No. 05-533

In The

Supreme Court of the United States

JOSE PADILLA,

Petitioner,

- versus -

C.T. HANFT, COMMANDER, U.S. NAVY,
COMMANDER, CHARLESTON CONSOLIDATED NAVAL BRIG,

Respondent.

On Petition for a *Writ of Certiorari*
To The United States Court of Appeals
For The Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS as *AMICUS CURIAE* IN SUPPORT OF THE *PETITIONER*

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INTERESTS OF *AMICUS CURIAE*[1]
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The *National Association of Criminal Defense Lawyers* ["NACDL"] is a non-profit corporation with a subscribed membership of over 13,000 members, including military defense counsel, public defenders, private practitioners and law professors, and an additional 35,000 state, local and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice (to include military justice) and preserving, protecting and defending the adversary system and the U.S. Constitution.

The NACDL's interest in this case is two-fold.[2] First, the Government's expansive interpretation of the Congressional *Authorization for Use of Military Force* [AUMF][3] as the basis for the three and one-half year detention of Mr. Padilla turns the AUMF into an unconstitutional *Bill of Attainder*.

Second, while NACDL members have represented

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[1]No counsel for a party authored this Brief in whole or in part. No person, entity or organization other than the *Amicus Curiae* made a monetary contribution to the preparation and submission of this Brief or to counsel.

[2]Counsel for the Parties have consented to *Amicus Curiae* filing this Brief and such have been filed with the Court.

[3]Pub.L. 107-40, 115 Stat. 224 (2001).

clients who have been threatened with being or who have been designated as an "enemy combatant," after criminal charges were brought,[4] our interests also include protecting the rights of all citizens from arbitrary confinement. Threatening a citizen - ethical considerations aside - with indefinite military detention is an anathema to our core concepts of liberty and due process.

INTRODUCTION AND SUMMARY OF ARGUMENT

> *Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the Constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.*[5]

There are profound and fundamental constitutional issues that permeate this case, which command resolution by this Court. Two Circuit Courts of Appeal have split on the authority of the President to detain Mr. Padilla, his right to *habeas corpus* relief and the applicability of various laws during Padilla's three and one-half year odyssey through the federal court system, to include this Court. *Rumsfeld v. Padilla,* 542

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[4]*E.g., Al-Marri v. Hanft,* Civ. Action No. 2:04-2257-HFF-RSC (D.SC. 2004), *habeas corpus* (pending); *United States v. Goba, et al* [WD, NY]: http://www.cnn.com/2003/LAW/12/03/buffalo.six/ [last visited: 11/21/05]; *United States v. Ahmed Abu Ali* (Cr. No. 05-53)(E.D. VA. 2005), http://www.foxnews.com/story/0,2933,149126,00.html [11/21/05], and *United States v. Lindh,* 212 F.Supp.2d 541, 558 (E.D. VA. 2002).

[5]*Schecter Poultry Corp. v. United States,* 295 U.S. 495, 528-29 (1935).

U.S. 426 (2004).

Not only was Padilla imprisoned for over three years as a military prisoner, he remained during that time *uncharged* with any crime, civilian or military. As a civilian, Padilla cannot constitutionally have military law applied to him absent a declared war. The only exception - legally and historically - would be the application of *martial law* to him. The Military Order of June 9, 2002,[6] confining Padilla as a *military* prisoner was just that - an *ad hoc* application of martial law disguised by the "enemy combatant" label.[7] No factual exigency or emergency existed to legally justify that action.[8]

The AUMF enacted by Congress on September 18, 2001, was a *limited* delegation of Congressional war power to the President. That delegation did not however, textually authorize him to designate a U.S. citizen, *not* a member of the armed forces of any country, as an "unlawful combatant," nor did it authorize an extended military detention of a U.S. citizen arrested in Chicago without charges.[9] Indicting Padilla on unrelated charges and transferring him, does not moot this case.

