

January 2004

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Recommended Citation

Donna R. Newman, *The Jose Padilla Story*, 48 N.Y.L. SCH. L. REV. (2003-2004).

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THE JOSE PADILLA STORY

DONNA R. NEWMAN*

The editors of the *New York Law School Law Review* have compiled the following article primarily from briefs submitted to the United States District Court for the Southern District of New York and the Court of Appeals for the Second Circuit in connection with the federal government's detention of Jose Padilla. The controversies connected with this case are still not resolved and new arguments continue to be developed as the case is briefed and presented to the Supreme Court.¹

* * *

“At a time like this, when emotions are understandably high, it is difficult to adopt a dispassionate attitude toward a case of this nature. Yet now is precisely the time when that attitude is most essential. While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. We live under the Constitution, which is the embodiment of all the high hopes and aspirations of the new world. And it is applicable in both war and peace. We must act accordingly.”²

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1. *See* Padilla v. Rumsfeld, No. 02 Civ. 4445 (S.D.N.Y. 2002); Padilla v. Rumsfeld, No. 03-2235 (L), 03-2438 (2d Cir. 2003), available at <http://news.findlaw.com/legal/news/us/terrorism/cases/index.html>.

2. *In re* Yamashita, 327 U.S. 1, 40-41 (1946) (Murphy, J., dissenting).

INTRODUCTION

Jose Padilla, a United States citizen traveling on a valid United States passport, was arrested by federal authorities on a material witness warrant at Chicago's O'Hare Airport. On June 9, 2002, two days before a scheduled court hearing, President George W. Bush executed a military order declaring Mr. Padilla to be an "enemy combatant" and directing the Secretary of Defense to seize him from the Metropolitan Correctional Center where he was being detained on a material witness warrant. Since that time, Mr. Padilla has been held in the Consolidated Naval Brig in Charleston, South Carolina. He has been allowed no communication with the outside world, not even with counsel.³

The government's actions are shocking, unprecedented and unconstitutional. In short, the government claims that military forces may seize a citizen on American soil and stow him away in a brig for as long as the government wants, without charges and without access to counsel or a court, whenever the Commander-in-Chief concludes on "some evidence" (regardless of its dubious reliability) that the citizen has "associated" with an enemy.

Andrew G. Patel and I represent Mr. Padilla in his federal habeas corpus proceeding. We present here a detailed factual account of Mr. Padilla's experience and edited portions of our briefs submitted to the United States Court of Appeals for the Second Circuit. We argue that: (1) the military seizure and detention of Mr. Padilla is beyond the President's power as Commander-in-Chief; (2) the President has engaged in unlawful executive law-making; (3) Mr. Padilla's detention is specifically prohibited by a federal statute, 18 U.S.C. § 4001(a); and (4) the recently enacted Joint Resolution by Congress in response to the September 11, 2001, attacks, does not authorize the seizure and detention of someone like Jose Padilla.

3. On March 3, 2004, Mr. Patel and I were permitted to see Mr. Padilla. The conditions of the meeting were extremely restrictive. We were restricted in the topics we could discuss. The meeting was monitored and videotaped. Accordingly, we did not engage in any confidential discussions. The materials we sent to him were reviewed by the Department of Defense and redactions were made.

Mr. Padilla's story is the sort associated with totalitarian states, not democracies. Mr. Padilla should either be charged criminally or released.

I. THE FACTS OF JOSE PADILLA'S CASE

Jose Padilla is a United States citizen, born in Brooklyn, New York. On May 8, 2001, he traveled to Chicago aboard a commercial airliner to visit his son, dressed in his own clothing and carrying a valid United States passport. He did not possess a weapon, a bomb, nuclear material, or an instruction manual relating to bomb-making. Law enforcement agents approached him in the airport. He politely answered questions and requested an attorney. He was arrested pursuant to a grand jury material witness warrant issued by a federal judge sitting in the Southern District of New York. The United States Attorney's Office for the Southern District of New York sought the warrant and included in support the affidavit of Federal Bureau of Investigation ("FBI") Special Agent Joseph Ennis. Its contents remain sealed, except for Agent Ennis' statement that Mr. Padilla was "unwilling to become a martyr."

Federal authorities took Mr. Padilla to New York City and, on May 14, 2002, detained him in the Metropolitan Correction Center ("MCC") on a high security floor. The next day, Mr. Padilla appeared before Chief Judge Michael B. Mukasey, of the Southern District of New York, who appointed me to represent him. Mr. Padilla was brought to court in leg irons, shackles, and handcuffs. Mr. Padilla and I were permitted to review the Ennis affidavit. For the next several weeks, I met with Mr. Padilla on a regular basis at MCC and filed motions asking the district court to find that a material witness for a grand jury could not be lawfully detained. I anticipated a decision on the motions at a conference scheduled for June 11, 2002.

The conference never occurred. On Sunday, June 9, 2002, President Bush executed a military order declaring Jose Padilla an "enemy combatant" and ordered his detention by the military, even though he is a civilian. On the same day, Judge Mukasey granted the government's *ex parte* application to vacate the material witness warrant. The President's order directed the Department of Justice to transfer Mr. Padilla to the custody of the Secretary of Defense.

The order stated that Mr. Padilla was an enemy combatant, was closely associated with al Qaeda (although it did not describe him as a member of al Qaeda), and was engaged in hostile and war-like acts, including preparation for acts of international terrorism. It also stated that Mr. Padilla possessed intelligence regarding personnel and activities of al Qaeda, and that he represented a continual and grave threat to national security.⁴

I was not advised of Mr. Padilla's seizure by the military until June 10, 2002, shortly before Attorney General John Ashcroft announced Mr. Padilla's transfer to a military brig at a news conference. That same day, Deputy Secretary of Defense, Paul Wolfowitz, also at a news conference, announced that Mr. Padilla was being detained because he was a "terrorist who allegedly was plotting to build and detonate a radioactive 'dirty bomb' in the United States."⁵ The next day, he stated, "I don't think there was actually a plot beyond some fairly loose talk"⁶ On June 12, 2002, Attorney General Ashcroft stated that the government was not interested in charging Mr. Padilla with a crime but rather was holding him for interrogation.⁷ The White House subsequently explained that its sudden decision to have Mr. Padilla taken by the military was one driven by the court hearing scheduled for June 11, 2002.⁸

On Tuesday, June 11, 2002, I filed a writ of *habeas corpus*.⁹ On June 12, 2002, the district court continued my appointment as

4. President's Order to the Secretary of Defense to detain Mr. Padilla as an Enemy Combatant (June 9, 2002), available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush60902det.pdf>.

5. Press Conference, Deputy Secretary of Defense Paul Wolfowitz, U.S. Department of Justice (June 10, 2002), available at http://www.defenselink.mil/transcripts/2002/t06102002_t0610dsd.html.

6. Interview by Jane Clayson, *CBS Early Show*, with Paul Wolfowitz, Deputy Secretary, U.S. Department of Defense (June 11, 2002) available at <http://usinfo.state.gov/topical/pol/terror/02061103.htm>.

