enemy Combatant*

Neither Padilla nor any of the amici denies directly the authority of the President to order the seizure and detention of enemy combatants in a time of war. Rather, they seek to distinguish this case from cases in which the President may make such an order on the grounds that this is not a time of war, and therefore the President may not use his powers as Commander in Chief or apply the laws of war to Padilla, and that Padilla in any event must be treated differently because he is an American citizen captured on American soil where the courts are functioning.

The claim by petitioner and the amici that this is not a time of war has two prongs: First, because Congress did not declare war on Afghanistan, the only nation state against which United States forces have taken direct action, the measures sanctioned during declared wars, principally in *Ex Parte Quirin*, 317 U.S. 1, 63 S. Ct. 1, 87 L.Ed. 3 (1942), discussed below, are not avail-

able here. Second, because the current conflict is with al Qaeda, which is essentially an international criminal organization that lacks clear corporeal definition, the conflict can have no clear end, and thus the detention of enemy combatants is potentially indefinite and therefore unconstitutional. For the reasons discussed below, neither prong of the argument withstands scrutiny.

The first prong of the argument—that we are not in a war and that only Congress can declare war—does not engage the real issue in this case, which concerns what powers the President may exercise in the present circumstances. Even assuming that a court can pronounce when a "war" exists, in the sense in which that word is used in the Constitution, *cf. Bas* v. *Tingy*, 4 U.S. (4 Dall.) 37, 42, 1 L.Ed. 731 (1800) (determining whether France, with which the United States had engaged in an undeclared naval war, was an "enemy" within the meaning of a prize statute, but noting that whether there was a war in a constitutional sense was irrelevant: "Besides, it may be asked, why should the rate of salvage be different in such a war as the present, from the salvage in a war more solemn [*i.e.*, declared] or general?"), a formal declaration of war is not necessary in order for the executive to exercise its constitutional authority to prosecute an armed conflict—particularly when, as on September 11, the United States is attacked. In *The Prize Cases*, 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1862), the Supreme Court rejected a challenge to the President's authority to impose a blockade on the secessionist states—an act of war—when there had been no declaration of war. The Court acknowledged that the President "has no power to initiate or declare a war." *Id.* at 668, 2 Black 635. However, the Court recognized also that "war may exist without a

declaration on either side," *id.*, and that when the acts of another country impose a war on the United States, the President "does not initiate that war, but is bound to accept the challenge without waiting for any special legislative authority," *id.* The Court made it plain that what military measures were necessary was a political and not a judicial decision: "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 decisions and acts of the political department of the Government to which this power was entrusted." *Id.* at 670, 2 Black 635. It was the President, and not the Court, who:

> 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.

Id. Here, I agree completely with Judge Silberman who, after examining and quoting from *The Prize Cases*, wrote as follows:

> I read the *Prize Cases* to stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected.

Campbell v. *Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring); *see also Johnson* v. *Eisentrager*, 339 U.S. 763, 789, 70 S. Ct. 936, 94 L.Ed. 1255

(1950) ("Certainly it is not the function of the Judiciary to entertain private litigation . . . which challenges the legality, wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); *Freeborn* v. *The Protector*, 79 U.S. (12 Wall.) 700, 702, 20 L.Ed. 463 (1871) (treating executive proclamations as conclusive evidence of when the Civil War began and ended); *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30, 6 L.Ed. 537 (1827) (Story, J.) ("We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons.").

The conclusion that the President may exercise his powers as Commander in Chief without a declaration of war is borne out not only by legal precedent, but also by even the briefest contemplation of our history. When one considers the sheer number of military campaigns undertaken during this country's history, declarations of war are the exception rather than the rule, beginning with the undeclared but Congressionally authorized naval war against France in the 1790's referred to in *Bas* v. *Tingy*, cited above. Taking into account only the modern era, the last declared war was World War II. Since then, this country has fought the Korean War, the Viet Nam War, the Persian Gulf War, and the Kosovo bombing campaign, as well as other military engagements in Lebanon, Haiti, Grenada and Somalia, to cite a random and by no means exhaustive list, with no appellate authority holding that a declaration of war was necessary. When confronted with challenges to the Viet Nam War, several appellate courts held specifically that no declaration of war was necessary. *See, e.g., Mitchell* v. *Laird*, 488 F.2d 611,

613-14 (D.C. Cir. 1973); *Com. of Massachusetts* v. *Laird*, 451 F.2d 26, 31-32 (1st Cir. 1971); *Orlando* v. *Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971).

Further, even if Congressional authorization were deemed necessary, the Joint Resolution, passed by both houses of Congress, authorizes the President to use necessary and appropriate force in order, among other things, "to prevent any future acts of international terrorism against the United States," and thereby engages the President's full powers as Commander in Chief. Authorization for Use of Military Force § 2(a).

The laws of war themselves, which the President has invoked as to Padilla, apply regardless of whether or not a war has been declared. What is sometimes referred to as the Third Geneva Convention—Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, to which the United States is a party and which therefore under the Supremacy Clause has the force of domestic law,[10] states that it applies, "to all cases of declared war or any other state of armed conflict." GPW, art. 2.

The question of when the conflict with al Qaeda may end is one that need not be addressed. So long as American troops remain on the ground in Afghanistan and Pakistan in combat with and pursuit of al Qaeda fighters, there is no basis for contradicting the President's repeated assertions that the conflict has not ended. *See Ludecke* v. *Watkins*, 335 U.S. 160, 167-69, 68

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[10] *See* U.S. Const. Art. VI, § 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land . . . .").

S. Ct. 1429, 92 L.Ed. 1881 (1948) (deferring to the President's position that a state of war continued to exist despite Germany's surrender to the Allies). At some point in the future, when operations against al Qaeda fighters end, or the operational capacity of al Qaeda is effectively destroyed, there may be occasion to debate the legality of continuing to hold prisoners based on their connection to al Qaeda, assuming such prisoners continue to be held at that time. *See id.* at 169, 68 S. Ct. 1429 ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.").

To the extent petitioner and the amici are suggesting that because the period of Padilla's detention is, at this moment, indefinite, it is therefore perpetual, and therefore illegal, the argument is illogical. Moreover, insofar as the argument assumes that indefinite confinement of one not convicted of a crime is *per se* unconstitutional, that assumption is simply wrong. In *Kansas* v. *Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997), the Court upheld Kansas's Sexually Violent Predator Act, providing for civil commitment of those who, due to "mental abnormality" or "personality disorder" are likely to commit sexually predatory acts. Rejecting the argument that the statute imposed criminal sanctions in the guise of a civil remedy, the Court noted that "commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." *Id.* at 361-62, 117 S. Ct. 2072. The Court found that the statute was not retributive "because it does not affix culpability for prior criminal conduct," *id.* at 362, 117 S.

Ct. 2072, and that it was not intended as a deterrent because the targets of the statute were "unlikely to be deterred by the threat of confinement," *id.* at 362-63, 117 S. Ct. 2072. *See also United States* v. *Salerno*, 481 U.S. 739, 748, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war and insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous."); *Moyer* v. *Peabody*, 212 U.S. 78, 84, 29 S. Ct. 235, 53 L.Ed. 410 (1909) (upholding the detention of a union president without charge during an insurrection, reasoning: "Such arrests are not necessarily for punishment but are by way of precaution, to prevent the exercise of hostile power"). To be sure, the standard of proof in some of those cases may well have been higher than the standard ultimately will be found to be in this case, but the point is that there is no *per se* ban.

The Court recently raised constitutional doubts as to the permissible length of preventive detention when it considered a case involving aliens awaiting deportation, and therefore read the governing statute to limit such detention to the time reasonably necessary to secure the alien's removal, with six months presumed as a reasonable limit. *Zadvydas* v. *Davis*, 533 U.S. 678, 691-97, 701, 121 S. Ct. 2491, 150 L.Ed.2d 653 (2001). However, even while doing so, the Court was careful to point out that the case before it did not involve "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the

judgments of the political branches with respect to matters of national security." *Id.* at 696, 121 S. Ct. 2491.