The scope of the AUMF must be evaluated within the parameters of the enumerated powers in the Constitution. Congressional enactments in addition to the AUMF, have not only preempted the field, but specifically preclude the actions

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[6]Petitioner's Appendix [hereinafter "App."] 6a-7a.

[7]*See* discussion of the term "enemy combatant" at page 11, *infra*.

[8]Martial law is defined as: "A government temporarily governing the ***civil population*** within its territory or a portion of its territory through its ***military forces as necessity may require***." *Manual for Courts-Martial United States* (2005 ed), paragraph 2(a)(2), page I-1[emphasis added] [promulgated as Executive Order 13365 (December 3, 2004)].

[9]Under the Government's theory and the Fourth Circuit's rationale, Padilla could be re-incarcerated as an "enemy combatant" without notice - hence, an on-going "controversy" exists under Article III, § 2, U.S. Const.

of the President and prohibit the use of our military against our citizens ***domestically***. The *Posse Comitatus Act*, 18 U.S.C. § 1385, was not repealed nor excepted. 18 U.S.C. § 4001(a) [the *Non-Detention Act*], was not modified, nor was 10 U.S.C. § 375 [prohibiting "direct participation" by military forces of "seizure, arrest or other similar activity" in law enforcement actions]. In the military context, Congress has spoken with unmistakably clear language in 10 U.S.C. § 809(d) ["No *person* may be ordered into arrest or confinement except for probable cause"].[10]

There is no hybrid system of laws in the United States - there is the "civilian" side, as primarily encompassed by Titles 18 and 28, U.S. Code, and the "military" side, as set forth in the *Uniform Code of Military Justice.*[11] Furthermore, when Congress created the modern-day ***military*** prison system, it expressly limited them to confining "offenders against chapter 47 of this title." 10 U.S.C. § 951(a) [Chapter 47, is the UCMJ]. Since Padilla was not then charged with an applicable offense, he could *not* lawfully be imprisoned in a military confinement facility under 10 U.S.C. § 951(a).

Both the Constitution and statutory authority - authority with specific lineage to Article I, § 8, U.S. Constitution - forbid the *military* detention of a civilian citizen without charges for three and one-half years. The claim that "enemy combatant" designation has some legal status, is simply false Finally, to adopt the interpretation that the Government urges for the AUMF as authorizing the preventive detention of Padilla, is to turn the AUMF into an unconstitutional Bill of Attainder.[12]

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[10]The language used, *viz.,* "no person," is an expression of clear Congressional intent. The U.S. military does not have unfettered discretion to confine people, period, especially civilians.

[11]10 U.S.C. §§ 801-946. 64 Stat. 107 (1950) [hereinafter "UCMJ"].

[12]Art. I, § 9, cl. 3, U.S. Const.

ARGUMENT

I. THIS CASE IS NOT MOOT AS A CONTINUING CONTROVERSY STILL EXISTS AND RELIEF FOR PETITIONER MAY BE EFFECTUATED.

Padilla's physical transfer from a military brig to a federal detention center by order of the President, does not *ipso facto* end the constitutional controversies attendant to the case. Although *Amicus* anticipates the Government to claim that Padilla's "subsequent release causes the petition to be moot," for Article III, § 2, U.S. Constitution purposes,[13] a chilling controversy still exists. More importantly, judicial relief can be effectuated, thus the case is *not* moot.

A. The Real Party In Interest.

Respondent Hanft, a Naval Officer, while Padilla's "custodian," was never the real party in interest in this litigation. She was only "following orders" of her Commander-in-Chief. Absent the Presidential Order of June 9, 2002, neither she nor anyone else in the military had authority to detain Padilla**.** Absent the superceding Presidential *transfer* order of November 20, 2005, 10 U.S.C. § 896 made it illegal for her to release Padilla. Indeed, the entire premise of the Fourth Circuit's opinion below was based on Presidential authority.[14]

B. There is a Continuing Controversy.

In the context of incarceration cases for Article III, § 2, U.S. Const., purposes, the decision in *Spencer, supra,* suggests two alternative considerations for non-mootness. First, "Once

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[13]*Spencer v. Kemna,* 523 U.S. 1, at 7 (1998).