7. News Briefing, Defense Secretary Donald Rumsfeld, U.S. Department of Defense (June 12, 2002), 2002 WL 22026773.

8. See Tom Brune, Craig Gordon and Thomas Frank, *Arrest in Terror Plot/Feds: American, al Qaeda sought to set off 'dirty bomb' in U.S.*, *NEWSDAY*, June 11, 2002, at A05.

9. Writ of Habeas Corpus (June 11, 2002), *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02-4445), available at <http://news.findlaw.com/hdocs/docs/terrorism/padillaus61102pet.pdf>. That petition was subsequently amended to name, as respondents, George W. Bush, as ex officio Commander-in-Chief; Donald Rumsfeld, Secretary of Defense; John Ashcroft, Attorney General; and Commander M.A. Marr, of the Consolidated Naval Brig in Charleston, South Carolina.

counsel and appointed Andrew G. Patel, Esq. to appear as co-counsel. The petition asserted that Mr. Padilla is being held in violation of his Fourth, Fifth, and Sixth Amendment rights, his confinement constitutes an unlawful suspension of the privilege of the writ of habeas corpus, and his seizure by the military violates the Posse Comitatus Act.¹⁰ I attempted to contact Mr. Padilla but was advised by the Department of Defense that no communication would be permitted, even by mail. The government moved to dismiss the petition on jurisdictional grounds, and after full briefing on those issues, the district court ordered the parties to submit briefs on the merits. In support of its position, the government submitted the affidavit of Michael H. Mobbs, a civilian attorney in the Department of Defense, which recited the grounds for Mr. Padilla's detention.¹¹ Mr. Mobbs's affidavit suggests that the information upon which the President relied in issuing his order was essentially the same information used to issue the Material Witness Warrant. The only difference being that the President does not appear to have been informed that Mr. Padilla was "unwilling to become a martyr."¹²

In his affidavit, Mr. Mobbs concedes that he has no personal knowledge of any of the facts offered to justify Mr. Padilla's detention and that his information was derived from two anonymous and uncorroborated intelligence sources.¹³ One of the sources admittedly was medicated when he provided the information and later recanted his statements. The other source has a history of intentionally providing false information to investigators in order to mislead them. Neither the President's order of June 9, 2002, nor the Mobbs' affidavit provides a reason why Mr. Padilla, already detained by order of a civilian court, would be less of a threat or more willing to provide information if he was detained by the military.

On December 4, 2002 the district court ruled that the President had the authority as Commander-in-Chief to direct the mili-

10. 18 U.S.C. § 1385 (1984).

11. Declaration of Michael H. Mobbs Special Advisor to the Under Secretary of Defense for Policy (Aug. 27, 2002), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702mobbs.pdf>.

12. See *supra* text accompanying Part I.

13. Declaration of Michael H. Mobbs Special Advisor to the Under Secretary of Defense for Policy (Aug. 27, 2002), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702mobbs.pdf>.

tary to detain an American citizen as an enemy combatant even though he was not a member of any foreign army and had been arrested in the United States.¹⁴ The court also ruled that the Authorization for Use of Military Force¹⁵ provided congressional authorization for the President's action. The court held, in consideration of the deference to be accorded to the President in these matters, that Mr. Padilla was entitled only to minimal judicial review to determine whether there was "some evidence" to support his detention.¹⁶ The court noted that it would consider events subsequent to Mr. Padilla's detention in determining whether the evidence relied upon by the President had become irrelevant. Finally, the court held that Mr. Padilla should be allowed to consult with counsel for the limited purpose of assisting him with pursuing a writ of habeas corpus.¹⁷

The government refused to agree to any conditions permitting access to counsel and opposed any attorney-client contact. On January 9, 2003, the government moved for reconsideration of the part of the order that granted Mr. Padilla access to counsel.¹⁸ Another

14. Order and Opinion at 101 (Dec. 4, 2002), *Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02-4445), available at <http://www.nysd.uscourts.gov/rulings/02CV04445.pdf>. The court ruled that I had standing as "next friend" to pursue a writ of habeas corpus on Padilla's behalf, that Secretary of Defense Donald Rumsfeld was a proper respondent and that the United States District Court for the Southern District of New York had jurisdiction over him and jurisdiction to hear this case. Thus, the court denied the Government's motion to dismiss for lack of jurisdiction or transfer to the District of South Carolina. *Id.* at 76-77. The court noted that under 28 U.S.C. § 2243 (2004), a petitioner has a right to present evidence in support of his petition as well as facts to refute the government's position. Thus, the district court ruled that to enable the court to properly perform its function in reviewing and deciding the Padilla petition, pursuant to the authority provided under the All Writs Act, 28 U.S.C. § 1651(a) (2000), Padilla was to have access to his attorneys for the limited purpose of presenting to the court facts and evidence in support of his petition. He ordered the parties to meet to attempt to agree on conditions under which defense counsel could meet with Padilla, and set a court date of December 31, 2002, at which time, the court would order the conditions if the parties had not come to an agreement.

15. Act of Sept. 18, 2001, Pub.L.No. 107-40, 115 Stat. 224.

16. Order and Opinion at 102 (Dec. 4, 2002), *Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02-4445), available at <http://www.nysd.uscourts.gov/rulings/02CV04445.pdf>.

17. *Id.* at 89, 102.

18. See Order Certifying Government's Interlocutory Appeal (April 9, 2003), *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2002) (No. 02 Civ. 4445), available at <http://news.findlaw.com/hdocs/docs/padilla/padillarums40903opn.pdf>.

full round of briefing followed. In support of their motion for reconsideration, the government submitted a declaration from Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency.¹⁹ The declaration spoke generally about the intelligence-gathering process, interrogation techniques, and the use of interrogation in the “War” on Terrorism. It also opined that Mr. Padilla may have some general intelligence information about al Qaeda regarding recruitment, training, and planning.

On March 11, 2003, the district court granted the government’s motion for reconsideration in part and then affirmed its earlier decision.²⁰ The court characterized Vice Admiral Jacoby’s statements about Mr. Padilla being a valuable source of intelligence as “speculative.”²¹ On the issue of access to counsel, the court reasoned that “[t]here is no dispute that Padilla has the right to bring this petition,” and “there is no practical way for Padilla to vindicate [the] right [to bring facts before the court] other than through a lawyer.”²² The court rejected the government’s argument that under the “some evidence” standard the court need only examine the facial sufficiency of the evidence.²³ The court again emphasized that it was unable to determine whether Mr. Padilla was being “arbitrarily detained without giving him an opportunity to respond to the government’s allegations.”²⁴

19. Declaration of Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency (January 9, 2003).

20. *Padilla*, 243 F. Supp. 2d 42, Opinion and Order (Mar. 11, 2003), *Rumsfeld*, (No. 02-4445), available at <http://news.findlaw.com/hdocs/docs/padilla/padillarums31103opn.pdf>.

21. *Id.* at 52.

22. *Id.* at 53.

23. *Id.* at 54.