Further, the notion that a court must be able now to define conditions under which the current conflict will be declared to be over, and presumably open its doors to parties who may wish to litigate before the fact what those conditions might be, defies the basic concept of Article III jurisdiction. Federal courts, it will be recalled, are not permitted to deal with any but actual "cases" and "controversies," U.S. Const., art. III, § 2, as opposed to those disputes that live only on the agendas of interested parties. When and if the time comes that Padilla can credibly claim that he has been detained too long, whether due to the sheer duration of his confinement or the diminution or outright cessation of hostilities, the issue of how and whether such a claim can be adjudicated will have to be faced. I do not understand Padilla to be making that claim now, and therefore see no need to face that issue now.

Padilla and the amici challenge the President's authority to declare him an enemy combatant, and to apply to him the laws of war, citing his American citizenship and his capture on American soil at a time when the courts were functioning. Before examining directly the issue of the President's authority, it is necessary to examine what the designation "enemy combatant" means in this case. The laws of war draw a fundamental distinction between lawful and unlawful combatants. Lawful combatants may be held as prisoners of war, but are immune from criminal prosecution by their captors for belligerent acts that do not constitute war crimes. *See United States* v. *Lindh*, 212

F. Supp. 2d 541, 553 (E.D. Va. 2002) (citing numerous authorities); GPW, art. 87.

Four criteria generally determine the conditions an armed force and its members must meet in order to be considered lawful combatants:

> (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of War.

Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex art. 1, 36 Stat. 2277, T.S. No. 539 (Jan. 26, 1910) (the "Hague Convention" and the "Hague Regulations"). Those who do not meet those criteria, including saboteurs and guerrillas, may not claim prisoner of war status. *See Quirin*, 317 U.S. at 31, 63 S. Ct. 1 (citing authorities for the proposition that unlawful combatants are "offenders against the law of war" and may be tried by military tribunals).

The Third Geneva Convention, referred to above, reaffirmed the distinction between lawful and unlawful combatants. Article 4 of that treaty uses the same standards as the Hague Regulations for distinguishing who must be treated as a prisoner of war from who enjoys no such protection. *See* GPW, art. 4(2). Although in the past unlawful combatants were often summarily executed, such Draconian measures have not prevailed in modern times in what some still refer to without embarrassment as the civilized world. *See* Manual of Military Law 242 (British War Office 1914) ("No law authorizes [officers] to have [any disarmed enemy] shot without trial; and international law forbids

summary execution absolutely.").[11] Rather, as recognized in *Quirin*, unlawful combatants generally have been tried by military commissions. *Quirin*, 317 U.S. at 35, 63 S. Ct. 1. They are not entitled to prisoner of war status, either as a matter of logic or as a matter of law under the Third Geneva Convention. It is not that the Third Geneva Convention authorizes particular treatment for or confinement of unlawful combatants; it is simply that that convention does not protect them.

Although unlawful combatants, unlike prisoners of war, may be tried and punished by military tribunals, there is no basis to impose a requirement that they be punished. Rather, their detention for the duration of hostilities is supportable—again, logically and legally—on the same ground that the detention of prisoners of war is supportable: to prevent them from rejoining the enemy. Under the Third Geneva Convention, the recognized purpose of confinement during an

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[11] However, when they did prevail, in the practices of German troops during World War II, who often shot partisans summarily, certain of those tried after that war were found to have a valid defense based on the unlawful status of their victims. In one trial of Axis officials accused of murdering captured partisans in the Balkans, the Court wrote: "The [partisan] bands . . . with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements [for lawful combatant status]. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs [another term for unlawful combatants, dating from the Franco-Prussian War, when irregular French fighters captured by Prussian soldiers were summarily executed]." *The Hostages Trial: Trial of Wilhelm List and Others* (Case No. 47), 8 L. Rpts. of Trials of War Criminals 34, 57 (U.N. War Crimes Comm'n 1948).

ongoing conflict is "to prevent military personnel from taking up arms once again against the captor state." ICRC, *Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention III Relative to the Treatment of Prisoners of War* 547 (1960). Thus, Article 118 of the Third Geneva Convention provides, as to release of prisoners, only that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." GPW, art. 118.

As noted, in the June 9 Order, the President designated Padilla an "enemy combatant" based on his alleged association with al Qaeda and on an alleged plan undertaken as part of that association. *See supra* pp. [84a-85a]. The point of the protracted discussion immediately above is simply to support what should be an obvious conclusion: when the President designated Padilla an "enemy combatant," he necessarily meant that Padilla was an unlawful combatant, acting as an associate of a terrorist organization whose operations do not meet the four criteria necessary to confer lawful combatant status on its members and adherents. *See* Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 Am. J. Int'l L. 328, 335 (2002) ("Al Qaeda has failed to fulfill four prerequisites of lawful belligerency."); *see also Quirin*, 317 U.S. at 31, 63 S. Ct. 1 (describing an unlawful combatant as, *inter alia*, one "who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property"). Indeed, even the Taliban militia, who appear at least to have acted in behalf of a government in Afghanistan, were found by Judge Ellis in *Lindh* not to qualify for lawful combatant status. *Lindh*, 212 F. Supp. 2d at 557-58.

That brings us to the central issue presented in this case: whether the President has the authority to designate as an unlawful combatant an American citizen, captured on American soil, and to detain him without trial. Padilla and the amici argue that, regardless of what treatment is permitted under the Third Geneva Convention and otherwise for unlawful combatants, the Constitution forbids indefinite detention of a citizen captured on American soil so long as "the courts are open and their process unobstructed," *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121, 18 L.Ed. 281 (1866). Padilla relies heavily on *Milligan*, a Civil War-era case in which Milligan was one of a group arrested in Indiana and tried before a military commission on a charge of conspiring against the United States by planning to seize weapons, free Confederate prisoners, and kidnap the governor of Indiana. Convicted and sentenced to death, he filed a habeas corpus petition challenging the jurisdiction of the military commission to try him. The Court set aside the conviction, declaring that the "[laws of war] can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." *Id.* The Court found that the military commission had unlawfully usurped the judicial function, *id.*, reasoning that although the President had the power to suspend the writ of habeas corpus during the Civil War, all other rights remained intact, even in wartime. The Framers, the Court found, "limited the [power of] suspension to one great right [*i.e.*, the right to petition for habeas corpus], and left the rest to remain forever inviolable." *Id.* at 126, 4 Wall. 2.

Milligan, however, received a narrow reading in *Quirin*, a case on which the government, not sur-

prisingly, places heavy reliance. Petitioners in *Quirin* were German saboteurs put ashore in June 1942, during World War II, in two groups, from submarines off Amagansett, a village on Long Island, New York, and off Ponte Vedra Beach, Florida. They landed wearing German uniforms, which they quickly buried, and changed into civilian dress.[12] They intended to sabotage war industries and facilities in the United States, but were arrested before their plans ripened into action. *See Quirin*, 317 U.S. at 21, 63 S. Ct. 1. One of the saboteurs, Haupt, claimed United States citizenship, which the government disputed; the Court found the issue immaterial. Rather, the Court found that Haupt's belligerent status distinguished him from Milligan, noting that "the [*Milligan*] Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states of rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or

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[12] At first glance, it seems nearly perverse that the saboteurs, whose mission not only did not require uniforms but could be betrayed by them, would nonetheless land in uniforms and thereby impose on one of the most dangerous parts of the mission—the landing—when they were most vulnerable to detection, the time-consuming and complicated steps of having to change into civilian clothes and bury the uniforms. In fact, it was not perverse at all. Rather, it seems clear that those who organized the mission well understood the rules of war, and understood also that if the saboteurs were captured during the landing, when they were particularly vulnerable to detection, and were not wearing uniforms, they would have no hope of being classified as lawful combatants. The uniforms provided at least a measure of protection for the saboteurs against unlawful combatant status if they were captured during the landing. *See supra* pp. [127a-129a] and authority cited therein.

subject to the penalties imposed upon unlawful belligerents." *Id.* at 45, 63 S. Ct. 1. The Court continued:

> We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.

Id. Because the *Quirin* Court found that the German saboteurs were not only attempting to harm the United States during an armed conflict but doing so as persons associated with an enemy's armed forces, the Court concluded that the saboteurs, unlike Milligan, could be treated as unlawful combatants. Padilla, like the saboteurs, is alleged to be in active association with an enemy with whom the United States is at war.