[14]This case is similar to *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579 (1952), where the constitutionality of Presidential "war powers" centered on an Executive Order. There was no suggestion that the case required anyone other than a Presidential subordinate, such as Commander Hanft to be the nominal party. Hanft, of course, was Padilla's "custodian" as well.

the [incarceration] has expired[15] . . .some concrete and continuing injury . . . must exist if the suit is to be maintained." 523 U.S. at 7. Alternatively, the "capable-of-repetition" doctrine requires "a reasonable expectation that the complaining party [will] be subject to the same action again." *Id.,* 17 [citation omitted]. As *Al-Marri* demonstrates, that is a reasonable expectation under the circumstances.

In Padilla's current *Petition for Writ of Habeas Corpus*, he repeatedly challenged his "enemy combatant" designation[16] in the June 9, 2002 Order. The findings and designation of that order were not repealed in the November 20th transfer order, so Padilla remains an "enemy combatant" in the eyes of the Government and before this Court. In *Church of Scientology v. United States,* 506 U.S. 9, 13 (1992), a unanimous Court noted that a person's interest in asserting Fourth Amendment rights "is of sufficient importance to merit ***constitutional protection.***" [emphasis added; citing the Fourth Amendment in n. 5]. Padilla's continuing right to be free of unreasonable military imprisonment must surely be co-equal to the privacy rights at issue in *Church of Scientology.*

The Court went on to examine under mootness concepts, the power to effectuate a *partial remedy* and concluded, "The availability of this partial remedy is sufficient to prevent this case from being moot." *Id.*[17] Here, *Amicus* suggests, *e.g.,* that

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[15]Here it has not expired. It has changed, but nothing prohibits the Executive from re-incarcerating Padilla as an "enemy combatant." Indeed, in *Al-Marri v. Hanft, supra,* n. 4, the Government *dismissed* the Indictment pending against him, designated him an "enemy combatant" and militarily imprisoned him. His *habeas* action is still pending.

[16]*See* paragraphs 12, 16, 22, and 28 of his Petition. Available at: http://news.findlaw.com/hdocs/docs/padilla/padillahanft70204pet.pdf

[17]*Compare Lane v. Williams,* 455 U.S. 624, 629 n. 8 (1992), where in a State *habeas* proceeding mootness was found, but was "based on the (continued...)

remedies include holding that the "enemy combatant" fiction provides no Constitutional basis for military imprisonment; that statements obtained from Padilla while imprisoned and deprived of his counsel, must as in *Church of Scientology* be sealed or destroyed and not used by the Government in any forum; that such designation cannot provide any basis for detention in the pending criminal case, nor form a basis for "Special Administrative Measures" [SAM's]; and the onerous restrictions on his right of access to counsel be stricken - these are just some of the partial remedies available.

Finally, *Amicus* suggests that the case is not moot because the intervening event, *viz.,* the November 20th transfer order has not "irrevocably eradicated" the constitutional violations alleged in Padilla's Petition. *Los Angeles v. Lyons,* 461 U.S. 95, 101 (1983).[18] The rationale was best expressed in *United States v. Concentrated Phosphate Export Corp.,* 393 U.S. 199, 203 (1968), where this Court held:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "(t)he defendant * * * free to return to his old ways." [citations omitted] A case might become moot if subsequent events made it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur.

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[17](...continued)
understanding that the State may not subject [Defendant] to any further detention or restraint as a result . . . ." Padilla does not have that guarantee.