24. *Id.* On March 31, 2003, the government moved for an interlocutory appeal of the court’s ruling on Padilla’s right to meet with counsel, the court’s ruling on jurisdiction, and the court’s determination that I was a proper “next friend.” Padilla opposed the motion for certification and, in the alternative, sought certification on all other rulings contained in the December 4, 2002 and March 31, 2003 Orders and Decisions. On April 9, 2003, the district court certified six questions for interlocutory appeal. However, the district court specifically did not certify for appeal its ruling that Ms. Newman had standing as “next friend.” The court found that this question did not meet the requirements for an interlocutory appeal because “there was no reasonable grounds for disagreement under existing law on the propriety of her serving as ‘next friend.’” Application was made to the Second Circuit by the Government for permission to take an interlocutory appeal and expedited appeal. Padilla also sought leave to take an in-

II. A CHALLENGE TO THE CONSTITUTIONALITY OF THE MILITARY SEIZURE AND DETENTION OF PADILLA

The President does not have the power to order the military to seize and detain a U.S. citizen on American soil unless the Constitution or a specific act of Congress grants him that power.²⁵ Where Congress has legislated in a particular area but has not authorized executive action, the President is without authority to proceed in a manner inconsistent with that legislation.²⁶ Simply put, the President, regardless of how well-intentioned, is not above the law.²⁷ The authority for the President's military seizure and detention of Mr. Padilla is not found in the text of the Constitution, in any congressional act, or in any judicial precedent. Moreover, the military imprisonment of a civilian citizen is prohibited by the Constitution absent a *bona fide* declaration of martial law.²⁸ Indeed, Congress has specifically prohibited civilian detention without charges.²⁹ Furthermore, the Supreme Court has repeatedly rejected similar attempts by the Executive to exercise the rights claimed here.³⁰

A. *The Authority Granted to the President as Commander-in-Chief Does Not Empower Him to Order the Military to Seize and Detain Padilla.*

The district court ruled that the President's authority as Commander-in-Chief was broad enough to encompass the military arrest

terlocutory cross-appeal. On June 10, 2003, the Second Circuit granted the parties leave to take an interlocutory appeal.

25. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); see also *Ex parte Milligan*, 71 U.S. 2, 114-16 (1866).

26. *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring); see also Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and The Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648 (2002) [hereinafter Torruella]; David G. Adler, *The Steel Seizure and Inherent Presidential Power*, 19 CONST. COMMENTARY 155, 172 (2002) ("[U]nder the banner of executive power a president may not lay claim to any of the powers, express or implied, that are allocated to either Congress or the judiciary.").

27. Cf. *Clinton v. Jones*, 520 U.S. 681 (1997); *United States v. Nixon*, 418 U.S. 683 (1974).

28. See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

29. 18 U.S.C. § 4001(a) (2003) (prohibiting any citizen from being imprisoned or otherwise detained by the United States except pursuant to an Act of Congress).

30. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex parte Milligan*, 71 U.S. 2, 114-16 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957).

and detention of Mr. Padilla, indefinitely, without congressional authorization.³¹ The district court did not point to any express constitutional provision granting the power claimed by the President.³²

The Supreme Court has repeatedly recognized that the U.S. government consists of separated and limited powers.³³ It has emphatically rejected the exercise of military power over civilian affairs. As Justice Jackson noted,

[the President's] command power is not such an absolute as might be implied from that office in a militaristic system, but is subject to limitations consistent with a constitutional Republic whose law and policy making branch is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the military.³⁴

That statement, made during the Korean War, stands as testament to the judiciary's ongoing commitment to preserve our system of government, even during times of war. As the Supreme Court noted during the height of the Cold War, "[o]urs is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny."³⁵ The Framers crafted a Constitution that confined the nature and power of the Presidency.³⁶

Consistent with the Framers' balanced design, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court explicitly described the role of the Commander-in-Chief.³⁷ In *Youngstown*, as in Mr. Padilla's case, a President sought arbitrarily to expand his powers during a perceived national security crisis. In the midst of the Korean War, steelworkers threatened a national strike.³⁸ President Truman

31. *Bush*, 233 F. Supp. 2d 564, 598 (stating "[p]rincipally because the Joint Resolution complies with all constitutional requirements for an Act of Congress, it should be regarded for purposes of § 4001(a) as an 'Act of Congress'").

32. *Id.*

33. *See generally* *Marbury v. Madison*, 5 U.S. (137 Cranch) (1803). *Marbury* stands for the proposition that Article III courts have the authority to review acts by the Executive and Legislative branches.

34. *Youngstown*, 343 U.S. at 645-46 (1952) (Jackson, J., concurring).

35. *Reid v. Covert*, 354 U.S. 1, 40 (1957).

36. *THE FEDERALIST*, Nos. 69, 71 (Alexander Hamilton), No. 48 (James Madison).

37. 343 U.S. 579 (1952).

38. *Id.* at 582.

ordered the military to take over the steel mills because he believed that an end to steel production would seriously jeopardize the national defense.³⁹ The Supreme Court rejected President Truman's claim that he had the authority to seize the steel mills for the war effort.⁴⁰ The Court found that no such authority flowed from any of the sources that President Truman claimed – the power of the Commander-in-Chief, the obligation to faithfully execute the laws, or any power inherent or implied.⁴¹ Moreover, the Court recognized that prior cases had upheld the President's exercise of power as Commander-in-Chief only when it directly related to day-to-day fighting in a zone of active combat.⁴²

Youngstown was not the first time the Supreme Court stayed the hand of a wartime President who improperly claimed that his war powers authorized his intrusion into the domestic arena. In *Ex parte Milligan*, the government was rebuffed when it attempted to use a military commission to prosecute a civilian for violating the law of war.⁴³ The Supreme Court ruled that where civil courts are functioning, whether in time of peace or war, a civilian may not be tried by the military.⁴⁴

The facts of *Milligan* are strikingly similar to the facts of Mr. Padilla's case. The government alleged that Milligan, a citizen of Indiana and a civilian, was a member of the Order of American Knights, a militia that aimed to overthrow the government of the United States. Milligan and others were alleged to have conspired to assist the Confederate Army by seizing ammunition, building an arsenal of weapons, releasing prisoners, and planning to kidnap the Governor.⁴⁵ They were tried before a military commission and sentenced to death.⁴⁶ Milligan petitioned for a writ of habeas corpus, claiming that trial by a military commission violated his constitutional rights.⁴⁷ The government argued then, as it does in Mr. Padilla's case, that Milligan had violated the laws and usages of war

39. *Id.* at 583.

40. *Id.* at 589.

41. *Id.* at 587-88.

42. *Id.* at 587.

43. 71 U.S. (4 Wall) 2 (1866).

44. *Id.* at 120-21.

45. *Id.* at 5-6.

46. *Id.* at 107.