Although the particular issue before the Court in *Quirin*—whether those petitioners could be tried by a military tribunal—is not precisely the same as the one now before this court—whether Padilla may be held without trial, the logic of *Quirin* bears strongly on this case. First, *Quirin* recognized the distinction between lawful and unlawful combatants, and the different treatment to which each is potentially subject:

> By universal agreement and practice the law of war draws a distinction between . . . lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in

> addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

Id. at 30-31, 63 S. Ct. 1. Second, if we revisit the last sentence quoted above, it appears that the Court touched directly on the subject at issue in this case when it said that "[u]nlawful combatants are likewise subject to capture *and detention*," *id.* at 31, 63 S. Ct. 1 (emphasis added). Although the issue of detention alone was not before the Court in *Quirin*, I read the quoted sentence to mean that as between detention alone, and trial by a military tribunal with exposure to the penalty actually meted out to petitioners in *Quirin* —death—or, at the least, exposure to a sentence of imprisonment intended to punish and deter, the Court regarded detention alone, with the sole aim of preventing the detainee from rejoining hostile forces—a consequence visited upon captured lawful combatants—as certainly the lesser of the consequences an unlawful combatant could face. 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—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. *See also Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (American citizen who entered the United States to commit hostile acts in aid of Germany during World War II could be tried by military commission: "[B]oth the executive and judicial branches of the government have recognized a clear distinction between a lawful combatant subject to capture and detention as a prisoner of war, and an unlawful combatant, *also subject to capture and detention*, but in

addition 'subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.'") (citing *Quirin*, 317 U.S. at 31, 63 S. Ct. 1) (emphasis added)); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (American citizen captured in Sicily while serving in enemy army could be held as prisoner of war in California for duration of hostilities).

Quirin spoke to the issue of Presidential authority as well, albeit obliquely, and not as Padilla and the amici would have me read that case. They argue that when the Court wrote that the Constitution "invests the President . . . with the power to wage war which Congress has declared," *id.* at 26, 63 S. Ct. 1, that was meant to confine the holding in that case to formally declared wars, such as World War II, and means that *Quirin* is irrelevant to this case. However, the logic of that argument requires a finding that *Quirin sub silentio* overruled the *The Prize Cases*, discussed at pages [120a-121a] above. That breathtaking conclusion is unwarranted, however, both because it is unreasonable to believe that the Court would deal so casually with its own significant precedents, and because, as noted above, *The Prize Cases* have been found authoritative since *Quirin*, and appear to be very much alive.

The *Quirin* Court found it "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." *Quirin*, 317 U.S. at 29, 63 S. Ct. 1. However, the Court did suggest that the President's decision to try the saboteurs before a military tribunal

rested at least in part on an exercise of Presidential authority under Article II of the Constitution:

> By his order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

Id. at 28, 63 S. Ct. 1.

Here, the basis for the President's authority to order the detention of an unlawful combatant arises both from the terms of the Joint Resolution, and from his constitutional authority as Commander in Chief as set forth in *The Prize Cases* and other authority discussed above. Also as discussed above, no principle in the Third Geneva Convention impedes the exercise of that authority.

B. *Is Padilla's Detention Barred by Statute?*

Whatever may be the President's authority to act in the absence of a specific limiting legislative enactment, Padilla and the amici argue that 18 U.S.C. § 4001(a) bars his confinement in the circumstances present here, and the ACLU argues that Padilla's confinement is barred as well by the USA Patriot Act, Pub.L. No. 107-56, 115 Stat. 272 (2001) (the "Patriot Act"). However, as set forth below, § 4001(a), which by its terms applies to Padilla, bars confinement only in the absence of congressional authorization, and there has been congressional authorization here; the Patriot Act simply does not bear on this case.

Taking the second argument first, the Patriot Act permits the detention of aliens suspected of activity endangering the security of the United States, for a period limited to seven days. *See* 8 U.S.C. § 1226A(a)(5) (2000). According to the ACLU, had Congress thought that American citizens or even aliens could be detained as enemy combatants, it would never have passed this provision of the Patriot Act. (*See* ACLU Br. at 8-9) The Patriot Act, however, cannot be read as a comprehensive guide to presidential powers under the Joint Resolution. Because the Patriot Act requires only that the Attorney General have a reasonable ground to believe that an alien is engaging in threatening activity, *id.* § 1126A(a)(3), that Act can be applied to persons who could not be classified as enemy combatants under the law of war. *See Quirin*, 317 U.S. at 45, 63 S. Ct. 1 (acknowledging that a citizen may not be tried by military tribunal if he is not serving a recognized enemy); discussion at page [127a], above. The cited portion of the Patriot Act applies to persons as to whom there is alleged to be far less reason for suspicion than there is as to Padilla. Moreover, to accept the ACLU's reading of the cited portion of the Patriot Act is to read that statute as having been intended to undercut substantially the logic of *Quirin.* I refuse to read the statute to accomplish such a stark result.

Padilla's principal statutory argument is based on 18 U.S.C. § 4001(a), which is broad and categorical:

> No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

18 U.S.C. § 4001(a) (2000); *see Howe* v. *Smith*, 452 U.S. 473, 480 n.3, 101 S. Ct. 2468, 69 L.Ed.2d 171 (1981)

("[T]he plain language of § 4001(a) proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain.") (emphasis in original).

To avoid the reach of that statute, the government appears to lean heavily on statutory construction arguments that fail to confront the plain language of the statute, and to rest rather lightly on what seems to me the more persuasive position: that Padilla in fact is detained "pursuant to an Act of Congress." Thus, the government argues that reading § 4001(a) to cover Padilla's detention would bring that section in conflict with Article II, section 2, clause 1 of the Constitution, which makes the President "Commander in Chief of the Army and Navy of the United States," U.S. Const., art. 2, § 2, cl. 1, and has been interpreted to grant the President independent authority to respond to an armed attack against the United States. *See The Prize Cases*, 67 U.S. at 668, 2 Black 635 ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."); *see also Hamdi* v. *Rumsfeld*, 296 F.3d at 281-82 ("The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section II."); *Campbell* 203 F.3d at 27 (Silberman, J., concurring) (collecting authorities for the proposition that "the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization").

The government suggests that because reading the statute to impinge on the President's Article II powers, including detention of enemy combatants, creates a danger that the statute might be found unconstitutional

as applied to the present case, a court should read the statute so as not to cover detention of enemy combatants, applying the canon that a statute should be read so as to avoid constitutional difficulty. *See, e.g.*, *Jones* v. *United States*, 529 U.S. 848, 857, 120 S. Ct. 1904, 146 L.Ed.2d 902 (2000) (citing "the guiding principle that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'") (quoting *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408, 29 S. Ct. 527, 53 L.Ed. 836 (1909)).

However, this doctrine of constitutional avoidance "'has no application in the absence of statutory ambiguity.'" *HUD* v. *Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 1235, 152 L.Ed.2d 258 (2002) (quoting *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494, 121 S. Ct. 1711, 149 L.Ed.2d 722 (2001)). Any other approach, as pointed out in *Rucker*, "'while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution.'" *Id.* at 1235-36 (quoting *United States* v. *Albertini*, 472 U.S. 675, 680, 105 S. Ct. 2897, 86 L.Ed.2d 536 (1985)). That is, if a court read an ambiguity into an unambiguous statute simply for the purpose of avoiding an adverse decision as to the constitutionality of that statute, the court would be exercising legislative powers and thereby usurping those powers. There is no ambiguity here. The plain language of the statute encompasses all detentions of United States citizens. Therefore, the constitutional avoidance canon cannot affect how the statute is read.

The government argues also that because § 4001(a) is in Title 18 of the United States Code, and that title governs "Crimes and Criminal Procedure," Congress could not have intended to impede the President's authority to use the military rather than the civilian law enforcement arm of the government to detain unlawful combatants in wartime. The government proffers, as additional textual evidence, that 18 U.S.C. § 4001(b) gives the Attorney General control over "Federal penal and correctional institutions, except military or naval institutions," 18 U.S.C. § 4001(b) (2000), and reasons that this shows that Congress meant to exclude military detention from the reach of the section. However, § 4001(b) simply limits the Attorney General's responsibility for prisons to those that are not run by the military. The placement of this section within Title 18 is entirely natural because most detentions result from arrest by law enforcement agencies. This textual argument, too, cannot overcome the plain language of the statute, as read by the Supreme Court in *Howe* v. *Smith*, cited above.