[18]*See also, United States v. Lindh,* (ED, Va. 2002), "Plea Agreement," ¶ 21, where the Government reserved the *future* right to "capture and detain [Lindh] as an unlawful enemy combatant....", available at: http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf

The *Al-Marri* and *Lindh* cases provide compelling proof that the unconstitutional military imprisonment of Padilla *can* "reasonably be expected to recur." *See also, Troy v. Cochran,* __ U.S. __, 125 S.Ct. 2108, 2110 (2005)[injunction still in effect precluded mootness].

II. *CERTIORARI* SHOULD BE GRANTED TO RESOLVE THE CONSTITUTIONAL ISSUES.

A. Further Litigation Is Unlikely to Assist in Refining the Core Issues and Arguments Herein.

Few cases in history have had the benefit of the same *de facto* parties (to include *amici curiae*), litigating the same basic issues in two different federal circuits - only to have the respective Circuit Courts of Appeal arrive at opposite results on the same facts. The basic question that needs to be resolved by this Court is, can the President order our military to detain a *citizen* in a military prison (for 3 ½ years) under either the amorphous language of the AUMF or some accepted principle of the "laws of war?"[19] Conflicting federal statutes, *viz.,* the AUMF (as interpreted by the Executive and the 4th Circuit), versus the *Non-Detention Act,*[20] (as interpreted by the District Court below and previously by the 2nd Circuit), need to be evaluated in light of other applicable legislation.

For example, the AUMF did not repeal or amend the *Posse Comitatus Act,* 18 U.S.C. § 1385,[21] a historical bulwark against using the military domestically. The military's seizure

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[19]As will be discussed *infra, Amicus Curiae* will show that the Executive designation of Padilla as an "enemy combatant" is a meaningless appellation under our domestic military law and the law of armed conflict post WW II.

[20]18 U.S.C. § 4001(a).

[21]*See, e.g.,* 33 Opn. Atty. Gen. 562, at 569 (1923).

of Padilla, facially violates the prohibitions in 10 U.S.C. § 375 [precluding "direct participation" by the military of "seizure, arrest or similar activity" to enforce the law], and it ignored the Congressional command of 10 U.S.C. § 809(d) ["No person may be ordered into . . . {military} confinement except for probable cause."].[22] But, even probable cause does not provide a license for the military to detain civilians.[23] *Cf., Ex Parte Bollman,* 8 U.S. 75 (1807); *Reid v. Covert,* 354 U.S. 1 (1957); and *Toth v. Quarles*, 350 U.S. 11 (1955).

Amicus would suggest that sections 375, 809(d) and 951(a), of Title 10, U.S. Code, must be considered *in pari materia*, and consistent with the *Non-Detention Act* and the *Posse Comitatus Act.* The clearly and consistently expressed will of Congress is that our armed forces will not imprison citizens *absent* the suspension of *habeas corpus* or the imposition of martial law. Thus, the military power claimed by the Executive as flowing from the AUMF to militarily imprison Padilla, can come only by ignoring explicit Congressional will. *Youngstown, supra* at 637, (Jackson, J., concurring).

Finally, we suggest that this case presents a number of "ripe" issues that respectfully need to be resolved by this Court. For example, does the June 9, 2002, Order exceed the scope of the AUMF? A similar situation arose in *Little v. Barreme,* 6 U.S. 170 (1804).[24] Or, does the plain language of 10 U.S.C. §

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[22]The military, absent martial law, does not have authority to confine citizens outside of a *bona fide* combat zone. *Ex parte Milligan,* 71 U.S. 2 (1866).

[23]*Ex parte Quirin,* 317 U.S. 1 (1942), (litigation limited by stipulation to the jurisdiction of the military commission) is simply inapplicable. Citizenship issues were *dicta* in *Quirin* as the defendants were unlawful belligerents and, unlike Padilla, they were under military charges while in military custody.

[24]Notably the Court found that the Presidential Military Order exceeded the delegation from Congress, and thus was an illegal order.