47. *Id.*

and was therefore subject to military jurisdiction.⁴⁸ The Supreme Court disagreed. Milligan, a civilian, who was not seized in a zone of active combat operations and who was not a member of the Confederate Army, could not be tried by a military commission as an enemy soldier where the courts were open and functioning.⁴⁹

The district court in Mr. Padilla's case chose not to rely on *Milligan*, concluding that *Ex parte Quirin*⁵⁰ related more closely to Mr. Padilla's situation. The *Quirin* Court considered the habeas petitions of German soldiers who landed on U.S. shores to engage in acts of military sabotage during World War II.⁵¹ The saboteurs admitted their status as German soldiers. The only issue before the Supreme Court was whether the President could order the saboteurs tried before a military commission rather than a civilian criminal court.⁵² In a narrow holding, *Quirin* held that President Roosevelt, pursuant to the Articles of War, had the authority to order the trial by military commission of German soldiers who had come behind our "lines" to perform hostile acts during a declared war.⁵³ *Quirin* civilian co-conspirators, who assisted the Nazi saboteurs in the U.S., were prosecuted in federal district court.⁵⁴ If the government's argument regarding Mr. Padilla was correct, these civilian co-conspirators would have been deemed "enemy combatants" and tried by the military.

Several features set the *Quirin* case apart from Mr. Padilla's case. First, the *Quirin* defendants acknowledged their status as soldiers of a foreign army.⁵⁵ Mr. Padilla never has. Second, the *Quirin* Court found that Congress, in the Articles of War, established the crimes with which the saboteurs were charged – a fact

48. *Id.* at 26-27.

49. *Id.* 71 U.S. at 122.

50. 317 U.S. 1 (1942); *see also* *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). *Colepaugh*, like *Quirin*, concerned a German soldier who attempted to infiltrate the United States. *Colepaugh* relied exclusively upon *Quirin* and *Quirin*'s analysis to find that *Colepaugh* could be tried by a military commission.

51. 317 U.S. 1.

52. *Id.* at 24-25.

53. *Id.* at 47.

54. *See, e.g.*, *Haupt v. United States*, 330 U.S. 631 (1947); *see also* *Cramer v. United States*, 325 U.S. 1 (1945).

55. *Quirin*, 317 U.S. at 20.

that the *Quirin* court considered crucial.⁵⁶ Unlike the *Quirin* petitioners, Mr. Padilla has not been charged with a crime defined by Congress. In *Quirin*, the President, during a declared war, acted in an area close to the traditional Commander-in-Chief power – the detention and trial of combatants who were self-acknowledged soldiers of a foreign enemy nation – and he acted pursuant to congressional authorization.⁵⁷ In Mr. Padilla's case, the President is acting far outside the traditional Commander-in-Chief power and without congressional authorization.⁵⁸ The difference between these two cases is stark.

It is thus *Milligan*, and not *Quirin*, that provides the proper framework for determining whether the President has the power to

56. *Id.* at 26-27. In the context of the opinion the Court's use of the phrases, "nation at war," "during time of war," "conduct of war," was a reference to a congressionally declared war. *Id.* at 20, 21, 22, 23, 25, 26, 28, 35, 37, 38, 42. See Torruella, *supra* note 26, at 668 n.132. Thus, it is clear that *Quirin* considers the extent of the Executive's powers only in the context of a declared war. 317 U.S. at 26 (stating that "[t]he Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared") (emphasis added); see also *id.* at 25, 35, 42 (all limiting analysis to "time of war"). In a declared war, the Executive's powers are considerably larger than they are in an undeclared conflict. See *Bas v. Tingy*, 4 U.S. (7 Dall.) 37, 43 (1800) ("If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, . . . but if a partial war is waged, its extent and operation depend on our municipal [*i.e.*, national] laws.") (emphasis added). Indeed, Attorney General Francis Biddle, who argued the case on the President's behalf, argued before the Supreme Court that the military commissions and the President's proclamation were based on congressional acts – the Alien Enemy Act and the Articles of War. FRANCIS BIDDLE, IN BRIEF AUTHORITY 594-95 (Doubleday & Co., Inc. 1962).

The Court clarified its reliance on congressional action in subsequent cases. See *In re Yamashita*, 327 U.S. 1, 7 (1946) ("In *Ex parte Quirin* . . . [we] pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution . . . of which the law of war is a part, had by the Articles of War . . . recognized the military commission appointed by military command") (internal citations omitted); *Madsen v. Kinsella*, 343 U.S. 341, 355 n.22 (1952) ("[T]he military commission's conviction of [the *Quirin*] saboteurs . . . was upheld on charges of violating the law of war as defined by statute") (emphasis added). See generally *Quirin*, 317 U.S. 1.

57. In addition, *Quirin* provides no support for the indefinite detention of Padilla without trial or access to counsel; the *Quirin* defendants were granted counsel and a chance to defend themselves and present evidence on their behalf.

58. It should also be noted that the statutory premise for *Quirin*, the Articles of War, was repealed and replaced by a comprehensive and complete revision of "Military Law" when Congress in 1950 enacted the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801 (1950), *et. seq.* The Supreme Court has held that the UCMJ does not give the Commander-in-Chief military jurisdiction over civilians. See *Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957).

detain Mr. Padilla indefinitely without charge. The *Milligan* Court understood that validating the President's claims would give the military vast power over the citizenry – at the expense of the legislature and of individual liberty.

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people, for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By that protection or the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.⁵⁹

Milligan's observations are no less true today than they were in 1864. "This general principle of *Milligan* — a principle never repudiated in subsequent cases — leaves the President little unilateral freedom to craft an order to detain people on his own suspicion for indefinite warehousing or trial at his pleasure in a system of military justice."⁶⁰

As in *Youngstown* and *Milligan*, in Mr. Padilla's case, the President has overstepped the authority granted to him by the Constitution.⁶¹ The President's exercise of unbridled power cannot stand.

B. The President has Engaged in Unlawful Executive Law Making by Labeling Padilla an "Enemy Combatant"

The President has unilaterally redefined the term "enemy combatant" to include any unarmed person outside a zone of combat who has contemplated a hostile act and has "associated" with an international terrorist organization. This constitutes an impermissi-

59. *Ex parte Milligan*, 71 U.S. at 118-19.

60. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1279-80 (2002) [hereinafter Katyal & Tribe].

61. *See also* *Little v. Barreme*, 6 U.S. 170 (1804) (holding that the President's Commander-in-Chief powers could not exceed the Article I, "War Power" of Congress).

ble expansion of the term “unlawful combatant” as defined by international law.⁶²

The Constitution grants Congress, not the President, the power to “make Rules concerning Captures on Land and Water,”⁶³ and “to define and punish . . . Offences against the Law of Nations.”⁶⁴ The authority of the sovereign in wartime “to take the persons and confiscate the property of the enemy” is “an independent substantive power” of Congress, not the President.⁶⁵ The *Youngstown* Court held: “In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”⁶⁶ Indeed, Congress has expressly criminalized the conduct the President alleges Mr. Padilla to have engaged in.⁶⁷

No court has ever held that a civilian, not found in a zone of active combat operations and not an acknowledged member of a foreign army, may be designated as an enemy combatant. As previously noted, the *Quirin* defendants acknowledged that they were members of the German army acting under orders of the German High Command.⁶⁸ The *Colepaugh* defendants also acknowledged membership in a foreign army.⁶⁹ The *In re Territo* petitioner was captured in his Italian Army uniform on the “field of battle.”⁷⁰ Likewise, General Yamashita, a commander in the Japanese army, was subject to military jurisdiction after his surrender to U.S. forces.⁷¹ In fact, a reading of *Quirin*, *Colepaugh*, *Territo* and

62. Protocol I Additional to the Geneva Conventions, Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43(2), 1125 U.N.T.S. 3, 23 [hereinafter Additional Protocol I]; see also Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(2), 6 U.S.T. 3316, *4-5 [hereinafter Third Geneva Convention] (further defining those combatants entitled to prisoner of war status to include certain members of militias).