Although the government struggles unsuccessfully to avoid application of the statute, the government is on firmer ground when it argues that even if § 4001(a) applies, its terms have been complied with. The statute permits detention of an American citizen "pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2000). If the Military Force Authorization passed and signed on September 18, 2001, is an "Act of Congress," and if it authorizes Padilla's detention, then perforce the statute has not been violated here.

The Joint Resolution is not called an "Act," but that is the only respect in which it is not an "Act." Joint resolutions generally, as their name would suggest,

require the approval of both Houses of Congress, and if signed by the President, have the force of law. *See Bowsher* v. *Synar*, 478 U.S. 714, 756, 106 S. Ct. 3181, 92 L.Ed.2d 583 (1986) ("The joint resolution, which is used for 'special purposes and . . . incidental matters,' makes binding policy and 'requires an affirmative vote by both Houses and submission to the President for approval'—*the full Article I requirements*." (emphasis added) (citation omitted)). That is to say, there is no relevant constitutional difference between a bill and a joint resolution; both require bicameralism—passage by both Houses, and presentment—submission to the President for signature.

Congress itself has intimated that a joint resolution qualifies as an "Act of Congress." *See* Joint Resolution of Dec. 15, 1981, Pub.L. No. 97-92, § 140, 95 Stat. 1183, 1200 ("Notwithstanding any other provision of law . . . none of the funds appropriated by this joint resolution *or by any other* Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted." (emphasis added)). A light smattering of cases suggests the same thing. *See Acme of Precision Surgical Co.* v. *Weinberger*, 580 F. Supp. 490, 501-02 (E.D. Pa. 1984) (calling joint resolutions "acts of Congress"); *Louisville & Nashville R.R.* v. *Bass*, 328 F. Supp. 732, 739 (W.D. Ky. 1971) (equating a joint resolution with an "Act of Congress"); *Berk* v. *Laird*, 317 F. Supp. 715, 723 (E.D.N.Y. 1970) (calling the Gulf of Tonkin Resolution an "act of Congress").

Principally because the Joint Resolution complies with all constitutional requirements for an Act of Con-

gress, it should be regarded for purposes of § 4001(a) as an "Act of Congress." *Cf. Hamdi*, 296 F.3d at 281 (concluding that the President acted with statutory authorization in designating Hamdi, an American citizen captured in Afghanistan, as an enemy combatant).

The authority conferred by the Joint Resolution itself is broad. It authorizes the President to "use all necessary and appropriate force against those . . . organizations, or persons he determines planned, authorized, committed or 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 . . . organizations or persons." Authorization for Use of Military Force, Pub. Law No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). This language authorizes action against not only those connected to the subject organizations who are directly responsible for the September 11 attacks, but also against those who would engage in "future acts of international terrorism" as part of "such . . . organizations." *Id.* As reflected, *inter alia*, in the President's November 13, 2001 order establishing military tribunals, al Qaeda is an organization the President has determined committed the subject acts. Mil. Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001). Indeed, in the June 9 Order directing Padilla's detention, the President refers to al Qaeda as "an international terrorist organization with which the United States is at war." June 9 Order at ¶ 2. As discussed above, Padilla is alleged in the June 9 Order to have been an unlawful combatant in behalf of al Qaeda. Also as discussed extensively above, the Third Geneva Convention does not forbid detention of unlawful combatants. Accordingly, the detention of

Padilla is not barred by 18 U.S.C. § 4001(a); nor, as discussed above, is it otherwise barred as a matter of law.

V. CONSULTATION WITH COUNSEL

The government has not disputed Padilla's right to challenge his detention by means of a habeas corpus petition. Although Padilla has the ability, through his lawyer, to challenge the government's naked legal right to hold him as an unlawful combatant on any set of facts whatsoever, he has no ability to make fact-based arguments because, as is not disputed, he has been held incommunicado during his confinement at the Consolidated Naval Brig in Charleston, and has not been permitted to consult with counsel. Therefore, unless I find that the only fact issue Padilla has a right to be heard on is whether the government's proffered facts, taken alone and without right of response, are sufficient to warrant his detention by whatever evidentiary standard may apply—an argument that can be presented by counsel without access to Padilla—I must address the question of whether he may present facts, and how he may do so. As explained below: (i) Padilla does have the right to present facts; (ii) the most convenient way for him to go about that, and the way most useful to the court, is to present them through counsel; and (iii) the government's arguments are insufficient to warrant denying him access to counsel. Therefore, to the extent set forth below, Padilla will be permitted to consult with counsel in aid of prosecuting this petition.

Padilla's right to present facts is rooted firmly in the statutes that provide the basis for his petition. Padilla has petitioned pursuant to 28 U.S.C. § 2241, which,

among other things, grants to district courts the power to issue writs of habeas corpus; a related section, 28 U.S.C. § 2243, provides the skeletal outline of procedures to be followed in a § 2241 case. It includes the following:

> Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.
>
> The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

28 U.S.C. § 2243 (2000). A related section, 28 U.S.C. § 2246, allows the taking of evidence in habeas corpus cases by deposition, affidavit, or interrogatories.

Further, both the Federal Rules of Civil Procedure and the Rules Governing § 2254 Cases may be applied in § 2241 habeas corpus cases, in the discretion of the court. *See* Fed. R. Civ. P. 81(a)(2) (rules apply "to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and . . . has heretofore conformed to the practice in civil actions"); Rules Governing § 2254 Cases 1(b) (§ 2254 rules may apply in other habeas corpus cases "at the discretion of the United States district court"). This blend of procedures that may be applied makes a habeas corpus case different from the usual civil lawsuit. *See, e.g.*, *Harris* v. *Nelson*, 394 U.S. 286, 293-94, 89 S. Ct. 1082, 22 L.Ed.2d 281 (1969) ("It is, of course, true that habeas corpus proceedings are characterized as 'civil.' But that label is gross and inexact. Essentially, the proceeding is unique."). The Supreme Court has praised the flexi-

bility of habeas corpus. *See, e.g., Jones* v. *Cunningham*, 371 U.S. 236, 243, 83 S. Ct. 373, 9 L.Ed.2d 285 (1963) ("It is not now and never has been a static, narrow, formalistic remedy.").

Quite plainly, Congress intended that a § 2241 petitioner would be able to place facts, and issues of fact, before the reviewing court, and it would frustrate the purpose of the remedy to prevent him from doing so.

The habeas corpus statutes do not explicitly provide a right to counsel for a petitioner in Padilla's circumstances, but 18 U.S.C. § 3006A(2)(B) permits a court to which a § 2241 petition is addressed to appoint counsel for the petitioner if the court determines that "the interests of justice so require." 18 U.S.C. § 3006A(2)(B) (2000). I have already so determined, and have continued the appointment of Newman and appointed also Andrew Patel, Esq., as co-counsel.

Of course, Padilla has no Sixth Amendment[13] right to counsel in this proceeding. The Sixth Amendment grants that right to the "accused" in a "criminal proceeding"; Padilla is in the custody of the Department of Defense; there is no "criminal proceeding" in which Padilla is detained; therefore, the Sixth Amendment does not speak to Padilla's situation. Beyond the plain language of the Amendment, "even in the civilian community a proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from

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[13] The Sixth Amendment to the Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const., amend. VI.

a traditional civilian criminal trial." *Middendorf* v. *Henry*, 425 U.S. 25, 38, 96 S. Ct. 1281, 47 L.Ed.2d 556 (1976). Such "elements" are present here—notably, that Padilla's detention "does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." *Hendricks*, 521 U.S. at 361-62, 117 S. Ct. 2072. Although *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L.Ed.2d 977 (1964), recognized a Sixth Amendment right against custodial interrogation without access to counsel, the remedy for violation of this right is exclusion of the fruits of the interrogation at a criminal trial, *id.* at 491, 84 S. Ct. 1758. There being no criminal proceeding here, Padilla could not enforce this right now even if he had it.