951(a),[25] limit *military* imprisonment to "offenders against chapter 47 of this title?"[26] As long as Padilla remains an "enemy combatant" in the eyes of the Government, there is a clear danger that he, like Mr. al-Marri, could again be imprisoned in a military brig.

The ancient but relevant words of Sir William Blackstone were certainly in the minds of our Constitution's Drafters, and are apt guidance herein:

> But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and ***therefore a more dangerous engine of arbitrary government***. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that ***it is not left to the executive power to determine when the danger of the state is so great***, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing.[emphasis added][27]

Congress did not suspend the Great Writ and *Amicus Curiae* respectfully submit that this Court can and should decide whether Padilla's military confinement was lawful.

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[25]82 Stat. 287 (1968). *Amicus* would note that this predates the *Non-Detention Act*, and makes no provisions for confinement of anyone but "offenders" against the UCMJ, which facially *excluded* Mr. Padilla.

[26]Chapter 47, 10 U.S.C., is the UCMJ*, supra,* which did not apply to Padilla.

[27]1 Blackstone, *Commentaries on the Laws of England* 132 (1765), available at: http://www.yale.edu/lawweb/avalon/blackstone/bk1ch1.htm

B. The Court Should Resolve the Issue of Whether or Not the Term "*Enemy Combatant*" Has Any Jurisprudential Significance.

> [T]he term enemy combatant has no clear definition.... This undefined designation creates a dangerous scenario where executive power can trump individual rights and liberties.[28]
>
> [I]t is the very essence of the rule of law that the executive's *ipse dixit* is not of itself conclusive of the necessity.[29]

On June 9, 2002, Mr. Padilla became the first person in history to be formally designated an "enemy combatant." As this Court noted in *Hamdi,*[30] "There is some debate as to the proper scope of this term...." *Id.,* at 2639. The term is not used in the context of international law, the law of armed conflict,[31] nor in our domestic military law.[32] So, the Court's concerns were valid, especially since in a declared war, *enemy aliens* would have far more legal rights than citizen Padilla has as an

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[28]Comment, *An Open Debate on United States Citizens Designated as Enemy Combatants: Where Do We Go From Here?* 62 Md. L. Rev. 975, 1011 (2003).

[29]Fairman, *The Law of Martial Rule and the National Emergency,* 55 Harv. L. Rev. 1253, 1272 (1942)[fn. omitted]. Professor Fairman went on to say, "It will be the emergency which called it forth, not the fact of the proclamation, which justifies the extraordinary measures taken." *Id.,* 1288.

[30]*Hamdi v. Rumsfeld,* 542 U.S. 507, 124 S.Ct. 2633 (2004).

[31]*See also,* "The legal category of enemy combatant has not been elaborated upon in great detail." *Hamdi, supra,* at n.1, 2642.

[32]It is not used in the four 1949 Geneva Conventions, nor in the UCMJ.

"enemy combatant"[33] under the Government's position.

As far as *Amicus* (and its Military Law Committee) can ascertain, the Government took the term "enemy combatant" out of context from *Quirin, supra,* and simply invented a legal "status" to accompany it.[34] To the uninformed, the term sounds like it is part of the "law of war," but to anyone with a rudimentary knowledge of international law and the law of armed conflict, it is not. The idea that there is a legal "enemy combatant" *status* is simply a fraud that has been perpetuated to avoid the strictures of both the actual laws of armed conflict and our domestic laws, criminal and military.

There is a clear textual commitment in Article I, § 8, U.S. Const., giving Congress the power "***To define and punish*** . . . ***Offences against the Law of Nations.***" That express grant, along with the other Article I, § 8, powers given to Congress, coupled with the absence of any similar powers in Article II, for the President, simply defeats any claim by the Respondent that this Court must somehow grant "deference" to the Commander-in-Chief's declaring Mr. Padilla to be an "enemy combatant."