63. U.S. CONST. art. I, § 8, cl. 14.

64. U.S. CONST. art. I, § 8, cl. 10.

65. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 122, 126 (1814).

66. 343 U.S. at 587.

67. See, e.g., 18 U.S.C. § 2332(b) (2004) (conspiracy to kill United States nationals); 18 U.S.C. § 844 (2004) (bombing and bombing conspiracy); 18 U.S.C. § 2332a(a)(1) (2004) (conspiracy to use weapons of mass destruction); 18 U.S.C. § 2441 (2004) (defining war crimes).

68. 317 U.S. at 21.

69. 235 F.2d at 432.

70. 156 F.2d 142 (9th Cir. 1946).

71. *Yamashita*, 327 U.S. at 5.

Yamashita shows that the Supreme Court's use of the term "enemy combatant" is synonymous with the term "enemy soldier." More recently, the Fourth Circuit upheld the classification of Yaser Hamdi as an "enemy combatant" precisely because he was seized by the military in a zone of active combat.⁷²

Under the law of war, combatants are defined primarily as "members of the armed forces of a party to a conflict."⁷³ The President's unilateral redefinition of "enemy combatant" falls outside the provisions of the 1949 Geneva Conventions and other customary norms of international law.⁷⁴ No statute, treaty or judicial opinion has ever defined the term "enemy combatant" as the President has.

Combatant is a term of art and cannot be read in isolation. In order to understand the meaning of the term "combatant" in the law of war, it is important to understand the rationale behind that categorization. The law of war makes a fundamental distinction between civilians and combatants.⁷⁵

The rules of engagement cards that American soldiers carry into battle state "Fight only Combatants,"⁷⁶ indicating that civilians are not armed and should not be shot. "Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities."⁷⁷ Noncombatants, which include civilians, are those remaining individuals who

72. *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (Wilkinson, J., concurring).

73. Additional Protocol I, *supra* note 62; *see also* Third Geneva Convention, *supra* note 62, at art. 4(2) (further defining those combatants entitled to prisoner of war status to include certain members of militias).

74. *Id.*

75. *See* DIETER FLECK, THE HANDBOOK OF HUMANITARIAN LAW PROTOCOL, 65 (1995); Additional Protocol I, *supra* note 62, at arts. 43, 48, 1125 U.N.T.S. 3, 16 I.L.M. 1391; *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866).

76. *See* U.S. DEP'T OF ARMY, OPERATIONAL LAW HANDBOOK, 95 (T. Johnson, ed., 2003).

77. Additional Protocol I, *supra* note 62, at art. 43(2). *See also* Jennifer Elsea, *Presidential Authority to Detain Enemy Combatants*, 33 PRESIDENTIAL STUD. Q. (forthcoming Sept. 2003) (for a complete discussion of the distinction between the two categories and how historically we have treated the different categories) available at <http://www.nimj.org>; *See also*, Brief of Amici Curiae Experts on the Law of War at 10-12.

are not members of the participants' military force and who are not authorized to take up arms.⁷⁸

Combatants, who are members of the armed forces of a party to a conflict, are lawful targets for military attack wherever they are found.⁷⁹ But the law of war sharply limits the situations in which civilians can become lawful targets of military action. Civilians cannot be targets of military attack "unless and for such time as they take a direct part in hostilities."⁸⁰ In other words, a civilian cannot be treated as a combatant except during the actual time he or she is taking a direct part in hostilities.⁸¹ The stringent requirement of *direct* participation in combat is designed to protect the civilian population during times of war. Any other rule would allow the use of military force against large parts of the civilian population on the theory that they were associated with and aiding the enemy forces.

Whether an individual is in the armed forces of a party to a conflict and whether he or she has directly participated in combat determines whether that person is a combatant. In Mr. Padilla's case, the government presumes that he is a combatant and argues that whether an individual is an acknowledged enemy soldier and is found engaging in conventional battlefield combat are pertinent only to the distinction between "lawful" and "unlawful" enemy combatants. In fact, the government has yet to prove Mr. Padilla was a combatant at all.

Contrary to the government's position, "infiltrating the domestic territory of a belligerent to commit acts of sabotage or terror in furtherance of the enemy's war efforts does not subject that individual to military arrest and detention, unless the saboteur is also a

78. See, e.g., U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL 27-10, para. 60 (1956) [hereinafter LAW OF LAND WARFARE]; Additional Protocol I, *supra* note 62, at art. 50(1); see Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F.L. Rev. 1, 24 fn. 135 (2001) ("The current definition of a combatant is any member of the armed forces of a party to the conflict except medical personnel and chaplains. All other parties are considered to be civilians.") (quoting, A.P.V. ROGERS, LAW ON THE BATTLEFIELD, 8 (1996)).

79. See, e.g., LAW OF LAND WARFARE, *supra* note 79, at para. 31; Additional Protocol I, *supra* note 68, at art. 48.

80. Additional Protocol I, *supra* note 62, at art. 51(3).

81. AIR FORCE PAMPHLET 110 - 31, INTERNATIONAL LAW - THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, para. 3-3.a. (1976).

member of the enemy army.”⁸² Mr. Padilla did not infiltrate anything.⁸³ The conduct in which the government alleged Mr. Padilla engaged – loosely associating with members of a terrorist organization and plotting to engage in future hostile acts – does not constitute direct participation in combat. Therefore, such conduct cannot transform a civilian into a combatant who would be a lawful military target.⁸⁴ Even if Mr. Padilla “associated” with a terrorist association, it would not be sufficient to make him a combatant.

The government ignores these fundamental principles of the law of war which compel a conclusion that Mr. Padilla is not a combatant.⁸⁵ In its analysis, the government fails to acknowledge the fact that one’s military status must be determined before one can be designated an enemy combatant.⁸⁶

C. *Padilla’s Detention is Specifically Prohibited by 18 U.S.C. § 4001(a)*

Congress has explicitly barred the Executive from detaining any citizen without specific congressional authorization. 18 U.S.C. § 4001(a) states that “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The language of the statute is direct and unambiguous.⁸⁷

The history behind the statute clearly indicates that it applies to Mr. Padilla’s case. Section 4001(a) was enacted in 1971 to repeal the 1950 Emergency Detention Act (the “1950 Act”), which was en-

82. Elsea, *supra* note 78, at 3-4.

83. Padilla arrived in his own country on a commercial airliner, unarmed, in civilian clothing, and used his U.S. passport.