Nor does the self-incrimination clause of the Fifth Amendment[14] provide any more help to Padilla than the Sixth Amendment in his effort to confer with counsel. Although the Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), found in that clause a right to counsel, calling the presence of counsel "the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege," *id.* at 466, 86 S. Ct. 1602, and "[a]lthough conduct by law enforcement officials prior to trial may significantly impair that right [to avoid self-incrimination], a constitutional violation occurs only at trial." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S. Ct. 1056, 108 L.Ed.2d 222 (1990). That is of no help to Padilla, who does not face the prospect of a trial. *But see Martinez* v. *City of Oxnard*, 270 F.3d 852 (9th Cir. 2001) (holding

[14] That clause states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V.

that a plaintiff may bring a § 1983 action alleging a violation of Fifth and Fourteenth Amendment rights to be free from police coercion in pursuit of a confession even though statements were not used against him at trial), *cert. granted sub nom. Chavez* v. *Martinez*, 535 U.S. 1111, 122 S. Ct. 2326, 153 L.Ed.2d 158 (2002).

The Due Process Clause of the Fifth Amendment states that "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. Professor Laurence Tribe has commented that, "[w]hat emerges from [the] disparate cases and lines of thought [interpreting the Due Process Clause] is, quite clearly, less than a solidly grounded or coherently elaborated right of judicial access." Laurence H. Tribe, *American Constitutional Law* §§ 10-18, at 759 (2d ed. 1988). Finding guidance in the due process clause would require, at a minimum, locating the delicate balance between private and public interests that is the test for finding a due process right, as set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S. Ct. 893. That is not to say that there are no guides whatever to striking that balance. There are. *See, e.g., Nat'l Council of Resistance of Iran* v. *Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001) (holding that organizations designated by the Secretary of State as terrorist organizations must have "the opportunity to be heard at a meaningful time and in a meaningful manner," and must have "the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations"). However, as explained below, the provisions and characteristics of the habeas corpus statute and remedy discussed at pages [143a-144a] above, and the court's power under the All Writs Act, 28 U.S.C. § 1651(a) (2000), to issue writs in aid of its jurisdiction, provide a statutory basis for decision. Considerations of prudence require that a court avoid a constitutional basis for decision when there exists a non-constitutional alternative. *See Harris* v. *McRae*, 448 U.S. 297, 306-07, 100 S. Ct. 2671, 65 L.Ed.2d 784 (1980) (cautioning that when a case can be decided based on either a statute or the Constitution, the statute should provide the basis for decision).

Part of that non-constitutional alternative lies in the provisions of the habeas corpus statute, and the characteristics of the remedy, discussed at pages [143a-144a] above, which make it clear that Congress intended habeas corpus petitioners to have an opportunity to present and contest facts, and courts to have the flexibility to permit them to do so under proper safeguards. Padilla's need to consult with a lawyer to help him do what the statute permits him to

do is obvious. He is held incommunicado at a military facility. His lawyer has been told that there is no guarantee even that her correspondence to him would get through. (Newman Aff. of 9/24/02 ¶ 8) Although it is not uncommon for habeas corpus cases to be pursued by petitioners *pro se*, such cases, usually involving challenges to either state convictions under 28 U.S.C. § 2254 or federal convictions under 28 U.S.C. § 2255, almost always are filed after the petitioners already have had the benefit of completed criminal proceedings, and appeals, in which they were represented by counsel. Padilla has had no such benefit here. It would frustrate the purpose of the procedure Congress established in habeas corpus cases, and of the remedy itself, to leave Padilla with no practical means whatever for following that procedure.

The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2000). In *United States* v. *Hayman*, 342 U.S. 205, 72 S. Ct. 263, 96 L.Ed. 232 (1952), the Supreme Court disapproved of a district court's use of *ex parte* procedures in a habeas corpus case under 28 U.S.C. § 2255 attacking a federal conviction. The Court pointed out that the district court could have used its powers under § 1651(a) in aid of its § 2255 jurisdiction, and ordered the petitioner transported from the district where he was confined so that a hearing could be held:

> The District Court is not impotent to accomplish this purpose, at least so long as it may invoke the statutory authority of federal courts to issue "all writs necessary or appropriate in aid of their

> respective jurisdictions and agreeable to the usages and principles of law." An order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is "necessary or appropriate" to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law.

Hayman, 342 U.S. at 221, 72 S. Ct. 263 (quoting 28 U.S.C. § 1651(a)).

In *Harris* v. *Nelson*, 394 U.S. 286, 89 S. Ct. 1082, 22 L.Ed.2d 281 (1969), the Supreme Court held that a district court could use its § 1651(a) powers to compel a warden to answer interrogatories posed by a habeas corpus petitioner:

> At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly "dispose of the matter as law and justice require," either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be "necessary or appropriate in aid of [its jurisdiction] . . . and agreeable to the usages and principles of law."

Id. at 300, 89 S. Ct. 1082 (quoting 28 U.S.C. §§ 2243 and 1651(a)). In the same case, the Court appears to have read broadly the power of a court hearing a habeas corpus petition to fashion remedies under the All Writs Act:

> [T]he habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651.

Id. at 299, 89 S. Ct. 1082.

The Court has also read generously the requirement that writs be issued only in aid of a court's jurisdiction. In *United States* v. *New York Telephone Co.*, 434 U.S. 159, 98 S. Ct. 364, 54 L.Ed.2d 376 (1977), the Court wrote of that requirement as follows: "[A] distinction between orders in aid of a court's own duties and jurisdiction and orders designed to better enable a party to effectuate his rights and duties . . . is specious." *Id.* at 175 n. 23, 98 S. Ct. 364.

I recognize that use of the All Writs Act itself is circumscribed by the requirement that the order be "necessary" in aid of a court's jurisdiction, and that that Act may not be employed to avoid the requirements of an otherwise applicable statute. "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pa. Bureau of Corr.* v. *United States Marshals Serv.*, 474 U.S. 34, 43, 106 S. Ct. 355, 88 L.Ed.2d 189 (1985). However, the habeas corpus statutes do not address "the particular issue at hand."

The decision whether to grant or withhold an order under the All Writs Act lies "in the sound discretion of the court." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25, 63 S. Ct. 938, 87 L.Ed. 1185 (1943). Although, as

noted above, the right-to-counsel jurisprudence developed in cases applying the Sixth Amendment does not control this case, there would seem to be no reason why that jurisprudence cannot at least inform the exercise of discretion here. In Sixth Amendment cases, the Supreme Court has stressed repeatedly the importance of counsel to a defendant. *See*, *e.g.*, *United States* v. *Gouveia*, 467 U.S. 180, 190, 104 S. Ct. 2292, 81 L.Ed.2d 146 (1984) ("[T]he right to counsel exists to protect the accused during trial-type confrontations with the prosecutor."); *Kirby* v. *Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 32 L.Ed.2d 411 (1972) ("[A] defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."). Although the Sixth Amendment does not control Padilla's case, the logic of the underlying case law suggests that discretion under the All Writs Act should be exercised in favor of permitting him to consult with counsel in aid of his petition and, in particular, in aid of responding to the Mobbs Declaration should he choose to do so.

The government has argued that affording access to counsel would "jeopardize the two core purposes of detaining enemy combatants—gathering intelligence about the enemy, and preventing the detainee from aiding in any further attacks against America." (Respondents' Resp. to This Ct's 10/21/02 Order at 6) This would happen, the government argues, because access to counsel would interfere with questioning, and because al Qaeda operatives are trained to use third parties as intermediaries to pass messages to fellow terrorists, even if "[t]he intermediaries may be unaware that they are being so used." (*Id.* at 7)

However, access to counsel need be granted only for purposes of presenting facts to the court in connection with this petition if Padilla wishes to do so; no general right to counsel in connection with questioning has been hypothesized here, and thus the interference with interrogation would be minimal or nonexistent. As to the possibility that Padilla might use his lawyers to pass messages to others, there are several responses to that conjecture. First, accepting that conjecture at face value and across the board proves far too much: by the government's logic, no indicted member of al Qaeda facing trial in an Article III court should be allowed to consult with counsel—a result barred by the Sixth Amendment. Second, I have read both the Mobbs Declaration and the Sealed Mobbs Declaration, the latter only for the purpose of assessing the government's access-to-counsel argument; the government's conjecture is, on the facts presented to me in those documents, gossamer speculation. Although the government presents facts showing that Padilla had contact with and was acting on behalf of al Qaeda, there is nothing to indicate that Padilla in particular was trained to transmit information in the way the government suggests, or that he had information to transmit. Third, Padilla has already had meetings with counsel in New York, and thus whatever speculative damage the government seeks to prevent may already have been done. Fourth, there is no reason that military personnel cannot monitor Padilla's contacts with counsel, so long as those who participate in the monitoring are insulated from any activity in connection with this petition, or in connection with a future criminal prosecution of Padilla, if there should ever be one. The U.S. Bureau of Prisons has adopted such procedures with respect to incarcerated defendants who present a

similar danger. *See* Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(a) (2002) (special procedures to be used if "there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily harm to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons"). One would think that such procedures would go a long way toward preventing Padilla from transmitting information through his lawyers to others. Finally, Padilla's lawyers themselves are members of this court's Criminal Justice Act panel who have appeared before this court in numerous cases. In addition to being able advocates, they have conducted themselves at all times in a fashion consistent with their status as—to use the antique phrase—officers of the court. There is nothing in their past conduct to suggest that they would be inclined to act as conduits for their client, even if he wanted them to do so.