Neither the AUMF, any other federal statute, nor any applicable treaty defines or creates an "enemy combatant." To interpret this into the AUMF, would as Justice Scalia observed in *Clark v. Martinez,*[35] "be to invent a statute rather than interpret one." *Id.,* 722-23.

The Defense Department has only recently (2005) promulgated an official definition of the term "enemy combatant," to wit: "Any person in an armed conflict who could

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[33]*See, The Enemy Alien Act's* "due process" protections in 50 U.S.C. § 23.

[34]This Court also used the term, as synonymous with "enemy soldier" in *In re Yamashita,* 327 U.S. 1, 7 (1946). But, as the Court also recognized, General Yamashita was a *bona fide* prisoner of war, *id.,* 5, who had been an enemy soldier in combat against Allied combat forces.

[35]543 U.S.__, 125 S.Ct. 716, 727 (2005).

be properly detained under the laws and customs of war."[36] As can be seen, this definition is so broad[37] that it includes (but is not limited to) *bona fide* POWs, civilian non-combatants,[38] non-combatant enemy aliens,[39] even though they are *hors de combat,*[40] or more importantly, never combatants in the first place. This definition would also include the tens of thousands of loyal Japanese-American citizens "detained" by the United States during WW II. *See, Ex Parte Endo,* 323 U.S. 283 (1944).

The Government's repeated use of the label[41] "enemy combatant" as if it has some pertinent impact on Padilla's case,

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[36]Joint Publication 1-02, *DOD Dictionary of Military and Associated Terms* (as amended through 31 August 2005). Prior to March 2005, JP 1-02 did *not* define or even list the term "enemy combatant."

[37]This "overbreadth" is troubling, both constitutionally and practically. It was Hermann Göring, who testified in response to a question from Justice Jackson at the Nürnberg Trials: "[T]he original reason for creating the concentration camps was to keep there such people whom we rightfully considered enemies of the State." as quoted in Appleman, *Military Trials and International Crimes,* 122 (1954).

[38]Art. 78, 1949 *Geneva Convention (IV) Relative to the Protection of Civilians,* 75 U.N.T.S. 287 (1950); available on-line at: http://www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm

[39]50 U.S.C. § 21.

[40]Padilla, assuming *arguendo* that he was ever in "combat" against the United States, was clearly *hors de combat* a month after he was arrested and jailed on the material witness warrant. His subsequent detention as an "enemy combatant" ignores the long-established *hors de combat* status under international law and the law of armed conflict. *See generally,* Watkins, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy,"* Harvard Program on Humanitarian Policy and Conflict Research, "Occasional Paper" (Winter 2005, No. 2); available at: http://www.hpcr.org/pdfs/OccasionalPaper2.pdf [11/30/05].

[41]*Compare, NAACP v. Button,* 371 U.S. 415, at 429 (1963); the government "cannot foreclose the exercise of constitutional rights by mere labels."

is respectfully nothing more than verbal camouflage. *Amicus* would note that the Department of Defense has at least two current regulations that apply and neither uses or mentions the term, "enemy combatant":

- DoD Directive, 2310.01, *DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees,* (August 18, 1994);[42] and
- Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,* (1 October 1997).[43]

Thus, calling Padilla (or anyone else) an "enemy combatant" is a classic example of *ipse dixit,* and nothing more.

Certiorari respectfully should be granted and *Amicus* respectfully submits that the Court "specify" the "enemy combatant" issue as noted herein. *Cf., Taylor v. Hayes,* 418 U.S. 488, 495 (1974).

C. The Government's Interpretation of the *AUMF* Results in an Unconstitutional "Bill of Attainder."

> *[W]e find nothing in this text that affirmatively authorizes detention, much less indefinite detention.*[44]

"Bills of attainder" are expressly prohibited by Article I, § 9, clause 3, U.S. Constitution. In *Cummings v. Missouri,*

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[42]Current as of November 30, 2005, but with a note: "Under Revision."