84. See, e.g., INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS 619 (C. Pilloud, et al., eds., 1987) (distinguishing between direct participation of a combatant as exemplified by battlefield activity and that of civilian assistance which provides support for the war effort); *id.* at 516 (“Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place.”); INGRID DETTER, THE LAW OF WAR, 285-88 (Cambridge University Press, 2d. Ed. 2000); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920); see also BRIEF OF AMICI CURIAE EXPERTS ON THE LAW OF WAR at 13 and references cited therein.

85. Brief for Respondent-Appellant at 22-24, *Padilla v. Rumsfeld*, No. 03-2235 (L), 03-2438 (2nd Cir. 2003), available at <http://news.findlaw.com/hdocs/docs/padilla/padillarums72203gbrf.pdf>.

86. See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866); Third Geneva Convention, *supra* note 62.

87. *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981).

acted at the height of Cold War fears of communist invasion and in response to the Japanese internment camps during World War II.⁸⁸ The 1950 Act authorized the President “in time of invasion, declared state of war, or insurrection in aid of a foreign enemy,” to proclaim an “Internal Security Emergency” during which he could apprehend and detain persons if there was reasonable belief that they “probably will engage in, or probably will conspire with others to engage in, acts of espionage or of *sabotage*.”⁸⁹

Although Congress had considered simply repealing the 1950 Act, it feared that repeal alone would not make sufficiently clear that the Executive branch was strictly prohibited from detaining citizens without specific congressional approval. As the report of the House Judiciary Committee makes clear, Congress concluded, “Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority . . . the Committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an act of Congress exists.”⁹⁰ The text and legislative history clearly establish that Congress intended to prohibit the President from detaining any American – including suspected spies and saboteurs – without congressional authorization.

The government claims, however, that “Section 4001(a) pertains to – and was intended to address – civilian detentions, not the detention of enemy combatants: the immediately ensuing subsection, 18 U.S.C. § 4001(b), speaks to the control of the Attorney General over ‘Federal penal and correctional institutions.’”⁹¹ This argument is wrong for at least four reasons. First, the Executive “cannot overcome the plain language of the statute as read by the Supreme Court in *Howe v. Smith*.”⁹² Second, § 4001(b) was enacted eighty years earlier, in completely different legislation than

88. Emergency Detention Act, 50 U.S.C. § 812, 64 Stat. 1019 (1950) (repealed 1971); see H.R. REP. NO. 92-116 (1971), U.S.C.C.A.N. 1435, 1438.

89. 50 U.S.C. §§ 812-13 (1950) (emphasis added).

90. *Id.*

91. Brief for Respondent-Appellant at 36, *Rumsfeld* (No. 03-2235), available at <http://news.findlaw.com/hdocs/docs/padilla/padillarums72203gbrf.pdf>.

92. *Padilla v. Bush*, 233 F. Supp. 2d 564, 598 (S.D.N.Y. 2002) (discussing *Howe*, 452 U.S. 473).

§ 4001(a).⁹³ The two share only a code designation, not an origin or a meaning. Third, § 4001(b) contains an exception for “military penal or military reformatory institutions or persons confined therein,” but § 4001(a) does not. This difference reflects the fact that § 4001(b) explicitly applies only to the Attorney General, whereas § 4001(a) applies to the entirety of the federal government. There is simply no reason to import the military exception of § 4001(b) into § 4001(a). Finally, Congress enacted § 4001(a) to repudiate the internment camps of World War II in which Japanese Americans were subject to executive detention under the auspices of the Department of War. This legislative history further underscores that the statute applies to the entire federal government, not only to the Attorney General.

D. The Joint Resolution Does Not Provide the President with Authority to Order the Military To Seize and Detain Padilla

The district court acknowledged that while 18 U.S.C. § 4001 (a) bars Mr. Padilla’s current detention without authorization from Congress, authority for his detention may be found in the Joint Resolution “Authorization for the Use of Force” (“AUF”),⁹⁴ Section 2 (a) of the Joint Resolution reads 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.⁹⁵

The government argues that “[t]he authority to use ‘all necessary and appropriate force’ against organizations determined by the President to be responsible for the September 11 attacks necessarily

93. See Act of Mar. 3, 1891, § 4, 51st Cong., ch. 529, 26 Stat 839, 839, as amended by Act of May 14, 1930, § 2, 71st Cong., ch. 274, 46 Stat. 325, 325.

94. S.J. Res. 23, 107th Cong., Pub. L. No. 107-40, 115 Stat. 224 § 2(a) (2001) [hereinafter Joint Resolution § 2(a)].

95. Joint Resolution § 2(a).

embraces the authority to seize and detain enemy combatants.”⁹⁶ However, the AUF does not provide the President with this authority.

In enacting the AUF, Congress authorized a limited use of force.⁹⁷ The AUF permits the use of force against “*such nations, organizations or persons*” who committed, planned, authorized or aided the September 11 terrorist acts and those who “harbored” such nations, organizations or persons.⁹⁸ Congress could have authorized the use of force against any person who associated with the perpetrators of September 11, but it did not. While the President has claimed that Mr. Padilla associated with and conspired with members of al Qaeda, he has never claimed that Mr. Padilla is a member of al Qaeda or that he harbored members of al Qaeda. Thus, the statute simply does not apply to Mr. Padilla. Its language does not support the government’s assertion that the President may unilaterally expand the categories of persons against whom Congress has authorized the use of force or military detention without charge.

Every applicable canon of statutory construction mandates the conclusion that § 2(a) provides no justification for the military detention without charge of an unarmed civilian seized by military personnel in the United States, far from any zone of combat. The Supreme Court has repeatedly held that a general statute cannot take precedence over a specific statute, unless the general statute contains a clear statement asserting that Congress intends it to control.⁹⁹ This principle is no less true when the general statute is the later-enacted statute. As the Court held in *Guidry v. Sheet Metal*

96. Brief for Respondent-Appellant at 31, *Rumsfeld* (No. 03-2235), available at <http://news.findlaw.com/hdocs/docs/padilla/padillarums72203gbrf.pdf>.

97. *Cf.* *Little v. Barreme*, 6 U.S. (2 Cranch) 170. As is evident from the legislative history Congress did not intend to authorize the broad power claimed by the President or the authority to infringe on civil liberties. *See* 147 CONG. REC. J5648, H5680 (daily ed. Sept. 14, 2001) (statement of Rep. Conyers); *see also* 147 CONG. REC. S9417 (daily ed. Sept. 14, 2001) (statement of Sen. Feingold); *see also* 147 CONG. REC. S9416 (daily ed. Sept. 14, 2001) (statement of Sen. Levin).

98. Joint Resolution § 2(a).

99. *See, e.g.,* *Busic v. United States*, 446 U.S. 398 (1980); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974).