Even giving substantial weight, as I do, to the President's statement in the June 9 Order that Padilla is "a continuing, present and grave danger to the national security of the United States" and that his detention "is necessary to prevent him from siding with al Qaeda in its efforts to attack the United States," there has been no fact presented to me that shows that the source of that danger is the possibility that Padilla will transmit information to others through his lawyers. By contrast, Padilla's statutorily granted right to present facts to the court in connection with this petition will be destroyed utterly if he is not allowed to consult with counsel. On the facts presented in this case, the balance weighs heavily in Padilla's favor.

I do not believe that the decision in *Hamdi* v. *Rumsfeld*, 296 F.3d 278 (4th Cir. 2002), alters the balance in the government's favor. In that case, the Court of Appeals for the Fourth Circuit reversed the order of a district court directing the government to permit unmonitored access by counsel to a detainee captured in Afghanistan and held at a Navy brig in Norfolk, Virginia. The order was rendered without benefit of briefing or argument, and with "little indication in the order (or elsewhere in the record for that matter) that the court gave proper weight to national security concerns." *Id.* at 282. According to the Fourth Circuit, "[t]he peremptory nature of the [District Court's] proceedings st[ood] in contrast to the significance of the issues before the court." *Id.* No such access is to be granted here, and the court has had the full benefit of the government's submissions, both sealed and unsealed. Further, Padilla's situation appears to differ from Hamdi's in that he had access to counsel after his capture but before his designation as an enemy combatant, and thus no potential prophylactic effect of an order barring access by counsel could have been lost.

Because this court has jurisdiction over Padilla's petition, and because the procedure outlined by the applicable statutes cannot be followed unless Padilla is permitted to consult with counsel, respondent Secretary Rumsfeld will be directed to permit Padilla to consult with counsel solely for the purpose of submitting to the court facts bearing upon his petition, under such conditions as the parties may agree to, or, absent agreement, such conditions as the court may direct so as to foreclose, so far as possible, the danger

that Padilla will use his attorneys for the purpose of conveying information to others.

VI. THE STANDARD APPLICABLE TO THIS COURT'S REVIEW AND THE FACTS THE COURT MAY CONSIDER

Before Padilla consults with counsel for the purpose of submitting facts to the court in aid of his petition, it would seem essential for him to know what standard the court will apply in determining whether whatever facts the government has presented are sufficient to warrant the finding in the President's June 9 Order that Padilla is an unlawful combatant. In addition, it would be helpful for Padilla to know, at least in a general sense, what the court will consider in that calculus other than what appears in the Mobbs Declaration—in particular, whether the court will consider the Sealed Mobbs Declaration. Unless he has some idea as to both of these subjects, he cannot decide what sort of factual presentation he must make, or indeed whether he wishes to stand mute rather than try to present any facts at all. The standard the court will apply in deciding the sufficiency of the government's showing is described below. In addition, I do not believe it necessary to decide now whether to consider the Sealed Mobbs Declaration. For the reasons explained below, Padilla can determine whether to submit facts, and frame those facts, solely based on the Mobbs Declaration and without knowing precisely the content of the sealed submission.

A. *Deference Due the President's Determination*

Padilla does not seem to dispute that courts owe considerable deference, as a general matter, to the acts and orders of the political branches—the President and Congress—in matters relating to foreign policy, national security, or military affairs. Nor could he. The Court of Appeals for the Fourth Circuit wrote as follows on that subject when it considered, and reversed, the order discussed immediately above, peremptorily granting to a detained combatant, captured during military operations in Afghanistan, unmonitored access to counsel:

> The order [under review] arises in the context of foreign relations and national security, where a court's deference to the political branches of our national government is considerable. It is the President who wields "delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." And where as here the President does act with statutory authorization from Congress, there is all the more reason for deference. Indeed, Articles I and II prominently assign to Congress and the President the shared responsibility for military affairs. *See* U.S. Const. art. I, § 8; art. II, § 2. In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs. This deference extends to military designations of individuals as enemy

> combatants in times of active hostilities, as well as to their detention after capture on the field of battle. The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2. As far back as the Civil War, the Supreme Court deferred to the President's determination that those in rebellion had the status of belligerents. And in World War II, the Court stated in no uncertain terms that the President's wartime detention decisions are to be accorded great deference from the courts.

Hamdi, 296 F.3d at 282 (citations omitted). Instead of disputing general principles, Padilla seeks to take his case outside their reach. Thus, he argues variously (i) that the President lacks statutory authority to act because Congress refrained in the Joint Resolution from declaring war, the Joint Resolution is limited only to those directly involved in the September 11 attacks, and the Patriot Act rather than the Joint Declaration should be read to control his case (Petitioners' Br. in Supp. of Am. Pet. and in Resp. to Respondents' Mot. to Dismiss at 9-12, 17-18); and (ii) the President lacks constitutional authority because his constitutional powers as Commander in Chief and as sole authority in the conduct of foreign affairs do not reach the capture of a United States citizen on American soil, and his detention as an enemy combatant (*id.* at 13-15, 16-17).

Padilla insists that this court conduct a "searching inquiry" into the factual basis for the President's determination that Padilla is an enemy combatant, lest the court "rubber stamp" the June 9 Order and thereby enforce a "Presidential whim." (*Id.* at 22, 32) In essence, Padilla argues that he is entitled to a trial on

the issue of whether he is an unlawful combatant or not.[15]

However, as set forth above, Padilla has lost the legal arguments he relies on to remove this case from the reach of the principles described by the Fourth Circuit in *Hamdi*, cited above. The President, for the reasons set forth above, has both constitutional and statutory authority to exercise the powers of Commander in Chief, including the power to detain unlawful combatants, and it matters not that Padilla is a United States citizen captured on United States soil. *See supra* pp. [119a-123a]. In his frequently-cited concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L.Ed. 1153 (1952), Justice Jackson described three degrees of Presidential authority. First, when the President acts pursuant to express or implied authorization by Congress, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635, 72 S. Ct. 863. Second, when he acts absent either approval or disapproval from Congress, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637, 72 S. Ct. 863. Third, when a President acts in a way incompatible with Congress's express or implied will, "his power is at its lowest ebb,

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[15] In an affidavit submitted "on information and belief" (Newman Aff. of 9/24/02 ¶ 1), Newman states what appears to be her belief, although not the information that led to it, that Padilla had "traveled to Chicago to visit with his son," and then "planned to travel to Florida to visit other members of his family." (*Id.* ¶¶ 2, 3) That affidavit does not deny the allegations in the Mobbs Declaration relating to Padilla's activities in Afghanistan and Pakistan.

for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* In the decision to detain Padilla as an unlawful combatant, for the reasons set forth above, the President is operating at maximum authority, under both the Constitution and the Joint Resolution.