[43]This is a "Joint Service" regulation, meaning that all branches of our Armed Forces have an identical version. Current as of November 30, 2005.

[44]*Clark v. Martinez,* __U.S.__, 125 S.Ct. 716, 727 (2005).

71 U.S. 277, 323 (1867), the Court defined the term: "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." Had Congress added language to the AUMF stating that "all 'enemy combatants' may be imprisoned by the military until the 'war' against terrorism is over," such would be a *prima facie* bill of attainder. However, that *is* the interpretation of the AUMF that the Government has urged throughout this litigation.

Amicus would note that battlefield detentions, to include unlawful belligerents, have historically been authorized under international law and the law of armed conflict. The necessity for *martial law*[45] is a temporary suspension of constitutional rights. *Cf., Milligan, supra,* and *Duncan v. Kahanamoku,* 327 U.S. 304 (1946). Both concepts - battlefield detention and martial law - have a "military necessity" element, something totally absent here. The undisputed facts show that Padilla was arrested at Chicago's O'Hare airport - not in a combat zone or on a battlefield. The undisputed facts also show that he was arrested by the FBI - not by the U.S. military. And, the undisputed facts show that Padilla was arrested pursuant to a material witness warrant - not for "war crimes" or treason.

The question then becomes, what if anything, was the military necessity on June 9, 2002, for transferring Padilla to *military* custody? It cannot be labeling him an "enemy combatant" because our military did not recognize that concept or status in 2002. But, if as urged throughout this and the *Hamdi* litigation, it is the AUMF,[46] then the application of the AUMF as justification for Padilla's transfer and military imprisonment for 3 ½ years, is nothing but an unconstitutional

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[45]*See* n. 8, *supra*.

[46]*Amicus* would note that an "authorization" for the use of military force, *i.e.,* the AUMF, is not a *bona fide* "military necessity." That was precisely the issue in *Youngstown Sheet & Tube, supra,* where the President claimed a "military necessity" to seize the nation's steel mills.

Bill of Attainder.[47]

The Constitutional prohibition against bills of attainder must be interpreted broadly within the framework intended by its Drafters:

> [T]he Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply - trial by legislature.[48]

Certainly the President cannot do by implication what the Constitution expressly prohibits Congress from doing to a citizen. See, e.g., *United States v. Lovett,* 328 U.S. 303, 315 (1946) [Court held that Congressional refusal to pay salaries of federal employees deemed "subversive"[49] constituted a bill of attainder].

The text of the AUMF says nothing about the *non-battlefield* detention - indefinite or otherwise - of "enemy combatants," unlawful belligerents or suspected terrorists, be they citizens or not. Nor did it suspend the *Writ of Habeas Corpus* or authorize the imposition of martial law. As this case and *Hamdi* illustrate, the proper interpretation of the AUMF is a matter of significant dispute.[50]

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[47]To include the ominous threat of further "enemy combatant" detentions, *cf., al-Marri* and *Lindh, supra.*

[48]*United States v. Brown,* 381 U.S. 437, 442 (1965); *see also, Ex parte Garland,* 71 U.S. 333 (1867).

[49]*See* 328 U.S. at 311, fn. 3 for a definition of "subversive activity" that would encompass the allegations against Padilla.

[50]As part of the USA PATRIOT Act [115 Stat. 350 (2001)], codified at 8 (continued...)

If it is unconstitutional for *Congress* to enact a "bill of attainder," the construct of the AUMF consistently urged by the Government seeking the Judiciary's *imprimatur* on the application of the AUMF by the President, is equally unconstitutional. It is a perverse application of basic constitutional doctrine to allow the President to do by fiat what the Constitution expressly forbids Congress from doing by legislation. To sanction this treatment of a citizen regardless of his suspected crimes, to include treason, cannot be anything but unconstitutional.