Workers Nat'l Pension Fund,¹⁰⁰ “[i]t is an elementary tenet of statutory construction that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment.”¹⁰¹

Section 2(a) is a broad statute, rapidly enacted four days after the September 11 attacks, and consistent with the War Powers Resolution to allow the President to launch a concerted assault against al Qaeda and its Taliban protectors. By contrast, 18 U.S.C. § 4001(a) is a specific statute, tailored precisely to the question of executive detention of American citizens. Section 2(a) does not specifically address American citizens; 18 U.S.C. § 4001(a) does. Section 2(a) does not speak of detention; 18 U.S.C. § 4001(a) does. The only way to conclude that Section 2(a) authorizes the detention of American citizens is to *infer* specific authorization from the broad words of the resolution and this is precisely what the Supreme Court has continually warned courts against doing.¹⁰²

Absent a clear statement, no general authorization for the use of force may permissibly be interpreted to authorize the detention of an American citizen without charge. The district court erred in ignoring this rule of statutory interpretation. Under the cases giving precedence to specific statutes over general statutes, that result would be clear enough. This fundamental principle becomes clearer when the government claims that a general enactment allows it to invade the liberty of citizens. As the Supreme Court has held: “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.”¹⁰³

These fundamental principles apply equally in times of peace and war. Our courts have repeatedly considered Executive branch claims that a broad authorization for the use of force should be interpreted implicitly to permit seizures away from zones of active

100. 493 U.S. 365 (1990).

101. *Id.* at 375 (internal quotations omitted).

102. *See, e.g., Guidry*, 493 U.S. at 375.

103. *Ex parte Endo*, 323 U.S. 283, 300 (1944).

combat, and they have held that an authorization to use force provides no such implicit authority.¹⁰⁴

Furthermore, in the months immediately following September 11, Congress acted to increase the President's authority to punish and detain suspected terrorists. The United States Patriot Act,¹⁰⁵ passed by Congress after the Joint Resolution, specifically authorizes the President to detain aliens suspected of having terrorist ties. Such detentions can occur for limited periods of time and are governed by procedural safeguards.¹⁰⁶ Notably, the Patriot Act did not amend or suspend the clear provisions of 18 U.S.C. § 4001(a).¹⁰⁷

The district court's interpretation of § 2(a) ignores the clear statement of alien detention and wrongly presumes the same Congress authorized without a clear statement or guidelines, the President to detain citizens indefinitely. Clearly, when enacting § 2(a), Congress did not intend to authorize the detention of American citizens seized outside zones of active combat. Consistent with elementary tenets of statutory construction, § 2(a) cannot be read to authorize the military seizure and detention of American citizens without charge. Its language reflects no "unmistakable intent"¹⁰⁸ to grant the Executive the power to detain American citizens without charge – a power denied to it in § 4001(a).

104. See *Little v. Barreme*, 6 U.S. (2 Cranch) at 177 (imposing financial liability on a naval officer who had seized a ship as a prize of war pursuant to orders from the President authorizing the seizing of sailing *from* France, when Congress had authorized the seizure only of ships sailing *to* France); *Brown v. U.S.*, 12 U.S. (8 Cranch) 110, 128-29 (1814) ("When war breaks out, the question, what shall be done with enemy property in our country, is a question . . . proper for the consideration of the legislature, not of the executive or judiciary."); *id.* at 126 (the right "to take the persons and confiscate the property of the enemy" is "an independent substantive power" of Congress); *Conrad v. Waples*, 96 U.S. 279, 284 (1877) (property of man "engaged in the rebellion, as a member of the Confederate Congress, and giving constant aid and comfort to the insurrectionary government" could not be seized without congressional warrant); *Salamandra v. New York Life*, 254 F. 852, 859 (2d Cir. 1918) ("wherever the enemy is present, and where his property is situate, Congress may determine there exists the element of danger, and to the extent of the jurisdiction of Congress the power exists, not only of seizure, but of disposition to the limits of the necessity.").

105. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

106. See 8 U.S.C. § 1226(a) (2003).

107. A fact that must be given credence in evaluating the Executive branch's current claim of congressional authorization.

108. See Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 § 2(a) (2001).

E. No Other Judicial Decision Supports the Finding that Padilla may be Detained

The district relied on the *Prize Cases*,¹⁰⁹ *Ex parte Quirin*,¹¹⁰ and *Moyer v. Peabody*,¹¹¹ to support its findings. All three are inapposite.

The *Prize Cases* considered the claims of ship owners whose property was seized by United States forces in zones of active combat.¹¹² The Supreme Court found the President had authority as Commander-in-Chief to seize property in what had become enemy territory by virtue of the secession.¹¹³ However, the Court also found it crucial that Congress had likewise authorized the President's use of force for the situation presented there — specifically, an insurrection.¹¹⁴ The Joint Resolution cannot legitimately be read to permit the detention without charge of an American citizen. The circumstances surrounding the detention of Mr. Padilla cannot be compared with the circumstances surrounding initiation of the blockade of the southern ports during the Civil War.

In *Ex parte Quirin*, President Roosevelt's actions were tethered to congressional legislation, including the Articles of War. As stated above, the *Quirin* saboteurs were acknowledged members of a foreign army, were held pursuant to congressional statutes, and were given an opportunity to assert their innocence.¹¹⁵ *Quirin* predated 18 U.S.C. § 4001(a). For more than thirty years, Congress has precluded any detention of an American citizen not grounded in a statute. The force of the *Quirin* precedent is questionable. Justice Frankfurter has referred to *Quirin* as not “a happy precedent.”¹¹⁶ Avoiding its usual procedures, the Supreme Court issued a summary order denying the *Quirin* defendants' writ of habeas corpus almost immediately after the oral argument. Six of the eight sabo-

109. 67 U.S. (2 Black) 635 (1863).

110. 317 U.S. 1 (1942).

111. 212 U.S. 78 (1909).

112. 67 U.S. at 666.

113. *Id.* at 670-71.

114. *Id.* at 668. To be sure, the President has the authority to “determine what degree of force the crisis demands.” *Id.* at 670. However, the discretion to determine the appropriate level of force does not somehow give him a mandate to act in excess of the authority that has been given him.

115. See *Ex parte Quirin*, 317 U.S. at 21.

116. David J. Danelski, *The ‘Saboteurs’ Case*, 1 J. S.Ct. HIST. 61, 80 (1966) (questioning the continued validity of the *Quirin* decision).

teurs were quickly executed and it was not until months after the execution of those petitioners that the Court handed down an opinion to justify its summary order. By then, coming to a different conclusion was impossible.¹¹⁷ Professor Katyal and Professor Tribe have suggested that *Quirin* “is more plausibly classified with those decisions like *Korematsu*, whose force as precedent has been diminished by subsequent events, rather than with those whose undiminished momentum counsels maintenance under principles of *stare decisis*.”¹¹⁸

Reliance upon *Moyer v. Peabody*¹¹⁹ is likewise misplaced. *Moyer* does not support the asserted proposition that the Commander-in-Chief clause authorizes Mr. Padilla’s military detention. In *Moyer*, the governor of Colorado, then a frontier state seeking to establish the rule of law, confronted a labor action by union officials that the Governor deemed an insurrection. In an exercise of an emergency power *explicitly provided by a state statute*, the Governor detained without charge those union officials whom he considered to be leaders of the incipient insurrection.¹²⁰ The Supreme Court affirmed the action, noting that it was undertaken with legislative authorization.¹²¹ Unlike the situation here, *Moyer*’s detention occurred pursuant to a specific state statute.