Notwithstanding *Hamdi*, and the cases it cites—which are, for the most part, the cases cited in support of the above findings as to the President's authority—it would be a mistake to create the impression that there is a lush and vibrant jurisprudence governing these matters. There isn't. *Quirin* offers no guidance regarding the standard to be applied in making the threshold determination that a habeas corpus petitioner is an unlawful combatant. Because the facts in *Quirin* were stipulated, *see Quirin*, 317 U.S. at 19, 63 S. Ct. 1, the *Quirin* Court moved directly to the legal principles applicable to unlawful combatants, and then to the application of those principles to the undisputed facts. Other controlling cases date to World War II, the Civil War, and even further back. As Justice Jackson observed in *Sawyer*, "[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves." *Sawyer*, 343 U.S. at 634, 72 S. Ct. 863. In this case, that poverty reflects, in part, a blessing—the blessedly placid history this country has enjoyed. The last time this country experienced widespread mayhem was during the Civil War; the last time a foreign army marched here was during the War of 1812.

However, if the case law seems sparse and some of the cases abstruse, that is not because courts have not

recognized and do not continue to recognize the President's authority to act when it comes to defending this country. Recall that in *Zadvydas* v. *Davis*, cited above, even as the Supreme Court placed limits on the government's authority to detain immigrants awaiting deportation, *Zadvydas*, 533 U.S. at 691-97, 701, 121 S. Ct. 2491, the Court was careful to point out that the case before it did not involve "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security," *id.* at 696, 121 S. Ct. 2491. The "political branches," when they make judgments on the exercise of war powers under Articles I and II, as both branches have here, need not submit those judgments to review by Article III courts. Rather, they are subject to the perhaps less didactic but nonetheless searching audit of the democratic process.

Zadvydas was decided at the end of June 2001, less than three months before the September 11 attacks, and the language now seems to convey ominous prescience. To the extent that the Court took pains to limit the rule it was creating so as to exclude cases involving "terrorism or other special circumstances" warranting "heightened deference to the judgments of the political branches," the quoted language cannot be dismissed as dictum. If it is dictum, it is the sort of considered dictum to which lower courts such as this one must pay particular heed. *See* Judge Newman's opinion in *United States* v. *Oshatz*, 912 F.2d 534, 540 (2d Cir. 1990) (distinguishing considered dictum from peripheral observations).

The deference to which the Supreme Court and the Fourth Circuit refer is due not because judges are not personally able to decide whether facts have been established by competent evidence, or whether those facts are sufficient to warrant a particular conclusion by a preponderance of evidence, or by clear and convincing evidence, or beyond a reasonable doubt. Indeed, if there is any task suited to what should be the job skills of judges, deciding such issues is it. Rather, deference is due because of a principle captured in another "statement of Justice Jackson—that we decide difficult cases presented to us by virtue of our commissions, not our competence." *Dames & Moore* v. *Regan*, 453 U.S. 654, 661, 101 S. Ct. 2972, 69 L.Ed.2d 918 (1981). That principle applies equally to the case a judge feels unqualified for but must decide, as to the case a judge feels well qualified for but may not decide. The commission of a judge, as *The Prize Cases*, the other authority cited at pages [119a-135a] above, and the quoted language from *Zadvydas* suggest, does not run to deciding *de novo* whether Padilla is associated with al Qaeda and whether he should therefore be detained as an unlawful combatant. It runs only to deciding two things: (i) whether the controlling political authority—in this case, the President—was in fact exercising a power vouchsafed to him by the Constitution and the laws; that determination in turn, is to be made only by examining whether there is some evidence to support his conclusion that Padilla was, like the German saboteurs in *Quirin*, engaged in a mission against the United States on behalf of an enemy with whom the United States is at war, and (ii) whether that evidence has not been entirely mooted by subsequent events. The first determination—that there is some evidence of Padilla's hostile status—would support the President's

assertion in the June 9 Order that he was exercising the power referred to above. That is the "some evidence" test suggested in the government's papers (Respondents' Resp. to and Mot. to Dismiss Am. Pet. at 17), and it will be applied once Padilla presents any facts he may wish to present to the court.

B. *The Sealed Mobbs Declaration*

There remains the question of whether the court will consider the Sealed Mobbs Declaration not only to help decide whether Padilla presents a particular danger if he is allowed to consult with counsel, as has already been done, but also to help decide whether there was some evidence to support the President's decision to designate him an enemy combatant, and whether such evidence has not become moot. Padilla objects to my doing so, arguing that he has a fundamental right to avoid suffering serious injury based on facts that are not disclosed. Thus, he cites *Greene* v. *McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 3 L.Ed.2d 1377 (1959), where the Supreme Court reversed denial of a security clearance to the employee of a defense contractor based on confidential reports, with Chief Justice Warren writing for the Court as follows:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Id. at 496, 79 S. Ct. 1400. Although the government has not discussed *Greene* in its reply papers, the case is

distinguishable from this one on several bases, including that the confidential evidence was used before an executive agency and without explicit delegation from Congress or the President. *Id.* at 507, 79 S. Ct. 1400.

Closer to the case at hand is *United States* v. *Hayman*, discussed at pages [148a-149a] above, where a district court faced with a claim of ineffective assistance of counsel in a habeas corpus case held a hearing without having the petitioner present, and then found that counsel had engaged in the conflicted representation with the knowledge and consent of the petitioner. The Supreme Court disapproved and reversed, holding that the district court "did not proceed in conformity with Section 2255 when it made findings on controverted issues of fact relating to respondent's own knowledge without notice to respondent and without his being present." *Hayman*, 342 U.S. at 220, 72 S. Ct. 263; *see also*, *Walker* v. *Johnston*, 312 U.S. 275, 285, 61 S. Ct. 574, 85 L.Ed. 830 (1941) (holding that disputed issues of fact cannot be resolved based on affidavits and must be decided based on evidentiary hearings, "the only admissible procedure" for resolving such issues). Although, as the government argues, in military habeas corpus cases "the inquiry, the scope of matters open for review, has always been more narrow than in civil cases," *Burns* v. *Wilson*, 346 U.S. 137, 139, 73 S. Ct. 1045, 97 L.Ed. 1508 (1953) (plurality opinion), the Court in *Burns* went to some lengths to discuss the care with which military appellate courts had reviewed the petitioners' claims, *id.* at 144-45, 73 S. Ct. 1045.

Judge Sand's opinion in *United States* v. *Bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000), suggests that,

rather than dealing with the problem at the level of abstract principle, it may be more useful to examine precisely what the nature is of the confidential submission so as to determine what rights, if any, are compromised if the court considers it. In *Bin Laden*, Judge Sand resolved a motion to suppress electronic surveillance without holding a hearing, based in part on "*in camera*, *ex parte* review of . . . sensitive material in the case." *Id.* at 287. He found, as required, that such review was necessary due to the damage that could be caused by disclosure of the subject information, *id.*, and also that the issues before him were not factually complex and were predominantly legal, so that the "benefit [to the court] of holding an adversary hearing was substantially lessened," *id.* He noted that the question before him was whether the searches in question were conducted for foreign intelligence purposes or law enforcement purposes, and that resolving that question "required that the Court review a limited (and manageable) number of documents." *Id.* Judge Sand upheld withholding disclosure of the classified material before him even to defense attorneys who had clearance to review certain classified documents, noting that clearance to see certain classified documents does not necessarily mean clearance to see all such documents. *Id.* at 287 n.27.

Of course, I recognize that Padilla is not pressing his objection simply to give the court the benefit of the adversary process, and that he raises an issue of fairness. However, the Sealed Mobbs Declaration does not engage issues of fairness to the extent that might at first be supposed because it does not broaden the nature of the accusations against Padilla beyond the bounds of the Mobbs Declaration itself, nor does it refer

to conduct by Padilla that is not described in the Mobbs Declaration. Instead, other than identifying one or more of the sources referred to only in cryptic terms in the Mobbs Declaration, the sealed document simply sets forth objective circumstantial evidence that corroborates the factual allegations in the Mobbs Declaration. Padilla's access to the unclassified Mobbs Declaration gives him all the notice necessary to meet the allegations of whom he had contact with and what he did, or to explain why those allegations are now moot. Padilla is not in a position to dispute the government's claim that disclosure of the Sealed Mobbs Declaration "could compromise intelligence gathering crucial to the ongoing war effort by revealing sources and by divulging methods of collecting intelligence." (Respondents' Resp. to This Ct's 10/21/02 Order at 15)

Whatever outcome might result from the discussion above, I need not reach the issue of whether to consider the Sealed Mobbs Declaration now. If, after Padilla has had an opportunity to contest the unsealed Mobbs Declaration, I find that the government has failed to meet the some evidence standard, I will decide whether to consider the sealed document. At that point, I will have two options: (1) I could find that it is impermissible to use the sealed document without giving Padilla access to it, in which case the government will have the option of withdrawing the submission; or (2) I could consider the sealed document *in camera*. Before Padilla has disputed any facts, it would be premature to choose between these options.