Amicus would note the caution expressed by Justice Story in his celebrated *Commentaries on the Constitution of the United States*:

> Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable . . . to forget their duties, and to trample upon the rights and liberties of others.[51]

The "rights and liberties" of citizen Padilla are those of "We the People" of the United States, and they have been trampled.

CONCLUSION

The Court's attention is invited to *Beckwith v. Bean,* 98 U.S. 266 (1878), where Bean sued Army officers for falsely

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[50](...continued)
U.S.C. § 1226a(a)(6), Congress expressly provided for the "mandatory detention of suspected terrorists," but limited it to aliens. This is consistent with the Non-Detention Act.

[51]3 Story, *Commentaries on the Constitution of the United States* § 1338, available at: http://www.constitution.org/js/js_332.htm [11/30/05].

imprisoning him allegedly for aiding Union deserters during the Civil War. He complained of being imprisoned without a Warrant, without charges and his demands for trial were ignored. The Court reversed the successful plaintiff's verdict on *evidentiary* grounds. However, Justice Field's dissent (urging affirmance) [*id.,* 285] is instructive. He first noted that the "arrest and imprisonment were in Vermont, far distant from the sphere of military operations. . . ." *Id.,* 292], and concluded:

> [I]t is a marvel that in this country, under a Constitution ordained by men who were conversant with the principles of Magna Charta . . . it could ever be contended that an order of the Executive, issued at his will for the arrest and imprisonment of a citizen, where the courts are open and in the full exercise of their jurisdiction, is due process of law, or could ever be made such by an act of Congress.
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> The assertion that the power of the government to carry on the war and suppress the rebellion would have been crippled and its efficiency impaired if it could not have authorized the arrest of persons, and ***their detention without examination or trial***, ***on suspicion of their complicity with the enemy*** . . . rests upon no foundation whatever so far as Vermont is concerned. . . . A claim to exemption from the restraints of the law ***is always made in support of arbitrary power whenever unforeseen exigencies arise in the affairs of government.*** . . . A doctrine more dangerous than this to free institutions could not be suggested by the wit of man. *Id.,* 296-97 [emphasis added].

There simply was no factual necessity herein to engage in the unconstitutional military imprisonment of Mr. Padilla. Regardless of the applicability of *Milligan, supra,* to this case, the Court's guidance was appropriate and should be heeded:

> If it was *dangerous*, in the *distracted condition of affairs*, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," ***the law said arrest him***, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury[52] of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, ***the Constitution would have been vindicated***, the law of 1863 enforced, and the securities for personal liberty preserved and defended. 71 U.S. at 122 [Emphasis added].

Jose Padilla is an American citizen and our Constitution indelibly cloaks him with inalienable rights. Rights that protect all citizens, the good, the brave and the bad. Rights so basic that Sir Edward Coke commented over 300 years ago:

> [N]o man ought to be imprisoned, but for some certain cause: and . . . that cause must be shewed; for otherwise how can the Court take

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[52]Mr. Padilla was initially detained for roughly one month by a Material Witness order pertaining to a pending Grand Jury. As in *Milligan,* the Government apparently then chose not to submit a case to the Grand Jury.

order therein according to Law?[53]

Justice Frankfurter once observed, "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[54] It is not whether one sympathizes with Mr. Padilla's plight, but rather, whether one respects the "safeguards of liberty."

The Petition for a *writ of certiorari* should be granted. This Court as the final arbiter of the Constitution, should "take order . . . according to the Law" and decide whether or not Mr. Padilla's right to be free from military detention exists, or was extinguished by the AUMF, thus justifying "secretly hurrying him to gaol."

Respectfully Submitted,

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[53]II *The Selected Writings and Speeches of Sir Edward Coke* (Sheppard, ed., 2003) "Institutes of the Lawes of England, Second Part" 864 (1642).

[54]*United States v. Rabinowitz,* 339 U.S. 56, 69 (1950)(Frankfurter, J., dissenting).