CONCLUSION

Never before has a President designated as an “enemy combatant” a citizen who had not sworn allegiance to a foreign national by joining its armed forces and who was not in the zone of combat. This unprecedented action by the Executive has no support in the text of the Constitution, it violates a specific mandate of Congress, and it is unsupported by judicial authority. In our system of government, the legislature, not the President, defines the basis on which a citizen may be deprived of liberty. Where, as here, the President has exceeded his authority, it is the obligation of the judiciary

117. *Id.*

118. Katyal & Tribe, *supra* note 60, at 1304.

119. 212 U.S. 78 (1909).

120. *Id.* at 84.

121. 212 U.S. at 84.

under Article III to safeguard the liberty of each individual citizen by prohibiting the President from exceeding his lawful authority.

EDITOR'S NOTE

On December 18, 2003, the United States Court of Appeals for the Second Circuit remanded Jose Padilla's case to the district court with instructions to issue a writ of habeas corpus directing the Secretary of Defense to release Mr. Padilla from military custody within 30 days. The court of appeals noted that the government could transfer him to appropriate civilian authorities who might bring criminal charges against him or detain him as a material witness for grand jury proceedings.

The court agreed with the main arguments made by Mr. Padilla's attorneys, Donna R. Newman and Andrew G. Patel; namely: (1) the President's constitutional authority as Commander-in-Chief did not empower him to detain American citizens on American soil outside a zone of combat; (2) the Non-Detention Act prohibits detention of American citizens without express congressional approval; and (3) the Joint Resolution authorizing the use of force against the perpetrators of the September 11 attacks did not provide such approval. The court's opinion further developed these arguments.

1. Inherent Power

The Second Circuit agreed that the President is entitled to great deference in exercising his authority as Commander-in-Chief. When the exercise of the Commander-in-Chief power is challenged on the grounds that it invades powers assigned by the Constitution to Congress, however, the courts must mediate.¹²² The court pointed to several specific provisions of Article I supporting the argument that the Commander-in-Chief powers of Article II, § 2, do not authorize Mr. Padilla's detention.¹²³ Article I, § 1, vests all legislative authority in Congress. Article I, § 8, cl. 10, specifically gives Congress the power to define and punish offenses against the law of

122. The court noted that these separation-of-powers concerns are heightened when the Commander-in-Chief powers are used domestically rather than abroad, citing Justice Jackson's opinion in *Youngstown*, 343 U.S. at 644 ("Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy") (Jackson, J., concurring).

123. *Padilla v. Rumsfeld*, 352 F.3d 695 (2nd Cir. 2003), *petition for cert. granted*, 157 L. Ed. 2d 1226 (U.S. Feb. 20, 2004) (No. 03-1027).

nations. In addition, only Congress can suspend the writ of habeas corpus.¹²⁴ Finally, the court noted that the Third Amendment's prohibition against quartering troops in homes in time of war except "in a manner to be prescribed by law" also supports the proposition that Congress, not the Executive, makes the laws. The court concluded: "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."¹²⁵

The court also addressed the debate between Mr. Padilla and the government about the precedential value of *Ex parte Quirin*,¹²⁶ the case involving German soldiers captured in the United States during World War II, and *Ex parte Milligan*¹²⁷ the Civil War case involving an American civilian tried by a military tribunal. The court held that *Quirin* did not control because in that case military jurisdiction rested on express congressional authorization to use military tribunals to try combatants charged with violating the laws of war. As described below, the court found such authorization lacking in Mr. Padilla's case. In addition, when *Quirin* was decided in 1942, Congress had not enacted 18 U.S.C. § 4001(a), which explicitly bars the detention of American citizens without congressional authorization. Finally, the *Quirin* petitioners admitted they were soldiers serving in the armed forces of Germany, a country formally at war with the United States. Mr. Padilla, by contrast, intends to dispute that he is an enemy combatant, and points out that the civilian accomplices of the *Quirin* saboteurs were charged and tried in civilian courts.

The court found *Ex parte Quirin* and *Ex parte Milligan* could be harmonized, despite Milligan's release from military custody. Although Congress authorized the President to suspend the writ of habeas corpus during the Civil War, Congress also denied him authority to detain indefinitely civilians who were not part of the Confederate Army where "the administration of the laws had continued

124. *Id.* at 727.

125. *Id.* at 715.

126. *See generally Quirin*, 317 U.S. 1.

127. 71 U.S. (4 Wall) 2 (1866).

unimpaired in the Federal courts.”¹²⁸ Because the federal courts were open where Milligan was detained, he could not properly be tried by a military tribunal. The Second Circuit concluded:

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.¹²⁹

2. The Non-Detention Act

Having concluded that the President lacks inherent authority to detain American citizens on American soil outside a zone of combat without congressional authorization, the court turned to the Non-Detention Act, which provides: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹³⁰ The court concluded that the Act means what it says. The Supreme Court has characterized the Act as “proscribing detention *of any kind* by the United States.”¹³¹ This precedent, plus the legislative history of the Non-Detention Act, convinced the court that the Act applies to “detentions by the President during war and times of national crisis.” Thus, military detentions are within its ambit. Moreover, Congress intended that exceptions to the Act must specifically approve detentions. Proponents of the measure answered the criticism that it left the nation defenseless against saboteurs by asserting that the ordinary processes of the criminal law provided adequate protection.

3. The Joint Resolution

Finally, the court considered the government’s contention that the Joint Resolution “Authorization for the Use of Force,”¹³² en-

128. *Rumsfeld*, 352 F.3d at 717.

129. *Id.* at 716.

130. *Id.* at 717 (citing 18 U.S.C. § 4001(a) (2004)).

131. *Howe v. Smith*, 452 U.S. 473, 479 n. 3 (1981) (emphasis in original).

132. Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 § 2(a) (2001).

acted shortly after the September 11 attacks, provided the authority required by the Non-Detention Act to detain someone in Mr. Padilla's circumstances. The court concluded the Joint Resolution did not provide that authority. First, the Resolution contains no language specifically authorizing detention, as contemplated by the Congress enacting the Non-Detention Act. Second, the Supreme Court has cautioned that even in interpreting war-time measures, "[w]e must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was *clearly* and *unmistakably* indicated by the language they used."¹³³ The court concluded:

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" and "unmistakable" language required by *Endo* . . . [T]here 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.¹³⁴

The Supreme Court has granted certiorari, and will hear oral arguments at the end of April, 2004.¹³⁵

133. *Ex parte Endo*, 323 U.S. 283, 300 (1944) (emphasis supplied).

134. *Rumsfeld*, 352 F.3d at 723.

135. *Rumsfeld*, 352 F.3d 695 (2nd Cir. 2003), *petition for cert. granted*, 157 L. Ed. 2d 1226 (U.S. Feb. 20, 2004) (No. 03-1027).