* * * * * *

To recapitulate: (i) Newman may pursue this petition as next friend to Padilla, and the government's motion

to dismiss for lack of standing therefore is denied; (ii) Secretary Rumsfeld is the proper respondent in this case, and this court has jurisdiction over him, as well as jurisdiction to hear this case, and the government's motion to dismiss for lack of jurisdiction, or to transfer to South Carolina, is denied; (iii) the President is authorized under the Constitution and by law to direct the military to detain enemy combatants in the circumstances present here, such that Padilla's detention is not *per se* unlawful; (iv) Padilla may consult with counsel in aid of pursuing this petition, under conditions that will minimize the likelihood that he can use his lawyers as unwilling intermediaries for the transmission of information to others and may, if he chooses, submit facts and argument to the court in aid of his petition; (v) to resolve the issue of whether Padilla was lawfully detained on the facts present here, the court will examine only whether the President had some evidence to support his finding that Padilla was an enemy combatant, and whether that evidence has been mooted by events subsequent to his detention; the court will not at this time use the document submitted *in camera* to determine whether the government has met that standard.

The parties will discuss and arrange the conditions for defense counsel's consultation with Padilla, and will attend a conference on December 30, 2002, at 9:15 a.m., in Courtroom 21B of the United States Courthouse, 500 Pearl Street, New York, N.Y. 10007, to report on the results of those discussions and arrangements, and to schedule further proceedings in this case.

SO ORDERED.

APPENDIX C

Declaration of Michael H. Mobbs
Special Advisor to the Under Secretary of Defense for Policy

Pursuant to 28 U.S.C. § 1746, I, Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

1. I am a government employee (GS-15) of the U.S. Department of Defense and serve as a special Advisor to the Under Secretary of Defense for Policy. The Under Secretary of Defense for policy is appointed by the President and confirmed by the Senate. He is the principal staff assistant and advisor to the Secretary and Deputy Secretary of Defense for all matters concerning the formulation of national security and defense policy and the integration and oversight of DoD policy and plans to achieve national security objectives. The Under Secretary of Defense for Policy has directed me to head his Detainee Policy Group. Since mid-February 2002, I have been substantially involved with matters related to the detention of enemy combatants in the current war against the Al Qaeda terrorists and those who support and harbor them (including the Taliban).

2. As part of my official duties, I have reviewed government records and reports about Jose Padilla (also known as "Abdullah al Muhajir" and "Ibrahim Padilla") relevant to the President's June 9, 2002 determination that Padilla is an enemy combatant and the President's order that

Padilla be detained by U.S. military forces as an enemy combatant.

3. The following information about Padilla's activities with the Al Qaeda terrorist network was provided to the President in connection with his June 9, 2002 determination. This information is derived from multiple intelligence sources, including reports of interviews with several confidential sources, two of whom were detained at locations outside of the United States.[1] The confidential sources have direct connections with the Al Qaeda terrorist network and claim to have knowledge of the events described. Certain aspects of these reports were also corroborated by other intelligence information when available.

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[1] Based on the information developed by U.S. intelligence and law enforcement agencies, it is believed that the two detained confidential sources have been involved with the Al Qaeda terrorist network. One of the sources has been involved with Al Qaeda for several years and is believed to have been involved in the terrorist activities of Al Qaeda. The other source is also believed to have been involved in planning and preparing for terrorist activities of Al Qaeda. It is believed that these confidential sources have not been completely candid about their association with Al Qaeda and their terrorist activities. Much of the information from these sources has, however, been corroborated and proven accurate and reliable. Some information provided by the sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials. One of the sources, for example, in a subsequent interview with a U.S. law enforcement official recanted some of the information that he had provided, but most of this information has been independently corroborated by other sources. In addition, at the time of being interviewed by U.S. officials, one of the sources was being treated with various types of drugs to treat medical conditions.

4. Padilla was born in New York. He was convicted of murder in Chicago in approximately 1983 and incarcerated until his eighteenth birthday. In Florida in 1991, he was convicted of a handgun charge and sent to prison. After his release from prison, Padilla began referring to himself as Ibrahim Padilla.[2] In 1998, he moved to Egypt and was subsequently known as Abdullah Al Muhajir. In 1999 or 2000 Padilla traveled to Pakistan. He also traveled to Saudi Arabia and Afghanistan.

5. During his time in the Middle East and Southwest Asia, Padilla has been closely associated with known members and leaders of the Al Qaeda terrorist network.

6. While in Afghanistan in 2001, Padilla met with senior Usama Bin Laden lieutenant Abu Zubaydah. Padilla and an associate approached Zubaydah with their proposal to conduct terrorist operations within the United States. Zubaydah directed Padilla and his associate to travel to Pakistan for training from Al Qaeda operatives in wiring explosives.

7. Padilla and his associate conducted research in the construction of a "uranium-enhanced" explosive device. In particular, they engaged in research on this topic at one of the Al Qaeda safehouses in Lahore, Pakistan.

8. Padilla's discussions with Zubaydah specifically included the plan of Padilla and his associate to build and detonate a "radiological dispersal de-

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[2] Padilla's use of the name "Ibrahim Padilla" was not included in the information provided to the President on June 9, 2002.

vice" (also known as a "dirty bomb") within the United States, possibly in Washington, DC. The plan included stealing radioactive material for the bomb within the United States. The "dirty bomb" plan of Padilla and his associate allegedly was still in the initial planning stages, and there was no specific time set for the operation to occur.

9. In 2002, at Zubaydah's direction, Padilla traveled to Karachi, Pakistan to meet with senior Al Qaeda operatives to discuss Padilla's involvement and participation in terrorist operations targeting the United States. These discussions included the noted "dirty bomb" plan and other operations including the detonation of explosives in hotel rooms and gas stations.[3] The Al Qaeda officials held several meetings with Padilla. It is believed that Al Qaeda members directed Padilla to return to the United States to conduct reconnaissance and/or other attacks on behalf of Al Qaeda.

10. Although one confidential source stated that he did not believe that Padilla was a "member" of Al Qaeda, Padilla has had significant and extended contacts with senior Al Qaeda members and operatives. As noted, he acted under the direction of Zubaydah and other senior Al Qaeda operatives, received training from Al Qaeda operatives in furtherance of terrorist activities, and was sent to the United States to conduct reconnaissance and/or other attacks on their behalf.

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[3] These attacks were to involve multiple, simultaneous attacks on such targets, and also included train stations. The additional facts in this footnote were not included in the information provided to the President on June 9, 2002.

11. Padilla traveled from Pakistan to Chicago via Switzerland and was apprehended by federal officials on May 8, 2002, upon arrival in the United States. Pursuant to court order, Padilla was held by the U.S. Marshals Service as a material witness in a grand jury investigation.

12. On June 9, 2002, George W. Bush, as President of the United States and Commander in Chief of the U.S. armed forces, determined that Jose Padilla is, and was at time he entered the United States in May 2002, an enemy combatant in the ongoing war against international terrorism, including the Al Qaeda international terrorist organization. A redacted version of the President's determination is attached at Tab 1.

13. The President specifically determined that Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation of acts of international terrorism that had the aim to cause injury to or adverse effects on the United States.

14. The President further determined that Padilla posed a continued, present and grave danger to the national security of the United States, and that detention of Padilla as an enemy combatant was necessary to prevent him from aiding Al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens.

15. On June 9, 2002, the President directed the Secretary of Defense to detain Padilla as an enemy combatant.

16. On June 9, 2002, acting on the President's direction, the Secretary of Defense ordered the U.S.

armed forces to take control of Padilla as an enemy combatant and to hold him at the Naval Consolidated Brig, Charleston, South Carolina.

/s/ MICHAEL H. MOBBS
MICHAEL H. MOBBS
Special Advisor to the
Under Secretary of Defense for Policy

Dates: 27 August 2002